

UNITED STATES DEPARTMENT OF JUSTICE
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: : Chapter 11
: :
: : Case No. 23-14853(JKS)
Cyxtera Technologies, Inc., *et al.*, :
: : Hearing Date: September 26, 2023 at 10:00 a.m.
Debtors.¹ :
: : The Honorable John K. Sherwood

**UNITED STATES TRUSTEE’S OBJECTION TO DEBTORS’ MOTION FOR ENTRY
OF AN ORDER APPROVING (I) THE ADEQUACY OF THE AMENDED
DISCLOSURE STATEMENT, (II) THE SOLICITATION PROCEDURES, (III) THE
FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH,
AND (IV) CERTAIN DATES WITH RESPECT THERETO**

Andrew R. Vara, the United States Trustee for Regions Three and Nine (“U.S. Trustee”), through his undersigned counsel, files this objection (“Objection”) to the Debtors’ *Motion for Entry of an Order Approving (I) the Adequacy of the Amended Disclosure Statement, (II) the Solicitation Procedures, (III) the Forms of Ballots and Notices in Connection Therewith, and*

¹ A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors’ Claims and Noticing Agent at <https://www.kccllc.net/cyxtera>.



(IV) *Certain Dates with Respect Thereto* (“Motion”) (Dkt. 408), and respectfully states as follows:

JURISDICTION

1. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of New Jersey issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine the Debtors’ request for approval of the relief requested in the Motion and the matters raised in this Objection.

2. The U.S. Trustee is charged with overseeing the administration of Chapter 11 cases filed in this judicial district, pursuant to 28 U.S.C. § 586. This duty is part of the U.S. Trustee’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts to guard against abuse and over-reaching to assure fairness in the process and adherence to the provisions of the Bankruptcy Code. *See In re United Artists Theatre Co.*, 315 F.3d 217, 225 (3d Cir. 2003) (“U.S. Trustees are officers of the Department of Justice who protect the public interest by aiding bankruptcy judges in monitoring certain aspects of bankruptcy proceedings.”); *United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 298 (3d Cir. 1994) (“It is precisely because the statute gives the U.S. Trustee duties to protect the public interest . . . that the Trustee has standing to attempt to prevent circumvention of that responsibility.”); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 499 (6th Cir. 1990) (“As Congress has stated, the U.S. trustees are responsible for protecting the public interest and ensuring that the bankruptcy cases are conducted according to [the] law”).

3. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment on such plans and disclosure statements.

4. Under section 307 of title 11 of the United States Code (the “Bankruptcy Code” or “Code”), the U.S. Trustee has standing to be heard on the Debtors’ request for approval of the relief in the Motion.

BACKGROUND

5. On June 4, 2023 (“Petition Date”), Cyxtera Technologies, Inc., *et al.*, (“Debtors”) (“Cyxtera”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* Dkt. 1

6. On June 6, 2023, this Court entered an Order directing that these cases be jointly administered. Dkt. 71.

7. The Debtors continue to operate their business(es) as debtors in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

8. No trustee or examiner has been appointed in these Chapter 11 cases.

9. On June 28, 2023, the Office of the United States Trustee filed a Notice of Appointment of Official Committee of Unsecured Creditors (the “Committee”). Dkt. 133.

10. On August 15, 2023, the Debtors filed the Motion, seeking, among other things, approval of the disclosures contained in the *Disclosure Statement Relating to the Joint Plan of Reorganization of Cyxtera Technologies, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the “Disclosure Statement”). Dkt. 407.

11. Debtors previously filed their *Joint Plan of Reorganization of Cyxtera Technologies, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the “Plan”) (Dkt. 372) on August 7, 2023.

12. On September 13, 2023, Debtors filed their *Amended Joint Plan of Reorganization of Cyxtera Technologies, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the “Amended Plan”) (Dkt. 501).

13. On September 13, 2023, Debtors also filed their *Disclosure Statement Relating to the Amended Joint Plan of Reorganization of Cyxtera Technologies, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the “Amended Disclosure Statement”) (Dkt. 502).

14. In the Amended Disclosure Statement, the Debtors discuss a “toggle” feature of the Amended Plan whereby “the Debtors will pursue the Recapitalization Transaction unless a more value-maximizing Sale Transaction materializes with a third party prior to the Confirmation Hearing,” (the “Sale Toggle”).² *Amended Disclosure Statement* at 2, Article II. “[T]he Plan provides flexibility for the Debtors to ‘toggle’ to a Sale Transaction should one develop that is more value-maximizing than the Recapitalization Transaction.” *Id.* “Sale Transaction” is defined as “either an Equity Investment Transaction or an Asset Sale.” *Amended Plan* at 12, ¶ 149. With this, the Amended Plan contains three possible proposals to be presented at confirmation, those being (i) the Recapitalization Transaction, (ii) a sale of the New Common Stock of Reorganized Cyxtera (the Equity Investment Transaction), or (iii) a sale of the Debtors’ assets (the Asset Sale).

