IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	
	:	Chapter 11
ALEX AND ANI, LLC, *et al.*,[1]	:	
	:	Case No. 21-10918 (CTG)
Debtors.	:	Jointly Administered
	:	Re: D.E. 48, 49

Hearing Date: July 19, 2021, at 10:00 a.m.
Obj. Deadline: July 14, 2021, at 4:00 p.m.[2]

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT, (II) APPROVING THE SOLICITATION AND NOTICE PROCEDURES WITH RESPECT TO CONFIRMATION OF THE DEBTORS' JOINT PLAN OF REORGANIZATION, (III) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, (IV) SCHEDULING CERTAIN DATES WITH RESPECT THERETO, AND (V) GRANTING RELATED RELIEF (D.E. 49, "Motion")

Andrew R. Vara, the United States Trustee for Region 3 ("U.S. Trustee"), through his undersigned counsel, and objects to Debtors' Motion for Entry of an Order (I) Approving The Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures With Respect to Confirmation of the Debtors' Joint Plan of Reorganization, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief (D.E. 49, "Motion") and states as follows:[3]

[1] The Debtors in these chapter 11 cases, along with the last four digits of each of the Debtors' respective federal tax identification numbers, are as follows: Alex and Ani, LLC (8360); A and A Shareholding, Co., LLC (7939); Alex and Ani International, LLC (2247); Alex and Ani Retail, LLC (1227); Alex and Ani Assembly, LLC (3215); Alex and Ani California, LLC (6368); Alex and Ani Canada, LLC (3317); Alex and Ani Puerto Rico, LLC (1477); and Alex and Ani South Seas, LLC (8592). The Debtors' headquarters and mailing address is: 10 Briggs Drive, East Greenwich, RI 02818.

[2] Extended for the U.S. Trustee.

[3] Terms shall have the same meaning given them in the Plan, Disclosure Statement or Motion unless otherwise noted herein.

PRELIMINARY STATEMENT

1. The Disclosure Statement in its present form does not satisfy the adequate information standard of 11 U.S.C. § 1125 and should not be approved. The Disclosure Statement was filed without a liquidation analysis or any supporting financial disclosures. The Disclosure Statement does not provide adequate information concerning the Plan's feasibility or whether the Plan will pay to the creditors not less than they would receive if the case were a case under Chapter 7 of the Bankruptcy Code. For these reasons, the United States Trustee urges that the Court deny approval of the Disclosure Statement and require its amendment so that adequate information is provided to voters as required by 11 U.S.C. § 1125. The Plan also seeks a discharge in the event that substantially all assets of the Debtors' are sold. Liquidating debtors are not entitled to a discharge. The Plan is also contrary to the ruling in *In re Emerge Energy Services*, 2019 WL 7634308 (Bankr. DE 2019), which held that creditors be given the choice to opt-in to proposed third-party releases rather than be required to object or opt out of proposed third-party releases. The United States Trustee also urges that certain problematic aspects of the Plan be addressed at this time, so that the various requirements of 11 U.S.C. § 1129 may be satisfied if the Debtors obtain the necessary acceptances from those who cast votes on the Plan.

JURISDICTION

2. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine this objection.

3. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U.S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the

courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

4. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment on such plans and disclosure statements.

5. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Plan and Disclosure Statement and the issues raised in this objection.

PLAN OVERVIEW

6. The Plan is styled as a toggle plan. If a sale of substantially all assets of the Debtors take place, then the Plan is a liquidating plan. If there is no sale, then the holders of pre-petition secured debt will engage in the Restructuring Transactions and the Debtors will emerge from this Chapter 11 as Reorganized Debtors.

STATEMENT OF FACTS

7. On June 9, 2021, the Debtors filed their petitions. The cases have been ordered jointly consolidated for administrative purposes. On June 22, 2021, the U.S. Trustee appointed an Official Committee of Unsecured Creditors ("Committee").

8. On the Petition Date, the Debtors filed the Plan ("Plan," D.E. 47), Disclosure Statement ("Disclosure Statement", D.E. 48) and the Motion.

9. On July 7, 2021, the Debtors filed their Schedules of Assets and Liabilities and Statements of Financial Affairs.

10. The definition of Exculpated Party includes the Consenting Sponsor, the Consenting Founder, the Debt Transfer Purchaser, and the secured debt administrative Agents (Plan I.A.48). None of these parties are estate fiduciaries.

