IN THE UNITED STATES BANKKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
KII Liquidating Inc. (f/k/a In re Katy Industries, Inc.), *et al.*[1]	Case No. 17-11101 (KJC) Jointly Administered
Debtors.	**Objection Deadline: 2/20/18 at 4pm (ET)** **Hearing Date: 2/27/18 at 3pm (ET)**

OBJECTION OF PENSION BENEFIT GUARANTY CORPORATION TO THE JOINT MOTION OF THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF AN ORDER (A) APPROVING THE DISCLOSURE STATEMENT ON AN INTERIM BASIS, (B) APPROVING THE FORM OF BALLOT AND SOLICITATION MATERIALS, (C) ESTABLISHING PROCEDURES FOR SOLICITATION AND TABULATION OF VOTES TO ACCEPT OR REJECT THE PLAN, (D) SCHEDULING A PLAN CONFIRMATION HEARING AND DEADLINE FOR FILING OBJECTIONS TO FINAL APPROVAL OF THE DISCLOSURE STATEMENT AND CONFIRMATION OF THE PLAN, (E) APPROVING THE RELATED FORM OF NOTICE, AND (F) GRANTING RELATED RELIEF

Pension Benefit Guaranty Corporation ("PBGC") objects to the above-referenced Joint Motion filed on February 6, 2018 (D.I. 533) (the "Joint Motion")[2] by the Debtors and the

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, where applicable, are: KII Liquidating Inc. (f/k/a Katy Industries, Inc.) (7589), ComPro Liquidating LLC (f/k/a Continental Commercial Products, LLC) (3898), FTWH Liquidating Inc. (f/k/a FTW Holdings, Inc.) (7467), FWPI Liquidating Inc. (f/k/a Fort Wayne Plastics, Inc.) (7470), Wabash Holding Corp. (9908), KTI Liquidating Inc. (f/k/a Katy Teweh, Inc.) (9839), WII, Inc. (0456), TTI Holdings, Inc. (8680), GCW, Inc. (5610), Hermann Lowenstein, Inc. (4331), American Gage & Machine Company (7074), WP Liquidating Corp. (2310), Ashford Holding Corp. (8113), and HPMI, Inc. (4677). The mailing address for each of the Liquidating Debtors listed above, solely for purposes of notices and communications, is 400 S. Hope Street, Suite 1050, Los Angeles, California 90071 (Attn.: Lawrence Perkins, Chief Restructuring Officer).

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Joint Motion and Combined Plan and Disclosure Statement.

Official Committee of Unsecured Creditors ("UCC," and together with the Debtors, the "Plan Proponents") for the approval of the "Disclosure Statement" on an interim basis and the procedures for solicitation and tabulation of votes to accept or reject the Plan ("Voting Procedures").[3] PBGC is a creditor in these cases with joint and several claims of approximately $1,342,007.59 relating to the Pension Plans as defined below. Because the Combined Plan and Disclosure Statement contains impermissible non-consensual releases and injunctions with respect to claims that creditors may hold against non-debtor parties, the Plan Proponents fail to comply with Local Bankruptcy Rule 3017-2(a)(iii) and are not entitled to interim approval of the disclosure statement pursuant to Local Bankruptcy Rule 3017-2(c). PBGC also objects to the Combined Plan and Disclosure Statement because it fails to provide "adequate information" as defined in 11 U.S.C. § 1125(a) of the Bankruptcy Code ("Code"), with regard to the following: (i) the overly broad release, injunction, and exculpation provisions; (ii) the basis for "deemed" substantive consolidation of the Debtors' estates and the impact of substantive consolidation on PBGC's claims; (iii) the Debtors' obligations and liabilities to PBGC and the Pension Plans; (iv) the W.J. Smith Litigation as defined below; and (v) the lack of a Disputed Claims reserve. Therefore, the Combined Plan and Disclosure Statement cannot be approved because it lacks adequate information to allow a creditor to make an informed judgment. PBGC also objects to the Voting Procedures set forth in Section 8.3 in that they prohibit Disputed Claims to vote on

[3] On February 5, 2018, the Debtors filed a Combined Disclosure Statement and Chapter 11 Plan of Liquidation Proposed Jointly by the Plan Proponents (D.I. 528) (the "Combined Plan and Disclosure Statement"). This Objection addresses only the Joint Motion's request for approval of the "Disclosure Statement" on an interim basis and the Voting Procedures. PBGC reserves the right to file any objections to confirmation of the Combined Plan and Disclosure Statement, which are due on April 13, 2018. Going forward, this Objection will use the term "Combined Plan and Disclosure Statement" to refer to the "Disclosure Statement."

the Combined Plan and Disclosure Statement, which would allow Debtors to object to any or all claims of creditors before the Voting Record Date to prevent certain or all creditors from voting on the plan.

BACKGROUND

I. PBGC and TITLE IV of ERISA

1. PBGC is the wholly owned United States government corporation that administers the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA")[4] and protects participants in private sector defined benefit pension plans. *See PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990). PBGC guarantees the pension benefits up to the statutory limits of PBGC's guarantee of nearly 40 million participants in approximately 24,000 pension plans, and is the statutory trustee of more than 4,900 failed pension plans.[5] PBGC provides a backstop for American workers, securing retirement income for more than 1.5 million retirees.[6]

2. Under ERISA, an employer must contribute to its pension plan to fund the pension benefits promised to its workers. The contributing sponsor and each member of its "controlled group"[7] are jointly and severally liable for: (1) if the pension plan terminates, the plan's unfunded benefit liabilities, 29 U.S.C. § 1362, and termination premiums, 29 U.S.C. §

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[4] 29 U.S.C. §§ 1301-1461 (2012 & Supp. IV 2016).

[5] 2017 PBGC Annual Report at 2, https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2017.pdf.

[6] *Id.*

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

1306(a)(7); and (2) regardless of whether the pension plan terminates, statutorily required minimum funding contributions, 26 U.S.C. § 412(b)(1), (2); *see also* 29 U.S.C. § 1082(b)(1), (2), and flat and variable rate insurance premiums, 29 U.S.C. § 1307.

3. When a pension plan covered by Title IV terminates without sufficient assets to pay promised benefits, PBGC typically becomes the statutory trustee of the plan and pays pension benefits up to the limits established by Title IV. *See* 29 U.S.C. §§ 1321, 1322, and 1361.

