IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
FREEDOM COMMUNICATIONS HOLDINGS, INC., et al.,[1]	)	Case No. 09-13046 (BLS)
	)	Jointly Administered
Debtors.	)	
	)	**Hearing Date: December 17, 2009 at 2:00 p.m.**
	)	**Objection Deadline: December 7, 2009 at 10:00 a.m.**

OBJECTION OF THE GONZALEZ CLASS ACTION PLAINTIFFS TO THE DEBTORS'[FIRST PROPOSED] DISCLOSURE STATEMENT CONCERNING JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11, TITLE 11, UNITED STATES CODE OF FREEDOM COMMUNICATIONS HOLDINGS, INC., ET AL., DEBTORS

The Gonzalez Class Action Plaintiffs (the "Gonzalez Plaintiffs") hereby file this objection (the "Objection") to the [First Proposed] Disclosure Statement Concerning Joint Plan of Reorganization Under Chapter 11, Title, 11, United States Code of Freedom Communications Holdings, Inc., et. al., Debtors [Docket No. 372], and respectfully represent as follows:

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identifications numbers are: Freedom Communications Holdings, Inc (2814); Freedom Communications, Inc. (0750); Freedom Broadcasting, Inc. (0025); Freedom Broadcasting of Florida, Inc. (6581); Freedom Broadcasting of Florida Licensee, LLC (1198); Freedom Broadcasting of Michigan, Inc. (6110); Freedom Broadcasting of Michigan Licensee, LLC (1122); Freedom Broadcasting of New York, Inc. (6522); Freedom Broadcasting of New York Licensee, LLC (9356); Freedom Broadcasting of Oregon, Inc. (7291); Freedom Broadcasting of Oregon Licensee, LLC (9295); Freedom Broadcasting of Southern New England, Inc. (7274); Freedom Broadcasting of Southern New England Licensee, LLC (1177); Freedom Broadcasting of Texas, Inc. (2093); Freedom Broadcasting of Texas Licensee, LLC (1147); Freedom Broadcasting of Tennessee, Inc. (7961); Freedom Broadcasting of Tennessee Licensee, LLC (9430); Freedom Magazines, Inc. (0328); Freedom Metro Information, Inc. (1604); Freedom Newspapers, Inc. (3240); Orange County Register Communications, Inc. (7980); OCR Community Publications, Inc. (9752); OCR Information Marketing, Inc. (7983); Appeal-Democrat, Inc. (4121); Florida Freedom Newspapers, Inc. (4227); Freedom Arizona Information, Inc. (5796); Freedom Colorado Information, Inc. (7806); Freedom Eastern North Carolina Communications, Inc. (5563); Freedom Newspapers of Ilinois, Inc. (2222); Freedom Newspapers of Southwestern Arizona, Inc. (5797); Freedom Shelby Star, Inc. (8425); Ilinois Freedom Newspapers, Inc. (8308); Missouri Freedom Newspapers, Inc. (8310); Odessa American (7714); The Times-News Publishing Company (0230); Victor Valley Publishing Company (6082); Daily Press (3610); Freedom Newspaper Acquisitions, Inc. (4322); The Clovis News-Journal (5820); Freedom Newspapers of New Mexico, LLC (5360); Gaston Gazette LLP (4885); Lima News (6918); Porterville Recorder Company (7735); Seymour Tribune Company (7550); Victorville Publishing Company (7617); Freedom Newspapers (7766); The Creative Spot, LLC (2420); Freedom Interactive Newspapers, Inc. (9343); Freedom Interactive Newspapers of Texas, Inc. (8187); Freedom Services, Inc. (3125). The address for Freedom Communications Holdings, Inc. and certain other Debtors is 17666 Fitch, Irvine, California 92614.

Preliminary Statement

On October 31, 2009, the Debtors filed a proposed plan of reorganization and requested approval of a related disclosure statement. The plan reflects the terms of a plan support agreement among the debtors and their prepetition purportedly secured lenders (the "Prepetition Lenders"), but was proposed without any consultation or input from the general unsecured creditors. As a result, the Plan does not contain or reflect any input from general unsecured creditors or their representatives, including the official committee of unsecured creditors (the "Committee"). Quite to the contrary, the Plan is an attempt to impose a restructuring negotiated with the Prepetition Lenders on the Debtors' other creditor constituencies and to disenfranchise the Gonzalez Plaintiffs en toto. Such strong-arm tactics are not consistent with the consensual nature of chapter 11 and the Court should reject the disclosure statement for this reason alone.

