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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
CUMULUS MEDIA INC., *et al.*,	:	Case No. 17-13381 (SCC)
Debtors.[1]	:	(Jointly Administered)

POST-HEARING BRIEF OF AD HOC CROSS-HOLDER COMMITTEE IN OPPOSITION TO CONFIRMATION OF THE DEBTORS' FIRST AMENDED JOINT PLAN OF REORGANIZATION OF CUMULUS MEDIA INC. AND ITS DEBTOR AFFILIATES

[1] The last four digits of Cumulus Media Inc.'s tax identification number are 9663. Because of the large number of Debtors in these jointly administered cases, a complete list of Debtors and the last four digits of their respective federal tax identification numbers is not provided herein. Such list may be obtained on the website of the Debtors' claims and noticing agent at http://dm.epiq11.com/cumulus. The location of the Debtors' service address is: 3280 Peachtree Road, NW, Suite 2200, Atlanta, Georgia 30305.

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TO: THE HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

The ad hoc committee of certain beneficial holders of Term Loan[2] debt and Senior Notes (the "Ad Hoc Cross-Holder Committee")[3], by and through their undersigned counsel, respectfully submit this post-hearing brief in support of its objection [ECF No. 649] to the confirmation of the *First Amended Joint Plan of Reorganization of Cumulus Media Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [ECF No. 446] (the "Plan").[4]

PRELIMINARY STATEMENT[5]

1. Even where parties-in-interest are allegedly "out of the money" (which, despite the Debtors' contention, is not the case here), a "gift" to unsecured creditors under a plan must comport with the absolute priority rule. *In re DBSD North America, Inc.*, 634 F.3d 79, 98 (2d Cir. 2011). To do otherwise "does not square with the text of the Bankruptcy Code." *Id.* at 98.

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2 Capitalized terms used but not defined herein shall have the meanings ascribed to them in the *First Amended Joint Plan of Reorganization of Cumulus Media Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [ECF No. 446] and Disclosure Statement.

3 The Ad Hoc Cross-Holder Committee consists of Brigade Capital Management, LP and Capital Research Management Company and their respective affiliates. *See Third Supplemental Verified Statement of Ad Hoc Cross-Holder Committee Pursuant to Bankruptcy Rule 2019* [ECF No. 595].

4 To avoid duplication in its post-hearing brief, the Ad Hoc Cross-Holder Committee joins the Official Committee of Unsecured Creditors in their post-hearing brief establishing the Debtors' undervaluation of its estates. *Post-Trial Brief of the Official Committee of Unsecured Creditors of Cumulus Media Inc.*, et al. (filed on April 27, 2018). Accordingly, this brief only addresses the other objection of the Ad Hoc Cross-Holder Committee. Notably, the Official Committee of the Unsecured Creditors has also raised an absolute priority rule objection. *See Objection of the Official Committee to Confirmation of the First Amended Joint Plan of Reorganization of Cumulus Media Inc.* [ECF No. 653]; *see also* Conf. Hr'g Tr. (Apr. 12, 2018) 128:16–129:12 (the Official Committee of Unsecured Creditors noting that it also has objected to the Unsecured Equity Distribution on the basis of absolute priority).

5 Notably, the Official Committee of Unsecured Creditors has also objected to the Plan. *See Objection of the Official Committee to Confirmation of the First Amended Joint Plan of Reorganization of Cumulus Media Inc.* [ECF No. 653]; *see also* Conf. Hr'g Tr. (Apr. 12, 2018) 128:21–129:06 (the Official Committee of Unsecured Creditors noting that it cannot make the specific argument raised by Ad Hoc Cross-Holder Committee because of its "diverse" members).

What is more, the absolute priority rule must be strictly applied. *Id.* at 97 ("indicat[ing] a preference for reading the [absolute priority] rule strictly").

