

I. **OVERVIEW**

1. On July 8, 2013, the Debtors filed their Disclosure Statement [Dkt. No. 920] (the “Disclosure Statement”) and proposed Joint Chapter 11 Plan of Reorganization [Dkt. No. 921] (the “Plan”). The Plan is jointly proposed by the Debtors and Yucaipa (collectively, the “Plan Sponsors”). The Court has set hearing on approval of the Disclosure Statement for August 13, 2013, with any objections to the Disclosure Statement due on or before August 2, 2013.¹

2. On July 10, 2013, pursuant to Rule 9016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 45 of the Federal Rules of Civil Procedure (the “Federal Rules”), counsel for the Committee duly served the Subpoenaed Parties with subpoenas (collectively, the “Subpoenas”). True and correct copies of the Subpoenas are attached hereto as **Exhibit A**. The Subpoenas seek production of documents from, as well as accompanying depositions of, the Subpoenaed Parties.

3. The information sought in the Subpoenas is relevant to the subject matter of the litigation, *i.e.*, approval of the Disclosure Statement and confirmation of the Plan, and reasonably calculated to lead to admissible evidence. The Committee requires the information sought in the Subpoenas to fully and properly discharge its fiduciary duties with respect to the disclosure statement and plan processes, including evaluating whether the Disclosure Statement contains adequate information that will enable creditors to make an informed decision when voting on the Plan and whether the Plan is confirmable and in the best interests of unsecured creditors.

4. Given the short amount of time in which the Committee had to object to the Disclosure Statement, the Committee had no choice but to set the document production

¹ By agreement with the Debtors, the Committee’s deadline to object to the Disclosure Statement has been extended through and including August 9, 2013.

deadlines as on or before July 24, 2013 and set the depositions of Nugent and Walker for July 30, 2013 and the depositions Yucaipa and CMA for July 31, 2013. These deadlines gave the Subpoenaed Parties two (2) full weeks to collect and produce documents to the Committee and three (3) full weeks to prepare for depositions. These dates and deadlines are reasonable given the short time frame within which the Committee has to evaluate the Disclosure Statement and Plan.

5. Rather than attempting in good faith to comply with the Subpoenas, the Subpoenaed Parties did nothing for two (2) weeks and, instead, waited until the document production deadline, *i.e.*, July 24, 2013, to send the Committee a letter in response to the Subpoenas setting forth broad and non-specific objections to the Subpoenas (the “Objection Letter”). A true and correct copy of the Objection Letter is attached hereto as **Exhibit B**. The objections raised by the Subpoenaed Parties in the Objection Letter are without merit and are only meant to delay, hinder and impede the Committee’s efforts to fulfill its fiduciary obligations with respect to the Disclosure Statement and Plan.

6. The Subpoenaed Parties have failed to produce a single document in response to the Subpoenas. The Committee requires production of the requested documents in order to take meaningful depositions of the Subpoenaed Parties. Because the Subpoenaed Parties have not and will not produce any documents in connection to the Subpoenas, the Committee has had to postpone the scheduled depositions—further delaying the disclosure statement and plan processes and shouldering the estates with additional and unnecessary costs.

7. In an attempt to resolve this matter without need for court intervention, the Committee sent a letter to the Subpoenaed Parties dated July 31, 2013 (the “Response Letter”). A true and correct copy of the Response Letter is attached hereto as **Exhibit C**. In the Response

Letter, the Committee, among other things, expressed its view regarding the inadequacies of the objections raised by the Subpoenaed Parties in the Letter Objection and insisted upon good faith compliance with the Subpoenas. The Subpoenaed Parties have yet to respond to the Committee's Response Letter. Consequently, the Committee has no choice but to file this Motion and seek court intervention.

II. **RELEVANT BACKGROUND**

8. On September 11, 2012 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Petition Date"). Following the Petition Date, the Debtors have continued to operate their businesses as debtors and debtors in possession.

