UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
PMGI Holdings, Inc., *et al.*,[1]	)	Case No. 13-12404 (CSS)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	**Hearing Date: To Be Determined**
	)	**Objection Deadline: February 3, 2014[2]**
	)	**Ref. Docket Nos. 383**

CRT CAPITAL GROUP LLC'S RESPONSE TO REORGANIZED DEBTORS' OBJECTION TO PROOFS OF CLAIM NOS. 102-140

[1] The Debtors in these Chapter 11 Cases, along with the last four (4) digits of each Debtor's federal tax identification number, are: Blue Hen Group Inc. (9667), Argus Payments Inc. (4661), Big Island Technology Group, Inc. (9795), Confirm ID, Inc. (7020), Danni Ashe, Inc. (5271), Fastcupid, Inc. (7869), Fierce Wombat Games Inc. (2019), FriendFinder California Inc. (2750), FriendFinder Networks Inc. (0988), FRIENDFINDER VENTURES INC. (3125), FRNK Technology Group (7102), General Media Art Holding, Inc. (2637), General Media Communications, Inc. (2237), General Media Entertainment, Inc. (2960), Global Alphabet, Inc. (7649), GMCI Internet Operations, Inc. (7655), GMI On-Line Ventures, Ltd. (7656), Interactive Network, Inc. (5941), Magnolia Blossom Inc. (8925), Medley.com Incorporated (3594), NAFT NEWS CORPORATION (4385), Penthouse Digital Media Productions Inc. (1056), Penthouse Images Acquisitions, Ltd. (9228), PerfectMatch Inc. (9020), Playtime Gaming Inc. (4371), PMGI Holdings Inc. (2663), PPM Technology Group, Inc. (9876), Pure Entertainment Telecommunications, Inc. (9626), Sharkfish, Inc. (1221), Snapshot Productions, LLC (7091), Streamray Inc. (2716), Streamray Studios Inc. (1009), Tan Door Media Inc. (1100),Traffic Cat, Inc. (1223), Transbloom, Inc. (1168), Various, Inc. (7762), Video Bliss, Inc. (6760), West Coast Facilities Inc. (4751), XVHUB Group Inc. (9401). The Debtors' business address is 6800 Broken Sound Parkway NW, Suite 200, Boca Raton, FL 33487.

[2] With Debtors' consent, the objection deadline was extended to February 3, 2014.

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CRT Capital Group LLC ("CRT"), by its undersigned counsel, hereby responds to the *Reorganized Debtors' Objection to Claim Nos. 102 through 140 filed by CRT Capital Group LLC Pursuant to 11 U.S.C. § 502(b) and Fed. R. Bankr. P. 2007* [Docket No. 383] (the "Objection"), and respectfully states as follows:

PRELIMINARY STATEMENT

CRT is owed a Success Fee[1] of at least $3.43 million for work performed on behalf of the Debtors during the ten-month period, immediately preceding the Petition Date, in which CRT served as the Debtors' exclusive financial advisor. CRT's considerable efforts on the Debtors' behalf resulted in the successful restructuring of the Debtors' obligations that the Court approved in the Debtors' Chapter 11 plan (the "Plan Transactions"), which substantially benefitted the Debtors and their stakeholders by deleveraging the Debtors' balance sheet and eliminating more than $250 million in debt obligations.

CRT is entitled to the $3.43 million Success Fee under the plain terms of Section 2 of its November 2, 2012 Engagement Letter with the Debtors (the "Engagement Letter" or "Agreement"). The Agreement provides:

> CRT will be entitled to receive the Success Fee provided for above if a Transaction is consummated during the term of this Agreement or at any time within nine (9) months following the expiration or termination of the Agreement, as the case may be.

(*See* Ex. A, at §2 (emphasis added) ("Section 2").) Section 2 establishes both the circumstances in which CRT is entitled to a Success Fee – *i.e.*, if a Transaction is consummated – and the time

[1] Defined terms used herein have the meaning given to them in the Agreement, as defined herein.

period in which CRT is so entitled – *i.e.*, during the Agreement, or within nine months after the expiration or termination of the Agreement (hereafter, the "Tail Period").