In any event, the Plan is facially flawed and cannot be confirmed. For example, the Plan impermissibly places all general unsecured creditors into a single class for voting purposes, although trade creditors will receive different and better treatment under the Plan—a clear violation of section 1123(a)(4) of the Bankruptcy Code.[2] Quite clearly, the intent of this classification scheme is to disenfranchise the disfavored unsecured creditors, including the Gonzalez Plaintiffs. The different and better treatment afforded to trade creditors also constitutes unfair discrimination among similarly situated creditors in violation of section 1129(b), largely intended to prejudice the Gonzalez Plaintiffs. The Plan also purports to release valuable and unencumbered avoidance actions and other causes of action against insiders and the Prepetition Lenders for no consideration and without satisfying the standards set forth in Rule 9019(a). Under these circumstances, the Court should not approve the disclosure statement. Permitting the Debtors to solicit a facially flawed plan is simply incompatible with sound judicial economy.

[2] 11 U.S.C. 101 et seq. All statutory references made herein are to the Bankruptcy Code unless otherwise specified.

Further, the disclosure statement cannot be approved because it does not contain "adequate information" as required by section 1125(a). Among other things, the disclosure statement contains no meaningful discussion of the merits or value of the Debtors' unencumbered claims against insiders and the Prepetition Lenders being released under the Plan for no consideration. Without this information, it is simply impossible for a general unsecured creditor to make any meaningful decision on whether to proceed with the plan or pursue the released claims under a different plan or as part of a chapter 7 liquidation. The Gonzalez Plaintiffs have filed a motion to appoint an examiner to investigate such claims and believe that no disclosure statement should be approved until the examiner has had a full and fair opportunity to investigate such claims.

Moreover, the disclosure statement does not disclose the identity of the trade creditors receiving preferential treatment under the plan or describe the nature of such consideration. This information is also critical for general unsecured creditors to make an informed choice in respect of the plan. Finally, the disclosure statement is flawed because it does not disclose that there is significant opposition to the plan, including from the official committee of unsecured creditors and the Gonzalez Plaintiffs. General unsecured creditors must know that their representatives believe that the plan is not in their interests. They must also know that their representatives do not believe that the plan complies with the Bankruptcy Code.

To conclude, the plan proposed by the Debtors is not the product of negotiations with unsecured creditors and is fatally flawed. Further, the disclosure statement does not contain the information required for a general unsecured creditor to make an informed choice regarding the plan. Under these circumstances, approval of the disclosure statement should be denied.

Facts

A. The Bankruptcy Cases.

1. On September 1, 2009 (the "Petition Date"), the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their respective businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. On September 9, 2009, the United States Trustee has appointed an Official Committee of Unsecured Creditors (the "Committee") in this case. A representative of the Class Action Plaintiffs is a member of the Creditors' Committee. No trustee or examiner has been requested or appointed in any of the Debtors' chapter 11 cases, although the Gonzalez Plaintiffs have requested that an examiner be appointed to investigate the merits and value of causes of action being released under the Plan.

B. The Gonzalez Plaintiffs.

3. At least from July 7, 1999 through August 22, 2008 (the "Class Period"), Freedom Communications, Inc. d/b/a The Orange County Register and certain other Debtors (collectively, "The Register") substantially underpaid their newspaper delivery employees. In short, The Register wrongly classified its delivery employees as "independent contractors" and denied them minimum wage, meal breaks and rest periods mandated by California law, as well as reimbursement of reasonable business expenses, including mileage. As a result, such employees were damaged in an amount that the Gonzalez Plaintiffs believe exceeds $100 million.

4. On July 7, 2003, Nelson Gonzalez, Marco Garcia, Reymundo Garcia, Aymer Avila, Julian Nunez, Luis A. Arteaga, Juan Carlos Torres, Roberto Lopez and Nestor Alvarez, on their own behalf and on behalf of others similarly situated (the Gonzalez Plaintiffs before this Court), filed a complaint (the "Complaint") against Freedom Communications, Inc.,

d/b/a The Orange County Register and Does 1-50 inclusive, which commenced a class action proceeding (the "Class Action"). The Complaint was last amended on March 5, 2007 and seeks damages for, among other things, failure to pay minimum wage and overtime wages, failure to provide meal periods or compensation in lieu thereof, failure to provide rest periods or compensation in lieu thereof, failure to provide rest periods or compensation in lieu thereof, failure to reimburse reasonable business expenses, unlawful deductions from wages, failure to provide itemized wage statements, failure to keep adequate payroll records, waiting time penalties and unfair business practices.

