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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Chapter 11
ADPT DFW HOLDINGS LLC, *et al.*,	§	Case No. 17-31432 (SGJ)
Debtors.	§	Jointly Administered under Case No. 17-31432

OBJECTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF ADEPTUS HEALTH INC. AND RESERVATION OF RIGHTS WITH RESPECT TO (I) AMENDED PROPOSED DISCLOSURE STATEMENT, AND (II) MOTION TO APPROVE THE SAME

The Official Committee of Equity Security Holders of Adeptus Health Inc. (the "**Equity Committee**") appointed in the Chapter 11 proceedings (the "**Chapter 11 Cases**") of the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**"), by and through its undersigned counsel, hereby files this objection and reservation of rights (this "**Objection**") with respect to: (i) the *Disclosure Statement for Debtors' First Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code* [Docket No. 452] (the "**Amended Proposed Disclosure Statement**"); and (ii) the *Motion of Debtors for Order (I) Approving Disclosure Statement, (II) Establishing Procedures for the Solicitation and Tabulation of Votes to Accept or*

Reject the Debtors' Joint Chapter 11 Plan, (III) Scheduling a Confirmation Hearing, and (IV) Approving Related Notice Procedures [Docket No. 321]. In support of this Objection, the Equity Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. The Amended Proposed Disclosure Statement cannot be approved for at least three principal reasons: (i) first, the Amended Proposed Plan,[1] as it presently stands, is patently unconfirmable insofar as it is predicated on an extraordinary remedy (substantive consolidation) that the Debtors cannot justify under the circumstances of these Chapter 11 Cases; (ii) second, the Amended Proposed Plan is the bad-faith product of a conflicted Board and advisors that have abandoned their fiduciary duties to the shareholders of Adeptus Health Inc. ("**AHI**"); and (iii) third, the Amended Proposed Disclosure Statement lacks adequate information with respect to several material aspects of the Amended Proposed Plan such that creditors and equity holders cannot make an informed voting decision with respect to the Plan.

2. The Court should not approve the Amended Proposed Disclosure Statement because the underlying Amended Proposed Plan is "fatally and obviously flawed,"[2] and proceeding to a confirmation hearing with such a patently unconfirmable plan would be a waste of the estates' resources. The infirmities inherent in the Amended Proposed Plan are substantial, preclude confirmation of the Plan, and must be addressed as soon as practicable (*i.e.*, at the hearing on the Amended Proposed Disclosure Statement). Parties should not be heard to

[1] Unless otherwise indicated, capitalized terms used in this Objection but not otherwise defined shall have the meanings ascribed to them under the Amended Proposed Disclosure Statement or the *Debtors' First Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code* [Docket No. 451] (the "**Amended Proposed Plan**"), as applicable.

[2] *In re Mahoney Hawkes, LLP*, 289 B.R. 285, 294 (Bankr. D. Mass. 2002) (Hillman, C.J.) (quoting *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1002 (Bankr. D. Mass. 1991) (Queenan, C.J.)); *see also In re O'Leary*, 183 B.R. 338, 338-39 (Bankr. D. Mass. 1995) (Feeney, J.) ("Courts may refuse to approve disclosure statements that describe plans that cannot be confirmed.").

complain that the matters raised in this Objection can be addressed at the confirmation hearing, only to then contend at the confirmation hearing that there is no alternative to the Amended Proposed Plan (presumably except liquidation). Rather, the Debtors should be required to address the Amended Proposed Plan's material deficiencies at this time.

3. A tent pole feature of the Debtors' recently revised plan of reorganization is the substantive consolidation of AHI and the rest of the Debtors' estates for voting and distribution purposes.[3] The Debtors have not (and cannot) satisfy their burden for approval of substantive consolidation and the Amended Proposed Disclosure Statement contains inadequate disclosure to substantiate the extraordinary relief requested by the Debtors.[4] There are generally only two circumstances in which substantive consolidation has been found to be appropriate: (1) where creditors dealt with the debtors as a single economic unit and did not rely on their separate identities, or (2) where the affairs of the debtors are so entangled that consolidation will benefit the estates of all of the debtors (*i.e.*, where "untangling is either impossible or so costly as to consume the [debtor's] assets").[5] Neither such circumstance is present here and the Amended Proposed Disclosure Statement contains only conclusory statements in support of substantive consolidation. These conclusory statements fall well short of containing the "adequate information" required by the Bankruptcy Code.

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[3] Notably, the revised disclosure statement provides no information (much less adequate information) to justify the about-face on corporate separateness in the Debtors' initial plan versus the revised plan, any background on which entity or entities encouraged the shift towards substantive consolidation, or how AHI's directors or officers are acting consistent with their fiduciary duties to AHI's creditors or interest holders in prosecuting a plan premised on substantive consolidation of AHI's estate with the estates of its subsidiaries.

[4] See *Bank of New York Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber, Co.)*, 584 F.3d 229, 249 (5th Cir. 2009) ("Substantive consolidation is an 'extreme and unusual remedy.'")

[5] *See In re Ward*, 558 B.R. 771, 797 (Bankr. N.D. Tex. 2016) (Houser, J.) (noting Second and Third Circuit precedent enumerating two factors).

4. There is no information contained in the Amended Proposed Disclosure Statement supporting the Debtors' contention that creditors relied on the Debtors conducting business as a single unit. Indeed, the evidence is quite the contrary. The Debtors' sophisticated prepetition lenders and Deerfield were well aware of which Debtors were obligors and guarantors under their secured loan documents. In connection with the Bridge Loan, the prepetition lenders demanded guarantees from additional Debtor entities that were not previously obligated under the Prepetition Loan Agreement. Through the DIP Facility, Deerfield demanded that AHI (whose assets were previously unencumbered) become an obligor thereunder. The Joint Venture agreements were all entered into by separate Debtor subsidiaries, as were the various leases with MPT. Only AHI is named as a Debtor defendant in any of the securities class action lawsuits.[6] These transactions (and others) demonstrate that creditors did not believe that they were dealing with the Debtors as a single economic unit.

5. The Debtors' Amended Proposed Disclosure Statement also contains inadequate information to support its position that its business affairs are so entangled that substantive consolidation is necessary or appropriate relief. As a public reporting company, the Debtors must comply with federal securities regulations, and routinely make detailed securities disclosures regarding such compliance (including detailed information with respect to their businesses, operations, and corporate and legal structures). Moreover, as the Debtors note, the Debtor subsidiaries operate in a highly regulated industry, and the various operating subsidiaries are subject to stringent oversight at the federal, state, and local levels.[7] Additionally, the Debtors

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[6] Amended Proposed Disclosure Statement Art. IV(A).

[7] As noted in the Amended Proposed Disclosure Statement, the Debtors are subject to:

> oversight of various divisions within CMS and DOJ, including without limitation, the Office of Civil Rights, Clinical Laboratory Improvement Amendments program, Center for Medicare, Center for Medicaid and CHIP Services, Center for Program

have already filed 140 individual schedules of assets and liabilities and statements of financial affairs for each Debtor entity, clearly demonstrating that the Debtors' finances are not impracticably entangled. There is also no evidence that the Debtors ignored corporate formalities in their dealings with counterparties.