The Debtors do not and cannot dispute that the Plan Transactions are a consummated "Transaction" pursuant to Section 2 of the Agreement. (*See* Objection ¶¶ 12-13.) Nor can the Debtors dispute that the Plan Transactions were consummated within the Tail Period, which commenced on September 11, 2013 and will conclude on June 11, 2014. CRT's right to a Success Fee under Section 2 of the Agreement is absolute, unqualified and beyond dispute. Debtors' Objection ignores Section 2 completely.

The Debtors object to CRT's claim based on an untenable interpretation of Section 4 of the Agreement that cannot be reconciled with Section 2 and the Agreement as a whole. Under the Debtors' interpretation of the Agreement, CRT is entitled to a Success Fee if the Debtors successfully restructure their obligations, but the Debtors can avoid paying CRT that Success Fee by terminating the Agreement minutes before "consummating" that restructuring. The Agreement cannot be interpreted in this economically irrational fashion. The more logical interpretation of the Agreement – and the only interpretation that gives effect to each and every contractual provision, as required by settled principles of contract interpretation – is that Section 4 does not apply to a Transaction, like this one, implemented through a pre-arranged bankruptcy. Interpreting the Agreement to preclude CRT from recovering fees in the event of a restructuring transaction consummated during the Tail Period would impermissibly excise Section 2 from the Agreement, and wrongfully permit the Debtors to avoid paying a fee for the services that they publicly announced they had engaged CRT to perform. *See* Debtors' November 5, 2012 Press

Release[2] (Debtors "retained CRT Capital Group LLC [as] financial advisor to help explore opportunities to refinance [Debtors'] long-term debt.").

If the Agreement is ambiguous as to CRT's right to receive a Success Fee, that ambiguity must be – and will be – resolved in CRT's favor by reference to extrinsic evidence. The extrinsic evidence will demonstrate that both parties intended CRT to obtain a Success Fee in the event of a pre-arranged bankruptcy, and that weeks before the Petition Date, the parties openly discussed that CRT would receive a Success Fee. The evidence will further show that CRT was instrumental to formulating and negotiating the Transaction Support Agreement ("TSA") that was the cornerstone of the Plan Transactions, and that when CRT rendered such services in connection with the TSA, both the Debtors and CRT understood that CRT would obtain a Success Fee whether the TSA was consummated in or out of bankruptcy.

In the alternative -- assuming that the Agreement is ambiguous with regard to CRT's right to a Success Fee in the event of a pre-arranged bankruptcy -- CRT may pursue an equitable claim for unjust enrichment to receive compensation for the work it performed on the Debtors' behalf, including developing and negotiating the TSA.

For the reasons below and based on facts that CRT is prepared to present in connection with adjudication of the Objection, the Objection should be overruled.

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[2] Attached to *CRT Capital Group LLC's Omnibus Response and Reservation of Rights to Debtors' Motion (I) To Assume Transaction Support Agreement and (II) To Employ SSG Advisors LLC*, dated October 4, 2013 [Docket No. 101] at Ex. A.

BACKGROUND[3]

A. The CRT Engagement Letter

1. In November 2012, FriendFinder Networks Inc. ("FFN," together with its subsidiaries and affiliates, the "Debtors") retained CRT as their exclusive financial advisor pursuant to the terms of the November 2, 2012 Agreement. (*See* Ex. A.)

2. The Agreement was subject to extensive bilateral negotiations between CRT and FFN, and underwent multiple rounds of revisions by each side.

3. FFN advised CRT that its primary objective in retaining CRT was to obtain new financing or recapitalize its existing capital structure to allow the Debtors to accomplish a financial restructuring and avoid the risks of an open-ended bankruptcy proceeding.

