Hearing Date: July 10, 2014 at 2:00 p.m. (ET)
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	**Chapter 11**
HAAS ENVIRONMENTAL, INC.	**Case No. 13-27297 (KCF)**
Debtor.	

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DISCLOSURE STATEMENT PURSUANT TO 11 U.S.C. § 1125 DESCRIBING PLAN OF REORGANIZATION OF HAAS ENVIRONMENTAL, INC.

The Official Committee of Unsecured Creditors (the "Committee") of Haas Environmental, Inc., the above-captioned debtor and debtor-in-possession (the "Debtor"), by and through its undersigned counsel, submits this objection (the "Objection") to the Debtor's Disclosure Statement Pursuant to 11 U.S.C. § 1125 Describing Plan of Reorganization of Haas Environmental, Inc. (the "Disclosure Statement"). In support of this Objection, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Disclosure Statement should not be approved as the Plan (defined herein) proposed by the Debtor is unconfirmable. While the Committee recognizes that, at this juncture, the Debtor is seeking approval of the adequacy of the information contained in the Disclosure Statement, there are instances, when, even if a disclosure statement contains adequate information, it is not in the best interests of the estate and creditors to allow a disclosure

statement to be approved and a plan to be solicited because the plan it describes cannot be confirmed. Such is the case with the Debtor's Disclosure Statement and Plan. The Plan suffers from several defects that render it unconfirmable. The most striking example is the Plan's distribution scheme which plainly violates the absolute priority rule as it impermissibly delivers all of the equity of the Reorganized Debtor to the Debtor's sole Equity Interest Holder, without providing payment in full to holders of senior classes of impaired claims. Moreover, the Debtor cannot avail itself of the "new value" exception to the absolute priority rule because the proposed "new value" contribution is woefully inadequate and the Debtor failed to test the adequacy of the "new value" contribution against the market, as required by the Supreme Court's decision in *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*., 523 U.S. 434, 449 (1999). The Debtor cannot establish that the "new value" provided for the new equity has been subjected to a meaningful market test in accordance with section 1129(b) of the Bankruptcy Code. Thus, the estate should not waste its limited resources by soliciting votes and seeking confirmation of the Plan as currently proposed.

2. The Plan also contains inappropriate provisions that are highly prejudicial to the interests of the Debtor's estate and creditors, such as the broad third-party releases by the Debtor's estate in favor of the Debtor's sole Equity Interest Holder and other insiders. The Disclosure Statement is completely silent as to any basis for the inclusion in the Plan of broad third-party releases in favor of the Debtor's sole Equity Interest Holder and various other insiders. These proposed releases warrant particular scrutiny by the Court as there is <u>no consideration</u>, much less fair consideration, being provided by the proposed beneficiaries of these third-party releases. Furthermore, many of the proposed beneficiaries of the third-party releases are the same exact parties who were recipients of significant and substantial prepetition

transfers, which the Committee believes were fraudulent transfers and/or preferential payments[1]. The Plan is silent as to the recipients of these transfers, the amount of the transfers and the potential recovery if tthe estate were to pursue such claims. Yet, the Plan proposes to give these broad third-party releases without a showing — and there can be no showing — that the proposed releases satisfy the standards required for approval of such releases in this Circuit.

3. Further, the Plan proposes to appoint the sole Equity Interest Holder as the Plan Administrator. The Plan Administrator will be responsible for the reconciliation of claims, filing objections to claims, making distributions from the Plan Payment Fund and hiring professionals without any Court approval or oversight. The Committee should have a role in the post-confirmation process, particularly with respect to the reconciliation and payment of Class 8 Claims.

4. Finally, the Plan does not provide adequate information as required by Section 1125 of the Bankruptcy Code. For example, the Plan and Disclosure Statement are devoid of any information on the proposed waiver of the estate's Avoidance Actions against insiders and other parties who are classified as Releasees under the Plan. The Plan also fails to adequately disclose the potential risks that could impair the proposed distributions to Class 8 General Unsecured Claims. Accordingly, the Committee respectfully submits that the proposed Plan cannot be approved and the Court should not consider approval of the Disclosure Statement at this time for the reasons set forth herein.

