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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re	:	Chapter 11
	:	
SAS AB, et al.,	:	Case No. 22-10925 (MEW)
	:	
Debtors.¹	:	(Jointly Administered)
-----	X	

**DEBTORS' REPLY TO OBJECTION OF
UNITED STATES TRUSTEE TO DEBTORS' DISCLOSURE STATEMENT**

SAS AB and its debtor subsidiaries, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**”), submit this reply (“**Reply**”) in support of the *Motion of Debtors for Entry of an Order (I) Approving (A) Disclosure Statement, (B) Solicitation, Voting, and Related Procedures, and (C) Proposed Cure Procedures, (II) Scheduling Confirmation Hearing, (III) Establishing Notice and Objection Procedures for Confirmation of Debtors' Chapter 11 Plan, and (IV) Granting Related Relief* [ECF No. 1733]

¹ The Debtors in these chapter 11 cases are SAS AB, SAS Danmark A/S, SAS Norge AS, SAS Sverige AB, Scandinavian Airlines System Denmark-Norway-Sweden, Scandinavian Airlines of North America Inc. (2393), Gorm Asset Management Ltd., Gorm Dark Blue Ltd., Gorm Deep Blue Ltd., Gorm Sky Blue Ltd., Gorm Warm Red Ltd., Gorm Light Blue Ltd., Gorm Ocean Blue Ltd., and Gorm Engine Management Ltd. The Debtors' mailing address is AVD kod: STOUU-T, SE-195 87 Stockholm, Sweden.

(the “**Motion**”)² and in response to the *Objection of the United States Trustee to Revised Disclosure Statement to the Joint Plan of Reorganization of SAS AB and Related Debtors Under Chapter 11 of the Bankruptcy Code* [ECF No. 1872] (the “**Objection**”), and respectfully represent as follows:

Preliminary Statement

1. Since filing the Motion, the Debtors have worked tirelessly to build consensus among the Debtors, the Investors,³ and the Official Committee of Unsecured Creditors (the “**Creditors’ Committee**”) regarding the terms of the *Second Amended Joint Chapter 11 Plan of Reorganization of SAS AB and Its Subsidiary Debtors* [ECF No. 1904] (as may be amended, modified, or supplemented from time to time, the “**Plan**”). The Debtors are pleased to announce they have now reached an agreement. Based on this resolution, the Creditors’ Committee supports the Plan and believes it is in the best interests of the Debtors’ estates and holders of general unsecured claims. Accordingly, the Debtors come before the Court seeking approval of the *Disclosure Statement for Second Amended Joint Chapter 11 Plan of Reorganization of SAS AB and Its Subsidiary Debtors* [ECF No. 1905] (as may be amended, modified, or supplemented from time to time, the “**Disclosure Statement**”) and the accompanying Solicitation and Voting Procedures, in order to proceed to the confirmation process with what the Debtors expect will be a largely consensual Plan.

2. The only party objecting to approval of the Disclosure Statement is the Office of the United States Trustee for Region 2 (the “**U.S. Trustee**”). The U.S. Trustee objects

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion or the Plan (as defined herein).

³ For purposes of this Reply, “**Investors**” means Castlake, L.P., on behalf of certain of its funds or affiliates, Air France-KLM, S.A., Lind Invest ApS, and the Kingdom of Denmark.

to (i) the adequacy of certain disclosures in the Disclosure Statement and (ii) the scope of certain Plan provisions. The Debtors have worked diligently to try to address the Objection as it relates to the adequacy of the Disclosure Statement and have made amendments to the Disclosure Statement, which the Debtors believe should satisfactorily resolve certain arguments raised in the Objection. The remaining arguments in the Objection are not properly before the Court at the disclosure statement phase and should instead be addressed in connection with confirmation of the Plan. As a result, the Debtors respectfully submit the Objection should be overruled, and the Disclosure Statement and Solicitation and Voting Procedures should be approved.

