AMERICAN BANKRUPTCY INSTITUTE

2017 Mid-Atlantic Bankruptcy Workshop

PLENARY SESSION

TED Talks

Thomas M. Horan, Moderator
Shaw Fishman Glantz & Towbin LLC; Wilmington, Del.

Amy Edgy
Jones Day; Washington, D.C.

Ted Gavin
Gavin/Solmonese LLC; Wilmington, Del.

Steven K. Kortanek
Drinker Biddle & Reath LLP; Wilmington, Del.

M. Natasha Labovitz
Debevoise & Plimpton LLP; New York

2017

The 10 Best Pieces of Career Advice and Teaching Moments…Ever.

M. Natasha Labovitz
August 2017

#10

Debevoise
& Plimpton

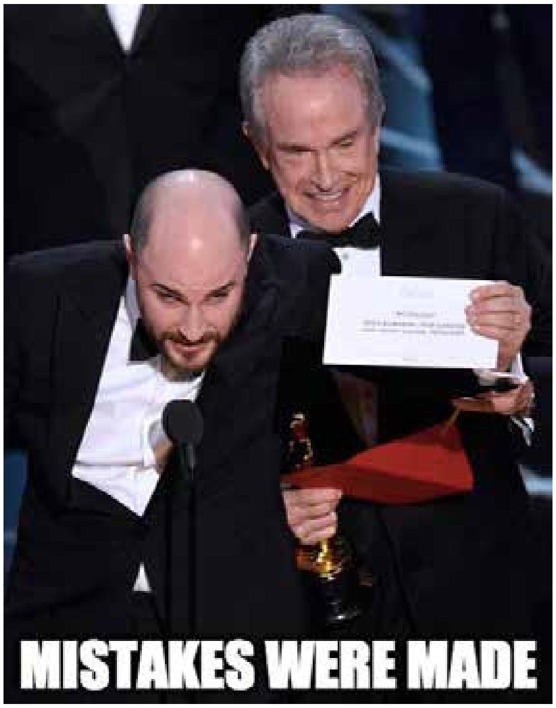
“Well, Natasha, sometimes you’ve just got to let them wear the sweatshirt.”

- D.J. (Jan) Baker, Latham & Watkins LLP

Still from *My Cousin Vinny*, directed by Jonathan Lynn (1992; Twentieth Century Fox).

#9

Debevoise & Plimpton



Falling on your sword can be an art form. You're just as smart, powerful, successful, and well-respected after letting the client be right and apologizing.

- Richard (Rick) Cieri, Kirkland & Ellis LLP

#8

Debevoise & Plimpton

Still from *The Great Gatsby*, directed by Baz Luhrmann (2013; Warner Bros.).

"It would really be a mistake for you not to go to that dinner."

- Todd Snyder, Rothschild Inc.

#7

"Life is long. Careers are long. Things happen."

- James H. M. Sprayregen, Kirkland & Ellis LLP

#6

Still from *Toy Story*, directed by John Lasseter (1995; Pixar Animation Studios).

In a restructuring, you always need to have a plan partner.

- Daniel H. Golden, Akin Gump Strauss Hauer & Feld LLP

#5

Debevoise & Plimpton

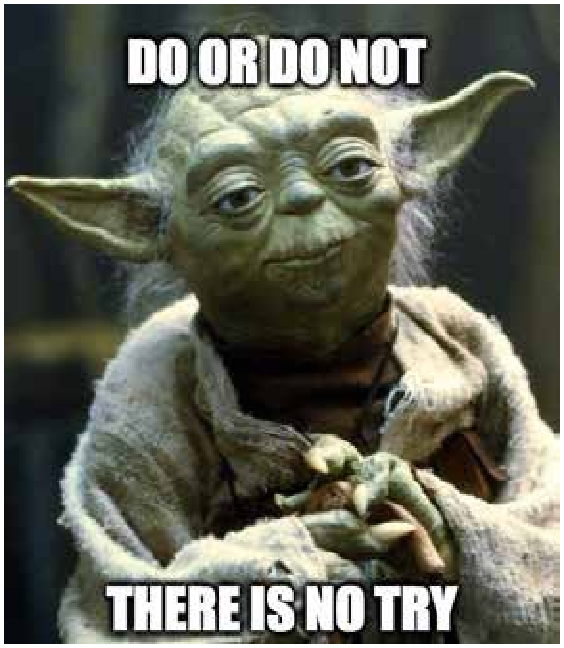
Still from *Taken*, directed by Pierre Morel (2008; Twentieth Century Fox).

Network with the people you want to know, not the ones you think you should know.

- Margaret Cannella, JPMorgan Chase & Co.

#4

Debevoise & Plimpton



Still from *The Empire Strikes Back*, directed by Irvin Kershner (1980; Lucasfilm).

"Be the guy who does his job…even when no one is looking and no one will know the good ideas came from you.

If you do that, not only the next job, but your career, will take care of itself."

- Preet Bharara, Former U.S. Attorney for the Southern District of New York

#3

Debevoise & Plimpton

"Sometimes partners just have to trust each other. It's that simple."

- Steven R. Gross, Debevoise & Plimpton LLP

#2

Debevoise & Plimpton

If you don't do something that makes you sick to your stomach with fear at least once a month, you're not learning.

- Leslie Moore, Deloitte Australia

#1

Debevoise & Plimpton

“You just have to #$@&*!-ing work harder than anyone else.”

- Daniel M. Aronson, Evercore Partners

363 Version 2.0: It's Time for an Upgrade in Sale Cases

Steven K. Kortanek
Drinker Biddle & Reath, LLP
Wilmington Delaware

I. Bringing Chapter 11 Back to 363 Cases

The prevalence of section 363 sale cases for middle-market and lower-middle-market chapter 11 cases shows no signs of abating. That's not necessarily a bad thing in and of itself. Yet an expedited 363 sale process both constrains the debtor-in-possession's fiduciary options and provides challenges for an effective case exit. For the large swath of 363 cases on the smaller side of the value spectrum (roughly $50 million or less in stalking horse purchase price value), the chapter 11 toolkit has been largely shelved for years as the 363 trend continues. The average stay in chapter in recent years, compared with historical norms (*see* Attachment A), is profoundly shorter.

Structured dismissals developed as an innovation to provide case exits in the many 363 cases where a traditional plan exit process did not appear viable. Structured dismissals had underpinnings in (and were in part designed to implement) the kind of extra-estate, priority-skipping/gifting settlements permitted by the line of cases following *In re SPM Manufacturing Corp.*, 984 F.2d 1305 (1st Cir. 1993).[1] As *Jevic* wound its way to the Supreme Court, and certainly in our post-*Jevic* environment now, some incremental improvements to 363 cases have started to evolve as priority-skipping structured dismissal orders are now impermissible. To be sure, the Supreme Court indicated "interim" priority-skipping orders are alive and well in chapter 11 cases – such as necessity-of-payment doctrine orders and, indeed, even *SPM*-style gifting settlements generally. We now need to move the dial much more toward a chapter 11 plan case exit to adjust course in the wake of Jevic.

One incremental improvement in 363 cases is the growing trend of locking in a "wind-down" fund for 363 cases. This innovation, among others, should be part of a broader package of dusting off and burnishing up chapter 11 tools to provide a streamlined and effective sale case process. Such an approach will make 363 cases look more like chapter 11 cases rather than high-priced sheriffs' sales. Wind-down funds and a streamlined plan-based exit should be the cornerstone of the "price of admission" to using the chapter 11 process to restructure via an asset sale.

The upgrade now called for is to materially expand the share of 363 cases that end up with confirmed plans. This can be done with only a slight increment in DIP financing in cases generally, and even without an increase in those more "enlightened" 363 cases of late with adequate wind-down funding. Many readers will find familiar the "price of admission" didactic as the frequent and authoritative utterance of Judge Peter J. Walsh. The statement embodies the

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[1] See, e.g., In re TSIC, Inc., 393 B.R. 71 (Bank. D. Del. 2008).

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key trade-off for a secured lender whose collateral will be efficiently sold in a 363 sale case: in order to obtain that benefit, the chapter 11 case must be adequately funded and run in a responsible way. The key components of the "price of admission" rule were embodied in the still-authoritative 1998 letter issued by Judge Walsh (Attachment B), now nearing its 20-year anniversary. The time is right to think about the 1998 Walsh Letter, post-*Jevic* momentum, and increasing recognition of wind-down obligations, and to improve a plan-based framework for 363 cases.

II. Setting the Stage for a Dual-Track Plan and 363 Process

A. The 363 Exigency and Timeline

For the typical 363 case, the typical foundations are (i) a binding stalking horse asset purchase agreement, which is subject to higher and better offers in (ii) a sale timeline of approximately 45 to 55 days from the petition date to the deadline for the submission of qualified topping bids, (iii) in a case funded by an appropriately-sized debtor-in—possession ("DIP") financing facility. Some insight into 363 sale process timelines can be gained from the comparables exhibit at Attachment C. These comparables are show timeline in recent credit bid 363 cases involving a junior lienholder – itself a meaningful subset of recent 363 cases.

Committees will often push to extend 363 sale timelines. Ultimately, there does appear to be consensus that in a sale process timeline is a balancing between a sufficient length of time for investment banking professionals to achieve an effective marketing process, while not setting a timeline that is too short or too long. The "burn rate" of most 363 cases has to be funded from a DIP facility and/or use of a secured lender's cash collateral, which is a key part of the balancing determination required for a sale process timeline. These considerations are the primary legitimate, above-board factors, and do not address what sometimes comes into the equation: defensive, barriers-to-entry considerations that an incumbent proposed buyer may seek to impose. The latter sometimes come into play, but in most 363 sales, there are indeed principled drivers of the sale process timeline.

With the "market" for sale process timelines being fairly well established, it is that timeline that should drive an upgraded 363 sale case process. A respectable goal is to take the typical 363 case that sees the sale close about 60 days into the case, and turn it into a case with a plan confirmed 90-100 days from the petition date.

B. A "Big Idea" – If Only Incremental – Front-Loading the 363 Case

Experience teaches that setting early DIP Facility budget expectations is a key element to any successful chapter 11. This is particularly true in a 363 case. In many 363 cases, the DIP may terminate at closing of the 363 sale. There's typically no "going back to the well" to seek DIP Facility budget line item increases once the chapter 11 case is underway.

There is considerable momentum and urgency in the preparation of a chapter 11 case for filing, carrying into the first weeks of the case. That momentum should be used to size professionals' retainers, the DIP budget and work plan to front-load the case as much as possible. It is merely incremental to the chapter 11 case investment to take the key early steps needed to set the stage for a plan-based exit to a 363 case. This includes a bar date motion including section 503(b)(9) claims and administrative claims, early advance work on the schedules and statement of financial affairs, and drafting of the key company background and historical information for both disclosure statement and first day declaration purposes. There should also be early analysis of basic liquidation plan modelling and issue-spotting, such as determining ways to have an impaired, non-insider accepting class. Front-loading these tasks fulfills several goals. For one thing, they increase optionality in the path of the chapter 11 case that is arguably key to meeting the fiduciary obligations of the debtor in possession. Having the option to pivot quickly to a reorganization plan by having the key procedural elements in place (bar date, early schedules, etc.) is too often not a viable option for the debtor in a typical 363 case. There's always a "fiduciary out" for a debtor in any otherwise binding transaction such as a stalking horse 363 purchase agreement. But if the debtor has painted itself into a corner so that the 363 sale hearing is the only option, the window for a fiduciary out is closed for practical purposes.

The development in a growing segment of 363 cases of a wind-down amount DIP line item is an essential element of setting DIP Facility expectations. Part of the DIP "sizing" responsibility for the Debtors' financial advisor, or Chief Restructuring Officer/legacy management is to build the components of an appropriate wind-down amount line item. Key elements include final tax returns (typically at least two years of returns), 401k termination costs, records retention and destruction costs, and, of course, the work of professionals and residual management to wind-down and exit the chapter 11 case.

Although the increasing incidence of setting a fixed wind-down amount is a very positive response to the 363 wave, arguably in most cases the parties (chiefly the debtor and the committee) are loading too many wind-down tasks into that final wind-down fund. For example, placing most or all chapter 11 plan of liquidation drafting work in that wind-down phases, after the 363 sale has closed, is problematic. For one thing, back-loading that key wind-down task inevitably leads to delay between the sale closing and achieving a responsible plan-based exit. It will often end up taking several weeks to bring forward a plan, disclosures for the plan (combined or separate) and the notice and balloting packages. Earlier preparation, before the 363 closing, is a simple and important improvement to today's process, and will serve to avoid these kinds of delays.

Front-loading chapter 11 wind-down work before the 363 closing, such as chapter 11 plan drafting, is also something that is easier to achieve as part of the DIP Facility sizing. Having this work done to a meaningful extent while the DIP Facility is in place serves an important purpose in terms of DIP lender expectations. It averages out the work and allows efficiencies such as efficiently carrying over knowledge gained from schedules preparation to plan-related disclosure.

III. Cheaper, Better, Faster Plan Exits

A. The (Low) Section 1125(b) Hurdle to a High-Speed Process

A number of judges in Delaware, by way of example, have approved plan processes in 363 cases that run as little as 35 days in length from plan filing to confirmation. For some reason this pace has seemed heretical to some. The Office of the United States Trustee, at least in Delaware, continues to press objections to efforts by debtors to pursue such expedited combined confirmation/disclosure statement processes. The arguments have included a contention that case stakeholders should be stuck with the 70 day-plus, two hearing disclosure statement and confirmation process designed for large, complex reorganization cases. Fundamentally, the U.S. Trustee has contended that section 1125 of the Bankruptcy Code does not permit the flexibility for the Court to undertake a cursory initial review of a proposed disclosure statement, or the disclosure components of a combined disclosure statement and plan, and allow solicitation without the full notice typically required for a formal disclosure statement process.

The practical reality is the preliminary approval required by Section 1125(b) can be obtained rather easily. If a debtor is not a "small business debtor" as defined in Section 101(51D) of the Bankruptcy Code, the automatic procedure for conditional approval of a disclosure statement under Section 1125(f) is not available. Disclosure statements in chapter 11 cases that are not small business cases is governed by Section 1125(b). That section states "An acceptance or rejection of a plan may not be solicited ... unless, at the time of or before such solicitation, there is transmitted to [creditors] the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information."