9. The Subpoenaed Parties are:

- a. ***Yucaipa*** – a Plan proponent and existing equity holder of debtor Piccadilly Investments, LLC.
- b. ***CMA*** – Yucaipa's "assignee and affiliate" with respect to its managing membership interest in Piccadilly Investments, LLC. *See* Disclosure Statement at 10.
- c. ***Walker*** and ***Nugent*** are employees of Yucaipa and/or CMA and have knowledge of and involvement in the Debtors' businesses and reorganization efforts.

10. The Subpoenaed Parties have knowledge of and possess information that the Committee needs to properly evaluate the Disclosure Statement and Plan.

11. Based on the Committee's initial review of the Disclosure Statement and Plan, there are glaring deficiencies that render the Disclosure Statement incapable of approval and the Plan unconfirmable. With respect to the Disclosure Statement, it does not, among other things, contain adequate information concerning or otherwise evaluate potential claims and causes of action the Debtors' bankruptcy estates may have against the Subpoenaed Parties and other

insiders of the Debtors. This information is necessary for creditors to make an informed decision when voting on whether to accept or reject the Plan. As for the Plan, it would, among other things, immediately release the Debtors' equity holders (including Yucaipa), management and other insiders from avoidance actions and other potential claims and causes of action irrespective of whether creditors are ever paid in full under the Plan. *See* Plan §§ 11.6, 11.7. The Plan would also allow the Debtors' equity holders to retain their interests in the Debtors in exchange for a loan made by equity to the Debtors and despite there being any assurances that creditors will be paid in full under the Plan. The Disclosure Statement and Plan fail to adequately evaluate the value of such retained equity and wholly fail to disclose any efforts made by the Debtors to attract new or additional investors, including efforts to market equity interests to third party investors.

12. Given these and other deficiencies with respect to the Disclosure Statement and Plan discovery is necessary for the Committee to properly evaluate the Disclosure Statement and Plan and to properly advise its constituency. The Subpoenaed Parties have knowledge of and possess information vital to the Committee's evaluation process and should be compelled to produce the requested documents and submit to depositions.

III. ARGUMENT AND AUTHORITY

13. One of the Committee's primary duties is the negotiation and participation in the formulation of a chapter 11 plan and disclosure statement on behalf of a debtor's unsecured creditors. 11 U.S.C. § 1103(c)(3); *In re Cumberland Farms, Inc.*, 154 B.R. 9, 12 (Bankr. D. Mass. 1993) (citing negotiation of plan as basic function of committee). *See also* H.R. Rep. No. 595, 95th Conv. 1st Sess. 401 (“[Section 1103] provides for the appointment of creditors’ and equity security holders’ committees, which will be the primary negotiating bodies for the

formulation of the plan of reorganization”). The Bankruptcy Code contemplates an official committee’s use of discovery to carry out its statutory duties. *See, e.g., In re Anderson*, 349 B.R. 448, 464 (E.D. Va. 2006) (affirming committee’s right to and participation in discovery in connection with claims objections).

14. Discovery regarding the Disclosure Statement and Plan are not only appropriate but also necessary at this stage of the Cases to determine, among other things, whether the Disclosure Statement provides sufficient information to satisfy sections 1125 and 1129 of the Bankruptcy Code and whether the Plan is capable of being confirmed. *See In re U.S. Brass Corp.*, 194 B.R. 420, 428 (Bankr. E.D. Texas 1996); *In re Monroe Well Service, Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987) (both holding that disclosure statement may be disapproved despite sufficiency of information where associated plan could not satisfy confirmation requirements of section 1129).