4. As statutory trustee of a terminated pension plan, PBGC has the power to take any action authorized by the plan and to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan. *See* 29 U.S.C. § 1342(d). PBGC therefore has authority to investigate and prosecute any fiduciary or party-in-interest that has participated in or committed a fiduciary breach or prohibited transaction with respect to the pension plan. *See* 29 U.S.C. §§ 1002(14), (21), 1104, 1106, 1109. Individual fiduciaries and parties-in-interest are personally liable for any losses to the pension plan resulting from each fiduciary breach and/or prohibited transaction. *See* 29 U.S.C. §§ 1106, 1109.

5. It may take years for PBGC to complete the process of taking over a terminated pension plan. PBGC's taking over a plan includes, among other things, (i) collecting, reviewing, and analyzing all pension plan documents and employee records; (ii) calculating each participant's pension benefit pursuant to the pension plan's terms and to ERISA's statutory limits; and (iii) paying to participants their pension benefits. Accordingly, ERISA provides PBGC up to six years after trusteeship to bring a civil action against a fiduciary or party-in-interest. *See* 29 U.S.C. § 1303(e)(6).

6. When PBGC becomes the statutory trustee of a terminated pension plan, it has authority to collect, among other things, all amounts for which the plan sponsor and controlled group members are jointly and severally liable.

II. PBGC-Covered Pension Plan Sponsored by the Debtors

7. Three of the Debtors – WII, Inc., Wabash Holding Corp., and GCW, Inc. (collectively, the "Plan Sponsors") – sponsored, respectively, the following three pension plans covered under Title IV of ERISA: (i) the Woods Industries, Inc. Hourly Employees' Pension Plan; (ii) the Wabash Holding Corporation Pension Plan; and (iii) the GC/Waldom Electronics Inc. Pension Plan (each a "Plan," and collectively, the "Plans" or "Pension Plans").

8. The Pension Plans terminated in a PBGC-initiated termination pursuant to section 4042 of ERISA. On August 14, 2017, PBGC and Katy Industries, Inc. ("Katy"), as the administrator of the Plans, entered into three separate agreements that (i) terminated each Plan, (ii) established each Plan's effective termination date as May 31, 2017, and (iii) appointed PBGC as statutory trustee of each Plan.

9. As statutory trustee of the Plans, PBGC ensures that the Debtors' retired employees receive their pension benefits under the Plans, subject to statutory limits.

10. Accordingly, the Plan Sponsors and all members of their controlled group, including the Debtors and any non-debtor controlled group members, are jointly and severally liable for: (i) the Plans' unfunded benefit liabilities; (ii) due and unpaid minimum funding contributions owed to the Plans; and (iii) statutory premiums owed to PBGC, with respect to each Plan.

11. Upon information and belief, the Plan Sponsors' controlled group, as of May 31, 2017, includes (i) all of the Debtors, (ii) W.J. Smith Wood Preserving Company ("W.J. Smith"), a non-debtor, and (iii) five foreign entities. *See* Decl. of Lawrence Perkins, Ex. A (D.I. 15-1).

12. As of May 31, 2017, PBGC estimates that, collectively, (i) the Pension Plans were underfunded by approximately $737,618, (ii) the unpaid minimum funding contributions owed to the Plans totaled $30,142, and (iii) the total amount of statutory premiums owed to PBGC, including termination premiums, was $584,247.59. Pursuant to a consolidated claims stipulation (D.I. 447), on October 6, 2017, PBGC filed nine proofs of claim, effective against each Debtor, for these claims.

13. On February 16, 2018, PBGC filed five amended proofs of claim, effective against each Debtor, to liquidate the amounts of its due and unpaid minimum funding contributions for the GC/Waldom Electronics Inc. Pension Plan and the Woods Industries, Inc. Hourly Employees' Pension Plan, and to liquidate the priority amounts of its claim for unfunded benefit liabilities for all three Plans.

14. Pursuant to Title IV of ERISA, PBGC holds against the Debtors and any non-debtor controlled group member, including W.J. Smith, joint and several claims relating to the Pension Plans in a total amount of approximately $1,352,007.59.

III. The Debtors' Bankruptcy Proceeding

15. On May 14, 2017, each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Code, along with their First Day Motions, including the Debtors' motion to sell substantially all of their assets pursuant to Section 363 of the Code (the "Sale Motion") (D.I. 18).

16. On May 16, 2017, the Court entered an order granting the Debtors' Motion for Joint Administration of the Debtors' cases for procedural purposes only under Case No. 17-11101 (D.I. 37).

17. On June 29, 2017, PBGC filed a reservation of rights and limited objection (D.I. 206) to the Sale Motion, objecting, in part, to the sale to the extent that the Debtors sought to sell any non-debtor assets, and preserving its joint and several claims against non-debtors.

18. A final hearing regarding the Debtors' Sale Motion (D.I. 18) was held on July 17, 2017.

19. On July 18, 2017, the Court entered an order approving the sale of substantially all of the Debtors' assets to Jansan Acquisition, LLC ("Jansan"). The sale to Jansan closed on July 21, 2017.

20. On October 19, 2017, Katy filed a motion ("Motion to Sell the Denison Parcel") seeking the Court's authorization to (i) consent to the sale of certain real property located in Denison, Texas (the "Denison Parcel") owned by its non-debtor subsidiary, W.J. Smith, to EIP Communications I, LLC; (ii) take any further actions that it determines are reasonably necessary or appropriate to consummate the sale; and (iii) cause the net proceeds from the sale to be remitted directly to Jansan (D.I. 444).

21. On November 1, 2017, PBGC filed an objection to Katy's Motion to Sell the Denison Parcel, asserting that the Bankruptcy Court lacks subject matter jurisdiction to authorize the sale of W.J. Smith's assets and the transfer of that sale's proceeds directly to Jansan because W.J. Smith is not a debtor in the bankruptcy proceeding (D.I. 451).

22. On December 19, 2017, the Court entered an order only authorizing the Debtors to consent to the sale of the Denison Parcel (D.I. 507).

23. On February 5, 2018, the Debtors filed the Combined Plan and Disclosure Statement. On February 6, 2018, the Debtors filed the Joint Motion.