To be sure, a debtor or other plan proponent can easily get sideways with the proscription of Section 1125(b) by undertaking any form of solicitation before entry of a conditional approval order. In *In re Signature Styles, LLC*, Case No. 11-11732 (KG), the court held that the debtor violated section 1125(b) by filing and mailing proposed disclosure statement and plan, even with an expedited hearing days thereafter to seek conditional approval of the disclosure statement. Judge Gross called it a "dangerous precedent if the parties are going to solicit before they have approval." *In re Signature Styles, LLC*, Case No. 11-11732 (KG), Docket No. 489, Dec. 12, 2011 Hearing Trans. at 9-10. The U.S. Trustee's memorandum of law in *Signature Styles* (Attachment D) is instructive.

Turning then to the procedural mechanisms to run a high-velocity plan process, the bankruptcy court has broad discretion to authorize just such a process. Section 102(1) of the Bankruptcy Court defines the phrase "after notice and a hearing" as "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." Section 102(1)(B) states that after notice and a hearing, "authorizes an act without an actual hearing" in certain circumstances.

Section 105(d)(2)(B)(vi) authorizes the bankruptcy court to combine a hearing on approval of a disclosure statement with the confirmation hearing. Thus a "105(d)(2) order" is the essential element of a streamlined plan process. While Section 1125(b) is clearly an inflexible hurdle, conditional approval is a relatively easy one to meet – and on an expedited basis.

B. The Time Line and Process for the 35-Day Plan Process

Attachment E is a recent submission of a proposed section 105(d)(2)(B)(vi) order in the 363 case of Sundevil Power Holdings, LLC in Delaware. The proposed order was teed up as a proposed case status conference topic at a regularly scheduled hearing immediately following closing of the debtor's 363 sale. The debtor had met and conferred with counsel to the U.S. Trustee and their DIP lenders with respect to the proposed order. At the status conference, the debtor reported that the proposed plan and disclosure statement were ready to file the very next day, along with proposed solicitation procedures (including forms of notices and ballots). The debtors requested that an expedited hearing be scheduled in approximately one week to consider conditional disclosure statement approval and approval of proposed balloting procedures.

The one-week spacing between plan and disclosure statement filing and the hearing to consider conditional disclosure statement approval was an essential element of the 35-day plan process. The timing allowed a reasonable opportunity for parties in interest to raise any issues with the proposed balloting procedures, and even to some extent any threshold issues with the proposed disclosure statement. Most importantly, the timing allowed solicitation of the proposed plan with the full required length of notice to creditors of the hearing on final disclosure statement approval and confirmation of a plan. The order entered by the Court in Sundevil conditionally approving the disclosure statement and authoring solicitation is Attachment F hereto. A recap of the Sundevil timeline is Attachment G here.

If plan work is sufficiently front-loaded in a 363 case, and indeed if drafting is made a periodic part of the pre-sale closing workflow, the stage is set for a controlled and efficient exit to the case.

Attachment A

Historical Days in Chapter 11

(UCLA-LoPucki Bankruptcy Research Database (BRD) http://lopucki.law.ucla.edu/)

Days in chapter 11

Year filed	Mean	Median	St. Dev.	Frequency
1980	1,008	1,157	220	3
1981	1,403	1,343	487	5
1982	1,084	1,029	513	13
1983	827	865	249	6
1984	823	765	215	6
1985	981	1,069	531	7
1986	891	904	643	11
1987	637	499	275	8
1988	732	625	252	12
1989	959	596	673	16
1990	732	691	377	28
1991	649	462	557	41
1992	358	294	329	31
1993	349	274	387	25
1994	399	287	371	12
1995	684	509	593	19
1996	460	203	492	16
1997	575	248	706	17
1998	512	329	635	31
1999	612	429	649	45
2000	615	477	451	80
2001	628	433	682	97
2002	417	299	396	83
2003	606	403	660	56
2004	340	267	308	29
2005	520	495	394	25
2006	475	314	526	14
2007	487	354	663	13
2008	593	388	484	35
2009	399	307	409	83
2010	334	275	289	28
2011	331	307	188	22
2012	323	309	192	24
2013	170	111	159	24
2014	293	204	220	17
2015	302	248	204	25
2016	164	134	111	34
2017	89	88	15	4
Total	517	380	518	1,045

Attachment B

1998 Walsh Letter

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SENT BY:Xerox Telecopier 7020 ; 4- 3-98 ; 5:19PM ; OFFICE #3025736174→ 302 656 2769;# 2

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

824 MARKET STREET
WILMINGTON, DE 19801
(302) 573-6272

April 2, 1998

RE: First Day DIP Financing Orders

Dear Delaware Bankruptcy Counsel:

This is a follow-up to our session of March 11, 1998, where, at the prompting of Judge McKelvie, we discussed the need for improving the DIP financing orders being submitted at first day hearings. At that meeting, I gave a number of examples of provisions in several orders that I thought were either unnecessary, overreaching, or just plain wrong. In an effort to improve the content of first day DIP financing orders, I volunteered to comment in writing on the forms and to identify a number of terms or provisions in those orders that I believe should be avoided.

The following items, in no particular order of priority (except as to the first item), are not intended as immutable rules that I have on the matter, and certainly I have no authority to speak for the other judges on these matters, but I thought if we could shorten and eliminate some of the more objectionable features of proposed first day DIP financing orders, we could improve the first day proceeding. Needless to say, however, I think it is not practicable to have a blanket set of prohibitions, given the numerous variations in the lending arrangements and the prepetition relationships between the debtor and the lender(s).

1. Many of the proposed orders are just too verbose and cover unnecessary matters. It is not necessary for the order to recite, even in summary fashion, the major provisions of the loan documents. For example, the following is a portion of a paragraph included in a recent DIP financing order, which obviously paraphrases what the loan document says on this particular matter:

> All advances and other extensions of credit and financial accom[m]odations shall be made solely on the terms and conditions of, and pursuant to, the Postpetition Loan Agreement and the other Postpetition Loan Documents, shall be evidenced by the Lenders' books and records, and shall be due and payable as provided in those agreements. The Lenders shall have no commitment to make any advances or other extensions of credit or financial accom[m]odations, and may, at any time, refuse to make advances, extensions of credit, or other financial accom[m]odations and may exercise their rights and remedies pursuant to the Prepetition Loan Agreement, the Postpetition Loan Agreement, and this Order upon an Event of Default as provided in the Postpetition Loan Agreement, including, without limitation, the incurrence by the Debtors of any liabilities above those approved in the "Budget" (as defined herein) appended hereto as Exhibit B.

If the DIP financing order authorizes the debtor to enter into the financing pursuant to the loan documents, it is simply not necessary for the order to restate a lot of the major terms of the financing. (Indeed, most of the above-quoted statement states the obvious for the type of loan transaction that we see on the first day.) The motion itself should spell out the terms that are essential to an understanding of the deal: maximum borrowing, interim borrowing limit, borrowing conditions (e.g., percentage of inventory value), interest rate, maturity, events of default, use of funds limitations, collateral, and/or priority, etc.; but I do not see that it is necessary to get into a lot of details on these in the order. Of course, the order should identify those sections of the Bankruptcy Code designed to protect the estate and/or creditors generally that are being limited or abridged in any manner by the terms of the loan documents.

2. Do not incorporate into the order specific sections of the loan documents without a statement of the section's import. In a recent case the proposed order contained a decretal paragraph regarding events of default that specifically referenced about a dozen particular sections of the loan agreement and tied them into the issue covered by the decretal paragraph. It is simply unrealistic to expect that I can fully read and digest all the provisions of the loan documents in the few hours those documents are in my possession leading up to the first day hearing. Reciting specific ties between the terms of the order and particular terms or provisions of the loan agreement is something that under most circumstances on the first day I cannot comfortably append my signature to.

3. Given the limited amount of time we have to review the first day motions prior to the hearing and given the substantial amount of paperwork presented, particularly the DIP financing motion with the loan documents and the related order, it is not realistic to have a provision in the order that recites that the Court has "examined" all the loan documents, or that the Court "approves" all the terms and provisions of the loan documents, or language of similar import. An egregious example in this regard reads: "The provisions of the Postpetition Loan Agreement and other Postpetition Loan Documents are hereby approved and by this reference incorporated herein as a part of this Order." Remember, the Court is authorizing the debtor to borrow money on basic terms that appear reasonable under the expedited circumstances; it is not placing its imprimatur on the multiple terms and conditions of the loan documents.

4. Many of the proposed orders contain lengthy recitations of findings that are preambles to the decretal portion of the order. Given the fact that at most first day hearings only the debtor is heard, it is somewhat presumptuous, and in many cases unduly aggressive, for counsel to hand up an order that sets forth detailed, and in many cases nonessential, findings by the Court

regarding prepetition deals, relationships, and understandings of the parties. Most of these findings are based on lengthy recitations in the motion papers. It seems to me, given the limited nature of the first day hearing, that most of these "findings" would better be recited under a heading of "stipulations" between the debtor and the lender. Please note, if the stipulation approach is used, do not put further back in the order a decretal statement that says something to the effect that all the terms and provisions of the subject order constitute an order of the Court. By its nature the order will be acknowledging the stipulations, and of course, appropriate court findings will be a part of the order.

5. The order should not state that parties in interest have been given "sufficient and adequate notice" of the motion. Nine times out of ten this is simply not true. Rule 4001(c)(2) contemplates an expedited hearing with little or no notice (at least not the type of notice that would be sufficient to prepare for an effective participation by third parties). Consequently, the order should simply recite that the hearing is being held pursuant to the authorization of Rule 4001(c)(2) and recite to whom and when the notice was given.

6. Given the limited nature of the hearing on the first day, the findings that are necessary for the § 364(e) protection afforded the lender can appropriately be expressed in language such as: "Based on the record presented to the Court by the Debtor, it appears that . . . ."

7. Absent exigent circumstances, neither the loan documents nor the order should give the lender a lien position on avoidance actions.

8. While, in order to give the prepetition/postpetition creditor protection typically demanded, it is appropriate for the debtor to acknowledge the validity, perfection, enforceability, and nonavoidability of the prepetition indebtedness and perhaps waive any lender liability claims, this provision should preferably be in the form of a stipulation and should be limited to the debtor so that it is not binding on the estate, the committee, or a trustee.

As discussed below, a time limit with respect to nondebtor challenges to the prepetition secured position may be appropriate.

9. Where a DIP financing facility includes the use of the prepetition creditors' cash collateral, adequate protection in the form of a substitute lien on postpetition collateral is appropriate to the extent there is a diminution in the value of the prepetition collateral, but such a provision should not include language such as the following: "[T]he Debtors' use of cash collateral pursuant to this Order or otherwise is hereby deemed to result in a dollar-for-dollar decrease in the value of the Prepetition Collateral . . . ."

10. The debtor's obligation to reimburse the lender for costs and expenses, including attorneys' fees, etc., should be expressed in terms of "reasonable" costs and expenses and such reimbursement obligation should not apply to the lender's defense to challenges by a committee to the lender's prepetition security position.

11. Carveouts for professional fees should not be limited to the debtor's professionals, but should include the professionals employed by any official committee. While the carveout for professionals of any official committee may appropriately exclude work related to the prosecution of an objection to the prepetition secured position of the lender, that exclusion should not encompass any prechallenge investigative work by the professionals.

12. The carveout for committee professionals and the limited period to challenge the lender's prepetition secured position is important. In my view it is the price of admission to the bankruptcy court to obtain the benefits of preserving the assets of the estate, which preservation typically first benefits secured parties.

13. The period of time during which the creditors' committee should have the right to challenge the lenders' prepetition position should generally be at least sixty days from the appointment of the committee. Unless the case is on a fast track, this period should be ninety days.

14. The following provision is patently objectionable:

> Nothing contained in this Order shall be deemed a finding with respect to adequate protection (as that term is described in Section 361 of the Code) of the interest of the Lenders in the Prepetition Collateral, but shall [sic] the Lenders' and security interests in the Prepetition Collateral require adequate protection, <u>Lenders shall be deemed to have requested and shall be deemed to have been granted</u> such adequate protection as of the Petition Date or such later date when such liens or security interests first were not adequately protected. [Emphasis added.]

15. The following provision is also patently objectionable:

> Notwithstanding anything to the contrary contained in this Order or in any of the Postpetition Agreements, the commitment of the Lenders to make loans, extend credit, and grant other financial accommodations to the Debtors shall <u>terminate immediately</u> and automatically, without notice of any kind, <u>upon the institution by any person or entity of any action seeking to challenge</u> the validity or priority of (or to subordinate) any of the Lenders' liens or security interests on any of the Prepetition Collateral. [Emphasis added.]

16. I know of no basis for including in a financing order a finding (recently proposed) such as the following: "The Debtor's other secured creditor(s) is/are adequately protected from any adverse consequences which might result from the consummation of the proposed post-petition secured financing between the Debtor and Lender."

17. In reciting the protection afforded the lender by § 364(e), verbose and redundant provisions such as the following are to be avoided. Furthermore, in the following quoted material the underscored language suggests to me that prepetition debt was intended to be afforded the § 364(e) protection. No such effect would be proper.

> If any or all of the provisions of this Order or the DIP Financing Agreement are hereafter modified, vacated or stayed by subsequent order of this Court or by any other court, such stay, modification, or vacation shall not affect the validity of <u>any debt</u> to Lender that is or was incurred pursuant to this Order <u>or that is or was incurred prior to the effective date of such stay, modification, or vacation</u>, or the validity and enforceability of any lien, security interest or priority authorized or created by this Order or the DIP Financing Agreement and notwithstanding such stay, modification, or vacation, any obligations of the Debtor pursuant to this Order or the DIP Financing Agreement arising prior to the effective date of such stay, modification or vacation shall be governed in all respects by the original provisions of this Order and the DIP Financing Agreement, and the validity of any such credit extended or lien granted pursuant to this Order and the DIP Financing Agreement is subject to the protections afforded under 11 U.S.C. § 364(e). [Emphasis added.]

18. Provisions that operate expressly or as a practical matter to divest the debtor, or any other party in interest, of any discretion in the formulation of a plan are not viewed with favor. I believe the lender can appropriately protect itself without attempting to dictate what may happen with respect to a plan. For example, the lender can certainly include a loan provision calling for repayment in full on the plan's effective date.