2. Here, the Debtors' proposed Plan fails to abide by the absolute priority rule and the Second Circuit's holding in *DBSD* for two reasons. First, the Plan provides that general unsecured creditors (Class 6) will receive an equal recovery to the Senior Notes Claims (Class 5), despite general unsecured creditors effectively having junior claims relative to the Senior Notes Claims at most of the Debtor entities.[6] Under the absolute priority rule, if an impaired class of unsecured claimants rejects a plan (as is the case here),[7] a plan of reorganization can only be confirmed if ***no classes junior to that class*** receive or retain any property under the plan on account of their junior claims or interests. 11 U.S.C. § 1129(b)(2)(B).[8]

3. Second, by providing an equal distribution to general unsecured creditors and Senior Notes Claims, the Plan effectively provides for a *de facto* distribution to equity at certain Debtors before the senior notes claims are paid in full—a blatant violation of the absolute priority rule. By way of example, if there are Class 5 Senior Notes Claims asserted against a particular Debtor subsidiary with valuable assets, no value should flow up to that Debtor

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[6] Class 6 claims are effectively "junior" to Class 5 claims because each Class 6 claim has no right of recovery at most of the Debtors, whereas each Class 5 claim has the right to recover at nearly all of the Debtors.

[7] *Declaration of Jane Sullivan on behalf of Epiq Bankruptcy Solutions, LLC, Regarding Voting and Tabulation of Ballots Cast on the First Amended Joint Plan of Reorganization of Cumulus Media Inc. And Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [ECF NO. 634], Ex. A (voting tabulation record reflecting Class 5's rejection of the Plan).

[8] The Ad Hoc Cross-Holder Committee and the Official Committee of Unsecured Creditors are actively negotiating a potential resolution of the issues raised in this brief relating to the distribution as among Class 5 and Class 6 creditors. We believe that an agreement will be reached. If those negotiations result in an agreement as to distributions between classes, the Ad Hoc Cross-Holder Committee would withdraw this portion of its objection in full and not object to a distribution methodology consistent with such agreement. The parties will notify the Court as soon as a resolution is reached.

subsidiary's parent entities until the Class 5 Senior Notes Claims are paid in full (*i.e.*, no distribution to equity). Yet, the Plan allows for the possibility that general unsecured creditors with no claims against that valuable subsidiary (but claims against one of its valueless parent entities) will nonetheless receive a distribution. The only way that general unsecured creditors can recover in this scenario is via a distribution to equity before the Class 5 Senior Notes Claims are paid in full.

4. As established at the confirmation hearing, Class 5 has claims against virtually all of the Debtors (36 out of the 37 total Debtors). *See* Conf. Hr'g Tr. (Apr. 16, 2018), 135:12–17. In stark contrast, most Class 6 members have claims against only one of the Debtors. *See* Conf. Hr'g Tr. (Apr. 16, 2018), 135:08–11. Notwithstanding this difference in legal entitlement and in sources of recovery, the Plan provides identical recoveries for creditors in both Class 5 and Class 6. Plan, Art. III.C §§ 5, 6.

5. By imposing identical treatment upon Class 5 and Class 6, despite their different rights to recover from different pools of the Debtors' assets, the Unsecured Creditor Equity Distribution necessarily disregards the corporate separateness of the different Debtors' estates, pools their assets, and results in *de facto* substantive consolidation. *See Buchwald Capital Advisors LLC v. JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 2009 Bankr. LEXIS 3606, at *29 (Bankr. S.D.N.Y., Nov. 10, 2009) (finding *de facto* substantive consolidation where two classes, with different entitlements, received identical treatment, and both were to be paid from a common pool).

6. The Debtors have all but conceded that the Plan results in substantive consolidation. *See* Conf. Hr'g Tr. (Apr. 12, 2018), 32:07–33:20. Nonetheless, they ask the Court to turn a blind eye to that issue, arguing that: "[a]ny alleged prejudice suffered by the

holders of Senior Notes on account of such an immaterial level of dilution is far outweighed by the administrative cost that would be required to develop and implement an alternative allocation of this value." *Debtors' Memorandum of Law in Support of Confirmation of the First Amended Joint Plan of Reorganization of Cumulus Media Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* ("Debtors' Br.") [ECF No. 641] ¶ 193. The Debtors, however, offered no evidence that they ever considered what that "administrative cost" would be relative to the dilution called for by their Plan.

7. Specifically, the Debtors' financial advisor testified that he was unaware of any effort by the Debtors to: conduct an "entity-by-entity analysis to determine value that's at each Debtor," "determine in which debtors…unencumbered assets sit," or allocate the value of FCC licenses owned by certain Debtors. *See* Conf. Hr'g Tr. (Apr. 16, 2018), 135:18–135:21.