6. Further, the proposed substantive consolidation would have several material adverse consequences on the AHI estate (and perhaps other subsidiary Debtors' estates), as well on trade creditors of the subsidiaries of AHI, that are not adequately disclosed to holders of claims and interests entitled to vote on the Plan. The Equity Committee is prepared to propose a plan (on the terms set forth in the term sheet attached to the Equity Committee's trustee motion) solely with respect to AHI that maximizes value for the AHI estate and affords a materially better recovery to the Debtors' innocent trade creditors. Pursuant to the proposed term sheet, if the Creditors' Committee consents to the relief requested in the Equity Committee's trustee motion, then the "Litigation Trust Funders" (as defined in the term sheet) will offer to acquire "Allowed Eligible Subsidiary General Unsecured Claims" (as defined in the term sheet) at 50% of the face amount of such Allowed Eligible Subsidiary General Unsecured Claims up to a maximum consideration of $25 million. The Litigation Trust Funders will also acquire any rights or interests that any holder of an Allowed Eligible Subsidiary General Unsecured Claim that accepts the GUC Claims Purchase may obtain on account of such Allowed Eligible

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> Integrity, Center for Clinical Standards and Quality, Consortium for Quality Improvement and Survey & Certification Operations, Drug Enforcement Administration, Federal Bureau of Investigation, and U.S. Attorney's Office, and the private organizations with deemed authority, including the respective Medicare Administrative Contractors and the Commission on Office Laboratory Accreditation. Various divisions within the Arizona Department of Health Services, Colorado Department of Public Health and Environment, and Texas Department of State Health Services may regulate hospital and facility licensing, Medicare certification surveys, laboratory certification, and radiation registrations.

Amended Proposed Disclosure Statement Art. II(A) n.7.

Subsidiary General Unsecured Claim pursuant to any chapter 11 plan of reorganization confirmed and consummated by the obligor of such Allowed Eligible Subsidiary General Unsecured Claim, including any Litigation Trust interest. Assuming consummation of the Equity Committee's alternative plan, the Liquidating Trust created thereunder would own the membership interests of Adeptus Health LLC ("**AH LLC**"). Once in the position of owning AH LLC, the Liquidating Trust would be in the position to either continue to pursue a plan along the lines currently proposed by the Debtors or an alternative. One such plan could include termination of the Joint Venture relationships (as mentioned in the Amended Proposed Disclosure Statement Art. II(B)(2)-(5)), reorganization around the non-Joint Venture locations, and reinstatement of prepetition indebtedness.[8] The Amended Proposed Disclosure Statement should contain adequate disclosure regarding the Equity Committee's alternative plan structure. The Amended Proposed Disclosure Statement should also contain the necessary information to provide claim and interest holders sufficient information to evaluate the economic impact to their recoveries of substantive consolidation, including an analysis of the proposal embodied in the Equity Committee's plan term sheet.

7. As noted in the Equity Committee's trustee motion, the most significant assets held by AHI's estate are its potential claims and causes of action against Sterling Partners and the other pre-IPO owners of AH LLC (including three of the four current members of AHI's Board) relating to the 2014 IPO and Secondary Offerings and tax receivable agreement, claims against its current and former directors and officers for breaches of fiduciary duties, and intercompany receivables.[9] There may be potentially hundreds of millions of dollars in claims

[8] The remaining balance of the DIP Facility would be repaid in full and working capital would be raised through an equity rights offering.

[9] According to AHI's amended schedules of assets and liabilities, AHI holds an outstanding intercompany receivable of approximately $119 million. *See* AHI Schedule A/B: Assets – Real and Personal

and causes of action arising in connection with the IPO/Secondary Offerings (including, without limitation, in respect of the $470 million in net proceeds received in connection with the Secondary Offerings within two years prior to the Petition Date that was paid out to insiders), sounding in the nature of fraudulent conveyance, breach of fiduciary duty and corporate waste, that are exclusively assets of the AHI estate (the equity issued in connection with the IPO/Secondary Offerings was AHI equity; AHI was entitled to the net proceeds in the IPO/Secondary Offerings; and those net proceeds were paid over to Sterling Partners and the other pre-IPO AH LLC owners).

8. The adverse consequences of the Debtors' proposed substantive consolidation of AHI are clear (but are not adequately disclosed): the transfer of these potentially valuable claims and other assets of AHI's estate to a Litigation Trust (controlled by Deerfield, which appoints the Litigation Trustee and dominates the Litigation Trust Oversight Board), and the distribution of any proceeds recovered on account of such claims and assets to not just creditors and equity holders of AHI, but to creditors of its subsidiaries as well, including Deerfield to the extent of the substantial deficiency claim that the Debtors appear prepared to allow. The Amended Proposed Disclosure Statement contains inadequate information on the relative benefits and costs to AHI's creditors and stakeholders resulting from substantive consolidation. At bottom, nothing presented in the Amended Proposed Disclosure Statement or these cases justifies the proposed substantive consolidation of AHI with its subsidiaries' estates, which would effectively compel the creditors and shareholders of AHI to share the proceeds of AHI's claims and causes of action with the creditors of AHI's subsidiaries.

Property (Docket No. 11; Case No. 17-31434), at 18. AHI's schedules do not show any material intercompany obligations owing from AHI to any other Debtor entity, or any material claims against or obligations of AHI.

9. The Debtors further assert, without adequate disclosure, that most of the Debtors' claims are held by all of the Debtors. This contention is relied upon by the Debtors to purportedly support its request for substantive consolidation. As noted in the Equity Committee's trustee motion, the Board of Directors and officers existed at the AHI level, and AHI likely possesses breach of fiduciary duty claims against its directors and officers with respect to the historical and ongoing mismanagement of the Debtors' businesses. These wrongful acts caused damage to AHI's estate. Mismanagement by certain officers may also have caused actionable damages to AHI's subsidiaries' estates. Merely because multiple estates have damages resulting from the same set of wrongful acts is insufficient to justify substantive consolidation. Also, merely because multiple estates might seek a recovery from the same set of defendants (including any available insurance) is inadequate justification for substantive consolidation. Any potential dispute regarding allocation of recoveries on account of such claims from insurance proceeds can be reasonably apportioned among the various Debtor entities under a plan or other agreement of the parties. Moreover, the Amended Proposed Disclosure Statement does not contain adequate information to support the Debtors' conclusory statement that the avoidance actions held by AHI's estate against the IPO/Secondary Offering Proceeds recipients are claims also held by AHI's subsidiaries' estates.

