Sander L. Esserman
State Bar No. 06671500
Peter D'Apice
State Bar No. 05377783
Cliff I. Taylor
State Bar No. 24042007
STUTZMAN, BROMBERG,
ESSERMAN & PLIFKA
A PROFESSIONAL CORPORATION
2323 Bryan Street, Suite 2200
Dallas, Texas 75201-2689
Telephone: (214) 969-4900
Facsimile: (214) 969-4999

Attorneys for the Office of the Commissioner of Baseball

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

In re **TEXAS RANGERS BASEBALL PARTNERS,** **Debtor.**	**Chapter 11** **Case No. 10-43400 (DML)**

THE OFFICE OF THE COMMISSIONER OF BASEBALL'S RESPONSE IN OPPOSITION TO THE AD HOC GROUP'S MOTION TO COMPEL DISCOVERY AND CROSS-MOTION TO COMPEL

Preliminary Statement

The Office of the Commissioner of Baseball ("BOC") respectfully submits this response in opposition to the Ad Hoc Group of First Lien Lenders' ("Lenders" or the "Ad Hoc Group") motion to compel discovery, and the BOC's cross-motion to compel.[1]

The BOC maintains that a stay of discovery is in place by Court order, and that in any case, the documents sought by the Lenders are irrelevant. Nonetheless, the BOC has expressed a willingness to produce responsive, non-privileged documents to the Lenders on the condition that all the Lenders reciprocate with documents going to the issues that the Lenders want to put in play. The Lenders have refused to reciprocate. Nevertheless, in light of the current scheduling and to facilitate moving the process forward, the BOC will immediately commence to produce documents to the Lenders. The BOC would hope the Lenders and the respective Agents, JP Morgan Chase and GSP Finance, would voluntarily reciprocate, but if they do not, the BOC seeks court assistance.

At bottom, the documents sought from the BOC by the Lenders are irrelevant. In their motion, the Lenders seek expansive and far-reaching discovery from both the Debtor and the BOC. But, the Lenders fail to explain how any of that discovery is relevant to the single issue they have identified as remaining before the Court—whether the Debtor's Plan of Reorganization was proposed in good faith. Under the guise of a "good faith" objection to the Plan's confirmation, pursuant to section 1129(a)(3) of the Bankruptcy Code, the Lenders request discovery about a wide array of

[1] The Lenders filed their *Motion of the Ad Hoc Group to Compel Texas Rangers Baseball Partners' and the Office of the Commissioner of Baseball's Response to Ad Hoc Group's First Requests for Production* (the "Lenders' Brief") on June 24, 2010.

pre-petition conduct reaching back at least to 2009. They request, among other things, documents concerning: any bids to purchase the Debtor; any appraisals or valuations of any bids; any communications among the Debtor and the BOC; and any documents related to the "Land Sale Agreements." (Lenders' Brief at 2-3.) Yet, as this Court and others have made clear, the "test for good faith is not based on what the plan proponents' behavior *prior* to petition was. It is only based on the *Plan itself*." *In re Tex. Extrusion Corp.*, 68 B.R. 712, 723 (Bankr. N.D. Tex. 1986) (emphasis added), *aff'd*, 844 F.2d 1142 (5th Cir. 1988). Thus, all of the pre-petition discovery the Lenders seek is, by definition, irrelevant to the issue they have identified.

Moreover, the Lenders assert the extraordinary position that, while the Debtor and the BOC should each be required to undertake the burdens of a full-scale document production, the Lenders themselves should not be required to respond to *any* discovery requests. In addition to being fundamentally unfair, the one-sided discovery proposed by the Lenders is unjustified under the circumstances of this case. If any discovery into issues such as the sale and auction process that took place in 2009 and early 2010 is relevant at this stage of the proceedings, then discovery from the Lenders concerning their role in that process is essential. The Lenders were kept fully informed about the 2009 auction process and made no objection to it while it was occurring. To the extent the Lenders wish to criticize alleged flaws in the auction process that occurred by taking discovery from the BOC, the BOC has a right to take discovery to establish the Lenders' knowledge of and participation in that process as well as their subsequent attempts to subvert and undermine it.

Relevant Background

On May 28, 2010, the Lenders served document requests on the Debtor and on the BOC. The Lenders requests called for a wide range of documents from an unlimited period of time. Though the Lenders purport to have "narrowed" their requests for purposes of this motion, the "Narrowed Topics" they identify cover a similarly broad array of issues. (*See* Lenders' Brief at 2-3.) The BOC served responses and objections to the Lenders' requests on June 9, 2010.

