

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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Preliminary Statement

1. In the Supplemental Prime Clerk Declaration,³ Prime Clerk LLC (“Prime Clerk”) revised its prior Preliminary Voting Certification with respect to the original list of ballots excluded from its vote tabulation. The revision changed the stated reason for excluding certain Master Ballots that had rejected the Plan and, in doing so, disclosed an error in the Preliminary Voting Certification that affected *over 18,000 votes that were originally cast to reject the Plan*: Prime Clerk changed the stated reason for the exclusion of those certain (rejecting) Master Ballots from “Master Ballot superseded by later received valid master ballot from *different law firm* with *consistent vote* on account of the same holder” to “Master Ballot superseded by latest-dated valid Master Ballot from the *same law firm* with **inconsistent vote** on account of the same holder.” Supplemental Prime Clerk Declaration ¶ 16 (emphasis added). This error in the Preliminary Voting Certification disguised the fact that over 18,000 votes to reject the Plan had been changed to votes to accept the Plan after the Voting Deadline, without the notice, hearing, showing of “cause,” or court approval required by Rule 3018(a).

2. Remarkably, this “revision” in the Supplemental Prime Clerk Declaration corresponds to an issue raised by Movants in Movants’ Motion to Extend Discovery Deadlines and Permit Discovery Relating to Solicitation and Voting with Respect to the Ninth Amended Joint Chapter 11 Plan [Docket No. 3425] (the “Discovery Motion”):⁴

³ On April 7, 2021, the Debtors filed the Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Preliminary Tabulation of Ballots Cast on the Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc., and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code [Docket No. 3334] (the “Preliminary Voting Certification” or “PVC”). On May 7, 2021, the Debtors filed the (Redacted) Supplemental Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Preliminary Tabulation of Ballots Cast on the Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code [Docket No. 3543] (the “Supplemental Prime Clerk Declaration”).

⁴ Capitalized terms used and not otherwise defined herein have the meaning ascribed thereto in the Discovery Motion.

According to the Preliminary Voting Certification, approximately 15,000 votes cast by Bevan to reject the Plan were excluded from the vote count for a reason which, as described below, is mathematically implausible. In fact, Arnold & Itkin has reason to believe that Bevan may have been responsible for a similar number of the post-Voting Deadline votes to accept the Plan. If that is the case, then without Bevan's accepting (but apparently previously rejecting) votes, the Plan vote would have fallen short of the 75% threshold required pursuant to section 524(g)(2)(B)(IV)(bb) of the Bankruptcy Code.

Discovery Motion ¶ 7 (citation omitted).

3. In the Discovery Motion, the Movants pointed out the mathematical improbability that Bevan's Master Ballot identified on Exhibit C to the PVC (purporting to cast more than 15,000 votes to reject the Plan) was "superseded by later received valid master ballot from *different law firm* with *consistent vote* on account of the same holder" and expressed concern that the votes in the Bevan Master Ballot had been changed from rejecting votes to accepting votes without meeting the strictures of Rule 3018. Discovery Motion ¶ 16.

4. Movants' concern was well-founded: With the filing of the Supplemental Prime Clerk Declaration, it is now clear that this is precisely what happened and that the votes of Bevan and the other Late Vote Change Parties were changed from votes to reject the Plan to votes to accept the Plan without meeting the standard of Rule 3018 and without even filing a motion seeking such approval that would have disclosed, and permitted scrutiny of, the reason for the massive vote change. As a result, Movants submit that the changed votes of the Late Vote Change Parties should be disregarded and the prior Master Ballots of such Late Vote Change Parties should be tabulated for purposes of determining the results of the vote on the Plan.

Jurisdiction and Venue

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the*

District of Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Movants confirm their consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

6. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The statutory bases for the relief requested herein is Rule 3018 and section 105(a) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”).

Background

8. On February 13, 2019 (the “Petition Date”), the Debtors filed voluntary petitions in this Court commencing cases for relief under chapter 11 of the Bankruptcy Code.

9. On January 28, 2021, the Plan Proponents filed the *Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (the “Plan”) [Docket No. 2864].

10. On January 27, 2021, the Court entered the Solicitation Procedures Order. Exhibit 1 to the Solicitation Procedures Order set forth the Solicitation Procedures (the “Solicitation Procedures”). As part of the Solicitation Procedures, Debtors, with the consent of the Plan Proponents, could extend the Voting Deadline with respect to a Ballot. Solicitation Procedures Section VI 1.b. The Solicitation Agent also had the discretion to contact voters to cure defects in the Ballots (*Id.* at VI 2.b.). The Solicitation Procedures did not explain or disclose that these provisions would empower the Plan Proponents to extend the Voting Deadline for parties that

had already submitted Ballots so that such parties could change their votes without complying with Rule 3018 and disclosing the reason for the vote change.