10. Given the adverse consequences to AHI's estate, it begs the question what could possibly motivate AHI's Board to go along with substantive consolidation? Who stands to benefit the most from substantive consolidation? Indeed, in light of the significant deficiency claim that the Debtors are prepared to allow for Deerfield, the vesting of effective control over the D&O Claims with Deerfield (through its appointment of the Litigation Trustee and control over the Litigation Trust Oversight Board), and rejection of the TRA (which may enable the

TRA counterparties to assert a substantial rejection damages claim), the principal beneficiaries of substantive consolidation are Deerfield, the pre-IPO AH LLC owners, and the TRA counterparties – including Sterling Partners and several members of the existing Board of Directors. The Amended Proposed Disclosure Statement fails to adequately disclose these parties as the principal beneficiaries of the Debtors' proposed substantive consolidation.

11. It is also revealing that the Amended Proposed Plan and Amended Proposed Disclosure Statement provide that the proposed "substantive consolidation shall not (other than for purposes relating to this Plan) affect the legal and corporate structures of the Reorganized Debtors," and that "[e]xcept as otherwise provided in [the] Plan, each Debtor shall continue to maintain its separate corporate existence after the Effective Date for all purposes other than treatment of Claims under [the] Plan."[10] It is further revealing that the Debtors' original proposed plan did not provide for substantive consolidation, but rather provided for each Debtor to maintain its individual corporate and legal form. In similar circumstances, courts have observed that a proposed substantive consolidation was little more than a "deemed scheme" designed to "strip … rights under the Bankruptcy Code [and] favor other creditors…."[11] For instance, by substantively consolidating the estates, Deerfield no longer needs to be concerned about satisfying Bankruptcy Code section 1129(a)(10) (requiring an impaired accepting class for each Debtor). It only needs to satisfy this confirmation requirement once under a substantively consolidated plan.

12. The second principal reason that the Amended Proposed Disclosure Statement cannot be approved is because the Amended Proposed Plan is the product of widespread conflicts of interest and a derogation of fiduciary oversight. As noted above, AHI (and AHI

[10] Amended Proposed Disclosure Statement Art. VIII(A)(2); Amended Proposed Plan § 3.2.

[11] *In re Owens Corning*, 419 F.3d 195, 216 (3d Cir. 2005).

alone) may hold potentially valuable claims and causes of action against at least three of the four Board members related to, among other things, the IPO/Secondary Offerings (such Board members were pre-IPO owners of AH LLC who received their allocable share of net proceeds in the IPO/Secondary Offerings). The most pernicious aspect of the Debtors' proposed substantive consolidation would be the transfer of these valuable claims belonging to AHI to a Litigation Trust, to be controlled by Deerfield, and the distribution of any proceeds recovered on account of such claims to subsidiary creditors ahead of AHI's stakeholders (including Deerfield on account of the substantial deficiency claim the Debtors are prepared to allow). The Debtors have also ignored professional conflicts, including Norton Rose's and DLA Piper's representation of Sterling Partners (perhaps the largest potential target of AHI estate claims related to the IPO/Secondary Offerings), that have harmed the estates, as Debtors' counsel cannot investigate or prosecute potentially valuable claims and causes of action against Sterling Partners. Moreover, the extensive conflicts of DLA Piper caused significant incremental cost to the estates once DLA Piper bowed out and Norton Rose stepped in.

13. The Board has abandoned its fiduciary duties to AHI and instead "handed the keys over" to Deerfield. Deerfield—not the Debtors—negotiated the so-called "Deerfield-MPT Agreement"[12] under which MPT will agree to shed certain lease locations, and to which the Debtors have wedded themselves. The Debtors have still not reached any form of resolution with respect to the Joint Venture agreements (the Amended Proposed Disclosure Statement provides that they may be restructured, terminated for cause, or assumed), which the Equity Committee suspects is to enable Deerfield to reach agreement with the other Joint Venture members with respect to the go-forward, post-consummation structure of the agreements and

[12] *See Declaration of Andrew Hinkelman in Support of Chapter 11 Petitions and First Day Motions* (the "**Hinkelman Decl.**") [Docket No. 32], ¶ 89.

reap the corresponding benefit. Resolution with respect to the Joint Venture agreements is perhaps the most important business issue in these Chapter 11 Cases (the Joint Ventures represent a massive expense of the estates), and restructured agreements inuring to Deerfield's benefit post-consummation would represent a windfall at the expense of AHI's estate, which has been funding the Joint Ventures' massive expense through draws under the DIP Facility. On the other hand, termination of the Joint Venture agreements for cause (a possibility noted in the Amended Proposed Disclosure Statement, but the relative benefits of which are not adequately explained) may enable the Debtors to restructure under an alternative plan structure. Most importantly, the Debtors appear to have completely abdicated responsibility with respect to formulating and proposing a Chapter 11 plan, choosing instead to accede to the Deerfield-sponsored plan.

14. Finally, the Court should not approve the Amended Proposed Disclosure Statement because it lacks "adequate information," as required under Bankruptcy Code Section 1125(a) and (b) on other critical matters that should be considered by those entitled to vote on the plan. The Amended Proposed Disclosure Statement also contains several improper statements that appear to be an attempt to insulate Sterling Partners and AHI's directors and officers from potential liability in respect of the IPO/Secondary Offerings.

15. The following is a summary overview of the key provisions under the Amended Proposed Disclosure Statement that lack adequate information:

Section of Amended Proposed Disclosure Statement	**Inadequate Information**
Global	(a) Where Amended Proposed Disclosure Statement makes reference to Creditors voting on the Amended Proposed Plan, having ability to request ballots, or having ability to request information with respect to the Amended Proposed Plan, does not include holders of Existing Common Equity Interests in such references.

Section of Amended Proposed Disclosure Statement	Inadequate Information	
Section II(A)	(b)	Does not include breakdown of how many of the 3,824 physicians, nurses, radiology technicians, laboratory professionals and administrative staff are employees of the Debtors (and which Debtor entities) versus how many are independent contractors.
Section II(B)(1)	(c)	Does not identify which Debtor entity paid the underwriting fees, commissions, and offering expenses in connection with the IPO and Secondary Offerings. AHI may hold claims or causes of action in respect of such fees, commissions, and expenses (including, without limitation, fraudulent transfer, breach of fiduciary duty, and clawback).
	(d)	Footnote 8 should be deleted.
	(e)	Does not identify basis for the following statement (bolded) and is likely incorrect: "[T]he Debtors are owed significant sums by the Joint Ventures. ***Such amounts, however, are only due and payable if and to the extent the particular Joint Venture is profitable***."
	(f)	Does not explain if the determination of whether a Joint Venture is profitable includes value derived from patients who are directed to hospitals.
Section II(B)(2)-(4)	(g)	Does not include clear statement regarding what amounts (if any) each Joint Venture owes to the Debtors' estates, including, without limitation, in respect of outstanding loan balances, managements fees, and expense reimbursements.
	(h)	With respect to each of the Arizona JV, Colorado JV, Texas JV, and Ohio JV agreements, does not provide adequate information regarding what course of action Deerfield intends take with respect to such Joint Venture agreements and the economic terms of any agreements or negotiations between Deerfield and the JV counterparties.
	(i)	Does not include an estimate with respect to potential (i) cure costs, to the extent that the Joint Venture agreements are assumed, and (ii) rejection damages to the extent that the Joint Venture agreements are rejected.
	(j)	Does not explain extent of management fees and expense reimbursements owed to the estates by each Joint Venture, and the basis for Debtors not collecting such management fees and expense reimbursements or otherwise enforcing their rights under the Joint Venture agreements.
	(k)	Does not explain the amount or nature of any loan obligations that exist between any of the Debtors and the Joint Ventures.
	(l)	Does not explain the potential benefits of terminating the Joint Venture agreements for cause.
	(m)	Dignity Joint Venture: Does not include adequate disclosure with respect to the buyout option referenced in Section II(B)(2)(d).

