Exhibit 11

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

In re:	)	
	)	
MARITIME	)	**Case No. 11-13463-DWH**
COMMUNICATIONS/LAND	)	
MOBILE, LLC,	)	**Chapter 11**
	)	
Debtor,	)	
	)	

UNITED STATES' OBJECTION TO DEBTOR'S FIRST AMENDED PLAN OF REORGANIZATION

The United States, on behalf of the Federal Communications Commission ("FCC"), respectfully submits this objection to the First Amended Plan of Reorganization ("Plan") proposed by Maritime Communications/Land Mobile LLC ("Maritime" or "the Debtor"). Docket No. 669. The Plan does not comply with the Bankruptcy Code because it provides for a discharge even though it is a liquidating plan, in violation of 11 U.S.C. § 1141(d)(3). The Plan further violates the Bankruptcy Code by excluding any distribution for debts awarded as penalties, a discrimination with no basis in the Code. The Debtor has also failed to establish that the Plan is feasible.

BACKGROUND

1. Maritime holds a number of Licenses granted by the FCC authorizing use of wireless spectrum. On April 19, 2011, the FCC released an Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing that commenced a proceeding to determine, among other issues, whether Maritime is qualified to be and remain a Commission licensee, whether Maritime violated FCC rules and regulations, whether any or all of Maritime's Licenses should be revoked and/or automatically terminated by operation of law, whether Maritime and its principals should be allowed to participate in future spectrum auctions, and whether Maritime must repay to the U.S. Treasury spectrum auction bidding credits granted by the FCC and pay forfeitures for any

violations of the Communications Act and the FCC's implementing regulations. 76 Fed. Reg. 30154 (May 24, 2011). Specifically, the FCC's Order to Show Cause and Hearing Designation Order stated: "based on the totality of the evidence, there are substantial and material questions of fact as to whether Maritime: (i) violated the designated entity rules and received a credit on its obligations to the United States Treasury of approximately $2.8 million to which it was not entitled; (ii) repeatedly made misrepresentations to and lacked candor with the Commission in connection with its participation in Auction No. 61 and the claimed bidding credit; (iii) failed to maintain the continuing accuracy and completeness of information furnished in its still pending long-form application; and (iv) purports to hold authorizations that have cancelled automatically for lack of construction or permanent discontinuance of operation." *Id.* at 30155. Maritime filed its petition for reorganization under chapter 11 of the Bankruptcy Code on August 1, 2011. Docket No. 1. The FCC timely filed a claim for $6,315,635.65 in auction bidding credits, accrued interest on bidding credits, and estimated forfeitures under the Communications Act and the FCC's rules and regulations. Claim No. 81.

2. The FCC objected to the Debtor's original Disclosure Statement. Docket No. 490. Among other grounds, the objection asserted that the Debtor's Plan of Reorganization was not confirmable because its discharge provision was unlawful. *Id.* at 4-5. The FCC later agreed to reserve this objection for the confirmation stage, and a statement to this effect was placed in subsequent versions of the Debtor's Disclosure Statement. *See* Docket No. 668 at 45.

ARGUMENT

I. The Debtor's Plan Violates the Bankruptcy Code by Providing a Discharge for a Liquidating Chapter 11 Plan.

3. To be confirmed, a plan must satisfy all the requirements of section 1129 of the Bankruptcy Code, including the mandate that it "complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). The First Amended Plan of Reorganization provides that the Debtor

will receive a discharge upon confirmation of the Plan, Docket No. 669 at 28-29, in direct conflict with the Code's denial of discharges for corporate debtors pursuing liquidation in a chapter 11 plan. Code section 1141(d)(3) states that:

> (3) 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.

Debtor's own statements concretely establish that, as a matter of law, the Debtor is not entitled to a discharge. The Plan would transfer and sell the Debtor's sole substantial asset, the FCC licenses, for the benefit of creditors. As the Third Amended Disclosure Statement explains, the Plan is intended to "efficiently and quickly liquidate Debtor's assets." Docket No. 668 at 17. Thus, the Plan provides for "the liquidation of all or substantially all of the property of the estate." 11 U.S.C. §1141(d)(3)(A). The Disclosure Statement further states that "the Debtor does not have the means to operate its business as a going concern" and that "the Debtor will wind down its business upon confirmation" of the Plan. *Id.* at 17, 19. As a result, the Debtor will "not engage in business after consummation of the plan." 11 U.S.C. § 1141(d)(3)(B). Finally, the Debtor is not an individual and would be denied a discharge under Code Section 727(a)(1) if this case was a proceeding under chapter 7 of the Code. 11 U.S.C. § 1141(d)(3)(C).

