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COUNSEL FOR PATRICK DAUGHERTY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	**CASE NO. 19-34054-SGJ-11**
HIGHLAND CAPITAL MANAGEMENT, L.P	§	**CHAPTER 11**
	§	
Debtor.	§	

PATRICK HAGAMAN DAUGHERTY'S OBJECTION TO APPROVAL OF DEBTOR'S DISCLOSURE STATEMENT FOT THE THIRD AMENDED PLAN OF REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Patrick Hagaman Daugherty ("**Daugherty**") a creditor and party-in-interest in the above-captioned bankruptcy case, files this Objection (the "**Objection**") to the Debtor's *Motion for Entry of an Order (A) Approving the Adequacy of the Disclosure Statement; (B) Scheduling a Hearing to Confirm the First Amended Plan of Reorganization; (C) Establishing Deadline for Filing Objections to Confirmation of Plan; (D) Approving Form of Ballots, Voting Deadline and Solicitation of Procedures; and (E) Approving Form and Manner of Notice* (the "**Solicitation Motion**") [Docket No. 1108] and represents as follows:

Background

1. On October 16, 2019 (the "**Petition Date**"), Highland Capital Management, L.P. (the "**Debtor**" or "**Highland**"), filed its voluntary petition for bankruptcy under chapter 11 of title

11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Delaware.

2. On October 29, 2019, the Official Committee of Unsecured Creditors (the "**Committee**") was appointed by the United States Trustee for in Delaware.

3. On August 12, 2020, the Debtor filed is Plan of Reorganization (the "**Original Plan**") [Docket No. 944] and Disclosure Statement ("**Original DS**")[Docket No. 945], which were heavily redacted.

4. The Debtor subsequently filed on September 21, 2020, its First Amended Plan of Reorganization of Highland Capital Management, L.P. (the "**First Amended Plan**") [Docket No. 1079] and Disclosure Statement for the First Amended Plan of Reorganization of Highland Capital Management, L.P. (the "**First Amended Disclosure Statement**") [Docket No. 1080].

5. On October 15, 2020, the Debtor filed its Notice of Filing of (I) Liquidation Analysis and (II) Financial Projections as Exhibits to Debtor's Disclosure Statement for the First Amended Plan of Reorganization of Highland Capital, L.P. (the "**Financials**") [Docket No. 1173].

6. The Court held a hearing on the approval of the First Amended Disclosure Statement on October 27, 2020.

7. The Debtor subsequently filed its Third Amended Plan (the "**Plan**")[Docket No. 1383], Disclosure Statement for the Third Amended Plan of Reorganization (the "**Disclosure Statement**")[Docket No. 1384], and Notice of Filing of Supplement to the Third Amended Plan of Reorganization of Highland Capital Management, L.P. (the "**Plan Supplement**")[Docket No. 1389].

Argument and Authority

8. Approval of the Disclosure Statement should be denied because it does not contain adequate information and the Plan is patently unconfirmable. Section 1125 of the Bankruptcy Code requires that "an acceptance or rejection of a plan may not be solicited…unless, at the time of or before such solicitation, there is transmitted to such holder the plan and a written disclosure statement approved, after notice and a hearing, by the court as containing *adequate information*." *See* 11 U.S.C. § 1125(b)(emphasis added). Further, where a plan is on its face non-confirmable as a matter of law, then it is appropriate to deny approval of the disclosure statement. *See e.g. In re U.S. Brass Corp.*, 194 B.R. 420 (Bankr. E.D. Tex. 1996); *In re Quigley Co. Inc.*, 377 B.R. 110, 115-16 (Bankr. S.D.N. Y. 2007); *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1002 (Bankr. D. Mass. 1991).