Section of Amended Proposed Disclosure Statement	Inadequate Information	
Section II(C)(1)	(n)	Does not identify each Debtor entity that is party to any of the MPT Agreements, or identify whether AHI is party to any MPT Agreements.
Section II(C)(2)	(o)	Does not identify which Debtor entities are party to any Non-MPT Leases or any other agreements with any of the Non-MPT Lessors and whether AHI is a party to such leases.
Section II(D)	(p)	Does not provide adequate information with respect to estimated payable for future amounts that are projected to be owed under the TRA if it is assumed. Furthermore, the Amended Proposed Disclosure Statement does not disclose the Debtors' calculation of amounts presently due under the TRA or rejection damages.
Section III(B)(5)	(q)	Does not explain who comprises First Choice ER's board of directors and what authority such board has in respect of the management of First Choice ER.
	(r)	Does not contain an analysis of whether any aspect of the Bridge Loan, including, without limitation, the 3.0% Bridge Loan Upfront Fee, may be subject to potential avoidance challenges.
Section IV(B)	(s)	Does not identify which Debtor entities are subject to the resolution reached with the Centers for Medicare and Medicaid Services.
Section V(A)	(t)	Does not provide an adequate explanation as to why the Debtors grew significantly over the last three years, notwithstanding their significant working capital needs.
Section V(B)	(u)	Does not identify which Debtor(s) retained McKesson and/or are signatory to the McKesson Agreement.
Section V(D)	(v)	Does not identify which Debtor(s) retained Houlihan Lokey Capital Inc. ("**HL**").
	(w)	Does not identify the third parties with whom HL engaged in dialogue on or about March 8, 2017.
	(x)	Does not provide adequate information regarding the March 8, 2017 dialogue between HL and certain third parties (*e.g.*, subject matter of discussion, nature of any proposals made).
Section VI(B)	(y)	Does not explain why the Debtors agreed to pledge AHI's equity to Deerfield and the assets that Deerfield relied on in selecting AHI as an obligor under the DIP Facility.
Section VI(C)	(z)	Does not identify whether the Debtors' estates may hold any potential claims against any professionals employed by any of the Debtors (*e.g.*, preference claims, malpractice claims).
Section VI(G)	(aa)	Does not identify whether any Debtors, other than AHI, have any directors and officers and, if so, does not identify any specific D&O Claims that may be asserted against such directors and officers. The Amended Proposed Disclosure Statement does not disclose any potential conflicts of interest due to the directors' or officers'

Section of Amended Proposed Disclosure Statement	Inadequate Information	
		affiliations with Sterling Partners or entitlements to claims arising under the TRA.
Section VII	(bb)	Does not identify whether the Debtors believe that the Amended Proposed Plan is in the best interests of holders of Existing Common Equity Interests.
	(cc)	Does not identify that the Litigation Trust will be controlled by a three (3) member oversight board, two (2) of which members shall be appointed by Deerfield and one of which member shall be appointed by the Creditors' Committee.
	(dd)	Does not provide adequate information with respect to the Debtors' decision not to pursue a potential sale of their assets under Bankruptcy Code Section 363.
Section VIII(A)(2)	(ee)	Does not provide adequate information with respect to the Debtors' decision to pursue substantive consolidation of the Debtors' estates, rather than not pursue substantive consolidation as set forth in the original plan filed by the Debtors on the Petition Date.
	(ff)	Does not identify whether the Debtors believe that substantive consolidation is in the best interests of holders of Existing Common Equity Interests.
Section VIII(C)(4)	(gg)	Does not identify or provide adequate information with respect to all Intercompany Claims, including, without limitation, the $119,538,012.28 intercompany claim owing from Debtor ECC Management, LLC to AHI, as set forth in AHI's Schedule A/B.

16. In addition to the above, the Debtors should provide a liquidation analysis on an independent basis as to AHI (*i.e.*, absent the proposed substantive consolidation) so that stakeholders can measure the impact of the proposed substantive consolidation.

17. At a minimum, the Amended Proposed Disclosure Statement should not be approved unless the above items are adequately addressed through appropriate revisions. Moreover, to the extent that the Court approves the Amended Proposed Disclosure Statement, the Equity Committee respectfully requests that it be permitted to provide a letter as an enclosure to the Amended Proposed Disclosure Statement reflecting the Equity Committee's views as described herein, including the right to make a recommendation to vote against acceptance of the

Amended Proposed Plan. The Equity Committee will provide a copy of such letter to the Debtors and the Court (for the Court's approval) prior to its inclusion in the Amended Proposed Plan solicitation materials

RELEVANT FACTUAL BACKGROUND

18. Relevant factual background in respect of this Objection is set forth in the *Emergency Motion of the Equity Committee of Adeptus Health Inc. for an Order (I) Appointing a Trustee for the Chapter 11 Estate of Adeptus Health Inc. Pursuant to Bankruptcy Code Section 1104(a); or, Alternatively, (II) Appointing an Examiner Pursuant to Bankruptcy Code Section 1104(c) and Terminating the Debtors' Exclusivity Period Pursuant to Bankruptcy Code Section 1121(d),* [Docket No. 484], which the Equity Committee fully incorporates herein by reference.

19. On the Petition Date, the Debtors filed their original Chapter 11 plan and disclosure statement with respect to the same. The original plan did not provide for the substantive consolidation of the Debtors' estates; rather, the original plan explicitly provided that "all Debtor entities shall continue to exist as separate legal entities."[13]

20. On July 19, 2017, the Debtors filed their Amended Proposed Plan and Amended Proposed Disclosure Statement. Unlike the original plan, the Amended Proposed Plan seeks to substantively consolidate each of the Debtors' estates.[14] Through the proposed substantive consolidation, the Amended Proposed Plan merges together all Litigation Trust Assets and the liabilities of each Debtor, while also eliminating all intercompany claims.[15] According to AHI's amended schedules of assets and liabilities, AHI holds an outstanding intercompany receivable

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[13] *See Debtors' Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code* [Docket No. 15], § 3.2.

[14] Amended Proposed Plan §§ 3.2, 5.1; Amended Proposed Disclosure Statement Art. VIII(A)(2).

[15] Amended Proposed Disclosure Statement Art. VIII(A)(2).

owing from Debtor ECC Management, LLC of approximately $119 million.[16] AHI's schedules do not show any material intercompany obligations owing from AHI to any other Debtor entity.