19. I often find that the record established at the hearing, either by affidavit or live testimony, is rather thin relative to the detailed findings that the Court is called upon to make. It is important that the affidavit or the live witness (either by testimony or, if appropriate, by proffer) offered in support of the motion be specific and complete regarding the findings required with respect to §§ 364(c) and (e) and Rule 4001(c)(2).

20. The lifting of the § 362 automatic stay upon the event of a default should be conditioned upon providing three to five business days' notice to the debtor, the U.S. Trustee and any official committee.

21. The order should be worded in a manner that makes it clear that, whatever the terms of the interim order, the Court is not precluded from entering a final order containing provisions inconsistent with or contrary to any of the terms of the interim order, subject, of course, to the lender's § 364(e) protection with respect to monies advanced during the interim period. Just by way of example, should the Court deem it appropriate, given a strong showing at the first day hearing, to allow a waiver of § 506(c), if the subsequently appointed committee presents a persuasive argument, the Court should revisit the matter and be guided by what it hears at the final hearing.

The items discussed above are not intended to be a complete list of the matters that need to be addressed on the issue of first day DIP financing orders. For the most part, they are derived from the latest four or five first day DIP financing orders that I have had before me. If I were to go back over the last few years and review other such orders, I am sure that I could pick out additional provisions that could be considered objectionable.

In any event, I hope that this communication will serve to give counsel sufficient incentive to make the proposed DIP financing orders more palatable while at the same time preserving those elements of the orders that the lending institutions reasonably believe are essential. Pérhaps further dialogue on the matter would be appropriate at a gathering similar to that of the March 11 session.

Very truly yours,

Peter J. Walsh

PJW:vw

cc: Chief Judge Joseph J. Farnan, Jr.
Judge Sue L. Robinson
Judge Roderick R. McKelvie
Patricia A. Staiano, United States Trustee

Attachment C

Sale Process Timeline Comparables

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Emerald Capital Advisors

Katy Industries, Inc. | Bid Protection Comps

The following selected bid protections were provided to Stalking Horse Bidders whose bid was comprised (in part, or in whole) of a credit bid of funded debt. Each of the Debtors filed for Chapter 11 bankruptcy after February 1, 2015, in the District of Delaware with total liabilities ranging from $20.0 million to $200.0 million and pursued a sale of assets pursuant to section 363 of the Bankruptcy Code.

($'s in 000's)

Debtor	Filing Date	District Filed	Est. Total Liabilities	Purchase Price	Approx. Prepetition Marketing Process (in Days)	Days from Petition to Bid Deadline	Buyers Relationship to Debtor	Initial Incremental Overbid	Initial Incremental Overbid as % of Purchase Price	Break-Up Fee	Expense Reimbursement	Bid Protections as % of Purchase Price
Sungevity, Inc.	3/13/2017	DE	$168,900.0	$53,000.0	50	29	Pre/Post Lender and Insider	$250.0	0.5%	$500.0	$500.0	1.9%
Chieftain Sand Proppant, LLC	1/9/2017	DE	72,751.0	8,236.0	116	64	Pre/Post Petition Lender	250.0	3.0%	0.0	0.0	0.0%
Delivery Agent, Inc.	9/15/2016	DE	90,910.0	18,910.0	120	57	Pre/Post Petition Lender	100.0	0.5%	200.0	150.0	1.9%
SynCardia Systems, Inc.	7/1/2016	DE	48,000.0	20,363.0	260	74	Pre/Post Petition Lender	250.0	1.2%	610.9	0.0	3.0%
SDI Solutions LLC	3/13/2016	DE	20,431.8	17,000.0	119	57	Pre/Post Petition Lender	150.0	0.9%	0.0	0.0	0.0%
IMRIS, Inc.	5/25/2015	DE	60,900.0	19,000.0	99	53	Pre/Post Petition Lender	100.0	0.5%	0.0	0.0	0.0%
ProNerve Holdings, LLC	2/24/2015	DE	48,472.0	35,000.0	51	41	Pre/Post Petition Lender	150.0	0.4%	0.0	270.0	0.8%
High			**$168,900.0**	**$53,000.0**	**260**	**74**		**$250.0**	**3.0%**	**$610.9**	**$500.0**	**3.0%**
Mean			**72,909.3**	**24,501.3**	**116**	**54**		**178.6**	**0.9%**	**187.3**	**131.4**	**0.9%**
Median			**60,900.0**	**19,000.0**	**116**	**57**		**150.0**	**0.5%**	**--**	**--**	**0.8%**
Low			**20,431.8**	**8,236.0**	**50**	**29**		**100.0**	**0.4%**	**--**	**--**	**0.0%**
KATY INDUSTRIES, INC.	**5/14/2017**	**DE**	**$100,000.0**	**$62,582.0**	**10[(1)]**	**47**	**Pre/Post Lender and Insider**	**$1,000.0**	**1.6%**	**$1,750.0**	**$350.0**	**3.4%**

Notes

(1) Per the Declaration, Lincoln was retained on March 16, 2017. Due to certain circumstances, including liquidity constraints, Lincoln contacted just 17 parties who might be interested in acquiring the Company *and* providing a Junior DIP. Lincoln finalized the marketing materials and initiated the sale process on May 4, 2017.

Attachment D

Signature Styles Objection

89147437.1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re SIGNATURE STYLES, LLC, *et al.*, Debtors.	Chapter 11 Case No. 11-11733 (KG) (Jointly Administered) **Hearing Date: December 2, 2011 at noon** **Objections Due: December 2, 2011 at 9 a.m.**

UNITED STATES TRUSTEE'S (I) OBJECTION TO EMERGENCY MOTION OF THE DEBTORS AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR THE ENTRY OF AN ORDER (A) PRELIMINARILY APPROVING DISCLOSURE STATEMENT, (B) APPROVING PROCEDURES FOR SOLICITATION AND TABULATION OF VOTES TO ACCEPT OR REJECT PLAN OF LIQUIDATION, (C) APPROVING THE FORM OF BALLOT AND SOLICITATION MATERIALS, (D) ESTABLISHING VOTING RECORD DATE, (E) FIXING THE DATE, TIME AND PLACE FOR THE COMBINED DISCLOSURE STATEMENT AND CONFIRMATION HEARING AND THE DEADLINE FOR FILING OBJECTIONS THERETO AND (F) APPROVING RELATED NOTICE PROCEDURES AND (II) PRELIMINARY OBJECTION TO THE DISCLOSURE STATEMENT, TO CONFIRMATION OF THE PLAN, AND TO THE SOLICITATION PROCEDURES UTILIZED BY THE PLAN PROPONENTS

Roberta A. DeAngelis, the United States Trustee for Region 3 ("U.S. Trustee"), by and through her undersigned attorneys, hereby (I) objects to the Emergency Motion Of The Debtors And Official Committee Of Unsecured Creditors For The Entry Of An Order (A) Preliminarily Approving Disclosure Statement, (B) Approving Procedures For Solicitation And Tabulation Of Votes To Accept Or Reject Plan Of Liquidation, (C) Approving The Form Of Ballot And Solicitation Materials, (D) Establishing Voting Record Date, (E) Fixing The Date, Time And Place For The Combined Disclosure Statement And Confirmation Hearing And The Deadline For Filing Objections Thereto And (F) Approving Related Notice Procedures (the "Motion"), and (II) sets forth preliminary objections (the "Preliminary Objections") to the disclosure statement (the "Disclosure Statement") and to confirmation of the plan (the "Plan") filed by the Debtors and the official committee of unsecured creditors (the "Committee," and collectively with the Debtors, the "Plan Proponents"), [Dkt. Nos. 453 and 454]. In support, the U.S. Trustee states as follows:

PRELIMINARY STATEMENT

1. On November 18, 2011, the Plan Proponents filed the Plan and Disclosure Statement, together with ballots and notices, in the above-referenced case. The following day, without seeking, let alone obtaining, Court approval of the Disclosure Statement or form of ballots, notices or solicitation procedures, the Plan Proponents had the Debtors' claims agent mail out solicitation packages, including the unapproved Disclosure Statement, ballots and notices, to the Debtors' creditors.

2. By soliciting votes without an approved disclosure statement, the Plan Proponents directly violated the plain language of § 1125(b) of the Bankruptcy Code (the "Code"), which requires that any solicitation of votes on a plan be accompanied by a disclosure statement that has been approved by the Court, after notice and a hearing, *prior* to any solicitation. The Plan Proponents attempt to remedy their violation of § 1125(b) by filing the Motion more than a week after sending out solicitation packages, seeking what is in essence retroactive preliminary approval of the Disclosure Statement. The Plan Proponents ignore that, under § 1125(b) of the Code, approval of a disclosure statement must be obtained before – not after – solicitation has begun.

3. The Plan Proponents claim that they followed their procedure in order to help the consumer creditors of the Debtors, namely those creditors holding gift cards or merchandise credits. The Plan Proponents assert that they wanted to alert the consumer creditors that, after being denied by the Debtors and their lender the right to use their gift cards

and merchandise credits for half a year, they now have the opportunity to use those cards and credits for a limited period of time (or they may elect to receive a distribution from the estate instead). The Plan Proponents further assert that they could not wait to get approval of the Disclosure Statement before beginning solicitation, as the Code requires them to do, because the holiday season is approaching, and the consumer creditors may want to use their gift cards or credits in the next few weeks.

4. The excuses the Plan Proponents offer cannot justify violation of the Code. In any event, the excuses ring hollow. The Plan Proponents had the ability to alert the consumer creditors to the fact that they could now use their cards and credits without, simultaneously, soliciting votes on the Plan.[1] In addition, if there really was time urgency, the Plan Proponents could have filed the Plan and Disclosure Statement long ago, as the sale of substantially all of the Debtors' assets closed on September 13, 2011 (*see* Motion, ¶ 9). At the very least, the Plan Proponents could have filed all solicitation documents a week or two earlier, and simultaneously filed a motion along the lines of the current one, seeking preliminary approval of the Disclosure Statement, ballots, notices and solicitation procedures, on shortened notice if necessary, in advance of undertaking any solicitation. Such procedure was followed in another case in this Court, *BT Tires*, Case No. 09-11173 (Bankr., D. Del.) (CSS), Dkt. Nos. 438, 439, 440. Counsel for both the Debtor and the Committee in the present case are well aware of the *BT Tires* procedure because both firms (including certain of the individual attorneys involved in the present case) were counsel to parties in interest in *BT Tires*. However, in the present case the Plan Proponents chose not to follow the procedure

[1] The Plan Proponents' claim that they acted in furtherance of the interests of the consumer creditors is also belied by the Plan's treatment of those consumer creditors, which, with respect to the priority gift card holders, further violates their rights under the Code, as detailed below.

used in *BT Tires*, and instead decided to solicit votes with no Court approval, and no opportunity for the U.S. Trustee or any other party in interest to object in advance of the solicitation and have that objection heard by the Court, as is their right under the Code.

5. The Plan Proponents assert in the Motion (¶ 4) that they "used their best efforts to keep the Office of the United States Trustee informed of the proposed process." The only information provided by the Plan Proponents to the Office of the United States Trustee ("OUST"), however, were the general statements made at Court hearings in September, 2011, and at the hearing on November 17, 2011, one day before the Plan Proponents filed the Plan and Disclosure Statement, and two days before the solicitation packages were mailed. At that Court hearing, counsel for the U.S. Trustee indicated that she had yet to see the Plan or Disclosure Statement, and reserved all rights to object to whatever procedures the Plan Proponents intended to use. Debtors' counsel agreed that all rights were reserved. In addition, Debtors' counsel asserted that the Plan Proponents would work with counsel for the U.S. Trustee to get any issues resolved. The following day, November 18, counsel for the U.S. Trustee communicated with Debtors' counsel by telephone and voice mail, indicating that the Plan Proponents should follow the procedures used in *BT Tires*, that the OUST had issues with certain provisions of the Plan and Disclosure Statement and needed additional time to fully review the papers, and that no solicitation packages should be sent out. Despite having had these communications with the OUST, the next day the Plan Proponents caused the Debtors' claims agent to send out solicitation packages to all voting classes.

6. In addition to all of the above, the Disclosure Statement should not be approved because it includes inaccurate – and therefore inadequate – information. The Disclosure Statement incorrectly describes the gift card class, which is a priority class, as

unimpaired, and therefore not entitled to vote, when such class is in fact impaired. Such impairment includes providing zero distribution to any gift card holder with a claim under $50 (which likely covers a significant percentage of gift card holders), requiring each gift card holder to fill out an additional form and return their gift card before being able to receive any distribution, and failing to provide distribution on the effective date of the plan, as required by 11 U.S.C. § 1129(a)(9)(B)(ii). In addition to failing to comply with § 1129(a)(9)(B)(ii) of the Code, the Plan also fails to comply with other requirements of §1129(a), including §1129(a)(1),(2),(3),(7), and (8). Therefore, the Disclosure Statement should not be approved for the additional reason that it proposes a Plan that is not confirmable as a matter of law.

7. The remedy for the Plan Proponents' violation of § 1125(b) of the Code is not retroactive approval of an inadequate Disclosure Statement that proposes an unconfirmable Plan, but rather designating as invalid all votes obtained through the improper solicitation. *See* 11 U.S.C. § 1126(e).

8. The U.S. Trustee objects to certain other aspects of the Motion, as detailed below.

9. In light of the above, the U.S. Trustee respectfully requests this Court to deny the Motion, deny approval of the Disclosure Statement and the solicitation procedures, and deny confirmation of the Plan.

JURISDICTION

10. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine the this objection.

11. Pursuant to 28 U.S.C. § 586(a)(3), the U. S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U. S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U. S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U. S. Trustee as a "watchdog").

12. Under 11 U.S.C. § 307, the U. S. Trustee has standing to be heard on the issues raised by this Motion.

BACKGROUND

13. On June 6, 2011 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

14. On June 17, 2011, the U.S. Trustee appointed an official committee of unsecured creditors.

15. Up until the sale of its assets in this bankruptcy case, the Debtor Signature Styles, LLC was a catalog and internet retailer of women's apparel, operating under the brand names of Spiegel, Newport News and Shape Fx. The other Debtor, Signature Styles Gift Card,

LLC, serviced gift card transactions for Signature Styles, LLC. A large amount of the Debtors' unsecured debt is held by consumer creditors, by way of gift cards and merchandise credits.