A. The Disclosure Statement Lacks Adequate Information.

9. Section 1125 of 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 investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a)(1); *see also In re Texas Extrusion Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988)("'Adequate information' is defined in 11 U.S.C. § 1125(a) as being 'information of a kind, and in sufficient detail…that would enable a hypothetical reasonable investor typical of holders

of claims or interests of the relevant class to make an informed judgment about the plan.'"). Courts have discussed a number of factors for evaluating the adequacy of a disclosure statement, which include:

- the events which led to the filing of a bankruptcy petition;
- a description of the available assets and their value;
- the anticipated future of the company;
- the source of information stated in the disclosure statement;
- a disclaimer;
- the present condition of the debtor while in Chapter 11;
- the scheduled claims;
- the estimated return to creditors under a Chapter 7 liquidation;
- the accounting method utilized to produce financial information and the name of the accountants responsible for such information;
- the future management of the debtor;
- the Chapter 11 plan or a summary thereof;
- the estimated administrative expenses, including attorneys' and accountants' fees;
- the collectability of accounts receivable;
- financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan;
- information relevant to the risks posed to creditors under the plan;
- the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;
- litigation likely to arise in a non-bankruptcy context;
- tax attributes of the debtor; and
- the relationship of the debtor with the affiliates.

See e.g. In re Metrocraft Pub. Services, Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984); *In re U.S. Brass Corp.*, 194 B.R. 420, 424 (Bankr. E.D. Tex. 1996).

i. The Disclosure Statement and Plan Supplement does not disclose the identities of any Insiders that may be employed by the Reorganized Debtor or Claimant Trust Post-Confirmation.

10. Section 1129(a)(5) requires the proponent of the plan to disclose "the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." *See* 11 U.S.C. § 1129(a)(5). In the Debtor's assumptions included

within its liquidation analysis, the Debtor expressly states that "Post-effective date, the reorganized Debtor would retain three HCMLP employees as contractors to help monetize the remaining assets." *See* Ex. C to Disclosure Statement, Assumption H. Likewise, the Debtor's Plan provides that "The Trustees, on behalf of the Claimant Trust and Litigation Sub-Trust, as applicable, may each employ, without further order of the Bankruptcy Court, employees and other professionals (including those previously retained by the Debtor and the Committee) to assist in carrying out the Trustee's duties hereunder and may compensate and reimburse the reasonable expenses of these professionals without further order of the Bankruptcy Court from the Claimant Trust Assets in accordance with the Plan and Claimant Trust Agreement." *See* Plan at art. IV.B.5. Because the Claimant Trust is practically the successor to the Debtor, and the Claimant Trustee is the "representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code,"[1] the Disclosure Statement should disclose whether the Reorganized Debtor and Claimant Trustee will employ any Insiders of the Debtor and what the compensation will be.

ii. The Disclosure Statement and Plan Supplement do not contain adequate information about the Claimant Trustee's Compensation.

11. As noted above, the Bankruptcy Code requires disclosure of Insiders that will be employed post-confirmation and his/her compensation. The Plan and proposed Claimant Trust Agreement specify that the Debtor's CEO/CRO, James Seery, will serve as the Claimant Trustee post-confirmation. Yet, the Claimant Trust Agreement does not explain the nature of Mr. Seery's compensation or how much it will be. Section 3.13 of the Claimant Trustee Agreement—entitled Compensation and Reimbursement; Engagement of Professionals—appears to be setup expressly to address this issue. Nevertheless, the information on the topic is bracketed, and even bracketed

[1] Plan at art. IV.B.1.

it does not provide adequate information about the amount and nature of the Claimant Trustee's compensation. In addition to plainly being required under the Bankruptcy Code, creditors are entitled to know how, and how much, the Claimant Trustee administering their assets is going to get paid.

iii. The Disclosure Statement lacks adequate information about the future employment status of the Debtor's employees.

12. As noted above, the Debtor's Disclosure Statement indicates only three employees will be retained post-confirmation. Further, the Debtor recently filed its Motion Pursuant to 11 U.S.C. § 105 and 363(b) for Authority to Enter Into Sub-Service Agreements (the "**Sub-Servicer Motion**")[Docket No. 1424], whereby the Debtor expressly states "given that the employment of the Debtor's currently employees is expected to be terminated, the Debtor needs the Sub-Servicers in place prior to the Plan confirmation to ensure they have access to the Debtor's employees and their historical knowledge to ensure a smooth transition."[2] If the Debtor is going to terminate its employees, it should be required to disclose when that is going to occur so that creditors and parties in interests can gauge the additional administrative expense costs of those employees and also the potential liability that may arise from the termination of those employees.

iv. The Disclosure Statement lacks adequate information about 2008 Tax Bonus Claims.

