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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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| In re: | : | |
| | : | Chapter 11 |
| TCI 2 Holdings, LLC., *et al.* | : | Case No. 08-13654 (JHW) |
| Debtor(s) | : | Hearing Date: February 23, 2010 at 9:00 a.m. |

**OBJECTION OF THE ACTING UNITED STATES TRUSTEE TO THE (I) MODIFIED SIXTH AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE PROPOSED BY THE AD HOC COMMITTEE OF HOLDERS OF 8.5% SENIOR SECURED NOTES DUE 2015 AND THE DEBTORS, AND (II) MODIFIED FOURTH AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE PROPOSED BY BEAL BANK AND ICAHN PARTIES**

The Acting United States Trustee (the "Acting UST"), by and through counsel, in furtherance of her duties and responsibilities under 28 U.S.C. § 586(a)(3) and (5), hereby respectfully submits this Objection (the "Objection") to the (i) Modified Sixth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Proposed by the Ad Hoc Committee of Holders of 8.5% Senior Secured Notes Due 2015 and the Debtors, and (ii) the Modified Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Proposed by Beal Bank and Icahn Parties, and in support of the Objection, respectfully states as follows:

## BACKGROUND

### A. The Bankruptcy Filing.

1. On February 17, 2009 (the "Commencement Date") [1], TCI 2 Holdings, LLC and its debtor affiliates (collectively, the "Debtors") filed separate voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code" or "Code").

2. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. As of the date of the Objection, the Acting UST has not appointed an official committee of unsecured creditors.

### B. Plans and Disclosure Statements.

4. On August 3, 2009, the Debtors filed a Disclosure Statement for the Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Debtors' Disclosure Statement") (Docket Entry 519) and a Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Debtor's Joint Plan") (Docket Entry 518). The proponents of the Debtors' Joint Plan included the Debtors, Beal Bank (f/k/a Beal Bank, S.S.B.) and Beal Bank Nevada ("Beal Bank") and Donald J. Trump ("DJT"). The Court scheduled a hearing on the adequacy of the Disclosure Statement for September 16, 2009.

5. Shortly thereafter, on August 11, 2009, the Ad Hoc Committee of Holders of 8.5% Senior Secured Notes Due 2015 (the "Ad Hoc Committee"), filed an emergency motion seeking the entry of an order terminating the Debtors exclusive periods in which to file a plan of

[1]Capitalized terms used herein as defined terms and not otherwise defined shall have those meanings ascribed to them in the Ad Hoc Committee Plan or the Icahn Partners/Beal Bank Plan.

reorganization and solicit acceptances thereto, and adjourning the hearing to approve the Debtors Disclosure Statement (the "Termination Motion") (Docket Entry 530).

6. In addition, on August 11, 2009, the Ad Hoc Committee filed a motion to appoint an examiner (the "Examiner Motion") (Docket Entry 531).

7. On August 27, 2009, the Court granted the Termination Motion and the Examiner Motion.

8. On August 31, 2009, as a result of the termination of exclusivity, the Ad Hoc Committee filed a Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Docket Entry 616) and a Disclosure Statement for Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Docket Entry 617).

9. Thereafter, the Debtors and the Ad Hoc Committee filed several modified plans and disclosure statements. On November 5, 2009, the Court entered a Joint Order Approving the Modified Second Disclosure Statement filed by Debtors and the Third Modified Disclosure Statement filed by the Ad Hoc Committee (Docket Entry 877).

10. On or about November 16, the DJT Parties withdrew their support for the Debtors' Joint Plan. Shortly thereafter, the Ad Hoc Committee and the DJT Parties entered into the DJT Settlement, wherein the DJT Parties agreed to support the Ad Hoc Committee's Plan.

11. As a result of the DJT Parties withdrawing their support for the Debtors' Joint Plan, Beal Bank determined that it was in its best interest to file its own disclosure statement and plan and filed a motion seeking to fix the time for the Court to consider its disclosure statement and plan (the "Beal Bank Motion") (Docket Entry 936).