[1] While the Committee's review and investigation of the estate's significant Avoidance Action claims are ongoing, the Committee believes that transfers in excess of $6 million were made to or for the benefit of the Debtor's Equity Interest Holder and other insiders in the four years prior to the Petition Date.

JURISDICTION

5. The Court has jurisdiction to consider this Objection under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this case in this District is proper under 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

6. On August 6, 2013 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the Bankruptcy Code[2].

7. The Debtor is presently operating its business and managing its property as a debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

8. To date, no trustee or examiner has been appointed in the Debtor's bankruptcy case.

9. On August 23, 2013, the Office of the United States Trustee appointed the Committee pursuant to 11 U.S.C. § 1102.

10. On May 27, 2014, the Debtor filed its proposed *Plan of Reorganization of Haas Environmental, Inc*. (the "Plan") [Docket No. 243] and the Disclosure Statement [Docket No. 244].

11. On May 28, 2014, the Court entered an order scheduling a July 10, 2014 hearing to approve the Disclosure Statement. [Docket No. 246].

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Disclosure Statement and Plan (defined below).

OBJECTION

I. Solicitation Of The Plan In Its Current Form Is Not In The Best Interests Of Creditors Or The Estate

12. Even if the Disclosure Statement is revised to remedy the various omissions and deficiencies noted herein, approval of the Disclosure Statement is not warranted because the Plan itself is so fundamentally flawed that confirmation of the Plan in its present form is impossible.

13. If a court can determine from a reading of a proposed plan that it does not comply with the Bankruptcy Code, "then it is incumbent upon the Court to decline approval of the disclosure statement and prevent diminution of the estate." *In re Pecht*, 53 B.R. 768, 768-69 (Bankr. E.D. Va. 1985); *see also In re GSC, Inc.*, 453 B.R. 132, 157 n.27 (Bankr. S.D.N.Y. 2011), citing *in re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007) ("An unconfirmable plan is grounds for rejection of the disclosure statement; a disclosure statement that describes a plan patently unconfirmable on its face should not be approved.); *In re Mahoney Hawkes*, 289 B.R. 285, 294 (Bankr. D. Mass. 2002) ("[I]t is permissible…for the Court to pass upon confirmation issues where, as here, it is contended that the plan is so fatally flawed that confirmation is impossible.") (citations omitted). Here the Debtor's Plan fails to comply with the Bankruptcy Code in several material respects.

14. The reasoning underlying the well-settled law that a disclosure statement should not be approved where the related plan cannot be confirmed applies equally here. Even if the Court were to approve the Disclosure Statement, the end result would be the same – the Plan cannot be confirmed. Putting off such a result to a later date would serve only to increase expense and inconvenience to all parties-in-interest and needlessly delay the progress of this case.

II. The Plan Is Unconfirmable On Its Face As It Violates The Absolute Priority Rule

15. The Plan is not fair and equitable to general unsecured creditors. In *203 N. LaSalle*, *supra*, the Supreme Court found that when senior creditors are not paid in full, prepetition equity holders may only receive value on account of their prepetition interests in the debtor if the plan is submitted to a market test or other market valuation method. *See 203 N. LaSalle*, 526 U.S. at 454-55. The opportunity offered by the proposed plan may not be offered exclusively to prepetition equity holders. *Id.* Under the Plan, unsecured creditors will not receive payment in full on their claims, yet the Debtor proposes to deliver all of the equity in the reorganized debtor to the Equity Interest Holder.

16. Under these circumstances, if a class of unsecured creditors votes to reject the Plan, it cannot be confirmed unless the Debtor satisfies the Supreme Court's mandate in *203 N. LaSalle*. Notwithstanding the clear mandates of *203 N. LaSalle* and the Bankruptcy Code, the Debtor has not subjected the purported "new value" contribution proposed by the Equity Interest Holder to a market test. Thus, Debtor will be unable to meet its burden under *203 N. LaSalle* and therefore, the Plan is unconfirmable under section 1129(b) of the Bankruptcy Code.

