IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: AMICUS WIND DOWN CORPORATION, *et al*., Debtors.	)	Chapter 11 Case No. 11-13167 (KG) Jointly Administered
In re: FREEZE, LLC, *et al*.,[1] Debtors.	)	Chapter 11 Case No. 11-13303 (KG) Jointly Administered

PENSION BENEFIT GUARANTY CORPORATION'S OBJECTION TO DEBTORS' DISCLOSURE STATEMENT FOR THE DEBTORS' PLAN OF LIQUIDATION

The Pension Benefit Guaranty Corporation ("PBGC"), a United States government agency, hereby objects to the Debtors' Disclosure Statement for the Debtors' Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code ("Disclosure Statement") filed with this Court on March 16, 2012. The Disclosure Statement fails to provide "adequate information," as that term is defined under 11 U.S.C. § 1125(a) in several key areas. In particular, the Disclosure

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Amicus Wind Down Corporation, f/k/a Friendly Ice Cream Corporation (3130); Amicus Restaurants Franchise Wind Down, LLC, f/k/a Friendly's Restaurants Franchise, LLC (3693); Amicus Realty I Wind Down, LLC, f/k/a Friendly's Realty I, LLC (2580); Amicus Realty II Wind Down, LLC, f/k/a Friendly's Realty II, LLC (2581); Amicus Realty III Wind Down, LLC, f/k/a Friendly's Realty III, LLC (2583); Freeze, LLC (9643); Freeze Group Holding Corp. (3232); Freeze Holdings, LP (3099); and Freeze Operations Holding Corp. (5239). The location of the Debtors' corporate headquarters is 1855 Boston Road, Wilbraham, Massachusetts 01095. The Debtors' services addresses are: 1855 Boston Road, Wilbraham, Massachusetts 01095 and 5200 Town Center Circle, Suite 600, Boca Raton, Florida 33486.

Statement fails to provide adequate information to justify the proposed plan's exceptionally broad releases, discharges, and exculpation of debtors and non-debtor entities and individuals.

BACKGROUND

A. PBGC and the Employee Retirement Income Security Act

PBGC is the United States government agency that administers the nation's pension plan termination insurance program pursuant to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461 (2006 & Supp. IV 2010). The program guarantees a secure, predictable retirement for more than 44 million American workers.[2] PBGC's funds come from four sources: insurance premiums paid by employers; assets in terminated pension plans; recoveries from employers of terminated plans; and investment income.

A defined benefit pension plan is "one where the employee, upon retirement, is entitled to a fixed periodic payment," as set forth in the plan. *See Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 154 (1993). Employers must set aside adequate funds to pay the pensions they have promised their workers. Accordingly, the Internal Revenue Code ("IRC") and ERISA provide that the employer and each member of its controlled group are jointly and severally liable to pay minimum funding contributions to the pension plan.[3] *See* 26 U.S.C. § 412(b)(1) & (2) (2009) (effective for pension plan years beginning after Dec. 31, 2007); *see* 29 U.S.C. § 1082(b)(1) & (2) (2009) (same).

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[2] *See* 2011 PBGC Annual Report at p.2, available at http://www.pbgc.gov/docs/2011_annual_report.pdf

[3] A group of trades or business under common control, referred to as a "controlled group," includes, for example, a parent and its 80% owned subsidiaries. Another example includes brother-sister groups of trades or business under common control. *See* 29 U.S.C. § 1301(14)(A), (B); 26 U.S.C. § 414(b), (c); 26 C.F.R. §§ 1.414(b)-1, 1.414(c)-1, 1.414(c)-2.

The minimum funding obligation continues through the year in which the pension plan is terminated in accordance with Title IV of ERISA. *See* Rev. Rul. 79-237, 1979-2 C.B. 190. If PBGC is required to take over the pension plan after termination, it collects any amounts owed to the pension plan, including any unpaid contributions. *See* 29 U.S.C. § 1342(d).