16. On the Petition Date, the Debtors filed a motion which sought, among other things, approval of the sale of substantially all of the Debtors' assets through a bidding and auction process (the "Sale Motion"). The stalking horse was an affiliate of the Debtors' secured lenders, which are funds related to Patriarch Partners Agency Services LLC ("Patriarch").

17. On September 7, 2011, the Court granted the Sale Motion, allowing the sale to the Patriarch affiliate. According to the Plan Proponents, the sale closed on September 13, 2011. *See* Motion, ¶ 9.

18. At the sale hearing on September 7, 2011, the Plan Proponents indicated that they anticipated being able to file a plan and disclosure statement by the end of September. Yet it was not until two months later, on November 18, 2011, that they filed the Plan and Disclosure Statement. Counsel for the U.S. Trustee first learned that the Debtors would be filing the Plan and Disclosure Statement just one day earlier, at a Court hearing on November 17, 2011, which primarily concerned a motion by Committee counsel relating to its fees. At that time, counsel for the U.S. Trustee reserved on the record all rights regarding whatever procedure the Plan Proponents intended to use to approve the Disclosure Statement and to confirm the Plan.

19. According to the affidavit of service [Dkt. No. 467] on November 19, 2011, the day after filing the Plan and Disclosure Statement, the Debtor's claims agent sent out the solicitation packages, and notice of the hearing on confirmation of the Plan and approval of

the Disclosure Statement by first class mail. A review of the service list shows that the vast majority of parties solicited served were individuals -- presumably consumers holding merchandise credits and gift cards. *See* Dkt No. 467, Ex. B and C.

20. The Disclosure Statement that was included in the solicitation packages states on the top of the first page that, "The Plan Proponents in these cases *are permitted* to distribute and have distributed this disclosure statement before its *final approval* by the bankruptcy court." Dkt. No. 454 (emphasis added). This statement is not true – there was no order permitting the Plan Proponents to distribute the Disclosure Statement before being approved by the Court, and the Code does not permit such procedure. Nor had the Plan Proponents obtained any preliminary approval of the Disclosure Statement at the time solicitation was made, as was suggested by the statement at the top of the Disclosure Statement.

21. The Plan classifies holders of gift cards into Class II.B, describing them as unimpaired, and indicating that their claims will be paid in full, although not on the effective date of the Plan. *See* Plan, § 1.2 (B). Moreover, in order to receive such treatment, a holder of a gift card must (1) have filed a timely proof of claim, (2) fill out a form, which will not be sent to them until after the effective date of the Plan, that requires each gift card claimant to elect between receiving a cash payment or using their gift card to purchase merchandise (although the latter option is available only through February 24, 2012), and (3) mail back their gift card with the election form. *See id.*; Disclosure Statement, § 3.2, under Class II.B.[2]

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[2] The Debtors scheduled all gift card claims as "contingent," and estimated those claims to exceed $11 million. *See* amended Schedule F to schedules of Signature Style Gift Cards, LLC, Dkt. No. 445. The Disclosure Statement indicates that there is only approximately $60,000 to $70,000 in allowed gift card claims. *See* Disclosure Statement, § 3.2. These are presumably the gift card holders that filed a proof of claim by the bar date. Thus,

22. The Plan classifies creditors that hold merchandise credits as Class III.B, and the Disclosure Statement states that such claimants shall receive an estimated recovery of 8 – 10% on their claims. *See* Plan § 1.3 (B); Disclosure Statement, § 3.2, under Class III.B. There is a proviso similar to that for the gift card class, requiring the holders of merchandise credits to complete an election form (which is included in their ballot) in order to receive any distribution. Unlike the gift card holders, the holders of merchandise credits are not required to turn in their merchandise credit cards or provide other physical evidence of the credit.

23. Although not set forth in the chart found at § 3.2 of the Disclosure Statement, a separate section of the Disclosure Statement, titled "De Minimis Distributions" provides that, "[t]he Debtors will not distribute Cash to the Holder of an Allowed Claim if the amount of Cash to be distributed on account of such Claim is less than fifty dollars ($50) in the aggregate." Disclosure Statement, § 3.8.2; Plan § 2.5. Such provision effectively means that many, if not most, of the gift card class and the merchandise credit class, all of whom are consumers, shall receive zero on their claims.[3]

24. The gift card creditors were not served with copies of the Plan or Disclosure Statement, because they are purported unimpaired under the Plan. Instead, on November 19, 2011, they were sent a Notice to Unimpaired Creditors of Hearing on Adequacy of Disclosure Statement and Confirmation of Joint Plan of Liquidation Filed by the Debtors and the Official Committee of Unsecured Creditors. *See* Aff't of Service, Ex. 467, and Dkt

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only approximately six-tenths of one percent of the consumers holding gift cards are included in the gift card class and eligible to receive any distribution.

3 The only holders of merchandise credit who are eligible to receive any cash distribution are those with claim at or more than $500. That is because the maximum recovery for the holders of merchandise credits is estimated at 10%. *See* Disclosure Statement, §3.2. Ten percent of $500 is $50. Thus, the claimant must have a claim of at least $500 to receive any recovery at all, as the Plan provides that no distributions of under $50 will be made.

No. 456. That notice informed the gift card holders that they were purported unimpaired and were not eligible to vote on the Plan. It also informed them that the gift card holder would receive a distribution under the Plan only if (a) they time filed a proof of claim, (b) their gift card exceeds $50, and (c) they submit an election form that will be sent after the Effective Date. The notice further stated that if the gift card holder did not return such election form within 30 days of the Effective Date, the gift card claim shall be deemed disallowed and the sole source of recovery shall be against the Purchaser, to purchase merchandise through February 24, 2012, after which time the card would be worthless. *See* Dkt. No. 456.

25. All notices sent by the Plan Proponents indicate that a hearing on the confirmation of the Plan and adequacy of the Disclosure Statement would take place on December 21, 2011, with an objection deadline of December 15, 2011.

ARGUMENT

A. Objection to Motion

26. Section 1125(b) of the Bankruptcy Code provides:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, *unless, at the time of or before such solicitation*, there is transmitted to such holder the plan or a summary of the plan, and *a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information*.

11 U.S.C. § 1125(b) (emphasis added).

27. The plain language of § 1125(b) makes clear that acceptance or rejection of a plan after the commencement of the case cannot take place without transmitting a disclosure statement to every person or entity whose vote the plan proponent is soliciting,

which disclosure statement was approved by the Court, after notice and a hearing, *prior* to solicitation. *Id*.[4]

28. As the Court of Appeals for the Third Circuit explained in *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996), "[o]nce the bankruptcy proceeding is underway, the debtor may not solicit approval of a plan of reorganization from a claim-holder unless '*at the time of or before such solicitation*, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.'" *Id.* at 362 (emphasis added), *quoting* 11 U.S.C. § 1125(b). The Third Circuit described these disclosure requirements as "*crucial* to the effective functioning of the federal bankruptcy system." *Id.* (emphasis added).

29. In *First American Bank of New York v. Century Glove, Inc.*, 81 B.R. 274 (D. Del 1988), *aff'd in part*, 860 F.2d 94 (3d Cir. 1988), the Plan Proponents moved to invalidate a creditor's vote rejecting the plan because another creditor had sent him a proposed competing plan, although no vote on such competing plan was solicited. The District Court declined to invalidate the vote, holding that "§ 1125(b) does not mandate prior court approval of all solicitation materials *so long as the disclosure statement has been approved as required*." *Id.* at 280 (emphasis added).

30. In affirming the District Court in part, the Third Circuit Court of Appeals in *Century Glove, Inc. v. First American Bank of New York*, 860 F.2d 94, 97 (3d Cir. 1988)

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4 Where, as here, "'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) *quoting Hartford Underwriters Insurance Co. v. Union Planters Bank N.A.*, 530 U.S. 1, 6 (2000).

explained that "[s]ection 1125(b) bars certain solicitation activities, regardless of the intent of the actor. Whether that provision is violated is not a matter left to the discretion of the bankruptcy court, but is a matter of fact and law." [5]

31. Applying the facts and law to the present situation, it is clear that the Plan Proponents violated § 1125(b) of the Code. The facts are established by the affidavit of service filed at Dkt. 467, which shows that the Plan Proponents sent out the Plan for solicitation on November 19, 2011, with the Disclosure Statement, ballots and notices. The docket establishes that, at the time of solicitation, there was no Court approval of the Disclosure Statement. The applicable law is set forth in § 1125(b) of the Code, which expressly prohibits solicitation of votes on a plan "unless, *at the time of or before such solicitation*, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. §1125(b) (emphasis added). As the Plan Proponents solicited votes without a disclosure statement that was approved, after notice and a hearing, prior to the solicitation, they violated § 1125(b) of the Code.

32. Violation of § 1125(b) of the Code cannot be remedied by approval of the Disclosure Statement at the confirmation hearing, because one of the express points of § 1125(b) is for the approval to take place *prior to* the solicitation.

33. There are only two narrow exceptions to the requirements of § 1125(b) of the Code. Section 1125(f) of the Code, which applies solely to small business cases, allows a

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[5] The Third Circuit's decision in *Century Glove* affirmed that portion of the District Court's decision that held that a creditor who sent the competing plan to another creditor did not violate 11 U.S.C. §1125(b). The Third Circuit did not decide whether the circumstances merited designation of the votes of any creditors, as there was not a final order on such matter. *See Century Glove,* 860 F.2d at 99, 103.

combined hearing on a plan and disclosure statement. Even under § 1125(f), however, "conditional" approval of the disclosure statement by the Court is required prior to solicitation. *See* 11 U.S. C. § 1125(f)(3). The other exception is a pre-packaged bankruptcy, in which the solicitation takes place prior to the filing of the petition. Section 1125(b) is inapplicable by its terms to pre-packaged cases, because it addresses solicitation "*after* the commencement of the case." *See* 11 U.S. C. § 1125(b)(emphasis added). As the present case is not a small business case or a pre-packaged case, solicitation without a prior approved disclosure statement is prohibited by § 1125(b).

34. The only authority the Plan Proponents cite for their failure to comply with § 1125(b) can be found in a footnote 5 of the Motion, which references § 105(a) of the Code. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). That section of the Code does not provide a basis for the relief the Plan Proponents seek. The equitable principles of § 105(a) of the Bankruptcy Code cannot be used to circumvent clear Congressional intent. *See, e.g., United States Trustee v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.*), 33 F.3d 294, 300 (3d Cir. 1994); *United States Trustee v. Price Waterhouse*, 19 F.3d 138, 142 (3d Cir. 1994). The Supreme Court has opined that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

35. As stated by the Third Circuit in *In re Combustion Engineering, Inc.,* 391 F.3d 190, 237 (3rd Cir. 2004), "[t]he general grant of equitable power contained in § 105(a) cannot trump specific provisions of the Bankruptcy Code, and must be exercised within the

parameters of the Code itself." Thus, the general equitable principals of § 105(a) of the Code cannot be used to trump the specific requirements of § 1125(b) of the Code, as the Plan Proponents ask the Court to do here.

36. As there is no authority to allow the Plan Proponents to retroactively seek approval of a Disclosure Statement after solicitation has been made, the Motion should be denied. In addition, any votes obtained by way of such solicitation should be designated as invalid under § 1126(e) of the Code, which provides:

> On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, *or was not solicited or procured in good faith or in accordance with the provisions of this title*.

11 U.S.C. § 1126(e) (emphasis added); *see also Century Glove, Inc. v. First American Bank of New York*, 860 F.2d 94. 97 (3d Cir. 1988)(recognizing § 1126(e) of the Code as "a remedy for § 1125(b) violations"); *In re Combustion Engineering, Inc.*, 391 F.3d 190, 247 n. 67 (3d Cir. 2004)("a court may designate (i.e. disqualify from voting) the ballot of any entity whose acceptance or rejection of the plan was not in good faith, or was not solicited or procured in good faith")(internal citations omitted).

B. Preliminary Objection to Disclosure Statement[6]

37. "[T]he general purpose of the disclosure statement is to provide 'adequate information' to enable 'impaired' classes of creditors and interest holders to make an informed judgment about the proposed plan and determine whether to vote in favor of or against that

[6] The U.S. Trustee's objections to the approval of the Disclosure Statement and confirmation of the Plan are preliminary objections, and are being filed prior to the objection deadline sought by the Plan Proponents for approval of the Disclosure Statement and confirmation of the Plan. The U.S. Trustee reserves the right to make further objections to both the Plan and Disclosure Statement.

plan." *In re Phoenix Petroleum, Inc.*, 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001). Section 1125(a) of the Bankruptcy Code defines "adequate information" as information of a kind and in sufficient detail to enable a hypothetical, reasonable investor to make an informed judgment about the plan.

38. The U.S. Trustee objects to the adequacy of the Disclosure Statement because it includes inaccurate information. The Disclosure Statement incorrectly describes the gift card class as unimpaired, and therefore not entitled to vote, when such class is in fact impaired for the reasons set forth in section C below.

39. The U.S. Trustee also objects to the adequacy of the Disclosure Statement because it proposes a plan that is unconfirmable as a matter of law, for the reasons set forth in section C below. Courts have routinely held that a disclosure statement accompanying an unconfirmable plan should not be approved because solicitation of votes on an unconfirmable plan would be a futile and wasteful effort. *See In re American Capital Equipment, Inc.*, 405 B.R. 415, 423 (Bankr. W.D. Pa. 2009) (rejecting disclosure statement that described a facially unconfirmable plan) (*aff'd sub nom. Skinner Engine Co. v. Allianz Global Risk U.S. Insurance Co.*, 2010 U.S. Dist. LEXIS 45667 (W.D. Pa. 2010)); *In re GSC, Inc.*, 453 B.R. 132, 157 n.27 (Bankr. S.D.N.Y. 2011) ("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." (*citing In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007))).

C. Preliminary Objection to Confirmation of the Plan

40. For a plan to be confirmed, § 1129(a)(9)(B) of the Code provides that, with respect to claims specified under § 507(a)(7)(which includes unsecured claims of individuals arising from the deposit of money in connection with the purchase of goods that were not delivered), a plan must provide as follows:

> (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claims.