Reply

I. Disclosure Statement Contains Adequate Information as Required by Section 1125 of Bankruptcy Code

3. As set forth in the Motion, the proponent of a chapter 11 plan must provide holders of impaired claims and interests entitled to vote on a plan with “adequate information” regarding the plan pursuant to section 1125 of the Bankruptcy Code. *See, e.g., In re Uno Rest. Holdings Corp.*, Case No. 10-10209 (MG), 2010 WL 3373959, at *1–3 (Bankr. S.D.N.Y. May 11, 2010); *Cadle Co. II, Inc. v. PC Liquidation Corp. (In re PC Liquidation Corp.)*, 383 B.R. 856, 865–66 (E.D.N.Y. 2008); *Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994). It is well-established that what constitutes adequate information is determined on a case-by-case basis. *See In re Ashley River Consulting, LLC*, No. 14-13406 (MG), 2015 WL 6848113, at *7 (Bankr. S.D.N.Y. Nov. 6, 2015) (“Congress purposely left vague the standard for judging what constitutes adequate information to allow the Court to make a case-by-case determination”); *Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 179 B.R. 24, 29 (S.D.N.Y. 1995) (“What constitutes adequate information is to be determined on a case-specific basis under a flexible standard that can promote the policy of Chapter 11 towards fair

settlement through a negotiation process between interested parties.” (quoting *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988)); *see also* H.R. REP. No. 95-595, at 409 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6365 (“Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case There will be a balancing of interests in each case.”).

4. The Objection asserts three issues pertaining to the adequacy of the disclosures made by the Debtors.⁴ The Debtors believe two of these issues have been resolved through the inclusion of language requested by the U.S. Trustee (and agreed to by the Debtors prior to the U.S. Trustee filing the Objection), as reflected in revised versions of the Disclosure Statement and the Plan as well as the Revised Proposed Order.

(a) First, the Debtors have included revised language in the Plan and Disclosure Statement to confirm that, despite the proposed substantive consolidation of certain Debtors for voting and solicitation purposes, each Debtor will continue to comply with 28 U.S.C. § 1930(a)(6) and pay all fees and charges assessed against it thereunder. *See* Plan, Art. XII § 12.1; Disclosure Statement, Art. V § J(1).

⁴ The Objection also asserts a general reservation of rights with respect to the Ballots on the basis that they were not yet finalized. *See Objection* at 6 ¶ 8. The Debtors have now filed revised Ballots, which are attached as Exhibits A-2 – A-6 to the *Notice of Filing Revised Exhibits for Motion of Debtors for Entry of An Order (I) Approving (A) Disclosure Statement, (B) Solicitation, Voting, and Related Procedures, and (C) Proposed Cure Procedures, (II) Scheduling Confirmation Hearing, (III) Establishing Notice and Objection Procedures For Confirmation of Debtors’ Chapter 11 Plan, and (IV) Granting Related Relief* [ECF No. 1909] filed with the revised proposed order approving the Disclosure Statement and Solicitation and Voting Procedures [ECF No. [1908] (the “**Revised Proposed Order**”) on February 4, 2024. The Objection does not appear to raise any concerns with respect to the Ballots, other than to note that the Ballots must include an “opt-in” to the third-party releases provided in the Plan. The Debtors submit that the opt-in mechanism has been included in all versions of the Ballots, including the Ballots filed with the Motion on December 19, 2023 [ECF No. 1733, Exhibits A-2 to A-6], and is appropriately and clearly identified in the Ballots.

(b) Second, the Debtors have included language in the Revised Proposed Order clarifying that all GUC Documents⁵ will be filed with the Plan Supplement ten days prior to the Voting Deadline (as defined in the Revised Proposed Order).⁶ *See* Objection at 12; *see also* Revised Proposed Order ¶ 36.