5. A class was certified on or about October 18, 2007 for "[a]ll persons presently or formerly engaged as newspaper home delivery carriers by the defendant and for the Orange County Register Newspaper in the State of California during the [Class Period]; and who, as a condition of such engagement, signed the Orange County Register Delivery Agreement . . . categorizing them as independent contractors and not as employees." A copy of the order certifying such class has previously been submitted to this Court. The Gonzalez Plaintiffs believe that they are owed in excess of $100 million in damages.

C. Plan and Disclosure Statement

6. On October 31, 2009, the Debtors filed their [First Proposed] Disclosure Statement Concerning Joint Plan of Reorganization Under Chapter 11, Title, 11, United States Code of Freedom Communications Holdings, Inc., et. al., Debtors (the "Disclosure Statement") along with their [First Proposed] Joint Plan of Reorganization Under Chapter 11, Title 11 of the United States Code of Freedom Communications Holdings, Inc., et al., Debtors (the "Plan"). For the reasons set forth below, the Disclosure Statement does not contain "adequate information" as that term is defined in section 1125(a) of the Bankruptcy Code. Further, the Disclosure Statement should not be approved because the Plan is not confirmable on its face.

Argument

A. The Plan is not Confirmable On Its Face.

7. It is well settled that a bankruptcy court has an independent obligation to determine whether a disclosure statement contains adequate information as that term is defined in the Bankruptcy Code. In re Eastern Maine Elec. Coop., 125 B.R. 329, 333 (Bankr. D. Me. 1991). Such a determination should be made in two separate steps. First, the bankruptcy court must determine whether "the disclosure statement describes a plan that is so 'fatally flawed' that confirmation is 'impossible.'" Id. Thereafter, then the bankruptcy court should focus on the adequacy of disclosures themselves. In short, determining whether a plan is "fatally flawed" is a threshold issue the Court should examine prior to considering whether the disclosure statement itself should be approved. As noted by the court in Eastern Maine:

> Such an exercise is appropriate because undertaking the burden and expense of plan distribution and vote solicitation is unwise and in appropriate if the proposed plan could never be legally confirmed.

Id.; see also, In re Beyond.com Corp., 269 B.R. 138, 143, 146 (Bankr. N.D. Cal. 2003) (disapproving disclosure statement where plan unconfirmable); In re Cardinal Congregate I, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) ("The Court believes that disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan so fatally flawed that confirmation is impossible."); accord In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) (declining to subject estate to expense of soliciting votes for unconfirmable plan).

8. In this case, the Plan is fatally flawed and, on that basis alone, the Court should not approve the Disclosure Statement. The Plan has at least three fatal flaws that render it

unconfirmable:[3] First, the Plan fails to comply with section 1123(a)(4) because it does not provide the same treatment for all members of Class A4 (the general unsecured creditor class). To the contrary, certain favored trade creditors will receive substantially higher recoveries than other general unsecured creditors. Second, such disparate treatment constitutes unfair discrimination against the disfavored unsecured creditors, and, third, the Plan cannot satisfy the best interests of creditors test and is not fair and equitable with respect to general unsecured creditors because it purports to release avoidance actions against the Prepetition Lenders and the Debtors' officers and directors, which are unencumbered and inure to the benefit of general unsecured creditors, for no consideration. Each of these flaws renders the Plan unconfirmable and is discussed in more detail below.

The Plan, on its face, violates sections 1123(a)(4) and 1129(a)

9. Section 1123(a)(4) states that a plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). The United States District Court for the District of Delaware has held that section 1123(a)(4) is to be enforced according to its plain language and has been clear that "if claims within the same class are not receiving the same treatment, and the holders of those claims being treated less favorably have not consented to the discrimination, the plan is not confirmable." In re New Century TRS Holdings, Inc., 407 B.R. 576, 592 (D. Del. 2009) (holding that plan where some members of a class would receive 100% of their distribution amount and others would receive 130% of such amount based on an intercompany settlement was not confirmable); see also In re Dow Corning Corp., 280 F.3d 648, 660 (6th Cir. 2002) (holding that a plan according better recovery rights to

[3] The Gonzalez Plaintiffs do not intend this to be an exhaustive list of plan objections and reserve the right to raise such objections at plan confirmation.

claims of Canadian governmental units than to claims of United States governmental units violated section 1123(a)(4) of the Bankruptcy Code). In this case, the Plan does not satisfy such requirement because holders of general unsecured claims (all of which are classified in Class A4) do not receive the same treatment under the Plan.