15. The scope of a subpoena is governed by Federal Rule 26(b)(1) (as made applicable to these Cases by, *inter alia*, Bankruptcy Rules 7026 and 9016). *Coleman v. District of Columbia*, No. 09–0050 RCL/DAR, 2011 WL 2802910 (D.D.C. July 14, 2011). Federal Rule 26(b)(1) sets forth the broad scope of a subpoena and states that a party “may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party ... [or which] appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

16. “By incorporating reference to Fed.R.Civ.P. 26(b), Rule 45(d)(1) applies an ‘exceedingly broad’ standard of relevancy to a subpoena seeking material from a non-party. The relevancy threshold is not high: material sought need not be admissible at trial, but must be relevant to the subject matter of the litigation and reasonably calculated to lead to admissible

evidence.” *Cofield v. City of LaGrange, Ga.* 913 F.Supp. 608 (D.D.C. 1996) (citations omitted). “The term relevance at the discovery stage is broadly construed to include information which is not admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Covertino v. United States Department of Justice*, 565 F.Supp.2d 10, 12 (D.D.C. 2008) (citation omitted). “The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.” “Amendments to Federal Rules of Civil Procedure.” Committee Note to Rule 45, 134 F.R.D. 525, 670 (1991).

17. In their Objection Letter, the Subpoenaed Parties’ first objection to the Subpoenas states:

Objection 1. The Subpoenaed Parties object to the Subpoenas as premature given that (i) the Official Committee of Unsecured Creditors has not filed objections to the Debtors’ Disclosure Statement or Chapter 11 Plan; and (ii) the parties are presently negotiating toward resolution of the issues for which discovery is now being sought. The Subpoenas only serve to delay and impede the attempts for consensual resolution.

This objection should be denied. Federal Rule 26 permits all discovery reasonably calculated to lead to the discovery of admissible evidence. As explained in the Committee’s Response Letter, the requests for documents set forth in the Subpoenas are reasonably calculated to obtain information necessary for the Committee to fully and properly evaluate the Disclosure Statement and Plan. As the Disclosure Statement and Plan are already on file and a hearing on the adequacy of the Disclosure Statement is currently set for August 13, 2013, the Committee’s discovery is more than timely. Moreover, any negotiations that may be taking place do not serve as grounds for delaying or preventing discovery, but rather obviate the need for same to ensure that the Committee is appropriately informed as to all relevant facts and circumstances regarding the Disclosure Statement and Plan.

18. The Subpoenaed Parties' second objection to the Subpoenas states:

Objection 2. The Subpoenaed Parties object to the Subpoenas to the extent they purport to impose burdens or duties on the Subpoenaed Parties that exceed the requirements or permissible scope of discovery under the Federal Rules, Bankruptcy Rules, and any applicable local rules.

This objection should be denied. The Subpoenas seek discovery regarding the Plan and Disclosure Statement and are directed to entities and individuals having knowledge of and possessing information with respect thereto. Federal Rules 26 and 45 provide an exceedingly broad scope for discovery sought in connection with a subpoena. Here, the Subpoenas are reasonably calculated to lead to the discovery of relevant information and admissible evidence concerning the Disclosure Statement and Plan and, therefore, are proper under the applicable Federal Rules and Bankruptcy Rules.

19. The Subpoenaed Parties' Objection No. 3 to the Subpoenas states:

Objection 3. The Subpoenaed Parties object to the requests for depositions on the grounds that four depositions of non-Debtor entities and non-Debtor employees are cumulative, unnecessary, unduly burdensome, and designed to harass and annoy. The Subpoenaed Parties will negotiate with the counsel for the Official Committee of Unsecured Creditors to determine whether one or more depositions are necessary and, if so, which topics may be covered in those depositions and when and where such deposition(s) will take place.

This objection is without merit and should be denied. The Subpoenaed Parties have produced no documents; however, the Committee has informed the Subpoenaed Parties that when production is made, such production need not include duplicative documents. As set forth herein, the Subpoenaed Parties all have knowledge of and possess information with respect to the Disclosure Statement and Plan. The discovery sought in connection with the Subpoenas, including topics covered by the depositions, are both tailored and critical to the Committee's statutory duties to fully evaluate and participate in the disclosure statement and plan processes. As to the remainder of the foregoing objection, the Committee has the right to take discovery

under the applicable rules, including the depositions of all entities and persons with potentially relevant knowledge as to the subject of the dispute.