5. The only asserted disclosure objection that remains unresolved is with respect to the circumstances in which Claims may be adjusted, expunged, or disallowed pursuant to the Plan. The Objection initially asserts that the Disclosure Statement “fails to provide sufficient information regarding the justification for the Plan provisions permitting the Debtors to adjust or expunge a claim after the effective date.” *See* Objection at 2. However, the body of the Objection seems to suggest that the U.S. Trustee’s concern is that the “Plan provides for the adjustment of the Claims Register after the Effective Date without requiring that the impacted claim holder receive notice and an opportunity to be heard regarding the change of status of its claim and that such change be approved by this Court.” *Id.* at 12.

6. This objection is entirely misplaced. The Plan only permits the Debtors to adjust or expunge Claims with the consent of the impacted party—*i.e.*, any amendment to the Claims Register must be upon stipulation. *See* Plan, Art. VII § 7.4 (“Any duplicate Claim or any Claim that has been paid, satisfied, or settled, or any Claim that has been amended or superseded, may be adjusted or expunged on the Claims Register by the Debtors or the Reorganized Debtors, as applicable, ***upon stipulation between the parties in interest*** without a Claims objection having to be filed and without any further notice or action, order, or approval of the Bankruptcy Court.”

⁵ “**GUC Documents**” means the GUC Agreement, the GUC Implementation Steps, the GUC Interest Agreement (if any), the GUC Holding Period Trust Agreement (if any), and any other agreement or document necessary to give effect to the distribution and terms of GUC Interests in accordance with the Plan, which agreement(s) will be included in the Plan Supplement (or for which term sheets shall be included in the Plan Supplement) and be in a form reasonably acceptable to the Debtors, Required Investors, and Creditors’ Committee.

⁶ All other Plan Supplement documents will be filed seven days prior to the Voting Deadline.

(emphasis added)). This provision is replicated for creditors' awareness in the Disclosure Statement. *See* Disclosure Statement, Art. V § E(4). As such, any settlement, compromise, withdrawal, or resolution of a Claim would require the consent of the impacted party, and thus there will be no circumstance in which a creditor has its Claim adjusted under the Plan without receiving notice or entering into an agreement with the Debtors (except as otherwise ordered by the Court). *See* Plan, Art. VII § 7.5.

7. In light of the foregoing, the Disclosure Statement contains adequate information regarding the consensual adjustment or expungement of Claims, and the U.S. Trustee has not articulated why the disclosures included in the Disclosure Statement are inadequate. Accordingly, this objection must be overruled.

II. Confirmation Objections Should be Considered at Confirmation Hearing

8. The remaining arguments in the Objection do not relate to the adequacy of the information provided in the Disclosure Statement. Rather, they relate to objections to confirmation of the Plan that should be deferred to the Confirmation Hearing and should not preclude the Court's approval of the Disclosure Statement. *See, e.g., In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("The question whether a plan meets requirements for confirmation is usually answered at confirmation hearings."); *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) ("[T]he Court will not look behind the disclosure statement to decide [confirmation] issues at the hearing on the adequacy of the disclosure statement.").

9. The hearing to approve a disclosure statement is solely intended to determine whether the information provided is "adequate" under section 1125 of the Bankruptcy Code. Disputes on confirmation-related issues are no bar to disclosure statement approval. Indeed, requiring adjudication on confirmation issues at this time would effectively convert any disclosure

statement hearing into a confirmation hearing without the benefit of the evidentiary record necessary to determine confirmation issues. *See, e.g., In re Copy Crafters Quickprint, Inc.*, 92 B.R. at 980 (“[C]are must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing, due process considerations are protected and objections are restricted to those defects that could not be cured by voting.”).