12. Pursuant to a hearing held on December 3, 2009 concerning the Beal Bank Motion, the Court allowed Beal Bank to file a plan and disclosure statement on or before December 4,

2009. In addition, at the hearing, the Debtors announced that they were no longer pursuing the Debtors' Joint Plan and would become a proponent of the Ad Hoc Committee's Plan.

13. On December 4, 2009, Beal Bank filed a Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code (Docket Entry 948) and a Disclosure Statement for the Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Docket Entry 949).

14. On December 10, 2009, the Icahn Partners and Beal Bank purportedly entered into certain purchase agreements pursuant to which Icahn purchased 51% of the First Lien Lender Claims from Beal Bank for 92.5% of par. In addition, Beal Bank and the Icahn Partners purportedly entered into an agreement pursuant to which the promissory notes evidencing the remainder of the First Lien Lender Claims, together with cash, equal to the purchase price for the remaining First Lien Lender Claims, were placed in escrow, pending activation of the Put/Call Agreement. To evidence this transfer, on December 12, 2009, Beal Bank filed notices of transfer of claims (Docket Entries 971-978).

15. On December 13, 2009, the Ad Hoc Committee filed its Fifth Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Docket Entry 979) and Fifth Disclosure Statement for the Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Docket Entry 980), which were supported by the Debtors and the DJT Parties.

16. On January 5, 2010, the Ad Hoc Committee filed a Modified Sixth Amended Disclosure Statement (the "Ad Hoc Committee Disclosure Statement") (Docket Entry 1076) and a Modified Sixth Amended Joint Plan of Reorganization (the "Ad Hoc Committee Plan") (Docket Entry 1075). Similarly, on January 5, 2010, Beal Bank and the Icahn Parties filed a Fifth Modified Disclosure Statement (the "Icahn Partners/Beal Bank Disclosure Statement)

(Docket Entry 1072) and a Fourth Chapter 11 Plan of Reorganization (the " Icahn Partners/Beal Bank Plan") (Docket Entry 1071).

17. On January 6, 2010, the Court entered a Joint Order approving the Ad Hoc Committee Disclosure Statement and the Icahn Partners/Beal Bank Disclosure Statement (the "Joint Order") (Docket Entry 1080).

18. The Joint Order was amended on January 8, 2009 to reflect that the hearing on confirmation of the Ad Hoc Committee Plan and the Icahn Partners/Beal Bank Plan was scheduled for February 23, 2010 at 9:00 a.m.

19. Pursuant to 11 U.S.C. §586, the Acting UST is obligated to oversee the administration of Chapter 11 cases. Under 11 U.S.C. §307, the Acting UST has standing to be heard on any issue in any case or proceeding under the Bankruptcy Code. Such oversight is part of the Acting UST's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.2d 294, 295-96 (3d Cir. 1994) (noting that the UST has "public interest standing" under 11 U.S.C. §307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the United States Trustee as a "watchdog").

## OBJECTION TO AD HOC COMMITTEE PLAN

### A. Reorganized Debtors Payment of Fees and Expenses of Ad Hoc Committee Advisors and Indenture Trustee

20. Pursuant to Section 2.2 of the Ad Hoc Committee Plan, any entity seeking an award of compensation for services rendered or reimbursement of expenses under 11 U.S.C. § 503(b) are required to file a fee application with the Bankruptcy Court and shall be paid an amount allowed by the Bankruptcy Court. However, this provision is limited by the additional provision

which requires the Reorganized Debtors are required to pay the Ad Hoc Committee' Advisors, which includes the Ad Hoc Committee's counsel and financial advisors, the Backstop Fees and Expenses and the unpaid fees and expenses of the Second Lien Indenture Trustee without notice and a hearing and without application to the Bankruptcy Court:

