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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re: **ATI LIQUIDATING, INC.,** formerly known as Aviza Technology, Inc., Employer's Tax ID No.: 20-1979646 **AI LIQUIDATING, INC.,** formerly known as Aviza, Inc., Employer's Tax ID No.: 20-0249205 **TTI LIQUIDATING, INC.,** formerly known as Trikon Technologies, Inc., Employer's Tax ID No.: 95-4054321 Reorganized Debtors. 440 Kings Village Road Scotts Valley, CA 95066	Cases Substantively Consolidated Case No. 09-54511-SLJ-11 Case No. 09-54514-SLJ-11 Case No. 09-54515-SLJ-11 Date: May 13, 2015 Time: 2:00 p.m. Place: United States Bankruptcy Court 280 S. First Street, Room 3099 San Jose, CA 95113 Judge: Honorable Stephen L. Johnson

REORGANIZED DEBTORS' OPPOSITION TO MOTION BY SHAREHOLDERS PURSUANT TO 11 U.S.C. §§ 105(A) AND 1142 AND BANKRUPTCY RULE 3020(D), FOR AN ORDER IN AID OF IMPLEMENTATION OF CONFIRMED CHAPTER 11 PLAN REGARDING DISTRIBUTIONS TO BENEFICIAL OWNERS OF PUBLICLY TRADED STOCK

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TO: THE HONORABLE STEPHEN L. JOHNSON, UNITED STATES BANKRUPTCY JUDGE:

ATI Liquidating, Inc., formerly known as Aviza Technology, Inc. ("ATI"), AI Liquidating, Inc., formerly known as Aviza, Inc., and TTI Liquidating, Inc., formerly known as Trikon Technologies Inc. (collectively, the "Reorganized Debtors"), hereby submit their opposition (the "Opposition") to the MOTION BY SHAREHOLDERS PURSUANT TO 11 U.S.C. §§ 105(A) AND 1142 AND BANKRUPTCY RULE 3020(D), FOR AN ORDER IN AID OF IMPLEMENTATION OF CONFIRMED CHAPTER 11 PLAN REGARDING DISTRIBUTIONS TO BENEFICIAL OWNERS OF PUBLICLY TRADED STOCK (the "Motion") filed by Dvir Weinberg and Yehuda Weinberg (together, the "Weinbergs"). This Opposition is supported by the DECLARATION OF PATRICK C. O'CONNOR IN SUPPORT OF MOTION BY SHAREHOLDERS PURSUANT TO 11 U.S.C. §§ 105(A) AND 1142 AND BANKRUPTCY RULE 3020(D), FOR AN ORDER IN AID OF IMPLEMENTATION OF CONFIRMED CHAPTER 11 PLAN REGARDING DISTRIBUTIONS TO BENEFICIAL OWNERS OF PUBLICLY TRADED STOCK (the "O'Connor Declaration") filed concurrently herewith and incorporated herein by this reference, and the documents and pleadings on file in the bankruptcy cases. As set forth in greater detail below, the Motion is based entirely on the Weinbergs' incorrect interpretation of the DEBTORS' JOINT PLAN OF LIQUIDATION (DATED MARCH 2, 2010) (as modified[1], the "Plan") and requests relief to effectively alter the bargained-for rights of the parties who are bound by the Plan, to their detriment. Further, the Weinbergs are not parties in interest in the bankruptcy cases and have no standing to bring the Motion. Accordingly, the Court should deny the Motion.

I. RELEVANT BACKGROUND

1. On April 8, 2010, the Court entered its ORDER CONFIRMING DEBTORS' JOINT PLAN OF LIQUIDATION (DATED MARCH 2, 2010) (the "Confirmation Order"), confirming the Plan. Pursuant to the Confirmation Order, the Plan "Effective Date" was established as April 23, 2010, and the

[1] The Plan was modified pursuant to the Bankruptcy Court's ORDER APPROVING STIPULATION RE POST-CONFIRMATION MODIFICATION OF DEBTORS' JOINT PLAN OF LIQUIDATION (DATED MARCH 2, 2010) entered on April 27, 2010 and the ORDER GRANTING MOTION BY REORGANIZED DEBTOR FOR APPROVAL OF NONMATERIAL AMENDMENTS TO CONFIRMED PLAN (the "Plan Modification Order") entered on November 5, 2012. The Plan Modification Order, among other things, revised the definition of "Notice Parties" under the Plan to modify the manner of notice to be provided to stockholders.

"Record Date" was established as May 24, 2010.