13. In 2009, the Debtor did not have sufficient cash available to pay bonuses on the February 29, 2009 payments date. Instead it opted to award non-cash bonuses to top performing employees referred to as "2008 Tax Refunds." There are multiple former employees, including Daugherty, which received these 2008 Tax Refunds. Each of the recipients received a compensation letter that said "[i]f [the] actual refund deviates materially from [the] estimate,

[2] *See*

other compensation will be fairly adjusted." The IRS has since challenged the Debtor's 2008 tax elections, which was the method the Debtor utilized to fund its obligations. There has been no resolution to the matter as of now. The Debtor does not have any disclosure regarding these contingent claims. The Debtor should be required to specifically address the 2018 Tax Refund claims by expressly treating or defining them at a minimum as a Disputed Claim.

v. The Disclosure Statement does not contain adequate information about the amount of potential claims or Disputed Claims.

14. On page 10 of the Disclosure Statement, the Debtor lists what the "Estimated Prepetition Claim Amounts" are for each class of claims. However, the amounts contained therein are based upon multiple assumptions, including no recovery for UBS, HarbourVest Entities, IFA, Hunter Mountain, and an Allowed Claim of only $3,722,019 for Daugherty. The chart on page 10 then indicates that the "estimated recovery" based on the assumption therein is 85.31%. However, nowhere in the Disclosure Statement does it disclose what the "potential" amount of claims are. If UBS, or HarbourVest, or any of the other entities are <u>not</u> zero, what would the estimate recoveries be. At a bare minimum, in the discussion of the Risk Factors, the Debtor should be required to disclose what the potential amount of claims may be and what effect that would have on distributions.

15. Similarly, there is a lack of any information about the amount of "Disputed Claims." According to the definitions in the Plan, a "Disputed" claim is "any claim or Equity Interest that is not yet Allowed." *See* Plan at art. I.B.48. "Allowed" is then a substantial definition which includes *inter alia* "a Claim Allowed pursuant to the Plan or a Final Order of the Bankruptcy Court." *See* Plan at I.B.6. However, the "Final Order" aspect of that definition is indeed problematic because in order to be a Final Order, the appellate deadline has to have run that order no longer subject to an active appeal. *See* Plan at I.B. 66. Accordingly, even though the Court has

entered order approving and allowing claims for Redeemer and ACIS, those Claims are definitionally "Disputed Claims" under the Plan until the appeals of the order approving the compromises allowing those claims have concluded.

16. The definition of "Disputed Claim Reserve Amount" as presently written is ambiguous providing a number of different options that may be utilized to determine the Disputed Claims Reserve Amount. As explained, there is going to be significant amount of "Disputed Claims" and accordingly the Disputed Claim Reserve will be large. The amount and manner in which "Disputed Claims" are reserved should not be open to interpretation. Daugherty recommends the definition of "Disputed Claims Amount" be amended to the following:

> Disputed Claim Reserve Amount means, for purposes of determining the Disputed Claim Reserve, the Cash that would have otherwise been distributed to a Holder of a Disputed Claim at the time any distributions of Cash are made to the Holders of Allowed Claims. The amount of Disputed Claims Claim upon which the Disputed Claims Reserve is calculated shall be: (a) the amount agreed to by the Holder of the Disputed Claim and the Claimant Trustee or Reorganized Debtor, as applicable, (b) the amount ordered by the Bankruptcy Court if it enters an order disallowing, in whole or in party, a Disputed Claim, or (c) as otherwise ordered by the Bankruptcy Court, including an order estimating the Disputed Claim; *provided, however*, if the Holder of a Disputed Claim has not reached an agreement on the Disputed Claim and the Bankruptcy Court has not entered a Final Order related to the Disputed Claim, the amount of the Disputed Claim shall be the greater of the amount set forth on the Schedules and the filed Proof of Claim.

