Docket #0850 Date Filed: 4/21/2013

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
School Specialty, Inc., *et. al.*,[1]	:	Case No. 13-10125 (KJC)
	:	
Debtors.	:	Jointly Administered
	:	
	:	**Related Docket Nos.: 599, 600, 601, 838, 839**
	:	

OBJECTION OF CERTAIN HOLDERS OF CONVERTIBLE NOTES TO PROPOSED DISCLOSURE STATEMENT FOR DEBTORS' AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE AND TO REVISED PROPOSED ORDER APPROVING DISCLOSURE STATEMENT AND SOLICITATION AND RELATED PROCEDURES

The undersigned counsel on behalf of certain holders (collectively, the "Objecting Noteholders")[2] of convertible subordinated debentures due 2016 (the "Convertible Notes"), hereby submit this objection (the "Objection") to the Disclosure Statement for Debtors' Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code and to the Revised Proposed Order Approving Disclosure Statement and Solicitation and Related Procedures. In support of the Objection, the Objecting Noteholders aver as follows:

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number and state of incorporation, are: School Specialty, Inc. (Wisc.; 1239), Bird-In-Hand Woodworks, Inc. (N.J.; 8811), Califone International, Inc. (Del.; 3578), Childcraft Education Corp. (N.Y.; 9818), ClassroomDirect.com, LLC (Del.; 2425), Delta Education, LLC (Del.; 8764), Frey Scientific, Inc. (Del.; 3771), Premier Agendas, Inc. (Wash.; 1380), Sax Arts & Crafts, Inc. (Del.; 6436), and Sportime, LLC (Del.; 6939). The address of the Debtors' corporate headquarters is W6316 Design Drive, Greenville, Wisconsin 54942.

[2] The Objecting Noteholders and face amount of Convertible Notes they hold are: Koyote Trading, LLC ($2,500,000), Singer Children Management Trust ($3,250,000), and Varana Capital Master, LP ($500,000). The foregoing list of Objecting Noteholders may be supplemented as appropriate. The Objecting Noteholders hold no short position with respect to their holdings of Convertible Notes.

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PRELIMINARY STATEMENT

The Objecting Noteholders object to the Debtors attempting to move forward with a Disclosure Statement on one day's notice that attempts to turn over 95% ownership to its DIP lenders. Among other things, the Disclosure Statement describes a Plan that, on its face, violates and circumvents numerous provisions of the Bankruptcy Code, including sections 363, 364, 1123(a)(4), and 1129(a)(1). In addition, the Disclosure Statement does not provide adequate information as required by section 1125 of the Bankruptcy Code.

The Objecting Noteholders maintain that notice of effectively less than one business day of the Debtors' numerous substantive changes to the Debtors' plan and Disclosure Statement is woefully inadequate. Moreover, adding to the concern of such short notice is the Debtors' proposed Amended Plan which is now inconfirmable on its face due to several new provisions designed to circumvent the Bankruptcy Code. First, the new, proposed Plan, in substance, modifies the existing Ad Hoc DIP Facility[3] without complying with the Bankruptcy Code Section 364 which does not allow liens and priorities if other lenders would require lesser terms. Here, the Plan modifies the DIP Loan to allow the Ad Hoc DIP Lenders to effectively foreclose on all the Debtors' assets without even holding a foreclosure action that allows the borrower to repay the loan. The DIP Facility did not include this feature when it was approved by the Court less than two months ago. Moreover, the Ad Hoc DIP Lenders are to receive $103 million of their $155 million loan back on the Effective Date via an exit facility and perhaps as much as an additional $25 million depending upon the outcome of the "make whole" litigation

[3] Terms not otherwise defined herein shall have the meanings ascribed to such terms in the Amended Plan.

with Bayside. Thus, the net "exposure" of the Ad Hoc DIP Lenders could be as little as $27 million for which they (with the acquiescence of the Debtors) are to receive 95% of the equity ownership of the reorganized Debtors.