A pension plan can terminate only if it meets the stringent requirements of Title IV of ERISA. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999). If an underfunded plan — one that does not have sufficient assets to provide employees all of their promised benefits — satisfies the requirements in Title IV of ERISA for termination, PBGC typically takes over the pension plan and pays the plan's benefits subject to statutory limitations. *See* 29 U.S.C. §§ 1322, 1341, 1342, 1361. Upon termination, the employer and each member of its controlled group become jointly and severally liable to PBGC for the amount of unfunded benefit liabilities, plus interest as of the pension plan's termination date. *See* 29 U.S.C. § 1362(b)(1)(A). The amount of unfunded benefit liabilities is the value of the benefit liabilities as of the pension plan termination date, based on assumptions prescribed by PBGC, over the current value of the pension plan's assets. *See* 29 U.S.C. § 1301(a)(18); *see also* 29 C.F.R. §§ 4044.41-4044.75.

B. Debtor's Defined Benefit Pension Plan and PBGC

Amicus Wind Down Corporation, f/k/a Friendly Ice Cream Corporation ("FICC") is the sponsor of the Friendly Ice Cream Corp. Cash Balance Pension Plan, a defined benefit pension plan covered by Title IV (the "Pension Plan"). PBGC anticipates that the Pension Plan will be terminated, and that PBGC will become the statutory trustee of the Pension Plan. PBGC has filed joint and several claims against all of the Debtors, as members of FICC's controlled group. The largest of PBGC's claims is for unfunded benefit liabilities for the Pension Plan, which is estimated to be $114,500,000.

C. Debtor's Bankruptcy Proceedings

On October 5, 2011, Friendly Ice Cream Corporation, *et al*. (the "Friendly Debtors") filed petitions in this Court seeking relief under Chapter 11 of the United States Bankruptcy Code. This Court ordered joint administration of the Friendly Debtors Chapter 11 cases for procedural purposes under Case No. 11-13167 (KG). On October 14, 2011, Freeze, LLC, *et al*. (the "Freeze Debtors") filed petitions in this Court seeking relief under Chapter 11 of the United States Bankruptcy Code. This Court ordered joint administration of the Freeze Debtors Chapter 11 cases for procedural purposes under Case No. 11-13303 (KG).

From the inception of the case, and indeed from the leveraged buyout which gave Sun Capital total control of the Debtors, Sun Capital has been the moving and controlling party behind the Friendly and Freeze Debtors. Sun Capital created the Debtors' capital structure, appointed the Debtors' managers, provided financing during the prepetition period, and provided the DIP financing after the filing. The Debtors' assets were sold, via a credit bid, to another Sun Capital affiliate. After litigation regarding the Unsecured Creditors Committee's and PBGC's objections to the terms of Sun Capital's asset sale, the parties reached a settlement of the sale objections, on December 14, 2011. On December 29, 2011, this Court entered an order approving the sale of substantially all of the Friendly's Debtors' assets to Sundae Group Holding II, LLC. The sale closed on January 9, 2012. On January 17, 2012, this Court entered an order approving name changes to the Friendly's Debtors. The Friendly and Freeze Debtors have now filed a combined Debtors Disclosure Statement, which contains, *inter alia*, extraordinarily broad release language. In addition, the Disclosure Statement fails to explain how the Distribution Trust is financed. PBGC hereby objects.

OBJECTIONS

PBGC objects to the Disclosure Statement because it fails to inform creditors of facts that may affect the value of their claims and the confirmability of the Debtors' Plan of Liquidation ("Plan of Liquidation"). It therefore does not provide "adequate information," as required by 11 U.S.C. § 1125(a). Pursuant to Chapter 11 of the Bankruptcy Code:

> A disclosure statement contains "adequate information" if it provides: information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable a hypothetical reasonable investor . . . to make an informed judgment about the plan.