17. Because the Plan provides that distributions will not be paid to Disputed Claims, and the amounts attributable to the Disputed Claims is going to be reserved, then the Debtor should be required to disclose, at a minimum, the aggregate amount of "Disputed Claims" and "Allowed Claims." Put differently, creditors and parties in interest are entitled to know what kinds of distributions they can expect and when. The timing and amount of those distributions are certainly

heavily influenced by the amount of "Disputed Claims," especially if the top 5 claims and the overwhelming majority of the amount of Claims are currently defined as "Disputed" under the Plan.

18. Moreover, the Debtor should be required to amend or modify the Claimant Trust Agreement so that the definition of "Disputed Claims Reserve" is consistent with the Plan.

B. The Plan is Patently Unconfirmable.

19. The Debtor's Plan of reorganization is patently unconfirmable because it fails to meet several of the requirements of section 1129 of the Bankruptcy Code. Where a plan is not confirmable on its face, a bankruptcy court may deny approval of the disclosure statement. *See e.g. In re U.S. Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996)("disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible"); *In re Quigley Co., Inc.* 377 B.R. 110, 115-16 (Bankr. S.D.N.Y. 2007)("If the plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied, as solicitation would be futile."); *In re Miller*, 2008 WL 191256, *3 (Bankr. W.D. La. 2008). The Plan is patently unconfirmable for the reasons explained herein.

i. Impermissible Gerrymandering.

20. The Plan's "Convenience Claims" class constitutes wrongful gerrymandering. As the Fifth Circuit has pronounced: "thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan." *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (Matter of Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991). Class 5 consists of "Convenience Claims."[3] "Convenience Claims" means "any prepetition,

[3] Plan at 19.

liquidated, and unsecured Claim against the Debtor that is less that or equal to **$1,000,000** or any General Unsecured Claims that is voluntarily reduced to an Allowed amount less than or equal to $1,000,000." *See* Plan art. I.B.41. Although Daugherty is cognizant of the significant reduction in the amount of Convenience Class threshold, $1 Million is still a significantly high threshold, and the Debtor does not give any reason for why the amount is set so high. Further, upon information and belief, a significant amount of the claims in the "Convenience" Class are lawfirms who are essentially agreeing to take a 15% reduction on their fees.

21. Moreover, the Debtor has now simply just moved the previously-described "Unpaid Employee Claims" (*i.e.,* the claims of Scott Ellington, Thomas Surgent, Frank Waterhouse, and Isaac Leventon") to the Convenience Class and those individuals are now referred to as the "Senior Employees." *See* Ex. H to the Plan Supplement. As explained below, these individual's reduction of their claims as consideration for the releases they are receiving is illusory and not real consideration.

ii. Absolute Priority Rule.

22. Section 1129(b)(2)(B)(ii) provides in pertinent part that with respect to a class of unsecured claims:

> the holder of any claim of interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property,

11 U.S.C. § 1129(b)(2)(B)(ii); *Bank of Am Nat'l. Trust & Sav. Ass'n. v. 203 N. LaSalle St. P'ship*., 526 U.S. 434, 444-48 (1999); *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 245 (5th Cir. 2009). On one page, the Plan provides with regard to Class B/C and Class A partnership interests holders will:

> On or soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class [9 or 10] Claim, in full satisfaction, settlement, discharge and release of, ***and in exchange for***, such Claim shall receive (i) Pro Rata share of the Contingent Claimant Trust Interests or (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing.[4]

One page later though, the Plan expressly provides: "On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships [*sic*] in the Debtor will be cancelled, and new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC – a newly-chartered limited liability company wholly-owned by the Claimant Trust."[5]

23. The Plan treatment for Class 9 and Class 10, on its face, violates the absolutely priority rule. The plain language of the treatment states that Holders of partnership interests (which are junior to the Class 7 general unsecured creditors) are receiving "***in exchange for"*** their limited partnership interests, the Contingent Claim Trust Interests. While those "Contingent Claimant Trust Interests" may never vest, the mere receipt of the contingent interest themselves when the Plan does not provide for a full recovery to Class 8 creditors violates the absolutely priority rule. The Financials show that the Debtor estimates recovery to general unsecured creditors at 85.31%, less than 100%. Further, the Debtor's CEO, James Seery, testified that with regard to the "contingent interests" going to limited partners: "without being specific or bankruptcy specific, on account of, they're not getting it for a charitable purpose. As such, the Plan is facially unconfirmable and the Court should deny approval of the Disclosure Statement.

iii. No Discharge For a Liquidating Plan.