Second, the Debtors were conducting a sale process that they apparently terminated the very day they filed the Disclosure Statement – even though the Debtors indicate that five parties were conducting due diligence. Instead, the Debtors now propose a private sale to the Ad Hoc DIP Lenders without an auction, without disclosing what the Ad Hoc DIP Lenders are giving management to go along, and without allowing the Objecting Noteholders and others similarly situated to participate in the acquisition by purchasing interests in the DIP loan or refinancing it. Accordingly, the Debtors have now embedded in their Plan a section 363 sale that violates the jurisprudence governing section 363 sales.

Third, the Plan embeds a violation of Bankruptcy Code section 1123(a)(4) which requires equal treatment of all claims in a class. Here, the ad hoc group, consisting of a subset of the Debtors' bondholders, is providing a new DIP loan that converts to ownership, without allowing all the Debtors' bondholders to participate on the same terms. At its core, that is simply a sophisticated method of violating section 1123(a)(4).

Fourth, the Plan's embedded violations of sections 363, 364, and 1123(a)(4) cause the Plan to violate Bankruptcy Code section 1129(a)(1) requiring the Plan not to violate any sections of the Bankruptcy Code.

BACKGROUND

1. On May 22, 2012, the above-captioned debtors (the "Debtors") entered into a term loan (the "Term Loan") under that certain Credit Agreement (the "Term Loan

Agreement") among School Specialty and certain of its domestic subsidiaries, as borrowers, and Bayside Finance LLC ("Bayside"), as administrative agent, collateral agent and lender. The Term Loan Agreement provides up to $70 million in term loan credit and matures on October 31, 2014.

2. The Debtors also maintained a pre-petition revolving senior secured asset-based credit facility (the "ABL") under that certain Credit Agreement (the "ABL Agreement", and together with the Term Loan Agreement, the "Prepetition Loan Agreements") between School Specialty and certain of its domestic subsidiaries, as borrowers, the lenders thereto (the "ABL Lenders") and Wells Fargo Capital Finance, LLC, as administrative agent (the "ABL Agent"). The ABL Agreement provides up to $200 million in revolving credit and matures on September 30, 2014.

3. By January 2013, the Debtors were in default under both Prepetition Loan Agreements. As of January 28, 2013 (the "Petition Date"), the aggregate principal amount outstanding under the Term Loan Agreement was approximately $92 million; the aggregate amount outstanding under the ABL Agreement was approximately $47.62 million. So, less than seven months after Bayside funded the term loan, the Debtors were in default under both loan agreements.

4. On the Petition Date, the Debtors filed voluntary petitions for protection under Chapter 11 of the Bankruptcy Code. As part of their first day pleadings, the Debtors filed, *inter alia*: (1) a motion seeking interim and final orders authorizing Debtors to obtain postpetition financing (the "DIP Motion") [D.I. 12]; and (2) a motion to sell substantially all of their assets (the "Sale") pursuant to Bankruptcy Code Section 363 (the "Sale Motion") [D.I. 18] with "Bayside School Specialty, LLC" listed as the

Proposed Purchaser. See Sale Motion at 7.

5. On January 29, 2013, the Steering Committee of Convertible Noteholders of School Specialty, Inc. (the "Steering Committee"), purportedly holding approximately 99% of the $157.5 million face amount of Convertible Notes issued by the Debtors as of the Petition Date, filed its objection (the "Steering Committee Objection") to the DIP Motion, arguing the Steering Committee had offered superior terms to those proposed by Bayside in the DIP Motion in order to avoid a sale to Bayside.

6. On January 31, 2013, this Court issued an order (the "Interim DIP Order") [D.I. 86] authorizing the Debtors to obtain interim debtor-in-possession financing, granting super-priority liens to Bayside and the ABL DIP Lenders (as defined in the Interim DIP Order). The Interim DIP Order specifies that the Debtors were liable to Bayside in the aggregate principal amount of approximately $95 million[4] plus $50 million of new money capital.

