

I. The What, Who, Why and When of Plan Support Agreements

A. **The What (12:15-12:30):** An agreement setting forth the terms of a plan of reorganization signed by the Debtor and the Debtors' stakeholders binding the stakeholders to vote in favor of the plan described.

1. **Prepackaged Plan ("Prepak") versus Prenegotiated Plan (w/ Plan Support Agreement):**

a. "Prepack" means debtor has negotiated a plan and solicited votes from impaired classes before filing the petition.

b. Prenegotiated plan also involves prepetition negotiations but there is no formal solicitation of votes. Instead the debtor signs up a "lock up" or "plan support agreement" with major creditors.

2. **Common Terms of Plan Support Agreement :**

a. **Agreement to Vote For The Plan:** The Stakeholders agree to vote in favor of and not withdraw such vote for a properly solicited plan.

b. **Trading Restrictions:** The stakeholders agree to "lock-up" any parties to whom they sell the debtors' debt by requiring the transferee to sign a joinder to the plan support agreement and be bound by its terms. Examples of Trading Language:

(i) "None of the provisions of Section 1 of this Agreement shall limit or interfere, in any way, with . . . the ability of any Party to transfer or assign its interests under, and pursuant to, the DIP Credit Agreement or the Prepetition Credit Agreement, as applicable. As a condition to the effectiveness of any transfer or assignment of interests by any Party pursuant to the DIP Credit Agreement or the Prepetition Credit Agreement, the transferee or assignee shall have agreed, in writing, to assume all of the transferor's or assignor's obligations under this agreement" Lake at Las Vegas Joint Venture, LLC Plan Support Agreement, § 1.6

(ii) "Each Consenting Lender party hereto agrees that it shall not sell, transfer, hypothecate or assign (each, a "Transfer") any of its Claims or any right or interest (voting or otherwise) therein; provided, however, that any Consenting Lender may (i) freely Transfer any of its Post-Effective Date Claims (as defined below) to any Person without such Post-Effective Date Claims being or becoming subject to this Agreement and (ii) Transfer any of its Claims that are not Post-Effective Date Claims (so long as such Transfer is not otherwise prohibited by any order of the Bankruptcy Court), to an entity (each, a "Transferee Lender") that agrees in writing, in the form attached hereto as Exhibit B (a "Transferee Joinder"), to be bound by the terms of this Agreement. Subject to the terms and conditions of any order of the Bankruptcy Court, each Consenting Lender agrees to provide FairPoint and the Administrative Agent with a copy of any Transferee Joinder executed by such Party. Any Consenting Lender that Transfers its Claims to its Affiliate pursuant to a Transferee Joinder shall remain liable

for breach of this Agreement by such Affiliate." Fairpoint Communications Inc. Plan Support Agreement, § 4.06(b)

(iii) "Each Participating Lender agrees that so long as this Agreement has not been terminated in accordance with its terms it shall not directly or indirectly (a) grant any proxies to any person in connection with its Lender Claims to vote on the Plan, or (b) sell, pledge, hypothecate or otherwise transfer or dispose of, or grant, issue or sell any option, right to acquire, voting, participation or other interest in ("Transfer") any Lender Claims, except, in each case, (i) in accordance with the terms of the Credit Agreement and the Restructuring Term Sheet and (ii) to a party that agrees in writing to be subject to the terms and conditions of this Agreement as a "Participating Lender", which writing shall be in form and substance reasonably satisfactory to the Agent and the Debtors. Each Participating Lender agrees to notify the Debtors and the Agent of any Transfer of its Lender Claims and to provide the Debtors and the Agent with a signed agreement of the transferee agreeing to be subject to the terms and conditions of this Agreement before such Transfer becomes effective. Any Transfer of any Lender Claim that does not comply with the foregoing shall be deemed void *ab initio*. This Agreement shall in no way be construed to preclude any Lender from acquiring additional Lender Claims or any other interests in any Debtors; provided, however, that any such additional Lender Claims or other interests in such Debtor shall, upon acquisition, automatically be deemed to be subject to all the terms of this Agreement." Citadel Broadcasting Corp. Plan Support Agreement, § 4

c. **Specific Performance:** Plan support agreements generally provide for specific performance (rather than money damages) for breach of the agreement. Courts have been concerned that these provisions essentially render the agreement a vote for the plan. Examples of Specific Performance Language:

(i) "It is understood and agreed by the Parties that money damages would be an insufficient remedy for any breach of this Agreement by any party and each non-breaching Party shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, without having to establish the inadequacy of damages as a remedy . . ." Lake at Las Vegas Joint Venture, LLC Plan Support Agreement, § 7