11 U.S.C. § 1125(a)(1); *see also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. GMC,* 337 F.3d 314, 321-22 (3d Cir. 2003); *First American Bank v. Century Glove, Inc*., 81 B.R. 274, 278-79 (Bankr. D. Del. 1988); *In re Quigley Co*., 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007) (a Disclosure Statement must contain adequate information describing a confirmable plan, and that if the plan is patently unconfirmable on its face, the application to approve the Disclosure Statement must be denied).

The primary focus of PBGC's objection is the extremely broad discharges, releases, and exculpations that the Debtors seek in the Plan of Liquidation and the Disclosure Statement. The Disclosure Statement refers to — but does not explain — the release and exculpation provisions of the Plan of Liquidation (Article VI (B), (C), & (D)). Under the Plan of Liquidation, the Debtors and all "parties in interest," including apparently PBGC, provide broad releases to the Debtors, their directors, officers, and shareholders, the Debtors' former shareholders, Sun Capital, their officers, directors and shareholders, and all professionals, for both prepetition and post petition conduct. Many of the releases are only tangentially involved with this bankruptcy case.

The Disclosure Statement falls far short in providing adequate information justifying these releases, and should not be accepted. Courts have held that non-debtor releases are "proper only in rare cases." *In re Metromedia Fiber Network, Inc*., 416 F.3d 136, 141 (2d Cir. 2005). Generally, third party releases are valid only when they are necessary for the reorganization. *In re Continental Airlines*, 203 F.3d. 203 (3d Cir. 2000). Further, some courts have held that the burden establishing the appropriateness of third party releases should be higher for liquidating debtors than reorganizing debtors, like Friendly's and Freeze, since "a reorganizing debtor, as opposed to a liquidating debtor, needs to be protected from suits that may deplete its assets so it can, in fact, reorganize." *In re SL Liquidating, Inc.*, 428 B.R. 799, 803 (Bankr. S.D. Ohio 2010); *In re Berwick Black Cattle Co.*, 394 B.R. 448, 461 (Bankr. C.D. Ill. 2008).

In *Continental Airlines*, *supra*, the Court suggested that "non consensual" third party releases, like Article VI(B) ("Debtor Release") are subject to different criteria than "consensual" third party releases, like Article VI(C) ("Third Party Release"). The different legal criteria are necessary since claimholders which are entitled to vote can avoid the Third Party Release by voting against the Plan, even if the Plan is ultimately confirmed, while the Debtor Release becomes effective unless the Plan as a whole is not confirmed. Neither release is explained in the Disclosure Statement in the context of the applicable legal standard for the confirmability of the non-consensual Debtor Release and the consensual Third Party Release. Both the Debtor Release and the Third Party Release may be unconfirmable; the Disclosure Statement does not provide adequate information of the risk that the Plan is unconfirmable, and does not provide adequate information to claimholders of the risks and rights regarding their votes.

A. The Disclosure Statement Fails to Provide Adequate Information to Justify a Discharge and Release of the Liquidating Debtors and Third Parties

The Debtor Release states, in pertinent part:

> NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, ON THE EFFECTIVE DATE AND EFFECTIVE AS OF THE EFFECTIVE DATE . . . FOR THE GOOD AND VALUABLE CONSIDERATION PROVIDED BY EACH OF THE DEBTOR RELEASEES AND THE THIRD PARTY RELEASEES, . . . **EACH OF THE DEBTORS DISCHARGE AND RELEASE AND SHALL BE DEEMED TO HAVE PROVIDED A FULL DISCHARGE AND RELEASE TO EACH DEBTOR RELEASEE AND TO EACH THIRD PARTY RELEASEE (AND EACH SUCH DEBTOR RELEASEE AND THIRD PARTY RELEASEE SO RELEASED SHALL BE DEEMED FULLY RELEASED AND DISCHARGED BY THE DEBTORS) AND THEIR RESPECTIVE PROPERTY FROM ANY AND ALL CAUSES OF ACTION** . . . .