4. In the Agreement, FFN engaged CRT to act as its exclusive financial advisor in connection with "any or all" of four categories of potential transactions: (i) the issuance of new debt securities to refinance the Debtors' existing indebtedness (a "Debt Issuance"), (ii) the agreement by some or all holders of the Debtors' 14% New First Lien Notes due 2013 ("First Lien Notes") to rollover their notes into the Debt Issuance (a "First Lien Rollover"), (iii) the recapitalization of the Debtors' 11.5% Non-Cash Pay Secured Notes due 2014 and 14% Cash Pay Secured Notes due 2013 (together, the "Second Lien Notes") through a restructuring, amendment, equitization, forgiveness, exchange and/or repurchase (a "Second Lien Recapitalization"), and (iv) the sale of new common or preferred equity or equity linked securities (an "Equity Financing") the proceeds of which may be used to purchase the Second

[3] CRT anticipates submitting at or prior to the hearing on this contested matter a declaration and/or testimony from, among others, William J. R. Wilson, the CRT Managing Director that led CRT's engagement by the Debtors. CRT expects that Mr. Wilson's declaration and/or testimony will address, among other things, each of the factual assertions set forth in this response.

Lien Notes at a discount. (Ex. A at 1-2.) Under the Agreement, a "Transaction" was defined as "any and all" of these four categories of potential transactions. (Ex. A at 1.)

5. Section 2 of the Agreement governed CRT's "Compensation." Pursuant to Section 2, FFN committed to pay CRT certain fees and expenses, including, among other things, a separate Success Fee ("Success Fee") for each type of Transaction. In the case of a First Lien Rollover and Second Lien Recapitalization (together, a "Restructuring Transaction"), the Success Fees payable to CRT are based in part on the level of participation by holders of First Lien Notes and Second Lien Notes. Specifically, Section 2 obligated FFN to pay CRT Success Fees equal to: (i) 1% of the face amount of all First Lien Notes subject to the First Lien Rollover, and (ii) a percentage, ranging from 0.25% to 0.75%, of the differential between the face amount of Second Lien Notes subject to the Second Lien Recapitalization (excluding Second Lien Notes owned by certain affiliated entities) and the value received by holders of those Second Lien Notes. (Ex. A § 2.)

6. Section 2 obligated FFN to pay CRT a Success Fee in the event that FFN consummated a Transaction during the term of the Agreement or during the Tail Period:

> CRT will be entitled to receive the Success Fee provided for above if **a Transaction** is consummated during the term of this Agreement **or at any time within nine (9) months following the expiration or termination of this Agreement**, as the case may be.

(*Id.* (emphasis added).) Section 2 therefore addressed both the type(s) of transactions giving rise to a Success Fee under the Agreement (*i.e.*, a "Transaction") and when a Transaction must be consummated to give rise to a Success Fee under the Agreement (*i.e.*, during the term of the Agreement, or within nine months after expiration or termination). Under Section 2 of the Agreement, CRT's right to receive Success Fees for a Transaction consummated during the nine-month tail period is absolute and unequivocal.

7. Section 3 of the Agreement entitles CRT to reimbursement for "reasonable expenses as incurred . . . . not to exceed an aggregate of $50,000 without the Company's prior written approval (not to be unreasonably withheld)."

8. Section 4 of the Agreement mirrors Section 2 in providing that CRT is entitled to a Success Fee for a Transaction consummated during the Tail Period, but imposes certain nebulous restrictions on CRT's right to receive a Success Fee:

> CRT's services hereunder may be earlier terminated with or without cause by you or by us at any time and without liability or continuing obligation to you or to us; provided, however, that CRT will be entitled to payment of all fees and expenses provided for above (including the Success Fee) in the event that at any time prior to the expiration of nine (9) months after the termination or expiration of CRT's engagement a Transaction is consummated outside of a Plan of Reorganization under the U.S. Bankruptcy Laws (other than a prepackaged Plan of Reorganization,) and is not terminated as a result of CRT's breach of this Agreement (x) between the Company and a Qualified Buyer (as defined below), or (y) the Company enters into an agreement providing for a Transaction with a Qualified Buyer. A "Qualified Buyer" means (i) any party identified in writing by CRT, or as to which CRT advised the Company during the term of CRT's engagement hereunder, (ii) any party that has proposed in writing to the Company, or with whom the Company had held discussions regarding, a Transaction during the term of CRT's engagement hereunder, or (iii) an affiliate of any of the parties identified in the foregoing clauses (i) and (ii), but shall not include existing holders of the Company's debt securities as of the date hereof. Notwithstanding any termination or expiration of this Agreement, the provisions of Sections 2, 3 and 4 hereof and the Standard Terms and Conditions shall survive such termination and remain operative and in full force and effect.