11. The definition of Released Party includes the Debtors (I.A.109).

12. The definition of Releasing Party (I.A.101) includes: "…(f) all holders of Claims or Interests who are eligible to vote, but abstain from voting on the Plan and who do not opt out of the releases provided by the Plan; (g) all holders of Claims or Interests who vote to reject the Plan and who do not opt out of the releases provided by the Plan…".

13. Plan Section III.B, entitled Treatment of Claims and Interests, contains the following language: "each holder of an Allowed Claim, or Allowed Interest, as applicable, shall receive under the Plan the treatment described below in full and final satisfaction, compromise, settlement, release, and discharge of…"

14. Plan section IV.A. reads in full as follows:

> As discussed in detail in the Disclosure Statement and as otherwise provided herein, pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, distributions, releases, and other benefits provided under the Plan, on the Effective Date, the provisions of the Plan shall constitute a good-faith compromise and settlement of all Claims, Interests, Causes of Action, and controversies resolved pursuant to the Plan. The Plan shall be deemed a motion to approve the good-faith compromise and settlement of all such Claims, Interests, Causes of Action, and controversies pursuant to Bankruptcy Rule 1019, as well as a finding by the Bankruptcy Court that such settlement and compromise fair, equitable, reasonable, and in the best interests of the Debtors and their Estates. Subject to Article VI hereof the Plan, all distributions made to Holders of Allowed Claims and Allowed Interests in any Class are intended to be and shall be final.

15. Section IX.A of the Plan, entitled Compromise and Settlement of Claims, Interests and Controversies, repeats Plan Section IV.A. The second paragraph of Plan Section IX.E, the third-party release provision, repeats this language again.

16. Section IX.B provides for a complete discharge of the Debtor.

17. Plan Section IX.F provides for exculpation of estate fiduciaries. The provision includes exculpation for reliance of any legal opinion requested by any Exculpated Party.

SUMMARY OF ARGUMENT

18. The Disclosure Statement was filed without any financial disclosures of any kind. As a result, it provides no record to aid in determining whether the Plan is feasible or, lacking a liquidation analysis, if the Plan satisfies the best interest of creditor test provided for by Bankruptcy Code 1129(a)(7) and does not contain adequate information. In addition to the material flaws of the Disclosure Statement, the Plan is not confirmable because, among other things, the Plan attempts to impose Bankruptcy Rule 9019 settlement standards upon parties who have not expressly agreed to a settlement, seeks to exculpate non-estate fiduciaries and is contrary to the recent ruling of this Court In *In re Emerge Energy Services,* supra, requiring creditors to opt out of the proposed third-party releases rather than afford them the choice to opt in, and provides for a discharge in a liquidating case.

ARGUMENT

I. The Disclosure Statement Fails to Provide Adequate Disclosure

A. General Considerations

19. Section 1125 of the Bankruptcy Code prohibits solicitation of votes on a reorganization plan prior to court approval of a written disclosure statement, which contains "adequate information." *See* 11 U.S.C. § 1125(b).

20. "Adequate information" is defined in section 1125 as being:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of debtor's books and records, that would enable a reasonable hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about

> the plan, but adequate information need not include such information about any other possible or proposed plan.

11 U.S.C. § 1125(a)(1).

21. The disclosure statement requirements of Section 1125 are "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (*citing Oneida Motor Freight, Inc. v. United Jersey Bank* (*In re Oneida Motor Freight, Inc.*), 848 F.2d 414 (3d Cir. 1988)).

22. "Adequate information" under § 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with debtors over proposed plans. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94 (3d Cir. 1988).

23. The Disclosure Statement was filed without a single financial disclosure. The liquidation discussion contained at Section XII.B of the Disclosure Statement (D.E. 48, p 55) makes a series of conclusory statements and a commitment to file a liquidation analysis: "…in advance of the objection deadline for this Disclosure Statement." The objection deadline was July 12, 2021. Although the Disclosure Statement was filed on June 10, 2021, as of July 14, 2021, the Debtors had not yet filed a single financial disclosure. This information is germane to any party in interest's decision to accept or reject the Plan. Without this information, no one can determine what they may receive and when they may receive it. Without this information there is an inadequate record to determine for the Court to determine the Plan's feasibility or if the Plan will satisfy the best interests of creditor test. Unsupported opinions and conclusions are not facts. The liquidation analysis is a germane part of any Disclosure Statement and the record in the case. The

Debtor's failure to file any disclosures with the Disclosure Statement means that no creditor or party in interest has had any meaningful opportunity to review them. Coupled with the fact that the Debtors are privately held and that Schedules of Assets and Liabilities and Statements of Financial Affairs were not filed until July 7, 2021, this means that the creditor body was deprived of meaningful financial disclosure in this case prior to the Disclosure Statement Objection Deadline.