> All entities seeking an award by the Bankruptcy Court of compensation for services rendered or reimbursement of expenses incurred through and including the Confirmation Date under section 503(b)(2), 503(b)(3), 503(b)(4) or 503(b)(5) of the Bankruptcy Code (i) shall file their respective final applications for allowance of compensation for services rendered and reimbursement of expenses incurred by the date that is forty-five (45) days after the Effective Date, (ii) shall be paid in full from the Debtors' or Reorganized Debtors' Cash on hand in such amounts as are allowed by the Bankruptcy Court…Notwithstanding the foregoing, the Debtors shall, on the Effective Date, pay the reasonable and documented fees and expenses of the Ad Hoc Committee Advisors, the Backstop Fees and Expenses, and the reasonable and documented unpaid fees and expenses of the Second Lien Indenture Trustee and its counsel in full in Cash in the ordinary course of the business, without application by or on behalf of any such parties to the Bankruptcy Court, and without notice and a hearing; provided, however, that, if the Debtors or Reorganized Debtors and any such entity cannot agree on the amount of fees and expenses to be paid to such party, the reasonableness of any such fees and expenses shall be determined by the Bankruptcy Court.

*See* Section 2.2 of the Ad Hoc Committee Plan. This carve-out circumvents the requirements of section 503(b).

21. Similarly, pursuant to Section 9.1(e) of the Ad Hoc Committee Plan, as a condition precedent to the Effective Date, the Reorganized Debtors are required to pay the fees and expenses of the Ad Hoc Committee Advisors, the Backstop Fees and Expenses and unpaid fees and expenses of the Second Lien Indenture Trustee without application to the Bankruptcy Court:

> (e) the Debtors shall have distributed the Backstop Stock to the Backstop Parties in accordance with the terms and conditions in the Backstop Agreement, and shall have paid the Backstop Fees and Expenses and the reasonable and documented fees and expenses of the Ad Hoc Committee Advisors and Second Lien Indenture Trustee and its counsel, in full in Cash, without the need for any of the members of the Ad Hoc Committee, the Backstop Parties, the Second Lien Indenture Trustee or the Ad Hoc Committee Advisors to file retention applications or fee

> applications with the Bankruptcy Court unless otherwise required by order of the Bankruptcy Court.

*See* Section 9.1(e) of the Ad Hoc Committee Plan.

22. Likewise, Section 12.2 of the Ad Hoc Committee Plan requires the Reorganized Debtors to pay the fees and expenses of the Second Lien Indenture Trustee and its counsel:

> On the Effective Date or as soon as reasonably practicable thereafter (and, thereafter, upon request by the Second Lien Indenture Trustee with respect to fees and expenses of the Second Lien Indenture Trustee relating to post-Effective Date service under this Plan), the Reorganized Debtors shall pay in full in Cash all outstanding reasonable and documented fees and expenses of the Second Lien Indenture Trustee and its counsel.

*See* Section 12.2. of the Ad Hoc Committee Plan.

23. The parties have failed to establish a basis and legal authority for by-passing the requirements of section 503(b). Moreover, the information provided by the Plan Proponents lack sufficient detail about the fees and expenses to permit this Court to make a determination of reasonableness, as required, to approve them as part of the confirmation process under 11 U.S.C. § 1129(a)(4) or as a substantial contribution claim under 11 U.S.C. §§ 503(b)(3), (b)(4) and (b)(5).

24. Pursuant to 11 U.S.C. § 1129(a)(4), any payment made by a Plan Proponent for services rendered or for costs and expenses incurred in connection with the case must be approved by the court as "reasonable". *See* 11 U.S.C. § 1129(a)(4). By failing to provide the means by which this requirement is satisfied, the Ad Hoc Committee Plan does not meet the threshold of 11 U.S.C. § 1129(a)(4) and may not be confirmed as a matter of law.

25. In addition, the proposed payment structure also violates 11 U.S.C. Code §§ 503(b)(3), (b)(4) and (b)(5). 11 U.S.C. § 503(b)(3)(D) limits the award of actual and necessary expenses incurred by a creditor, indenture trustee, equity security holder, a committee

representing creditors, or equity security holders, in making a substantial contribution in a Chapter 11 case:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title.