7. On February 5, 2013, the United States Trustee for the District of Delaware (the "UST") appointed a seven-member Official Committee of Unsecured Creditors (the "Committee") which included three holders of Convertible Notes, namely Zazove Associates LLC, Davis Appreciation & Income Fund, and Steel Excel Inc, which, upon information and belief, were also members of the Ad Hoc Noteholders Committee. On February 27, 2013, the UST issued an amended appointment of the Committee due to the voluntary resignation of these same three holders of Convertible Notes who became part of the Ad Hoc DIP Lenders.

8. On February 15, 2013, the Court entered a preliminary order scheduling a

[4] This amount contains a $25 million "make whole" payment (the "Make Whole Payment") that is being litigated by the Committee. See, e.g., D.I. 295.

hearing (the "Sale Hearing") on approval of the Debtors' proposed sale. The Sale Hearing was preliminarily set for March 27, 2013.

9. On February 18, 2013, an ad hoc committee of holders of the Convertible Notes (the "Ad Hoc Noteholders Committee"), succeeded the Steering Committee as the objecting party under the Steering Committee Objection, filed its supplemental objection (the "Ad Hoc Objection") [D.I. 220] to the DIP Motion and joinder in the Steering Committee Objection. The Ad Hoc Noteholders Committee detailed its efforts to provide alternate DIP financing to the Debtors, promising a "new debtor-in-possession loan to refinance the Bayside DIP Facility, repay Bayside's prepetition term loan and escrow an amount equal to the Make-Whole Payment allegedly due plus disputed default interest to be distributed pursuant to a final court order determining Bayside's entitlement, if any, to the amounts." Ad Hoc Objection, at 3.

10. After the formation of the Ad Hoc Noteholders Committee, Objecting Noteholder, Singer Children Management Trust, was permitted to join the Ad Hoc Noteholders Committee; however, its request to participate in the Ad Hoc DIP Facility was rejected. Objecting Noteholder, Koyote Trading, LLC, however, was not even permitted to participate on the Ad Hoc Noteholders Committee. None of the Objecting Noteholders are participants in the Ad Hoc DIP Facility.

11. On February 14, 2013, the Ad Hoc Noteholders Committee filed their 2019 statement (the "2019 Statement"). Upon information and belief, the 2019 Statement has not been amended since that time.

12. On February 26, 2013, the Court entered an order (the "Ad Hoc DIP Interim Order") [D.I. 300] authorizing the Debtors to enter into a debtor-in-possession

financing facility (the "Ad Hoc DIP Facility") with the Ad Hoc Noteholders Committee. The Ad Hoc DIP Interim Order authorized the Debtors to obtain replacement postpetition financing in an aggregate principal amount of $155 million, allowing the payoff of all obligations due to Bayside in respect of the prepetition Term Loan and $25 million to set up an escrow for the disputed Make Whole Payment.

13. On March 14, 2013, the Court entered its final order approving the Ad Hoc DIP Facility [D.I. 548].

14. On March 18, 2013, the Court entered a final order (the "Sale Hearing Order") scheduling the Sale Hearing for May 13, 2013, with Qualified Bids due by April 24, 2013.

15. On March 19, 2013, the Debtors filed their Joint Plan Under Chapter 11 of the Bankruptcy Code (the "Plan") [D.I. 599] and their Disclosure Statement for the Plan (the "Initial Disclosure Statement") [D.I. 600]. The Plan initially contemplated a dual track process by which the Debtors would simultaneously pursue a plan of reorganization and market their assets for sale. A hearing to consider the adequacy of the Disclosure Statement was scheduled for April 11, 2013; however, on April 10, 2013, the hearing was adjourned without explanation to April 22, 2013 (the "Disclosure Statement Hearing").

16. On April 19, 2013, the Debtors filed their Notice of Filing of Blackline Versions of Plan and Disclosure Statement (the "Amendment Notice") [D.I. 838], which contains as exhibits proposed amended versions of the Plan (the "Amended Plan") and Disclosure Statement. Contemporaneously, and consistent with the Amended Plan and Disclosure Statement, the Debtors filed their Notice of Intent to Terminate the Sale Process (the "Sale Termination Notice") [D.I. 840]. Despite the numerous material

changes to the terms and conditions contained in the Amended Plan and Disclosure Statement, both notices reflect the Debtors desire to proceed with the Disclosure Statement Hearing as scheduled.