2. The Plan includes, *inter alia*, the following provisions:

a) **"Allowed Interest"** means the Allowed Interest of an Equity Security Holder. [Section 1.9].

b) "**Equity Security Holder**" means the holder of common stock in ATI, as of the Record Date. [Section 1.42].

c) **Proofs of Interests.**

> Equity Security Holders shall not be required to file any Proof of Interest because the Plan affords treatment to Equity Security Holders of record as of the Record Date. The Reorganized Debtors and their professionals, the Disbursing Agent, and the Responsible Person shall be entitled to recognize and deal for all purposes with only those Equity Security Holders of record as of the Record Date. For purposes of any Distribution under the Plan, the Reorganized Debtors and their professionals, the Disbursing Agent, and the Responsible Person shall have no obligation to recognize any transfer of Interests after the Record Date.
>
> The Reorganized Debtors and their professionals, the Disbursing Agent, and the Responsible Person shall be entitled to recognize and deal for all purposes with only those Equity Security Holders of record as of the Record Date. [Section 7.2].

d) **Binding Effect of Plan.**

> The provisions of the confirmed Plan shall bind the Debtors, the Reorganized Debtors, any entity acquiring property under or otherwise accepting the benefits of the Plan, and every Creditor and Equity Security Holder, whether or not such Creditor or Equity Security Holder has filed a Proof of Claim or Interest in the Bankruptcy Case, whether or not the Claim or Interest of such Creditor or Equity Security Holder is impaired under the Plan, and whether or not such Creditor or Equity Security Holder has accepted or rejected the Plan. [Section 11.1].

3. In addition, in its Section 3.5, the Plan accords specific treatment to Holders of Allowed Interests as discussed in greater detail in the Motion and below.

4. The Reorganized Debtors have continued to perform their obligations under the Plan. The DISCLOSURE STATEMENT FOR DEBTORS' JOINT PLAN OF LIQUIDATION [D.E. 489] estimated a range of distribution to unsecured creditors of between 10% to 69%; however, the Reorganized Debtors have had extraordinary success and have paid all allowed claims in full, including interest.

Therefore, as a result of their liquidation efforts, the Reorganized Debtors far exceeded the anticipated estimated distribution in these cases.

5. In 2009 prior to the commencement of the bankruptcy cases, ATI cooperated with the NASDAQ Stock Market ("NASDAQ") in delisting its stock from the NASDAQ Global Market, the only market on which ATI was registered for trading. The company issued a press release providing notice that it did not plan to comply with NASDAQ listing requirements as it intended to delist its shares from the public market. Subsequently during 2009, the company filed the appropriate documents with the Securities and Exchange Commission (the "SEC") and NASDAQ to delist the Company." The company took no steps to facilitate any subsequent trading. In order to establish a demarcation with respect to stockholders for the administration of the Plan, the Reorganized Debtors included language in the Plan requiring the closing of the company's stock register as of the Record Date and prohibiting further transfers on the records of the company after that date.

6. After confirmation of the Plan, and due to the language in the Plan which ceased all transfers of ATI's stock, the Reorganized Debtors were not aware that stock continued to trade until on or around March 2012, when Dvir Weinberg contacted the Reorganized Debtors' responsible person, Patrick O'Connor, to inquire about, among other things, the Quarterly Reports filed in the cases, the company's financial information and the estimated timing and amount of distributions. During the course of their communications, Mr. O'Connor advised Mr. Weinberg to review the Plan and noted that the Plan provided for distributions only to stockholders as of the Record Date and that subsequent trading would place him "at risk."

7. After responding to Mr. Weinberg's inquiries on several occasions, Mr. O'Connor became concerned that Mr. Weinberg was attempting to obtain and exploit information received from Mr. O'Connor, in order to facilitate trading of ATI's stock, and in or around June 2012 Mr. O'Connor began to limit his communications and the information he provided to Mr. Weinberg.

8. The Weinbergs purchased shares of ATI stock from the period from October 3, 2011 to February 1, 2013. [See declaration of Dvir Weinberg in support of the Motion (the "Weinberg Declaration") at ¶4].

9. On or around September 6, 2012, the SEC contacted Mr. O'Connor and informed him

that they detected trading activity of ATI's stock on the "pink sheets" and that they were concerned that the stock could be "manipulated" in that market. In response to the SEC's request that the Reorganized Debtors assist it to cease trading, on or around September 12, 2012, Mr. O'Connor, on behalf of ATI, executed a consent agreement permitting the SEC to institute proceedings, make findings and revoke the registration of the securities.