Plan of Liquidation Art. VI(B) (emphasis added). Under the Debtor Release provision, each of the Debtors grants a discharge and release to each Debtor Releasee[4] and to each Third Party Releasee.[5] A Debtor Releasee includes "all current and former . . . shareholders of the Debtors, as well as their subsidiaries and affiliates." Plan of Liquidation Art. I(A)(37). The Disclosure

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[4] "*Debtor Releasee*" means, collectively, (a) all current and former officers, directors, employees, and shareholders of the Debtors, as well as their subsidiaries and affiliates, including Sun Capital; (b) the Committee; (c) all Committee Members; (d) the Purchaser; (e) the DIP Agent, the DIP Lenders and all participants in the DIP Claims and the DIP Credit Agreement, and (f) all attorneys, financial advisors, accountants, investment bankers, investment advisors, actuaries, professionals, and affiliates of the Debtors (including, without limitation, Sun Capital), the Committee, all Committee Members, the Purchaser and their respective subsidiaries, and each of their respective predecessors and successors in interest, and all of their respective current and former members (including *ex officio* members), officers, directors, employees, partners, attorneys, financial advisors, accountants, managed funds, investment bankers, investment advisors, actuaries, professionals and affiliates, each in their respective capacities as such. Plan of Liquidation Art. I(A)(37).

[5] "*Third Party Releasees*" means, collectively, the DIP Agent, the DIP Lenders and all participants in the DIP Claims and the DIP Credit Agreement, Sun Capital, the Secured Credit Agreement Agent, the Secured Credit Agreement Lenders, the Secured Promissory Noteholder, the Committee Members, and the 8.375% Senior Subordinated Notes Indenture Trustee, each in their capacities as such; provided, however, that any Holder of a Claim who votes to reject this Plan shall not be a Third Party Releasee. Plan of Liquidation Art. I(A)(103).

Statement fails to discuss the standard for granting this release, nor does it in any way explain why the release is "necessary" to the Plan of Liquidation.

The Debtor Release releases almost all causes of action, including causes of action that any holder of a claim or equity interest could assert on behalf of the Debtors or their estates, against any Debtor Releasee and Third Party Releasee. Together, the "Debtor Releasees" and the "Third Party Releasees" are released from any conceivable cause of action held by the Debtors.

The general test for such "non-consensual" third party releases is, as discussed above, whether such releases are "necessary to the reorganization." In determining "necessity," courts have developed a number of criteria to determine whether such releases should be approved. For example, in *In re Exide Techs.,* 303 B.R. 48, 74 (Bankr. D. Del. 2003) the court discussed four criteria: (1) whether the non-consensual release is necessary to the reorganization; (2) the releases have provided a critical financial contribution to the Debtors' plan; (3) the releasees financial contribution is necessary to make the plan feasible; and (4) the release is fair to the non-consenting creditors. *See also Genesis Health Ventures*, 266 B.R. at 607-08.

The Disclosure Statement provides no information regarding the appropriateness of this long list of releases, and instead refers to the Plan of Liquidation. The Plan of Liquidation states that "good and valuable consideration [has been] provided by each of the Debtor Releasees and Third Party Releasees" but does not specify exactly what consideration each individual or entity allegedly provided. *See* Plan of Liquidation Art. VI(B). The release of each party must be evaluated separately to determine if they are reasonable. *See In the Matter of Genesis Health Ventures,* 266 B.R. 592, 606 (Bankr. D. Del. 2001); s*ee, e.g., In re Washington Mutual*, *Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011).

The Disclosure Statement fails to describe the necessity to the liquidation for these releases, or describe the legal standards for such releases. The Debtors fail to justify the validity of the Debtor Release for each and every party listed in the definition of Debtor Releasee and Third Party Releasee. Accordingly, the Disclosure Statement has not provided adequate information to justify overly broad and improper releases granted by the Debtors.

