IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Salem Harbor Development, LP (f/k/a Footprint Power Salem Harbor Development LP), *et al.*,[1] Debtors.	Chapter 11 Case No. 22-10239 (MFW) (Jointly Administered) **Related Docket Nos. 129 and 130**

OBJECTION BY CREDITOR IBERDROLA ENERGY PROJECTS INC. TO (I) DISCLOSURE STATEMENT FOR JOINT CHAPTER 11 PLAN OF SALEM HARBOR POWER DEVELOPMENT LP AND ITS DEBTOR AFFILIATES [DOCKET NO. 129] AND (II) DEBTORS' MOTION FOR ENTRY OF AN ORDER (A) APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT; (B) APPROVING THE SOLICITATION AND NOTICE PROCEDURES WITH RESPECT TO CONFIRMATION OF THE DEBTORS' JOINT CHAPTER 11 PLAN; (C) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH; (D) SCHEDULING CERTAIN DATES WITH RESPECT THERETO; AND (E) GRANTING RELATED RELIEF [DOCKET NO. 130]

Creditor Iberdrola Energy Projects Inc. ("IEP") objects (the "Objection") to the (i) *Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Salem Harbor Power Development LP and its Debtor Affiliates* [Dkt. No. 129] ("Disclosure Statement")[2] and (ii) *Debtors' Motion for Entry of an Order (A) Approving the Adequacy of the Disclosure Statement; (B) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Joint Chapter 11 Plan; (C) Approving the Forms of Ballots and Notices in Connection*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Footprint Power Salem Harbor Development LP (1360); Highstar Footprint Holdings GP, LLC (2253); Highstar Footprint Power Holdings L.P. (9509); Footprint Power Salem Harbor FinCo GP, LLC (N/A); Footprint Power Salem Harbor FinCo, LP (9219); and Footprint Power SH DevCo GP LLC (9008) (collectively, the "Debtors").

[2] Defined terms not otherwise defined herein have the meaning set forth in the Disclosure Statement.

Therewith; (D) Scheduling Certain Dates with Respect Thereto; and (E) Granting Related Relief [Docket No. 130] ("Disclosure Statement Motion") as follows:

INTRODUCTION

As a result of its $237 million Arbitration Award, IEP is the Debtors' largest creditor after the secured Lenders' claims are considered. In the Disclosure Statement, the Debtors continue a refrain of casting blame on IEP for the circumstances that resulted in these Chapter 11 Cases, while ignoring the actions of Lenders, equity, and management. It is very clear from even a cursory reading of the Disclosure Statement and Plan that the Debtors have proposed a Plan that benefits only the Lenders. Worse, they do so at the expense of all other creditors, including IEP, without providing sufficient (or any) information regarding the history of the Debtors' relationship with the Lenders and equity, the interconnections and conflicts of directors and their professionals, any claims that might exist against these parties, or the failure of the Debtors to investigate such claims. Adequate information about the Debtors' relationship with the Lenders and with equity, and disclosures regarding potential claims against these parties, are critical to all creditors' decisions to vote – and whether to opt out of the proposed third party releases – on the Debtors' proposed plan.

Notwithstanding the Debtors' attempt in the Disclosure Statement to spin the $237 million Arbitration Award (which is now final) as a vindication of its complaints about IEP's actions in constructing the Debtors' power plant, it plainly was not. Among other things, the Arbitral Tribunal found that the Debtors' termination of the contract with IEP was wrongful and that $140 million from an IEP Letter of Credit that never should have been drawn was drawn by the Debtors. As further confirmation that IEP clearly won the arbitration, the Arbitral Tribunal awarded IEP its fees and costs, while awarding nothing to the Debtors. Both the Lenders and equity were complicit in the draw upon IEP's Letter of Credit. The Lenders had to approve of every action that the Debtors took regarding terminating IEP to draw down its letter of credit; they even kept physical custody of the document. They voted to let the Debtors draw the letter in full despite analyses showing that its shareholders' equity commitment agreements and ISO-NE capacity payments would cover the cost of completion because they regarded giving Debtors access to IEP's money as credit positive—after all, it increased their collateral. Concurrent with the improper draw, the Letter of Credit proceeds were deposited into a segregated bank account pursuant to an agreement between the Debtors and the Lenders. At the time of the Arbitration Award, that segregated account had $89.5 million remaining in it, all directly traceable to the Letter of Credit. Shortly thereafter, the Lenders seized the $89.5 million from that segregated account with full knowledge of the Arbitration Award and its determination that the money from the Letter of Credit belonged to IEP.[3] IEP requests that the Debtors correct the unsupported, misleading or incorrect statements in the Disclosure Statement regarding IEP's $237,404,377 Arbitration Award against the Debtors, now confirmed as a Judgment, and regarding the pre- and post-Award actions by the Debtors and IEP – which information is critical to providing creditors with sufficient information to vote on the Plan. It is worthy of note that not one person involved in the poor conduct by management was fired or disciplined. The very same management and Board remains in control and is proposing the Plan that benefits the Lenders, just as they supported the course of conduct that resulting in the massive liability owed to IEP.