10. The Reorganized Debtors' ongoing liquidation efforts enabled them to make a distribution to holders of Allowed Interests in accordance with the Plan on or around November 13, 2013 (the "First Distribution Date"). The Reorganized Debtors, as the disbursing agent under the Plan, sent distribution payments to the names and addresses identified on the stock registers received from the company's transfer agent, which did not include the Depository Trust Company ("DTC") or its affiliate Cede & Co. ("Cede") which is the nominee name of DTC. Instead, the Reorganized Debtors passed over DTC as the custodian and made the distribution directly to the broker-nominees for which DTC was the nominee, and, in some instances, to non-objecting beneficial owners ("NOBOs"), which were identified on their stock registers. Such broker-nominees included, among others, TD Ameritrade. Since being contacted by the Weinbergs and learning of their allegations that distributions should have been directed first to DTC and ultimately, to them, Mr. O'Connor has engaged in discussions with the majority of the broker-nominees in order to ensure distributions had been sent accurately to each Record Date stockholder. In this regard, Mr. O'Connor has reconciled shares and Record Date stockholders with several of the broker-nominees confirming that distributions have in fact been accurately made in each such instance with a single exception.[2] During discussions with the broker-nominees, several have informed the Reorganized Debtors that distribution payments can be made directly to them as opposed to DTC which ultimately would transmit the payments to the broker-nominees as well, with the same result.

II. THE MOTION

11. The Motion requests that the Court (a) find that any holders of ATI stock who sold shares in ATI (each, as defined in the Motion, a "Gap Seller") after the Record Date be deemed to

[2] With respect to that single instance, the Reorganized Debtors are awaiting further contact from the broker-nominee in the instance it requires additional assistance in identifying the remaining owner(s).

have transferred to any respective purchasers of such shares (each, as defined in the Motion, a "Gap Buyer") all rights associated with the shares, including rights to distributions on account of such shares pursuant to the Plan; (b) approve and establish a procedure (the "Gap Buyer Procedure") whereby Gap Buyers are permitted to establish their alleged beneficial ownership of ATI shares and whereby the Debtors are required to distribute cash to each qualified Gap Buyer equal to the number of the shares allegedly beneficially owned by each Gap Buyer as of the First Distribution Date, multiplied by $0.0549036430 per share of Stock, which is the Weinbergs' calculated rate of the distribution sent by the Debtors on the First Distribution Date, with distributions to Gap Buyers to be funded from uncashed amounts from the first distribution and "other funds on hand"; and (c) finding that any future distributions shall belong to the Gap Buyers. [Motion at ¶23]. In short, the Motion seeks payment and redirection of distributions to the Weinbergs.

12. Ultimately, the Motion is based on two arguments: (a) the Plan provides that the Weinbergs, as Gap Buyers of stock after the Record Date, purchased the right to receive distributions from such stock; and (b) the Debtors' failure to direct distributions to the Depository Trust Company ("DTC") as the "record holder" of non-certificated shares as of the Record Date, resulted in the Weinbergs not receiving a distribution to which they were entitled. The Motion purports to seek to enforce the "letter and spirit" of the Plan, yet, in actuality, the Motion constitutes a lengthy attempt to obfuscate both. In order to support its arguments, the Motion endures a contrived analysis of eight sentences within the Plan. [Motion at ¶29]. However, notwithstanding the Weinbergs' attempt to interject commentary and consider each sentence distinctly in a vacuum, the commentary, when considered both alone and in the entire context of the Plan and bankruptcy cases, leads only to an incorrect interpretation of the Plan.

III. APPLICABLE LAW

13. It is axiomatic that a chapter 11 plan constitutes an enforceable contract between a debtor and its creditors and interest holders.[3] *Aino v. Maruko, Inc. (In re Maruko, Inc.)*, 200 B.R. 876, 881 (Bankr. S.D.Cal.1996) (citations omitted) ("A chapter 11 plan is a contract between the debtor and its creditors in which general rules of contract interpretation apply."). The state in which

[3] The Weinbergs were neither creditors nor interest holders at the time of confirmation or as of the Record Date.

a plan is confirmed will govern the interpretation of its terms. *Dolven v. Bartleson (In re Bartleson),* 253 B.R. 75, 84 (B.A.P. 9th Cir. 2000).

14. In California law, a contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting. Cal. Civ. Code § 1636. The intention of the parties should be ascertained from the language of the contract; "the language is to govern the contract's interpretation, if the language is clear and explicit and does not involve an absurdity." *Bartleson, 253 B.R. at 84* (citing Cal. Civ. Code §§ 1636 and 1638). Every part of contract must be given effect, and "constructions of contractual provisions that would render other provisions surplusage" are disfavored. *Phoenix, LLC v. Alameda Liquidating Trust (In re Alameda Invs., LLC),* 2014 Bankr. LEXIS 851, *12 (B.A.P. 9th Cir. 2014) (internal citations and quotation omitted). Cal. Civ. Code § 1650 provides that specific provisions in an agreement prevail over general provisions that are inconsistent with it. *Id. at *14.*

IV. DISCUSSION

A. The Weinbergs' Construction Of The Plan Is Incorrect.

15. As established above, California law applies here with respect to the interpretation of the Plan. Under such law, the entirety of the Plan should be considered and constructions of provisions that render other provisions "surplusage" are disfavored. Further, the language of the Plan will govern its interpretation if it is clear and "does not involve an absurdity."

