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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
ARCAPITA BANK B.S.C.(c), *et al.*,	)	Case No. 12-11076 (SHL)
Debtors.	)	Jointly Administered

MAYHOOLA FOR INVESTMENT Q.S.P.C.'S OBJECTION TO THE DEBTORS' MOTION FOR AN ORDER (I) APPROVING THE DISCLOSURE STATEMENT AND THE FORM AND MANNER OF NOTICE OF THE DISCLOSURE STATEMENT HEARING, (II) ESTABLISHING SOLICITATION AND VOTING PROCEDURES, (III) SCHEDULING A CONFIRMATION HEARING, AND (IV) ESTABLISHING NOTICE AND OBJECTION PROCEDURES FOR CONFIRMATION OF THE DEBTORS' JOINT CHAPTER 11 PLAN

Mayhoola for Investment Q.S.P.C. ("MFI"), a creditor and party-in-interest in the above-captioned consolidated cases, objects to the *Debtors' Motion for an Order (I) Approving the Disclosure Statement and the Form and Manner of Notice of the Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Joint Chapter 11 Plan* [Docket No. 828] (the "Motion"), and states as follows:

I. Background

1. On August 24, 2012, MFI timely filed proofs of claims (the "Original Proofs of Claim") against all seven (7) of the Debtors. On February 19, 2013, MFI filed an amended proof of claim (the "Amended Proof of Claim", and with the Original Proofs of Claim, the "Proofs of Claim") against Debtor Arcapita Bank B.S.C. ("Arcapita Bank")

2. As set forth in the Proofs of Claim, MFI invested $7,000,000 in one of Arcapita Bank's "investment opportunities", as described in the Section III(A) of the proposed Disclosure Statement (the "Disclosure Statement"). MFI's investment was made on or around January 26, 2012, a mere seven (7) weeks before all of the Debtors, except for Falcon Gas Storage Company, Inc., filed their bankruptcy petitions. As a result of the timing of the solicitation of MFI's investment and the placement of MFI's invested funds into what appears to have been a non-segregated account held at Arcapita Bank, MFI believes that in addition to its claims against Arcapita Bank it has viable causes of action against non-debtor third parties involved in the transaction. MFI intends to assert such claims outside of this bankruptcy proceeding.

3. As set forth below, MFI objects to the Motion on the grounds that the plan of reorganization described in the Disclosure Statement (the "Plan") is unconfirmable as a matter of law because of the Third-Party Releases (as defined below). MFI also objects to the Motion because the Disclosure Statement does not contain adequate information concerning the need for, or the propriety of, the Third-Party Releases. Accordingly, for the reasons set forth below, MFI respectfully requests that the Motion be denied.

II. Objection

A. The Plan Improperly Provides for Non-Consensual Third-Party Releases and is Unconfirmable Under the Law in this Circuit.

4. The Plan represents an aggressive and overreaching attempt to release, among others, the Debtors' officers, directors and employees, from liability on account of claims held

by individual creditors in these cases. Specifically, the Plan provides that both creditors who vote to accept the Plan and creditors who vote to reject the Plan shall be deemed to have released all claims held by those creditors against the "Released Parties." *See* Plan, § 9.2.3. The "Released Parties" are defined under the Plan to include, *inter alia*, the Debtors' current and former officers, directors, employees, managers and agents. *See* Plan, Appendix A, § 156.

5. The law in the Second Circuit is clear that such broad releases are prohibited by the Bankruptcy Code except in exceptionally limited circumstances. *See, e.g., Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.),* 416 F.3d 136, 143 (2d Cir. 2005) (stating that "[a] nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to the success of the plan"). One reason for their disfavor is that non-consensual third-party releases are prone to abuse and can act as a bankruptcy discharge without the third-parties filing their own bankruptcy petitions. *Id.* at 142-143 (noting that a non-debtor release "lends itself to abuse" because "it may operate as a bankruptcy discharge without a filing and without the safeguards of the Code."). Thus, a bankruptcy court's ability to approve third-party releases is, at best, significantly limited. *See Metcalfe & Mansfield Alt. Investments,* 421 B.R. 685, 694 (Bankr. S.D.N.Y. 2010) ("The Second Circuit imposes significant limitations on bankruptcy courts ordering non-debtor releases and injunctions in confirmed chapter 11 plans."); *accord Behrman v. National Heritage Foundation*, 663 F.3d 704, 712 (4th Cir. 2011) ("[W]e agree with Appellants that approval of nondebtor releases [as part of a plan of reorganization] should be granted cautiously and infrequently.").