[3] In addition to IEP's claims against the Debtors and their estates, IEP has actions pending in New York state court against certain of the Debtors' Lenders in which the trial court recently denied most of the Lenders' motions to dismiss and an action against the Debtors' equity holders, including Oaktree Capital Management L.P. and certain affiliated individuals (the equity holder defendants are collectively referred to herein as "Oaktree") that was recently dismissed by the trial court, except as to two Debtor defendants as to whom the matter was stayed, which IEP plans to appeal.

Further, IEP objects to the Disclosure Statement on the grounds that the Debtors failed to include critical information concerning potential causes of action against a wide variety of individuals and entities involved in the catastrophic decisions that led to their insolvency, which could form the basis of a recovery for unsecured creditors. The Debtors have not included this information in large part because they did not investigate it; the only investigation they conducted was whether to release pre-petition directors, officers, and shareholders. The Debtors also should explain why they chose to pay off the claims of those creditors most likely to serve on a creditors' committee, not pursue nor investigate (or provide a mechanism for same) clear preferential payments or claims under 11 U.S.C. § 329(b) despite the Debtors' fees and expenses in the arbitration (which they lost) were multiples of those of IEP and provide impermissible third party and debtor releases to parties that provided no consideration therefor.

Further, the Disclosure Statement is misleading as to the nature of these proceedings. The Debtors' Chief Restructuring Officer, Debtors' independent board members, and Oaktree's representative have each made abundantly clear, in testimony or in pre-filing documents, that they never expected anyone other than the Lenders to have a recovery (beyond a few thousand dollars of unencumbered assets) in this proceeding and that no-one is contributing new value. This is, in short, an egregiously expensive foreclosure proceeding (with the benefit of releases) for the sole benefit of the lenders, and the Disclosure Statement ought to say so.

For these, as well as other reasons detailed below, IEP objects to approval of the Disclosure Statement.

OBJECTION

I. LEGAL STANDARD

Section 1125(b) of the Bankruptcy Code requires a plan proponent to furnish creditors with "a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information" in order to solicit acceptances or rejections of a proposed chapter 11 plan. 11 U.S.C. § 1125(b). "Adequate information" is defined in the Bankruptcy Code as:

> 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 the debtor's books and records . . . that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan.

11 U.S.C. § 1125(a)(1).

Adequate disclosure is crucial to the bankruptcy process. *See, e.g., Westland Oil Dev. v. MCorp Mgmt. Sols, Inc.*, 157 B.R. 100, 102 (Bankr. S.D. Tex. 1993) (disclosure is the "pivotal" concept in reorganization cases); *Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) ("Of prime importance in the reorganization process is the principle of disclosure."); *see also Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) ("The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of 'adequate information.'*"); Galerie Des Monnaies of Geneva, Ltd. v. Deutsche Bank, A.G., N.Y. Branch (In re Galerie Des Monnaies, Ltd.)*, 55 B.R. 253, 259 (Bankr. S.D.N.Y. 1985) ("The preparing and filing of a disclosure statement is a most important step in the reorganization of a Chapter 11 debtor.").

The plan proponent bears the burden of proof regarding the adequacy of a disclosure statement once objectors have identified specific issues. *See, e.g., In re Michelson*, 141 B.R. 715, 720 (Bankr. E.D. Cal. 1992) ("[T]he plan proponent bears the ultimate risk of nonpersuasion on the question of compliance with the requirement to disclose adequate information and must bear that burden twice—once at the hearing on the disclosure statement pursuant to section 1125 and once again at confirmation pursuant to section 1129(a)(2)."); *In re Alaska Fur Gallery, Inc.*, No. A09-00196-DMD, 2011 WL 4904425, at *2 (Bankr. D. Alaska Apr. 29, 2011) ("At a disclosure statement hearing, the debtor bears the ultimate burden of persuasion.").