16. Through its labored analysis of Section 3.5, the Motion attempts to construct a class of Interest holders – i.e., post-confirmation, distribution date, non-certificated, beneficial owners which comprise Qualified Gap Buyers – by drawing artificial distinctions where they simply do not exist in the Plan. [Motion at ¶¶9, 21, 29]. Indeed, the Plan does not once mention any distinction between certificated or non-certificated shares, and only mentions beneficial ownership twice in a single two-sentence paragraph which pertains specifically to the mailing of distribution payments and the responsibility for assuring receipt of the distribution. [Plan p. 16:4-7]. The purpose for the Motion's attenuated analysis is evident - because the only reasonable interpretation of the Plan is that Interest holders in Class 11 as of the Record Date were to be entitled to distributions, if any, under the Plan, the Motion strives to carve out a new category of parties, which contrary to the plain

meaning of the terms of the Plan, were permitted to engage in continued trading of shares after the Record Date, so that the Weinbergs can stake a claim to distributions.

17. The Motion's reasoning and interpretation of the Plan is unsupported and ultimately without merit for numerous reasons. First, the Weinbergs contend that because the Plan did not cancel the shares of Class 11 Interest holders and also preserved their rights, it "facilitated the continued public trading" of ATI stock. [Motion, p. 2:22-24]. This is incorrect. The Plan includes numerous provisions which stop the trading, including, *inter alia*, closing ATI's stock transfer ledgers, prohibiting any further changes in the holders of record of the stock, prohibiting any transfer agent from processing any transfers, precluding the Reorganized Debtors from recognizing any transfers after the Record Date, and compelling them to recognize only with stockholders as of the Record Date. [Plan § 3.5]. The Plan also states that for purposes of distributions, the Reorganized Debtors and their responsible person need not recognize any transfer of Interests after the Record Date. [Plan § 7.2]. The Plan could not be more explicit both in letter and in sprit.

18. In addition, the Reorganized Debtors simply could not guarantee that stock would not continue to trade after the Record Date on an unregulated public market. [See generally "Risk Warning" guide from OTC Markets Group Inc., at http://www.otcmarkets.com/risk-warning ("Issuers of OTC securities quoted on the OTC Link system have no duty to provide any information to investors … Quotation of a security on the OTC Link system or the Yellow Sheets does not in itself create any ongoing filing or reporting obligations with the SEC for any issuer. *In many cases, issuers may not even be aware that their securities are quoted on the OTC Link system*."). In fact, as explained in the Motion in its discussion of the *In re President Casinos, Inc.* case[4], "despite that the stock was cancelled under that plan, the stock nevertheless continued to trade." [Motion, p. 12:25-26]. Cancellation of the shares under the Plan would not have guaranteed that trading would end.

19. Second, the Weinbergs contend that the Plan accord rights to distributions "on account of, and in exchange for" (i.e., as consideration for) Allowed Interests as of the Record Date and then contemplate that (a) the holders of such Interests would still continue to possess rights

[4] The Motion does not provide any official cite to a published decision from this case. However, the case cited *Williams v. Gusky (In re President Casinos, Inc.)*, 502 B.R. 841 (Bankr. E.D. Mo. 2013) is discussed below.

against and interests in ATI, especially in a chapter 11 liquidation scenario, whereby they could continue to sell their stock for profit, and (b) purchasers of such stock after the Record Date (notwithstanding the Plan's prohibition against any trading) would then succeed to distribution rights under the Plan indefinitely into the future.

20. The Plan does not contemplate or anticipate, nor does it provide for, a class of beneficial owners which would arise after the Record Date but could exercise rights to distributions under the Plan in the future, as the Weinbergs contend. On the contrary, it is unassailable that the Plan established a Record Date to avoid this and similar circumstances, to provide a demarcation for all matters related to holders of stock, in executing the Plan. Undoubtedly, the only reasonable interpretation is that only members of Class 11, which is comprised of all Allowed Interests of holders of ATI's common stock as of the Record Date, would receive the treatment and benefit accorded under the Plan and that no trading of ATI stock was permitted to continue, be processed or be recognized after the Record Date.

21. Third, the Motion's fixation on the construction of the term "record holders" which it construes to mean DTC as opposed to the actual owners as of the Record Date is flawed and irrelevant. [*See, e.g.*, Motion at ¶ 11 ("The (post-Record Date) public trading of the Gap Shares did not change the identity of the record holder of such shares as of the Plan Record Date, which continued to be DTC.")]. By clinging onto this distinction, the Weinbergs first contend that the Reorganized Debtors were required to send the distribution to DTC. [Motion p. 14:23-25]. However, the Plan provides that distributions shall be made to brokers or account representatives on behalf of beneficial owners in Sentence 7 referenced in the Motion, which the Motion deems as merely an "informational sentence." [Motion p. 15:5]. The Reorganized Debtors therefore complied with this provision of Section 3.5 by sending payments to the broker-nominees.