B. The Disclosure Statement Has Not Provided Adequate Information to Justify Discharges and Releases of Non-Debtor Third Parties

The Third Party Release states:

> NOTHWITSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, ON THE EFFECTIVE DATE AND EFFECTIVE AS OF THE EFFECTIVE DATE, THE RELEASING PARTIES . . . SHALL BE DEEMED TO BE HAVE PROVIDED A FULL DISCHARGE AND RELEASE . . . TO THE THIRD PARTIES AND THEIR RESPECTIVE PROPERTY FROM ANY AND ALL CAUSES OF ACTION . . . ARISING FROM OR RELATED IN ANY WAY TO THE DEBTORS . . . ARISING FROM THE CHAPTER 11 CASES OR THIS PLAN.

Plan of Liquidation Article VI(C). As in the case of the Debtor Release, the Third Party Release is far reaching.

To the extent such third party releases are permitted at all, case law in the Third Circuit requires them to be "consensual." *See, e.g. Washington Mutual,* 442 B.R. at 352; *In re Coram Healthcare Corp.,* 315 B.R. 321, 335 (Bankr. D. Del. 2004); *In re Zenith Electronics Corp.,* 241 B.R. 92, 111 (Bankr. D. Del. 1999). This Court has held that, "any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases," and "failing to return a ballot is not a sufficient manifestation of consent to a third party release." *Washington Mutual,* 442 B.R. at 355; *see also Zenith*, 241 B.R. at 111.

The Disclosure Statement fails to provide any "adequate information" either to inform claimholders of their ability to avoid the Third Party Releases, or the means to do so.

In addition to bankruptcy law, the releases are contrary to ERISA. The releases, potentially, would require PBGC to abandon its joint and several claims against the Pension Plan controlled group because the controlled group may include Sun Capital and its affiliates. Courts have recognized that Congress has specifically intended for controlled groups to be liable to PBGC when the pension plan is terminated and PBGC becomes the pension plan's Statutory Trustee.

> Congress has clearly provided for the imposition of joint and several liability against the Reorganized Debtors [controlled group members], and it has not expressed any explicit, contrary legislative intent. Furthermore, PBGC's position is consistent with the case law. *See Tavery v. United States*, 897 F.2d 1032 (10th Cir. 1990) (regarding claims against joint obligors as distinct and separate, including application to joint income tax returns).

In re CF&I Fabricators of Utah, Inc., 179 B.R. 704, 711-12 (D. Utah 1994), *see also Cent. States Se. & Sw. Areas Pension Fund v. Chatham Props.,* 929 F.2d 260, 264 (6th Cir. 1991) (declining to relax ERISA's joint and several liability rule where one controlled group member was in bankruptcy); *In re Ne. Dairy Coop. Fed'n, Inc.,* 88 B.R. 21, 23-24 (Bankr. N.D.N.Y. 1988). Thus, PBGC's joint and several claims against the nondebtor controlled group members, even if it includes Sun Capital and its affiliates, should not be released.

Equally as important, entities or individuals who may be Third Party Releasees may have been fiduciaries of the Pension Plan. Whether an entity or individual is a fiduciary to the Pension Plan requires an intensive analysis based upon facts and circumstances. 29 U.S.C. § 1002(21)(A); *see Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993) (statute delineates fiduciary conduct "in functional terms of control and authority over the plan"). A blanket release of fiduciary breach claims is "void against public policy." 29 U.S.C. § 1110(a). PBGC

anticipates that it will soon become Statutory Trustee of the Friendly Ice Cream Corporation Cash Balance Pension Plan. PBGC, as Statutory Trustee, succeeds to any and all claims of the Pension Plan. Consequently, PBGC may have claims — yet unknown without further investigation — against present or former entities or individuals, like the directors and officers of the Debtors or other non-debtors, for breach of duty under ERISA, 29 U.S.C. § 1101-1114. ERISA holds such persons personally liable to make good to the pension plan any losses to the plan resulting from any fiduciary breach. *See* 29 U.S.C. § 1104, 1106, 1109; *see also Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238 (2000) (finding that non-fiduciary party in interest can be held liable for ill-gotten assets in ERISA prohibited transaction). In addition, PBGC's recoveries for fiduciary breaches are treated as assets of the terminated pension plan and may affect the amount of benefits paid to participants. 29 U.S.C. § 1344. Because of the fact intensive nature of a fiduciary breach investigation, ERISA affords PBGC several years to pursue losses to the pension plan caused by a fiduciary breach or prohibited transaction of a terminated pension plan. *See* 29 U.S.C. § 1303(e)(6).