15. The Amended Plan defines “Post-Effective Date Debtors” as “the Debtors after the Effective Date or the Plan Administrator, as applicable.” *Amended Plan* at 9, ¶ 112.

16. The Summary of Expected Recoveries table includes a column for “Estimated % Recovery.” *Amended Disclosure Statement* at 6-7. Class 1 “Other Secured Claims” receive

² Unless otherwise defined herein, capitalized terms in this Objection shall have the meaning ascribed to them in the relevant pleading or document including the Motion.

100%, Class 2 “Other Priority Claims” receive 100%, but Class 3 First Lien Claims are listed as “Unspecified,” and Class 4 General Unsecured Claims are listed as “To Be Determined.” *Id.*

Regarding a possible Equity Investment Transaction, no estimated recovery for creditors is detailed, and no form of Purchase Agreement is provided. Regarding a possible Asset Sale, no estimated recovery for creditors is detailed, and no form of Purchase Agreement is provided.

17. The Amended Plan defines “Plan Supplement” as a compilation of documents and exhibits which include, “(g) in the event of an asset sale, the identity of the Plan Administrator and the terms of compensation of the Plan Administrator, (h) in the event of a Sale Transaction, the Purchase Agreement.” *Amended Plan* at 9, ¶ 111. The definition provides that the Plan Supplement will be filed “no later than seven (7) days before the Confirmation Hearing or such later date as may be approved by the Bankruptcy Court on notice to parties in interest.” *Id.*

ARGUMENT

I. The Plan and Disclosure Statement Do Not Convey Sufficient Information to Allow a Hypothetical Reasonable Investor of the Relevant Class to Make an Informed Judgment about the Plan.

18. Section 1125 of the Bankruptcy Code provides that a disclosure statement must contain “adequate information” describing a confirmable plan. 11 U.S.C. § 1125; *see also In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007). The Bankruptcy Code defines

“adequate information” as:

Information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical reasonable investor of the relevant class to make an informed judgment about the plan

11 U.S.C. § 1125(a)(1) (emphasis added); *see also Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994); *Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999).

19. The disclosure statement requirement of section 1125 of the Bankruptcy Code is “crucial to the effective functioning of the federal bankruptcy system [;] . . . the importance of full and honest disclosure cannot be overstated.” *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.)*, 848 F.2d 414 (3d Cir. 1988)).

20. The “adequate information” requirement is designed to help creditors in their negotiations with debtors over the plan. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94 (3d Cir. 1988). Section 1129(a)(2) conditions confirmation upon compliance with applicable Code provisions. The disclosure requirement of section 1125 is one of those provisions. *See* 11 U.S.C. 1129(a)(2); *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000).

21. To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. *See In re McLean Indus.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) (“substantial financial information with respect to the ramifications of any proposed plan will have to be provided to, and digested by, the creditors and other parties in interest in order to arrive at an informed decision concerning the acceptance or rejection of a proposed plan”); *In re Duratech Indus.*, 241 B.R. 291, 298 (Bankr. E.D.N.Y.), *aff’d*, 241 B.R. 283 (E.D.N.Y. 1999) (the purpose of the disclosure statement is to give creditors enough information so that they can make an informed choice of whether to approve or reject the debtor’s plan).

22. Section 1125 of the Bankruptcy Code is geared towards more disclosure rather than less. *See In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990). The “adequate information” requirement merely establishes a floor, and not a ceiling for disclosure to voting creditors. *In re Adelpia Commc’ns Corp.*, 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006) (citing *Century Glove, Inc. v. First Am. Bank of New York*, 860 F.2d 94, at 100 (3d Cir. 1988)).

23. “Adequate information” under section 1125 is “determined by the facts and circumstances of each case.” *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)).

24. A disclosure statement must inform the average creditor what it is going to get and when, and what contingencies there are that might intervene. *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). Although the adequacy of the disclosure is determined on a case-by-case basis, the disclosure must “contain simple and clear language delineating the consequences of the proposed plan on [creditors’] claims and the possible [Bankruptcy] Code alternatives so that they can intelligently accept or reject the Plan.” *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988).

25. Here, the Amended Disclosure Statement and Amended Plan simply lack enough information such that holders of claims and interests cannot reasonably determine whether any proposed distribution or recovery on their claims is proper. Clear and concise information is necessary for creditors and interest holders in voting classes to properly evaluate whether to vote to accept or reject the Amended Plan, and for creditors in non-voting classes and other parties in interest to determine whether to object to confirmation of the Amended Plan.

26. The Debtors are asking creditors to accept a Plan that simultaneously approaches three possible paths toward confirmation, without knowing what path the case will take. One path, the default fork, is the Recapitalization Transaction. No percentage or range of percentages is given for the recovery for General Unsecured Claims, only a “To Be Determined” placeholder. The other path is itself forked. It is the Sale Toggle, which could result in either an Equity Investment Transaction or an Asset Sale. The Debtors have failed to provide an estimated range of recoveries for the General Unsecured Claims for any scenario, and no form of Purchase Agreement is provided for either possible Sale Transaction.