IV. W.J. Smith Texas Litigation

24. On November 14, 2017, PBGC filed a Complaint[8] against W.J. Smith in the United States District Court for the Eastern District of Texas ("Texas District Court") (Civil Action No. 17-803) (the "W.J. Smith Litigation"), and a Motion for a Temporary Restraining Order and Preliminary Injunction to prevent the transfer of any proceeds from the sale of the Denison Parcel to any third party. PBGC obtained the temporary restraining order and preliminary injunction prohibiting the transfer of any of the proceeds realized from any sale, including any costs and fees associated with the sale, to any third party during the pendency of the W.J. Smith Litigation.[9]

25. The preliminary injunction further orders that an accounting of all proceeds, costs, fees, and expenses in connection with the sale of the Denison Parcel must be provided to the

[8] PBGC's Complaint alleges the following causes of action: (1) W.J. Smith, as a member of the Plan Sponsors' controlled group, is jointly and severally liable to PBGC for statutory liability arising under 29 U.S.C. §§ 1082, 1083 for missed minimum funding contributions to the Pension Plans; (2) W.J. Smith, as a controlled group member of the Plan Sponsors, is jointly and severally liable to PBGC for statutory liability arising under 29 U.S.C. § 1362(a) and (b) for unfunded benefit liabilities owed as a result of the termination of the Pension Plans; (3) W.J. Smith, as a controlled group member of the Plan Sponsors, is jointly and severally liable to PBGC for statutory liability arising under 29 U.S.C. §§ 1306 and 1307 for unpaid pension insurance premiums and termination premiums; (4) the transfer of the net proceeds of the sale the Denison Parcel from W.J. Smith to Jansan will constitute a fraudulent transfer pursuant to 28 U.S.C. § 3304(a); and (5) PBGC, as a federal government agency, has priority of its claims against W.J. Smith over any other unsecured nongovernmental persons or entities that may be asserting claims against W.J. Smith pursuant to the Federal Priority Statute, 31 U.S.C. § 3713.

[9] On November 15, 2017, PBGC filed a Notice with this Court that a Temporary Restraining Order was entered by the Texas District Court (D.I. 469). On November 28, 2017, PBGC filed a Notice with this Court that a Preliminary Injunction was entered by the Texas District Court (D.I. 480).

Texas District Court before any such costs or fees are paid. To date, neither W.J. Smith, Katy, nor any other party has appeared in the W.J. Smith Litigation.

26. As of February 13, 2018, Katy's counsel has represented to PBGC that sale of the Denison Parcel has not yet closed.

ARGUMENT

27. The Combined Plan and Disclosure Statement, in its current state, cannot be approved. PBGC objects to the Combined Plan and Disclosure Statement because it fails to provide "adequate information," as defined under 11 U.S.C. § 1125(a), to inform creditors of facts that may affect the value and treatment of their claims, the confirmability of the Combined Plan and Disclosure Statement, and sufficient facts that justify the proposed releases, injunctions, and exculpations. Under the Code, a disclosure statement contains "adequate information" if it provides:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable such a hypothetical investor . . . to make an informed judgment about the plan. . . .

See 11 U.S.C. § 1125(a)(1).[10] Such adequate information is necessary for creditors to understand and to make an informed decision about whether to accept or reject the Combined Plan and Disclosure Statement. *Krystal Cadillac*, 337 F.3d at 321. The Combined Plan and Disclosure Statement submitted by the Plan Proponents fails to meet this threshold, as further argued below.

[10] *See also In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 322 (3d Cir. 2003) ("The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of adequate protection.") (quoting *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988)).

I. Because the Combined Plan and Disclosure Statement Provides for Non-Consensual Releases and Injunctions with Respect to Claims Creditors May Hold Against Non-Debtor Parties, the Disclosure Statement May Not Be Approved on an Interim Basis.

28. Local Bankruptcy Rule 3017-2 provides that a plan proponent may request interim approval of the disclosure statement if the combined disclosure statement and plan of liquidation does not seek non-consensual releases/injunctions with respect to claims creditors may hold against non-debtor parties.

29. Here, the Combined Plan and Disclosure Statement's non-debtor third party releases are non-consensual because creditors can only opt out of Section 15.8, which discusses "Releases by Certain Holders of Claims," and cannot opt out of Sections 15.9 (Exculpation), and creditors remain bound by this Section, regardless of how they vote. Section 15.9 effectively causes creditors to release claims against non-debtor parties, such as the Debtors' members. Consequently, the Combined Plan and Disclosure Statement cannot be approved on an interim basis.

II. The Combined Plan and Disclosure Statement Lacks Adequate Information to Justify the Proposed Release, Injunction, and Exculpation Provisions.

30. The Combined Plan and Disclosure Statement fails to provide adequate information to creditors regarding the proposed overly broad release, injunction, and exculpation provisions in Sections 15.4, 15.6, 15.7, 15.8, and 15.9 (collectively, the "Release Provisions").

31. Despite the inclusion of these extensive Release Provisions, the Combined Plan and Disclosure Statement fails to provide any information, let alone adequate information, to justify the Debtors' entitlement to a discharge or the overly broad non-debtor third party releases, especially in the context of a liquidating chapter 11 plan.

32. Moreover, as further discussed below, the Combined Plan and Disclosure Statement contain impermissible non-consensual releases and injunctions with respect to claims that creditors may hold against non-debtor parties. Therefore, the Plan Proponents fail to comply with Local Bankruptcy Rule 3017-2(a) and are not entitled to interim approval of the disclosure statement pursuant to Local Bankruptcy Rule 3017-2(c).

A. The Combined Plan and Disclosure Statement lacks adequate information to justify the injunction and exculpation provisions in Sections 15.4 and 15.9, which effectively provide the liquidating Debtors with a discharge in violation of Section 1141(d)(3) of the Code.

33. Section 1141(d)(3)[11] of the Code makes clear that a liquidating corporate debtor is not entitled to a discharge in bankruptcy, and Section 727(a) of the Code does not grant a discharge if the debtor is not an individual. 11 U.S.C. § 727(a)(1).

34. Here, the Debtors are not individuals. Rather, they are corporate entities that ceased operations, sold substantially all of their assets, proposed a liquidating Chapter 11 plan, and will not continue in business post-confirmation.[12] Therefore, the Debtors are not allowed a discharge.