11 U.S.C. § 1129(a)(9)(B)(emphasis added).

41. The gift card holders are priority creditors under § 507(a)(7) of the Code. This is recognized by the Plan Proponents, as the Plan classifies gift card holders who filed a proof of claim as priority creditors that are unimpaired, and therefore not able to vote. *See* Plan, § 1.2 (B)("Allowed gift card claims are classified under the Plan as Priority Claims.") Because the gift card creditors are unable to vote, the Plan has to comply with § 1129(a)(9)(B)(ii) of the Code, which requires that the gift card claimants be paid "cash on the effective date of the plan equal to the allowed amount of such claims." (emphasis added) The Plan fails to comply with § 1129(a)(9)(B)(ii) of the Code in the following ways:

(a) Many of the gift card holders are likely to have claims of less than $50, and the Plan provides that the Debtors shall not make any distributions less than $50. Therefore many of the gift card holders will receive zero distribution on their claim under the Plan.

(b) In order to receive any distribution, the Plan Proponents are requiring gift card holders, who have already filed proofs of claim, to jump through two additional hoops: (i) they have to fill out yet another form, to elect between receiving a cash payment or using their gift card to purchase merchandise (which they can do only through February 24, 2012); and (ii) they have to return the actual gift card with the election form.

(c) No gift card holder will be paid any distribution until some time *after* the

Effective Date, as their election form will not even be sent out until the Effective Date.

42. The various impairments to the priority class of gift card holders set forth above renders the plan unconfirmable because (a) not all of these priority claimants are being paid in full, and many of them may actually receive zero, (b) no gift card holders will be paid prior to the effective date, and (c) the gift card holders' rights have been otherwise impaired by additional steps they must take to receive their distribution, yet they have been denied the opportunity to vote on the plan.

43. Even if the gift card holders were given a right to vote on the Plan, and the class accepted the Plan, the Plan would still have to comply with § 1129(a)(9)(B)(i) of the Code, which requires that each claimant be paid the full allowed amount of their claim, although deferred cash payments are allowed. The Plan cannot comply with this section of the Code because any gift card claimants with an approved claim of less than $50 will receive zero on their claim.

44. The Plan also is not confirmable because it fails to comply with the requirements of § 1129(a)(1), (7), and (8) of the Code, due to the treatment of the gift card holders, which are an impaired class of priority creditors that have not been given the right to vote on the Plan, and which, according to the liquidation analysis included in the Disclosure Statement, would receive a 100% distribution in a chapter 7 liquidation.

45. The Plan also is not confirmable under § 1129(a)(2) or (3) because the Plan Proponents solicited votes on the Plan in violation of the express requirements of § 1125(b). Therefore the Plan Proponents have not complied with the applicable provisions of Title 11, as required by § 1129(a)(2), and have not proposed the Plan in good faith and not by any means forbidden by law, as required by § 1129(a)(3).

Objections to Solicitation Procedures, Notices, and Objection Deadlines

46. The U.S. Trustee also objects to the solicitation procedures, as well as the to the notice sent, and the election form to be sent, to the gift card holders.

47. First, as detailed above, the U.S. Trustee objects to that aspect of the solicitation procedures that seek to ratify the actions of the Plan Proponents in soliciting votes on the Plan without first obtaining approval of a disclosure statement, after notice and a hearing, as required by § 1125(b).

48. Second, the U.S. Trustee objects to the Plan Proponents failing to file a motion to approve voting procedures, including the form of ballots, and the time and manner of voting, as required by Rule 3017-1 of the Local Rules of this Court, *prior* to soliciting votes and sending out the ballots and notices to creditors and other parties in interest.

49. Third, the U.S. Trustee objects to the deadline the Plan Proponents seek for filing and serving objections to confirmation of the Plan and approval of the Disclosure Statement. The Plan Proponents are seeking to cut the notice period provided by Bankruptcy Rule 2002(b) by at least two days. Bankruptcy Rule 2002(b) provides that at least 28 days' notice must be given to parties in interest as to the objection deadline for both approval of a disclosure statement and the confirmation of a plan.[7] The objection deadline is December 15, 2011, and service was made by mail on November 19, 2011. Such service provided a total of 26 days' notice, which is two days short of the notice mandated by the Bankruptcy Rules.

50. Fourth, the U.S. Trustee objects to the Unimpaired Notice that was sent to the gift card holders stating that they are unimpaired, because they are in fact impaired.

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[7] Arguably the notice is five days short because it was made by mail. *See* Bankruptcy Rule 9006(f)(when service is made by mail, three days must be added to the notice period).

51. Fifth, the U.S. Trustee objects to the procedure of requiring the gift card holders to submit another form (the form electing whether to receive a cash distribution or to use their gift card to purchase merchandise), and to turn in their gift card, to receive a cash distribution under the Plan. The U.S. Trustee also objects to requiring the holders of merchandise creditors to submit an election form (which is included in their ballot) to be eligible to receive a cash distribution under the Plan.

52. If the Court allows the election forms to be required in order for a holder of a gift card to receive a distribution, then the election form should be sent to gift card holders immediately, and not after the effective date, so that they can be paid in full on the effective date, as required by 11 U.S.C. § 1129(a)(9)(B)(ii). In addition, if the election form is to be allowed, the U.S. Trustee has objections to certain wording and information included on the proposed election form.

53. Sixth, the U.S. Trustee objects to the deadline for making Rule 3018(a) motions with respect to any claim as to which the Debtors have objected, or will object prior to the confirmation hearing. The time table proposed by the Plan Proponents (*see* Motion, ¶ 21), allows the Debtors to object to claims through December 1, 2011, and seeks a deadline to file 3018(a) motions only 6 days later, on December 7, 2011. Such shortened notice does not provide claimants with due process.

Reservation of Rights

54. The U.S. Trustee reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Motion, and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

55. The U.S. Trustee reserves all rights to assert further objections to the Disclosure Statement and to confirmation of the Plan.

56. The U.S. Trustee also reserves all rights to object to any fee application of counsel for either of the Plan Proponents relating to legal work performed in connection with the Plan or the Disclosure Statement, as the Plan is not confirmable as a matter of law, the Disclosure Statement contains inaccurate information, and the Plan Proponents solicited votes for such Plan in violation of § 1125(b) of the Bankruptcy Code.

WHEREFORE, the United States Trustee respectfully requests this Court to deny the Motion, deny approval of the Disclosure Statement, the solicitation procedures, the notice of unimpaired status sent to the gift card holder, and the election form to be sent to the gift card holders, to deny confirmation of the Plan, and award such other and further relief as this Court deems appropriate under the circumstances.

Dated: December 1, 2011
Wilmington, Delaware

Respectfully submitted,

ROBERTA A. DeANGELIS
UNITED STATES TRUSTEE

By: *<u>/s/ Juliet Sarkessian</u>*
Juliet Sarkessian, Esquire
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(302) 573-6497 (Fax)

Attachment E

Sundevil Proposed 105(d)(2) Order

89147437.1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Case No. 16-10369 (KJC)
	)	Chapter 11
Sundevil Power Holdings, LLC, *et al.*,	)	
	)	(Jointly Administered)
Debtors.[1]	)	

CERTIFICATION OF COUNSEL REGARDING PROPOSED ORDER PROVIDING FOR COMBINED DISCLOSURE STATEMENT AND CONFIRMATION HEARING AND RELATED PROCEDURES

The undersigned counsel to the above-captioned debtors and debtors-in-possession (the "**Debtors**") hereby certifies as follows:

1. The Debtors have worked with their primary case stakeholders on what the Debtors believe is a straightforward, consensual chapter 11 plan to efficiently exit these cases, having just closed upon the sale of substantially all of their assets. The Plan and a proposed Disclosure Statement are in near-final form and can be filed as soon as November 18, 2016.

2. In order to achieve an exit by year-end, and otherwise in an effort to achieve the significant efficiencies and cost-savings of a combined disclosure and confirmation hearing, the Debtors have proposed to their Lenders and the U.S. Trustee a form of scheduling order, attached hereto as "Exhibit A" hereto.

3. The proposed order is patterned very closely upon the order entered by Chief Judge Shannon in *In re Prommis Holdings, LLC*, Case No. 13-10551 (BLS), a copy of which is annexed as Exhibit "B". The *Prommis* order was entered in virtually identical circumstances, following the closing of the Debtors' asset sales, in a case in the which the Lenders supported an appropriate chapter 11 plan-based case exit with a fully funded wind-down budget, bucking the

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1 The Debtors in these chapter 11 cases, and their respective federal tax identification numbers, are Sundevil Power Holdings, LLC (2308) and SPH Holdco LLC (7777). The Debtors' service address is: 701 East Lake Street, Suite 300, Wayzata, Minnesota 55391.

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prevailing trend of less desirable post-363 sale exits, namely, structured dismissal or conversion.

4. The U.S. Trustee's counsel has expressed concerns, and likely objections, regarding the Debtors' proposal. One such concern is that the form of order would not comply with Section 1125(b) of the Bankruptcy Code. The Debtors believe that in the particular circumstances of a straightforward liquidating case such as the Debtors' cases, the *Prommis* form of order is appropriate and indeed expressly contemplated by Section 105(d)(2)(B)(iv) of the Bankruptcy Code. In essence, the Debtors simply seek the ability to commence solicitation, with a full understanding that all parties' rights are fully preserved regarding the adequacy of disclosure. The primary gating issue appears to be the extent which this Court has the discretion, as was exercised by the Court (and, indeed, affirmative suggested by the Court to promote efficiency) in *Prommis*, to permit solicitation to commence contemporaneously with the filing of a proposed disclosure statement, versus being constrained to requiring an additional step involving notice, hearing and preliminary disclosure statement approval.

5. The U.S. Trustee has also expressed timing concerns, regarding the length of notice for the operative dates set forth in the proposed order. The proposed timeline follows very closely the timeline used in *Prommis*.

6. The Debtors and counsel to the U.S. Trustee are prepared to discuss the proposed form of order at the status conference scheduled for November 17, 2016 at 1:30 p.m. Counsel to the Lenders has advised that the Lenders support entry of an order substantially in the form of "Exhibit A".

Dated: November 17, 2016
Wilmington, Delaware

DRINKER BIDDLE & REATH LLP

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Attorneys for the Debtors

Exhibit A

Proposed Scheduling Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Case No. 16-10369 (KJC)
Sundevil Power Holdings, LLC, *et al.*,	)	Chapter 11
Debtors.[1]	)	(Jointly Administered)
	)	**Re: Docket No.**

ORDER PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 1125, AND 1128, BANKRUPTCY RULES 2002, 3016, 3017, AND 3020, AND LOCAL RULES 2002-1 AND 3017-1 SCHEDULING A COMBINED HEARING ON APPROVAL OF DISCLOSURE STATEMENT AND CONFIRMATION OF PLAN AND ESTABLISHING RELATED DEADLINES

Pursuant to sections 105(d)(2)(B), 1125, and 1128 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), Rules 2002, 3016, 3017, and 3020 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 2002-1 and 3017-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), and the Court having jurisdiction to grant the relief provided herein in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the relief granted herein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue being proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the relief granted herein being adequate and appropriate under the particular circumstances, and it appearing that no other or further notice need be provided; and the Court having found and determined that the scheduling relief granted herein is appropriate in the circumstances of the cases of the above-captioned debtors and debtors in possession (collectively, the "Debtors"); it is hereby:

[1] The Debtors in these chapter 11 cases, and their respective federal tax identification numbers, are Sundevil Power Holdings, LLC (2308) and SPH Holdco LLC (7777). The Debtors' service address is: 701 East Lake Street, Suite 300, Wayzata, Minnesota 55391.

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ORDERED, ADJUDGED, AND DECREED:

A. Plan Filing Deadline

1. In order to maintain the schedule set forth herein, the Debtors shall file their plan(s) (the "Plan") and accompanying disclosure statement(s) (the "Disclosure Statement") on or before November 18, 2016.

B. Solicitation Procedures Deadlines

2. In order to maintain the schedule set forth herein, the Debtors shall file and serve a motion to approve the adequacy of the Disclosure Statement, approving the form and manner of notice of the confirmation hearing, approving procedures for the solicitation and tabulation of votes to accept or reject the Plan, approving the deadline and procedures for filing objections to the plan, and granting related relief (the "Solicitation Procedures Motion") on or before November 18, 2016.

3. Objections to the Solicitation Procedures Motion must (a) be in writing; (b) conform to the Bankruptcy Rules, the Local Rules, and any orders of the Court; (c) state, with particularity, the legal and factual basis for the objection; and (d) be filed with the Court and served upon the parties to be identified in the notice filed with the Solicitation Procedures Motion so as to be actually received on or before December 5, 2016 at 4:00 p.m. Eastern Time.

4. The Debtors are authorized to solicit votes to accept or reject the Plan from holders of claims in classes entitled to vote under the Plan (the "Voting Classes"), subject to the approval of the Disclosure Statement at the Combined Hearing (defined below).

5. The Debtors shall cause the proposed Confirmation Hearing Notice, proposed form of ballot (each, a "Ballot") and a pre-addressed, postage pre-paid return envelope, together with voting instructions, the Disclosure Statement, and the Plan (collectively, the "Solicitation

Package") to be mailed by first class mail to holders of claims in the Voting Classes on or before November 22, 2016.

C. Combined Disclosure Statement and Confirmation Hearing and Related Deadlines

6. Objections to the approval of the Disclosure Statement must (a) be in writing; (b) conform to the Bankruptcy Rules, the Local Rules, and any orders of the Court; (c) state, with particularity, the legal and factual basis for the objection, and, if practicable, a proposed modification to the Disclosure Statement that would resolve such objection; and (d) be filed with the Court (contemporaneously with a proof of service) and served upon the parties to be identified in the confirmation notice so as to be actually received on or before **December 5, 2016 at 5:00 p.m. (prevailing Eastern Time**)] (the "Disclosure Statement Objection Deadline").

7. On or before December 8, 2016, the Debtors, at the Debtors' discretion, will supplement the Disclosure Statement and post any such additional disclosures on the Debtors' voting and claims agent's (the "Voting and Claims Agent") website.