(Ex. A § 4 (emphasis in original).)

9. Apart from the Success Fees, the Agreement also obligates each Debtor to reimburse CRT for its "reasonable expenses as incurred, including travel costs (including coach airfare), document production, specialized information systems usage and other similar expenses, not to exceed an aggregate of $50,000 without the Company's prior written approval (not to be unreasonably withheld)" (the "Expenses"). (Ex. A § 3.)

B. CRT's Efforts on the Debtors' Behalf Culminate in the TSA

10. The Debtors contend (Objection ¶ 18) that "CRT provided only limited input during the negotiations with the Consenting Noteholders, and did not contribute in any material way to the negotiation or execution of the [TSA] between the Debtors and the Consenting Noteholders". This is demonstrably false. To the contrary, CRT played an integral role not only in negotiating the transactions with First and Second Lien Noteholders that were memorialized in the TSA, but also in negotiating the TSA, and advising the Debtors with respect to the TSA.

11. Beginning in November 2012, CRT worked with the Debtors to develop and implement a strategy for engaging with existing lenders in contemplation of a First Lien Rollover and/or a Second Lien Recapitalization, both "Transactions" under the Agreement that, if consummated, required the Debtors to pay a Success Fee to CRT. Among other things, CRT: (i) worked with management to prepare lender presentations containing potential restructuring alternatives; (ii) engaged directly with representatives for holders of the Second Lien Notes; (iii) negotiated potential terms for restructuring the First Lien Notes and the Second Lien Notes. CRT also actively sought potential investors for a potential Equity Financing and coordinated diligence on behalf of the Debtors.

12. Between January and March 2013, CRT played a pivotal role in the Debtors' restructuring efforts. For example, CRT: (i) negotiated potential deal terms with representatives for holders of the Second Lien Notes; (ii) provided the Debtors with advice and analysis concerning proposals made by such holders; and (iii) advised the Debtors in connection with meetings with holders of the First Lien Notes and Second Lien Notes, including by analyzing potential alternatives and providing direct input to the Debtors' board. CRT also continued to engage in parallel efforts to identify potential equity or debt investors, facilitated meetings and

discussions with numerous interested parties, and coordinated the production, presentation and review of due diligence materials on behalf of the Debtors. Notably, before the Debtors retained CRT as their exclusive financial advisor, the Debtors had been rebuffed in their attempts to engage the Second Lien Noteholders in negotiations regarding a restructuring transaction.

13. In April and May 2013, CRT advised the Debtors concerning their anticipated forbearance agreement with noteholders. CRT was also instrumental in the Debtors' negotiation of a draft term sheet with Stonehill (lead holder of the First Lien Notes) addressing the proposed terms of a First Lien Rollover that was the foundation for the TSA. During this same period of time, CRT's efforts to source an Equity Financing generated proposals from two potential investors to acquire a controlling interest in the Debtors.

14. In June 2013, in addition to advising the Debtors on the two potential purchase proposals, CRT also continued to provide the Debtors with recommendations and guidance in connection with their ongoing efforts to negotiate a consensual debt restructuring with their lenders. Among other things, CRT received, reviewed and commented on drafts of the TSA and advised the Debtors with regard to the terms of the TSA.

15. In July and August 2013, CRT's efforts on the Debtors' behalf focused almost exclusively on achieving a consensual restructuring of the First Lien Notes and the Second Lien Notes. These efforts included: (i) advising the Debtors on the TSA, its appendices and revisions thereto; (ii) engaging in frequent discussions and negotiations with principals and counsel for holders of the First Lien Notes and the Second Lien Notes in order to obtain their consent to the proposed restructuring; and (iii) providing the Debtors' executive management and board with CRT's assessments of the evolving deal terms, along with guidance concerning ongoing negotiations.