22. However, even if the Weinbergs are correct and the Reorganized Debtors should have made payments to DTC (which, the Weinbergs contend, without basis, is the sole "account representative" referenced in Sentence 7), there is not one scintilla of evidence that this would have changed any outcome. If it complied with the Plan, Cede would have delivered the distribution payments to the broker nominees which would have then made the same distributions they

ultimately made[5] to the Record Date stockholders. Significantly, the Reorganized Debtors have already reconciled with several broker-nominees confirming that distributions were accurately made to stockholders (both OBO and NOBO) as of the Record Date. Moreover, if, as the Weinbergs contend, DTC was the "record holder for non-certificated shares" as of the Record Date contemplated by the Plan, then as the "holder of record," DTC, and not the actual owners of the stock as of the Record Date, would be an Equity Security Holder (defined as "holder of common stock in ATI, as of the Record Date") and would be a member of Class 11. This would not make sense in the context of the Plan or in any chapter 11 reorganization.

23. Fourth, the Motion's artificial distinction between beneficial owners and record stockholders further illustrates the shortcomings of the Weinbergs' interpretation of the Plan. For example, in response to the Plan's treatment applicable to Class 11 which provides in part that "[e]ach holder of an Allowed Interest in Class 11 shall receive, on account of, and in exchange for, its Allowed Class 11 Interest, its Pro Rata share of all Available Cash remaining, if any, after payment in full of Allowed Claims in Classes 8 through 10…", the Motion offers an unrelated observation that "NOTHING HERE REQUIRES A BENEFICIAL OWNER TO HOLD ITS BENEFICIAL OWNERSHIP AS OF THE PLAN RECORD DATE OR ANY OTHER DATE." [Motion p. 14:4-5 (capitalization in original)]. Similarly, in response to the Plan provision which unequivocally prohibits changes to stockholders of record as of the Record Date, the Motion constructs a meaning, *inter alia*, that the provision "…FREEZES ONLY RECORD OWNERSHIP AS REFLECTED ON THE DEBTORS' LEDGERS; IT DOES NOT FREEZE BENEFICIAL OWNERSHIP OR RESTRICT THE TRANSFER OF BENEFICIAL OWNERSHIP." [Motion p. 14:8-11 (capitalization in original)]. Of course, when read in context with the multitude of other provisions closing and prohibiting any transfers after the Record Date, the Motion is clearly wrong.

24. The Motion engages in similar out of context deconstruction of the Plan's terms to carve out the applicability of the Plan to the invented class of (post-Record Date, non-certificated, beneficial owning) Gap Buyers. *See, e.g.*, Motion p. 14:15-18 (contending that sentence applies only

[5] TD Ameritrade was one of the broker nominees to which the Reorganized Debtors sent a distribution payment and is the account representative through which the Weinbergs purchased and hold their alleged shares. [Weinberg Declaration ¶5 and Exhibits 1 and 2].

to transfer agents which process certificated shares and not to DTC which processes transfers of non-certificated shares), and Motion p. 15:11-14 (contending that, notwithstanding the Motion's characterization of the Weinbergs as Distribution Date beneficial owners, sentence placing responsibility on beneficial owners to ensure payment from their nominees is inapplicable to non-certificated shares (and ultimately inapplicable to the Weinbergs) because DTC "handles the record keeping and logistics of routine distributions").

25. Finally, the Weinbergs' interpretation is at odds with Rule 3021 of the Federal Rules of Bankruptcy Procedure ("FRBP") which governs distributions under a chapter 11 plan and provides, similar to the Plan, that distributions shall be made to interest holders which "include the holders of stock and other equity securities, of record at the time of commencement of distribution unless a different time is fixed by the plan or the order confirming the plan." FRBP 3021. Such rule makes no distinction of beneficial owners from holders of stock at the record date fixed by a plan. Notably, the Advisory Committee Notes on the 1997 amendments to FRBP 3021 explain that because "… it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time," Rule 3021, as amended, "provides flexibility to fix the record date for distributions, including to fix a date that is earlier than the date on which distributions commence". This is what the Plan accomplished in addressing precisely the scenario envisioned by Congress.