8. All holders of claim in the Voting Classes must complete, execute, and return their Ballots so as to be **actually received** by the Voting and Claims Agent on or before **December 15, 2016 at 5:00 p.m. (prevailing Eastern Time**).

9. Objections to confirmation of the Plan must (a) be in writing; (b) conform to the Bankruptcy Rules, the Local Rules, and any orders of the Court; (c) state, with particularity, the legal and factual basis for the objection, and, if practicable, a proposed modification to the Plan that would resolve such objection; and (d) be filed with the Court (contemporaneously with a proof of service) and served upon the parties to be identified in the Confirmation Hearing Notice so as to be **actually received** on or before **December 15, 2016 at 5:00 p.m. (prevailing Eastern**

Time).

10. The Court shall consider approval of the Debtors' Disclosure Statement and confirmation of the Plan at a hearing to be held on **December 22, 2016 at 11:00 a.m. (prevailing Eastern Time)** (the "Combined Hearing"). The Combined Hearing may be continued from time to time by the Court or the Debtors without further notice other than by such adjournment being announced in open court or by a notice of adjournment filed with the Court.

11. The Debtors are authorized and empowered to take all actions necessary to effectuate the relief granted pursuant to this Order.

12. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

13. This Court shall retain jurisdiction to hear and determine all matters arising from or relating to the implementation of this Order.

14. Notwithstanding any Bankruptcy Rule to the contrary, this Order shall be immediately effective and enforceable upon its entry.

Dated: November ____, 2016

____
The Honorable Kevin J. Carey
United States Bankruptcy Judge

Exhibit B

Prommis Scheduling Order

87007023.2

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
PROMMIS HOLDINGS, LLC, et al.,[1]	)	Case No. 13-10551 (BLS)
Debtors.	)	(Jointly Administered)
	)	**Related Docket No.** 671

ORDER PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 1125, AND 1128, BANKRUPTCY RULES 2002, 3016, 3017, AND 3020, AND LOCAL RULES 2002-1 AND 3017-1 SCHEDULING A COMBINED HEARING ON APPROVAL OF DISCLOSURE STATEMENT AND CONFIRMATION OF PLAN AND ESTABLISHING RELATED DEADLINES

Pursuant to sections 105(d)(2)(B), 1125, and 1128 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), Rules 2002, 3016, 3017, and 3020 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 2002-1 and 3017-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), and upon the telephonic hearing held on October 24, 2013 (the "Status Conference"); and the Court having jurisdiction to grant the relief provided herein in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the relief granted herein being a core proceeding

[1] The Prommis Debtors in these chapter 11 cases, along with the last four digits of each Prommis Debtor's federal taxpayer-identification number, are: Prommis Holdings, LLC (6940); Prommis Fin Co. (2965); Prommis Solutions, LLC (9978); E-Default Services LLC (0016); Statewide Tax and Title Services LLC (0049); Statewide Publishing Services LLC (0079); Nationwide Trustee Services, Inc. (2436); Statewide Tax and Title Services of Alabama LLC (7733); Nationwide Trustee Services of Virginia, Inc. (6687); EC Mailing Corp. (f/k/a Interface Inc.) (9903); and Prommis Homeownership Solutions, Inc. (0569). The EC Debtors in these chapter 11 cases, along with the last four digits of each of the EC Debtor's federal taxpayer-identification number, are: EC Closing Corp. (8580); EC Posting Closing Corp. (9995); and EC Closing Corp. of Washington (2552). The location of the Debtors' headquarters and the Debtors' service address is P.O. Box 767427, Roswell, GA 30076.

pursuant to 28 U.S.C. § 157(b)(2); and venue being proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the relief granted herein being adequate and appropriate under the particular circumstances, and it appearing that no other or further notice need be provided; and upon consideration of the record and all proceedings had before the Court ; and the Court having found and determined that the relief granted herein is in the best interests of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), their estates, their creditors, and other parties in interest; and the factual bases set forth at the Status Conference establish that the relief granted herein is appropriate to ensure the cases are handled expeditiously and economically; and after due deliberation and sufficient cause appearing therefor, it is hereby:

ORDERED, ADJUDGED, AND DECREED:

A. Plan Filing Deadline

1. The Debtors shall file their plan(s) (the "Plan") and accompanying disclosure statement(s) (the "Disclosure Statement") on **November 13, 2013**.

B. Solicitation Procedures Deadlines

2. The Debtors shall file and serve a motion to approve the adequacy of the Disclosure Statement, approving the form and manner of notice of the confirmation hearing, approving procedures for the solicitation and tabulation of votes to accept or reject the Plan, approving the deadline and procedures for filing objections to the plan, and granting related relief (the "Solicitation Procedures Motion") on **November 13, 2013**.

3. Objections to the Solicitation Procedures Motion must (a) be in writing; (b) conform to the Bankruptcy Rules, the Local Rules, and any orders of the Court; (c)

state, with particularity, the legal and factual basis for the objection; and (d) be filed with the Court (contemporaneously with a proof of service) and served upon the parties to be identified in the notice filed with the Solicitation Procedures Motion so as to be actually received on or before **November 27, 2013 at 4:00 p.m. (prevailing Eastern Time)**.

4. The Court shall consider approval of the Solicitation Procedures Motion, and shall convene a status conference regarding the proposed Disclosure Statement, at a hearing to be held on **December 3, 2013 at 12:00 p.m. (prevailing Eastern Time)**.

5. The Debtors are authorized to solicit votes to accept or reject the Plan from holders of claims in classes entitled to vote under the Plan (the "Voting Classes"), subject to the approval of the Disclosure Statement at the Combined Hearing (defined below).

6. The Debtors shall cause the proposed Confirmation Hearing Notice, proposed form of ballot (each, a "Ballot") and a pre-addressed, postage pre-paid return envelope, together with voting instructions, the Disclosure Statement, and the Plan (collectively, the "Solicitation Package") to be mailed by first class mail to holders of claims in the Voting Classes on or before **November 13, 2013**.

C. Combined Disclosure Statement and Confirmation Hearing and Related Deadlines

7. Objections to the approval of the Disclosure Statement must (a) be in writing; (b) conform to the Bankruptcy Rules, the Local Rules, and any orders of the Court; (c) state, with particularity, the legal and factual basis for the objection, and, if practicable, a proposed modification to the Disclosure Statement that would resolve such objection; and (d) be filed with the Court (contemporaneously with a proof of service) and served upon the parties to be identified in the confirmation notice so as to be actually

received on or before **November 26, 2013 at 5:00 p.m. (prevailing Eastern Time**) (the "Disclosure Statement Objection Deadline").

8. On or before **December 4, 2013**, the Debtors, at the Debtors' discretion, will supplement the Disclosure Statement and post any such additional disclosures on the Debtors' voting and claims agent's (the "Voting and Claims Agent") website.

9. All holders of claim in the Voting Classes must complete, execute, and return their Ballots so as to be **actually received** by the Voting and Claims Agent on or before **December 11, 2013 at 5:00 p.m. (prevailing Easter Time)**.

10. Objections to confirmation of the Plan must (a) be in writing; (b) conform to the Bankruptcy Rules, the Local Rules, and any orders of the Court; (c) state, with particularity, the legal and factual basis for the objection, and, if practicable, a proposed modification to the Plan that would resolve such objection; and (d) be filed with the Court (contemporaneously with a proof of service) and served upon the parties to be identified in the Confirmation Hearing Notice so as to be **actually received** on or before **December 11, 2013 at 5:00 p.m. (prevailing Easter Time)**.

11. The Court shall consider approval of the Debtors' Disclosure Statement and confirmation of the Plan at a hearing to be held on **December 16, 2013 at 10:30 a.m. (prevailing Eastern Time)** (the "Combined Hearing"). The Combined Hearing may be continued from time to time by the Court or the Debtors without further notice other than by such adjournment being announced in open court or by a notice of adjournment filed with the Court.

12. The Debtors are authorized and empowered to take all actions necessary to effectuate the relief granted pursuant to this Order.

13. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

14. This Court shall retain jurisdiction to hear and determine all matters arising from or relating to the implementation of this Order.

15. Notwithstanding any Bankruptcy Rule to the contrary, this Order shall be immediately effective and enforceable upon its entry.

16. The court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: November 13, 2013

The Honorable Brendan Linehan Shannon
United States Bankruptcy Judge

Attachment F

Sundevil Conditional Disclosure Statement / Solicitation Order

89147437.1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Case No. 16-10369 (KJC)
	)	Chapter 11
Sundevil Power Holdings, LLC, *et al.*,	)	(Jointly Administered)
Debtors.[1]	)	**Related Docket Nos. 377 & 378, 385**

ORDER (I) SCHEDULING A COMBINED DISCLOSURE STATEMENT APPROVAL AND PLAN CONFIRMATION HEARING, (II) ESTABLISHING A PLAN AND DISCLOSURE STATEMENT OBJECTION DEADLINE AND RELATED PROCEDURES, (III) APPROVING (A) THE SOLICITATION PROCEDURES, (B) THE COMBINED HEARING NOTICE, (C) VOTE TABULATION PROCEDURES, AND (IV) GRANTING RELATED RELIEF

Upon the motion [D.I. 378] (the "***Motion***")[2] of the above-captioned debtors and debtors in possession for entry of an order (this "***Order***"): (i) scheduling a combined hearing (the "***Combined Hearing***") on the adequacy of the Debtors' disclosure statement [D.I. 377] (as may be amended or supplemented and including all exhibits and supplements thereto, the "***Disclosure Statement***") and confirmation of the *Debtors' Joint Chapter 11 Plan* [D.I. 376] (as may be amended or supplemented and including all exhibits and supplements thereto, the "***Plan***"); (ii) establishing a deadline for objections to the adequacy of the Disclosure Statement and confirmation of the Plan (the "***Objection Deadline***") and approving related procedures; (iii) approving (a) the solicitation procedures regarding votes to accept the Plan (the "***Solicitation Procedures***"), (b) the form and manner of notice of the Combined Hearing (the "***Notice***"), and (c) procedures for tabulating votes with respect to the Plan; and (iv) granting related relief, all as

[1] The Debtors in these chapter 11 cases, and their respective federal tax identification numbers, are Sundevil Power Holdings, LLC (2308) and SPH Holdco LLC (7777). The Debtors' service address is: 701 East Lake Street, Suite 300, Wayzata, Minnesota 55391.

[2] Capitalized terms not herein defined shall have the same meaning ascribed to them in the Motion.

set forth more fully in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order consistent with Article III of the United States Constitution; and it appearing that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that there is just cause for the relief requested in the Motion, to the extent granted by this Order; and it appearing that notice of and opportunity for a hearing on the Motion were appropriate under the circumstances, and that no other or further notice of the Motion need be provided, except as set forth in this Order; and this Court having reviewed the Motion and having heard statements in support of the relief requested therein at a hearing before this Court (the "***Hearing***"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation, and sufficient cause appearing therefor, it is HEREBY ORDERED that:

1. The Motion is GRANTED as set forth herein.

2. The following schedule of dates is hereby approved:

Event	Date
Voting Record Date	November 23, 2016
Solicitation and Service of Notice of Combined Hearing	November 23, 2016
Deadline for filing and serving the Liquidating Trust Agreement on members of voting Classes	December 2, 2016, at 5:00 p.m. (ET)
Deadline for filing any additional Plan Supplement	December 12, 2016, at 5:00 p.m. (ET)
Voting Deadline	December 19, 2016, at 5:00 p.m. (ET)

Event	Date
Objection Deadline	December 19, 2016, at 5:00 p.m. (ET)
Deadline for Filing Proposed Form of Order Confirming Plan and Granting Final Approval of Disclosure Statement	December 19, 2016, at 5:00 p.m. (ET)
Deadline for Filing (i) Balloting Report, and (ii) Brief in Support of Confirmation of Plan and Final Approval of Disclosure Statement	December 20, 2016, at noon (ET)
Deadline for filing any Reply Brief in Support of Confirmation	December 21, 2016 at noon (ET)
Combined Hearing	December 22, 2016, at 11:00 a.m. (ET)

3. The Combined Hearing, at which time this Court will consider, among other things, the adequacy of the Disclosure Statement and confirmation of the Plan, shall be held on December 22, 2016, at 11:00 a.m. (prevailing Eastern Time); provided, however, that the Combined Hearing may be continued from time to time by the Court or the Debtors without further notice, through adjournments announced in open court or indicated in any notice of agenda of matters scheduled for hearing or in any other appropriate filing with the Court. Any objections to the Disclosure Statement or to confirmation of the Plan must be filed by the Objection Deadline.

4. Any objections to the Disclosure Statement or to confirmation of the Plan must:

(i) be in writing;

(ii) comply with the Bankruptcy Rules and the Local Rules;

(iii) state the name and address of the objecting party and the amount and nature of the claim or interest beneficially owned by such entity;

(iv) state with particularity the legal and factual basis for such objections and, if practicable, a proposed modification to the Plan that would resolve such objections; and

(v) be filed with this Court with proof of service thereof in accordance with the Local Rules of this Court and served upon the parties set forth in the

> Notice so as to be actually received on or before the Objection Deadline. Service by email will be deemed good and sufficient notice.

5. Any objections not satisfying the requirements of this Order may not be considered and may be overruled.

6. The form of the Notice, substantially in the form attached hereto as **Exhibit 1**, complies with the requirements of the Bankruptcy Code and Bankruptcy Rules and is hereby approved. The Notice shall be served on (a) all known holders of claims against or interests in any of the Debtors, whether in voting or non-voting classes, or unclassified, (b) all counterparties to executory contracts or unexpired leases with the Debtors, (c) all other parties who were served with the *Notice of (I) Proposed Sale of Certain Assets of Sundevil Power Holdings, LLC and SPH Holdco LLC Free and Clear of Liens, Claims, Encumbrances, and Interests; (II) Auction; and (III) Final Sale Hearing Related Thereto* [D.I. 93 Ex. 1], and (d) all other parties entitled to notice of the Combined Hearing under Bankruptcy Rule 2002.

7. The Voting Record Date and the Voting Deadline are hereby approved.

8. The relief "conditionally" granted in the following paragraphs is without prejudice to the rights of any party in interest to object, prior to the Objection Deadline, to the Disclosure Statement, the Plan, or the relief "conditionally" granted herein.