16. By early September 2013, the TSA – due in large part to CRT's considerable efforts – was drafted, negotiated and ready for execution. Because the TSA included "an agreement by some or all of the holders of the Debtors' First Lien Notes due 2013 to rollover their Notes into new Debt Financing", as well as a "recapitalization of the Company's junior securities" at "a discount", the TSA represented two distinct "Transactions" under the Agreement (a First Lien Rollover and Second Lien Recapitalization), each of which gave rise to a Success Fee. (*See* Ex. A at 1-2.)

17. According to the Debtors, "it became clear that the contemplated restructuring transaction" – *i.e.*, the TSA – "would require the Debtors to file for chapter 11 and to implement the contemplated transaction through a prepackaged plan." (Objection ¶ 16) (emphasis added.) The Debtors then "filed these Chapter 11 cases to implement the terms of the TSA." (Objection ¶ 19.)

C. The Plan Transactions

18. To avoid paying CRT a Success Fee, the Debtors terminated the Agreement on September 11, 2013.[4] Six days later, on September 17, 2013 (the "Petition Date"), the Debtors commenced their bankruptcy cases in this Court.

19. On the Petition Date, the Debtors filed a motion seeking authority to assume and to implement that certain Transaction Support Agreement (the "TSA") dated September 16, 2013 entered into by the Debtors and certain holders of First Lien Notes and Second Lien Notes. (*See Motion of the Debtors for an Order, Pursuant to Sections 105(a) and 365(a) of the Bankruptcy Code, Authorizing the Assumption of Transaction Support Agreement* [Docket No. 14] (the "TSA

[4] The Debtors' assertions that "CRT advised the Debtors that it could not provide the services the Debtors required for their chapter 11 cases" is false. (Obj ¶ 3.) In fact, CRT informed the Debtors that CRT was willing and able to undertake such a role. Nonetheless, the Debtors terminated CRT's engagement.

Motion").) The Debtors informed the Court that the TSA and the plan treatment contemplated therein had the support of 80% of the First Lien Notes and 78% of the Second Lien Notes. (*Declaration of Ezra Shashoua in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief* [Docket No. 16] (the "First Day Declaration") ¶¶ 18-19; TSA Motion ¶ 1.)

20. The Debtors made explicit that they had filed their bankruptcy cases in order to implement the transactions set forth in the TSA. (*See* First Day Declaration ¶ 9; TSA Motion ¶ 25 ("The TSA is designed to ensure that the Debtors can emerge from these Chapter 11 Cases in an expeditious manner with a reduced debt burden . . . .").) They announced their intent to file a plan of reorganization embodying the terms and conditions of the TSA. (First Day Declaration ¶ 10.)

21. On October 11, 2013, the Court entered an Order authorizing the Debtors to assume and implement the TSA. (*See* [Docket No. 136].) The Debtors proposed a plan of reorganization to implement the transactions set forth in the TSA. (*See* [Docket No. 229] (as amended and/or supplemented, the "Plan").) On December 16, 2013, the Bankruptcy Court confirmed the Debtors' Plan. On December 20, 2013, the Debtors' Plan became effective.

22. On November 13, 2013, CRT filed its Proofs of Claim.[5] The Debtors filed their Objection on January 13, 2014.

[5] CRT filed proofs of claim against each of the Debtors because, pursuant to the Agreement, CRT served as exclusive financial advisor to FFN ***and*** each of its subsidiaries and affiliates. (Ex. A at 1.) Contrary to Debtors' assertion (Obj. ¶ 42), CRT is not seeking multiple recoveries; rather, each Debtor is jointly and severally liable to CRT under the Engagement Letter.

CRT'S RESPONSE

A. CRT is Entitled to a Success Fee Under the Agreement

1. Debtors Consummated a Transaction That Entitles CRT to a Success Fee

23. Debtors' Objection conspicuously ignores Section 2 of the Agreement, which provides that CRT is entitled to receive a Success Fee in connection with any Transaction consummated during the Tail Period. (Ex. A § 2.) Here, the TSA executed on September 16, 2013 and the Plan Transactions confirmed on December 16, 2013 are both a "Transaction" defined by the Agreement; *i.e.* a First Lien Rollover and Second Lien Recapitalization. The TSA and Plan Transactions were both consummated within the Tail Period, which commenced on September 11, 2013 and will conclude on June 11, 2014.