11. Section VI(2)(h) of the Solicitation Procedures provides that “if multiple Ballots are received from the same attorney or agent with respect to the same Claim (but not from the holder thereof), the latest-dated otherwise valid Ballot that is received before the Voting Deadline (or such later date as agreed by the Debtors with the consent of the Plan Proponents, with such consent not to be unreasonably withheld) will be the Ballot that is counted as a vote to accept or reject the Plan.” Supplemental Prime Clerk Declaration FN 10.

12. Although the above language the Solicitation Procedures Order purportedly provides for the tabulation of such “superseding” Master Ballots; but it does not address the issue of whether those votes may be tabulated to the extent that they represent a change or withdrawal of such votes made without complying with the requirements of Rule 3018 and without Bankruptcy Court approval upon a showing of cause. Indeed, while Section VI(2)(f) of the Solicitation Procedures provides a rebuttable presumption that a change in vote in a superseding Master Ballot is for “cause” pursuant to Rule 3018, that presumption does not purport to eliminate Rule 3018’s requirement that court approval for the vote change be sought, and the reason for the vote change explained. Moreover, this rebuttable presumption of cause applies only to votes cast before the original Voting Deadline:

There will be a rebuttable presumption that any claimant who submits a properly completed superseding Ballot or withdrawal of a Ballot **on or before the Voting Deadline** has sufficient cause, within the meaning of Bankruptcy Rule 3018(a), to change or withdraw such claimant’s acceptance or rejection of the Plan.

Solicitation Procedures Order Section VI(2)(f) (emphasis added).

13. On April 7, 2021, Debtors filed the Preliminary Voting Certification indicating that the Debtors had permitted 21,781 votes submitted after the Voting Deadline, including 18,231 from the Late Vote Change Parties. PVC Exhibit C.

14. The Master Ballots submitted after the Voting Deadline by the Late Vote Change Parties all voted to accept the Plan. PVC Exhibit C.⁵ Additionally, Exhibit C to the PVC indicated that Master Ballots representing 18,231 votes to reject the Plan cast by the Late Vote Change Parties were excluded because they were superseded by *consistent* votes cast by later Master Ballots from *a different law firm* on behalf of the same holder. This (mis)description masked the fact that over 18,000 votes to reject the Plan had been changed, without complying with Bankruptcy Rule 3018 and its requirement that the reason for the vote change be exposed to the light of day and Court review.

15. As now corrected, the description of the reason for excluding the earlier Master Ballots of the Late Vote Change Parties makes clear that the post-Voting Deadline votes of the Late Vote Change Parties were actually changes of their earlier, original votes to reject the Plan submitted prior to the Voting Deadline. If those earlier Master Ballots were tabulated as originally submitted prior to the Voting Deadline, Class 4 would have voted to reject the Plan.⁶

Relief Requested

16. Movants respectfully request entry of the proposed Order directing that the vote changes of the Late Vote Change Parties submitted after the Voting Deadline be disregarded, as

⁵ Based on the change described in the Supplemental Prime Clerk Declaration (¶ 16) that the excluded votes of the Late Vote Change Parties were superseded by “inconsistent” votes of the “same” law firms, it follows that, to the extent the votes of the Late Vote Change Parties that were superseded are listed on PVC Exhibit C as votes to “reject” the Plan, the inconsistent “superseding” votes from the same law firms must be votes to “accept” the Plan.

⁶ If the Master Ballots of the Late Vote Change Parties rejecting the Plan were tabulated instead of the changed Master Ballots submitted after the Voting Deadline, then the results of the vote tabulation would be 56.49% (44,318) accepting and 43.50% (34,131) rejecting. If the changed Master Ballots were not included in the tabulation, then the results of the vote tabulation would be 73.60% (44,318) accepting and 26.40% (15,900) rejecting.

there has been no showing of cause pursuant to Rule 3018 for the changing of the votes of the Late Vote Change Parties, and the earlier Master Ballots of the Late Vote Change Parties rejecting the Plan should be included in the vote tabulation.

Basis for Relief

17. Rule 3018(a) provides that “[f]or cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection.” The Rule contains no provision for waiving or modifying this requirement. In this case, the Late Vote Change Parties changed their votes from rejecting votes to accepting votes without notice and hearing, without a showing of cause, and without Court approval.