26. The Motion simply cannot refute the fact that the Plan stopped trading as of the Record Date, and affords treatment only to Record Date stockholders who were the undeniable beneficiaries of, and parties to, the Plan. Indeed, the clear intent of the Plan has been set forth in other instances such as the NOTICE TO STOCKHOLDERS OF ENTRY OF ORDER APPROVING NONMATERIAL AMENDMENTS TO CONFIRMED PLAN [D.E. No 691] (the "Plan Modification Notice") filed on November 15, 2012, which was served on all stockholders on the Debtors' ledgers and posted on the Debtors' website. The Plan Modification Notice is conspicuously addressed to "Stockholders as of the Record Date of May 24, 2010", and states, *inter alia*:

> "You are receiving this notice because you are listed as a stockholder of Aviza Technology, Inc. ("ATI") as of the record date established by the Court's order confirming the DEBTORS' JOINT PLAN OF

> LIQUIDATION (DATED MARCH 2, 2010) (the "Plan") . . . *As set forth in the Plan, any distribution will be made only to those persons holding stock as of the Record Date established by the Plan and the Court's order confirming the Plan: May 24, 2010."*

Plan Modification Notice ¶1 (emphasis supplied in original).

27. Further, as the Motion concedes, the Reorganized Debtors posted a notice letter on their website (in accordance with the modified procedure under the Plan) and sent copies of such letters to nominee brokers, explicitly addressed to Record Date stockholders and indicating that the distribution would be made to stockholders on the Record Date, referencing Section 3.5 of the Plan. [Motion at ¶18]. Nonetheless, the Motion focuses on and speculates about the "current beneficial owner" language in the transmittal letter to brokers. This speculation on what effect the language may have had on brokers has no bearing on the indisputable terms of the Plan. In addition, if such language did somehow cause the brokers to direct distributions to post-Record Date purchasers, such distributions would have been in contravention of the Plan's terms (although the Weinbergs could have received a distribution in that instance). It is unclear whether the brokers would even have the ability to track down post-Record Date holders, given that the Plan prohibits recognition of continued transfers, but at any rate, the Reorganized Debtors have already reconciled and confirmed with several brokers that distributions were properly sent to Record Date holders.

28. The Motion references two cases evidently as examples where distributions were made to DTC on behalf of beneficial owners and then redirected to shareholders as of the distribution date[6]. The only applicable published decision, *Williams v. Gusky (In re President Casinos, Inc.)*, 502 B.R. 841 (Bankr. E.D. Mo. 2013)[7], is telling. There, the Missouri bankruptcy court considered the arguments of a shareholder who held its shares in street name and sold a portion of its shares after the record date established in the plan but only received distributions from its nominee based on the amount it retained as of the distribution date. The shareholder contended that it was entitled to distributions based on all of its shares because it was the intended beneficiary as of the record date and filed an adversary complaint seeking declaratory judgment that the liquidating

[6] The Reorganized Debtors did not locate information with respect to *In re: National R.V. Holdings, Inc.*, No. 6:07-17937-DS, relevant to the references in the Motion.

[7] The Motion does not cite to this or any published decision in discussing the case.

trustee was required under the plan to ensure that the first liquidation distribution was ultimately paid to the beneficial owners of stock held in street name and that the trustee breached his fiduciary duties in this regard and was negligent. The liquidating trustee filed a motion to dismiss the shareholder's complaint which the Court granted. *President Casinos* is clearly distinguishable because there, the complaining shareholder sold its shares after the record date yet alleged that the trustee failed to meet a duty to ensure that beneficial owners as of the record date received ultimate distributions although the trustee did make distributions to brokers and nominees, including Cede[8].

29. However, in ruling in favor of the liquidating trustee, the bankruptcy court made several telling observations: (1) DTC does not know the identity of the beneficial owners, only their brokers, and will make distributions to such brokers, *id*. at 845; (2) the mechanism of using brokers, depositories and other financial intermediaries "creates certain challenges to the bankruptcy administration because the intermediaries … are not subject to the Plan and are not bound by the Plan…" *id*. at 849-850; (3) the liquidating trustee had no obligation to dictate to DTC or its participant brokers that "they are likewise compelled to disregard subsequent transfers of the cancelled PCI stock and that disbursement of the funds received from the First Liquidation Distribution must be performed in such a manner where the beneficiaries of stock held in street name must receive the same ultimate treatment as those who held their PCI stock directly", *id*. at 850; and 4) the liquidating trustee could not "control … the stock market" or exercise "control over Cede, DTC or DTC's participants…", *id.* In other words, the liquidating trustee, like the Reorganized Debtors, could not, and had no obligation to, control trading and transfers after the record date.