4. After the Debtor's original Disclosure Statement drew objections on the ground that a discharge was unlawful, Docket Nos. 490 and 495, the Debtor added a number of statements to subsequent versions of both the Disclosure Statement and the Plan of Reorganization, statements apparently intended to establish that the Debtor was entitled to a discharge despite the clear applicability of section 1141(d)(3). None of the Debtor's arguments demonstrate that the Debtor is entitled to a discharge in this case. First, the Debtor states that the planned sale of the Licenses is

not a true liquidation because the Debtor will not receive payments directly but will, instead, be "owner financing" a sale by transferring the Licenses for another entity to market, conditioned upon the FCC granting extraordinary relief under the *Second Thursday* precedent and allowing assignment of Licenses otherwise subject to hearing proceeding regarding enforcement of the Communications Act and FCC rules. Docket No. 669 at 28. However, the fact that the disposal of the Licenses takes a more circuitous route than a direct sale by the Debtor is irrelevant. Liquidation is the end result. Courts have found that section 1141(d)(3) does not bar a discharge if liquidation is just one possible result of a plan's operation, while other alternatives allow for a successful continuation of the Debtor's business. *See In re T-H New Orleans Ltd.P'ship,* 116 F.3d 790, 804 (5th Cir. 1997). By contrast, liquidation is the only outcome under the Debtor's Plan. Even if the FCC denies the Debtor's request for extraordinary relief under *Second Thursday* to transfer the Licenses to Choctaw or Council Tree, and, after final resolution of the administrative hearing, Maritime retains the Licenses, the Plan states the Debtor will then "become active and aggressive with respect to seeking a purchaser" for the Licenses. Docket No. 669 at 29.

5. Next, the Debtor discusses a number of activities it would be engaged in following confirmation of the Plan, including "monitoring and assisting the FCC approval process," prosecuting claim objections and avoidance actions post-confirmation, and pursuing a purchaser for the Licenses if the FCC denies a request for extraordinary relief under *Second Thursday* and Maritime retains rights to the Licenses after final resolution of the administrative hearing. *Id.* The Debtor states that these potential activities will "cause the Debtor to be engaging in business post-confirmation." *Id.* Again, even if this statement is true, it is irrelevant for determining whether a discharge is lawful. A discharge is allowed if a Debtor will "engage in business after *consummation* of the plan." 11 U.S.C. § 1141(d)(3)(B). None of the possible business activities listed by the Debtor involve post-consummation activity following the Plan's full implementation. Rather, they

are only potential post-*confirmation* activities that may be needed to bring the Plan to consummation. As a result, these activities do not allow the Debtor to escape the Code's bar on discharges.

6. Finally, the Debtor claims that it will retain and allegedly operate the assets of Critical RF, a subsidiary of Maritime. Docket No. 669 at 29. At the June 13, 2012 hearing on the Debtor's original Disclosure Statement, Debtor's counsel stated that the retention of Critical RF was another reason the Debtor's Plan qualified for a discharge, since the Debtor would be engaging in business after consummation of the plan by operating Critical RF. However, to establish that a discharge is lawful by operation of section 1141(d)(3)(B), the Debtor has the burden of demonstrating it will actually engage in business post-consummation, as opposed to simply asserting it. *See Repurchase Corp. v. Bodenstein,* 2008 WL 4379035 at *3 (N.D. Ill. March 24, 2008). In assessing such claims, courts must "look forward in time and address the Debtor's operations after Plan consummation." *In re Global Water Tech., Inc.* 311 B.R. 896, 900 (Bankr. D. Col. 2008).