21. Under the Amended Proposed Plan, all Litigation Trust Beneficiaries will receive distributions from a merged trust comprising the assets of all Debtor entities. Pursuant to the waterfall analysis contained in the Amended Proposed Plan, distributions from the Litigation Trust will be made in the following order:

(1) the fees and expenses of the Litigation Trust, in full;

(2) the Deerfield Trust Repayment Distributions;

(3) the Deerfield Parties, in an amount equal to the fees and expenses incurred by the Equity Committee and the Creditors' Committee from August 18, 2017 through the Effective Date;

(4) $7.5 million to holders of Allowed General Unsecured Claims (excluding Deerfield's allowed deficiency claim, if any);

(5) $17.5 million to Deerfield on account of the Deerfield Deficiency Claims;

(6) pro rata distributions to the holders of Allowed General Unsecured Claims, including Deerfield as the holder of the Deerfield Deficiency Claims, plus interest; and

(7) residual value (if any) distributed pro rata to equity holders (first to holders of preferred stock, then to holders of common stock).[17]

22. Pursuant to the Amended Proposed Disclosure Statement, the Debtors provide four purported justifications for the proposed substantive consolidation of the Debtors' estates:

(i) The Debtors allege that substantive consolidation is appropriate because, under the DIP Facility, substantially all of the assets of the Debtors are encumbered by liens of Deerfield, and all of the Debtors are jointly liable for the obligations under the DIP Facility.

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[16] *See* AHI Schedule A/B: Assets – Real and Personal Property (Docket No. 11; Case No. 17-31434), at 18.

[17] Amended Proposed Plan at §1.1.

(ii) The Debtors allege that they maintain consolidated books and records and a centralized cash management system, pursuant to which all debts of the "Adeptus Enterprise" are paid, thereby resulting in substantial intercompany claims between the Debtors.

(iii) The Debtors allege that "many creditors" of the Debtors "view the Debtors as a single economic unit" and "did not rely on their separate identity in extending credit."

(iv) Finally, the Debtors allege that the Debtors have common directors and officers, and, purportedly as a result, the D&O Claims and any recovery thereon will be jointly owned by all of the Debtors.[18]

23. Notwithstanding the above, both the Amended Proposed Plan and the Amended Proposed Disclosure Statement state that:

(i) "Except as expressly provided in the Plan, each Debtor shall continue to maintain its separate corporate existence for all purposes other than the treatment of Claims under the Plan and distributions from the Litigation Trust"; and

(ii) "Such substantive consolidation shall not (other than for purposes relating to the Plan) affect the legal and corporate structures of the reorganized Debtors."[19]

24. The Amended Proposed Disclosure Statement contains several improper statements (including improper legal conclusions) regarding the 2014 IPO and the Secondary Offerings. For example, with respect to the net proceeds realized through the Secondary Offerings, the Debtors allege that "[AHI] did not have the right to use these net proceeds other than to allow it to acquire a greater economic stake in [AH LLC] through the purchase of additional LLC Units."[20] Further, with respect to the flow of net proceeds realized through the Secondary Offerings, the Debtors allege "the funds that were received on account of the

[18] Amended Proposed Disclosure Statement Art. VIII(A)(2).

[19] Amended Proposed Plan § 3.2, Amended Proposed Disclosure Statement Art. VIII(A)(2).

[20] Amended Proposed Disclosure Statement Art. II(B).

Secondary Offerings did not flow through the bank accounts of [AHI] (because bank accounts have never been opened in the name of [AHI])."[21]

ARGUMENTS IN OBJECTION

I. Approval Of The Amended Proposed Disclosure Statement Should Be Denied Because The Amended Proposed Plan Is Patently Unconfirmable.

A. A Disclosure Statement Should Not Be Approved If The Underlying Plan Is Patently Unconfirmable.

25. A disclosure statement should not be approved if the underlying plan is "patently unconfirmable."[22] Where a plan is patently unconfirmable, approving the disclosure statement and proceeding with a full confirmation hearing would be an exercise in futility.[23] Rather, "a bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage that a later confirmation hearing would be futile…."[24] Here, as described below, the Amended Proposed Plan is patently unconfirmable and, therefore, the Court should deny approval of the Amended Proposed Disclosure Statement. As noted above, the Amended Proposed Plan includes material structural deficiencies that should be addressed at the earliest practicable time (*i.e.*, the hearing on the Amended Proposed Disclosure Statement), not at the

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[21] *Id*. at n.8.

[22] *See In re EQK Bridgeview Plaza, Inc.*, No. 10-37054-SGJ-11, 2011 WL 2458068, at *2 (Bankr. N.D. Tex. June 16, 2011) (declining to approve debtor's disclosure statement on the basis that the plan it described was patently unconfirmable); *see also In re U.S. Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996) ("Disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible.").

[23] *See, e.g., In re K Lunde, LLC*, 513 B.R. 587, 590 (Bankr. D. Colo. 2014) ("[T]he estate and parties should not bear the expense and effort required by the full confirmation process if there is a fatal flaw that makes the plan unconfirmable as a matter of law.").

[24] *In Am. Capital Equip., LLC*, 688 F.3d 145, 154 (3d Cir. 2012) (citations and internal quotations omitted); *In re Main St. AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) ("It is now well accepted that a court may disapprove of a disclosure statement. . . if the plan could not possibly be confirmed."); *see also In re Hyatt*, 509 B.R. 707, 714 (Bankr. D.N.M. 2014).

confirmation hearing, where the Debtors/Deerfield will undoubtedly contend that they have stepped in so far, they cannot turn back.

B. The Amended Proposed Plan Is Patently Unconfirmable, And, Therefore, The Amended Proposed Disclosure Statement Should Not Be Approved.

(i) The Amended Proposed Plan Is Predicated On Substantive Consolidation Of All The Debtors.

26. A proposed Chapter 11 plan is "patently unconfirmable" where it "is so fatally and obviously flawed that confirmation is impossible."[25] Here, the Amended Proposed Plan is predicated on the substantive consolidation of AHI and the other Debtors' estates. No provision of the Bankruptcy Code provides for substantive consolidation.[26] Rather, substantive consolidation is an extraordinary, judicially-created remedy that the Fifth Circuit has observed should be seldom used.[27] As previously noted by the Northern District of Texas Bankruptcy Court, "[t]hough there are some justifications for substantive consolidation, courts, particularly in the Fifth Circuit, warn that the power to consolidate is a drastic remedy to be used sparingly."[28]

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[25] *In re Hawkes*, 289 B.R. at 294 (quoting *Bjolmes Realty Trust*, 134 B.R. at 1002); *see also EQK Bridgeview Plaza*, 2011 WL 2458068, at *2; *O'Leary*, 183 B.R. at 338-39 ("Courts may refuse to approve disclosure statements that describe plans that cannot be confirmed.").

[26] *Ward*, 558 B.R. at 793; *see In re AHF Development, Ltd.*, 462 B.R. 186, 195 (Bankr. N.D. Tex. 2011).