The Disclosure Statement provides no information to justify this overbroad Third Party Release. Consequently, the Disclosure Statement fails to provide adequate information.

C. The Disclosure Statement Fails to Justify the Exculpation Provision Provided in the Plan of Liquidation

Article VI(D) contains the following Exculpation clause:

> The Exculpated Parties shall neither have, nor incur any liability to any Entity for any prepetition or postpetition act taken or omitted to be taken in connection with, or related to formulating, negotiating, preparing, disseminating, implementing, administering, confirming or effecting the Consummation of this Plan, the Disclosure Statement, the Liquidating Trust Agreement, or any contract, instrument, release or other agreement or document created or entered into in connection with this Plan or any other prepetition or postpetition act taken or omitted to be taken in connection with or in contemplation of the restructuring of the Debtors; provided, however, that the foregoing "Exculpation" shall have no

> effect on the liability of any Entity that results from any such act or omission that is determined in a Final Order to have constituted gross negligence or willful misconduct; provided, further, that each Exculpated Party shall be entitled to rely upon the advice of counsel concerning his, her or its duties pursuant to, or in connection with, this Plan; provided, further that, the Purchaser shall not be exculpated from the Purchaser's obligations under the Asset Purchase Agreement, the Sale Order, this Plan or any related documents or orders of the Bankruptcy Court.

Plan of Liquidation, Art. VI(D) ("Exculpation Clause").

The Exculpation Clause provides that Exculpated Parties[6] have no liability to any Entity, presumably anyone, *see* 11 U.S.C. § 101(15), for any prepetition or postpetition act or omission in connection with or contemplation of restructuring of the Debtors, the Disclosure Statement, the Plan of Liquidation, the Liquidating Trust Agreement, and other contracts, agreements, documents or releases, except for acts constituting gross negligence or willful misconduct. Plan of Liquidation Art. VI(D).

The leading authority for the analysis of exculpation clauses in a plan of reorganization is *PWS Holding Corp.,* 228 F.3d 224 (3d Cir. 2000). There, the Court held that an exculpation clause insulates liability for postpetition conduct of estate fiduciaries. Thus, except for gross negligence or willful misconduct, exculpation is appropriate where the exculpated parties are fiduciaries, such as members of the official creditors committee, its professionals, and the debtors' professionals. *PWS,* 228 F.3d at 246; *In re Washington Mutual,* 442 B.R. at 350.

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[6] "Exculpated Parties" means, collectively: (a) the Debtors; (b) the Debtor Releasees; (c) the Secured Credit Agreement Agent; (d) the Secured Promissory Noteholder; (e) the 8.375% Senior Subordinated Notes Indenture Trustee; and (f) all of the current and former members (including *ex officio* members), officers, directors, employees, partners, attorneys, financial advisors, accountants, managed funds, investment bankers, investment advisors, actuaries, professionals, agents, affiliates and representatives of each of the foregoing Entities (whether current or former, in each case in his, her or its capacity as such). Plan of Liquidation Art. I(A)(49).

However, only these fiduciaries are entitled to exculpation. When reviewing an exculpation clause against the *PWS* standard, an exculpation clause "must be limited to the fiduciaries who have served during the chapter 11 proceedings: estate professionals, the Committee and their members, and the Debtors' directors and officers." *Washington Mutual,* 442 B.R. at 350-51, *Coram Healthcare,* 315 B.R at 337 (third party release provisions against Trustee, Equity Committee and their agents and professionals are not permissible except to the extent they are limited to post-petition activity which does not constitute gross negligence or willful misconduct).