35. Nevertheless, the Debtors improperly attempt to effect a discharge through the Combined Plan and Disclosure Statement's overly broad injunction and exculpation provisions

[11] Section 1141(d)(3) of the Code provides that "[c]onfirmation of a Chapter 11 plan does not discharge a debtor if: (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under Section 727(a) of this title if the case were a case under chapter 7 of this title." 11 U.S.C. § 1141(d)(3).

[12] *See* Combined Plan and Disclosure Statement, Section 4.3.12 ("The Plan is a liquidating plan . . . ."); Section 4.1.8 (explaining that the sale of substantially all of the Debtors' assets to Jansan already closed on July 21, 2017).

in Sections 15.4 and 15.9. In fact, the Debtors concede as much in their Combined Plan and Disclosure Statement:

> The Plan is a liquidating plan and, as provided in section 1141(d)(3) of the Bankruptcy Code, the confirmation of a plan does not formally discharge a debtor if the plan provides for the liquidation of all or substantially all of the property of the estate. **However, the releases and injunctions provided under the Plan, when coupled with the permanent dissolution of the Debtor entities, have an effect that is similar in some respects to a full discharge.**

See Combined Plan and Disclosure Statement Section 4.3.12 (emphasis added).

36. An injunction such as the one in Section 15.4 is "inappropriate as applied to the Debtors because a liquidating Chapter 11 plan may not provide for a discharge of the debtor." *In re Bigler LP*, 442 B.R. 537, 545-46 (Bankr. S.D. Tex. 2010) ("An injunction preventing the post-confirmation prosecution of claims would certainly operate as a discharge of the [d]ebtors. . . . For the same reasons, actions against property of the Estate may not be enjoined after the confirmation of a liquidating plan.").

37. Similarly, the exculpation provision in Section 15.9, as applied to the Debtors, impermissibly provides them with a discharge. *See In re Sis Corp.*, 120 B.R. 93, 96 (Bankr. N.D. Ohio 1990) (language that limits a debtor's liability is impermissible in a liquidating plan because the language would effectively "provide the [d]ebtors with a discharge on those specific obligations which are not otherwise treated in the Plan. Such an effort is contrary to the letter and intent of § 1141(d)(3) of the Code"); *see also In re The Fairchild Corp.*, C.A. No. 09-10899, 2014 WL 7215211, at *3 (D. Del. Dec. 17, 2014) (confirmation of a liquidating plan denies a discharge and dissolves the automatic stay).

38. Despite the inclusion of provisions that would effectively grant the liquidating Debtors a discharge, the Combined Plan and Disclosure Statement lacks any information to justify these provisions or explain why the Debtors are entitled to a discharge in this case.

B. The Combined Plan and Disclosure Statement fails to provide adequate information to justify the broad Release Provisions, which improperly release non-debtor third parties.

i. *Releases Granted by the Debtors*

39. The Debtors seek to release Causes of Action that could conceivably be a source of recovery for the Debtors' unsecured creditors. Section 15.6 of the Combined Plan and Disclosure Statement provides releases by the Debtors and their estates of causes of actions against Released Parties.[13] Section 15.6 provides that the Released Parties will be "fully, completely, unconditionally, and irrevocably released and discharged by the Debtors, their Estates, the Debtors' current and former affiliates, and representatives, to the fullest extent permitted by applicable law . . . ." Combined Plan and Disclosure Statement Section 15.6.

40. This Court has held that the following five factors "form the foundation" for determining whether, notwithstanding Section 524(e) of the Code, a plan may provide for releases by debtors of non-debtor entities:

> (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources;
> (2) a substantial contribution to the plan by the non-debtor;
> (3) the necessity of the release to the reorganization;
> (4) the overwhelming acceptance of the plan and release by creditors and interest holders; and
> (5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan.

In re Wash. Mut., Inc., 442 B.R. 314, 346-47 (Bankr. D. Del. 2011) (*citing In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999)).

[13] "Released Parties" is defined as "(a) the Debtors, (b) the Creditors' Committee and all members thereof in their capacities as such, (c) the Retirees' Committee and all members thereof in their capacities as such, and (d) with respect to each person named in (a)-(c), such person's post-petition directors, officers, employees, agents, attorneys, members, and professionals. Combined Plan and Disclosure Statement Section 3.1.107.

41. The Debtors have the burden to establish whether the *Zenith* factors have been met as to each proposed Released Party. But, the Combined Plan and Disclosure Statement does not provide any explanation or legal justification for these broad releases by the Debtors and their estates in Section 15.6. In fact, the Debtors have failed to address whether *any* of the *Zenith* factors are met for any of the Released Parties.[14]

ii. *Releases by Creditors in the Exculpation and Injunction Provisions*

42. Section 524(e) of the Code provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Accordingly, the bankruptcy discharge of a debtor, by itself, does not operate to relieve non-debtors of their liabilities. *Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 211 (3d Cir. 2000).

43. Although the Third Circuit has not established a blanket rule permitting or proscribing non-debtor releases, it has stated that the hallmarks of permissible, non-consensual, non-debtor releases include specific factual findings that such releases are (i) necessary to the reorganization and (ii) fair – i.e., given in exchange for reasonable consideration. *Id*. at 214, n.11; *see also In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 603 (Bankr. D. Del. 2001).

[14] It is extremely unlikely that the Debtors can provide any information, let alone information supporting the *Zenith* factors, to justify the Debtors' releases of the Creditors' Committee, the Retirees' Committee and their respective members, directors, officers, employees, agents, attorneys, and professionals. "The releases being granted to the Committee and its members are . . . not appropriate." *In re Wash. Mut., Inc.*, 442 B.R. at 348. There is no identity of interest between the Debtors and the Committees. *See id.* "With respect to the directors, officers or professionals of the Debtors and the Committee who served in the chapter 11 case, they are receiving exculpations. Consequently, the releases as to them are unnecessary, duplicative or exceed the limits of what they are entitled to receive." *Id.* at 350 (citation omitted).

44. To determine whether non-debtor releases are necessary to the reorganization, the plan's proponent must demonstrate that there is a relationship between the debtors' successful reorganization and the non-consensual parties' release, and that the releasees have provided a critical financial contribution to the debtors' plan that is necessary to make the plan feasible in exchange for receiving a release of liability. *In re Genesis Health*, 266 B.R. at 607.