To be approved, a disclosure statement must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy] Code alternatives." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988). Courts determine the adequacy of information in a disclosure statement based on the facts and circumstances of each individual case. *See Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 179 B.R. 24, 29 (S.D.N.Y. 1995). Even if creditors could find additional information that transcends the disclosure statement through formal discovery, the availability of such information does not render a plan proponent's disclosure adequate. *See In re Jeppson*, 66 B.R. 269, 292, n.159 (Bankr. Utah 1986) ("[W]ith adequate disclosure creditors could independently evaluate the plan without extensive judicial involvement in the process") (citing H.R. Rep. No. 95-595, at 226 (1977), reprinted in 1990 U.S.C.C.A.N. 6185); *Official Comm. Of Unsecured Creditors v. Michelson*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) (*citing In re Braten Apparel Corp.*, 21 B.R. 239, 259-60 (Bankr. S.D.N.Y. 1982)), aff'd, 26 B.R. 1009 (S.D.N.Y. 1983), aff'd mem., 742 F.2d 1435 (2d Cir. 1983).

Here, Debtors' Disclosure Statement falls far short of this basic standard. It lacks adequate information in critical areas that are absolutely necessary for creditors to make an informed decision of whether to accept or reject the Plan.

II. THE DEBTORS DO NOT PROVIDE SUFFICIENT INFORMATION FOR CREDITORS TO MAKE AN INFORMED DECISION

a. History and Development of the Facility

The Disclosure Statement does not accurately describe the circumstances that lead to the dispute between the Debtors and IEP. For example, the Disclosure Statement states:

> During construction of the Facility, numerous disputes arose between DevCo and IEP concerning changes, added costs, delays, and inefficiencies. **On April 15, 2018, DevCo terminated the EPC Contract pursuant to and in accordance with its terms.** DevCo subsequently entered into a contract with a third-party to complete construction of the Facility on a time-and-materials basis for actual costs and expenses reasonably incurred. The Facility began commercial operations on May 31, 2018.

Disclosure Statement, page 31 of 275 (emphasis added). In fact, the Arbitration Award, as confirmed by a New York Judgment, finds explicitly that "*Footprint wrongfully terminated the EPC Contract*," a finding that demonstrates the exact opposite of what the Disclosure Statement states: That Footprint did *not* terminate the EPC Contract "*pursuant to and in accordance with its terms*." *See* Declaration of Thomas Watson ("Watson Decl."), Ex. 1 (Arbitration Award) at 47; Ex. 2 (Judgment in favor of IEP).[4]

Later in the Disclosure Statement, when discussing the IEP Arbitration, the Debtors simply state:

> Arbitration hearings began in January 2021, and on October 15, 2021 the Arbitration Panel rendered the Arbitration Award. **The Arbitration Panel found that DevCo lacked sufficient grounds to terminate the EPC Contract** and awarded IEP approximately $236.4 million, plus interest thereon.

[4] In fact, the Arbitration Award is overwhelmingly in IEP's favor on its claims that the Debtors breached their contract, subject to an offset for delays in completion that was an order of magnitude smaller than IEP's damages. IEP attaches the full Arbitration Award to correct the record regarding these misstatements and to inform all parties about what the Arbitral Tribunal actually found. A net $237 million was awarded to IEP.

Disclosure Statement, page 33 of 275 (emphasis added). In fact, among other things, for example, the Tribunal found "Footprint to be the opposite of an ideal owner," that "Footprint's decision to terminate IEP was driven by its goal of drawing on IEP's Letter of Credit to fund completion of the Project, notwithstanding that commercial operation by IEP was within sight," and that "Default termination and the [letter of credit] draw were extreme self-help measures, and when combined with the many specific and general examples of lack of cooperation, tainted Footprint's position." Watson Decl., Ex. 1 at 3. None of this is reflected in the Disclosure Statement.

Similarly, the Disclosure Statement states:

> In connection with the termination of the EPC Contract, DevCo sought to draw down the Performance LC. Before payment was made to DevCo by the issuing bank under the Performance LC, however, IEP commenced arbitration proceedings pursuant to the dispute resolution provisions of the EPC Contract. **DevCo's entitlement to draw down the Performance LC was subsequently litigated during the arbitration proceedings. Ultimately, the arbitration panel (the "Arbitration Panel") ruled that DevCo could draw down the Performance LC and, on February 20, 2019, DevCo drew on the Performance LC in the amount of approximately $140.9 million.** As required under the terms of the Depositary Agreement, such funds were deposited into an account held by DevCo at MUFG.