*See* 11 U.S.C. § 503(b)(3)(D).

26. 11 U.S.C. § 503(b)(4) provides for reasonable compensation for professional services rendered by an attorney or accountant:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of any entity whose expense is allowable under subparagraph (A), (B), (C), (D) or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

11 U.S.C. § 503(b)(4).

27. Likewise, 11 U.S.C. § 503(b)(5) limits the award of actual and necessary expenses incurred by an indenture trustee in making a substantial contribution in a Chapter 11 case:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –
> (5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title.

*See* 11 U.S.C § 503(b)(5).

28. Through the Ad Hoc Committee Plan, the Ad Hoc Committee Advisors and the Second Lien Indenture Trustee seek to circumvent the requirements under 11 U.S.C. § 503(b) by

allowing the fees and expenses of the Ad Hoc Committee Advisors and the Second Lien Indenture Trustee to be paid by the Reorganized Debtors for services rendered during the pendency of the bankruptcy case without disclosing the amounts owed and/or filing appropriate applications with the Bankruptcy Court seeking claims for substantial contribution. In addition, through the Ad Hoc Committee Plan, the Ad Hoc Committee Advisors and the Second Lien Indenture Trustee seek to circumvent the requirements under 11 U.S.C. § 1129(a)(4) by failing to provide a requirement that their fees and expenses are subject to approval by the Bankruptcy Court as reasonable.

**B. Reorganized Debtors Payment of Backstop Parties Fees and Expenses**.

29. As set forth above, Section 2.2 and 9.1(e) of the Ad Hoc Committee Plan requires the Reorganized Debtors to pay the fees and expenses of the Backstop Parties without application and without Bankruptcy Court approval. In addition, Section 5.4(h) of the Ad Hoc Committee Plan provides that the Backstop Parties shall receive the Backstop Stock and reimbursement of all Backstop Fees and Expenses in consideration for their agreement to backstop the Rights Offering. *See* Section 5.4(h) of the Ad Hoc Committee Plan.

30. The Backstop Fees and Expenses are defined in the Ad Hoc Committee Plan as all out-of-pocket expenses of the Backstop Parties including any and all fees to the Backstop Parties counsel and financial advisors in connection with the transactions contemplated by the Backstop Agreement or the Ad Hoc Committee Plan:

> Backstop Fees and Expenses means all out-of-pocket expenses of reasonably incurred by the Backstop Parties with respect to the transactions contemplated by the Backstop Agreement and the Rights Offering, including, without limitation, filing fees (if any) required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or the requirements of the NJCC, and the expenses relating thereto, and all Bankruptcy Court and other judicial and regulatory proceedings related to such transactions, including all reasonable fees and expenses of Strook & Strook & Lavan LLP, Fox Rothschild LLP and Lowenstein Sandler PC, as counsel to the

> Backstop Parties, Houlihan Lokey Howard & Zuckin, and any other professionals retained by the Backstop Parties in connection with the transactions contemplated by the Backstop Agreement or by the Plan."

*See* Section 1.15 of the Ad Hoc Committee Plan.

31. The Ad Hoc Committee Plan, which incorporates the Amended and Restated Backstop Agreement (*see* Sections 3b and 3c), not only allows payment of the Backstop Parties' attorneys and financial advisors without application and without Bankruptcy Court approval, it authorizes the payment of a Backstop Fee in order to compensate the Backstop Parties for the risk of their undertaking in the Rights Offering.

32. The Plan Proponents have characterized the Backstop Fee as compensation for the risk undertaken by the Backstop Parties pursuant to the Rights Offering. *See* Backstop Agreement ¶ 3(b). A similar type of risk is asserted by parties seeking to purchase debtor's assets in the form of a break-up fee. *See Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 181 F.3d 527, 536 (3d Cir. 1999)(holding that break-up fees must be treated as administrative expense claims under 11 U.S.C. § 503(b)(1)(A), "which requires that an expense provide some benefit to the debtor's estate.") *See also, In re America West Airlines, Inc.*, 166 B.R. 908, 912-13 (Bankr. D. Ariz. 1994) ("the proposed break-up fee does not meet the standard of [11 U.S.C. §] 503 because it is not correlated to any transactional cost or expense incurred by the negotiating bidder"); *In re Hupp Industries, Inc*., 140 B.R. 191, 196 (Bankr. N.D. Ohio 1992) (denying break-up fee where "assertion of unforeseen and unspecified liquidated damages . . . is insufficient to establish" that a benefit was conferred on estate).