45. Where the debtors are liquidating, however, non-consensual, third party releases can never be necessary to the reorganization because the liquidation can be successfully accomplished with or without the releases. *See In re Nickels Midway Pier, LLC*, 2010 WL 2034542, at *13 (Bankr. D.N.J. May 21, 2010), *cited by In re Wash. Mut.*, 442 B.R. at 352.

46. Further, if the Code prohibits a discharge to a liquidating corporate debtor, so should non-debtor releases be prohibited in a liquidating Chapter 11 proceeding. "It would indeed be anomalous if the Bankruptcy Code prohibited a plan from discharging a liquidating non-individual debtor that will not remain in business postconfirmation, but allowed that plan effectively to discharge non-debtor third parties by means of releases and permanent injunctions." *In re New Towne Dev., LLC*, 410 B.R. 225, 232 (Bankr. M.D. La. 2009); *see also In re Berwick Black Cattle Co.*, 394 B.R. 448, 461 (Bankr. C.D. Ill. 2008) ("The rationale for granting third-party releases is far less compelling, if it exists at all, in a liquidation than in a reorganization"); *In re Optical Techs., Inc.*, 216 B.R. 989, 994 (Bankr. M.D. Fla. 1997) ("[I]n a liquidation case, a third-party injunction is not essential to the continued operation of the debtor because the purpose of such an injunction is to aid in the rehabilitation of an ongoing business").

47. Here, the non-debtor third party releases are non-consensual because creditors can only opt out of Section 15.8, which discusses "Releases by Certain Holders of Claims," and cannot opt out of the other Release Provisions in the Combined Plan and Disclosure Statement.

Indeed, the Combined Plan and Disclosure Statement provides no provision or mechanism for opting out of Sections 15.4 (Injunction), 15.6 (Debtor and Estate Releases), 15.7 (Waiver of Statutory Limitation on Releases), or 15.9 (Exculpation), and creditors remain bound by these Sections, regardless of how they vote.

48. Specifically, regarding the Exculpation provision, "the Third Circuit has held that a creditors' committee, its members, and estate professionals may be exculpated under a plan for their actions *in the bankruptcy case* except for willful misconduct or gross negligence." *In re Wash. Mut., Inc.*, 442 B.R. at 350 (emphasis added) (citing *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)). Moreover, the exculpation provision "must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers." *Id.* at 350-51 (citing *PWS*, 228 F.3d at 246) (finding that an exculpation provision that merely sought to extend the plan's release provision was improper).

49. As drafted, the definition of Exculpated Parties includes "the Debtors . . . and [their] post-petition directors, officers, members, and professionals." Combined Plan and Disclosure Statement Section 3.1.43. The Debtors' post-petition *members* appear to be improperly included in the definition of Exculpated Parties because they are not fiduciaries who have served during this chapter 11 cases. If the Plan Proponents believe that the entirety of the Exculpation provision is justified, then they should amend the Combined Plan and Disclosure Statement to disclose who these members are, how they qualify as estate fiduciaries, and why they are entitled to an exculpation of liability. As currently drafted, the Combined Plan and Disclosure Statement lacks any information or explanation regarding the Exculpated Parties.

50. Further, the Injunction provision in Section 15.4 provides, in part: "[a]ll persons who have held, hold or may hold Claims against or Interests in any or all of the Debtors, are permanently enjoined, on or after the Effective Date, from . . . (e) commencing or continuing in any matter any action or other proceeding of any kind with respect to any claims and Causes of Action which are retained pursuant to this Plan." *Id.* Section 15.4. "Causes of Action," as defined in Section 3.1.19, is expansive and essentially encompasses any conceivable claim and cause of action that could be asserted by any person against third parties, and not only includes causes of action that can brought in the Bankruptcy Court, but also includes those brought in "any other forum." *Id.* Section 3.1.19. And, though "Retained Causes of Action" is not a defined term, Section 15.11 describes the Causes of Action retained under the Combined Plan and Disclosure Statement so broadly that it essentially encompasses nearly any conceivable cause of action against any party, and thus adds no clarity to what the "claims and Causes of Action which are retained" are. *Id.* Section 15.11. Section 15.4(e), therefore, mirrors the release provision in Section 15.8.[15]

51. The Injunction provision in Section 15.4 and the Exculpation provision in Section 15.9 are clearly non-consensual because creditors are not given an option or choice to opt out of these Sections. Accordingly, creditors' inability to opt out of Sections 15.4 (Injunction) and 15.9 (Exculpation) effectively negate their ability to opt out of the releases in Section 15.8 and renders the non-debtor third party release in this Section non-consensual as well. *See In re Wash. Mut.*, 442 B.R. at 351 (third party releases were non-consensual where the Plan provided that "even

[15] In part, Section 15.8 releases the Released Parties "from any and all claims, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever . . . based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Chapter 11 Cases, the negotiation, documentation, and consummation of the Sale . . . ."

parties who thought they were opting out of the releases by checking the box on their ballot would be bound by the releases").

52. Therefore, the Combined Plan and Disclosure Statement has not, and cannot, provide adequate information regarding the necessity or appropriateness of the Release Provisions. The non-consensual releases cannot be necessary to the Debtors' reorganization because their bankruptcy is a routine liquidation, which is essentially complete. The sale of the Debtors' assets to Jansan already closed on July 21, 2017. Additionally, none of the Released Parties or Exculpated Parties provided a critical financial contribution to creditors or the Debtors' estates in exchange for their release. *See U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 145 (Bankr. D. Del. 2010) (actions undertaken to "formulate and negotiate" the plan of reorganization were not a "critical financial contribution" needed to obtain approval of non-consensual releases). And, this Court has already determined that directors, officers, employees, and professionals performing their jobs and assisting with the drafting and negotiating a plan do not qualify as the kind of contribution that would justify a release. *See, e.g.*, *In re Genesis Health*, 266 B.R. at 606-07.

53. Therefore, because the Combined Plan and Disclosure Statement contain impermissible non-consensual releases and injunctions with respect to claims that creditors may hold against non-debtor parties, the Plan Proponents fail to comply with Local Bankruptcy Rule 3017-2(a) and are therefore not entitled to interim approval of the disclosure statement pursuant to Local Bankruptcy Rule 3017-2(c).