Disclosure Statement, page 31 of 275 (emphasis added). However, the Arbitration Award establishes that the Debtors had ***no*** right to draw the $140,881,675 Letter of Credit. Importantly, for the purposes of this proceeding, the Tribunal specifically noted that the Debtors had no right to keep the proceeds of the Letter of Credit draw. Contrary to the above statement that the Tribunal "ruled that DevCo could draw down the Performance LC," the Tribunal in fact only declined to enjoin Debtors' draw on the letter of credit because "Footprint sought the $140,881,675 with the explicit understanding that it would be a credit in IEP's favor once all of the claims advocated by each Party were heard and adjudicated by the Tribunal." Watson Decl., Ex. 1 at 66. Indeed, to procure the Tribunal's declination to enjoin, Debtors represented that permitting the draw would not result in a "windfall" to it for that precise reason. *Id.* Ultimately, the Tribunal expressly awarded the proceeds from the Letter of Credit ("LOC") to IEP and held that for this specific claim it was "irrelevant whether the draw on the LOC was wrongful or proper, or what the Tribunal's view of the LOC draw happens to be," given Debtors' representations that the funds would be "in IEP's 'column' for purposes of determining the net amount of an Award." *Id.*

The Disclosure Statement must be revised to correct these insufficient, misleading and incorrect statements.

b. Post-Award Actions by Footprint and IEP

In the Disclosure Statement, the Debtors incorrectly attempt to lay blame for the failure to reach a consensual resolution of all issues outside of a bankruptcy on IEP, stating:

> The Debtors, including the Special Committee, and the Advisors **made repeated attempts to engage IEP and its advisors** in substantive discussions regarding the terms of a potential restructuring transaction throughout January, February, and into March 2022. During this time, the Advisors also attempted to facilitate discussions among the Prepetition Secured Parties and their advisors and IEP and its advisors.
>
> Notwithstanding the Debtors' and the Advisors' **diligent efforts** over the preceding months, on March 18, 2022, IEP delivered a termination notice to the Debtors, notifying the Debtors that IEP was electing to terminate the Standstill Agreement effective March 23, 2022. Because the Forbearance Agreement and Standstill Agreement were structured to be coterminous, as a result of IEP's election, the Forbearance Agreement would also terminate on March 23, 2022.
>
> The Debtors recognized that **without any engagement or support from IEP** around a consensual restructuring framework, and with the specter of a judgment enforcement, foreclosure, or other imminent adverse action, the protection of chapter 11 would be necessary. As such, the Debtors, in consultation with the Advisors, determined that commencing the Chapter 11 Cases was in the best interests of the Debtors and all stakeholders.

Disclosure Statement, page 38 of 275 (emphasis added).

Suffice it to say, IEP strongly disagrees with these statements and the implication that it was IEP – rather than the Debtors or the Lenders – who was unwilling to engage. In the October 15, 2021 Arbitration Award, the Tribunal states, "within 30 days from the date of this Final Award

Footprint shall pay IEP the amount of US$236,404,377." Watson Decl., Ex. 1 at 76. The Debtors did not pay this amount (or even a single penny of it) as they were obligated to. Instead, the Debtors proposed a standstill agreement with IEP and, ultimately, IEP voluntarily agreeing to defer its rights to enforce the Award, entered into a Standstill Agreement. *See* Watson Decl., Ex. 3 (Standstill Agreement). Following significant, substantial and good faith efforts by IEP and only after it became apparent that no consensual resolution could be reached, IEP terminated its Standstill Agreement. IEP is reluctant to say more as this issue concerns conversations that are protected under FRE Rule 408. [5]

IEP will note that it was made abundantly clear that the Lenders were unwilling to make any meaningful reduction in their claims or provide any meaningful consideration to any non-Lender parties (except those affiliated parties receiving releases) – which severely limited any ability to resolve this matter amicably no matter how heroic IEP's efforts were. *See* Watson Decl., ¶¶ 4-5. In fact, on March 18, 2022, IEP's counsel received via email a letter from William Transier and D.J. Baker, "the independent managers of the Board of Managers of Highstar Footprint Holdings GP, LLC and Footprint Power SH DevCo GP LLC (collectively, the 'Boards'), which are the ultimate governing bodies of Footprint Power Salem Harbor Development LP (the 'Company')" that stated, in relevant part, "As you are likely aware, however, the Lenders have continually expressed an unwillingness to reduce their claims against the Company…." *Id*. In other words, with a Lenders group that refused to reduce their claims, or bring additional assets into the estate through recovery of preferential payments, excessive pre-petition fees or litigation attached to the improper actions that lead to the Arbitration Award, with Debtors that had no independent

[5] If the Debtors' point is to waive that privilege, IEP would be pleased to put the entire record before the Court, a record that demonstrates the opposite of what the Debtors contend regarding who was demanding extraneous concessions.

funding or authority, and equity that refuses to contribute funds despite being contractually obligated until the Lenders forgave such obligations (again without consideration), IEP concluded that there was nothing to be gained from avoiding the inevitable filing.