17. In addition to cancellation of the Sale, the Amended Plan now provides for the lenders under the Ad Hoc DIP Facility to "receive (i) Cash in an approximate amount of $103 million, which amount is subject to change . . . and (ii) ninety-five percent (95%) of the New SSI Common Stock in full satisfaction of their Ad Hoc DIP Financing Claims." See Disclosure Statement, page 9. For the remaining Allowed Noteholder Unsecured Claims like the Objecting Noteholders' claims, a holder of such claim is to receive its "Pro Rata share of five percent (5%) of the New SSI Common Stock to be issued by the Reorganized Debtors." Id. at 10.

18. On April 19, 2013, the Committee filed its objection to the Disclosure Statement [Dkt. 847] (the "Committee Objection"), which is incorporated herein by reference. The Committee Objection notes that the the holders of the Ad Hoc DIP Facility are effectively in control of the Debtors. The Committee Objection further notes, "[T]o the Committee's chagrin, it appears that the Ad Hoc DIP Lenders have picked up the mantle of the Debtors' original pre-petition secured lender, Bayside Finance, LLC ("Bayside"), and the Committee is once again left to battle lenders bent on stealing the value all to themselves."

OBJECTION

A. Notice of the Disclosure Statement is Inadequate Pursuant to Bankruptcy Code Section 102 and Bankruptcy Rule 2002(b) Because One Business Day Notice of this Expedited Private Sale Process to the Ad Hoc DIP Lenders is Inadequate

19. As an initial matter, Bankruptcy Rule 2002(b) requires notice of twenty–

eight days to parties in interest for filing objections and for the hearing to consider approval of a disclosure statement. On April 19, 2013, for the very first time in these cases, the Debtors proposed a pro rata distribution of ninety-five percent (95%) equity in reorganized Debtor, School Specialty, Inc., to holders of allowed Ad Hoc DIP Financing Claims. In other words, while purporting to have jettisoned the sale process, the Ad Hoc Lenders actually seek to facilitate on less than one day notice, a private sale process which excludes the participation of other holders of Convertible Notes in order to sell the Ad Hoc Lenders equity in the reorganized Debtors.[5] Less than one business day notice of this material change to the Amended Plan is clearly inadequate.

20. Also, Section 102 provides that where the Bankruptcy Code requires notice and a hearing, such as for approval of a disclosure statement pursuant to section 1125(b) to solicit acceptances, the notice and hearing must be "such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances". Given the significant revisions to the Plan and Disclosure Statement made one business day prior to the hearing, the Debtors cannot reasonably assert compliance with the foregoing sections of the Bankruptcy Code. Thus, neither notice nor opportunity for hearing is appropriate in this instance.

B. The Disclosure Statement Should Not Be Approved Because the Amended Plan is Patently Unconfirmable

21. Courts throughout the country, including the Third Circuit Court of Appeals, have recognized that a disclosure statement cannot be approved where the plan to which it relates is not confirmable on its face. As the Third Circuit recently noted:

[5] It is also not without irony that the Ad Hoc Noteholders Committee (of which each member is also a member of the Ad Hoc DIP Lenders) is taking some of the very same actions to which it objected with respect to Bayside in the Ad Hoc Objection.

> We find the reasoning of these many courts to be persuasive, and hold that a bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage that a later confirmation hearing would be futile because the plan described by the disclosure statement is patently unconfirmable.