[27] *See, e.g.*, *In re Amco Ins.*, 444 F.3d 690, 695 (5th Cir. 2006); *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 61 (2d Cir. 1992); *Union Savings Bank v. Augie/Restivo Baking Company, Ltd. (In re Augie/Restivo Baking Company)*, 860 F.2d 515, 518 (2d Cir. 1988); *see also In re Owens Corning*, 419 F.3d 195, 208-09 (3d Cir. 2005); *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 767 (9th Cir. 2000); *Reider v. FDIC (In re Reider)*, 31 F.3d 1102, 1107 (11th Cir. 1994); *Flora Mir Candy Corp. v. R.S. Dickson & Co. (In re Flora Mir Candy Corp.)*, 432 F.2d 1060, 1062-63 (2d Cir. 1970); *In re Donut Queen, Ltd.*, 41 B.R. 706, 709 (Bankr. E.D.N.Y. 1984).

[28] *AHF Development*, 462 B.R. at 195 (quoting *Pac. Lumber*, 584 F.3d at 249 (substantive consolidation is an "extreme and unusual remedy.") (citing *In re Gandy*, 299 F.3d 489, 499 (5th Cir. 2002); *Ward*, 558 B.R. at 793-94 (citing *AHF Development*, 462 B.R. at 194 (describing the approaches used by courts)).

(ii) The Debtors Have Failed To Satisfy Their Heavy Burden To Justify The Extraordinary Remedy Of Substantive Consolidation.

27. The Fifth Circuit has not articulated a standard with respect to when substantive consolidation is appropriate. Courts have considered a number of factors in analyzing whether substantive consolidation is appropriate, but have noted that the Second Circuit's seminal decision in *Augie/Restivo* "distilled the factors courts have considered into two critical ones: (i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit ...; or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors."[29]

28. Application of these factors here strongly militates against substantive consolidations. First, to show creditor reliance, the Debtors must demonstrate that creditors actually and reasonably viewed the Debtors as a single economic unit.[30] Whether the Debtors purported to hold themselves out as a single unit (which, in any event, is not the case here) is irrelevant to the analysis; rather, the inquiry focuses on whether creditors actually viewed the debtors as a single unit.[31] There is no evidence that creditors dealt with the Debtors as a single economic unit or viewed them in such way. Indeed, the record reflects quite the opposite. The Debtors' prepetition lenders (prior to Deerfield acquiring the Prepetition Loan Agreement) were all highly sophisticated banks and lending institutions (*e.g.*, Bank of America, Goldman Sachs, Fifth Third Bank), and executed the Prepetition Loan Agreement with First Choice ER LLC

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29 *Ward*, 558 B.R. at 794 (internal quotations omitted); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 518 (W.D. Tex. 2000). Additional factors that have been considered by courts include (1) the degree of difficulty in segregating and ascertaining individual assets and liability; (2) the presence or absence of consolidated financial statements; (3) the profitability of consolidation at a single physical location; (4) the commingling of assets and business functions; (5) the unity of interests and ownership between the various corporate entities; (6) the existence of parent and inter-corporate guarantees on loans; and (7) the transfer of assets without formal observance of corporate formalities. *Permian Producers Drilling*, 263 B.R. at 518.

30 See *Augie/Restivo*, 860 F.2d 515, 518-19; *Owens Corning*, 419 F.3d at 207-08, 212.

31 See *Augie/Restivo*, 860 F.2d at 518; *Owens Corning*, 419 F.3d at 207-08

("**First Choice ER**") as borrower and AH LLC as guarantor (AHI was neither a borrower nor an obligor under the Prepetition Loan Agreement). When these same lenders agreed to enter into the Bridge Loan in the weeks prior to the Debtors' bankruptcy, they insisted that additional subsidiaries of First Choice ER become parties to the Prepetition Loan Agreement and/or guarantors thereunder. And, after Deerfield acquired the Prepetition Loan Agreement and negotiated with the Debtors regarding DIP financing, they required that AHI (one of the few Debtors not encumbered under the Prepetition Loan Agreement) become the primary obligor under the DIP Facility.

29. Further, each of the Joints Ventures was entered into by a subsidiary Debtor:

(A) The Colorado JV was formed by agreement of Adeptus Health Colorado Holdings LLC, a wholly-owned subsidiary of Adeptus Health Ventures, and University of Colorado Health;

(B) The Texas JV was formed by agreement of ADPT DFW Holdings LLC, a wholly-owned subsidiary of Adeptus Health Ventures, and Texas Health Resources;

(C) The Ohio JV was formed by agreement of ADPT Columbus Holdings LLC, a wholly-owned owned subsidiary of Adeptus Health Ventures and Mount Carmel Health System; and

(D) The Louisiana JV was formed by agreement of ADPT New Orleans Holdings LLC, a wholly-owned subsidiary of Adeptus Health Ventures, and Ochsner Clinic Foundation.[32]

30. In connection therewith, the Debtor subsidiaries that formed the Joint Ventures also entered into operating agreements for each of the respective Joint Ventures.[33]

31. In addition, certain Debtor subsidiaries and MPT entered in numerous financing and leasing agreements, including the following:

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[32] *See* Amended Proposed Disclosure Statement Art. II(B)(3)-(6).

[33] Hinkelman Decl. ¶¶ 40, 44, 47.

(A) the 2013 Master Funding Agreement, entered into by and between First Choice ER and MPT;

(B) the 2014 Master Funding Agreement, entered into by and between AH LLC and MPT; and

(C) the Colorado Master Lease, entered into by and among ADPT-CO MPT Holdings LLC, an affiliate of First Choice ER, and numerous MPT affiliates.

32. Additional agreements between specific Debtors and creditors demonstrating that creditors did not actually and reasonably view the Debtors as a single economic unit include the Tax Receivable Agreement, dated as of June 25, 2014 (the "**TRA**"),[34] by and among AHI and the pre-IPO owners of AH LLC. The TRA was entered into in connection with the 2014 IPO and imposes on AHI an obligation to make certain payments to the pre-IPO owners of AH LLC, but only to the extent that AHI actually realizes "Net Tax Benefits" resulting from certain acquisitions by AHI of AH LLC's membership units.[35]

33. It is further noteworthy that, of the eight (8) trade creditors appointed to the Official Committee of Unsecured Creditors, a review of the claims register maintained in the Chapter 11 Cases indicates that only one (1) such creditor filed a proof of claim against AHI.

34. All of these transactions evidence a high degree of knowledge between the Debtors and their creditors/contract counterparties as to which specific Debtor entities they were doing business with, and that such parties did not actually view the Debtors as a single economic unit.

35. Second, there is no evidence that the affairs of the Debtors are so entangled that consolidation will benefit the estates of all of the Debtors. Expounding on the second factor in *Augie/Restivo*, the Second Circuit observed that:

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[34] Amended Proposed Disclosure Statement Art. XI(E).

[35] "Net Tax Benefits" is defined in TRA § 3.1(b).