Further, while placing all apparent blame for driving the Debtors into bankruptcy on IEP, the Debtors downplay the Lenders' reaction to the entry of the Arbitration Award. For example, under "Key Events Leading to Commencement of Chapter 11 Cases", the Debtors state:

> Following the Arbitration Panel's issuance of the Arbitration Award on October 15, 2021, on October 22, 2021, the Prepetition Agent delivered a Notice of Events of Default, Acceleration, Exercise of Certain Remedies and Reservations of Rights (the "Acceleration Notice") to DevCo. In addition to asserting the occurrence and continuation of numerous Events of Defaults under the Credit Agreement, pursuant to the Acceleration Notice, the Prepetition Agent declared all loans outstanding under the Credit Agreement to be due and payable in full, together with accrued interest and all fees and other obligations of DevCo under the Credit Agreement. The Acceleration Notice also provided that the Prepetition Agent had been directed to exercise certain rights and remedies pursuant to the Intercreditor Agreement and Depositary Agreement.
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> **On the same date, the Prepetition Agent transferred approximately $89.5 million of cash from DevCo's accounts held at MUFG and applied approximately $78.7 million of such amount to pay down outstanding principal on the Term Loans and approximately $10.7 million to pay down accrued interest and fees and to cash collateralize a portion of the Gas Lateral Letter of Credit. Following this cash sweep (the "October Sweep"), DevCo was left with approximately $27.5 million in available cash.**

Disclosure Statement at 34-35 of 275 (emphasis added).

In other words, the Lenders accelerated the $300 million credit agreement and swept the Debtors' available cash (but purposefully left the Debtors with enough cash to continue all its operations pending the court supervised turnover of the assets to the Lenders via the Plan), while simultaneously making clear their position that they were unwilling to reduce their claims in any meaningful manner, thereby placing the Debtors in a position where bankruptcy was almost inevitable. Yet the Debtors continue to assert the position that it was IEP's lack of "engagement or support" that was the primary driver of the Debtor's bankruptcy filing, failing to adequately describe the Lenders' actions and the impact they had on the Debtors' ability to either continue to operate, to obtain replacement financing, and/or to negotiate with IEP in a meaningful way. Similarly, the Debtors fail to disclose that the major determinants or the Plant's value, gas constraints, location and declining capacity payments had nothing to do with IEP.

The Disclosure Statement must be corrected to disclose accurately the Lenders' role in the circumstances that led to the Chapter 11 cases, and to correct the misstatements blaming the bankruptcy filing on IEP.

III. THE DEBTORS DO NOT PROVIDE ADEQUATE INFORMATION REGARDING POTENTIAL CAUSES OF ACTION

a. The Discussion of Potential Causes of Action is Completely Inadequate

The Disclosure Statement refers to "Potential Causes of Action", noting, among other things, that a Special Committee was appointed and given:

> the full and exclusive power and authority of the Board to: (1) oversee, and engage professionals to undertake, an independent investigation of any potential claims and causes of action the Debtors may have against their insiders (collectively, the "Potential Causes of Action"); and (2) determine what actions, if any, should be taken on account of any such Potential Causes of Action.

Disclosure Statement page 35 of 275. However, the discussion of the Special Committee Investigation is only ***two paragraphs***, includes no discussion of the actual claims investigated, and discloses none of the conclusions reached. Disclosure Statement at page 36; *see also* Disclosure Statement at page 158 (defining "Investigation" as "the investigation into certain potential claims and Causes of Action held by the Debtors' Estates conducted by the Special Committee and its counsel."). Further, the Plan provides for no mechanism to pursue any such claims or causes of action that might exist. This failure to provide any information about the Investigation and the

Debtors' intent not to pursue any claims that might exist clearly fails the requirements of section 1125.

Importantly, this discussion does not include what was not investigated – which is basically anything other than the purported liens of the Lenders or claims against directors or officers.

The Debtors must provide sufficient information regarding the independence of the members of the Special Committee,[6] the claims purportedly investigated, the claims not investigated at all,[7] the potential causes of action including avoidance actions, and the outcome of the Special Committee's "investigation" in order for all parties – including IEP – to have sufficient information to vote on a plan of reorganization. This is especially critical where, as here, the Debtors are granting broad releases to various parties, including the Lenders relating to the validity of their liens and collateral, prepetition behavior and almost every conceivable interaction and where plan discussions never contemplated a mechanism for claim investigation or prosecution post-confirmation, a committee was engineered not to be appointed.[8]

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[6] For example, their "independence" is not precisely as implied. Mr. Transier is a board member of two other companies whose ultimate majority ownership is the same as that of the Debtors. This information was not disclosed to at least one of the non-independent board members (Mr. Schapiro). Similarly, Mr. Baker's "investigation" into the arbitration and the fees incurred included speaking to the counsel who lost the Arbitration, who happens to have been Mr. Baker's former associate and someone who is close to Mr. Baker, and then relying on what that person said.

[7] For example, in Rule 2004 Examinations, described further *infra*, of Mr. Baker and Mr. Transier, it is apparent that no real investigation was performed of many potential claims.