10. Notwithstanding this, the U.S. Trustee objects to approval of the Disclosure Statement on grounds that the release, injunction, and exculpation provisions included in the Plan are overly broad and non-consensual. *See* Objection at 8. The U.S. Trustee further argues that the exculpation provisions of the Plan improperly seek to exculpate non-fiduciary parties for post-effective date conduct in violation of section 1125(e) of the Bankruptcy Code.⁷

11. Courts have consistently held that challenges to plan release, injunction, and exculpation provisions are not proper disclosure objections but rather should be addressed at confirmation. *See, e.g., In re N.Y.C. Off-Track Betting Corp.*, Case No. 09-17121 (MG) (Bankr. S.D.N.Y. Dec. 1, 2010), ECF No. 234 (approving disclosure statement over objection on basis of subject matter jurisdiction to grant third party releases and propriety of third party release and exculpation provisions); *In re Quigley Co.*, 377 B.R. 110, 119 (Bankr. S.D.N.Y. 2007) (approving disclosure statement and holding that plan-related issues, including the scope of third party releases, are confirmation issues); Hr’g Tr. at 19:8-9, *In re Arcapita Bank B.S.C. (C)*, Case No. 12-11076 (SHL) (Bankr. S.D.N.Y. Apr. 26, 2013), ECF No. 1057 (noting at the disclosure statement

⁷ Prior to the filing of the Objection, in response to the U.S. Trustee’s expressed concerns, the Debtors confirmed to the U.S. Trustee that they would revise the exculpation provision in the Plan to limit the exculpation to actions undertaken through the Effective Date. *See* Plan § 10.8 (“To the fullest extent permitted by applicable Law, from and after the Effective Date, no Exculpated Party shall have or incur, and each such Entity shall be released and exculpated from, any Cause of Action based on, in whole or in part: the negotiation, execution, and implementation of any transactions approved by the Bankruptcy Court in the Chapter 11 Cases on or after the Commencement Date **through the Effective Date**” (emphasis added)).

hearing that “[t]here was a lot about third party releases, obviously. And that’s a plan issue.”); Hr’g Tr. at 126:14-16, *In re Chemtura Corp.*, Case No. 09-11233 (Bankr. S.D.N.Y. July 21, 2010), ECF No. 3358 (noting at the disclosure statement hearing that “[t]he propriety of a third-party release . . . is a confirmation issue”); Hr’g Tr. at 17:12-16, *In re Celsius Network LLC*, Case No. 22-10964 (MG) (Bankr. S.D.N.Y. Aug. 14, 2023), ECF No. 3335 (deferring arguments on plan objections raised by the U.S. Trustee, including with respect to releases and exculpation provisions, to confirmation hearing).

12. The very limited exception permitting the Court to hear plan confirmation issues at the disclosure statement stage is if the objecting party proves, as a matter of law, that the plan “is so fatally flawed that confirmation is impossible.” *See In re Cardinal Congregate I*, 121 B.R. at 764; *accord In re U.S. Brass Corp.*, 194 B.R. 420, 428 (Bankr. E.D. Tex. 1996). A plan is patently unconfirmable “[only] where (1) confirmation defects [cannot] be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.” *In re Am. Cap. Equip., LLC*, 688 F.3d 145, 154–55 (3d Cir. 2012) (internal citation and quotation marks omitted).

13. The U.S. Trustee has not alleged the Plan is patently unconfirmable, nor is this the case. The confirmation related arguments raised in the Objection do not rise, or even come close, to the level of demonstrating that the Plan is patently unconfirmable. Rather, confirmation of the Plan is far from impossible. The arguments related to the release, injunction, and exculpation provisions in the Plan are, therefore, of the kind properly heard at the hearing on confirmation.

Conclusion

14. The Disclosure Statement provides adequate information for creditors entitled to vote to make an informed decision about whether to accept or reject the Plan, as required

by section 1125 of the Bankruptcy Code. Further, the Objection does not raise any issues that warrant a finding that the Plan is fatally flawed and not confirmable as a matter of law. Accordingly, the Debtors respectfully request the Court overrule the Objection and enter the Revised Proposed Order.

Dated: February 5, 2024
New York, New York

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