20. The Subpoenaed Parties' Objections Nos. 4, 5, 6, 9, 12 and 13 are without merit for similar reasons. These objections are as follows:

Objection 4. The Subpoenaed Entities object to the deposition topics specified in the Subpoenas on the grounds that they are vague, ambiguous, overbroad, and encompass matters that are neither relevant to the Debtors' Disclosure Statement and Chapter 11 Plan of Reorganization, nor reasonably calculated to lead to the discovery of admissible evidence.

Objection 5. The Subpoenaed Entities object to the Subpoenas on the grounds that they are unduly burdensome, overbroad, needlessly repetitive, and encompass documents neither relevant to the subject matter of Debtors' Disclosure Statement and Chapter 11 Plan of Reorganization, nor reasonably calculated to lead to the discovery of admissible evidence.

Objection 6. The Subpoenaed Entities object to the Subpoenas to the extent that their instructions, definitions, document requests, and deposition topics are vague and ambiguous.

Objection 9. The Subpoenaed Parties object to the Subpoenas to the extent they seek documents or information to which the Official Committee of Unsecured Creditors has equal or superior access, including but not limited to documents and information in the public domain or documents available from the Debtors, on the grounds that the Subpoenas are unreasonably duplicative and burdensome.

Objection 12. The Subpoenaed Entities object to the Subpoenas to the extent they call for the production of "All Documents" or "All Documents and Communications" (including documents and information "evidencing," "comprising," "concerning," "relating to," and "constituting" various topics) on the grounds that they are overbroad and unduly burdensome. The Subpoenaed Entities further object to such demands for "All Documents" or "All Documents and Communications" where production of a subset of all documents and/or communications would be reasonable and sufficient to show pertinent information.

Objection 13. The Subpoenaed Entities object to the requests for identification of unavailable documents and privilege logging on the grounds that they are unduly burdensome and to the extent they impose requirements beyond those of the Federal Rules, Bankruptcy Rules, and any applicable local rules.

As explained in the Committee's Response Letter and herein, the Subpoenas are not overly broad or vague, but rather contain requests tailored to discover information relevant to the Committee's evaluation of the Plan and Disclosure Statement. Furthermore, objections to a request for production are invalid unless the party resisting discovery shows "specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive . . ." *McLeod, Alexander, Powell & Apfell, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (internal citations omitted). The Subpoenaed parties failed to make any such showing, but have advanced only general, vague objections and essentially refused to produce any of the requested documents. Moreover, given the Subpoenaed Parties' strong interests in the subject matter, the Court should not countenance the Subpoenaed Parties' objections that a particular request is overly burdensome because, among other things, the Subpoenaed Parties are not the Debtors.

21. The Subpoenaed Parties' Objection No. 7 to the Subpoenas is as follows:

Objection 7. The Subpoenaed Entities object to the Subpoenas to the extent they seek documents, including but not limited to electronically stored information, that are not within the possession, custody, or control of the Subpoenaed Entities in the United States.

This objection should be denied. The Committee has requested that the Subpoenaed Parties identify and/or describe all documents being withheld from production pursuant to this objection, but to date the same has not been provided.

22. The Subpoenaed Parties' Objection No. 8 to the Subpoenas is as follows:

Objection 8. The Subpoenaed Parties object to the Subpoenas to the extent they seek the discovery of information protected by the attorney-client privilege, the work product doctrine, common interest privilege, or any other applicable privilege or immunity protecting materials from disclosure. The Subpoenaed Parties' responses to the Subpoenas shall not be deemed to be a waiver of any such privilege or protection, and the Subpoenaed Parties preserve all such privileges and protections. To the extent that any document or information is

inadvertently produced in response to the Subpoenas, such production is not to be construed as a waiver of any privilege or protection.

With respect to this objection, the Committee has requested that the Subpoenaed Parties provide a privilege log of documents being withheld from production pursuant to Objection No. 8, but to date the same has not been provided and the Subpoenaed Parties have objected to providing the same, despite the requirements of the applicable rules.