24. The Debtors ignore Section 2 because it is fundamentally at odds with the Debtors' interpretation of the Agreement.

25. Instead, Debtors contend they can avoid paying CRT a Success Fee because they terminated the Agreement on September 11, 2013, five days before executing the TSA on September 16 in connection with the pre-arranged bankruptcy filed on September 17. The Agreement does not provide for this inequitable result.

26. The Debtors' Objection derives from Section 4 of the Agreement, which the Debtors interpret (Obj. ¶¶ 1-2) as imposing "two conditions" on CRT's ability to receive a Success Fee in connection with a Transaction consummated during the Tail Period: (i) the Transaction is consummated outside of bankruptcy or as part of a "prepackaged" plan; and (ii) the Transaction is with a "Qualified Buyer," a term defined in the Agreement as excluding existing holders of the Debtors' secured notes.

27. Section 4 does not and cannot govern CRT's entitlement to a Success Fee in the event of a First Lien Rollover or Second Lien Recapitalization (defined herein as "Restructuring

Transactions") during the Tail Period. This is because Restructuring Transactions must (by their nature) be consummated with existing noteholders, and could therefore never be consummated with a "Qualified Buyer", a term defined to exclude existing noteholders. The Debtors' interpretation of Section 4 is therefore illogical and wrong because it would preclude CRT from earning a Success Fee for a Restructuring Transaction consummated during the Tail Period under any and all circumstances. CRT would never have entered into an agreement that provided for a Success Fee if FFN consummated a Restructuring Transaction, but permitted FFN to unilaterally avoid paying such fees by terminating the Agreement after CRT's work was nearly complete. *See InterDigital Communs. Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 530 (S.D.N.Y. 2005) ("A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." (quoting *In re Lipper Holdings, LLC*, 1 A.D. 3d 170, 171, 766 N.Y.S.2d 561, 562 (1st Dep't 2003)).

28. The most natural way to confer meaning on both Section 2 and Section 4 of the Agreement, as required by elemental principles of contract interpretation, is to interpret Section 4 as addressing only Equity Financing transactions, which are the only type of transaction for which the term "Qualified Buyer" – *i.e.*, new money – makes sense. *In re Wash. Mut., Inc.*, 421 B.R. 143, 146-147 (Bankr. D. Del. 2009) ("[I]in interpreting a contract [under New York law], a court is to consider the contract as a whole and construe it in a manner that confers meaning upon all of its terms.") (internal quotations omitted); *Lawyers' Fund for Client Protection v. Bank Leumi Trust Co.*, 94 N.Y.2d 398, 404 (N.Y. 2000) (finding "interpretation would render the second paragraph superfluous, a view unsupportable under standard principles of contract interpretation").

29. Because Section 4's supposed "condition" of a "Qualified Buyer" is flatly incompatable with the Restructuring Transactions at issue here, Section 4's supposed other "condition" (Obj. at ¶1) – the consummation of a Transaction outside of bankruptcy or as part of a "pre-packaged plan" – is likewise inapplicable. But even assuming this "condition" applied here (and it does not), the Restructuring Transactions that gave rise to a Success Fee were part of a "pre-packaged plan" as that term was intended[6] in the Agreement, particularly where Debtors acknowledge (Obj. at ¶16) that the "restructuring transaction" here "would require the Debtors to file for chapter 11 and to implement the contemplated transaction through a prepackaged plan." (emphasis added).

2. Extrinsic Evidence Is Required To Address Any Ambiguity Regarding CRT's Entitlement to Success Fees

30. Interpreting Section 2 of the Agreement as providing for a Success Fee to CRT here, and Section 4 as relating to Equity Financing transactions *only*, is the most logical way to afford meaning to each provision in the Agreement.