7. By any measure, Maritime has not met its burden of establishing that Critical RF will be the basis of viable business operations after consummation of the Plan. The Third Amended Disclosure Statement admits that Critical RF, given a nominal value of $50,000, in fact has "a negative net worth and a history of losses." Docket No. 668 at 15. As for the future, Critical RF will receive no additional monetary investment from Maritime, but the Debtor asserts, without further explanation, that the "expertise and experience" of Maritime's employees will allow Critical RF to generate sufficient revenue to survive, despite the conspicuous failure of that same expertise and experience to generate profits for Critical RF to this point. *Id.* By contrast, when courts have allowed discharges on the ground that a debtor will engage in business after consummation of the plan, debtors have provided detailed support demonstrating a business's future viability, such as a

business plan for post-consummation operations and specific information about established relationships with customers and vendors. *See Global Water*, 311 B.R. at 900. Maritime has not proven that retaining Critical RF will allow it engage in business after consummation of the Plan. Since the Plan meets all three of the section 1141(d)(3) conditions that bar a discharge, it cannot be confirmed with its discharge provision intact.

8. The Bankruptcy Code's clear bar of a discharge for the Debtor's Plan also forestalls practical problems a discharge would create. To reach consummation in any form, the license transfers proposed in the Debtor's Plan must be approved by the FCC, notwithstanding the pending administrative hearing involving material questions of fact about the Debtor's qualifications to be and remain a Commission licensee. Section 309 of the Communications Act obligates the Commission to determine in the case of each application before it, whether the "public interest, convenience and necessity" will be served by the granting of such application. 47 U.S.C. § 309. The FCC's general policy prohibits the transfer or assignment of Licenses when the licensee's qualifications are under investigation, or as here are subject to an administrative hearing. *See, e.g., Jefferson Radio v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964). This general policy reflects the FCC's determination "that permitting a licensee to evade the consequences of alleged or adjudicated misconduct by transferring his interest or assigning his license will diminish the deterrent effect that revocation or renewal proceedings should have." *See In re Family Broadcasting, Inc.*, 2010 WL 2234097, at *5 (FCC June 4, 2010). In *Second Thursday*, the FCC established a narrow exception to its general policy when the licensee in question is in bankruptcy which permits the assignment of licenses "if the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefits from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." *Second Thursday Corp.*, 1970 WL 18097, at *2 (FCC March 27, 1970). The Second Thursday doctrine is intended to

protect innocent creditors and to accommodate the policies of federal bankruptcy law with those of the Communications Act. *LaRose v. FCC*, 494 F.2d 1149 (D.C. Cir. 1974). Thus, there is always a significant risk that any request for extraordinary relief under *Second Thursday* will be denied.

9. The application of the *Second Thursday* exception to the unique circumstances here will be particularly complex. In addition to deciding whether potential benefits of any transfer of the Licenses, including releases from personal guaranties, would flow to the individuals charged with misconduct and whether the discretion granted the Liquidating Agent would result in payments to individuals charged with misconduct, here the FCC will also need to consider whether the value of the Licenses exceeds the debts to be repaid and creates a potential windfall gain that usually does not result from *Second Thursday* transfers. *Second Thursday* approval might also be delayed and complicated by the Administrative Law Judge's determination in the FCC enforcement proceeding that certain of the Debtor's licenses have automatically terminated for permanent discontinuance of operation. Thus, the FCC could refuse to grant *Second Thursday* approval to transfer the Debtor's Licenses in any form. In that case, the Debtor will be unable to transfer and sell the Licenses while the administrative hearing continues. Under the Plan, the Debtor would still have a discharge of its debts in this scenario, producing a "perverse" outcome in which creditors' claims have not been satisfied but they are "without options under the Bankruptcy Code." *Repurchase Corp.*, 2008 WL 4379035 at *4. Barring a discharge prevents this perverse outcome from arising.

10. The discharge in the Debtor's plan is unlawful, and the FCC requests that the Court either deny Confirmation of the Plan or issue a Confirmation Order stating the Plan's discharge provision is null and of no effect. If the Court issues a confirmation order nullifying the discharge provision, the FCC also requests that the Court disallow the provision for a permanent injunction on the commencement or continuation of certain actions against the Debtor. Docket No. 669 at 30, 32 and 33. The injunction's purpose is to enforce a discharge, as provided for by Code section

524(a)(2-3). If the discharge is unlawful, so is an injunction enforcing it. Furthermore, despite agreeing to include language recognizing that the FCC's regulatory authority would be unimpeded by any permanent injunction, Debtor also inserted a caveat that it would be "entitled to injunctive relief, as to all creditors, to allow it to enforce the provisions of a plan that may be confirmed by the Court, whether or not a discharge is granted… ." Docket No. 669 at 30. The FCC denies there is a basis for an injunction absent a discharge and objects to Debtor's implication that Confirmation of the Plan would lawfully enjoin or limit in any way the FCC's regulatory authority.