10. The Plan classifies all general unsecured claims against "Encumbered Debtors" (i.e., unsecured claims against Debtor entities that are purportedly obligors under Debtors' primary credit facility with the Prepetition Lenders) in Class A4. The Plan further creates sub-classes within Class A4 consisting of one sub-class for each "Encumbered Debtor." Under the Plan, holders of claims in Class A4 are entitled to receive their pro rata share of a $5 million fund, if their particular sub-class accepts the Plan. If their particular sub-class does not accept the Plan, they will receive nothing. Section 5.10 of the Plan further provides "trade creditors" that are members of Class A4 with the opportunity to obtain additional payments not available to any other Class A4 claimants.

11. Specifically, Section 5.10 creates a "Trade Unsecured Claim Escrow" funded by the Encumbered Debtors from estate assets and provides that "any provider of goods or services" that holds a "Trade Unsecured Claim" may enter into a "Post-Emergence Trade Agreement" pursuant to which "each holder of an Allowed Trade Unsecured Claim shall receive, in full satisfaction, settlement, release and discharge of and in exchange for such Allowed Trade Unsecured Claim, Cash from the Trade Unsecured Claim Escrow equal to all or such portion of the Allowed Trade Unsecured Claim as the parties may agree." Plan § 5.10.

12. The Disclosure Statement is clear that holders of Trade Unsecured Claims are a subset of Class A4 creditors. Indeed, the Disclosure Statement states that:

> Providers of goods and services who may later become holders of Trade Unsecured Claims pursuant to the procedures in the Plan will be holders of

> General Unsecured Claims at the time of voting. Such holders will vote as General Unsecured Claims in Class A4.

See Disclosure Statement, pp. 12 and 47. Further the Plan is clear that the opportunity to obtain more favorable treatment is not available to all Class A4 creditors. Indeed, the definition of "Trade Unsecured Claim" expressly excludes any claims arising from:

> (i) any employee or individual independent contractor relationship between the Debtor and any Person, (ii) the rejection of an executory contract or unexpired lease, (iii) the litigation captioned Gonzalez v. Freedom Communications, Inc., Case No. 03CC08756, Superior Court of California, County of Orange, (iv) any other litigation brought, or that could have been brought, prior to the Petition Date, and (v) any non-qualified pension or retirement plan or agreement provided by any Debtor, or any termination of any such plan or agreement.

See Plan § 1.102. Put another way, all general unsecured creditors are classified as Class A4 creditors and will vote as such. However, certain of those general unsecured creditors (after voting in Class A4) are entitled to better treatment under the Plan if they provided goods and services to the Encumbered Debtors and can agree on the terms of a Post Emergence Trade Agreement. This provision, on its face, violates section 1123(a)(4) by favoring "trade creditors" over other similarly situated creditors. Clearly the treatment to be received by holders of Trade Unsecured Claims is not the "same" as the treatment to be received by other general unsecured creditors.

13. The Debtors attempt to circumvent the requirement that all similarly classified creditors be treated the same by technically removing holders of Trade Unsecured Claims from Class A4 after such creditors receive an Allowed Trade Unsecured Claim. This is simply form over substance and does not fix the Plan's faulty classification scheme. Most importantly, there is no question that all general unsecured creditors, including holders of Trade Unsecured Claim will vote in a single class with respect to the Plan, but will receive different treatment thereunder. This has the effect of disenfranchising the disfavored creditors, which is

exactly what section 1123(a)(4) is supposed to prevent. There is simply no basis for allowing trade creditors that will likely be paid in full to vote in the same class with creditors that will receive substantially worse treatment and it is patently unequitable to do so.

14. This is particularly true in light of the fact that the outcome of the class vote will have a significant and substantial effect on the rights of disfavored creditors. If Class A4 rejects the Plan, the Debtors must satisfy section 1129(b), including the requirements that the Plan not discriminate unfairly and be fair and equitable. Such rights may not be available if Class A4 accepts the Plan. In essence, the Debtors are attempting to cram down disfavored creditors without meeting the requirements of section 1129(b). Further, classifying trade creditors and other general unsecured creditors into a single class as opposed to two separate classes excuses the Debtors from having to establish that the separate classification (and treatment) is justified by a legitimate business reason. See Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S.Truck Co.), 800 F.2d 581, 586 (6th Cir. 1986).

15. In short, the Plan contains an impermissible classification scheme which must be corrected prior to any solicitation in respect of the Plan and the Disclosure Statement should be rejected on this basis alone.

The Plan unfairly discriminates between general unsecured creditors

16. More fundamentally, and regardless of the classification scheme set forth in the Plan, the Plan cannot be confirmed because it unfairly discriminates among similarly situated creditors by providing greater recoveries to purported "trade creditors" than to other general unsecured creditors. See 11 U.S.C. § 1129(b). As an initial matter, the fact that disfavored general unsecured creditors and the potential holders of Trade Unsecured Claims are initially classified in the same Class is an admission by the Debtors that such claims are substantially

similar in nature. Indeed, pursuant to section 1122, such claims otherwise could not be placed into the same class.