In re American Capital Equipment, LLC, 688 F.3d 145, 154 (3d Cir. 2012) (citations and internal quotations omitted). *Accord, In re Main St. AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) ("It is now well accepted that a court may disapprove of a disclosure statement . . . if the plan could not possibly be confirmed."); *In re Quigley Company, Inc.*, 377 B.R. 110 (Bankr. S.D.N.Y. 2007); *In re El Comandante Mgmt. Co.*, 359 B.R. 410, 415 (Bankr. D. P.R. 2006); *In re Beyond.com Corp.*, 289 B.R. 138 (Bankr. N.D. Cal. 2003) (collecting cases); *In re Mahoney Hawkes, LLP*, 289 B.R. 285, 294 (Bankr. D. Mass. 2002); *In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001); *In re Silberkraus*, 253 B.R. 890, 899 (Bankr. C.D. Cal. 2000); *In re Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996); *In re Felicity Assocs., Inc.*, 197 B.R. 12, 14 (Bankr. D. R.I. 1996); *In re Market Square Inn, Inc.*, 163 B.R. 64 (Bankr. W.D. Pa. 1994); *In re 266 Washington Assocs.*, 141 B.R. 275 (Bankr. E.D.N.Y. 1992), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992); *In re Olive Street Invs., Inc.*, 117 B.R. 488 (Bankr. E.D. Mo. 1991); *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990); *In re Dakota Rail, Inc.*, 104 B.R. 138, 143 (Bankr. D. Minn. 1989); *In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987); *In re Unichem Corp.*, 72 B.R. 95, 100 (Bankr. N.D.Ill. 1987).

22. As noted *supra*, the Amended Plan proposes to provide the holders of allowed Ad Hoc DIP Financing Claims ninety-five (95%) of the equity in reorganized debtor, School Specialty, Inc, in addition to approximately $103 million in satisfaction of

their $155 million Ad Hoc DIP Facility. In essence, then, the holders of allowed Ad Hoc DIP Financing Claims will pay as little as $27 million to $52 million for a 95% stake in the reorganized Debtors. The holders of the Ad Hoc DIP Financing Claims accomplish their feat by convincing the Debtors to violate sections 363, 364, 1123(a)(4), and 1129(a)(1) of the Bankruptcy Code without disclosing what is promised to management to propose such a plan.

i. The Amended Plan Violates Section 364(c) and 1129(a)(1)

23. The Debtors attempt to convert the existing DIP Facility into equity in the reorganized Debtor is contrary to the Ad Hoc DIP Facility approved by the Court and is an impermissible circumvention of Bankruptcy Code section 364, rendering the Amended Plan unconfirmable pursuant to 1129(a)(1) because it adds an option to purchase into the priority and lien rights in the Ad Hoc DIP Facility without providing for any hearing to determine whether the facility can be refinanced on better terms.

24. Section 364(c) provides:

> (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—
>
> > (1) with priority over any or all administrative expenses of the kind specified in section 503 (b) or 507 (b) of this title;
> > (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
> > (3) secured by a junior lien on property of the estate that is subject to a lien.

25. Here, the Amended Plan also goes beyond section 364(c)(1), (2), and (3) authorizing priority over all other administrative expenses and granting liens. It bars repayment and grants ninety-five percent (95%) ownership in the reorganized Debtors. Put differently, the Amended Plan grants lien rights while depriving the Debtors of their

equity of redemption. It is well settled that mortgages depriving borrowers of their equity of redemption by granting the mortgagee an option to purchase, are invalid because they clog the equity of redemption. Here, the Amended Plan provides no option for the trustee (here the debtors in possession) to obtain that credit on better terms.

26. Accordingly, the Amended Plan is illegal on its face pursuant to section 1129(a)(1) which requires compliance with applicable provisions of the Bankruptcy Code.

ii. The Amended Plan Violates Section 363 and 1129(a)(1)

27. Section 363(b) of the Bankruptcy Code provides, in relevant part, as follows:

> (b) (1)The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate

28. An overarching requirement for the approval of a proposed sale under 11 U.S.C. § 363(b) is the maximization of value to the estate. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 394 (3d Cir. 1996) ("[I]t is the trustee's duty to both the debtor and the creditor to realize from the estate all that is possible for distribution among the creditors.") (citation omitted); *see also Cello Bag Co. v. Champion Int & Corp. (In re Atlanta Packaging Products, Inc.)*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988) ("It is a well-established principle of bankruptcy law that the objective of bankruptcy sales and the trustee's duty with respect to such sales is to obtain the highest or greatest overall benefit possible for the estate."); *Four B. Corp. v. Food Barn Stores, Inc., (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (The court "must remain mindful of the ubiquitous desire of the unsecured creditors, and a primary objective of the Code, to enhance the value of the estate at hand.").