6. The courts in this Circuit have identified five situations in which non-debtor releases may be appropriate: (a) where the released party made a material contribution to the estate that is itself an essential element of the debtor's plan of reorganization, (b) where the

enjoined claims are not extinguished, but are merely channeled to a settlement fund, (c) where the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution, (d) where the plan otherwise provided for the full payment of the enjoined claims, or (e) if the affected creditors consent. *See In re Metromedia*, 416 F.3d at 142; *In re Oneida Ltd.*, 351 B.R. 79, 94 (Bankr. S.D.N.Y. 2006).

7. The circumstances in the instant case fall far short of justifying the Third-Party Releases. There is nothing in the Disclosure Statement that indicates that the Released Parties made any contribution to the estate, let alone a "material contribution." The claims being released are being extinguished and there is no settlement fund from which creditors, including MFI, can seek recovery for those claims. Furthermore, there is nothing in the Disclosure Statement that would indicate that claims against the Released Parties would impact the Debtors' reorganization, especially here where the Debtors seek to wind-down their business operations, and not to reorganize, and project a recovery for unsecured creditors of only 6.3% on their claims. *See* Disclosure Statement, § I(C) (discussing treatment of Class 5(a)); *id.* at § VI(A) (discussing the Debtors' "Standalone Business Plan" which contemplates "the Debtors' emergence from chapter 11 with the goal of an orderly wind-down of its business operations"). Finally, MFI does not, and will not, consent to the Third-Party Releases. As with all waivers, a creditor's consent to a third-party release must be affirmative and consensual. *See Matter of Specialty Equip. Co., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (releases must be "consensual and non-coercive"). Accordingly, even MFI's acceptance of a distribution under a confirmed plan would not establish MFI's consent to the Third-Party Releases. *See In re Conseco, Inc.*, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) (striking as inappropriate provisions that deem consent to third-party releases from distribution acceptances).

8. Because the Third-Party Releases are inappropriate as a matter of law, the Plan is unconfirmable on its face and the Disclosure Statement should not be approved. *See In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("If the disclosure statement describes a plan that is so 'fatally flawed' that confirmation is 'impossible', the court should exercise its discretion to refuse to consider the adequacy of disclosures.") (citations omitted); *In re 266 Wash. Assoc.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992) ("A disclosure statement will not be approved where, as here, it describes a plan which is fatally flawed and thus incapable of confirmation."); *In re Copy Crafters Quick Print, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988) (approval of a disclosure statement should be withheld "if it is apparent that the plan will not comply with Code § 1129(a) . . .").

B. The Disclosure Statement Does Not Contain Adequate Information Supporting the Third-Party Releases.

9. Even if this Court was reluctant to find in the context of a disclosure statement hearing that the Plan is unconfirmable on its face, the Disclosure Statement should not be approved because it does not contain adequate information supporting the Third-Party Releases.

10. Section 1125 of the Bankruptcy Code provides that before a plan proponent can solicit acceptances of a plan, the court must find that the disclosure statement contains "adequate information." Section 1125 defines "adequate information" as:

> Information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan…

11 U.S.C. § 1125(a)(1).

11. The Disclosure Statement contains absolutely no information supporting the need for, or the propriety of, the Third-Party Releases. By way of example, the Disclosure Statement

contains no information as to material contributions made by the Released Parties to the estates or how such contributions were essential to the Plan. The Disclosure Statement is absolutely silent as to how claims held by creditors against non-debtors would somehow impact the Debtors' liquidation. In fact, the only information concerning the Third-Party Releases is a wholly conclusory statement that the releases "are consistent with *Metromedia* and interpreting case law within the Southern District of New York." *See* Disclosure Statement, § XII(B)(3). This statement is legal argument, not factual disclosure, and is clearly insufficient. *See In re Source Enterprises, Inc.*, No. 06-11707 (AJG), 2007 WL 7144778, *3 (July 31, 2007 Bankr. S.D.N.Y.) (requiring the debtors to include in their disclosure statement an "expanded explanation of the *Metromedia* justification for the third party releases").

12. The Debtors have failed to provide adequate information supporting the Third-Party Releases. The reason for this omission is simple – the Third Party Releases were made without any consideration flowing back to the estates and are essentially an unsupportable "gift" to the Released Parties. Because the Disclosure Statement does not contain adequate information concerning the need for, or propriety of, the Third-Party Releases, the Court should not approve the Disclosure Statement.

(Remainder of page intentionally left blank)

WHEREFORE, MFI respectfully asks that the Court (a) deny approval of the Disclosure Statement, and (b) grant MFI such other and further relief as it may be entitled.

Dated: March 11, 2013

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CERTIFICATE OF SERVICE

I certify that on March 11, 2013, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of New York and on March 11, 2013 by First Class Mail and e-mail to the parties listed below.

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