III. The Disclosure Statement Cannot Be Approved Because It Does Not Contain Adequate Information To Allow Creditors To Make An Informed Judgment When Voting On The Plan

17. A debtor may only solicit votes to accept or reject a chapter 11 plan after the Court has approved the debtor's written disclosure statement for that plan as containing "adequate information" 11 U.S.C. § 1125(b). Section 1125(a) of the Bankruptcy Code defines "adequate information" as follows:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to . . . a hypothetical investor typical of the holders of claims or interests in the case, that would enable

> such a hypothetical investor of the relevant class to make an informed judgment about the plan[.]

11 U.S.C. § 1125(a)(1).

18. The United States Court of Appeals for the Third Circuit has emphasized the importance of adequate disclosure in connection with proposed chapter 11 plans, stating that, given the reliance creditors and bankruptcy courts place on disclosure statements, "we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code['s] standard of adequate information." *In re Oneida Motor Freight, Inc.*, 848 F.2d 414, 417 (3d Cir. 1988).

19. Although courts assess adequacy on a case-by-case basis, a disclosure statement must contain "simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible . . . alternatives so that [creditors] can intelligently accept or reject the Plan." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988). In essence, a disclosure statement "must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). The information presented in a disclosure statement should not be interpretive, speculative, or opinion, but instead must be "uncontested, concrete facts" from which voting claimants can make their own informed decisions how to vote. *See In re Zenith Electronics Corp.*, 241 B.R. 92, 99-100 (Bankr. D. Del. 1999); *see also In re Unichem Corp.*, 72 B.R. 95 (Bankr. N.D. Ill. 1987); *In re Ligon*, 50 B.R. 127 (Bankr. M.D. Tenn. 1985).

20. As set forth below, the Disclosure Statement in its current form is deficient and fails to satisfy the basic disclosure requirements of Bankruptcy Code section 1125(a). For the Disclosure Statement to be approved as containing adequate information, it must be revised to address, among other things, the material omissions discussed below.

A. The Disclosure Statement Does Not Disclose That Potential Causes Of Action Exist Against The Sole Equity Interest Holder And Other Insiders Of The Debtor, Which May Result In Additional Recoveries For Unsecured Creditors

21. As noted above, the Committee has been investigating potential causes of action against the Debtor's sole Equity Interest Holder and other insiders in connection with numerous pre-petition transfers. To this end, the Committee has obtained certain information and documents from the Debtor through informal discovery requests and anticipates serving formal discovery requests for additional documents on the Debtor's sole Equity Interest Holder and other insiders. The Committee is also likely to seek to depose various individuals in connection with its investigation.

22. The Disclosure Statement does not disclose the significant pre-petition transfers made to the Debtor's insiders and the Committee's ongoing investigation of same; instead, it implies that the Committee concluded an investigation and now supports the Plan. Nowhere does the Disclosure Statement disclose that it was filed in support of a Plan which would *waive and release* all such potential claims and causes of action against the Debtor's sole Equity Interest Holder and other insiders. Such claims and causes of action could lead to increased recoveries for general unsecured creditors if they are not waived or released. Given this lack of disclosure concerning potential causes of action and the Committee's ongoing investigation, the mere recital in the Disclosure Statement that the Plan contains non-debtor releases is insufficient and inadequate.

23. The Disclosure Statement also fails to include any discussion of whether other potential sources of recovery for creditors exist, such as other claims and causes of action held by the Debtor's estate, and the value of those claims and causes of action. While the Disclosure Statement makes a brrief reference to payments made within the 90 day preference period, it fails to make any reference to or provide any information about the numerous payments and other

transfers made to the Debtor's Equity Interest Holder and other insiders. Given that the Plan provides for a non-consensual third-party release of numerous insiders, detailed information on the nature, extent and amount of transfers made to these various insiders must be disclosed in order for creditors to understand and assess the basis for the Debtor's determination not to pursue any such claims and causes of action prior to voting on the Plan.