II. The Debtor's Plan Violates the Bankruptcy Code By Discriminating Against the FCC's Claim.

11. A plan must provide "the same treatment for each claim or interest of a particular class." 11 U.S.C. §1123(a)(4). However, the Plan states that an "Allowed Interest shall not include any amount for punitive damages or penalties," unless the Plan specifically provides for it. Docket No. 669 at 3. This provision would disallow a large portion of the FCC's claim composed of potential forfeitures for regulatory violations. As a result, the FCC's claim is treated significantly worse than others in the general unsecured creditor class. This discrimination has no basis in the Bankruptcy Code. The Code does not disallow or even subordinate penalties in a chapter 11 proceeding.[1] Without a basis in the Code, courts have no authority to subordinate, much less disallow, an entire category of debt. *See United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 229 (1996) ("[C]ategorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under [Code section] 510(c)."). The FCC requests that Confirmation either be denied for this discriminatory treatment or that any Confirmation Order provide that the FCC's claim,

[1] Code section 726(a)(4) subordinates but does not disallow penalties in chapter 7 proceedings. However, this provision has no effect in a chapter 11 bankruptcy. *See* 11 U.S.C. § 103(b).

when adjudicated in the administrative proceeding pending before the Commission or otherwise established, must receive the same distribution provided to other allowed Class 9 claims.

12. In addition, the Council Tree proposal, attached to the Third Amended Disclosure Statement, provides for no payment at all for the FCC's claim, while apportioning money to pay other claims in the general unsecured class. Docket No. 668, Ex. D, Pt. 1 at 16. After discussion of this issue, counsel for Council Tree has agreed that excluding all payment for the FCC's claim preemptively has no basis. To clarify the status of its claim, the FCC again requests that any Confirmation Order state that, once the FCC claim is adjudicated or otherwise established, it would be paid with the other claims of the general unsecured class according to the priority established by the Plan.

III. Debtor Has Not Established That the Plan is Feasible

13. Separate and apart from any issues connected to obtaining extraordinary *Second Thursday* relief or any other necessary FCC approval, the Debtor has not met its burden of establishing that the Plan is feasible, which requires a showing that a plan is not likely to require "liquidation, or…further financial reorganization" beyond what is provided for in the plan's terms. 11 § U.S.C. 1129(a)(11). Besides FCC approval, the Plan's successful consummation depends on a number of large contingencies for which the Debtor has provided little or no basis to judge the outcome. If the FCC grants extraordinary *Second Thursday* relief to transfer the Licenses, Choctaw or Council Tree must still market and sell the Licenses not already under contract, but the Debtor has submitted no real analysis of how these sales will proceed or what challenges they face. The Debtor has also not provided any reasoned estimate of the money it expects the sales to produce.

14. The Plan's uncertainty is aggravated by the unbounded discretion granted to either Choctaw or Council Tree. Either entity would have the right under the Plan to not seek transfer of some or all of the Licenses from Maritime, wholly according to its own judgment. Either entity

would also have absolute control over the sale of Licenses following a transfer. There is no oversight to ensure that the sales take place in a timely, expeditious manner or that the sales maximize value for other creditors. This lack of accountability is reinforced in the case of Choctaw by an exculpation provision releasing the Choctaw entities and their members, officers and employees from any claim arising from any act or omission during the implementation of the Choctaw proposal, with the exception of willful misconduct. Docket No. 668, Pt. C-1 at 21. In addition to shielding Choctaw from effective oversight, this exculpation violates the Bankruptcy Code's prohibition on liability releases for non-debtors.[2] 11 § U.S.C. 524(e); *see In re Pacific Lumber*, 584 F. 3d 229, 252-53 (5th Cir. 2009).

15. The operation of the Debtor's Plan is even more uncertain in the event that the FCC denies extraordinary *Second Thursday* relief to transfer the licenses to Choctaw or Council Tree. The Plan states the Debtor will then "become active and aggressive with respect to seeking a purchaser" for the Licenses, but provides no other detail. Docket No. 669 at 29. The Debtor does not indicate how it expects to gain FCC approval to sell the Licenses itself, nor does the Plan explain to what extent its other provisions would continue to operate after the FCC's denial of a request for extraordinary relief under *Second Thursday*. In short, apart from what the FCC may decide, the Plan's successful implementation depends on too many substantial uncertainties for the Debtor to establish the Plan's feasibility.