24. The U.S Trustee cannot overemphasize the materiality of this failure. Among other things, financial disclosures disclose the amounts necessary to pay unclassified administrative and priority claims which are required to be paid in full except to the extent a claimant agrees to accept a lesser amount pursuant to Bankruptcy Code section 1129(a)(9). Unless claimants entitled to priority treatment are paid in full, the Plan is not confirmable. The amount necessary to fund payments to the various classes should be shown in the Disclosure Statement. The disclosure of material financial information is as important in this case as the text of the Disclosure Statement, if not more so.

25. Section 1129(a)(7) of the Bankruptcy Code requires as a condition of confirmation that impaired classes will receive not less than they would receive if the case were one under chapter 7 of the Bankruptcy Code. Section 1129(a)(11) requires as a condition of confirmation that a plan be feasible. Feasibility includes that priority claims be paid in full. The Disclosure Statement does not contain adequate information on either of these points. Without this information, creditors entitled to vote on the Plan will be unable to make an informed judgment as to whether to vote to accept or reject the Plan.

26. Federal Rule of Bankruptcy Procedure 2002(b) requires that parties have 28-day notice to object to a hearing on a Disclosure Statement. This rule presumes that when a Disclosure

Statement is filed, it is complete. A Disclosure Statement filed that is devoid of any financial disclosures is incomplete and should not be approved absent the filing of all exhibits and a meaningful opportunity to object. This hearing should be adjourned until all financial exhibits have been filed and the creditor body afforded a reasonable opportunity to review and object to the same. The Court should not countenance the Debtors' conduct here.

II. Confirmation Issues

27. The Disclosure Statement should also not be approved because the Plan in its present form is patently not confirmable. These material defects include:

- Not providing creditors with an opportunity to opt in to the third-party releases;
- Inappropriately attempting to impose a 9019 standard upon parties who have not expressly agreed to settlement;
- Proposing to provide exculpation for non-estate fiduciaries.

A. Third Party Releases

28. There are numerous ways in which the third-party releases, the Debtor releases and exculpation provisions set forth in the Plan are contrary to the standards set forth by this Court in *In re Tribune Company*, 464 B.R. 126 (Bankr. D. Del. 2011), *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), and other applicable law. Certain opt in mechanisms must also be clarified or amended before the voting solicitation process begins.

29. Some Courts in this District have determined that third party releases of non-debtors should be allowed provided that they are consensual. *See In re Wash. Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011), *citing, inter alia, In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D.

Del. 1999) (holding that the release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan); *In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan). *See Cont'l*, 203 F.3d at 215 ("[W]e have found no evidence that the non-debtor D & Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability"); *Wash. Mut.*, 442 B.R. at 354 ("[T]here is no basis for granting third party releases of the Debtors' officers and directors , ... [as] [t]he only 'contribution' made by them was in the negotiation of the Global Settlement and the Plan, [which] activities are nothing more than what is required of directors and officers of debtors in possession (for which they have received compensation and will be exculpated) . . . ."); *In re Genesis Health Ventures,* Inc., 266 B.R. 606–07 (Bankr. D. Del. 2001) ("[T]he officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization."). The same logic is also applicable to third party releases of the Debtors' professionals who, like the Debtors' directors and officers, will be protected by the exculpation provision. *See Wash. Mut.*, 442 B.R. at 354.

30. Section IX.E of the Plan provides that all Releasing Parties are providing all Released Parties with a release. The definition of Releasing Party (I.A.101) includes all holders of Claims or Interests: "…*provided* that in each case, an Entity shall not be a Releasing Party if it: (x) elects to opt out of the releases contained in the Plan, or (y) timely Files with the Bankruptcy Court or on the docket of the Chapter 11 Cases an objection to the releases contained in the Plan is not resolved before Confirmation."