> entanglement of the debtors' affairs ... involves cases in which there has been a commingling of two firms' assets and business functions. Resort to consolidation in such circumstances, however, should not be Pavlovian. Rather, substantive consolidation should be used only after it has been determined all creditors will benefit because untangling is either impossible or so costly as to consume the assets…. Commingling, therefore, can justify substantive consolidation only where "the time and expense necessary even to attempt to unscramble them [is] so substantial as to threaten the realization of any net assets for all the creditors," or where no accurate identification and allocation of assets is possible.[36]

36. Here, AHI is a public company and routinely makes required securities filings providing detailed information with respect to the Debtors' corporate structure, business, and operations. Moreover, as the Debtors have observed, they operate in a highly regulated industry, and are subject to oversight of various divisions within CMS and DOJ, including without limitation, the Office of Civil Rights, Clinical Laboratory Improvement Amendments program, Center for Medicare, Center for Medicaid and CHIP Services, Center for Program Integrity, Center for Clinical Standards and Quality, Consortium for Quality Improvement and Survey & Certification Operations, Drug Enforcement Administration, Federal Bureau of Investigation, and U.S. Attorney's Office, and the private organizations with deemed authority, including the respective Medicare Administrative Contractors and the Commission on Office Laboratory Accreditation, and various divisions within the Arizona Department of Health Services, Colorado Department of Public Health and Environment, and Texas Department of State Health Services.[37]

37. Further, pursuant to the plan construct outlined in the Equity Committee's term sheet, unsecured trade creditors of all of the Debtors' subsidiaries stand to obtain a materially

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[36] *Augie/Restivo*, 860 F.2d at 518-19 (internal citations omitted).

[37] Amended Proposed Disclosure Statement Art. II(A).

better recovery in these Chapter 11 Cases through non-consolidation of AHI than they otherwise would through the Debtors'/Deerfield's proposed substantive consolidation.

38. Other evidence militating against substantive consolidation of AHI into AHI's subsidiaries' estates include the following:

(i) The Debtors would not have any difficulty in segregating and ascertaining individual assets and liabilities. Indeed, the Debtors have already accomplished this task when they filed detailed schedules of assets and liabilities and statements of financial affairs for each of the 140 Debtor entities.

(ii) The most significant intercompany loan inures to the benefit of AHI (*i.e.*, the $119 million intercompany receivable). On the other hand, according to AHI's amended schedules of assets and liabilities, AHI has no intercompany obligations.

(iii) The Debtors were a public reporting company, and there is no evidence that they transferred assets without observance of corporate formalities (which transfers, presumably, would have violated applicable securities laws).

(iv) AHI is not party to the Prepetition Loan Agreement, the Joint Venture agreements, or the MPT agreements. Indeed, the ***only*** material intercompany obligations for which AHI is jointly liable with the other Debtors is the DIP Facility. This alone cannot form an adequate basis for substantive consolidation, as substantive consolidation would then be justifiable in nearly every bankruptcy case, which would be a far cry from the "drastic remedy" that the Fifth Circuit admonished should be used only "sparingly."[38]

39. It also bears emphasizing that the Debtors are not proposing to actually consolidate the Debtors' businesses into a single reorganized business. Rather, the Amended Proposed Disclosure Statement and Amended Proposed Plan include two telling admissions: (i) that the proposed "substantive consolidation shall not (other than for purposes relating to this Plan) affect the legal and corporate structures of the Reorganized Debtors," and (ii) that

[38] *AHF Development*, 462 B.R. at 195 (quoting *Pac. Lumber*, 584 F.3d at 249 (substantive consolidation is an "extreme and unusual remedy.") (citing *In re Gandy*, 299 F.3d 489, 499 (5th Cir. 2002); *Ward*, 558 B.R. at 793-94 (citing *AHF Development*, 462 B.R. at 194 (describing the approaches used by courts)).

"[e]xcept as otherwise provided in [the] Plan, each Debtor shall continue to maintain its separate corporate existence after the Effective Date for all purposes other than treatment of Claims under [the] Plan."[39] Further, the Debtors' original proposed plan did not provide for the substantive consolidation of the Debtors' estates, but rather provided for the Debtors to maintain their separate corporate and legal form. In denying a request for substantive consolidation in similar circumstances, the Third Circuit observed that:

> If Debtors' corporate and financial structure was such a sham before the filing of the motion to consolidate, then how is it that post the Plan's effective date this structure stays largely undisturbed, with the Debtors reaping all the liability-limiting, tax and regulatory benefits achieved by forming subsidiaries in the first place? In effect, the Plan Proponents seek to remake substantive consolidation not as a remedy, but as a stratagem to "deem" separate resources reallocated to [one entity] to strip the Banks of rights under the Bankruptcy Code, favor other creditors, and yet trump possible Plan objections by the Banks. Such "deemed" schemes we deem not Hoyle.[40]

40. Pursuant to the Amended Proposed Plan, the Debtors/Deerfield are proposing to do precisely what the Third Circuit rebuked in *Owens Corning*.

(iii) The Debtors' Purported Justifications For Substantive Consolidation Are Erroneous, Unsupported By Evidence, And/Or Inadequate.

41. None of the Debtors' purported justifications for substantive consolidation are adequate to support the extraordinary relief requested. The Debtors allege that "many creditors" of the Debtors "view the Debtors as a single economic unit" and "did not rely on their separate identity in extending credit." However, the Debtors provide not a single shred of evidence to support this self-serving and conclusory claim. As reflected herein, the evidence tells a far different story.

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[39] Amended Proposed Disclosure Statement Art. VIII(A)(2); Amended Proposed Plan § 3.2.

[40] *Owens Corning*, 419 F.3d at 216.

42. The Debtors allege that they all have common directors and officers, and, purportedly as a result, the D&O Claims and any recovery thereon will be jointly owned by all of the Debtors. However, only AHI has directors and officers. The other Debtor subsidiaries are largely single member-managed LLCs. As described above, claims in respect of the IPO/Secondary Offerings belong exclusively to AHI. To the extent that any subsidiaries do hold mismanagement claims against AHI's *officers* (of which the Equity Committee is skeptical), insurance recoveries on account of such claims can be apportioned among the estates.

43. Finally, the Debtors allege that substantive consolidation is appropriate because all of the Debtors are jointly liable under the DIP Facility, and because the Debtors maintain consolidated books and records. Again, without any further evidence, these are not adequate bases upon which to approve the extraordinary relief of substantive consolidation, as they are present in the substantial majority of Chapter 11 cases involving multiple debtors.

44. Accordingly, the Equity Committee submits that the Debtors have not and cannot satisfy their substantial burden in justifying the extraordinary remedy of substantive consolidation of AHI in the other Debtors' estates. As a result, the Amended Proposed Plan, as presented, cannot be confirmed and the Amended Proposed Disclosure Statement, therefore, should not be approved.

II. The Amended Proposed Disclosure Statement Fails To Provide Adequate Information As Required By Bankruptcy Code Section 1125.