9. The Disclosure Statement is conditionally approved as having adequate information as required by Bankruptcy Code section 1125.

10. The Solicitation Procedures utilized by the Debtors for distribution of the Solicitation Packages as set forth in the Motion in soliciting acceptances and rejections of the Plan are conditionally determined to satisfy the requirements of the Bankruptcy Code and the Bankruptcy Rules and are conditionally approved. Copies of the Plan and Disclosure Statement, the Combined Hearing Notice, and a copy of this Order with all attachments shall be served by

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the Debtors on (a) all parties in each voting class, (b) the U.S. Trustee's Office, (c) the Internal Revenue Service, (d) all state and local taxing authorities in jurisdictions in which the Debtors may have tax liability, (e) all federal and state authorities that regulate any aspect of the Debtors' business, (f) all parties who have filed a request for notice under Bankruptcy Rule 2002 in these cases, and (g) any other party who makes a request in writing to Debtors' counsel for such documents. The Debtors shall also serve the appropriate ballot on all parties in each voting class.

11. The Debtors shall not be required to send Solicitation Packages to (i) any holder of an unimpaired Claim under the Plan; (ii) any holder of a Claim or Equity Interest in a class that is deemed to reject the Plan; or (iii) any creditor that has a Claim that has already been paid in full.

12. The forms of Ballots and voting instructions, substantially in the form attached hereto as **Exhibit 2**, are conditionally approved.

13. The Vote Tabulation Procedures as set forth in the Motion and as provided by the Ballots are conditionally approved. All votes to accept or reject the Plan must be cast by using the appropriate Ballot. All Ballots must be properly executed, completed, and delivered by (a) first class mail, in the return envelope provided with each ballot; (b) overnight courier; or (c) personal delivery, so that the Ballots are actually received, in any case, by the Voting Agent, no later than the Voting Deadline at the following address, as applicable:

If by regular mail:
Sundevil Power Holdings, LLC, et al.
c/o GCG
P.O. Box 10267
Dublin, Ohio 43017-5767

If by hand or overnight courier:
Sundevil Power Holdings, LLC, et al.
c/o GCG
5151 Blazer Parkway, Suite A
Dublin, Ohio 43017

14. The Debtors have agreed not to file any claims objections for voting purposes only, reserving all rights to file claims objections for distribution purposes after the Combined Hearing.

15. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

16. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

17. The Court shall retain jurisdiction over any and all matters arising from or related to the interpretation or implementation of this Order.

Dated: November 23, 2016

The Honorable Kevin J. Carey
United States Bankruptcy Judge

Attachment G

Sundevil Plan Confirmation Timeline

89147437.1

A 35-day Combined Disclosure/Confirmation Hearing Timeline

	Date		Days Elapsed
FILING - PLAN / DS / SOL PROCEDURES MOTION	11/18/2016	Fri	
Submission of Proposed 105(			
Hearing on Expedited Conditional DS Approval and Solicitation Procedures	11/23/2016	Wed	
Solicitation mailout	11/23/2016	Wed	
Days from Solication and DS filing to DS Objections			26
Plan Supplement Deadline	12/12/2016	Mon	
Days Supp Disclosures to Online Supp DS			7
Days Ballot Obj D.L before Conf Hearing			*7*
Disclosure/Balloting/Plan Objection Deadline	12/19/2016	Mon	
Days Mailout to Ballot/Plan D/L			26
Days Solicitation mailing to Confirmation Hearing			***29***
DAYS FILING TO COMBINED CONFIRMATION/DS HEARING			***34***
DS / PLAN combined hearing	**12/22/2016**	**Thu**	

Survey of Current Law on Section 546(e)'s Safe-Harbor Provision: Can Financial Institutions That Serve as Mere Conduits in a Transaction Benefit from Safe Harbor Protection?

Presented by:

Amy Edgy
Jones Day

August 4, 2017
ABI Mid-Atlantic Bankruptcy Conference

On May 1, 2017, the U.S. Supreme Court granted a petition for *certiorari* in *FTI Consulting, Inc. v. Merit Management Group, LP* (No. 16-784), a case from the U.S. Court of Appeals for the Seventh Circuit. The case could resolve a circuit split regarding the Bankruptcy Code's safe harbor provision in § 546(e). Section 546(e) provides:

> [T]he trustee may not avoid a transfer that is a margin payment . . . or settlement payment . . . made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract . . . that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

There is currently a 5-2 split among federal appellate courts over whether § 546(e)'s safe harbor can shield a financial institution from a fraudulent conveyance action if that financial institution was merely a conduit in the transaction.

I. *Majority Rule* (Second, Third, Sixth, Eighth, and Tenth Circuits)

The majority of circuits has found that financial institutions are protected by the safe harbor provision even if they are merely conduits in the underlying transaction. These courts have held that the plain reading of § 546(e) is unambiguous and only requires that the transfer be made "to" a financial institution for the transfer to be protected by the safe harbor. Such statutory language does not require that the financial institution have any beneficial interest in the money involved.

Furthermore, the majority of circuits have found that a plain reading of the statute leads to sensible results because (a) requiring the financial institution to derive benefit from the transaction in order to benefit from the safe harbor provision opens the door for complex transactions involving large payments to be unwound in a fraudulent conveyance action and (b) the § 548(a) exception built into § 546(e) still affords a debtor or trustee the ability to void conveyances that had the intent to hinder, delay, or defraud even if those conveyances would otherwise be protected by § 546(e)'s safe harbor. In other words, if a financial institution is a conduit, but the transfer was meant to actually defraud the creditors, then the transfer could be avoided.

A. *The Tenth Circuit − In re Kaiser Steel Corp.*, 952 F.2d 1230 (10th Cir. 1991).

Kaiser Steel's board of directors agreed to an LBO in which the company would merge with a new entity. All outstanding shares of company common stock would be converted into the right to receive $22 and two shares of preferred stock of the new entity. The transaction would be financed from Kaiser's cash reverses and a $100 million loan from Citibank which would be secured by Kaiser's assets. The former holders of Kaiser Steel common stock were required to tender their shares to Bank of America in order to receive the cash and the preferred stock.

Kaiser sought to avoid payments made to shareholders in connection with the LBO. It argued that "even if the payments were settlement payments, § 546(e) does not protect a settlement payment 'by' a stockbroker, financial institution, or clearing agency, unless that payment is to another participant in the clearance and settlement system and not to an equity security holder." *Id.* at 1240.

Held: Section 546(e)'s language unambiguously prohibits avoiding payments to financial institutions, even if they are simply acting as conduits. Such an outcome would not lead to an absurd result but instead would prevent the unwinding of LBOs years after the transaction was consummated.

B. *The Third Circuit − In re Resorts International, Inc.*, 181 F.3d 505 (3d Cir. 1999).

Griffco Acquisition Corporation purchased Sun International, Inc. through an LBO. The securities passed from Merrill Lynch (the Resorts International shareholder's broker) to Chase Manhattan Bank. Chase then forwarded the funds to Merrill Lynch, who paid the shareholder.

Held: The language of section 546(e) "protects from the trustee's avoidance powers settlements payments made 'by . . . a financial institution'." *Id.* at 516. Since "[u]nder a literal reading of section 546 . . . this was a settlement payment 'made by . . . a financial institution,'" the transfer could not be avoided. *Id.* The court dismissed the arguments advanced by the Eleventh Circuit in *In re Munford, Inc.*, 98 F.3d 604 (11th Cir. 1996), on why section 546(e) did not apply to financial institutions who merely served as conduits in a transaction. Siding with the *Munford* dissent, the Third Circuit found that § 546(e) protects settlement payments made "by . . . a financial institution," from the trustee's avoidance powers even if the financial institution received no beneficial interest in the transfer. *Resorts Int'l*, 181 F.3d at 516.

C. *The Eighth Circuit − Contemporary Industries v. Frost*, 564 F.3d 981 (8th Cir. 2009).

Pursuant to an LBO arrangement, a shareholder received payments that the debtor later sought to avoid. The debtor argued that because the financial institution never obtained a beneficial interest in the payments made to the shareholders, then the financial institution was not a transferee, thereby disqualifying the financial institution from the safe harbor protection.

Held: Like the Third Circuit, the Eighth Circuit found that the text of § 546(e) does not require that a financial institution have a "beneficial interest" in a transaction in order for it to be protected by the safe harbor. *Id.* at 987.

D. *The Sixth Circuit − In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009).

Prior to its chapter 11 filing, QSI Holdings, Inc.'s shareholders received payment as a result of an LBO. The debtor later sought to avoid those transfers.

Held: The text of § 546(e) does not expressly require that the financial institution obtain a beneficial interest in the payments. Thus, payments by financial institutions are protected by the safe harbor provision, even if the financial institution receives no beneficial interest as a result of the transfer.

E. *The Second Circuit - In re Quebecor World (USA)*, 719 F.3d 94 (2d Cir. 2013).

This case concerned a multi-party transaction involving Canadian company Quebecor World, two of its subsidiaries, and institutional noteholders holding private placement notes issued by one of the subsidiaries with a value of $371 million. As the parent company faced continuing financial pressures and default under the notes, it looked for a way to redeem the notes. In a complex intercompany transaction, one of the subsidiaries (Quebecor World (USA)) purchased the notes for cash from the shareholders and the other subsidiary redeemed the notes in exchange for forgiveness of intercompany debt it owed the parent company. Shortly before its chapter 11 filing, the Quebecor World (USA) transferred $376 million to the noteholders' trustee, who then distributed funds to the noteholders. The unsecured creditors committee brought an adversary proceeding against the debtors' estates to avoid and recover this amount as a preferential transfer.

In 2006, the Financial Netting Improvements Act amended § 546(e). The Second Circuit case *Quebecor World* is significant because it was the first circuit case to consider § 546(e)'s new language. The amendment changed the text to read "by or to (or for the benefit of) . . . a financial institution," from reading "by or to a . . . financial institution."

Held: A transfer "for the benefit of" or "to" a financial institution is protected by section 546(e). The *Quebecor World* court focused both on the plain language of the statute as well as congressional purpose. Preferring a construction that does not render the section superfluous, the court concluded that the transfer "may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both." *Id.* at 100.

The court also looked to the purpose behind the safe harbor provision:

> Congress enacted § 546(e)'s safe harbor in 1982 as a means of 'minimiz[ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.' If a firm is required to repay amounts received in settled securities transactions, it could have insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants and the securities markets themselves at risk.

Id. (citing *In re Enron Creditors Recovery Corp.*, 651 F.3d 329, 334 (2d Cir. 2011)).

Financial intermediaries usually serve as facilitators for the financial transaction, instead of substantive participants in the financial transaction. Thus, the safe harbor provision was meant to promote stability in the markets and to ensure that the transactions were transparent, thereby reducing incentives to commit fraud.

II. *Minority Rule* (the Seventh and Eleventh Circuits)

The Eleventh and Seventh Circuits have held that § 546(e)'s safe harbor does not protect transfers to financial institutions where the financial institution has no beneficial interest in the money transferred. The minority circuits have reasoned that the trustee must pursue a transferee in order to avoid a transfer pursuant to § 550. Because the financial institutions have no beneficial interest in the money transferred, they cannot be a transferee pursuant to §§ 546(e) or 550. If the financial institution is not the transferee, then they are not covered by § 546(e)'s safe harbor provision. According to these courts, there is no potential for an absurd result or danger to the securities markets from unwinding large transactions if the entities involved in the transaction are merely using the financial institution to facilitate their transaction.

A. *The Eleventh Circuit − In re Munford, Inc.*, 98 F.3d 604 (11th Cir. 1996).

After an LBO, Munford sought to avoid payments it had made to shareholders for their shares.

Held: A transfer to a financial institution could be avoided if the financial institution was a mere conduit in the transaction. "§ 546(e) does not bar the trustee in bankruptcy from avoiding payments the debtor corporation made to its shareholders in a leveraged buy-out." *Id.* at 606. Even though the funds were deposited with the financial institution, the funds were "to" shareholders, not the banks, since the bank never acquired a beneficial interest in those funds. Because the bank never received a beneficial interest in the funds, it was not the transferee of the payments, and the trustee can only avoid a transfer to a transferee. Therefore, the shareholders were the only transferees of the funds, and § 546(e) offers shareholders no protection from the trustee's avoiding powers.

Dissent: Chief Judge Hatchet reasoned that the plain language of § 546(e) does not require the financial institution to have a beneficial interest in the property involved and that the majority "chose to disregard the plain language of section 546(e) in order to create a new exception to its application." *Id.* at 614. Instead, § 564(e) only permits a trustee to avoid a settlement payment made by a financial institution "when such payments are made with the actual intent to hinder, delay or defraud creditors." *Id.*

B. *The Seventh Circuit − FTI Consulting, Inc. v. Merit Management Group. LP*, 830 F.3d 690 (7th Cir. 2016).

Valley View Downs, a racetrack, choose to merge with a competitor racetrack (Bedford Downs) in order to avoid fighting with each other over obtaining a state license to operate a "racino" (a combination racetrack and casino) in Pennsylvania. The two racetracks agreed to a transaction where Valley View would purchase all of Bedford's shares for $55 million. Valley View obtained financing through a variety of lenders in order to purchase the shares.

The exchange occurred via Citizens Bank, who served as an escrow agent. After obtaining financing, Valley View relied on Citizens Bank as escrow agent for the transaction. Valley View later filed for chapter 11 protection, and the trustee of a litigation trust created during the bankruptcy initiated litigation against Merit Management, a 30% shareholder in Bedford, to recover the $16.5 million Merit had received in the merger.

Held: A trustee may use its avoidance power against a financial institution, notwithstanding section 546(e)'s safe harbor, if the financial institution was not a "transferee" in the relevant transaction. Although the overall transaction looked like an LBO, the parties involved in the transaction were not in the securities industry. Instead, these parties were merely "corporations that wanted to exchange money for privately held stock." *Id.* at 698.

Under circuit precedent, *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988), a "transferee" is either an entity "with dominion over the money" that it held or an entity that had "the right to put the money to [its] own purposes." *FTI Consulting*, 830 F.3d at 698. *Bonded Financial* further held that a bank which "acted as a financial intermediary" and "received no benefit" was not a "transferee" for purposes of the Bankruptcy Code's avoidance provisions. *Id.* at 893. The trustee can use its avoidance power against a financial institution in this instance, since that financial institution was not a "transferee."