17. Next, there is no question that the Plan discriminates among these similarly situated creditors. As noted above, some general unsecured creditors will receive their pro rata share of $5 million (if their class votes for the Plan) and others will receive treatment pursuant to Post-Emergence Trade Agreements that could pay their claims in full. The Debtors will undoubtedly attempt to justify this discrimination by claiming that trade creditors providing goods and services to the Debtors are entitled to better treatment than other general unsecured creditors because they are important to the Debtors' post-emergence business. This rationale, however, has been rejected by numerous courts and is unpersuasive under the facts of this case. For example, in Snyders Drug Stores, Inc., 307 B.R. 889, 895 (Bankr. S.D. Ohio 2004), the bankruptcy court held that discrimination between trade creditors and landlords of rejected leases was not permissible because the debtor produced no evidence that the trade creditors being provided preferential treatment were critical to the debtor's ability to reorganize or would otherwise refuse to transact business with the debtor.

18. That also is the case here. The Disclosure Statement fails to provide *any* rationale for the discrimination in favor of so-called trade creditors. Indeed, the Disclosure Statement does not even identify who the trade creditors are or what critical goods and services they provide to the Debtors. Nor does it claim that no plan can be confirmed without the discrimination. Further, the definition of "Trade Unsecured Claim" does not require that the relationship between the trade creditor and the Debtors be critical or necessary to the Debtors' reorganization and is not reserved for trade creditors that otherwise would not continue to supply goods and services to the Debtors. Any trade creditor willing to provide goods and services

pursuant to a Post-Emergence Agreement is eligible. Based on these facts, the Debtors simply cannot establish that the discrimination they propose is compatible with the Bankruptcy Code. See also Liberty National Enterprises v. Ambanc La Mesa Limited Partnership (In re Ambanc La Mesa Limited Partnership), 115 B.R. 650, 656 (9th Cir. 1987) (discrimination in favor of trade creditors not permitted unless court makes specific findings that such discrimination is reasonable, a plan could not be confirmed without the discrimination, the discrimination was proposed in good faith and was reasonably related to the purpose of the discrimination).

19. The court in In re Sentry Operating Co. of Texas, 264 B.R. 850 (Bankr. S.D. Tex 2001) reached a similar conclusion. There, the debtor proposed a plan containing two separate classes of general unsecured creditors. One class of unsecured creditors, the "trade class," was to receive substantially better treatment than another class whose claims arose from a note. The debtor argued that such classification was permissible because goodwill between the debtor and trade creditors was essential to the debtor's ongoing business. The court rejected the debtor's reasoning finding that there was no evidence to support that conclusion. Additionally, the court noted that providing trade creditors with better treatment also served another purpose—ensuring that the debtor obtained an impaired consenting class for its plan. The court found that this reason for discriminating was clearly improper and rendered the discrimination impermissible, even if the debtor could articulate a business reason for the discrimination.

20. Sentry is directly applicable to this case. The Debtors articulate no business reason in the Disclosure Statement to favor trade creditors. Further, the Debtors clearly have an ulterior motive for discriminating in favor of trade creditors—to obtain a favorable vote of Class A4, the general unsecured creditor class. Although the Debtors do not disclose in the Disclosure Statement how many creditors in Class A4 hold trade claims and how many do not, it is

not difficult to surmise that the Debtors hope that the discriminatory treatment being provided to trade creditors under the Plan will cause Class A4 to accept the Plan, thereby disenfranchising other general unsecured creditors in the same class being provided with treatment that is significantly worse. The Debtors are, in essence, gerrymandering the vote to assure that they will not need to cram down their disfavored general unsecured creditors. This is simply not a legitimate reason for discriminating among creditors. See also In re Nutritional Sourcing Corp., 398 B.R. 816 (Bankr. D. Del. 2008) (finding that plan that discriminated against trade creditors could not be confirmed).