29. The Debtors had commenced a sales process. On April 19, 2013, the Debtors determined not to consummate a sale pursuant to the Plan but chose to do so post-confirmation – notwithstanding the fact that the Amended Disclosure Statement reveals that five (5) parties are continuing to conduct due diligence. See Amended Disclosure Statement, at 34-35. The effect of the Plan is to essentially sell 95% of the reorganized equity to certain selected creditors (the holders of the Ad Hoc DIP Loan) while preserving the upside anticipated from an arms-length sales process outside the scrutinty of this Court. The limited notice and hearing the Debtor and Ad Hoc Noteholders are attempting to effectuate through the Plan is tantamount to a private sale. Because the Amended Plan seeks to circumvent the requirements of section 363, it violates 1129(a)(1) as well.

iii. The Amended Plan Violates 1123(a)(4) and 1129(a)(1)

30. Meanwhile, the Objecting Noteholders under the Amended Plan are relegated to receiving a pro rata share of only five percent (5%) equity in the reorganized Debtors, despite the fact that certain Objecting Noteholders attempted to participate in the Ad Hoc DIP Facility and on the Ad Hoc Noteholder Committee but were rebuffed. Thus, the Objecting Noteholders are now destined to receive unequal treatment vis-à-vis similarly situated holders of Convertible Notes who were permitted to participate as allowed Ad Hoc DIP Financing Claims. This discriminatory treatment is yet another element of the Amended Plan which renders it unconfirmable pursuant to Bankruptcy Code section 1123(a)(4) which provides that "…a plan shall provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."

31. Because the disparate treatment of holders of Convertible Notes is unlawful, the Amended Plan could not have been proposed in good faith and, therefore, also violates section 1129(a)(3) which provides that a court shall confirm a plan only if, among other things, "[t]he plan has been proposed in good faith and not by means forbidden by law."

32. Significantly, the courts have long prevented unequal treatment of creditors in the same class, even when the unequal treatment technically occurs outside the plan. For instance, in *Young v. Higbee Co.*, 324 U.S. 204, 211 (1945), the Supreme Cour would not allow two preferred shareholders to settle an appeal of confirmation for their own benefit, as opposed to the benefit of all preferred shareholders. Similarly, in *In re P-R Holding Corp*., 147 F.2d 895 (2d Cir. 1945), the court would not allow the plan proponent to vote claims it purchased for more than it was offering other similar claims under the plan. In *In re Allegheny International, Inc.*, 118 B.R. 282 (Bankr. W.D. Pa. 1990), the court described how the plan proponent seeking to acquire the reorganized debtor paid different amounts for similar claims, and ultimately designated the propoent's votes; but allowed the proponent to acquire the reorganized debtor, if it would pay top dollar to each creditor.

33. The instant case is a variation on the exact same theme. It's a sophisticated attempt to extract special treatment for the Ad Hoc Noteholders, by circumventing multiple provisions of the Bankruptcy Code.

C. The Disclosure Statement Does Not Contain Adequate Information

34. Bankruptcy Code Section 1125(b) provides in relevant part: "An acceptance or rejection of a plan may not be solicited after the commencement of the case

under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and **a written disclosure statement approved**, after notice and a hearing, by the court **as containing adequate information**." 11 U.S.C. § 1125(b) (emphasis added). Section 1125(a)(1) provides in relevant part: "'adequate information' means information of a kind, and in sufficient detail . . . that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1).

i. The Disclosure Statement Fails to Disclose Why the Debtors Need to Effectuate a Quick Sale to the Ad Hoc Lenders Followed by a Separate Sale or Sales Post-Confirmation

35. The Disclosure Statement abruptly sets forth an immediate change in strategy from a dual track sale and plan, to a plan that must be confirmed on an expedited basis without providing details as to events leading to this point and the process undertaken to make such a determination. In the same Disclosure Statement in which the Debtors disclose abandonment of the pre-confirmation sale process, they also note that five parties are continuing due diligence for a possible post-confirmation sale without providing any detail as to why the sale should not take place pre-confirmation.