[8] As written, and without clarification, the Plan's releases, exculpation and limitation of liability provisions can be interpreted to include non-consensual third-party releases that may not comply with provisions of the Bankruptcy Code. Concerningly, even some of the Debtors' Board members were unaware of these provisions or believed them not to extend as far as their text appears to go, suggesting that the Plan may be the Debtors' in name only. IEP plans to object to the scope of these provisions at the appropriate time.

b. The Disclosure Statement Must Include a Discussion of the 2004 Examinations

Given the utter insufficiency of the Investigation and recognizing that litigation claims were likely to be the only means of recovery for unsecured creditors, IEP determined that in order for a proper investigation to be done, IEP would have to do one itself. IEP therefore brought a motion seeking this Court's approval to examine the Debtors, their officers and directors, and Oaktree for potential causes of action that might result in a recovery to the Debtors' estate – and to unsecured creditors. The parties ultimately resolved the motion and established a schedule for examinations and production of documents. Simultaneously, IEP reached an agreement with certain of the Lenders who agreed to voluntary examinations and document productions. *See* Docket No. 175, 176, & 227. These examinations are collectively referred to as the "2004 Examinations".

In connection with the 2004 Examinations, IEP has sought further information regarding the Debtors' own investigation into prepetition claims, viable claims that should be brought against insiders or third parties, and examined whether the proposed releases and other stipulations in the Cash Collateral Order are proper in advance of the Challenge Deadline. As of the date of the filing of this Objection, the 2004 Examinations are ongoing and IEP is continuing to review the documents produced.[9] Without going into detail, based on the 2004 Examinations to date, however, IEP believes that there may be viable claims against many of these parties that may result in recoveries to other creditors. IEP recognizes, however, that the Debtors are unwilling and unable under the Plan and the terms of the RSA to bring such claims on their own and therefore IEP, or another party, will have to do so on behalf of the Estate, or alternatively object to confirmation of

[9] By stipulation dated June 20, 2022, the parties agreed to extend the Challenge Deadline through June 29, 2022 at 5:00 pm.

a Plan that does not provide for an Estate representative to pursue these claims on behalf of creditors.

The existence of this ongoing investigation is critical to creditors determining how to vote in connection with the Plan – especially in light of the voluntary (and third party) releases that the Debtors seek in connection with the Plan, all without a scintilla of consideration.[10] Therefore, IEP proposes that the Debtors add the following discussion:

> On May 16, 2022, IEP filed a motion under Bankruptcy Rule 2004 to examine certain parties, including the Debtors, their officers and directors, and their equity holders to investigate potential litigation claims against these parties and third parties (the "Potential Claims"). The parties ultimately reached an agreement regarding the proposed examinations, which were held between June 10, 2022 and June 23, 2022 *[or whatever the final date ultimately is]*, and the production of documents, which remains ongoing. At this time, the viability of any Potential Claims is uncertain and may depend, among other things, upon the availability of litigation financing or contingency fee arrangements. However, any recoveries on account of such claims may increase the funds to the Estate and provide for recoveries for unsecured creditors.

At a minimum, the Disclosure Statement must be updated to include a discussion of the motion filed by IEP and ongoing examination of the various parties, as well as noting the possibility that IEP or another party will bring a Challenge against the Lenders. In order to provide voting parties with adequate information, the Debtors must provide the foregoing, as well as a discussion of the impact the success of such an action would have on these Chapter 11 cases and on distributions to non-Lender creditors.

c. The Debtors Misstate the Avoidability of IEP's Liens

The Disclosure Statement fails to account for, and disclose the impact, of IEP having a valid secured claim based both on a judicial lien and a mechanic's lien. The Debtors state:

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[10] Of course, the credibility of the Debtors' disclosures and representations is material to whether parties voting on the Plan should trust the information provided.

> The IEP Lien recordation constitutes an involuntary transfer of an interest in property of the Debtors within ninety (90) days prior to the Petition Date, which the Debtors believe may be avoidable as a preference under section 547(b) of the Bankruptcy Code. **Accordingly, for that reason, and alternatively, because the IEP Claims are entirely undersecured, the IEP Claims are classified within Class 4 (General Unsecured Claims) under the Plan.** The Debtors will seek to engage with IEP on a consensual basis regarding the avoidability of the IEP Lien and the classification of the IEP Claims under the Plan or otherwise pursue alternatives, including, but not limited to, the commencement of an adversary proceeding against IEP to avoid the IEP Lien as a preferential transfer pursuant to section 547(b) of the Bankruptcy Code. The Plan also expressly reserves the Debtors' rights under section 502(d) of the Bankruptcy Code with respect to any distributions to IEP.