Further, section 546(e)'s new language does not overrule *Munford*.

> We do not believe that Congress would have jettisoned *Munford's* rule by such a subtle and circuitous route. Its addition of an alternate way to meet the safe harbor criteria says nothing about the method already in the statute. If Congress had wanted to say that acting as a conduit for a transaction between non-named entities is enough to qualify for the safe harbor, it would have been easy to do that. But it did not.

Id. at 697. The particular circumstances of the case were such that safe harbor was not necessary as a means to prevent harm to the securities markets. As such, the Seventh Circuit was "not troubled by any potential ripple effect through the financial markets from returning the funds to [the estate]." *Id.* at 696.

AMERICAN BANKRUPTCY INSTITUTE
THIRTEENTH ANNUAL MID-ATLANTIC BANKRUPTCY WORKSHOP
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ABI TALKS

SOLICITATION & YOU: RULE 7.3 AND HOW WE GOT HERE

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This ABI Talk was inspired by the article "In Defense of Ambulance Chasing: A Critique of Model Rule of Professional Conduct 7.3" by Prof. Nancy Rapoport. 2011 Yale Law & Policy Review (29 Yale L. & Pol'y Rev. 603)

INTRODUCTION

Governing conduct by attorneys, Rule of Professional Conduct 7.3 (helpfully captioned "Direct Contact with Prospective Clients") proscribes a number of activities which lawyers may not undertake in the search for work. Unless, of course, the reader happens to practice in a state that has changed the terms of its implementation of Rule 7.3, or has lifted the ban on lawyer solicitation outright. That the Rules of Professional Conduct are promulgated by the American Bar Association but implemented individually by the separate states, according to their own state bar and judicial oversight priorities necessarily results in a hodgepodge of implementations and interpretations that may vary from state to state. Lawyers maintaining a diverse regional or national practice are faced with the inevitable question "*which Rule should I obey – the Rule in the state in which my office is located; the Rule in the state in which I am presently sitting; the Rule in the state in which the instant case is filed, or the Rule in the state in which the person I am hoping to contact about future work is located?*" There are no easy answers to this question, which ultimately leads people in this writer's position to suggest that the reader pick the state Rule that is most strident against whatever the lawyer is about to do, and follow that Rule[1].

And then hope that the ethics panel reviewing your actions in hindsight is as lacking in context and insight as many of the ethics panels have been in adjudicating these issues in the past. Perhaps this discussion, by shedding light on how we got to the present state of affairs, can offer some guidance to attorneys seeking clarity on this issue.

WHERE WE STARTED

In the beginning (which, for our purposes, is the middle-ages-through-1800s England), lawyers were viewed (perhaps mostly by themselves) as members of a public profession. Set apart from merchants engaging in commercial activities, attorneys stood apart and, either by gentleman's agreement or more formal edict, viewed soliciting for clients as beneath them – they were not mere tradesmen, after all. While a modern attorney might, tongue-in-cheek, refer to this as a time when lock-step compensation based solely on seniority reigned, it was expected that a lawyer would get future business solely based on their existing relationships and their reputation. In fact, an aura of cultural discomfort surrounding the issue of money permeated the practice of law. English barristers, for example, traditionally wore black robes that included a small pocket in the back in which solicitors would surreptitiously place the barrister's fees since the lawyer, as a gentleman, should not be motivated by financial gain or even be aware of how much he was paid.[2]

There was a social inclination away from legal representation for purposes of litigation – indeed, solicitation was deemed to bring the risk of stirring up litigation – which, in England, was a crime. There was an institutional fear that an abler advocate would manipulate the

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1 Michael P. Richman and Anthony Nguyen, Whose Rules Apply for Multi-Jurisdictional Cold-Calling?, XXX ABI Journal 10, 18, 68-69, December/January 2012

2 William Hornsby, Clashes of Class and Cash: Battles from the 150 Years War To Govern Client Development, 37 Ariz. St. L.J. 255, 258 (2005).

procedures so as to prevail over an inexperienced but "righteous claimant"[3]. As English legal practices evolved and informed America's legal practices, most states took the past practice and formalized it on their own. As a result, most states barred lawyers from the conduct of advertising. Colonial America expressed the same disinclination towards lawyers receiving income for their expertise – Virginia, for example, barred lawyers from engaging in legal representation for any type of compensation or reward, direct or indirect. As a result, lawyers wishing both to work and not starve went underground, creating a shadow market for legal representation. These so-called "mercenary lawyers" were then condemned by the likes of President John Adams for having fomented unnecessary lawsuits.[4]

In the nineteenth century, many states took steps to open the legal profession to greater access, easing educational requirements, giving way to what Harvard Law School Dean Roscoe Pound calls the "Era of Decadence". During this period, in which critics opine that the practice of law ceased being a profession and, instead, became a money-making trade, direct solicition of prospective clients by lawyers was routine. No less than future U.S. President Abraham Lincoln, who hung out a shingle and practiced law, is known to have advertised. As bar associations grew in the late 1800s, lawyers did what we all do when we're gathered into groups – we look for ways to pull the ladder up into the clubhouse behind us – and so, lawyers became subject to greater regulations and professional requirements established by state bar associations. Some of this may have been economically motivated, as well – when anyone can become an attorney, then there are too many attorneys for the amount of work to go around. Law schools were pressured to require greater academic credential prerequisites (such as a high school education). The Era of Decadence was about to some crashing to a halt.

HOW WE GOT HERE – PART 1
PUTTING THE HORSE BACK IN THE BARN

In 1905, President Theodore Roosevelt made a speech in which he rebuked attorneys for aiding in their clients' illegal acts. Responding to this charge, the President of the American Bar Association, Henry St. George Tucker, called for an inquiry into whether the profession was doing enough to uphold the ethical standards of their practice. The result of this exercise, in 1908, was the publication of the thirty-two Canons. There was, however, a difference between that which President Roosevelt decried and the population the Canons sought to protect. Roosevelt's target were the lawyers who represented and aided the robber barons. The Canons, on the other hand, captured their authors' perceptions and believes about lawyers who sought work for monetary gain – what would become to be known as ambulance chasers (several years later, perhaps after powered ambulances had been invented and lawyers began to chase them). The Canons, adhering to a mid-1800s perception of right and wrong and the divisions between both professional classes and social classes, prohibited direct solicitation of clients and these Canons made their way into state regulatory schemes.

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3 See Max Radin, Maintenance by Champerty, 24 Calif. L. Rev. 48, 56 (1935).
4 See Roscoe Pound, The Lawyer: From Antiquity to Modern Times 98-111 (1953) at 143.

Solicitation, however, as we would learn later, wasn't always solicitation. For example, while attorneys could not advertise in print or on television or radio, they could advertise in Bar association publications or directories, as these publications catered only to other lawyers and corporate clients. Of course, personal jnjury attorneys would have no need to reach corporate entities – their clients were individuals who read newspapers or watched television or listened to the radio – where attorneys were prohibited from advertising. The inconsistency in how opinion-leaders perceived what was or was not solicitation was remarkable only for its predictability. Whether a party was viewed as breaking the rules depending largely on who they were or on what side they were. Accordingly, the NAACP was a frequent subject of complaints about charges of barratry and violation of solicitation rules[5], whereas the "Liberty League", which solicited suits against the National Labor Relations Board on behalf of corporate interests, was lauded by the American Bar Association. What started as bans on solicitation during the middle ages because it encouraged meritless litigation were later characterized as bans on what were proclaimed as unprofessional conduct threatening the purity of the practice. This continued until the 1970s, when courts began sharpening the definition of solicitation.

HOW WE GOT HERE – PART 2
LAW GETS BIG, INDIVIDUAL RIGHTS DRIVE CHANGE

In 1976, the U.S. Supreme Court held that the First Amendment applied to commercial speech[6]. At the same time, the size and shape of firms were changing and, as firms grew in size and complexity, these firms began to appreciate the need to operate themselves as a business. So, when these firms could orchestrate activities such as advertising or solicitation openly, they did; when they couldn't do it openly, some firms accomplished it through subterfuge – by holding press conferences or achieving earned media, which accomplished the same goals as advertising, but with the imprimatur of perceived journalistic integrity. As the number of firms pushed the envelope on what solicitation and advertising could or could not be done, the number of test cases grew. When the U.S. Supreme Court ruled on the constitutionality of solicitation bans in Bates v. the State Bar of Arizona, there were another ten cases challenging solicitation bans making their way through the federal judiciary. The Court considered and rejected bans on attorney advertising. This was followed by a number of cases over the next twenty years or so that considered and rejected constraints on lawyer solicitation. As a result, the American Bar Association amended its Model Rules of Professional Conduct to reflect the liberalization of solicitation rules.

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[5] See, e.g., Robyn Duff Ladino, Desegregating Texas Schools: Eisenhower, Shivers, and the Crisis at Mansfield High 134 (1996); Susan D. Carle, Race, Class, and Legal Ethics in the Early NAACP (1910-1920), Law & Hist. Rev., Jan. 15, 2002, at 97; see also Note, supra note 13, at 1189 ("[O]ne suspects that an unvoiced reason for the animus against stirring up litigation is the fear that some of the litigation stirred up will involve socially unpopular causes--such as suits attacking segregation or those brought by tenants against landlords or consumers against corporations.").

[6] See Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976).

This journey had some bumps and reversals, as the Court often revisited previous rulings and clarified its stance, narrowing interpretation of certain past decisions. Drawing a distinction between the training of an accountant (which emphasizes independence and objectivity) as distinct from the training of a lawyer (which emphasizes advocacy) the Court did not extend its past rulings against solicitation bans for lawyer to a case in which it was being asked to view accountant and lawyer advertising as one and the same. In 1995, the Court upheld the Florida State Bar Association's ban on direct mail solicitation of prospective clients within thirty days of an accident or disaster. The Court focused on professionalism – once again setting the focus on the true "ambulance chaser" – and also paid heed to the privacy rights of the recipients or accident victims. This case, aptly named *Florida Bar v. Went For It, Inc.*, effectively closed the door on allegations that attorney advertising was beneath the profession and damaged the perception of the profession's integrity – instead focusing the debate on what was good for the prospective client – protecting the individual from manipulation by the unscrupulous lawyer.

And so, now lawyers can advertise (albeit with some regulation) – anybody driving on a highway or seeing a phone book (yes, phone books still exist) or watching television during the hours when advertising is cheap knows this. But there is still one remaining prohibition – that contained in Rule 7.3 – the prohibition against direct solicitation of prospective clients.

WHERE WE ARE NOW

Model Rule 7.3 states, in relevant part:

> (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
>
> > (1) is a lawyer; or
> >
> > (2) has a family, close personal, or prior professional relationship with the lawyer.

Simple enough, right? If a lawyer wants to contact someone about getting hired and that person isn't another lawyer or a close personal friend, family member, or a past client, don't contact them. Except, no. There are a lot of details that can be easily missed. First, what about *pro bono* representation? Can a lawyer contact an unrepresented non-lawyer, non-family member, non-friend, non-past client person about a pro bono representation? The case history says yes – because a pro bono representation is not for the lawyer's pecuniary gain.

What about email? Is sending an email to a prospective client a violation? It would seem so – it is real-time and it is electronic. Is making a blog post solicitation? Or is it advertising? Is it real-time? A blog post isn't generally solicitation since it's not directed at any specific party – it's a one-to-many communication. But it could violate advertising restrictions. Same with a Facebook post, a Tweet or any other social media communication that isn't directed at specific parties.

What about a creditors' committee? Can an attorney contact a prospective creditors' committee member about a representation on behalf of the committee, which does not exist at the time the communication occurs? Cases such as Universal Building Products instruct us that an individual who might be on a committee is as much as prospective client as the Committee itself. Learned attorneys have written volumes on this not being the case[7]. How do we know which is permissible? Watch what the learned attorneys do – chances are, they act as though any individual who could be a Committee member is subject to the solicitation protections. One of the challenges in wading through the details of the prohibition on solicitation is that the rule hasn't changed, but the world has. Written in a time when a letter or telephone call were the only real options to contacting potential clients short of physically showing up at their home, workplace or hospital bed, the rule hasn't kept up with reality. Or, more correctly, those who interpret the rule haven't kept up with what reality actually is.

Consider the example of the Supreme Court of Ohio's Opinion 2013-2, in which the Court was asked to consider whether the Rules of Professional Conduct permit (Ohio) lawyers to advertise their services directly to prospective clients via text message. A text message is electronic; it is real-time. Relying on a six-year-old treatise on mobile text message spam, the Court distinguished text messages as different from emails because text messages were (in 2007) generally limited to 160 characters. This restriction didn't exist in 2013 for all practical purposes. Furthermore, the opinion addresses mass advertising by lawyers, but doesn't generally address the hypothetical of an attorney sending a text message to a credit manager of a creditor in a chapter 11 case soliciting direct employment in that specific case. This opinion, in the writer's opinion, makes little sense as technology has continued to evolve, and lawyers outside of Ohio should probably proceed with great caution around this issue.

CONCLUSION

The prohibition on direct lawyer solicitation of prospective clients stems from English societal mores as they applied to members of a profession and perceptions of decorum on issues involving money. The prohibition evolved to consider what was best for the image of the profession, only recently coming to rest with a focus on the protection of the actual consumer of those legal services. And because we n the United States are, at one time, both fifty states and one nation, it is the states that implement such prohibitions for members of their Bars. But we are a multijurisdictional practice, with lawyers in one state often crossing boundaries – political, technological and otherwise, in pursuit of representation. Accordingly, lawyers should make themselves aware of the applications of Rule 7.3 in whatever states their activities might touch, and should keep in mind the reasoning, borne by decades of litigation to narrow the focus, behind the prohibition on solicitation – consumers should be protected from the unwanted advances of potentially unscrupulous lawyers. Whether the communication is by voice, by email, by text or some other means, attorneys should ensure through action that they are not being the conducting themselves like the type of lawyer from whom an unknowing individual should have to be protected in the first place.

[7] Michael P. Richman, Chasing Committees: the Ethics of Entertainment Solicitation, 22 OCT Am. Bankr. Inst. J. 18 (2003)