[4] Plan at 21-22 (emphasis added).
[5] *See* Plan at 23 (Summary).

24. The Debtor's Plan is plainly a liquidating plan and the Bankruptcy Code prohibits a discharge when a "plan provides for the liquidation of all or substantially all of the property of the estate." *See* 11 U.S.C.§ 1141(d)(3). The Plan provides that on or before the "Effective Date" the Debtor shall irrevocably transfer the "Claimant Trust Assets" to the "Claimant Trust." The "Claimant Trust" are in turn defined as: "(i) all assets of the Estate other than the Reorganized Debtor Assets, including, but not limited to, the Causes of Action, Available Cash, any proceeds realized or received from such assets, (ii) any Assets received from the Reorganized Debtor on or after the Effective Date, (iii) the limited partnership interests in the Reorganized Debtor, and (iv) the ownership interests in New GP LLC."[6] The "Reorganized Debtor Assets" are defined as "any limited and general partnership interests held by the Debtor, and any other Assets, including Causes of Action (including, without limitation, claims for breach of fiduciary duty), that have not been, or cannot be, for any reason, transferred to the Claimant Trust."[7] In other words, all of the Debtor's assets are being transferred to the "Claimant Trust" to be administered and wound down for payment to creditors—or put more succinctly, a liquidating plan. Article IX (Exculpations, Injunction and Related Provisions) then provides *inter alia*: "[e]xcept as otherwise expressly provided by this Plan of the Confirmation Order, upon the Effective Date, the Debtor and its estate will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions under the Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever…"[8] In order to confirm a plan, the plan must comply "with the applicable provisions of this title." *See* 11 U.S.C. § 1129(a)(1); *In re Schwarzmann*, 203 B.R. 919 (Bankr. E.D. Va. 1995). The Plan's inclusion of a discharge when

[6] Plan at 5.
[7] Plan at 12-13.
[8] Plan at 44.

the Plan is a liquidating plan is impermissible and thus the Plan is patently unconfirmable. As such, the Court should decline approval of the Disclosure Statement.

iv. The Releases are Still Impermissible.

25. Although its has tweaked the releases proposed in the Plan, the release are still problematic. Fifth Circuit law disfavors non-debtor releases. *See In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1061 (5th Cir. 2012); *In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *In re Bigler LP*, 442 B.R. 537, 546 (Bankr. S.D. Tex. 2010); *In re Pilgrim's Pride Corp.*, Case No. 08-45664-DML-11, 2010 WL 2000000, at *5 (Bankr. N.D. Tex. 2010). Even in circuits where non-debtor releases are permitted, those circuits have held that releases should only be granted in "extraordinary circumstances" and are the exception rather than the rule. *See e.g. In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005); *Class Five Nev. Claimants v. Dow Corning Cor. (In re Dow Corning Corp.)*, 280 F.3d 648, 657-58 (6th Cir. 2002); *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 212-24 (3d Cir. 2000). When determining whether to approve a debtor's release of a non-debtor in a chapter 11 plan, courts analyze a number of factors. *See e.g. Nat'l Heritage Foundation, Inc. v. Highbourne Foundation*, 760 F.3d 344, 347 (4th Cir. 2014); *In re Washington Mut. Inc.*, 442 B.R. 314, 351 (Bankr. D. Del. 2011); *In re Dow Corning Corp.*, 280 F.3d at 658; *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999); *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992). The five factors generally evaluated include: (1) is there an identity of interest between the debtor and the third party such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete estate assets, (2) has the non-debtor made a substantial contribution to the plan, (3) is the release or injunction essential or necessary to the plan, (4) is there an overwhelming acceptance of the plan and release

by creditors and interest holders, and (5) does the plan provide for payment of all, or substantially all of the claims of the creditors and interest holders under the plan. *See In re Zenith Elecs. Corp.*, 241 B.R. at 110; *In re Dow Corning Corp.*, 280 F.3d at 658; *Nat'l Heritage Foundation, Inc.*, 760 F.3d at 347; *In re Washington Mut. Inc.*, 442 B.R. at 349; *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. at 935. The Debtors have the burden of establishing that the Debtor releases satisfy the above factors. *See e.g. In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 42 (Bankr. D. Del. 2000).