Disclosure Statement page 39 of 275.[11] The foregoing assumes two factors – first that IEP's liens will be avoided and two that IEP is entirely undersecured.

As a preliminary matter, IEP strongly disputes the implication that Defendant waited to obtain and file the writ of execution until just hours prior to the commencement of the Chapter 11 Case. In fact, as the Debtors recognize elsewhere in the Disclosure Statement (p. 13 of 275), on April 3, 2018, IEP recorded a Notice of Contract with the registry of deeds in Southern Essex County in Massachusetts asserting a mechanic's lien (the "Mechanic's Lien"). Following issuance of the Arbitration Award, IEP filed an amended complaint, reducing the amount of the Mechanic's Lien to $79,479,709.00, consistent with the findings in the Arbitration Award. Pursuant to applicable law. The recorded lien relates back to the date of the filing of the Notice of Contract – *i.e.* April 3, 2018 – well outside of the preference period. In other words, the Disclosure Statement fails to disclose that, even if IEP's judicial lien is avoided, IEP continues to hold a perfected and recorded mechanic's lien. Furthermore, as noted above, IEP agreed to delay obtaining and filing

[11] On May 17, 2022, the Debtors commenced an adversary proceeding against IEP seeking, among other things, to avoid the IEP Lien. Adv. No. 22-50347 (the "Adversary"). The Disclosure Statement should be updated to include a discussion of the Adversary.

the writ of execution in connection with the Standstill Agreement in an effort to attempt to resolve some of the issues among the parties.

Rather than acknowledge these facts, however, the Debtors brush aside IEP's Mechanic's Lien based on the assertion that IEP is undersecured and must be treated as a general, unsecured creditor. The Debtors fail, however, to provide the basis for this assertion or to disclose the consequences of this decision if they are wrong and have incorrectly classified IEP's claims for purposes of voting on the Plan. Creditors are entitled to this information in determining whether to vote for or against the Plan.

IV. THE DEBTORS FAIL TO PROVIDE ADEQUATE INFORMATION REGARDING POLLUTION OR CARBON CREDITS

The Disclosure Statement fails to mention any pollution or carbon credits that the Debtors may hold. These credits may be a valuable Estate asset. The Disclosure Statement must be amended to include a discussion of what credits the Debtors hold, whether there is an option to monetize those credits, and the process for doing so. In addition, the Disclosure Statement should clarify whether these credits are part of the Secured Lenders' collateral or are available to pay unsecured creditors.

V. THE DEBTORS DO NOT PROVIDE ADEQUATE INFORMATION REGARDING EQUITY CONTRIBUTIONS

In the Disclosure Statement, the Debtors mention "equity contribution" twice. The Debtors state:

> Additionally, in connection with the Credit Facility, DevCo is also party to that certain Completion Equity Contribution Agreement (as amended, supplemented, restated, or otherwise modified from time to time, the "<u>CECA</u>"), dated as of November 30, 2018, by and among DevCo, OCM-HighStar Footprint Aggregator LLC ("<u>OCM-Aggregator</u>"), and the Prepetition Agent. OCM-Aggregator is a non-Debtor affiliate that holds 100% of the membership interests in TopCo GP and 100% of the Class A limited partnership interests in TopCo. The equity interests in OCM-Aggregator are indirectly wholly-owned by certain funds that are managed

> and/or advised by Oaktree Capital Management L.P. Pursuant to the CECA, OCM-Aggregator agreed to provide up to approximately $23 million in equity contributions to DevCo, subject to certain conditions as set forth in the CECA.

Disclosure Statement, page 30 of 275. Later, the Debtors state:

> Also on October 22, 2021, the Prepetition Agent delivered a Notice of Acceleration Event to OCM-Aggregator in connection with the CECA, exercising rights afforded to the Prepetition Agent under the Financing Documents (as defined in the Credit Agreement) directing OCM-Aggregator to fund the approximately $23 million of equity contributions contemplated under the CECA for the sole purpose of payment of the Secured Obligations.

Disclosure Statement, page 34 of 275. At no point in the Disclosure Statement do the Debtors provide any information about the basis for the demand for the funds, whether the funds were provided to the Debtors, and how the funds were used. Further, there is no discussion about additional efforts by any party to obtain such equity contributions, especially given that no party other than the Lenders will receive payment under the Plan.

The Disclosure Statement must be amended to provide this information.

VI. **THE DEBTORS FAIL TO PROVIDE ADEQUATE INFORMATION REGARDING THE TRANSACTION ELECTION**

Under the Plan as proposed, the Debtors were moving forward on two tracks – either a sale to a currently unknown purchaser or a stand-alone restructuring – and proposed to inform creditors which path the Debtors "elect" in the Plan Supplement. According to the Disclosure Statement, "[t]he Debtors will make the Transaction Election in connection with filing the initial Plan Supplement, which the Debtors propose shall be no later than ten (10) days prior to the Voting Deadline." Disclosure Statement at page 20 of 275.