Prior to the June 15, 2010 hearing before this Court, the BOC met and conferred with the Lenders on several occasions regarding the Lenders' document requests as well as requests that the BOC served on the Lenders on May 30, 2010. Without conceding the relevance of the discovery sought by the Lenders, the BOC represented that it was prepared to begin a rolling production of documents prior to June 15 in response to the Lenders' requests, so long as the Lenders would commit to begin a reciprocal production in response to the BOC's requests. The Lenders refused that request, arguing that while discovery from the BOC was relevant to the issues before the Court at the June 15 hearing, discovery from the Lenders was not.

On June 22, 2010, this Court issued an order (Dkt. No. 257, the "Order"), determining, among other things, that: (i) the "Debtor does not have a duty to maximize the value obtained for its estate" and "the Plan is confirmable even if a better offer for purchase of the Rangers could be had" (*id*. at 10-11); (ii) the Lenders are not "entitled to exercise control" over the Debtor and are not "entitled to act for the Rangers Equity Owners" (*id*. at 13-14); and (iii) the Lenders have no "effective veto over any proposed sale of the Rangers" (*id*. at 20, 25).

On June 23, the BOC again met and conferred with the Lenders regarding discovery. In light of the Order, and the current status of the proceedings, the BOC observed that none of the discovery sought by the Lenders is relevant to the issue of Plan confirmation. The Lenders argued that such discovery is relevant to an objection they intend to make under section 1129(a)(3) of the Bankruptcy Code. Again, without conceding the relevance of the Lenders' requested discovery, the BOC offered to begin a rolling production of documents if the Lenders would agree to do the same. The Lenders maintained their refusal to produce any documents in response to the BOC's requests, arguing that such documents are irrelevant and that discovery should be strictly one-sided. On June 24, 2010, the Lenders filed their motion to compel and subsequently pulled it off the calendar when the Court entered its order on mediation and staying discovery. The Court's stay of discovery still stands. See June 25, 2010, Order Granting Motion for Reconsideration, Resetting Mediation, and Resetting Hearing on Confirmation, [Doc. No. 274], at P. 3 ("all portions of the Prior Order that have not been specifically addressed by the order remain in effect…"). The Lenders now reurge their Motion to Compel.

Argument

I. DISCOVERY RELATED TO THE PRE-PETITION CONDUCT OF THE DEBTOR AND THE BOC IS IRRELEVANT TO THE ISSUE OF "GOOD FAITH" UNDER SECTION 1129(A)(3)

Under Federal Rule of Civil Procedure 26, parties "may obtain discovery regarding any nonprivileged matter that is relevant" to a claim or defense. Fed. R. Civ. P. 26(b)(1). The Lenders contend that the discovery they seek is "directly relevant" to the question of whether the Plan was proposed in good faith under section 1129(a) of the Bankruptcy Code. (Lenders' Brief at 5.)

Section 1129(a) provides, in relevant part, that a plan is confirmable only if it "has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Good faith, in this context, "is generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984) (internal quotation marks omitted). Thus, "for purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is *the plan itself*." *Id*. (emphasis added).

This Court and others consistently have held that pre-petition conduct of the plan's proponents is *irrelevant* to the section 1129(a)(3) inquiry. *See In re Tex. Extrusion Corp.*, 68 B.R. 712, 723 (Bankr. N.D. Tex. 1986), *aff'd*, 844 F.2d 1142 (5th Cir. 1988) ("The test for good faith is not based on what the plan proponents' behavior prior to petition was. It is only based on the Plan itself and its acceptance."); *In re MCorp Fin., Inc.*, 160 B.R. 941, 961 (S.D. Tex. 1993) (holding that the good faith of a proposed plan "is ascertained from the objective consequences of the plan, not the moral consciousness of the various proponents"); *In re Gen. Homes Corp.*, 134 B.R. 853, 862

(Bankr. S.D. Tex. 1991) ("[E]valuation of good faith is not based on the plan proponents' behavior prior to the filing of the bankruptcy petition. It is only based on the Plan and its acceptance."); *In re Fiesta Homes of Ga., Inc.*, 125 B.R. 321, 325 (Bankr. S.D. Ga. 1990) (holding that the showing required under section 1129(a)(3) "is not determined by what a proponent's behavior was prior to the filing of the bankruptcy petition, but rather upon the proponent's post-petition actions"); *In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988) ("Prior behavior of the debtor before the filing of the petition is not the test of 'good faith.'").

All of the discovery the Lenders have requested concerns pre-petition conduct of the Debtor and MLB. Such discovery is irrelevant to determining the "objective consequences of the plan," *MCorp*, 160 B.R. at 961, and thus—as a matter of law—is irrelevant to the issue of good faith under section 1129(a)(3). The Lenders cite no authority to the contrary. Instead, the Lenders rely on cases decided under section 1112(b), which authorizes dismissal of a chapter 11 case for "cause." 11 U.S.C. § 1112(b). (*See* Lenders' Brief at 6 (citing *In re Integrated Telecom Express, Inc.*, 384 F.3d 108 (3d Cir. 2004); *In re Mirant*, No. 03-46590, 2005 WL 2148362 (Bankr. N.D. Tex. Jan. 26, 2005)).) But, there is no section 1112(b) motion to dismiss before the Court, and the Lenders have indicated no intent to file one. In any event, the Lenders' authorities, which simply allude to the requirement that a plan must be consistent with the purposes of the Bankruptcy Code, do not authorize a free-floating inquiry into the pre-petition state of mind of the Debtor and third parties. As discussed above, the touchstone for good faith under section 1129(a)(3) is "the Plan itself." *Tex. Extrusion Corp.*, 68 B.R. at 723.