33. The payments required to be made to the Backstop Parties are significant fees and expenses without any Bankruptcy Court oversight, which is inconsistent with the policies underlying the Bankruptcy Code.

34. As a result, the Backstop Parties should be required to file an appropriate application disclosing its costs and expenses and establishing that the Backstop Fee is an actual and necessary expense of preserving the estate.

**C. Reorganized Debtors Payments to the DJT Parties Fees and Expenses**

35 Pursuant to Section 4.6 of the Ad Hoc Committee Plan, as consideration for the DJT Settlement, the Reorganized Debtors agreed to reimburse the reasonable and documented fees incurred by the DJT Advisors in connection with these bankruptcy cases. *See* Section 4.6 of the Ad Hoc Committee Plan. As set forth in the Ad Hoc Committee Disclosure Statement, the DJT Parties estimate fees and expenses of $5.6 million. *See* Ad Hoc Committee Disclosure Statement ¶ (VII)(D)(4). However, Section 4.6 of the Ad Hoc Committee Plan is silent as to whether the payments are subject to 11 U.S.C. § 503(b).

36. The DJT Settlement Agreement provides that payment of all reasonable professional fees of the DJT Parties relating to the bankruptcy cases will be paid on account of the DJT Parties' post-petition contractual rights under the assumed Trademark License Agreement and under 11 U.S.C. § 503(b). The DJT Settlement Agreement further provides that the DJT Advisors will provide detailed invoices to certain of the Ad Hoc Committee members for payment of their fees pursuant to previously existing engagement letters. *See* Ad Hoc Committee Plan, Exhibit I.

37. Although the DJT Settlement Agreement includes an agreement to pay the DJT Parties fees and expenses relating to the bankruptcy cases, it is unclear from the Ad Hoc

Committee Disclosure Statement, the Ad Hoc Committee Plan and the Plan Support Agreement if the DJT Parties' fees must be applied for and approved pursuant to 11 U.S.C. § 503(b).

**D. Severance Packages**

38. Pursuant to Section 5.12(d) of the Ad Hoc Committee Plan, the officers of TER immediately prior to the Effective Date will continue to serve as officers of Reorganized TER on and after the Effective Date in accordance with any employment and severance agreements authorized by the board of directors of Reorganized TER. *See* Section 51.2(d) of the Ad Hoc Committee Plan.

39. 11 U.S.C. § 503(c)(2) prohibits this Court from either allowing or paying severance to an "insider" of the Debtor under 11 U.S.C. § 503(a, b) unless two criteria are met: first, "the payment is part of a program that is generally applicable to all full-time employees;" and second, "the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made." 11 U.S.C. § 503(c)(2)(A, B). *See Dana Corp.*, 351 B.R. at 103; *In re Pilgrim's Pride Corporation*, 401 B.R. 229 (Bankr. N.D.Tex. 2009).

40. The threshold inquiry in determining whether 11 U.S.C. § 503(c)(2) applies is whether the severance payments are designated for "insider[s]," as that term is defined in 11 U.S.C. § 101(31). Here, the Reorganized Debtor is extending severance packages to certain of the officers of the Debtors, who fall within the definition of insider under the Bankruptcy Code.

41. Section 5.12 of the Ad Hoc Committee Plan is silent concerning whether the severance payments, if any, will be paid as administrative claims of the Debtors or by the Reorganized Debtors.