31. To the extent, however, that the incongruity between Section 2 and Section 4 renders CRT's rights under the Agreement ambiguous, that ambiguity must be resolved by reference to extrinsic evidence of the parties' intent. *Garza v. Marine Transport Lines, Inc.*, 861 F.2d 23, 28 (2d Cir. 1988) ("Because of this ambiguity, extrinsic evidence bearing on the intentions of the parties must be examined."); *Creative Waste Mgmt. v. Capitol Envtl. Servs.*, 458 F. Supp. 2d 178, 186 (S.D.N.Y. 2006) ("If, however, the contract is ambiguous, the court must

[6] The extrinsic evidence will prove that the business practitioners who negotiated the Agreement agreed and understood that CRT was entitled to a Success Fee whether a Restructuring Transaction was consummated as part of a plan that was "pre-packaged", "pre-negotiated", or "pre-arranged" and that those business persons intended and understood the term "pre-packaged" to mean any bankruptcy filing that was not a "free fall" filing necessitated by failed negotiations with stakeholders.

look at extrinsic evidence, and determine whether a genuine issue of material fact exists as to the meaning of the contract.").

32. CRT will present extrinsic evidence providing that both parties intended CRT to receive a Success Fee here. Specifically, the extrinsic evidence will demonstrate the parties agreed on four categories of transactions that would give rise to a Success Fee, agreed that CRT would be entitled to a Success Fee if "any or all" of these four transactions was consummated during the term of the Agreement or the Tail Period, and that Section 4 was not intended to address the instant circumstance of a pre-arranged bankruptcy that implemented a Restructuring Transaction.

33. The Debtors implicitly recognize (but never address) the disagreement between Section 2 and Section 4, arguing that any ambiguity in the Agreement should be construed against CRT, as "drafter." (Objection ¶ 32.) But the principle of construction against the drafter – a doctrine of "last resort" that does not "preclude" parol evidence – has no application here, where FFN and CRT engaged in extensive, bilateral negotiations of the Agreement, including several drafts and detailed revisions by both sides. *See, e.g., Albany Sav. Bank, F.S.B. v. Halpin*, 117 F.3d 669, 674 (2d Cir. 1997). Ambiguous contracts are construed against the drafter only where, unlike the negotiation of the Agreement here, the other party "had no voice in the selection of its language" *Mercury Partners LLC v. Pac. Med. Bldgs., L.P.*, No. 02-6005, 2007 U.S. Dist. LEXIS 55855, at *24-25 (S.D.N.Y. July 30, 2007) (construction against drafter inapplicable where both parties participated in the drafting of the agreement); *Citibank, N.A. v. 666 Fifth Ave. Ltd. P'ship*, 2 A.D.3d 331 (N.Y. App. Div. 1st Dep't 2003) (same); *Record Club of America, Inc. v. United Artists Records, Inc.*, No. 72-5234, 1991 U.S. Dist. LEXIS 5748, 19-20 (S.D.N.Y. Apr. 29, 1991) (doctrine inapplicable where "Agreement was the result of successive

drafts" where the non-drafting party made "many changes" and "had equal and ample opportunity to clarify any ambiguity").

B. Equitable Considerations Entitle CRT to Compensation for Unjust Enrichment

34. As an alternative to CRT's contract claims arising out of the Agreement, CRT is entitled to equitable compensation for its substantial efforts on the Debtors' behalf in developing, facilitating and negotiating the TSA.[7]

35. CRT has stated in its Proofs of Claim and is prepared to present evidence to support each element of its unjust enrichment claim: (i) a benefit to defendant; (ii) at the Plaintiff's expense; (iii) such that equity and good conscience require restitution. *See Industrial Enters. of Am., Inc. v. Mazzuto (In re Pitt Penn Holding Co.)*, 484 B.R. 25, 51 (Bankr. D. Del. 2012) (applying New York law[8], and citing *Beth Israel Med. Ctr. v. Horizon Blue Cross and Blue Shield of New Jersey, Inc.*, 448 F.3d 573, 586 (2d Cir. 2006)).

36. CRT was Debtors' exclusive financial advisor during the ten-month period immediately preceding the Debtors' successful restructuring of debt with existing noteholders, and played in integral role in that successful restructuring. That work provided the Debtors with substantial and tangible benefits at CRT's considerable expense.

