

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

In re:

ABEINSA HOLDING INC. *et al.*,

Reorganized and Liquidating Debtors.¹

Chapter 11

Case No. 16-10790 (KJC)

(Jointly Administered)

**LITIGATION TRUSTEE’S STATEMENT REGARDING MOTION OF THE
RESPONSIBLE PERSON FOR AUTHORITY TO MAKE FIRST INTERIM
DISTRIBUTION UNDER EPC REORGANIZING DEBTORS’ PLAN**

Drivetrain LLC, as trustee (the “Litigation Trustee”) of the Abeinsa Litigation Trust (the “Litigation Trust”) appointed on behalf of the EPC Reorganizing Debtors, hereby makes this statement (this “Statement”) in order (i) to correct certain inaccurate statements made in the *Motion of the Responsible Person for Authority to Make First Interim Distribution under EPC Reorganizing Debtors’ Plan* [Dkt. No. 2142] (the “Interim Distribution Motion”) and accompanying notice (the “Notice”) and (ii) to clarify other potentially ambiguous or erroneous provisions of the Interim Distribution Motion. The Litigation Trustee had understood both from the Notice of Adjournment filed by the Responsible Person [Dkt. No. 2152 & 2167] and communications from the Responsible Person that the Responsible Person would revise the Interim Distribution Motion. However, as no revision has yet been filed and the objection deadline in respect of the Interim Distribution Motion is now at hand, the Litigation Trustee is required now to file this Statement. Accordingly the Litigation Trustee respectfully states as follows:

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Plan or Confirmation Order, as applicable.

BACKGROUND

1. On March 29, April 6, April 7, and June 12, 2016 (collectively, the “Petition Date”), the Debtors commenced these chapter 11 cases by filing voluntary petitions for relief under title 11 of the United States Code (the “Bankruptcy Code”).

2. On December 15, 2016, the Court entered an order (the “Confirmation Order”) [D.I. 1042; *amended*, D.I. 1043] confirming the *Debtors’ Modified First Amended Plans of Reorganization and Liquidation* [D.I. 1042-1] (the “Plan”), which became effective on March 31, 2017 (the “Effective Date”). The Confirmation Order effectuated the substantive consolidation of the bankruptcy estates of Abener Teyma Mojave General Partnership, Abener North America Construction, LP, Abeinsa Abener Teyma General Partnership, Teyma Construction USA, LLC, Teyma USA & Abener Engineering and Construction Services General Partnership, Abeinsa EPC LLC, Abeinsa Holding Inc., Abener Teyma Hugoton General Partnership, Abengoa Bioenergy New Technologies, LLC, Abener Construction Services, LLC, Abengoa US Holding, LLC, Abengoa US, LLC, and Abengoa US Operations, LLC (collectively, the “EPC Reorganizing Debtors”).

3. Pursuant to the Plan, the Litigation Trust Agreement, dated March 31, 2017, was put in place for the purposes of, among other things, (i) investigating, prosecuting, settling, liquidating or disposing of certain claims and causes of action held by the EPC Reorganizing Debtors and identified in the Plan (as more fully described in the Plan, the “Litigation Trust Causes of Action”), and (ii) adjudicating certain claims (defined as the “Retained Claims”) that defendants or potential defendants to the Litigation Trust Causes of Action have asserted against the EPC Reorganizing Debtors. Drivetrain, LLC is acting as the duly-appointed trustee under the Litigation Trust Agreement.

4. Upon the Effective Date, the EPC Reorganizing Debtors and the Solar Reorganizing Debtor were to establish and fund the “Reorganizing Post-Confirmation Reserves” in the total amount of \$5.35 million (comprised of a \$3,850,000 payment from the EPC Reorganizing Debtors and a \$1,500,000 payment from the Solar Reorganizing Debtor) for the purpose of funding the “fees and costs anticipated to be incurred following the Confirmation Date through the completion of the Responsible Person’s duties under the Plan.” *See* Plan, Article IV.F.5. Following the Effective Date, the Responsible Person was permitted to increase, as necessary, the amounts held in the Reorganizing Post-Confirmation Reserves only with the consent of the Litigation Trustee (which consent shall not be unreasonably withheld). *See* Confirmation Order, Paragraph GG.II.