42. If such payments are intended to be paid as administrative claims of the Debtors' estates, the Ad Hoc Committee Plan must provide information concerning (i) whether the proposed severance obligations are not "part of a program that is generally applicable to all full-time employees," *see* 11 U.S.C. § 503(c)(2)(A), and (ii) whether the amount of each obligation proposed to be assumed and paid "is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made," *see* 11 U.S.C. § 503(c)(2)(B).

**E. Broad Exculpation and Indemnification Provisions**

43. Section 10.6 of the Ad Hoc Committee Plan exculpates the Debtors, the Reorganized Debtors, the members of the Ad Hoc Committee, the Backstop parties, the DJT Parties, subject to the DJT Settlement, the Coastal Parties, subject to the sale of the Trump Marina and the current and former directors, officers, employees, affiliates, agents, financial advisors, investment bankers, professionals, accountants and attorneys of each of the entities listed above. *See* Section 10.6 of the Ad Hoc Committee Plan.

44. In addition, the exculpation provision in Section 10.6 of the Ad Hoc Committee Plan limits liability of the parties that is determined by a final order of a court of competent jurisdiction for actions or failure to act amounting to willful misconduct, intentional fraud or criminal conduct. *See id.* In contrast, Section 10.5 of the Ad Hoc Committee Plan provides releases among the Released Parties, which are limited by gross negligence, willful misconduct or fraud. *See id.*, Section 10.5.

45. As drafted, the provision in Section 10.6 of the Ad Hoc Committee Plan is too broad and should be limited to gross negligence, willful misconduct or fraud in accordance with the

holding of the Third Circuit Court of Appeals in *In re PWS Holding Co.*, 228 F.3d 224, 245 (3d Cir. 2000).

46. Pursuant to Section 5.4(n) of the Ad Hoc Committee Plan, the Debtors or the Reorganized Debtors agree to indemnify and hold harmless the Backstop Parties and each of their respective affiliates, members, partners, officers, directors, employees, agents, advisors, controlling persons and professionals from and against any and all losses, claims, damages, liabilities and reasonable expenses to which any Indemnified Person may become subject arising out of or in connection with any claim, challenge, litigation, investigation or proceeding with respect to the Rights Offering, the Backstop Agreement, the Plan or any transactions contemplated hereby or thereby. *See* Section 5.4(n) of the Ad Hoc Committee Plan.

47. Although the Third Circuit has not established a blanket rule prohibiting all non-consensual releases and permanent injunctions, in *In re Continental Airlines,* 203 F.3d 203 (3d Cir. 2000), it examined the rules established in other Circuits and then rejected a plan provision that purported to involuntarily release and permanently enjoin shareholder lawsuits against former directors and officers of the debtor who were not themselves in bankruptcy.

48. After considering the rules established by other circuits, the Third Circuit held that the provision before it "does not pass muster under even the most flexible tests for the validity of non-debtor releases. The hallmarks of permissible non-consensual releases--fairness, necessity to the reorganization, and specific factual findings to support these conclusions--are all absent here." *In re Continental*, 203 F.3d at 214. The Third Circuit specifically found that the bankruptcy court had not made sufficient findings that the release and permanent injunction provisions were (i) necessary to the success of the debtor's reorganization, (ii) fair to the enjoined parties, or (iii) given for reasonable consideration. *Id.* at 215.

49. Even if the court were to determine that non-debtors were entitled to some form of release, the releases contemplated here are almost unlimited and are therefore should not be approved unless the scope of the releases is narrowed substantially. *See In re PWS Holding Co.*, 228 F.3d at 245; *In re Genesis Health Ventures*, 266 B.R. 591, 607-09 (Bankr.D.Del. 2001).

50. As drafted, it is unclear who is subject to the broad indemnification provision. As a result, further specificity is required. In addition, with respect to the exculpation and indemnification provisions, the Plan Proponents should be required to establish the hallmarks of permissible non-consensual releases--fairness, necessity to the reorganization, and specific factual findings, which has not been established.