A. A Disclosure Statement Should Not Be Approved If It Fails To Provide "Adequate Information".

45. Approval of a disclosure statement requires a debtor to provide "adequate information."[41] The Bankruptcy Code defines "adequate information" as "information of a kind,

[41] *See* 11 U.S.C. § 1125(a).

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."[42]

46. The determination of what constitutes adequate information is made on a case by case basis.[43] In determining whether a disclosure statement contains adequate information, courts look to, among other things, financial information, valuations, and projections relevant to the decision whether to accept or reject the plan; information relevant to the risks posed under the plan; and the actual or projected realizable value from recovery on litigation claims.[44] To the extent that a disclosure statement lacks information necessary for a proper evaluation of the proposed plan, then the disclosure statement cannot be approved.[45]

B. The Amended Proposed Disclosure Statement Does Not Provide "Adequate Information," And, Therefore, Should Not Be Approved.

47. The Amended Proposed Disclosure Statement lacks material information that creditors and equity holders require in order to make an informed decision whether to accept or reject the Amended Proposed Plan. Most critically, creditors and equity holders have no idea what the reorganized Debtors' businesses will look like post-consummation, as the Amended Proposed Disclosure Statement provides no material guidance with respect to, among other

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42 *See id*.

43 *See In re Applegate Prop., Ltd.*, 133 B.R. 827, 829 (Bankr. W.D. Tex. 1991) ("The issue of adequate information is usually decided on a case by case basis and is left largely to the discretion of the bankruptcy court.").

44 *See In re U.S. Brass Corp.*, 194 B.R. 420, 424-25 (Bankr. E.D. Tex. 1996).

45 *See In re Divine Ripe, L.L.C.*, 554 B.R. 395, 405–13 (Bankr. S.D. Tex. 2016) (rejecting disclosure statement as lacking adequate information regarding, among other things, projections and financial information); *In re Fullmer*, No. 09-50086-RLJ-11, 2009 WL 2778303, at *2 (Bankr. N.D. Tex. Sept. 2, 2009) (rejecting disclosure statement that contained inadequate information about settlement); *Applegate Prop.*, 133 B.R. at 829–32 (rejecting disclosure statement for failing to disclose that insider had acquired claims to control voting on debtor's plan).

things, the Joint Venture agreements (*e.g.*, they may be restructured, terminated for cause, or assumed).

48. The Amended Proposed Disclosure Statement provides little information with respect to the Litigation Trust Causes of Action and D&O Claims, including, specifically, the identification of such claims and an analysis of such claims on a consolidated versus non-consolidated basis. This analysis is crucial. The Debtors engaged in a number of significant prepetition transactions, each of which is currently being investigated by the Equity Committee. Contrary to what the Debtors state in the Amended Proposed Disclosure Statement, the Equity Committee's investigation into, among other things, the IPO/Secondary Offerings indicate that AHI may hold substantial and unique claims against certain parties, which claims should be preserved for the benefit of AHI's creditors and equity holders. However, under the Amended Proposed Plan, all such claims would be transferred to the Litigation Trust (to be controlled by Deerfield) and distributed in accordance with the proposed waterfall.

49. The Amended Proposed Disclosure Statement provides woefully inadequate information with respect to the Debtors' proposal to substantively consolidate AHI into the Debtors' estates. Other than four conclusory statements (unsupported by evidence) purportedly justifying the substantive consolidation of the Debtors' estates, the Amended Proposed Disclosure Statement and Amended Proposed Plan are bereft of any information supporting such extraordinary relief. More importantly, the Debtors have not provided any information as to the relative recoveries to the stakeholders of AHI to enable them to compare whether they would obtain a better recovery under a substantively consolidated plan versus a non-consolidated plan.

As the plan proponents, the Debtors bear the burden of demonstrating an adequate rationale for the proposed substantive consolidation.[46] The Debtors have thus far failed to satisfy this burden.

50. At a minimum, before the Court considers approval thereof, the Amended Proposed Disclosure Statement must be revised to adequately address the items identified by the Equity Committee in the chart in Paragraph 15 of this Objection.

III. To The Extent That The Court Allows Dissemination Of The Amended Proposed Disclosure Statement, The Debtors Should Be Required To Include A Letter From The Equity Committee Expressing Its Concerns Regarding The Amended Proposed Plan.

51. Should the Court approve the Amended Proposed Disclosure Statement for solicitation, the Equity Committee respectfully requests that it be permitted to provide a letter as an enclosure to the Amended Proposed Disclosure Statement (the "**Equity Committee Letter**") reflecting the Equity Committee's views as described herein, including the right to make a recommendation to vote against acceptance of the Amended Proposed Plan.[47] The Equity Committee will provide a copy of the Equity Committee Letter to the Debtors and the Court (for the Court's approval) prior to its inclusion in the Amended Proposed Plan solicitation materials.

RESERVATION OF RIGHTS

52. The Equity Committee continues to analyze and review the Amended Proposed Disclosure Statement, the Amended Proposed Plan, and the Debtors' proposed valuations materials in respect of the same, and reserves all rights in connection with confirmation of the

[46] *Owens Corning*, 419 F.3d at 212.

[47] *See In re Motor Coach Indus., Inc.*, No. 08-12136 (Bankr. D. Del. 2008), Tr. of Proceedings held Dec. 17, 2008 at 44:7-46:21 (allowing creditors' committee to include in solicitation package a letter outlining the committee's issues with the proposed plan); *In re Tucker Freight Lines, Inc.*, 62 B.R. 213, 215 n.1 (Bankr. W.D. Mich. 1986) (permitting a creditors' committee objecting to a disclosure statement to include in the ballot package a letter recommending that creditors vote against acceptance of the plan); *In re Federated Dep't Stores, Inc.*, Consolidated Case No. 1-90-00130, 1992 Bankr. LEXIS 392, at *21 (Bankr. S.D. Ohio Jan. 10, 1992) (solicitation packages included a letter from the appropriate creditors' committee recommending a vote in favor of the plan).

Amended Proposed Plan. This Objection is submitted without prejudice to, and with a full reservation of, the Equity Committee's rights to supplement or amend this Objection in advance of, or in connection with, the hearing to approve the Amended Proposed Disclosure Statement and/or confirmation of the Amended Proposed Plan. Nothing herein is intended to be a waiver by the Equity Committee of any right, objection, argument, claim, or defense with respect to any matter, including any matters in respect of the Amended Proposed Disclosure Statement and the Amended Proposed Plan, all of which are hereby expressly preserved.

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CONCLUSION

WHEREFORE, for the foregoing reasons, the Equity Committee respectfully requests that the Court: (i) sustain the Objection; (ii) deny approval of the Debtors' Amended Proposed Disclosure Statement and the relief requested in the motion to approve the same; and (iii) grant such other and further relief as the Court may deem just, proper, and equitable.

Dated: July 28, 2017

Respectfully submitted,

By:
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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, the foregoing document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District.

/s/ Annmarie Chiarello
One of Counsel