18. The requirement that the Court must review any vote change is to “ensure that the change is not improperly motivated.” *In re MPM Silicones, LLC*, No. 14-22503-rdd, 2014 Bankr. LEXIS 4062, *5 (Bankr. S.D.N.Y. Sep. 17, 2014); *see also In re Mcorp Fin., Inc.*, 137 B.R. 237, 238 (Bankr. S.D. Tex. 1992) (denying unsecured creditor's motion to change vote rejecting plan after creditor reached agreement with debtor regarding treatment of his claim where “the timing of the change [was] highly suspect, and the evidence [did] not overcome the possibility of improper motivation”). Changing a vote is not a matter of right—court approval is required to avoid the possibility that an entity will switch its vote on the basis of consideration or promises outside a plan. *Id.*

19. “Cause is not defined in Rule 3018 and is left to the court to determine in the exercise of its discretion in the context of the case.” *MPM Silicone Bankr.* LEXIS 4062, *5. “Cause” under Rule 3018(a) “require[s] something more than a mere change of heart,” and should not be permitted where it “did the [confirmation] process violence.” *Beal Bank USA v. Windmill Durango Office, LLC (In re Windmill Durango Office, LLC)*, 473 B.R. 762, 777 (9th

Cir. 2012) (affirming bankruptcy court and noting that bankruptcy court had made such a finding). A creditor has the burden of proof to establish that the requested change was not improperly motivated. *Id.*

20. Here, while the Solicitation Procedures provide a rebuttable presumption of cause for votes changed prior to the Voting Deadline, the Solicitation Procedures do not provide the same rebuttable presumption under Rule 3018 for votes submitted after the Voting Deadline even if the Debtors and Plan Proponents permit such votes to be submitted after the Voting Deadline.

21. This distinction is important. Even if it is permissible for a solicitation procedures order to include such a rebuttable presumption under Rule 3018, that presumption does not excuse compliance with Rule 3018 altogether. If a presumption is “rebuttable,” then there must be some procedure to “rebut” it. That procedure is the filing of a Rule 3018 vote change motion. Such “rebuttable presumption” language in solicitation procedures cannot be read or permitted to circumvent the plain language of Rule 3018 and allow the reason for the vote change to be shrouded in secrecy—especially in a case such as this one, where over **18,000** votes to reject the Plan were changed *en masse* after the Voting Deadline, and the vote change led to the difference between acceptance and rejection of the Plan. Moreover, in light of the fact that the votes in question were cast by presumably sophisticated law firms who had almost two months between the transmittal of the solicitation packages and the Voting Deadline to make their decision and cast their original votes to reject the Plan, and presumably gave the matter careful thought before doing so, it is fair to inquire into the motivation for, and the techniques for persuasion used to secure, their post-Voting Deadline about-face.

22. To read the Solicitation Procedures otherwise would enable a debtor to use the fine print of a solicitation procedures order to end-run Rule 3018. Such an approach would effectively enable debtors to eviscerate the vote change requirements of Rule 3018(a), and make use of Rule 3018 selectively and strategically when it suits a debtor to do so, i.e., when a party wishes to change a vote to accept a plan to a vote to reject the plan, but not vice versa.

23. Nowhere in their motion to approve the Solicitation Procedures did the Debtors address the Rule 3018 issue with respect to changing votes. The Debtors did not give reasonable notice to parties in interest or the Bankruptcy Court that the Debtors were setting up procedures, *in direct contravention of Rule 3018*, whereby they could abuse their power to accept Master Ballots after the Voting Deadline to “persuade” parties to change their votes after the Voting Deadline, without adhering to the requirements of Rule 3018 and the required showing of cause and disclosure of reasons and motivation for the change of such votes. The Debtors and the other Plan Proponents should not be able to argue they can do so now.

24. The fairness and integrity of the voting process are vital in connection with the confirmation of a plan of reorganization and should be a critical part of the good faith analysis. Movants submit that under the circumstances of this case, the Court should direct that Prime Clerk and the Debtors disregard the changed votes of the Late Vote Change Parties for non-compliance with Rule 3018 and their failure to disclose the reason and motivation for the vote changes after the Voting Deadline. Prime Clerk should also be directed to include the original Master Ballots of the Late Vote Change Parties that were submitted prior to the Voting Deadline in the vote tabulation.

Notice

25. Notice of this Motion shall be given by email or overnight mail to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the District of Delaware; (b) the Debtors; (c) the Official Committee of Tort Claimants; (d) the Future Claimants' Representative; (e) Prime Clerk; (f) the Late Vote Change Parties; (g) all parties who have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. Arnold & Itkin submits that, in light of the nature of the relief requested, no other or further notice need be given.

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WHEREFORE, Arnold & Itkin respectfully requests entry of the Order, granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Dated: June 8, 2021

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Laura Davis Jones

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Counsel to the Movants

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

IMERYS TALC AMERICA, INC., *et al.*,¹

Debtors.