B. The Disclosure Statement Does Not Include An Accurate Liquidation Analysis Reflecting Claims Against the Debtor's Insiders or An Accurate Estimate Of Distributions To Be Made To General Unsecured Creditors

24. The Disclosure Statement does not contain an accurate liquidation analysis and supporting documentation demonstrating that the Plan is in the "best interests" of creditors pursuant to section 1129(a)(7) of the Bankruptcy Code. The Liquidation Analysis attached to the Disclosure Statement as Exhibit F reflects a deflated projected recovery of potential avoidance actions. As discussed herein, the Plan and Disclosure Statement completely ignore the significant pre-petition transfers and payments made to the Debtor's Equity Interest Holder and other insiders. Based on the information obtained by the Committee to date, pre-petition transfers to the Equity Interest Holder and other insiders during the four (4) years prior to the Petition Date exceed six million dollars. If this case were to be converted to a chapter 7 proceeding, a chapter 7 trustee would likely pursue all fraudulent transfer and preference claims that belong to the estate, including pursuit of the millions transferred to the Debtor's insiders. Thus, an accurate liquidation analysis should reflect a much greater recovery on Avoidance Actions, which would ultimately result in a greater projected recovery to holders of general unsecured claims. The Disclosure Statement further fails to disclose any details or amount of claims against the Debtor's insiders and the impact of such claims on distributions to be made to general unsecured creditors. The Committee submits that this basic information must be included

in the Disclosure Statement in order to enable creditors to make informed decisions when voting whether to accept or reject the Plan, or any alternative plan that may be proposed by the Debtor.

IV. The Plan Is Unconfirmable On Its Face Due To Inappropriate Release And Exculpation Provisions

25. As noted earlier, Courts routinely hold that, if a plan is not confirmable as a matter of law, the related disclosure statement should not be approved. *See In re Quigley Co., Inc.*, 377 B.R. 110, 115-16 (Bankr. S.D.N.Y. 2007) (stating that if a plan is "patently unconfirmable on its face" then solicitation of votes on the plan would be futile); *In re Criimi Mae, Inc.*, 251 B.R. 796, 799 (Bankr. D. Md. 2000) ("it is now well accepted that a court may disapprove of a disclosure statement, even if it provides adequate information about a proposed plan, if the plan could not possibly be confirmed"); *In re Felicity Assocs., Inc.,* 197 B.R. 12, 14 (Bankr. D.R.I. 1996) (noting that "[i]t has become standard Chapter 11 practice that when an objection raises substantive plan issues that are normally addressed at confirmation, it is proper to consider and rule upon such issues prior to confirmation, where the proposed plan is arguably unconfirmable on its face") (citation omitted).

26. The rationale for withholding approval of a disclosure statement in such circumstances is that:

> If, on the face of the plan, the plan could not be confirmed, then the Court will not subject the estate to the expense of soliciting votes and seeking confirmation . . . . If the Court can determine from a reading of the plan that it does not comply with [section] 1129 of the Bankruptcy Code, then it is incumbent upon the Court to decline approval of the disclosure statement and prevent diminution of the estate.

In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986); *In re E. Maine Elec. Coop., Inc.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991) (disapproving of disclosure statement where proposed plan related thereto offended the absolute priority rule and noting that burden and expense of distributing plan and soliciting votes related thereto is "unwise and inappropriate" if the plan is

unconfirmable). Indeed, courts should not approve a disclosure statement and engage in the "wasteful and fruitless exercise of sending the disclosure statement to creditors . . . when the plan is unconfirmable on its face." *In re Atlanta* W. VI, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988) ("A court may refuse to approve a disclosure statement when it is apparent that the plan which accompanies the disclosure statement is not confirmable"). "[S]uch an exercise in futility only serves to further delay a debtor's attempts to reorganize." *Id.* Moreover, as a matter of public policy and judicial economy, a disclosure statement should not be approved unless it is conceivable that the plan may be confirmed. *In re Franklin Indus. Complex*, 386 B.R. 5, 10-11 (Bankr. N.D.N.Y. 2008) (adjourning a disclosure statement hearing until contingencies implicated in the plan could be resolved).