C. Proposed Language

54. PBGC is concerned that the broad language in the Release Provisions discussed above could be construed to improperly affect the future ability of PBGC or the Pension Plans to

pursue any liability for any harm to PBGC or the Plans resulting from any violation under ERISA or any other law, thereby irreparably harming both PBGC and the Plans. PBGC only became trustee of the Pension Plans on August 14, 2017. The agency is currently working to gather documents and information relating to the Pension Plans and the Plans' participants so that it may calculate and pay benefits under the Plans – a process that may take upwards of three years or more. PBGC is also simultaneously reviewing all documents received for any potential causes of action under ERISA and any other law.

55. Accordingly, all of PBGC's objections with respect to the Release Provisions can be resolved if the following language is added to the Combined Plan and Disclosure Statement and the Plan Confirmation Order:

> Nothing in the Debtors' bankruptcy proceedings, Confirmation Order, Plan of Liquidation (including but not limited to Sections 15.4, 15.6, 15.7, 15.8, and 15.9), the Bankruptcy Code (and § 1141 thereof), or any other document filed in the Debtors' bankruptcy cases shall in any way be construed to discharge, release, limit, or relieve the Debtors or any other party, in any capacity, from any liability or responsibility with respect to (i) the Woods Industries, Inc. Hourly Employees' Pension Plan, (ii) the Wabash Holding Corporation Pension Plan, and (iii) the GC/Waldom Electronics Inc. Pension Plan ("Pension Plans"), or any other defined benefit pension plan under any law, governmental policy, or regulatory provision. PBGC and the Pension Plans shall not be enjoined or precluded from enforcing such liability or responsibility by any of the provisions of the Combined Disclosure Statement and Chapter 11 Plan of Liquidation, Confirmation Order, Bankruptcy Code, or any other document filed in the Debtors' bankruptcy cases.

Should the above language be included in the Combined Plan and Disclosure Statement and Plan Confirmation Order, PBGC would withdraw its objection regarding the Release Provisions.

III. The Combined Plan and Disclosure Statement Lacks Adequate Information Regarding the Grounds for Substantive Consolidation of the Individual Estates and the Effects of Substantive Consolidation on PBGC's Claims.

56. The Combined Plan and Disclosure Statement lacks "adequate information" because it fails to provide sufficient information to creditors regarding the grounds for the proposed deemed substantive consolidation of the individual Debtors' estates, the effect of substantive consolidation on PBGC's and other general unsecured creditors' claims, and the significant risks associated with seeking this extraordinary remedy.

57. Section 10.1 states:

> To promote efficient administration and effectuation the Plan, including for purposes of Distributions to be made under the Plan, the Plan Proponents seek authority under Bankruptcy Code section 105 and Bankruptcy Rule 9019 to consolidate the Debtors' Estates solely with respect to holders of General Unsecured Claims.
>
> As a result of such consolidation, (i) the Debtors and their Estates shall be deemed to be a single entity and Estate for purposes of Distributions to holders of Allowed General Unsecured Claims, (ii) each Allowed General Unsecured Claim against any Debtor shall be deemed to be an Allowed Claim against the consolidated Debtors, and (iii) each General Unsecured Claim that is Allowed against more than one Debtor shall be deemed to be a single Allowed Claim against the consolidated Debtors. For the avoidance of doubt, this limited consolidation shall not affect: (i) the legal and corporate structures of the Debtors; (ii) pre- and post-Effective Date guarantees, liens and security interests that are required to be maintained (a) in connection with executory contracts and unexpired leases that have been or will be assumed, if any, or (b) pursuant to the Plan; or (iii) distributions from any insurance policies or proceeds of such policies. . . .

Combined Plan and Disclosure Statement Section 10.1.[16]

[16] The Combined Plan and Disclosure Statement seeks a "deemed" substantive consolidation, which is where the effect of substantive consolidation occurs, but the debtors remain separate legal entities. *See Owens Corning*, 419 F.3d 195, 202, 216 (3d Cir. 2005) ("[T]he flaw most fatal to the Plan Proponents' proposal is that the consolidation sought was 'deemed (*i.e.*, a pretend consolidation for all but the Banks).").

58. However, the Combined Plan and Disclosure Statement fails to mention anything further about substantive consolidation. Indeed, the Disclosure Statement cannot be approved, even on an interim basis, before substantive consolidation has been properly addressed by motion and a hearing, or, at the very least, the disclosure of information that the factors set forth by the Third Circuit in *In re Owens Corning* have been met. *See In re Owens Corning*, 419 F.3d at 210-12.

59. The Third Circuit considers substantive consolidation an "extraordinary" and "last-resort remedy." *Id.* at 199-200. The Third Circuit and this Court has held that the following principles govern the "extraordinary remedy" of substantive consolidation:

> [T]he "general expectation" is that "courts respect entity separateness absent compelling circumstances calling equity (and even then only possibly substantive consolidation) into play"; (2) the "harms substantive consolidation addresses are nearly always those caused by *debtors* (and entities they control) who disregard separateness"; (3) "[m]ere benefit to the administration of the case . . . is hardly a harm calling substantive consolidation into play"; (4) the "rough justice" remedy of substantive consolidation "should be rare and, in any event, one of last resort after considering and rejecting other remedies"; and (5) substantive consolidation "may not be used offensively (for example, having a primary purpose to disadvantage tactically a group of creditors in the plan process or to alter creditor rights)."

Id. at 211; *see also In re Nortel Networks, Inc.*, 532 B.R. 494, 556 (Bankr. D. Del. 2015).

60. Based on these principles, the Third Circuit held that a proponent of substantive consolidation has the burden of proving: "(i) prepetition [the debtors] disregarded separateness so significantly [that] their creditors relied on the breakdown of entity borders and treated them as one legal entity; or (ii) postpetition [the debtors'] assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *Owens Corning*, 419 F.3d at 211-12. Creditor opponents of substantive consolidation can defeat any *prima facie* showing under the first rationale if they prove that they are adversely affected and actually relied on the debtors'

separate existence. *Id*. at 212. Indeed, the Third Circuit rejected the notion that if a proponent makes a showing of reliance on the debtors' separateness, a court may still order consolidation if the benefits of consolidation heavily outweigh the harm. *Id*. at 210. Rather, the Third Circuit made clear that "[i]f an objecting creditor relied on the separateness of the entities, consolidation cannot be justified *vis-à-vis* the claims of that creditor." *Id*.