However, on June 13, 2022, the Debtors filed a notice of cancellation of auction (the "Cancellation Notice"). Docket No. 242. Other than the barebones Cancellation Notice, the Debtors have failed to provide any additional information since that time explaining the basis for the cancellation, whether efforts to sell the Debtors' assets remain ongoing, or whether the Debtors are electing to move forward with the Plan opting for a stand-alone restructuring. Creditors simply cannot be expected to vote on a Plan without information regarding which path will be taken and, more importantly, why a sale was abandoned.

At a minimum, if the Debtors are electing to move forward with a turnover of all material assets to the Lenders, as appears to be the case, the Debtors must provide information regarding the sales process, any bids received in connection with a possible sale, and an explanation of why those bids were not elected. In either case, creditors must be given sufficient information to understand the choice that the Lenders made. Without this information, creditors simply do not have adequate information to vote on the Plan.

RESERVATION OF RIGHTS

IEP's examinations of the Debtors, equity, and the Lenders, as well as IEP's review of the related document production, remained ongoing. In light of the Debtors' refusal to extend the deadline for IEP to file this Objection, IEP expressly reserves all rights, claims, arguments, defenses, and remedies with respect to the adequacy of the Disclosure Statement, confirmation of the Plan, or any other issue in these Chapter 11 cases, and to supplement, modify, and amend this Objection, to seek discovery, and to raise additional objections in writing or orally at the final hearing on the Motion.

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CONCLUSION

For the foregoing reasons, IEP requests that the Court deny approval of the Disclosure Statement unless it is appropriately amended and subject to a further approval hearing, and grant such other and further relief as the Court deems appropriate.

Dated: June 23, 2022
Wilmington, Delaware

WHITEFORD, TAYLOR & PRESTON LLC

/s/ Richard W. Riley
Richard W. Riley (No. 4052)
600 North King Street, Suite 300
Wilmington, Delaware 19801
Telephone: (302) 357-3265
Email: rriley@wtplaw.com

-and-

STEPTOE & JOHNSON LLP
Jeffrey M. Reisner, Esq. (admitted *pro hac vice*)
Thomas Watson, Esq. (admitted *pro hac vice)*
633 West Fifth Street, Suite 1900
Los Angeles, California 90071
Telephone: (213) 439-9417
Email: jreisner@steptoe.com
twatson@steptoe.com

Counsel for Iberdrola Energy Projects Inc.

CERTIFICATE OF SERVICE

I, Richard W. Riley, do hereby certify that on June 23, 2022, I caused a copy of the foregoing ***Objection by Creditor Iberdrola Energy Projects Inc. to (I) Disclosure Statement for Joint Chapter 11 Plan of Salem Harbor Power Development LP and Its Debtor Affiliates [Docket No. 129] and (II) Debtors' Motion for Entry of an Order (A) Approving the Adequacy of the Disclosure Statement; (B) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Joint Chapter 11 Plan; (C) Approving the Forms of Ballots and Notices in Connection Therewith; (D) Scheduling Certain Dates with Respect Thereto; and (E) Granting Related Relief [Docket No. 130]*** to be served on the parties on the attached service list by electronic mail, or in the manner indicated.

/s/ Richard W. Riley
Richard W. Riley (No. 4052)

Salem Harbor Power Development LP
c/o Tateswood Energy Company, LLC
480 Wildwood Forest Drive, Suite #475
Spring, TX 77380
Attn: John R. Castellano, CRO
First-Class Mail

Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
Attn.: Brian S. Hermann
John T. Weber
Alice Nofzinger
Email: bhermann@paulweiss.com
jweber@paulweiss.com
anofzinger@paulweiss.com

Young Conaway Stargatt & Taylor, LLP
1000 North King Street
Wilmington, DE 19801
Attn.: Pauline K. Morgan
Andrew L. Magaziner
Email: pmorgan@ycst.com
amagaziner@ycst.com

Mayer Brown LLP
1221 Avenue of the Americas
New York, NY 10020
Attn.: Brian Trust
Joaquin M. C De Baca
Email: btrust@mayerbrown.com
jcdebaca@mayerbrown.com

Potter Anderson & Corroon LLP
1313 North Market Street
Wilmington, DE 19801
Attn.: Christopher M. Samis
L. Katherine Good
Email: csamis@potteranderson.com
kgood@potteranderson.com

Office of the United States Trustee
for the District of Delaware
844 King Street, Suite 2207
Wilmington, DE 19801
Attn.: Joseph Cudia
Email: joseph.cudia@usdoj.gov