26. Courts in this district have previously looked closely at the "identify of interest" factor and found that it is an incredibly difficult standard to meet. *See In re Couture Hotel Corp.*, 536 B.R. 712, 751 (Bankr. N.D. Tex. 2015)(*explaining* that in order to meet the "identity of interest" test the individuals obtaining the release must "for all intents and purposes [be …]the debtor, and the debtor's reorganization efforts would rise or fall with the individual."); *see also In re Seatco, Inc.*, 257 B.R. 469, 477 (Bankr. N.D. Tex. 2001); *In re Bernhard Steiner Pianos, USA, Inc.*, 292 B.R. 109, 116 (Bankr. N.D. Tex. 2002). Here, the "Senior Employees" receiving the releases are nowhere near the level of "identity of interest" that the courts in this district have held must be met in order to obtain an injunction, much less a release.

27. Second, the proposed "contribution to the plan" is illusory. The Debtor's Disclosure Statement describes the Senior Employees as giving up millions dollars in the aggregate in "deferred compensation." Specifically, the Disclosure Statement states:

> "In addition to the obligations set forth in Article IX.D of the Plan, as additional consideration for the foregoing releases, the Senior Employees will waive their right to certain deferred compensation owed to them by the Debtor. As of the date hereof, the total deferred compensation owed to the Senior Employees was approximately $3.9 Million, which will be reduced by approximately $2.2 Million to approximately $1.7 Million. That reduction is composed of a reduction of (i) approximately $560,000 in the aggregate in order to qualify as Convenience Claims, (ii) approximately $510,000 in the aggregate to reflect the Convenience Claims treatment of 85% (and may be lower depending on the number of

> Convenience Claims), and (iii) or approximately $1.15 Million in the aggregate to reflect an additional reduction of 40%.

Disclosure Statement at 71-72. As the Debtor's counsel acknowledged at the hearing on the First Amended Disclosure Statement:

> Under the plan, only if an employee is actually employed on the date will they be entitled to a bonus. It doesn't matter if they're terminated with or without cause. So the key date for determining whether these employees are entitled to a bonus is February 28 of next year.[9]

The "bonus" payments Debtor's counsel was referring to, are the "deferred compensation" amounts that the Senior Employees are volunteering to reduce and treat as a Convenience Claim in exchange for obtaining a release. However, as discussed above, the Debtor has already indicated in multiple pleadings that it intends to terminate all of the employees, and only retain three employees post-Effective Date on a consulting basis. With confirmation targeted at the end of the year, none of the Senior Employees would be entitled to the deferred compensation they are using to bargain for their releases at the time of confirmation (*i.e.*, the Senior Employees had not made it to February 28, 2021 and still be employed by the Debtor). Therefore, the "consideration" they are providing and reducing is illusory because they are using money they are not entitled to.

28. Further, and perhaps more importantly, the damages caused by the Senior Employees far exceeds the $2.2 Million that they are alleging that they are giving up to obtain the releases.

29. The releases of the Senior Employees is certainly not essential or required for the plan and the Debtor's own projections (even with their assumptions) show that "substantially all of the claims of the creditors" will not be paid in full. Although the question of releases is generally one for confirmation, in cases where such releases are patently violative of Fifth Circuit law, the

[9] *See* Tr. of Hrg. Oct. 27, 2020 at 40:25-41:4.

Court should deny approval of a disclosure statement in support of any plan that contains such releases.

WHEREFORE, Daugherty respectfully requests that the Court enter an order (i) denying the approval of the Disclosure Statement, and (ii) granting Daugherty such other and further relief, legal or equitable, special or general, to which Daugherty may show himself justly entitled.

Dated: November 20, 2020.

Respectfully submitted,

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