(ii) "Each Party hereto recognizes and acknowledges that a breach by it of any covenants or agreements contained in this Agreement may cause the other Parties to sustain damages for which such Parties would not have an adequate remedy at law for money damages, and therefore each Party hereto agrees that in the sole event of any breach the other Parties shall be entitled to seek the remedy of specific performance or injunctive relief to enforce such covenants and agreements." Fairpoint Communications Inc. Plan Support Agreement, § 6.06

(iii) "It is understood and agreed by the parties that money damages would not be a sufficient remedy for any breach of this Agreement by any party and each non-breaching party shall be entitled to seek specific performance and injunctive or other equitable relief, including attorneys fees and costs, as a remedy of any

such breach, and each party agrees to waive any requirement for the securing or posting of a bond in connection with such remedy, in addition to any other remedy to which such non-breaching party may be entitled, at law or in equity." Citadel Broadcasting Corp. Plan Support Agreement, § 7.

3. Common Outs

a. **"Fiduciary Outs"**: A party who signs a plan support agreement but then finds itself with interests adverse to the terms of the plan may no longer obligated to support the plan if such support violates its fiduciary duties. Examples of Fiduciary Out language:

(i) "Company Termination Events. This Agreement and the obligations hereunder shall be terminated, unless waived by the Company, upon the occurrence of any of the following events . . . (b) the board of directors of the Company has determined in good faith, after consultation with legal counsel, that the taking of any action under this Agreement would be inconsistent with its applicable fiduciary obligations. . ." Fairpoint Communications Inc. Plan Support Agreement, § 5.02

(ii) "The Debtors' Covenants: As long as a Support Termination Event has not occurred, or has occurred but has been duly waived in accordance with the terms hereof, the Debtors shall, to the extent not inconsistent with the fiduciary obligations of any of the Debtors or any of their respective subsidiaries, use their commercially reasonable efforts to [file the Disclosure Statement, obtain from the Bankruptcy Court an order confirming a Qualified Plan, and effectuate and consummate this Plan]." Citadel Broadcasting Corp. Plan Support Agreement, § 5

(iii) "WHEREAS, subject to the caveats set forth herein regarding Bankruptcy Court approval and observance of fiduciary duties, the Debtors intend to use reasonable best efforts to obtain Bankruptcy Court approval of the Plan . . ." Chemtura Corporation Plan Support Agreement, at 2 (Recitals)

(iv) "Fiduciary Duties. Notwithstanding anything to the contrary herein, nothing in this Agreement shall require (i) the OCC or any of its members or professionals, or (ii) the Debtors, their professionals or any directors or officers of any of the Debtors, in such person's capacity as a director, or officer, professional, or member (as applicable), to take any action, or to refrain from taking any action, that such person determines in good faith, after consultation with counsel, is inconsistent with its or their fiduciary obligations under applicable law, and no action or failure to take action, including any disclosure that the board of directors of the Company so determines is required by its fiduciary duties shall be deemed to have been so required." Chemtura Corporation Plan Support Agreement, at § 26

b. **No Material Adverse Change**: If there is a material change between the terms set out in the plan support agreement and those included in the plan, the stakeholders do not have to support the plan.

B. **The Who (12:30-12:45):** The key to a successful lockup/plan support agreement is getting the support of a block of key constituents.

1. Need enough support to satisfy Code provisions:

a. Section 1126(c) provides a class of claims is considered to have accepted a plan if such plan has been accepted by creditors that hold at least two-thirds in amount and more than 1/2 in number, of the allowed claims of that class, that have rejected such plan.

b. Section 1129 provides that if any class of claims is impaired under the plan at least 1 class of claims that is impaired must have voted in favor of the plan.

2. Need to identify where the biggest fights will be and try to settle with those parties.

C. **The Why (12:45-12:55):** With amendments that reduced the debtor's exclusivity period and the time for assumption and rejection of contracts, BAPCPA encouraged debtors to find ways to expedite the bankruptcy process. Plan support agreements are one tool because they:

1. Reduce the cost and duration of bankruptcy proceedings.

2. Create less disruption to employee, customer, and business partner relationships.

3. Reduce negative publicity of an extended stay in bankruptcy and level of judicial inquiry.

4. Assure the market that the debtor will emerge relatively quickly from bankruptcy.

D. **The When (12:55-1:00):**

1. **Prepetition:**

a. **Before Section 1125(g):** Section 1125(b) prohibits the post-petition solicitation of votes for a plan prior to the approval of a disclosure statement. At least one Court suggested a plan support agreement is void under this section if there are *any* post-petition actions taken on behalf of the plan support agreement. See In re NII Holdings, Inc., 288 B.R. 356 (Bankr. D. Del. 2002) ("NII Holdings") (Court rejected a plan support agreement because while it was negotiated pre-petition it was signed and dated by a number of the parties two days post-petition); In re Stations Holding Co., Inc., 2002 WL 31947022 (Bankr. D. Del 2002) ("Stations").

b. **After Section 1125(g):** Probably in response to the NII Holdings and the Stations cases, Section 1125(g) (an amendment under the Bankruptcy

Abuse Prevention and Consumer Protection Act of 2005) protects pre-negotiated plans (which comply with applicable non-bankruptcy laws) from situations in which a bankruptcy petition has been filed but the plan support agreement has not yet been formally signed. Courts have been interpreting this provision to allow continuing postpetition "negotiations" if the plan support agreement discussions began before the petition was filed. See, In re CIT Group Inc. and CIT Group Funding Company of Delaware LLC, 2009 WL 4824498 at 2 (Bankr. S. D. N.Y. Dec. 8, 2009) (approving a plan in which "[t]he continued postpetition solicitation of Class 7 and Class 8 was proper and in compliance with Bankruptcy Code section 1125(g)").

2. **Postpetition:** §1125(b) prohibits the post-petition solicitation of votes for a plan prior to the approval of a disclosure statement but Courts have been reading solicitation narrow lately embolden by section 1125(g).

II. **The Chemtura Case (1:00-1:05):** (In re Chemtura Corporation, 09-11233)

A. **The Plan Support Agreement:** The Debtors, along with the Creditors Committee and the Ad Hoc Bondholders Committee, negotiated and entered into a plan support agreement (described also as a "global settlement") AFTER the petition was filed.

1. **Code Provisions Implicated**

a. **Section 363(b)(1) and Rule 9019**

b. **Section 1125(b):** The Debtors argue it is *not a solicitation* under section 1125(b) citing cases that find such post petition agreements valid where (i) they only require people to use their best efforts to pursue confirmation of a plan and not to support other plans and (ii) the agreement is merely documenting the plan negotiations. They further argue it is not a solicitation as the plan support agreement provides many "outs" to creditors and only kicks in after a disclosure statement is approved by the Court.

2. **Plan Support Agreement Key Terms**

a. resolution of litigation between the Creditors Committee and the Debtors' prepetition lenders

b. resolution of certain asserted rights of the Ad Hoc Bondholders Committee to payment in full of their professional fees and expenses in the chapter 11 cases (the "Settlement").

B. **Equity Holders Objection (also trying to terminate exclusivity and file own plan):**

1. **Impermissible Solicitation:** Calling it an improper lockup agreement serving only to marginalize the equity holders, the equity committee are asking the Court to apply Stations and NII Holdings (both Delaware cases) to this situation and deny the Debtors' application finding the plan support agreement to be a

violation of section 1125(b). The question is whether the agreement is a negotiation or a solicitation??

2. **Line Between Negotiation and Solicitation crossed:** They argue this is solicitation and not merely plan negotiations.

3. **Equity Holders Adversely Impacted:** The equity committee argues that Courts approve plan support agreements only where the settlements do not adversely impact other constituents' treatment or recoveries under the proposed plan and here the interests of the equity holders are adversely impacted.

a. **Value Not Maximized:** The equity committee argues the proposed plan includes a low plan valuation and the payment of hundreds of millions to settle meritless claims in the Debtors' plan while an alternate plan (proposed by the equity committee) "injects \$470 million of new cash, pays creditors in full and provides the fulcrum security holders with value well beyond what they would otherwise receive under the Debtors' Plan." Equity Objection at 4. Moreover, the Settlement adversely impacts the equity holders significantly.

b. **Only Limited Fiduciary Outs/Limited Solicitation Period Provided:** No fiduciary outs for consenting noteholders and only limited outs for creditors' committee. Also the plan support agreement allows a solicitation period of 5 business days. Because of these restrictions, the equity committee argues the plan support agreement will not allow stakeholders to consider any competing plan.

4. **Specific Performance Provisions Improper Solicitation:** The equity committee notes that courts often excise any specific performance language before approving a plan support agreement.

5. **Hearing is Scheduled for August 4th.** We will keep you posted.