8. The Debtors argue that their Plan does not substantively consolidate their various estates by relying upon this Court's holding in *Sabine*. Debtors' Br. ¶ 198 (citing *Sabine Oil & Gas Corp.*, 555 B.R. 180, 318 (Bankr. S.D.N.Y. 2016)) (asserting that *Sabine* involved "virtually identical provisions"). This case is not like *Sabine*. In *Sabine*, there was no allegation that the Plan allowed stakeholders with lesser rights to recover, at the expense of the recovery of creditors with greater recovery rights. Indeed, the impaired holders of claims did not object to plan distribution schemes on the basis that it violated the absolute priority rule.[9] As such, *Sabine* has no bearing on the facts at issue here.

[9] *See In re Sabine Oil & Gas Corp.*, Case No. 15-11835 (SCC), *Debtors' (I) Memorandum of Law in Support of Conformation of Debtors' Second Amended Joint Chapter 11 Plan of Reorganization of Sabine Oil & Gas Corporation and Its Affiliates, and (II) Omnibus Reply Objections Thereto* [ECF. No. 1219] (outlining various objections received, none of which was an absolute priority challenge to the distribution scheme).

9. The Debtors say that it was "***convenient*** just to provide" unsecured creditors with the Unsecured Creditor Equity Distribution and "have it shared *pro rata*." *See* Conf. Hr'g Tr. (Apr. 16, 2018), 67:05–12 (emphasis added). Although that approach may be "convenient" for the Debtors, such convenience is no basis for ignoring the requirements of Section 1129. *See DBSD*, 634 F.3d at 98; *see also Union Sav. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 (2d Cir. 1988) (noting that substantive consolidation is "no mere instrument of procedural convenience…but a measure vitally affecting substantive rights").

10. Because the Plan does not satisfy the requirements of the Code, it cannot be confirmed.

ARGUMENT[10]

11. Before the Court can confirm the Plan, the Debtors must demonstrate, by a preponderance of the evidence, that the Plan satisfies the requirements of section 1129 of the Bankruptcy Code. *See, e.g.*, *In re Charter Commc'ns*, 419 B.R. 221, 243 (Bankr. S.D.N.Y. 2009) (holding that the debtor bears the burden of establishing compliance with each component of section 1129). The Debtors have not met their burden. The Debtors do not cite a single case, where—as here—a court has approved a plan distribution scheme that: (1) disregards the differing rights of claim holders; and (2) effects a *de facto* substantive consolidation of the debtors' estates on the basis of some unestablished "administrative convenience," in the absence of consent. Here there is no such consent.

[10] The Ad Hoc Cross-Holder Committee incorporates, as if fully set forth herein, the facts as set forth in its Proposed Finding of Fact, which were filed in conjunction with this post-hearing brief.

I. The Unsecured Creditor Equity Distribution Violates the Absolute Priority Rule

A. *Relevant Authority Makes Clear That the Unsecured Creditor Equity Distribution Must Comport with the Absolute Priority Rule.*

12. Under the Second Circuit's holding in *DBSD*, "gifts" under a plan of reorganization must respect each class's relative distribution rights, in accordance with the absolute priority rule of the Bankruptcy Code. 634 F.3d at 97 (rejecting the Debtors' argument that gifts are not subject to the absolute priority rule). In *DBSD*, an unsecured creditor objected to the confirmation of the debtors' plan under which unsecured creditors were not paid in full, while existing equity holders were also receiving shares and warrants in the reorganized debtor. *Id.* at 86. Over the unsecured creditor's objection, the bankruptcy court confirmed the plan, holding that there was no violation of the absolute priority rule because the secured creditors "may voluntarily offer a portion of their recovered property to junior stakeholders." *Id.* at 87. On appeal, the Second Circuit reversed. *Id.* at 98.

13. In rejecting this "gift" approach under a chapter 11 plan, the Second Circuit clarified that "gifts" under a plan must be distributed consistent with the absolute priority rule, even if secured creditors are undersecured. "[W]hatever the secured creditors here did not take [through the plan to fulfill their claims] remains in the estate for the ***benefit of other claim-holders***." *Id.* at 99 (emphasis added). Even assuming secured creditors are undersecured, secured creditors and/or the Debtors are not entitled to distribute the estate's property in a way that violates the absolute priority rule. *Id.*

14. Though the facts are analogous, the Debtors argue that *DBSD* has "no bearing on the instant case" because *DBSD* involves a "gift" to "***junior equity holders***," not unsecured creditors. Debtors' Br. ¶ 196 (emphasis in original). This argument is unconvincing, particularly given that the Debtors fail to cite a single case supporting such a limited reading of *DBSD*.