30. What is most notable about the *President Casinos* decision, however, is what the court did not consider. While the court highlighted the fact that the shareholder, with knowledge that it would be entitled to distributions on all shares as of the record date, nonetheless sold its shares hoping for a windfall, the court did not consider any argument that the shareholder could not prevail

[8] Unlike in these cases, the Plan in *President Casinos* explicitly identified DTC in its provision governing delivery of distributions. See "Jointly Proposed Chapter 11 Plan of Liquidation of President Casinos, Inc. and PRC Management, Inc." [D.E. 1954-1 in Case. No. Case No. 02-53005, E.D. Mo. Bankruptcy Court], Sec. 6.5 ("Distributions … shall be made … at the address set forth in the list of registered shareholders held by the Stock Transfer Agent, DTC's book-entry transfer facility system or other address made available to the Disbursing Agent by or on behalf of a particular holder of such Equity Interest.").

because the shares (and the rights to distributions thereunder) properly belonged to the post-record date purchaser of its shares. In fact, the court pointed out that the broker "allocated only the amount to which the [shareholder] was entitled on the date of disbursement rather than what the [shareholder] would have been entitled to on the Distribution Record Date" and then opined that there could be "other pending litigation" which was beyond the purview of the issues before the court intimating that the shareholder could find recourse elsewhere, i.e., that distributions on the shares sold by the shareholder post-Record Date did in fact belong to the shareholder. *Id.* at 850-51. The interpretation and argument advanced by the Weinbergs was not even considered in *President Casinos* notwithstanding the ruling against the shareholder. The court's decision in that case, therefore, compels the conclusion that the Weinbergs' interpretation is plainly wrong.

B. The Weinbergs Have No Standing In These Cases.

31. Even assuming, *arguendo*, that the Weinbergs' interpretation is accurate to some extent, the unequivocal language in Sentences 3, 4 and 5 of Section 3.5 of the Plan (as designated in the Motion) precludes the Weinbergs from being heard in the cases. That language is explicit that immediately after the Record Date, there shall be no changes in the holders of record, that all transfer agents may not process any transfers and that the Reorganized Debtors may not recognize any transfers. It is indisputable that the Weinbergs' shares, if any, were obtained after the Record Date. Thus, they cannot be holders of record and cannot be recognized.

32. 11 U.S.C. § 1109(b) determines who may be heard in a chapter 11 bankruptcy proceeding and provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." The term "party in interest" is not limited to the examples set forth in section 1109(b), however, and an inquiry into the issue must be made on a case-by-case basis into "whether the prospective party in interest has a sufficient stake in the proceeding so as to require representation" and if so, then it may be considered a party in interest. *In re Amatex Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985). Generally, "…anyone holding a direct financial stake in the outcome of the case should have an opportunity . . . to participate in the adjudication of any issue that may ultimately shape the

disposition of his or her interest." *Savage & Assocs. P.C. v. K&L Gates LLP (In re Teligent, Inc.)*, 640 F.3d 53, 60-61 (2d Cir. 2011) (citations omitted). "[I]f a party is not affected by the reorganization process it should not be considered a party in interest." *Id*. (quoting In re Ionosphere *Clubs, Inc.*, 101 B.R. 844, 849 (Bankr. S.D.N.Y. 1989)).

33. Because they purchased their shares after the Record Date, the Weinbergs have no rights or obligations against the Reorganized Debtors or their property and have no "direct financial stake" in these cases. Indeed, the Weinbergs were not participants in the negotiation, approval and confirmation of the Plan, nor were they affected, or even a participant in the Company's reorganization process. *See In re Ionosphere Clubs, Inc., supra*, 101 B.R. at 849. Thus, the Weinbergs do not have standing to be heard, and the Court should not approve, or even consider, the Motion.

C. The Equities Militate Against Granting the Motion.

34. The Weinbergs have brought the Motion pursuant to, among other provisions, 11 U.S.C. § 105(a) requesting that the Court exercise its equitable powers to implement the proposed Gap Buyer Procedure. However, the equities militate against the Weinbergs here for several reasons. For one, the Weinbergs reviewed the Plan and had notice of its provisions before purchasing any of their alleged shares. [Weinberg Declaration p.2:22-23]. It is beyond belief that based on their reading, they arrived at the interpretation set forth in the Motion without any concerns and would continue to purchase shares thereafter on an unregulated market. This is especially true considering the fact that the Plan Modification Notice was posted on the Reorganized Debtors' website which Dvir Weinberg visited, [Weinberg Declaration p.3:21-22], was addressed to "Stockholders as of the Record Date of May 24, 2010", and states *"As set forth in the Plan, any distribution will be made only to those persons holding stock as of the Record Date established by the Plan and the Court's order confirming the Plan: May 24, 2010."* Mr. Weinberg even contacted Mr. O'Connor on numerous occasions, and Mr. O'Connor cautioned him several times of the Plan's terms to make distributions only to those holders of stock as of the Record Date. Yet, the Weinbergs continued to purchase additional shares after all of these events.

35. Moreover, during his discussions with Mr. O'Connor, Mr. Weinberg inquired

multiple times about the financial condition of the Reorganized Debtors, including requesting information which Mr. O'Connor eventually became concerned that Mr. Weinberg could exploit to facilitate his trading of ATI stock.