Here, the Exculpation clause goes beyond the *PWS* standard. The Plan of Liquidation provides exculpation for both non-estate fiduciaries and for pre-petition conduct. The Disclosure Statement does not indicate that circumstances exist to allow such expansive and sweeping exculpation language and, even if such circumstances did exist, the failure to mention them renders the Disclosure Statement inadequate.

D. The Disclosure Statement Fails To Provide Adequate Information Because It Fails To State That The Debtors Cannot Obtain A Discharge

The breadth of the Debtor Release and the Exculpation Clause together make it clear that the Debtors are seeking a discharge. It is clear that a liquidating debtor cannot receive a discharge. Section 1141(d)(3) of the Bankruptcy Code provides that a corporate debtor cannot obtain a discharge if it has liquidated all or substantially all of its assets, does not engage in business after confirmation, and would be denied a discharge under section 727(a) of the Bankruptcy Code if the case were a case under chapter 7. 11 U.S.C. §§ 727(a)(1) (court will grant a discharge unless the debtor is not an individual); 1141(d)(3). *See Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Malone Realty Co.,* 82 B.R. 346, 349 (E.D. Pa. 1988); *see also Coram Healthcare,* 315 B.R. at 337. Because the Disclosure Statement nowhere states

that the Debtors are not entitled to a discharge under 11 U.S.C. § 1141(d)(3), it fails to contain adequate information.

E. The Disclosure Statement Fails to Provide Adequate Information Regarding the Liquidating Trust

The Disclosure Statement fails to provide adequate information regarding funding of the Liquidating Trust and the Liquidating Trustee's costs, liabilities and expenses.

First, the Disclosure Statement does not state what funds will be available for the Liquidating Trust. The Disclosure Statement provides that the Debtors *anticipate* the "Remaining Assets" consisting of the "Sale proceeds and certain assets (including Causes of Action) excluded from the Sale" will be available for distribution through the Liquidating Trust. Disclosure Statement Art.II.(C). However, "Sale proceeds" is not defined or even explained anywhere in the Disclosure Statement, nor is there a description or value of "certain assets. . . excluded from the Sale." It is unclear exactly what funds will be available for distribution to Classes 5 and 6, the only classes entitled to vote. Thus, creditors cannot make an informed decision to vote for or against the Plan of Liquidation when it is not apparent what funds will be turned over to the Liquidating Trust for distribution.[7]

The Plan of Liquidation does not provide clarity. The Plan of Liquidation indicates that the "Liquidating Trust Assets" shall vest in the Liquidating Trust on the Effective Date. Art. III(B)(3). The Plan of Liquidation defines Liquidating Trust Assets to include "the $2.75 million in Cash paid by the Secured Promissory Noteholder to the Estates in connection with the Settlement *or any balance or residue therof.*" Art. I(A)(66) (emphasis added). This begs the

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[7] In addition, before any distributions to unsecured creditors, the Liquidating Trust may pay Senior Claims and Holders of Allowed Accrued Professional Compensation Claims, further depleting the assets available to unsecured creditors. *See* Disclosure Statement Art. III(A), III(D)(4).

question – what is the balance or residue that will be placed into the Liquidating Trust? There is no answer in the Disclosure Statement or Plan.

Last, under the Disclosure Statement, "Debtors anticipate Remaining assets will be available to" unsecured creditors. However, the Liquidating Trustee is given numerous tasks to perform including making distributions to creditors and litigating, settling, and pursuing causes of action and objections to claims. Disclosure Statement Art. III.(E)(1). There is a complete lack of information as to how the Liquidating Trustee will be compensated for the fees and expenses incurred. The Disclosure Statement fails to provide adequate information required under 11 U.S.C. § 1125(a).

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CONCLUSION

The Disclosure Statement does not provide adequate information required by 11 U.S.C. §1125(a). Specifically, the Disclosure Statement fails to provide adequate information to creditors regarding the proposed overly broad releases and exculpation provisions. Nor does it provide necessary information that the releases and exculpation clauses may violate ERISA.

Dated: April 13, 2012
Washington, D.C.

Respectfully submitted,

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