27. No disclosure is made as to who the counter parties will be in either Sale Transaction. The Amended Disclosure Statement fails to inform voting creditors and contract parties who will acquire the Debtors in either Sale Transaction, or what the terms will be. The Amended Disclosure Statement merely warns that General Unsecured Creditors may not receive *any* recovery, as the Debtors, Committee, and Consenting Term Lenders continue to negotiate the terms of the GUC Recovery Pool, and there is a possibility that these parties may not be able to reach an agreement on the contents of a GUC Recovery Pool. *Amended Disclosure Statement* at 57, Article IX.B.9. Creditors should know whether any recovery on their claims is being proposed in connection with being asked to vote on the Amended Plan.

28. The Amended Disclosure Statement suggests a reorganization of the Debtors by way of a Recapitalization Transaction or an Equity Investment Transaction. However, an Asset Sale would be a liquidation. A reorganization versus a liquidation represents two very distinct paths for creditors and parties in interest to consider. For example, liquidation of the Debtors through an asset sale would have a significant impact on confirmation pursuant to section 1141(d)(3). These two vastly different approaches would also have numerous different

consequences on the Plan, including but not limited to vesting of remaining assets, releases, injunctions, and conditions to the effective date. Without knowing what path confirmation is going to take, creditors and parties in interest cannot assess their vote on or other response to the Amended Plan.

29. Moreover, as presented by the Motion, notice of what path confirmation is going to take does not occur until *after* the voting and objection deadlines. The Voting Deadline and Confirmation Objection Deadline are October 24, 2023. As outlined above, in the event of a Sale Transaction, the Plan Supplement will contain the Purchase Agreement in question, and if an Asset Sale occurs, disclose terms relating to the Plan Administrator. The Plan Supplement is to be filed seven (7) days before the Confirmation Hearing. With a Confirmation Hearing of November 2, the Plan Supplement is due to be filed on October 26, which is *two days after* the Voting and Confirmation Objection Deadlines.

30. Ultimately, the General Unsecured Creditors are being asked to vote blind collectively on all three paths to confirmation, rather than allowing the sale process to play out prior to moving ahead with confirmation. The Amended Disclosure Statement states that “negotiations with certain bidders remain ongoing as of the filing of this [Amended] Disclosure Statement.” *Amended Disclosure Statement*, 2, Article II. It is further stated that “[b]ecause the Debtors do not want to prejudice the sale process by disclosing the estimated recoveries for First Lien Claims or General Unsecured Claims, such recoveries are not estimated [in the Amended Disclosure Statement].” *Id.*, at 6, footnote 5.

31. For these reasons, the Amended Disclosure Statement should be denied for lack of adequacy at this time.

II. Approval of Solicitation Procedures Must Be Limited at this Time.

32. The Motion, and its accompanying Proposed Order, seek approval of certain Solicitation Procedures. Additionally, the Debtors seek approval of various documents, including the Ballots, Non-Voting Status Notice, and Opt-Out Forms. The proposed Order states that the Non-Voting Status Notice and Opt-Out Form are “hereby approved,” and that the Ballots “are hereby approved.” *See Proposed Order* ¶¶ 7, 12, 19.

33. The Plan documents taken together propose approval at the Confirmation Hearing of certain releases contained in the Plan, and the Debtors propose to establish a party’s consent to such releases through an opt-out process. This approach toward accomplishing approval of such releases is objectionable. *See In re Emerge Energy Services LP*, 2019 WL 7634308, Case No. 19-11563 (Bankr. D. Del. Dec. 5, 2019).

34. Accordingly, the U.S. Trustee respectfully seeks clarification, at this juncture, that approval of any and all of the terms of the Debtors’ proposed Amended Plan (including but not limited to any and all settlement, release, injunction, exculpation, and related provisions) is expressly reserved for Confirmation. In addition, approval of the Solicitation Procedures, as well as approval at this juncture of any document(s) attendant to the Solicitation Procedures (such as the documents included in the Solicitation Package, the Non-Voting Status Notice, and the Opt-Out Form) must be limited to approval for solicitation purposes only.

RESERVATION OF RIGHTS

35. The U.S. Trustee reserves any and all rights, remedies and obligations to, among other things, complement, supplement, augment, alter or modify this objection, assert any further objection, file an appropriate motion, or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon

further factual discovery. The U.S. Trustee also reserves all such rights with respect to any and all plan confirmation issues.

WHEREFORE, the U.S. Trustee respectfully requests that the Court deny the Motion and relief sought and grant such other relief as the Court deems appropriate and just.

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 and 9

/s/ David Gerardi
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Dated: September 14, 2023