This Court's June 22 Order underscores the irrelevance of the discovery the Lenders are seeking. The Lenders' purportedly "Narrowed Topics" for discovery include, among other things, documents reflecting communications between the Debtor and the BOC on unspecified topics, for an unspecified period of time, as well as "documents relating to *any* bids to purchase the Debtor." (Lenders' Brief at 2-3 (emphasis added).) Though all of the Lenders' requested discovery is irrelevant to a section 1129(a)(3) inquiry, requests relating to the bidding process that took place in 2009 and early 2010 are especially far afield from the question of whether the Plan was proposed in good faith. Such documents have no conceivable relevance to these proceedings going forward, as is made clear by the Court's June 22 Order.

II. IF THE COURT PERMITS DISCOVERY, IT SHOULD BE RECIPROCAL

For the reasons discussed above, the Court should deny the Lenders' motion to compel the production of documents from the BOC. However, if the Court does permit the Lenders to move forward with discovery, it should not be the one-sided discovery that the Lenders propose.

The Lenders claim that documents in the BOC's possession that relate "to any bids to purchase the Debtor" are "highly relevant," but assert that documents in the Lenders' possession that relate to "bids received for the assets of" the Debtor are "not relevant." (Lenders' Brief at 3, 5, 7.) That position is meritless on its face. The Lenders have alleged repeatedly to the Court that the auction process that took place in 2009 was "flawed," and much of the discovery they seek appears to relate to that allegation. To the extent this issue has any relevance to whether the Plan was proposed in good faith, the BOC has an equal right to take discovery from the Lenders in order to establish, among

other things, that the Lenders were kept fully informed about the 2009 auction process and made no objection to it while it was occurring. Likewise, the Lenders have alleged that the BOC acted improperly by refusing to allow negotiations to continue after the auction process had ended and by taking control of the sale process in January 2010. To the extent those issues have any relevance to Plan confirmation, the BOC must be permitted to defend against such allegations through discovery that will establish, among other things, that the Lenders sought to undermine the sale process in violation of their contractual obligations and in interference with the contractual rights of others.

In addition, the BOC is entitled to documents that go to, among other things, the issues of whether there is in fact any other, better credible bid; why the Lenders think any other bid is in fact a “better” bid; and the extent to which the Lenders were kept apprised, or were aware through any source, of the sale process and were involved in the sale process. Thus, the BOC is entitled to full production of all documents and communications among the Lenders concerning any bids or offers, the valuation or analysis of any bids or offers, the financial wherewithal of any bidder; all documents concerning communications by or among any of the Lenders and any potential bidder; and all documents concerning communications with the BOC, the Debtor, and any of the Hicks entities concerning the sale of any of the pertinent assets.

In sum, to the extent any discovery regarding pre-petition conduct is relevant to the issue of good faith, the Lenders should not be permitted to impose one-sided discovery burdens on the BOC or to avoid exposing their own pre-petition conduct to scrutiny.

Conclusion

For the foregoing reasons, the Court should deny the Lenders' motion to compel discovery from the Office of the Commissioner of Baseball. In the alternative, to the extent the Court requires the BOC to respond to the Lenders' requests for discovery regarding pre-petition conduct, the Court should also require the Lenders and the agents, JP Morgan Chase and GSP Finance, to respond to the BOC's discovery requests.

Dated: June 27, 2010
Fort Worth, Texas

STUTZMAN, BROMBERG,
ESSERMAN & PLIFKA
A PROFESSIONAL CORPORATION

By: /s/ Sander L. Esserman
Sander L. Esserman
State Bar No. 06671500
Peter D'Apice
State Bar No. 05377783
Cliff I. Taylor
State Bar No. 24042007
2323 Bryan Street, Suite 2200
Dallas, Texas 75201-2689
Telephone: (214) 969-4900
Facsimile: (214) 969-4999

ATTORNEYS FOR THE OFFICE OF THE COMMISSIONER OF BASEBALL

CERTIFICATE OF SERVICE

I certify that on June 27, 2010, the foregoing was served on the parties receiving electronic notice via the Electronic Court Filing system and via electronic mail on counsel to all parties listed in the Order Approving the Disclosure Statement [Docket No. 254].

/s/ Peter C. D'Apice
Peter C. D'Apice