61. The Debtors and other Plan Proponents have the burden of proving that they meet the high standard for substantive consolidation as set forth in *Owens Corning*. But, the Combined Plan and Disclosure Statement fails to provide any evidence or allegations that, prepetition, the Debtors disregarded their separateness, or that, postpetition, their assets and liabilities were so hopelessly commingled that without substantive consolidation, every creditor would be worse off. *See id.* at 211 n.20.

62. And, it is not enough for the Debtors to argue that the conmingling of assets justifies substantive consolidation or that improper accounting of intercompany cash transfers and interest and royalty payments would make untangling the Debtors' finances extremely difficult. The Third Circuit held that commingling of assets justifies substantive consolidation "only when separately accounting for the assets and liabilities of the distinct entities will reduce the recovery of *every* creditor – that is, when every creditor will benefit from the consolidation," and "[n]either the impossibility of perfection in untangling the affairs of the entities nor the likelihood of some inaccuracies in efforts to do so is sufficient to justify consolidation." *Id.* at 214-15.

63. In addition to proving the factors for substantive consolidation, the Debtors must provide adequate information that quantifies the impact of substantive consolidation on creditors' claims. *See Krystal Cadillac*, 337 F.3d at 321; *see also In re Monroe Well Serv., Inc.*,

80 B.R. 324, 330 (Bankr. E.D. Pa. 1987) (holding that a disclosure statement must provide sufficient financial information "so that a creditor . . . can make an 'informed judgment' whether to accept or reject the plan"). The Combined Plan and Disclosure Statement fails to provide *any* information regarding the effect of denying PBGC a separate recovery against each of the Debtors.

64. The Combined Plan and Disclosure Statement should also warn creditors about the possibility that deemed substantive consolidation will not be permitted here, if this Court were to hold that the *Owens Corning* standards are not satisfied. *See Owens Corning*, 419 F.3d at 216. Accordingly, the Combined Plan and Disclosure Statement should also be amended to include substantive consolidation among the enumerated risk factors to be considered regarding the Combined Plan and Disclosure Statement and its implementation.

IV. The Combined Plan and Disclosure Statement Lacks Adequate Information Regarding the Debtors' Obligations and Liabilities to PBGC and the Pension Plans.

65. The Combined Plan and Disclosure Statement fails to provide adequate information regarding the Debtors' obligations and liabilities to PBGC and the Pension Plans. In fact, it is deafeningly silent regarding PBGC's claims. The Combined Plan and Disclosure Statement should be amended to provide adequate information regarding PBGC's claims, the amount of PBGC's claims, and reflect that all Debtors, and all other members of the Plan Sponsors' controlled, are jointly and severally liable for these claims. PBGC has filed claims against each Debtors for unfunded benefit liabilities, minimum funding contributions, and pension insurance premiums with respect to the Pension Plans.

66. Further, the Combined Plan and Disclosure Statement incorrectly states that the "Pension Plans have been frozen for participant admission and accruals for years prior to the

Petition Date." Combined Plan and Disclosure Statement Section 4.1.2(6). Though the GC/Waldom Electronics, Inc. Pension Plan was frozen effective April 30, 2003, and the Wabash Holding Corp. Pension Plan was frozen effective July 1, 1999, the Woods Industries, Inc. Hourly Employees' Pension Plan was never frozen. The Combined Plan and Disclosure Statement should be amended to correct this error.

67. The Combined Plan and Disclosure Statement fails to disclose that PBGC has joint and several claims of approximately $1,352,007.59 against each of the Debtors. The Combined Plan and Disclosure Statement should disclose that on October 6, 2017, PBGC filed the following claims that are effective against each of the Debtors:[17] (1) unfunded benefit liabilities in the amount of $34,440 for the GC/Waldom Electronics, Inc. Pension Plan; (2) due and unpaid minimum funding contributions in an unliquidated amount for the GC/Waldom Electronics, Inc. Pension Plan; (3) liability for pension insurance premiums in the amount of $112,466.49 for the GC/Waldom Electronics, Inc. Pension Plan; (4) unfunded benefit liabilities in the amount of $627,308 for the Wabash Holding Corp. Pension Plan; (5) due and unpaid minimum funding contributions in the amount of $30,142 for the Wabash Holding Corp. Pension Plan; (6) liability for pension insurance premiums in the amount of $173,035.03 for the Wabash Holding Corp. Pension Plan; (7) unfunded benefit liabilities in the amount of $75,870 for the Woods Industries, Inc. Hourly Employees' Pension Plan; (8) due and unpaid minimum funding contributions in in an unliquidated amount for the Woods Industries, Inc. Hourly Employees'

[17] Pursuant to the Order Permitting Pension Benefit Guaranty Corporation to File Consolidated Claims Under One Case Number (D.I. 447), entered by the Court on October 24, 2017, the proofs of claim that PBGC filed against KII Liquidating Inc. (f/k/a Katy Industries, Inc.) (17-11101) also constitutes the filing of a proof of claim against each and every Debtor, asserted as a joint and several liability, in each of the other Debtors' jointly administered cases.

Pension Plan; and (9) liability for pension insurance premiums in the amount of $298,746.07 for the Woods Industries, Inc. Hourly Employees' Pension Plan.

68. On February 16, 2018, PBGC filed amended proofs of claims, effective against each of the Debtors, to liquidate amount of its claims for the due and unpaid minimum funding contributions for the GC/Waldom Electronics, Inc. Pension Plan and the Woods Industries, Inc. Hourly Employees' Pension Plan. On February 16, 2018, PBGC also amended all three of its unfunded benefit liabilities proofs of claim, which are effective against each of the Debtors, in order to liquidate the priority amounts associated with these claims.

69. The Combined Plan and Disclosure Statement should be amended to include adequate information regarding PBGC's claims, the amounts of PBGC's claims, and reflect that the Plan Sponsors of the Pension Plans, and all members of their controlled group, including all of the other Debtors and W.J. Smith, are jointly and severally liable for these claims.