15. In *Energy Future Holdings*, which the Debtors' cite in their brief, all of the impaired classes accepted the debtors' plan. *See In re Energy Future Holdings Corp., et al.*, Case No. 14-10979 (CSS) (Bankr. D. Del., Aug. 29, 2016) [ECF 9421]. Approval of a consensual distribution scheme is completely unremarkable. Here, by contrast, the impaired classes have not accepted the Plan. Thus, *Energy Future Holdings* has no bearing on the issue.

B. DBSD *Mandates that the Absolute Priority Rule Is to Be Strictly Applied Regardless of Plan Value.*

16. In *DBSD,* the Second Circuit found that the history and evolution of the absolute priority rule through Congressional record and case law "indicate[s] a preference for reading the rule strictly." *Id.* at 97; *see also id.* at 100–01 (citing H.R. Rep. 95-595(1978) U.S.C.C.A.N. 5963, 6372 for proposition that "absolute priority rule was 'designed' to prevent a senior class from giving up consideration to a junior class unless every intermediary class consents, is paid in full, or is unimpaired").

17. Under a strict application of the absolute priority rule, a creditor's right to object to a plan on the basis that it violates the Code's absolute priority rule does not "turn on estimations of valuation, or on whether a creditor was in or out of the money." *See DBSD*, 634 F.3d at 90. Regardless of whether Class 5 creditors are in or out-of-the-money based on various alleged valuations before the Court, the Plan must adhere to the absolute priority rule to be confirmed.

C. DBSD *Instructs that because the Debtors' Plan "Gifts" "Property" of the Estate, Under the Plan to Class 6 "On Account of" Their Claims with Lesser Rights, the Plan Violates the Absolute Priority Rule.*

18. When evaluating "gifts" in a chapter 11 plan for potential violation of the absolute priority rule, three elements must be considered: whether (1) the lesser claim holder received "property" of the estate, (2) this property was distributed "under the plan," and (3) the

distribution was "on account of" the junior claim or interest. *Id.* at 94–97. All three elements are met in this case.

19. First, as in *DBSD*, parties with junior distribution rights (Class 6) are receiving property of the estate, *i.e.*, shares in Reorganized Cumulus, before Class 5 Claimants are paid in full. As discussed above, Class 6 claims are effectively "junior" to Class 5 claims because each Class 6 claim has no right of recovery at most of the Debtors, whereas each Class 5 claim has the right to recover at nearly all of the Debtors. By providing an equal distribution to Class 5 and Class 6 Claims, the Plan effectively provides for a *de facto* distribution to equity at certain Debtors before the Class 5 Senior Notes Claims are paid in full. General unsecured creditors with claims solely against an individual Debtor ***with no assets*** will, incredibly, receive the same recovery as holders of Class 5 Senior Notes Claims who have claims against nearly all of the Debtors. The only way this can occur is via a *de facto* distribution to equity from the assets of a valuable subsidiary flowing up to general unsecured creditors at entities that have no assets (or no assets other than equity interests). Such value rightfully should be distributed to Class 5 Senior Notes Claims.

20. Second, the distribution is under the terms of the Plan. Plan, Art. III.C. § 6. Third, the "gift" is provided "on account of" the junior claim interest, because the Plan provides that "***in exchange for and in full and final satisfaction, compromise, settlement, release, and discharge of each Allowed General Unsecured Claim***, each Holder of an Allowed General Unsecured Claim shall receive… its Pro Rata share of the Unsecured Creditor Equity Distribution." *Id.* (emphasis added). The Plan therefore violates Section 1129 and is contrary to the Second Circuit's holding in *DBSD*.