36. It also should be noted that the Disclosure Statement estimated that the Plan would provide for distributions to unsecured creditors in the range of between 10% and 69% of their claims. Thus, by obtaining information from the Reorganized Debtors, it is likely that the Weinbergs while having obtained updated and better information, purchased shares from holders of Allowed Interests as of the Record Date who were bound by the terms of the Plan and were informed by the Disclosure Statement.

37. While the Disclosure Statement indicated that the stock continued to trade on the "pink sheets," the Reorganized Debtors were not monitoring or aware of any trading activity until initially contacted by Mr. Weinberg at which time they advised him of the Plan's terms requiring payments to record stockholders. After the SEC indicated to the Reorganized Debtors that it had detected trading activity, they immediately cooperated with the SEC to assist it in stopping trading of the stock. This circumstance is not unusual, as the "pink sheets" constitute an unregulated market whereupon investors trade at their own substantial risk and where fraud is rampant. A simple search of publicly available electronic information returns a wealth of information regarding the risks, fraudulent activity and uncertainty associated with the "pink sheets" market. *See, e.g.*, Risk Warning" guide from OTC Markets Group Inc., *supra*; SEC statement at http://www.sec.gov/answers/pink.htm[9], and article "Use Caution Trading Pink Sheet Stocks" on Yahoo! Finance at: http://finance.yahoo.com/news/caution-trading-pink-sheet-stocks-190500686.html[10]. As such, the Weinbergs should have been aware of the risks associated with

[9] "Lacking the capital or qualifications to list on a regulated exchange, many promising small companies issue shares on the OTC market. However, they're sharing space with other companies that are known for fraudulent business practices, including falsified financial reports and stock-price manipulation. Many pink sheet companies simply serve as personal automated teller machines for scam artists, who hire marketers to tout their shares and businesses so they can raise money. The classic OTC 'pump and dump' involves inflating a stock through wildly optimistic predictions on various Internet sites, then selling at the peak, leaving ordinary investors holding near-worthless shares."

[10] "Pink Sheets stocks lack liquidity and are often thinly traded, which can make them volatile. The bid-ask spread is wide, and investors need to be patient and cautious when putting in any buy or sell order. In addition, despite some of the quality companies, many are worthless. Because Pink Sheets is not an exchange, but a quotation service, it is unregulated and can therefore result in scams or other potentially harmful investments. Minimal to no transparency or fundamental information is available for many of the stocks, while some are subject to various schemes."

purchasing ATI stock, especially in light of the language in the Plan and the warnings from Mr. O'Connor, and should have taken steps to protect their interests or to identify their sellers, if they nonetheless decided to continue to trade.

38. Furthermore, the relief requested in the Motion overreaches. It seeks a procedure which demands payment from unclaimed distributions[11] and "other cash on hand"[12]. This would not only revoke the Interests and the rights to payment of the holders of Allowed Interests who participated in the Plan confirmation process and were bound by the terms of the Plan[13], it would reduce the amounts available for distributions to the holders of Allowed Interests who are not Gap Sellers. In addition, if DTC is the actual "record holder" and the Plan somehow directed it to maintain records of beneficial owners so that it could have made appropriate distributions on shares purchased after the Record Date, as the Motion alleges, then it follows that the Weinbergs could seek recourse by discovering DTC's records. Instead, the Weinbergs have chosen to seek payment from the post-confirmation estates, while prejudicing parties who are rightfully entitled to distributions under the Plan.

39. At the end of the day, the Reorganized Debtors ultimately do not have a strong opinion about to whom they make distributions, if any, going forward, so long as such distributions are directed by the Court after consideration of all the issues and equities of this matter. Thus, while the Reorganized Debtors believe that the Weinbergs' interpretation of the Plan is manifestly incorrect, that they have no standing to be heard in the cases and that there are equitable concerns regarding the Weinbergs' proposed modification, if ultimately the Court decides in favor of the Motion and enters an order establishing the Gap Buyer Procedure proposed therein, the Reorganized Debtors are prepared to comply with any such order and procedure.

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[11] The amount of unclaimed distributions set forth in the declaration of Weinbergs' counsel, Mr. Bregman, was disclosed by the Reorganized Company to Mr. Bregman during confidential settlement discussions which were expressly covered under Federal Rule of Evidence 408. The Reorganized Debtors reserve their rights with respect to this matter if the post-confirmation estates incur any damages arising from Mr. Bregman's disclosure.

[12] The procedure proposes a calculation based on the rate used for distributions to outstanding shares as of the Record Date. However, the number of distributions, if the Motion is approved, would be increased substantially and therefore the rate of distribution should be decreased proportionately.

[13] The altering of the rights of members of Class 11 under the Plan likely would constitute an impermissible modification of the Plan which relief is only available to the Reorganized Debtors under 11 U.S.C. § 1127(b) and not the Weinbergs.

Dated: April 29, 2015

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