27. Here, the Plan contains broad release and exculpation provisions in favor of non-debtor third-parties that violate applicable law and cannot be approved by the Court absent unusual circumstances that are not present in these cases. Accordingly, the Plan is not confirmable and the Disclosure Statement cannot be approved. Specifically, as to creditor releases of non-Debtor parties, Article IV.H. of the Plan provides as follows:

D. Releases

> EFFECTIVE AS OF THE EFFECTIVE DATE, AND EXCEPT AS OTHERWISE PROVIDED IN THE PLAN OR THE CONFIRMATION ORDER, TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, FOR GOOD AND VALUABLE CONSIDERATION, INCLUDING, WITHOUT LIMITATION, IN CONSIDERATION FOR THE OBLIGATIONS OF THE RELEASEE UNDER THE PLAN AND, IF APPLICABLE, NEW VALUE CONTRIBUTION, THE DISTRIBUTIONS, CONTRACTS, RELEASES AND OTHER AGREEMENTS OR DOCUMENTS TO BE DELIVERED IN CONNECTION WITH THE PLAN, EACH HOLDER OF A CLAIM (OTHER THAN A RELEASEE) AND EACH EQUITY INTEREST HOLDER AND EACH EQUITY INTEREST HOLDER ANY AFFILIATE OF ANY SUCH HOLDER OF CLAIM (OTHER THAN A RELEASEE) OR EQUITY INTEREST HOLDER (AS WELL AS ANY TRUSTEE OR

> AGENT ON BEHALF OF EACH SUCH HOLDER OF A CLAIM OR EQUITY INTEREST HOLDER) THAT HAS AFFIRMATIVELY VOTED TO ACCEPT THE PLAN SHALL BE DEEMED TO HAVE FOREVER WAIVED, RELEASED AND DISCHARGED THE RELEASEES FROM ANY AND ALL CLAIMS, OBLIGATIONS, SUITS, JUDGMENTS, DAMAGES, DEMANDS, DEBTS, RIGHTS, CAUSES OF ACTION AND LIABILITIES (INCLUDING ANY CLAIMS OR CAUSES OF ACTION THAT COULD BE ASSERTED ON BEHALF OF THE DEBTOR), WHETHER FOR TORT, CONTRACT, VIOLATIONS OF FEDERAL OR STATE SECURITIES LAWS, OR OTHERWISE, WHETHER LIQUIDATED OR UNLIQUIDATED, FIXED OR CONTINGENT, MATURED OR UNMATURED, KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, THEN EXISTING OR THEREAFTER ARISING, IN LAW, EQUITY OR OTHERWISE THAT ARE BASED IN WHOLE OR PART OF ANY ACT, OMISSION, TRANSACTION, EVENT OR OTHER OCCURRENCE TAKING PLACE ON OR PRIOR TO THE EFFECTIVE DATE THAT REFER, RELATE OR PERTAIN TO (A) THE DEBTOR; (B) THE CHAPTER 11 CASE; (C) ANY OBLIGATION OR LIABILITY OF THE DEBTOR TO ANY RELEASEE; (D) THE NEGOTIATION, FORMULATION AND PREPARATION OF THE PLAN, OR ANY AGREEMENTS, INSTRUMENTS OR OTHER DOCUMENT RELATED TO THE PLAN; OR (E) THE PLAN OR ANY AGREEMENTS, INSTRUMENTS OR OTHER DOCUMENT RELATED TO THE PLAN; PROVIDED, HOWEVER, THAT THESE RELEASES WILL HAVE NO EFFECT ON THE LIABILITY OF ANY RELEASEE ARISING FROM ANY ACT, OMISSION, TRANSACTION, AGREEMENT, EVENT OR OTHER OCCURRENCE CONSTITUTION WILLFUL MISCONDUCT, GROSS NEGLIGENCE, FRAUD OR CRIMINAL CONDUCT; PROVIDED FURTHER, HOWEVER, THAT THE FOREGOING SALE NOT CONSTITUTE A WAIVER OR RELEASE OF ANY RIGHT OF THE HOLDER OF AN ALLOWED CLAIM TO PAYMENT UNDER THIS PLAN ON ACCOUNT OF SUCH ALLOWED CLAIM.