**OBJECTION TO BEAL BANK/ICAHN PARTNERS PLAN**

**A. Severance Packages**

51. Pursuant to Section 5.9 of the Icahn Partners/Beal Bank Plan, after the Effective Date, the officers of NewCo will be determined by NewCo's board of directors. In addition, certain officers and employees of TER will be offered one year severance packages, which will be equal to one year's salary triggered upon termination by NewCo without cause. *See* Section 5.9 of the Icahn Partners/Beal Bank Plan.

52. 11 U.S.C. § 503(c)(2) prohibits this Court from either allowing or paying severance to an "insider" of the Debtor under 11 U.S.C. § 503(a, b) unless two criteria are met: first, "the payment is part of a program that is generally applicable to all full-time employees;" and second, "the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made." 11 U.S.C. § 503(c)(2)(A, B). *See Dana Corp.*, 351 B.R. at 103; *In re Pilgrim's Pride Corporation*, 401 B.R. 229 (Bankr. N.D.Tex. 2009).

53. The threshold inquiry in determining whether 11 U.S.C. § 503(c)(2) applies is whether the severance payments are designated for "insider[s]," as that term is defined in 11 U.S.C. § 101(31). Here, NewCo is extending severance packages to at least ten officers of the Debtors, who fall within the definition of insider under the Bankruptcy Code.

54. Although the Icahn Partners/Beal Bank Plan sets forth that the severance payments may be made on or after the Effective Date, it is unclear whether the severance payments will be paid as administrative claims of the Debtors or by NewCo.

55. If such payments are intended to be paid as administrative claims of the Debtors' estates, the Ad Hoc Committee Plan must provide information concerning (i) whether the proposed severance obligations are not "part of a program that is generally applicable to all full-time employees," *see* 11 U.S.C. § 503(c)(2)(A), and (ii) whether the amount of each obligation proposed to be assumed and paid "is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made," *see* 11 U.S.C. § 503(c)(2)(B).

**B. Reorganized Debtors Payment of Backstop Parties Fees and Expenses**.

56. As set forth in Section 9.1(e) of the Icahn Partners/Beal Bank Plan, the Debtors are required to pay in cash all unpaid fees and expenses of the Plan Proponents incurred in connection with the Reorganization Cases, including any fees and expenses incurred in connection with the transactions contemplated by the Backstop Agreement owing under the Final Cash Collateral Order or otherwise. *See* Section 9.1(e) of the Icahn Partners/Beal Bank Plan.

57. In addition, the Backstop Agreement sets forth that the Debtors will pay all reasonable expenses of the Plan Proponents including all reasonable fees of the Plan Proponents' professionals. *See* Icahn Partners/ Beal Bank Backstop Agreement ¶ 3c.

58. Both the Icahn Partners/Beal Bank Plan and the Icahn Partners/Beal Bank Backstop Agreement require the payment of fees and expenses pursuant to the Final Cash Collateral Order. However, if it is determined that the valuation of the Debtors renders Icahn Partners/Beal Bank undersecured, the Icahn Partners/Beal Bank Plan is silent as to how these payments will be made.

59. Nevertheless, the Backstop Parties should be required to disclose the amount of the Backstop fees and expenses. Further, if Icahn Partners/Beal Bank are rendered undersecured, the Backstop Parties should be required to file an appropriate application disclosing its costs and expenses and establishing that the Backstop Fee is an actual and necessary expense of preserving the estate.

**C. Broad Exculpation and Indemnification Provisions**

60. Section 10.6 of the Icahn Partners/Beal Bank Plan exculpates the Backstop Parties, defined as Beal Bank, the Icahn Parties and certain of the Debtors, Beal Bank and the Icahn Partners together with their affiliates, direct or indirect subsidiaries, predecessors, successors, assigns, designees, heir current and former officers and directors, limited and general partners, members, employees, agents, representatives, accountants, financial advisors, professionals, and attorneys and all of their predecessors, successors and assigns. *See* Section 10.6 of the Icahn Partners/Beal Bank Plan.