37. It would be inequitable not to compensate CRT for its effort and expenses in connection with Debtors' successful restructuring through a TSA that eliminated nearly $250 million in debt from Debtors' balance sheet. The TSA was the linchpin of the expedited

[7] New York law applies to CRT's claim for unjust enrichment because the parties selected New York law to govern their relationship under the Agreement; indeed, Debtors recognize that New York law applies when discussing the standards for evaluating an unjust enrichment claim. (Objection ¶ 36.) Without explanation or justification, however, the Debtors also rely on inapplicable Delaware law in their Objection. (*See* Objection ¶ 35.)

[8] By relying on New York law in the Objection (at ¶ 36), Debtors implicitly concede it applies here.

restructuring by the Court, and the Debtors' contention that CRT did not contribute to the formation of the TSA is counter-factual, as CRT will demonstrate in discovery. However, in the absence of a contractual remedy (which CRT respectfully submits exists), equitable restitution is appropriate to prevent the Debtors from reaping the benefits of CRT's considerable efforts without paying for them, and to avoid condoning the Debtors' attempt to avoid paying CRT by terminating the Agreement less than a week before CRT's efforts bore fruit in the TSA.

38. Debtors' assertion (Obj. at ¶35) that CRT cannot pursue a quasi-contractual remedy because the Debtors and CRT were party to a binding contract is wrong. Simply stated, under New York law, "where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of *quantum meruit* and will not be required to elect his or her remedies." *See Joseph Sternberg, Inc. v. Walber 36th Assoc.*, 187 A.D.2d 225, 227, 594 N.Y.S.2d 144 (App. Div. 1st Dept. 1993) (real estate broker could pursue unjust enrichment claim seeking commission, notwithstanding enforceable contract governing commissions, where the contract was ambiguous as to broker's right to a commission under the circumstances). Where, as here, the parties' rights and obligations under the contract are unclear due to ambiguous language, an unjust enrichment claim can be asserted by one party to a contract against the other despite the existence of a binding contract, and in the alternative. *See id.*; *Fantozzi v. Axsys Techs., Inc.*, No. 07-2667, 2008 U.S. Dist. LEXIS 94040, at *30 (S.D.N.Y. Nov. 6, 2008) (unjust enrichment claim may proceed in conjunction with contract claim in the event the contract "is found by a fact finder to be either ambiguous or unclear . . ."). Here, to the extent the Agreement is ambiguous with respect to CRT's entitlement to a Success Fee, CRT need not "elect its remedy" and may proceed with an unjust enrichment claim, in the alternative, against the Debtors.

C. CRT Is Entitled to Reimbursement of Expenses

39. Debtors argue (Obj. ¶40) that CRT's Proofs of Claim do not properly assert claims for expenses because they lack "sufficient specificity". Debtors are wrong, as courts have found that compliance with Federal Rule of Bankruptcy Procedure 3001(c) requires only that "the claimant attach the writings that give rise to the legal entitlement to the claim . . . rather than the documents that constitute additional, supporting evidence." *In re Sacko*, 394 B.R. 90, 100 (Bankr. E.D. Pa. 2008). CRT attached the Agreement to each Proof of Claim; specified that $24,131.38 is due and owing under the Agreement; and explained that these costs reflect communication-related expenses, supplies, and word-processing/support costs. *See* Proofs of Claim ¶ 23. Consistent with CRT's internal billing practices, which are in line with industry practices, CRT incurs these categories of expenses on a firm-wide basis and then allocates portions to specific projects based on estimated percentages determined by CRT's principals. These expenses are out-of-pocket costs for which CRT makes no profit and adds no mark-up or premium. CRT believes that it has provided sufficient information to support the allowance and payment of such expenses, and will provide additional information at the Court's request.

WHEREFORE, for the reasons set forth herein and based upon the evidence that CRT intends to present in connection with the hearing on this contested matter, CRT respectfully requests that the Court overrule the Objection and enter an Order allowing CRT's claim and granting to CRT such other and further relief deemed just and proper.

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