16. The same uncertainty that renders the Plan unfeasible also means the Debtor has not established that the Plan is in the best interest of the creditors. The Bankruptcy Code requires that the Debtor demonstrate that the Plan will provide to each holder of a claim or interest that has not accepted the Plan "property of a value, as of the effective date of the plan, that is not less than the

[2] The FCC objects to Choctaw's liability release, and it also objects to any release or exculpation, whether in the Plan, the Choctaw Proposal, or the Council Tree proposal, of any non-debtors that would not be allowed under 11 § U.S.C. 524(e) or 11 § U.S.C. 1103(c), including any releases for Choctaw, Council Tree, the owners, officers and employees of the Debtor, or the Liquidating Agent.

amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7). Given the unexamined contingencies inherent in the Plan, the Debtor has not met its burden of demonstrating that impaired creditors will receive an amount at least equal to the amount they would receive in a chapter 7 liquidation.

17. In the event that an impaired class rejects the Plan, the Debtor has not shown the Plan is "fair and equitable, with respect to each class of claims or interests that is impaired" and therefore cannot meet the standard for cramdown approval of the Plan. 11 U.S.C. § 1129(b). To receive cramdown approval, a plan must, among other requirements, show that a class of unsecured claimants will either receive the full allowed amounts of their claims or that any holder of claims or interests junior to that class "will not receive or retain…any property" on account of their junior claims. 11 U.S.C. § 1129(b)(2)(B)(ii). Here, while it is claimed that all allowed claims will be paid in full, as discussed above the Plan provides no certain basis to believe this will be true. However, the most junior class of creditors, the members of Maritime, retain their shares in Maritime and Maritime retains its stock in Critical RF. Since the Plan cannot demonstrate that all senior classes to the Maritime equity interest holders will be paid in full, the retention of Critical RF by the Debtor, to the extent Critical RF has any value whatsoever, violates 11 U.S.C. § 1129(b)(2)(B)(ii) and makes cramdown unavailable.

18. The FCC also objects to the extent that the Plan has or is intended to have any effect of recognizing liens or security interests in FCC Licenses directly, as opposed to the proceeds of the sale of such Licenses. The Choctaw proposal ambiguously asserts that the Secured Lenders and SECF hold liens in "the incidents of ownership" of FCC licenses. Docket No. 668, Pt. C-1 at 16. The courts have consistently recognized that liens or security interests affecting FCC Licenses attach only to the economic proceeds of the sale of the Licenses. *See, e.g., In re Tracy Broad. Corp.,* 2012 WL 4874485 (10th Cir. Oct. 16, 2012).

CONCLUSION

The Debtor's Plan should either be denied Confirmation or revised by a Confirmation Order consistently with the concerns set forth above and in any hearing on the merits of this matter.

DATED: November 6, 2012

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

/s/ Richard Drew ___________
J. CHRISTOPHER KOHN
TRACY J. WHITAKER
RICHARD DREW
Attorneys
Corporate/Financial Litigation Section
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, DC 20044-0875
Tel: (202) 305-1479
Fax: (202) 514-9163

OF COUNSEL:

FELICIA ADAMS
United States Attorney

SAMUEL WRIGHT
Assistant United States Attorney
900 Jefferson Avenue
Oxford, Mississippi 38655-3608
Tel: (662) 234-3351
Fax: (662) 234-3318

CERTIFICATE OF SERVICE

I, Richard Drew, hereby certify that a true and correct copy of the foregoing was served to all parties registered with the ECF system, including the following counsel:

Craig M. Geno, Esquire
Law Office of Craig M. Geno, PLLC
Post Office Box 3380
Ridgeland, Mississippi 39158-3380

Sammye S. Tharp, Esquire
United States Trustee
501 East Court Street
Suite 6-430
Jackson, MS 39201

Amanda M. Beckett
Derek F. Meek
Marc P. Solomon
Burr & Forman LLP
420 North 20th Street, Suite 3400
Birminghan, AL 35203

This the 6th day of November, 2012.

/s/Richard Drew
Richard Drew