61. Similar to the Ad Hoc Committee Plan, the exculpation provision in Section 10.6 of the of the Icahn Partners/Beal Bank Plan limits liability of the parties that is determined by a final order of a court of competent jurisdiction for actions or failure to act amounting to willful misconduct, intentional fraud or criminal conduct. *See id.* Also similar to the Ad Hoc Committee Plan, the Icahn Partners/Beal Bank Plan provides releases among the Released Parties, which are limited by gross negligence, willful misconduct or fraud. *See id.*, Section 10.5.

62. As drafted, the provision in Section 10.6 of the Ad Hoc Committee Plan is too broad and should be limited to gross negligence, willful misconduct or fraud in accordance with the holding of the Third Circuit Court of Appeals in *In re PWS Holding Co.*, 228 F.3d 224, 245 (3d Cir. 2000).

63. Pursuant to Section 5.3(p) of the Icahn Partners/Beal Bank Plan, the Debtors or the Reorganized Debtors agree to indemnify and hold harmless the Backstop Parties and each of their respective affiliates, members, partners, officers, directors, employees, agents, advisors, controlling persons and professionals from and against any and all losses, claims, damages, liabilities and reasonable expenses to which any Indemnified Person may become subject arising out of or in connection with any claim, challenge, litigation, investigation or proceeding with respect to the Rights Offering, the Backstop Agreement, the Plan or any transactions contemplated hereby or thereby. *See* Section 5.4(n) of the Ad Hoc Committee Plan.

64. Although the Third Circuit has not established a blanket rule prohibiting all non-consensual releases and permanent injunctions, in *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), it examined the rules established in other Circuits and then rejected a plan provision that purported to involuntarily release and permanently enjoin shareholder lawsuits against former directors and officers of the debtor who were not themselves in bankruptcy.

65. After considering the rules established by other circuits, the Third Circuit held that the provision before it "does not pass muster under even the most flexible tests for the validity of non-debtor releases. The hallmarks of permissible non-consensual releases--fairness, necessity to the reorganization, and specific factual findings to support these conclusions--are all absent here." *In re Continental*, 203 F.3d at 214. The Third Circuit specifically found that the bankruptcy court had not made sufficient findings that the release and permanent injunction

provisions were (i) necessary to the success of the debtor's reorganization, (ii) fair to the enjoined parties, or (iii) given for reasonable consideration. *Id.* at 215.

66. Even if the court were to determine that non-debtors were entitled to some form of release, the releases contemplated here are almost unlimited and are therefore should not be approved unless the scope of the releases is narrowed substantially. *In re PWS Holding Co.*, 228 F.3d 224, 245 (3d Cir. 2000); *In re Genesis Health Ventures*, 266 B.R. 591, 607-09 (Bankr.D.Del. 2001).

67. As drafted, it is unclear who is subject to the broad indemnification provision. As a result, further specificity is required. In addition, with respect to the exculpation and indemnification provisions, the Plan Proponents should be required to establish the hallmarks of permissible non-consensual releases--fairness, necessity to the reorganization, and specific factual findings, which are absent here.

68. The Acting UST leaves the proponents of the Ad Hoc Committee Plan and the Icahn Partners/Beal Bank Plan Debtors to their burden and reserves any and all of her rights to modify, amend, supplement or augment this objection and take whatever other actions are deemed necessary and appropriate.

WHEREFORE, for the reasons set forth above, the Acting UST respectfully requests that the Court deny confirmation of the Ad Hoc Committee Plan and the Icahn Partners/Beal Bank Plan, and that this Court grant such further relief as is just.

Respectfully submitted,

ROBERTA A. DeANGELIS
ACTING UNITED STATES TRUSTEE
REGION 3

By: */s/ Jeffrey M. Sponder*
Martha Hildebrandt, Assistant United States Trustee
Jeffrey M. Sponder, Trial Attorney

Dated: February 19, 2010

# General Information

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| **Court** | United States Bankruptcy Court for the District of New Jersey; United States Bankruptcy Court for the District of New Jersey |
| **Docket Number** | 1:09-bk-13654 |
| **Status** | Closed |