5. Pursuant to the Plan, all distributions to creditors of the EPC Reorganizing Debtors shall be made by the Responsible Person. *See* Plan, Articles IV.F.1, V.C; *see also* Litigation Trust Agreement, Section 8.1(b) (providing that the Litigation Trustee “shall have no authority, obligation or responsibility to directly make Distributions of Litigation Trust Assets to Holders of any Claims....”). The Litigation Trustee is responsible for administering (but not paying) Retained Claims only and not other claims against the EPC Reorganizing Debtors, which are administered by the Responsible Person. *See* Plan, Article VI.B, F; Litigation Trust Agreement, Section 2.2(j). The Litigation Trustee and the Responsible Person are to cooperate in the resolution of Disputed Claims in respect of the EPC Reorganizing Debtors. *See* Confirmation Order, Paragraph GG.II.

6. In order to make a distribution under the Plan, Article IV.F.3 provides that the “Responsible Person (in his capacity as such or as Disbursing Agent for the EPC Reorganizing Debtors) may from time to time deliver to the Litigation Trustee a written request for a

disbursement of Controlled Funds for use in according with the provisions of [the] Plan and Confirmation Order.” The Litigation Trustee must then consent “prior to making any transfer of Controlled Funds to the Responsible Person.” *See* Plan, Article IV.F.3.

7. Any transfer of such funds from the Litigation Trust pursuant to Article IV.F.3 may only be net of amounts necessary to pay accrued or estimated future liabilities, fees, expenses or other relevant amounts as set forth in the Litigation Trust Agreement and determined by the Litigation Trustee. *See* Litigation Trust Agreement, Section 8.1(a); Confirmation Order, Paragraph GG.

8. The Plan also provides that the Responsible Person’s costs and expenses “shall be paid from the applicable Reorganizing Debtors” (in contrast the costs and expenses of the Litigation Trustee are to be paid from the Litigation Fund, and the Liquidation Trustees’ costs and expenses are to be paid from the assets of the applicable Liquidating Debtors). *See* Plan, Article IV.W; Confirmation Order, Paragraph GG.

9. The Plan additionally provides that the reasonable fees and expenses incurred by the Responsible Person acting as the Disbursing Agent (including, without limitation, reasonable attorneys’ fees and expenses) shall be paid in Cash by Reorganizing Debtors in the ordinary course of business. *See* Plan, Article V.C. The Motion is brought by the Responsible Person in his capacity as Responsible Person and, expressly, as Disbursing Agent.

10. On January 22, 2020, Jeffrey Bland, the Responsible Person (the “Responsible Person”) and Disbursing Agent (the “Disbursing Agent”) appointed pursuant to the Plan, informed the Litigation Trustee via email that he, with counsel, was finalizing an interim distribution motion, and provided the Litigation Trustee with certain data contained in an Excel

spreadsheet. That same day, the Litigation Trustee responded by email asking follow up questions and requesting a call.

11. The next day, on January 23, 2020, the Responsible Person provided the Litigation Trustee with additional data via email. The following day, on January 24, 2020, the Litigation Trustee provided the Responsible Person via email with additional questions and comments regarding the data provided.

12. The Litigation Trustee received no response to its queries. Instead, on January 25, 2020, the Responsible Person, through counsel, filed the Interim Distribution Motion and Notice, seeking authority from the Bankruptcy Court to make an interim distribution to the EPC Reorganizing Debtors' creditors. The Notice states that the Interim Distribution Motion was filed by the Responsible Person, the Litigation Trustee and the Liquidating Trustee (in which capacity Drivetrain, LLC also serves).² This is not correct.

STATEMENT

I. The Notice is Inaccurate

13. The Notice states that the Interim Distribution Motion was filed on behalf of the Responsible Person, Litigation Trustee and Liquidation Trustee. To the contrary, the Litigation Trustee (and, accordingly, the Liquidating Trustees) was never shown even a draft of the Interim Distribution Motion, much less authorize its filing. For the reasons set forth above, the Litigation Trustee (and for the avoidance of doubt, the Liquidating Trustees) expressly disclaims responsibility for the Interim Distribution Motion, including its contents and the work done in preparation for its filing, other than in respect of the quantum of the "Litigation Trust Disputed

² There are actually **two** Liquidating Trustees under the Plan.

Claims” set forth in paragraph 32 and data provided by the Litigation Trustee to the Responsible Person regarding undisputed Retained Claims.