31. The most material defect in the third-party release provision at this stage of the proceeding is that parties in interest are not being given a choice to opt into the third-party releases.

32. In *In re Emerge Energy Services LP*, 19-11563 (KBO), 2019 WL 7634308 (Bankr. D. Del. Dec. 5, 2019), this Court ruled that consent to a third-party release "cannot be inferred by the failure of a creditor or equity holder to return a ballot or Opt-Out Form." *Id.* at *18. The Court reached this conclusion even though the Opt-Out Forms provided conspicuous notice of how to opt-out and the implication of the failure to do so. The Court also rejected the Debtor's argument that inferred consent from "silence" should be approved as typical, customary, and routine. *Id.* The Court held that it could not, "on the record before it[,] find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations." *Id.* at *18.[4]

33. The Court in *Emerge* indicated further that it "has concluded that a waiver cannot be discerned through a party's silence or inaction unless specific circumstances are present." *Id.* at *18. The Court clarified that, "[a] party's receipt of a notice imposing an artificial opt-out requirement, the recipient's possible understanding of the meaning and ramifications of such

[4] Although not mentioned in the *Emerge* decision, other alternative explanations for not returning a ballot or opt-out form would include that a creditor never received the solicitation package, because it was wrongly addressed or wrongly delivered, or the creditor did not understand these dense, legal documents and could not afford, or otherwise did not have access to counsel to interpret the same.

notice, and the recipient's failure to opt-out simply do not qualify" as such circumstances. *Id.* at *18.[5]

34. The Plan provides releases by the Debtors and their estates of many non-debtor parties. Pursuant to this Court's decision in *Tribune*, 464 B.R. 126 (Bankr. D. Del. 2011), and *Washington Mutual,* 442 B.R. 314 (Bankr. D. Del. 2011), among others, the five factors set forth in In re *Zenith Elecs. Corp.,* 241 B.R. 92, 110 (Bankr. D. Del 1999) and *In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994) should be considered to determine whether, notwithstanding § 524(e) of the Code, a plan may provide for releases by debtors of non-debtor entities. *See Tribune* 464 B.R. at 186; *Wash. Mut.*, 442 B.R. at 346; *In re Spansion,* 426 B.R. 114, 142-43, n. 47 (Bankr. D. Del. 2010); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004).

35. In the present cases, neither the Plan nor the Disclosure Statement address whether any of the *Zenith* factors are met for any of the parties who will receive releases from the Debtors or claimants. Absent a showing, and appropriate finding by the Court, that each proposed Released Party has made a substantial contribution to the Plan,[6] and that the other

[5] Although not a reported decision, Judge Owen's ruling in *Fizzics, Inc*., Case No. 19-10545 (Bankr. D. Del.) (KBO), eliminates any argument that the *Emerge* ruling was limited to situations in which the parties deemed to give releases are to receive no distribution under the plan. In *Fizzics,* the debtors' plan of reorganization provided for a distribution to be made to general unsecured creditors. The third-party releases were to be deemed to be given by all holders of claims and equity interests, except for those who had timely submitted a ballot on which they opted out of such releases, or, for those who did not receive a ballot, submitted a "written notice" before the plan objection deadline. *See* First Amended Plan of Reorganization in *Fizzics*, D.I. 123, § VIII.F (Dec. 16, 2019). At confirmation, the Court limited those who would be deemed to give the third-party releases to creditors who had actually voted on the plan, either to accept or reject, and did not check the opt-out box. *See Fizzics* confirmation order, D.I. 144, ¶ 8, (Jan 24, 2020).

[6] An example of a "substantial contribution" can be found in *Coram*, where this Court, after examining the *Zenith* factors, allowed the debtors to release noteholders who had contributed $56 million in funding to the plan, which funds allowed the debtors to repay in full all creditors other than the noteholders, as well as make a significant distribution to the debtors' shareholders. 315 B.R. at 335.

elements of *Zenith* have been met, the releases given by the Debtors render the Plan not confirmable. For each and every one of the various entities enumerated in the various definitions, the Debtors must show who they are and what they have contributed to the success of this case. For example, what has the financial advisor of an indirect equity holder contributed to this case?