)
) Chapter 11
)

) Case No. 19-10289 (LSS)
)

) Jointly Administered
)

) **Hearing Date: June 22, 2021 at 10:00 a.m. (ET)**
)

) **Objection Deadline: June 15, 2021 at 4:00 p.m. (ET)**
)

**NOTICE OF MOTION OF HOLDERS OF TALC PERSONAL INJURY CLAIMS
REPRESENTED BY ARNOLD & ITKIN LLP TO DISREGARD CERTAIN VOTE
CHANGES MADE WITHOUT COMPLYING WITH BANKRUPTCY RULE 3018,
AND THE REQUIRED SHOWING OF CAUSE, IN CONNECTION WITH THE
VOTING ON THE NINTH AMENDED JOINT CHAPTER 11 PLAN OF
REORGANIZATION OF IMERYS TALC AMERICA, INC. AND ITS DEBTOR
AFFILIATES UNDER CHAPTER 11 OF THE BANKRUPTCY CODE**

PLEASE TAKE NOTICE that on June 8, 2021, Arnold & Itkin LLP, on behalf of more than seven thousand holders of Talc Personal Injury Claims (the “Movants”), filed the *Motion of Holders of Talc Personal Injury Claims Represented by Arnold & Itkin LLP to Disregard Certain Vote Changes Made Without Complying With Bankruptcy Rule 3018, and the Required Showing of Cause, In Connection With the Voting on the Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* (the “Motion”), with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, Wilmington, Delaware 19801 (the “Bankruptcy Court”). A copy of the Motion is attached hereto.

PLEASE TAKE FURTHER NOTICE that any response or objection to the

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Imerys Talc America, Inc. (6358), Imerys Talc Vermont, Inc. (9050), and Imerys Talc Canada Inc. (6748). The Debtors’ address is 100 Mansell Court East, Suite 300, Roswell, Georgia 30076.

relief sought in the Motion must be filed with the Bankruptcy Court on or before **June 15, 2021 at 4:00 p.m. prevailing Eastern Time** (the “Objection Deadline”).

PLEASE TAKE FURTHER NOTICE that at the same time, you must also serve a copy of the response or objection upon the undersigned counsel on, or prior to, the Objection Deadline.

PLEASE TAKE FURTHER NOTICE THAT IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

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PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE RELIEF SOUGHT IN THE MOTION WILL BE VIA ZOOM VIDEOCONFERENCE HELD ON JUNE 22, 2021 AT 10:00 A.M. PREVAILING EASTERN TIME BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN, UNITED STATES BANKRUPTCY JUDGE, AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, SIXTH FLOOR, COURTROOM NO. 2, WILMINGTON, DELAWARE 19801.

Dated: June 8, 2021

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Laura Davis Jones

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Counsel to the Movants

EXHIBIT A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
)	
IMERYYS TALC AMERICA, INC., <i>et al.</i> , ¹)	Case No. 19-10289 (LSS)
)	
)	
Debtors.)	Jointly Administered
)	
)	

**ORDER GRANTING MOTION OF HOLDERS OF TALC PERSONAL INJURY
CLAIMS REPRESENTED BY ARNOLD & ITKIN LLP TO DISREGARD CERTAIN
VOTE CHANGES MADE WITHOUT COMPLYING WITH BANKRUPTCY RULE
3018, AND THE REQUIRED SHOWING OF CAUSE, IN CONNECTION WITH THE
VOTING ON THE NINTH AMENDED JOINT CHAPTER 11 PLAN OF
REORGANIZATION OF IMERYYS TALC AMERICA, INC. AND ITS DEBTOR
AFFILIATES UNDER CHAPTER 11 OF THE BANKRUPTCY CODE**

Upon consideration of the *Motion of Holders of Talc Personal Injury Claims Represented by Arnold & Itkin LLP to Disregard Certain Vote Changes Made Without Complying with Bankruptcy Rule 3018 and the Required Showing of Cause In Connection with the Voting on the Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* (the “Motion”);² and the Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having found that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the Movants provided appropriate notice of the Motion and the opportunity for a hearing on the Motion under the circumstances;

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Imerys Talc America, Inc. (6358), Imerys Talc Vermont, Inc. (9050), and Imerys Talc Canada Inc. (6748). The Debtors’ address is 100 Mansell Court East, Suite 300, Roswell, Georgia 30076.

² Capitalized terms not otherwise defined herein shall have the meaning given to them in the Motion.

and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing, if any, before the Court (the “Hearing”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Master Ballots submitted by the Late Vote Change Parties that changed their votes after the Voting Deadline shall be disregarded and not included in the tabulation of votes with respect to the Plan.
3. Prime Clerk shall include the original Master Ballots of the Late Vote Change Parties in the tabulation of votes with respect to the Plan.