V. The Combined Plan and Disclosure Statement Lacks Adequate Information Regarding the W.J Smith Litigation.

70. The Combined Plan and Disclosure Statement also fails to provide adequate information regarding the W.J. Smith Litigation, and the "Reimbursable Expenses," defined as "certain expenses incurred in connection with the maintenance of the land owned by W.J. Smith." *See* Combined Plan and Disclosure Statement Section 4.1.2(6). The Plan Proponents should amend the Combined Plan and Disclosure Statement to accurately reflect the facts surrounding the W.J. Smith Litigation.

71. On October 19, 2017, Katy filed the Motion to Sell the Denison Parcel, in which it sought the Court's permission (i) to consent to the sale of the Denison Parcel and (ii) cause the net proceeds from that sale to be remitted directly to Jansan. On November 1, 2017, PBGC filed an objection to the Motion to Sell the Denison Parcel, arguing that the Bankruptcy Court (i)

lacked jurisdiction to (i) authorize the sale of W.J. Smith's assets and (ii) direct that the net proceeds from the sale be remitted to Jansan in violation of ERISA and the Federal Priority Statute. On December 19, 2017, this Court entered an Order authorizing Katy *only* to consent to the sale of the Denison Parcel.

72. As discussed above, on November 14, 2017 PBGC filed a Complaint against W.J. Smith in the Texas District Court (Civil Action No. 17-803), and a Motion for a Temporary Restraining Order and Preliminary Injunction to prevent the transfer of any proceeds from the sale of the Denison Parcel to any third party. PBGC obtained the temporary restraining order and preliminary injunction over the disposition over any of the proceeds realized from the sale, including the Reimbursable Expenses, to which the Debtors are claiming an interest. The preliminary injunction further orders that an accounting of all proceeds, costs, fees, and expenses in connection with the sale of the Denison Parcel must be provided to the Texas District Court before any costs or fees are paid.

73. To date, W.J. Smith has failed to appear in the action, and no party has filed the required accounting of any proceeds, costs, fees, or expenses with the Texas District Court. Without filing the required accounting and approval of any costs, fees, or expenses by the Texas District Court, no such costs, fees, or expenses will be paid.

74. PBGC asserts that the Plan Proponents should amend the Combined Plan and Disclosure Statement to accurately reflect the status of the Reimbursable Expenses and disclose the possibility that the Reimbursable Expenses may never come into the Debtors' bankruptcy estate.

75. First, despite the original closing date of the sale of the Denison Parcel being scheduled on or around November 17, 2017, the sale has not yet closed. Though the sale of the

Denison Parcel was originally scheduled to close on November 17, 2017, the closing has since been delayed multiple times. At this time, it is unclear to PBGC whether the sale will go forward. Accordingly, the Combined Plan and Disclosure Statement should reflect the possibility that the sale may never close, and therefore, the Debtors may not receive any Reimbursable Expenses before their estates are wound down.

76. Second, PBGC continues to dispute the amount the Debtors are entitled to for its Reimbursable Expenses, and to date, no resolution has been reached regarding the payment of the Reimbursable Expenses.

VI. The Combined Plan and Disclosure Statement Lacks Adequate Information Regarding a Disputed Claims Reserve.

77. The Combined Plan and Disclosure Statement fails to provide adequate procedures to ensure pro rata distribution of the Debtors' assets. Though the Combined Plan and Disclosure Statement provides that the Plan Administrator may object to claims,[18] it fails to adequate disclose whether the Debtors have established a disputed claims reserve and whether sufficient funds will be set aside to pay disputed claims once they become allowed claims. Without an appropriate reserve, PBGC's claims, if disputed, and other disputed claims may be subject to prejudicial treatment.

VII. PBGC Objects to the Approval of the Voting Procedures Set Forth in Section 8.3 of the Combined Plan and Disclosure Statement, Prohibiting Disputed Claims From Voting.

[18] *See* Combined Plan and Disclosure Statement Section 9.5.1(iv). "Plan Administrator" is defined as "Emerald Capital Advisors, the entity to be appointed pursuant to Section 9.5 to carry out the provisions of this Plan." *Id.* Section 3.1.83.

78. Section 8.3 of the Combined Plan and Disclosure Statement, entitled Claims and Interests Not Entitled to Vote, states:

> Holders of Claims are not entitled to vote if, as of the Voting Record Date,[19] the Claim (a) has been disallowed or (b) is a Disputed Claim.[20] However, if a Claim has been disallowed in part (or a pending objection seeks disallowance of such Claim only in part) as of the Voting Record Date, the holder of such Claim shall be entitled to vote the Allowed (or undisputed) portion of the Claim.

See Combined Plan and Disclosure Statement, Section 8.3.

79. Under the terms of the Combined Plan and Disclosure Statement, a Disputed Claim is not entitled to vote to accept or reject the plan. The definition of Disputed Claim includes a claim that is "(ii) the subject of an objection or request for estimation that has not been withdrawn, resolved, or overruled by a Final Order of the Bankruptcy Court." Combined Plan and Disclosure Statement Section 3.1.37. The terms, as proposed, are arbitrary, abusive, unjustified, and result in unfair prejudice to creditors because the Debtors can dispute any or all claims of creditors before the Voting Record Date to prevent certain or all creditors from voting on the plan. The Section 8.3 should not be approved because the Debtors have not provided sufficient information to justify its arbitrary and prejudicial terms. If the Court were to approve Section 8.3 as proposed, Debtors could abuse the protections provided to creditors under the Code in order to achieve acceptance of a plan of liquidation.

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[19] The Joint Motion proposes to set February 27, 2018 as the "Voting Record Date."

[20] Disputed Claim means a Claim, or any portion thereof, that is either (i) listed on the Schedules as unliquidated, disputed, or contingent and for which no proof of claim in a liquidated and non-contingent amount has been filed, *or (ii) the subject of an objection or request for estimation that has not been withdrawn, resolved, or overruled by a Final Order of the Bankruptcy Court*. Combined Plan and Disclosure Statement, Section 3.1.37 (emphasis added).

80. For the foregoing reasons, PBGC files this objection to the Combined Plan and Disclosure Statement. PBGC further reserves all of its claims, defenses, liens, and rights to assert any further objections to any modifications to the Combined Plan and Disclosure Statement, and treatment of PBGC's claims against the Debtors.

CONCLUSION

Based on the foregoing, PBGC requests that the Court require the Plan Proponents to further amend the Combined Plan and Disclosure Statement to provide adequate information as required by 11 U.S.C. § 1125.

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Respectfully Submitted,

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