B. Exculpation

36. Section I.A.48 of the Plan includes a number of non-estate fiduciaries as Exculpated Parties, including the Consenting Sponsor, Consenting Founder, the Debt Transfer Purchaser, and the secured debt administrative Agents. The parties receiving exculpation should be limited to those parties who served in the capacity of estate fiduciaries, *i.e.*, the creditors' committee, its members, estate professionals and the Debtor's directors and officers. *See In re Indianapolis Downs, LLC,* 486 B.R. 286 (Bankr. D. Del. 2013); *In re Tribune Co.,* 464 B.R. 126, 189 (Bankr. D. Del. 2011)*; In re PTL Holdings, LLC*, 2011 WL 5509031 *12 (Bankr. D. Del. Nov. 10, 2011); *In re Washington Mutual Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011). See also *PWS Holding Corp*, 228 F.3d 224 (3d Cir. 2000).

37. Plan Section VIII.F also proposes that Exculpated Parties be exculpated for: "…any legal opinion requested by any Entity regarding any transaction…contemplated by the Plan or reliance by any Released Party on the Plan or Confirmation Order in lieu of such legal opinion." This provision should be stricken. This defense is available at common law without having to be included as a plan provision. Including this language in the provision tends to elevate a defense into an immunity. Further, to the extent the advice of counsel is unlimited, it should nominally be restricted to written advice and to the extent the language purports to implicate any Released Party, it should be limited to any Exculpated Party.

C. FRBP 9019 is Limited to Parties Who Have Expressly Agreed to Settlement

37. Plan Section IV.A, and similar language contained in Sections IX.A and IX.E of the Plan, purport to impose the settlement standards of FRBP 9019 upon all claims and interests. The language of Plan Section IV.A purports to impose this language upon the distributive provisions of the Plan. The settlement of claims against a debtor subject to FRBP 9019 is limited solely to those parties who have expressly entered into a settlement agreement. Bankruptcy Code Section 1123(b)(3) allows a Debtor to settle claims it has against others but not claims against the Debtor. Claims against a Debtor are subject to the standards of Bankruptcy Code Sections 1129 and 1141.

38. FRBP 9019 reads in pertinent part: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." The standard for approval of a settlement is subject to the sound discretion of the court guided by the following criteria as set forth in *In re Martin*, 91 F. 3d 389 (3rd Cir. 1996): "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." 91 F.3d at 393 (citations omitted).

39. Black's Law Dictionary defines compromise or settlement as follows: "An agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other." Black's Law Dictionary, 10th ed. The terms satisfaction and release, or the phrase "complete settlement" are synonyms of the term discharge. The Ballentine's Law Dictionary definition of satisfaction is: "The discharge of an obligation; the payment of a debt. A

fulfillment of needs. A performance of the terms of an accord." (Ballentine's Law Dictionary 2010).

40. Bankruptcy Code Section 1123(b)(3)(A) allows for a plan to: "…provide for- the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." However, the converse is not true. This provision does not permit the Debtor to settle claims against it. Absent an express settlement agreement between parties, the standards of Bankruptcy Code Section 1129 prevail over the standards of FRBP 9019. The court must find that a plan is fair and equitable and the plan otherwise satisfies the provisions of Bankruptcy Code Section 1129. Included within Bankruptcy Code Section 1129(b)(1) is the requirement that the court find a plan to be "fair and equitable."

41. In denying confirmation, Judge Walsh observed in *In re Nutritional Sourcing Corporation*, 398 B.R. 816 (Bankr. Del. 2008): "When evaluating a settlement provided for under a plan of reorganization, 'the Bankruptcy Court must determine that a proposed compromise forming part of a reorganization plan is fair and equitable'." 398 B.R. at 832. Accord: *In re New Century TRS Holdings*, 390 B.R. 140 (Bankr. Del. 2008); *In re Coram Healthcare Corp.*, 315 B.R. 321 (Bankr. Del. 2004).