II. The Debtors' Plan Impermissibly Pools the Debtors' Assets and Ignores that Different Unsecured Creditors Have Claims Against Different Entities, Thus Effectuating *De Facto* Substantive Consolidation

21. Not only does the Debtors' Unsecured Creditor Equity Distribution violate the absolute priority rule by contravening the varying recovery rights of Class 5 and Class 6, the "gift" also results in an impermissible *de facto* substantive consolidation. *See In re M. Fabrikant & Sons, Inc.*, 2009 Bankr. LEXIS 3606, at *29 (where two classes received identical treatment, and both were to be paid from a common pool, the plan effected a *de facto* substantive consolidation.). Substantive consolidation by definition is a "consolidat[ion] [of] the assets and liabilities of multiple debtors… treating them as if the liabilities were owed by, and the assets held by, a single entity." *ACC Bondholder Group v. Adelphia Commc'ns Corp. (In Adelphia Commc'ns Corp.),* 361 B.R. 337, 359 (Bankr. S.D.N.Y. 2007) (citations omitted). The danger of such a consolidation is that "creditors of the corporation with greater assets will have their claims ***diluted*** and will have to share in the pool of assets with the creditors of the corporation possessing no assets or lessor assets." *In re I.R.C.C., Inc.*, 105 B.R. 237, 241 (Bankr. S.D.N.Y. 1989). This is precisely the treatment contemplated by the Debtors' Plan.

22. The language of the Plan does not, of course, acknowledge that it calls for "substantive consolidation." But even where a plan does not expressly provide for substantive consolidation, a court must find a *de facto* substantive consolidation where, as is the case here, a debtors' assets have been pooled and separately classified claimants receive the identical treatment of payment from that common pool. *See In re M. Fabrikant & Sons, Inc.*, 2009 Bankr. LEXIS 3606, at *29 ("The Plan did not expressly provide for substantive consolidation… [n]evertheless the two classes received identical treatment, and both were to be paid from that common pool… [u]nder these circumstances, the plan effected a *de facto* substantive consolidation."); *see also In re New Century TRS Holdings, Inc.*, 407 B.R. 576, 591–92 (Bankr.

D. Del. 2009) (aggregating multiple debtors to pay claims from a consolidated pool of assets effects substantive consolidation).[11]

23. Second, that the Plan would effectuate a *de facto* substantive consolidation here is evidenced by the confirmation hearing testimony of the Debtors' witnesses. The Debtors' financial advisor testified that he was unaware of any effort by the Debtors to: conduct an "entity-by-entity analysis to determine value that's at each Debtor," "determine in which debtors…unencumbered assets sit," and allocate the value of FCC licenses owned by Debtors. *See* Conf. Hr'g Tr. (Apr. 16, 2018), 135:25–136:04.

24. Further, both in their brief and at the confirmation hearing, the Debtors concede that they have not ensured that value is allocated appropriately from among the Debtors' estates:

> **MR. BASTA:** …And your Honor, the interesting thing here is if you had asked me the question is [sic] show me the legal box that is generating the value that is being gifted, okay, show me – put an org. chart, ***show me the legal box that's generating the value of being gifted, I couldn't do it***.
>
> **THE COURT:** About what do you mean legal box?
>
> **MR. BASTA**: Like the legal entity. Show me the legal entity that is creating the value that is being gifted and the answer is you cannot do it because what generated the value is negotiating leverage over reinvestment. And that value isn't attributable to any particular legal entity, and therefore, for us to gift it to all unsecureds pro rata we think is the appropriate way to gift it. Because ***there is no methodology that's available that can trace it to a legal entity***.
>
> **THE COURT**: ***So the party that is arguing that the plan reflects impermissible substantive consolidation, didn't you just concede that point***?

Conf. Hr'g Tr. (Apr. 12, 2018), 32:08–33:08 (emphasis added).

[11] Relying upon *Sabine*, the Debtors attempt to distinguish their use of a pooling distribution scheme. *See* Debtors' Br. ¶ 198. In *Sabine*, however, the fact that there was no absolute priority challenge demonstrates that there was no similar concern about "class skipping," as there is here.

25. In response to this Court's inquiry regarding conceding *de facto* substantive consolidation, the Debtors assert that they ***could*** (not that they have) go to each legal entity and determine what assets are there to be recovered:

> **MR. BASTA:** Nobody is pooling the assets and liabilities of those legal entities. I can go to any legal entity and I show up and say, please tell me how much is going to unsecured creditors and that legal entity says, I'm not worth the value of the secured debt.

Conf. Hr'g Tr. (Apr. 12, 2018), 33:12–18.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Ad Hoc Cross-Holder Committee respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief to the Ad Hoc Cross-Holder Committee as the Court may deem just and proper.

Dated: April 27, 2018
New York, New York

By: /s/ Dennis F. Dunne

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