II. The Responsible Person’s Power to Determine and Make Distributions Under the Plan is not Plenary.

14. The Interim Distribution Motion states at paragraph 13 that the Responsible Person has “unlimited rights, powers and duties,” citing Article IV.R of the Plan. However, Article IV.R provides expressly to the contrary, stating in its first sentence that the Responsible Person’s “rights, powers and duties” shall be “*subject to the limitations set forth in this Plan [and detailing certain limitations]*” (emphasis added). Further, the statement in paragraph 13 of the Interim Distribution Motion that the Responsible Person may act pursuant to his “reasonable business judgment” is not a universal authorization under Article IV.R of the Plan but is limited to only certain of the subsections of Article IV.R of the Plan.

III. The Interim Distribution Motion and Any Order Entered Thereupon Should Make Clear That The Amounts Set Forth in Paragraph 30 are Not Binding For Any Purpose and Shall Remain With the Litigation Trustee as Controlled Funds.

15. The Litigation Trustee does not object to the proposed distribution³ if the Court approves the Disbursing Agent’s calculations and determinations as to the appropriateness of disbursing such amounts to creditors of the EPC Reorganizing Debtors. However, paragraph 30 of the Interim Distribution Motion sets forth certain “sources and uses” that it asserts “take into account future obligations under the Plan and the various other requirements thereunder,” which it states shall “remain[] as Controlled Funds⁴ and will not actually be earmarked or reserved but

³ Paragraph 33 of the Interim Distribution Motion sets forth the “Amount to be Distributed” as \$35,370,059.80, but the proposed order attached as Exhibit M sets forth a different amount, \$36,378,221.86. The correct amount should be clarified by the Responsible Person and the Disbursing Agent.

⁴ The Plan defines “Controlled Funds” as “the EPC Reorganizing Distribution and all proceeds thereof (whether now existing or existing from time to time hereafter), including funds derived from the liquidation by the Responsible Person or any other Entity of any non-Cash portion thereof.” *See* Plan, Article IV.F.3.

are set out...to ensure an appropriate distribution is made while ensuring the ongoing viability of the administration of the Plan.” Among such non-earmarked uses are line items for (i) “Abengoa, S.A. Litigation Trust Proceeds”, in the amount of \$3,000,000; (ii) “Reorganized Debtor Litigation Trust Proceeds”, in the amount of \$3,000,000; (iii) “Responsible Person’s Future Costs and Expenses Estimate”, in the amount of \$2,500,000; and (iv) “Litigation Trustee’s Future Costs and Expenses Estimate”, in the amount of \$2,500,000 (collectively, the “Non-Claim Amounts”).⁵ Any order granting the Interim Distribution Motion should make clear that the Non-Claim Amounts set forth in the chart in paragraph 30 are not allocations, segregations, minimums or maximums; shall have no force or effect whatsoever; and that such monies remain in the Litigation Trust as Controlled Funds to be used only in accordance with the terms of the Confirmation Order, the Plan and the Litigation Trust Agreement, including without limitation those provisions governing fees, expenses, reserves and distributions set forth above. The Litigation Trustee reserves all rights with respect to these amounts and any request to use or disburse any such funds.

IV. The Interim Distribution Motion Should Clarify and Confirm the Validity and Accuracy of the Amounts, Categories and Calculations in respect of Claims that are Proposed to Receive a Distribution.

16. As set forth above, the Litigation Trustee expressly disclaims responsibility for the Interim Distribution Motion, including its contents and the work done in preparation for its filing, other than in respect of the quantum of the “Litigation Trust Disputed Claims” set forth in paragraph 32 and data provided by the Litigation Trustee to the Responsible Person regarding undisputed Retained Claims.

⁵ As recognized by the Motion, the amounts set forth by the Motion as roman (i) and (ii) of paragraph 30 have yet to become payable.

17. Notwithstanding such disclaimer, the Litigation Trustee reviewed the Interim Distribution Motion after its filing, and notes that certain provisions of the Interim Distribution Motion appear on their face to be inaccurate or ambiguous. Accordingly, the Litigation Trustee notes certain provisions herein and suggests that the Responsible Person and Distribution Agent address such provisions to ensure the integrity of the Interim Distribution Motion. For the avoidance of doubt, the issues noted herein are not meant to be exhaustive and the Litigation Trustee has not undertaken a fulsome review of the bases for the Interim Distribution Motion and its underlying assumptions, but merely notes that certain provisions appear facially to require clarification.