21. Moreover, as was the case in Sentry, in this case the disparate treatment being provided by the Debtors to general unsecured creditors is aimed more at depriving a discrete group of creditors of recoveries than preserving good will with trade creditors. Under the Plan, the Prepetition Lenders will obtain either 98% or 100% of the equity of the Debtors and a sizeable secured note. Additionally, administrative claimants and priority claimants will be paid in full in cash, the Debtors will assume their qualified pension plans for the benefit of their employees and trade creditors will receive payment in full (or something similar) under the terms of their Post-Emergence Trade Agreements. The only creditors that will receive little to no recoveries are the Gonzalez Plaintiffs, the holders of rejection claims and executives that participated in the Debtors non-qualified pension plans. In short, the Plan targets a small group of creditors, the large bulk of which are made up of the Gonzalez Plaintiffs, for unfair treatment while providing substantial recoveries to the Debtors' other remaining creditors, including similarly situated trade creditors. A Plan whose sole purpose is to discriminate against a discrete group of creditors cannot satisfy the requirement of section 1129(b) that a Plan not discriminate unfairly and simply should not be confirmed.

22. The Debtors are also likely to argue that the discrimination is permissible because the Plan is a "gift plan" and, therefore, not subject to section 1129(b). The Class Action Plaintiffs urge the Court to reject this rationale. As an initial matter, the permissibility of gift plans is in serious doubt in this circuit. Indeed, in In re Armstrong World Industries, Inc., the Third Circuit stated that that the gift doctrine does "not stand for the unconditional proposition that creditors are generally free to do whatever they wish with the bankruptcy proceeds they receive." 432 F.3d 507, 514 (3rd. Cir. 2005); see also Motorola Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating, LLC), 478 F.3d 452, 464 (2nd Cir. 2007) (settlement must not be used as device for frustrating absolute priority rule). In other words, any plan, including a "gift plan" must meet the requirements of the Bankruptcy Code. Further, the fact that the Prepetition Lenders may have a lien on the Debtors' cash simply does not give them or the Debtors the unilateral right to ignore sections 1122, 1123(a)(4) and 1129(a) and (b) of the Bankruptcy Code. To hold otherwise sends the bankruptcy process down a slippery slope. If a secured creditor and the debtor can conspire to determine which provisions of the Bankruptcy Code should be followed and which should not, why have any confirmation requirements at all in a case where the debtor's assets are encumbered other than the requirement that the secured creditor "consent" to the plan? Such a result clearly could not have been intended by Congress.

23. As noted by the Court in Sentry:

> To accept SCI-L's argument that a secured lender can, without any reference to fairness, decide which creditors get paid and how much those creditors get paid, is to . . . read the 1129(b) requirements out of the Code. If the argument were accepted with respect to § 1129(b) 'unfair discrimination requirement,' there is no logical reason not to apply it to the § 1129(b) 'fair and equitable' requirement, or to the § 1129(a)(10) requirement that at least one class has accepted the plan. To accept that argument is simply to start down a slippery slope that does great violence to history and to positive law.

264 B.R. at 865. There is little doubt that the Prepetition Lenders are using the Bankruptcy Code to their benefit in this case. Indeed, the plan process is enabling the Prepetition Lenders to preserve the going concern value for the Debtors in a manner that they could not achieve in a state law foreclosure. To obtain these benefits, however, both the Debtors and the Prepetition Lenders must comply with the Bankruptcy Code and cannot use their purported liens on estate property as an excuse for failing to do so.

24. Moreover, characterizing the Plan as a "gift" plan is a misnomer. The "gift plan" doctrine has its genesis in Official Unsecured Creditors Committee v. Stern (In re SPM Manufacturing, Corp.), 984 F.2d 1305 (1st Cir. 1993) and generally permits a secured creditor to voluntarily allocate its recoveries from the bankruptcy estate among junior creditors as it sees fit. Indeed, in SPM all recoveries to unsecured creditors occurred after funds had been removed from the estate. Here, however, the Prepetition Lenders are not gifting any recoveries to trade creditors in the traditional sense. Indeed, the funds to be deposited in the Trade Unsecured Claim Escrow will come from the Encumbered Debtors, not from recoveries paid to the Prepetition Lenders, and they will be paid to trade creditors holding allowed Trade Unsecured Claims against the estate under a Plan. Moreover, although the Prepetition Lenders will receive any residual amounts in the Trade Unsecured Claim Escrow as payment on their claims, the funding of the Trade Claims Escrow itself will not reduce the amount of claims payable to the Prepetition Lenders by one penny. At best, the Trade Unsecured Claim Escrow is a glorified cash collateral account, not a gift of recoveries.

25. The Debtors will likely cite In re Journal Register Co., 407 B.R. 520 (Bankr. S.D.N.Y 2009) for the proposition that the Plan is confirmable under the gift plan doctrine. Indeed, the Plan appears to be modeled in some respects on the plan in Journal Register. The

Gonzalez Plaintiffs believe that the Journal Register case is wrongly decided and should be rejected by this Court. The Sentry case, which disapproves gift plans, is much better reasoned and the Journal Register court simply does not explain how the existence of a lien grants a secured creditor veto rights over which provisions of the Bankruptcy Court should be enforced and which should not.