23. The Subpoenaed Parties' Objection No. 10 to the Subpoenas is as follows:

Objection 10. The Subpoenaed Entities object to the Subpoenas to the extent they call for the location and/or restoration of data stored on computers, back-up tapes, or other forms of electronic media because such a request is unduly burdensome, costly and time-consuming to the Subpoenaed Entities, which are non-Debtors.

This objection is without merit and should be denied. The Subpoenaed Parties include Yucaipa, a Plan Proponent, and two of its employees and an "assignee or affiliate" of Yucaipa. The Subpoenaed Parties all have knowledge of and possess information with respect to the Disclosure Statement and Plan. To wit, the Subpoenaed Parties are equity holders or involved in management of the Debtors and their businesses. As such, the Subpoenaed Parties are strongly interested in the instant proceeding. Pursuant to the applicable rules, the Subpoenaed Parties are obligated to produce any requested electronically stored information.

24. The Subpoenaed Parties' Objection No. 11 to the Subpoenas is as follows:

Objection 11. The Subpoenaed Entities object to return dates of the Subpoenas and the deposition dates on the grounds that they are burdensome and provide an unreasonably short amount of time for compliance.

This objection should be denied. As set forth herein, the Committee promptly caused the Subpoenas to be duly served within two (2) days after the Plan and Disclosure Statement were filed. The timing of the return and deposition dates was dictated by the deadlines and hearing dates set by the Court at the request of the Plan Proponents, which, among other things, require

that objections to the Disclosure Statement be filed on or before August 2, 2013. Accordingly, the document production date was set for July 24, 2013, *i.e.*, fourteen (14) days after issuance of the Subpoenas, and the depositions were set to commence six (6) days following the document production date, or three (3) weeks after service of the Subpoenas.

25. The discovery needs to be completed within sufficient time to allow the Committee time to prepare and file any necessary objections to the Disclosure Statement and Plan. Unfortunately, no documents have been produced by the Subpoenaed Parties. The Committee has requested the Subpoenaed Parties' immediate good faith production of documents responsive to the Subpoenas. As a result of the Subpoenaed Parties' failure to produce any documents requested in the Subpoenas, the Committee has been forced to reschedule the depositions to a later time and date.

26. The Subpoenaed Parties' Objection No. 11 to the Subpoenas is as follows:

Objection 14. The failure to object to any specific item in the Subpoenas does not constitute a representation by the Subpoenaed Parties that they will produce responsive documents or information, or that any such documents or information exist or are within the Subpoenaed Parties' knowledge, possession, custody, or control.

This objection should be denied. This objection does not relieve the Subpoenaed Parties from their duty to comply with the Subpoenas, and the Committee has demanded that the Subpoenaed Parties immediately produce documents responsive to the Subpoenas. Until such time as documents are produced and depositions are taken, the Committee cannot fully and properly evaluate the Disclosure Statement and Plan.

27. Ultimately, the Subpoenaed Parties may not simply refuse to comply with obligations imposed on them under the applicable Federal Rules and Bankruptcy Rules. The document requests in the Subpoenas are specifically tailored to obtain information that the

Committee requires in order to evaluate the Disclosure Statement and Plan. Accordingly, the Committee respectfully requests that this Court enter an order compelling the Subpoenaed Parties to comply with the Subpoenas forthwith.

28. The undersigned counsel for the Committee certifies that counsel has in good faith conferred or attempted to confer with counsel for the Subpoenaed Parties by, among other things, seeking to engage in a telephonic discussion of the issues with counsel for the Subpoenaed Parties and sending correspondence on July 31, 2013 in an effort to obtain the Subpoenaed Parties' compliance with the Subpoenas.

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WHEREFORE, PREMISES CONSIDERED, the Committee respectfully requests that this Court enter an order (i) compelling the Subpoenaed Parties to comply with the Subpoenas and (ii) granting such other and further relief as the Court deems just and equitable.

Dated: August 1, 2013.

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