42. Except for any express settlement entered into between a debtor and claimant that is subject to approval pursuant to FRBP 9019, Bankruptcy Code Section 1141 governs a debtor's discharge. In denying approval of a proposed third-party release provision in a plan where the court had previously approved a settlement agreement pursuant to FRBP 9019, the non-debtor contended that language in the approved settlement resolved the issue, but the court disagreed, holding: "Thus, the 9019 Order did not resolve with finality the treatment of the Bondholders in the Debtor's plan of reorganization. That could be accomplished only through the plan confirmation process…" (*In re Lower Bucks Hospital*, 471 B.R. 419, 457 (Bankr. E.D. PA. 2012)). In *Coram Healthcare Corp.*, supra, the Court found the standards of FRBP 9019

inapplicable to proposed third party releases: "…a release of claims by third parties against a non-debtor cannot be approved under the above standards." (315 B.R. at 335). The Court also disapproved a release proposed by the Trustee of the Debtor finding: "No release of the Debtors is appropriate, since the Debtors are entitled only to the discharge provided by section 1141(d)." (315 B.R. at 337).

43. Section IV.A. of the Plan, and Sections IX.A and IX.E should be revised to clearly indicate that the settlement standards of FRBP 9019 apply only to express settlement agreements entered into between the Debtors and a settling party, and not, as presently proposed, to the entire universe of claims and interests. Here, for example, the parties who have entered into the Settlement Agreement are entitled to the standards of FRBP 9019.

44. The language in Plan IV.A, that distributions are in exchange for full satisfaction and so on, should be removed for all the foregoing reasons. The distributions are being made pursuant to the distributive provisions of the Bankruptcy Code.

D. <u>Bankruptcy Code Section 1141 Controls the Debtors' Discharge</u>

45. Section 1141(d)(3) of the Bankruptcy Code states:

> "The confirmation of a plan does not discharge a debtor if-
> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
> (B) the debtor does not engage in business after consummation of the plan; and
> (C) the debtor would be denied a discharge under Section 727(a) of this title if the case were a case under chapter 7 of this title."

46. If the Plan results in a sale of substantially all assets, then the Debtors would not be entitled to a discharge under Section 727(a)(1), which provides: "The court shall grant the debtor a discharge, unless the debtor is not an individual...". The Debtors are not individuals.

47. The U.S. Trustee suggests that section IX. B of the Plan be revised to indicate that if the Plan results in a sale of substantially all assets of the Debtors, then there is no discharge but if the Restructuring Transactions are implemented, then the Debtors will receive a discharge. This point should be stated expressly rather than by implication.

CONCLUSION

48. The Disclosure Statement should not be approved because it was filed without a single financial disclosure, the most fundamental information that must be included in every disclosure statement. Without financial disclosure creditors are bereft of the information they need to make an informed decision to vote for or against the Plan. Without appropriate disclosure, the Court lacks an adequate record upon which to base findings pursuant to 1129 (a)(7) or (a)(11) at the Confirmation Hearing. To the extent that a primary purpose of a disclosure statement is to tell creditors what they are going to get and when they are going to get it the Disclosure Statement here is a failure because it was filed without adequate information. The exhibits are not afterthoughts to file when the plan proponent decides to file them. The Disclosure Statement should also not be approved because the Plan is not confirmable. The Plan does not provide creditors with the choice to opt into the third-party releases as this Court ruled in *Emerge Energy Services,* supra. The Plan inappropriately attempts to impose settlement standards upon parties who have not expressly agreed to a settlement. The Plan purports to provide the Debtors with a discharge in what may become a liquidating estate.

49. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become

apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that this Court issue an order denying approval of the Disclosure Statement, denying the Motion, and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: July 14, 2021
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE
Region 3

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
ALEX AND ANI, LLC, *et al.*,[1]	)	
	)	Case No. 21-10918 (CTG)
Debtor-in-Possession.	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on July 14, 2021, the United States Trustee's Objection to Debtors' Motion for Entry of an Order (I) Approving The Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures With Respect to Confirmation of the Debtors' Joint Plan of Reorganization, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief (D.E. 49, "Motion") was served in the manner indicated to the following persons:

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1 The Debtors in these chapter 11 cases, along with the last four digits of each of the Debtors' respective federal tax identification numbers, are as follows: Alex and Ani, LLC (8360); A and A Shareholding, Co., LLC (7939); Alex and Ani International, LLC (2247); Alex and Ani Retail, LLC (1227); Alex and Ani Assembly, LLC (3215); Alex and Ani California, LLC (6368); Alex and Ani Canada, LLC (3317); Alex and Ani Puerto Rico, LLC (1477); and Alex and Ani South Seas, LLC (8592). The Debtors' headquarters and mailing address is: 10 Briggs Drive, East Greenwich, RI 02818.

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