26. Further, the Journal Register case is distinguishable. The lynchpin of the Journal Register decision was its finding that the payments to be made to trade creditors were not payments under the plan. This Court simply cannot reach a similar conclusion in this case. Section 5.10 of the Plan expressly provides for the creation and funding of the Trade Unsecured Claims Escrow Account from the estate, the allowance of Trade Unsecured Claims against the estate, the treatment and payment of those claims from the Trade Unsecured Claims Escrow and the execution of Post-Emergence Trade Agreements. In fact, the Disclosure Statement is clear that the Post-Emergence Trade Agreements will be filed with the Court as part of the "Plan Supplement." Under these circumstance, any payments to be received by trade creditors are payments under the Plan and are subject to all of the requirements of the Bankruptcy Code, including the requirements of sections 1122 and 1123(a)(4).

27. Further, there is no indication in the Journal Register opinion that the purpose of the plan was to discriminate against specific creditors. Here, the evidence is to the contrary. In fact, the Plan is crafted to deny recoveries to the Gonzalez Plaintiffs and certain other disfavored groups more than to provide benefits to trade creditors. Second, the Journal Register plan, as ultimately confirmed, was the product of negotiations with the creditors' committee and had the support of a wide array of the Debtors' unsecured creditors, including the disfavored creditors. Id. at 524. Indeed, the creditors' committee sent a letter to unsecured creditors stating

that after "intense efforts and negotiations" among the Debtors, the creditors' committee, and other parties in interest, the creditors' committee believed that the plan represented the best result that could be achieved, and the court noted that unfair discrimination under section 1129(b) was not an issue in the case because "large supermajorities of both the recipients of the Trade Account Distribution and the non-favored unsecured creditors voted in favor of the Plan." Id. at 528. That is simply not the case here. The Debtors have had no meaningful negotiations with the creditors' committee in this case and it is unlikely that the disfavored creditors will support the Plan. Under these circumstances, the Plan is facially deficient and cannot be confirmed.

The Plan cannot comply with the best interests of creditors rule and Rule 9019

28. Section 1129(a)(7) provides that a plan cannot be confirmed unless each holder of a claim in an impaired class either accepts the plan or:

> will receive or retain under the plan on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date . . . .

11 U.S.C. § 1129(a)(7). This test is known as the "best interests of creditors" test. It is extremely unlikely that all unsecured creditors will accept the Plan. Accordingly, the Debtors must demonstrate that the Plan provides greater recoveries to unsecured creditors than a chapter 7 liquidation. They cannot do so. Under the Plan, unsecured creditors will receive distributions from a $5 million fund if their particular sub-class accepts the Plan. If it does not, unsecured creditors in such sub-class will receive nothing. Notwithstanding the foregoing, the Plan purports to release all claims of the Debtors against the Prepetition Lenders and the Debtors' their officers and directors, including avoidance actions and claims for breach of fiduciary duty, for no consideration and without any serious analysis of what such claims are worth. Such claims are not subject to the liens of the Prepetition Lenders, represent legitimate avenues of

recoveries for general unsecured creditors and would be available for distribution to unsecured creditors in a chapter 7 liquidation. Under these circumstances, the Debtors cannot establish that the best interests of creditors test is satisfied.

29. Further, a chapter 7 trustee would also be entitled to assert other preference and fraudulent transfer claims for the benefit of general unsecured creditors. Under the Plan, none of these causes of action will be pursued for the benefit of general unsecured creditors. Indeed and strangely, they appear to be preserved for the benefit of the reorganized Debtors. The Debtors cannot deprive general unsecured creditors of avoidance action recoveries, release the claims described above, provide minimal or no recoveries to general unsecured creditors under the Plan and satisfy the best interest of creditors test.

30. Further, the Debtors should not be allowed to release their claims against insiders and the Prepetition Lenders without satisfying the requirements of Rule 9019(a) of the Federal Rules of Bankruptcy Procedure. The Plan provides for no such showing. Perhaps that is because the Debtors would be unable to establish that the releases are "fair and equitable" and in the paramount interests of creditors, especially in light of the fact that general unsecured creditors had no input whatsoever with respect to the formulation of the Plan. See In re RFE Industries, Inc., 283 F.3d 159, 165 (3rd Cir. 2002). Indeed, in In In re Exide Technologies, 303 B.R. 48, 71 (Bankr. D. Del. 2003), Judge Carey refused to confirm a plan containing a settlement that would have released claims being brought by the creditors' committee against the debtor's lenders and officers and directors precisely because the Debtors and the prepetition lenders were attempting to obtain releases without first negotiating with unsecured creditors. Such a plan, the court concluded, could not be in the paramount interest of creditors. Judge Carey wrote:

> [T]he proposed settlement was not the result of arms-length bargaining with the unsecured creditors, who are the plaintiffs in the action and are

> directly affected by it. Instead, it is the result of discussions between the Prepetition Lenders and the Debtor only.