18. Paragraph 31 of the Interim Distribution Motion contains a chart setting forth the following proposed amounts for distribution: \$45,971,927.96 on account of “Scheduled Claims”; \$10,748,111.65 on account of claims in Class 3b; \$217,771,367.82 on account of claims in Class 4; and \$9,691,151.08 on account of claims in Class 5. Though the chart indicates that the “Scheduled Claims” amount set forth therein includes only “*non-duplicative* claims scheduled as non-disputed, fixed, and liquidated,” the Responsible Person should confirm such non-duplication (emphasis added).

19. First, the Responsible Person should confirm that notwithstanding that scheduled claims are treated in relevant classes under the Plan, none of the claims described as “Scheduled Claims” in the Motion are also included in the amounts set forth in the Motion for Classes 3b, 4 or 5. Second, Exhibit I to the Interim Distribution Motion purports to list those claims that comprise and will receive distributions as “Scheduled Claims” and footnote 22 of the Interim Distribution Motion states that “the Responsible Person removed claims that were in duplicative amounts against the substantive (sic) consolidated estates as noted in the Court’s memorandum

decision in paragraph 11 above.” However, Exhibit I appears to contain many multiple claims for identical amounts asserted against various debtors that have been substantively consolidated. Many instances of such multiple claims for identical amounts appear to involve claims asserted against partnership debtors and their respective partners. This suggests that such claims are based on the same premises. The Responsible Person should confirm that all duplicative claims, whether such duplication is based on substantive consolidation or for other reasons (including contractual and statutory reasons), have indeed been removed from the calculations and determinations of claims that will receive distributions.

20. Exhibit I also appears to include claims from non-debtor affiliates, which should not receive any distribution under the Interim Distribution Motion. *See* Interim Distribution Motion at paragraph 21.

21. Certain of the numbers and calculations contained in the Interim Distribution Motion regarding distributions should be clarified and confirmed. By way of example but not limitation, the “Total Claims” amount listed in the chart in paragraph 33 is stated to be \$367,052,737.50. This amount presumably is the denominator that would form the basis for determining the pro rata percentage that each entitled claim would receive. However, this number appears (i) to be different than the sum of the claims categories listed in the chart in paragraph 33 and (ii) to be different than the number listed as the denominator in the box at the bottom of the chart in paragraph 33. Additionally, the formula set forth in the bottom box of the chart in paragraph 33 does not produce the percentage set forth in such bottom box (and the basis for the use of such formula is unclear). These matters should be clarified to ensure proper distributions.

22. Additionally, paragraph 34 of the Interim Distribution Motion states the quantum of funds that should be segregated and reserved for Disputed Claims. The paragraph references \$75,349,938.02 of Disputed Claims and states that \$7,297,086.35 will be segregated. However, the \$75,349,938.02 is *not* the amount used for Disputed Claims in paragraph 33; using the amount in paragraph 33 would require a different, higher amount required to be segregated in order to protect Disputed Claims. These matters should be clarified to ensure proper distributions.

23. Separately, paragraph 35 (“Relief Requested”) references a reserve for “Disputed Administrative Claims” but there does not appear to be any other indication of a reserve for “Disputed Administrative Claims” (as opposed to “Disputed Claims”) in the Interim Distribution Motion or its proposed order.⁶ Accordingly the Responsible Person should confirm that no reserve for “Disputed Administrative Claims” is sought.

24. Finally, the Disputed Claims list generated by the Responsible Person as Exhibit J (which excludes Disputed Claims that are Retained Claims) contains 10 claims; 4 claims are listed with specific claim reserve amounts and 6 claims are listed with \$0 claim reserve amounts. The Responsible Person should clarify that the \$0 reserve amounts mean that no amounts need be reserved for these claims as part of a Disputed Claim Reserve and confirm that no other reserves for any other claims scheduled or filed (whether scheduled or filed with unliquidated or liquidated amounts) for which the Responsible Person has oversight are required for the Disputed Claims reserve.

[Signature Page Follows]

⁶ The proposed order appears to require corrections in several areas, including, without limitation, in respect of the matters raised herein and possible typographical errors.

Date: February 26, 2020

/s/ Andrew R. Remming

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