36. The Disclosure Statement fails to effectuate why the Debtors need to accelerate a "sale" to the Ad Hoc DIP Lenders only to be possibly followed after confirmation by yet another sale or sales, perhaps to one of five potential buyers continuing to conduct due diligence. The Disclosure Statement does not disclose why the Debtors need to conduct the sale post-confirmation instead of pre-confirmation. If the problem is because the Ad Hoc DIP Facility requires it, then the Disclosure Statement

fails to describe what efforts have been made to find an alternate DIP loan on better terms to enable the full enterprise value to be realized by the constituents.

37. In terms of specifics of the sale to the holders of Ad Hoc DIP Facility Claims, the Disclosure Statement fails to provide sufficient details as to why the Debtors are proposing to sell themselves to the Ad Hoc Lenders, why creditors such as the Objecting Noteholders were excluded from the group of Ad Hoc DIP Lenders, and what they are proposing to give to management.

38. Additionally, the proposed Disclosure Statement does not provide all creditors with the data furnished the Ad Hoc DIP Facility holders. The Ad Hoc Noteholders seemingly have been provided access to information by the Debtors that have lead such holders and Debtors' management to conclude that they are better served rushing out of bankruptcy so that sale of some or all of the Debtor's assets can be accomplished by this small subset of parties to preserve the majority of the upside for themselves. The Objecting Noteholders should be provided access to the same information and it should be included in the Amended Disclosure Statement. How can creditors being asked to vote, make their decisions without the data the insiders have? They cannot.

ii. The Disclosure Statement Fails to Provide Sufficient Details Regarding Deemed Substantive Consolidation

39. The Disclosure Statement at Article VIII.B. provides no details to support deemed substantive consolidation, only providing certain conclusory statements which fall fall short of meeting the minimum details required in the Disclosure Statement. Debtors acknowledge the shortfall of details by adding that the Debtors will be prepared to offer further arguments in support of deemed substantive consolidation at the hearing

on Plan Confirmation. The United States Court of Appeals is highly critical and skeptical of deemed substantive consolidation, to say the least. *Credit Suisse First Boston v. Owens Corning (In re Owens Corning)*, 419 F.3d 195 (3d Cir. 2005), amended, 2005 U.S. App. LEXIS 18043 (3d Cir., August 23, 2005), cert. den. 2006 U.S. LEXIS 3492, 3493 (U.S., May 1, 2006). What are the grounds? Are the debtors' assets and liabilities hopelessly commingled? Did ALL creditors rely on all the entities being one entity? If neither test is passed, there cannot be any substantive consolidation or deemed consolidation unless all creditors consent. The Objecting Noteholders have not consented.

iii. The Disclosure Statement Fails to Disclose Why Perella Did Not Independently Verify the Financial Projections

40. The Liquidation analysis contains inadequate disclosure as it does not set forth the basis used in calculating such liquidation value, including the indications of value the Debtors have received in the sale process.

D. The Truncated Solicitation Timeline Does Not Allow Time to Obtain Necessary Information

41. Because additional information is needed which may involve discovery related to such issues as designation, and whether the Ad Hoc Noteholders are insiders, and because additional time might be needed to arrange alternative dip financing, the Objecting Noteholders object to the proposed solicitation procedures due to the extremely truncated solicitation process (i.e. date ballots are to be mailed (April 26, 2013), Voting Deadline (May 9, 2013), Confirmation Hearing (May 13, 2013)).

CONCLUSION

42. Based on the foregoing, the Objecting Noteholders respectfully request that the Court enter its Order: (i) sustaining this Objection; (ii) denying approval of the Disclosure Statement based on the lack of adequate notice and the unconfirmability of certain Amended Plan provisions; and (iii) granting the Objecting Noteholders such other and further relief as is just and appropriate.

Dated: April 21, 2013
Wilmington, DE

BAYARD, P.A.

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