28. The Bankruptcy Code prohibits the release and permanent injunction of claims against non-debtors in most circumstances. *See* 11 U.S.C. § 524(e) ("Except as provided in subsection (a)(3) . . . discharge of a debt of a debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt"). While the Third Circuit has not barred third-party releases, it has recognized that they are the exception, not the rule. *In re*

Washington Mut., Inc., 241 B.R. 314, 351 (Bankr. D. Del. 2011). In *In re Continental Airlines*, 203 F.3d 203, 214-15 (3d Cir. 2000), without deciding when third-party releases may ever be permissible under a chapter 11 plan, the Third Circuit identified the minimum "hallmarks of permissible non-consensual releases" in favor of non-debtors as "fairness, necessity to the reorganization, and specific factual findings to support these conclusions," as well as whether "reasonable consideration" was given by the party or parties to be released. *See also In re Washington Mut., Inc*., 241 B.R. at 352 ("This Court has previously held that it does not have the power to grant a third-party release of a non-debtor. Rather, any such release must be based on consent of the releasing party (by contract or the mechanism of voting in favor of the plan")) (*citing In re Coram Healthcare Corp.*, 315 B.R. 321, 330 (Bankr. D. Del. 2004) and *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999)).

29. Under the Debtor's proposed Plan, the parties that would receive the benefit of third-party releases and exculpation from liability include (a) the Debtor's sole Equity Interest Holder, Eugene Haas; (b) his wife, Kimberly Haas; (c) other relatives of the Equity Interest Holder; and (d) numerous other entities in which the sole Equity Interest Holder either owns or maintains a controlling interest.[3]

30. The proposed third-party releases warrant particular scrutiny by the Court in this case because the proposed beneficiaries of the releases are providing no consideration whatsoever to the estate. Moreover, *many of the proposed released entities and associated individuals are the exact parties who received substantial pre-petition transfer and payments.* It would be contrary to law and equity for the Debtor to gain approval of a Disclosure Statement for, and solicit votes on, a Plan that, regardless of creditors' votes, releases certain parties and

[3] *See* Plan, Art. IV. H and G; Plan, Art. II. B. 56.

individuals whose pre-petition conduct the Committee is currently investigating.[4] Accordingly, the releases and related injunction provisions must be severed from the Plan. Even if third-party releases and exculpations can be appropriate in some circumstances, they are completely inappropriate here where there has been absolutely no showing that the minimum standards for approval of such provisions espoused in this Circuit have or can be met. *See*, *e.g.*, *In re Nickels Midway Pier, LLC*, 2010 WL 2034542, at *13 (Bankr. D.N.J. May 21, 2010) (finding third-party releases were impermissible where no consideration was going to the releasing parties who had objected and they were not necessary to the debtor's reorganization because it was liquidating); *In re Spansion, Inc.*, 426 B.R. 114, 145 (Bankr. D. Del. 2010) (finding improper releases of third parties by objecting shareholders who were receiving nothing under the plan).