Id. Under similar circumstances here, the Plan is fatally flawed and the Court should not approve the Disclosure Statement.

B. The Disclosure Statement does not contain adequate information

31. The Disclosure Statement should not be approved, even if the Court finds that the Plan is not fatally flawed on its face (which it is). In order for a disclosure statement to be approved, it must contain "adequate information," which is defined as:

> [I]nformation 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 the debtor, any successor of the debtor, and a hypothetical investor typical of the holders of claims or interest in the case, that would enable such hypothetical investor of the relevant class to make an informed judgment about the plan . . . .

11 U.S.C. § 1125(a). "[T]he determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court." In re Brotby, 303 B.R. 177, 193 (9th Cir. BAP 2003) (citing In re Texas Extrusion Corp., 844 F.2d 1142, 1157 (5th Cir. 1988)). Here, the Disclosure Statement does not meet this standard.

The Disclosure Statement does not provide adequate information concerning the value of released claims

32. The principal flaw in the Disclosure Statement is that it does not contain a serious discussion or analysis regarding the value of the causes of action the Debtors intend to release under the Plan or a fair discussion of the pros and cons of litigation. As noted above, such causes of action are unencumbered and could produce valuable recoveries for unsecured creditors. In order for general unsecured creditors to make an informed judgment to release those claims

under the Plan, it is critical for such creditors to understand the merits and value of those claims. The short statement contained on page 77 of the Disclosure Statement stating that "[t]he Debtors do not believe that any valid potential actions exist against the Released Parties" is woefully inadequate.

33. In order to obtain a credible analysis of the claims being released under the Plan, the Class Action Plaintiffs have filed a motion to appoint an examiner. The Class Action Plaintiffs believe that the plan process should be stayed until the examiner concludes its investigation and is in the position to present its report to this Court. In the alternative, the Debtors should be required to fully describe the claims against their officers and directors and the Prepetition Lenders being released under the Plan and to provide an analysis of their merits and value that is consistent with the requirements of Federal Rule of Bankruptcy Procedure Rule 9019. General unsecured creditors cannot make an informed decision without such information.

34. Further, as noted above, the Plan does not preserve avoidance actions for the benefit of general unsecured creditors, although such claims would clearly be preserved in a chapter 7. Accordingly, the Disclosure Statement should disclose all payments and other transfers subject to avoidance and describe the value and merits of potential preference recoveries in detail.

The FCC Licenses

35. The Disclosure Statement is also deficient because it does not value the FCC licenses held by the Debtors or estimate how much such licenses add to the value of the Prepetition Lenders' purported collateral. The Prepetition Lenders concede that the FCC licenses are not subject to their liens. The FCC licenses, however, clearly add value to the Prepetition Lenders' purported collateral, because the Debtors cannot operate their television stations (which may constitute collateral for the Prepetition Lenders) without them. The Debtors should disclose the amount of such value and describe the merits of any potential actions under section 506(c).

The Disclosure Statement does not disclosure sufficient information regarding trade creditors

36. The Disclosure Statement also fails to disclosure the identity of trade creditors, the nature of their claims and the potential terms of the Post-Emergence Trade Agreements contemplated by the Plan. This also constitutes a flaw in the disclosure statement. General unsecured creditors must know that information to determine the amount of discrimination contemplated by the Plan and make an informed judgment upon whether or not to support the Plan.

Miscellaneous disclosure problems

37. The Disclosure Statement must also clearly indicate that the Plan was formulated without input from unsecured creditors, is not supported by the creditors' committee, may not satisfy the best interests of creditors test and will be opposed on the grounds that it improperly discriminates among general unsecured creditors.

38. Finally, the Disclosure Statement must include a statement to the Gonzalez Plaintiffs that the Debtors dispute their claims and that they will only receive recoveries under the Plan if they are successful in overcoming those objections. It must be clear from the face of the Disclosure Statement that they will not receive recoveries simply by voting for the Plan.

Conclusion

WHEREFORE, the Class Action Plaintiffs request that the Court disapprove the Disclosure Statement and for any other relief as may be just and proper.

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