31. Similarly, the proposed releases by the Debtor of the "Releasees" contained in Article IV.H. of the Plan are inappropriate and unwarranted. Courts in this district have applied a non-exclusive five-factor test to determine whether a debtor's release of non-debtors as part of a chapter 11 plan may be appropriate:

> (1) an identity of interest between the debtor and the third-party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;
>
> (2) substantial contribution by the non-debtor of assets to the reorganization;
>
> (3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;
>
> (4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impaired class of classes "overwhelmingly" votes to accept the plan; and

[4] While the Debtor may argue that ballots for the Plan will include release opt-out provisions, the effect of a creditor's election not to grant the proposed releases *is not* set forth in the Plan. *See In re Washington Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011) (noting that "the original language in the [p]lan that would mandate third party releases even in the place of an indication on the ballot that the party did not wish to grant the release would not pass muster"). At a minimum, should the Court approve the Disclosure Statement, the Plan should provide that the proposed releases set forth in Article IV.H. of the Plan shall not be binding upon any creditor that rejects the Plan and/or does not return a Ballot voting to accept or reject the Plan.

> (5) a provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

In re Indianapolis Downs, LLC, 486 B.R. 286, 303 (Bankr. D. Del. 2013); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortgage Inv. Fund Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)). Here, the Debtor has not provided any basis in the Disclosure Statement or the Plan for the proposed releases, and the Committee is not aware of any facts justifying such releases.

32. In addition, the exculpation provision in Article IV.G. of the Plan must be modified to conform to the limited scope of protection provided by section 1125(e) of the Bankruptcy Code relating to activities in connection with solicitation of a plan. Moreover, the exculpation provision must be limited to fiduciaries that have served the estates during the Chapter 11 Cases and may not include unrelated third parties. *In re Washington Mut., Inc.*, 442 B.R. at 350-51.

RESERVATION OF RIGHTS

33. This Objection is submitted without prejudice to, and with a full reservation of, the Committee's rights to supplement it in advance of, or at, any hearing to consider approval of the Disclosure Statement. In addition, the Committee reserves its right to object to confirmation of the Plan, or any other plan proposed in this Chapter 11 Case, on any and all grounds.

34. The Committee also reserves the right to raise other objections to the previously filed motion to extend the solicitation period prior to or at the hearing on approval of the Disclosure Statement. Or the hearing on the motion to extend the solicitation period.

CONCLUSION

35. The Disclosure Statement should not be approved as it was filed in support of a Pan that is patently unconfirmable. The Plan prejudices all general unsecured creditors because it, *inter alia*, violates the absolute priority rule; the "new value" contribution is insufficient and

has not been subject to a market test; the Plan is not "fair and equitable"; the Plan provides for non-consensual releases of the Debtor's sole Equity Interest Holder and numerous other insiders who are not providing any consideration for those releases; and the Plan proposes to abandon various estate causes of action that the Committee believes have significant value. While the Plan is very favorable to the Debtor's numerous insiders, the same cannot be said for unsecured creditors.

36. The proposed Plan provides for the Debtor's sole Equity Interest Holder to retain all of the equity in the Reorganized Debtor without subjecting the Equity Interest Holder's proposed "new value" contribution to the market in violation of the Bankruptcy Code and longstanding precedent. Exposing the Debtor's assets to the marketplace is of utmost importance here where the Plan provides for the Debtor's sole Equity Interest Holder to retain all of the equity for nominal consideration.

37. At this juncture, the Committee believes that the Debtor will be unable to confirm the Plan, as it cannot demonstrate that the Plan is fair and equitable as required by section 1129(b)(2)(B)(ii) of the Bankruptcy Code. Indeed, the United States Supreme Court has held that "plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii)." *203 N. LaSalle*, 526 U.S. at 458.

38. The Plan violates the absolute priority rule, provides for the Debtor's sole shareholder to retain all of the equity in the reorganized Debtor in exchange for a nominal "new value" contribution and provides for non-consensual third-party releases for the Debtor's sole equity holder, his family members and other insiders who received significant pre-petition transfers from the Debtor without any consideration for same. More troubling are the non-

consensual third-party releases for entities controlled by the Debtor's sole shareholder – some of which were never disclosed to the Committee at any point during this Chapter 11 case.

WHEREFORE, the Committee respectfully requests that the Court (i) deny the motion for approval of the Disclosure Statement and (ii) grant the Committee such other and further relief as the Court deems just and appropriate.

Dated: June 26, 2014

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