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Electronically filed on January 26, 2012

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13 **UNITED STATES BANKRUPTCY COURT**
14 **DISTRICT OF NEVADA**

15 In re:
16 AMERICAN PACIFIC FINANCIAL
17 CORPORATION,

18 Debtor.

) Case No. BK-S-10-27855-BAM

) Chapter 11

) **U.S. SECURITIES AND EXCHANGE**
) **COMMISSION'S OBJECTION TO**
) **APPROVAL OF DISCLOSURE**
) **STATEMENT [Docket No. 542];**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES**

) DATE: February 9, 2012

) TIME: 9:00 a.m.

) PLACE: Foley Federal Building,
) 300 Las Vegas Blvd., South
) 3rd Floor, Courtroom 3
) Las Vegas, NV 89101

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24 **To the Honorable Bruce A. Markell, United States Bankruptcy Judge, the Acting United**
25 **States Trustee, the Chapter 11 Trustee, Debtor, the Official Committee of Unsecured**
26 **Creditors, Their Respective Counsel, and Other Parties-in-Interest:**

27 The United States Securities and Exchange Commission ("Commission") appears in
28 this proceeding under 11 U.S.C. §§ 1109 (a) and (b). The Commission hereby objects to

1 approval of Disclosure Statement Describing Third Amended Chapter 11 Plan of
2 Reorganization Proposed by the Official Committee of Unsecured Creditors and American
3 Pacific Financial Corporation (Dated January 12, 2012) (“Disclosure Statement” or “DS”). In
4 support of its objection, the Commission respectfully states as follows:

5 **I.**

6 **BACKGROUND**

7 The Official Committee of Unsecured Creditors (Creditors Committee) and American
8 Pacific Financial Corporation, the debtor-out-of-possession, (“APFC” or “Debtor”) have filed a
9 Third Amended Chapter 11 Plan of Reorganization Proposed by the Official Committee of
10 Unsecured Creditors and American Pacific Financial Corporation, dated January 12, 2012
11 [Docket No. 541] (“Plan”). The Plan proposes to liquidate APFC’s assets through a liquidating
12 trust and embodies a settlement agreement (Exhibit 8 to the Disclosure Statement) that the Plan
13 proponents present for the court’s approval through confirmation of the Plan. Generally, the
14 settlement agreement provides that Stillwater Capital, an entity controlled by the Debtor’s
15 principal Larry Polhill (“Polhill”) and his family, will contribute to a Plan-created liquidating
16 trust a scaled percentage of the funds it receives from its share of distributions on account of its
17 equity stake in Capital Foods. The contributions will continue over a defined period until the
18 liquidating trust receives certain set dollar amounts from any source. If the liquidating trust
19 receives at least \$25 million, from not just Stillwater Capital but from any source, in its first six
20 years, then “the Debtor, the Estate, the Committee, the Liquidating Trust, and all creditors
21 voting to approve the Plan” (Exh. 8, p.1) would release all claims they have or may have against
22 Polhill, Bradley Crandall, and persons and entities affiliated with them.¹

23 The Disclosure Statement accompanying the Plan fails to provide adequate information in
24 several important respects. The Disclosure Statement: (1) fails to provide a full account of the
25 Creditors Committee’s investigation of APFC, Polhill, and the potential claims against Polhill and
26

27 ¹ The settlement agreement refers inconsistently to the mechanism which would effect the
28 release of individual creditor claims against these nondebtors. *See* Exh. 8, pages 6 - 7

1 affiliated persons and entities; (2) fails to explain why the proposed settlement embodied by the
 2 Plan is reasonable, adequate, fair, and equitable; (3) fails to discuss impediments to the Plan's
 3 confirmation given its release of third-party claims against nondebtors; (4) fails to define the term
 4 "Entity" in the Plan's limitation on liability; (5) lacks clarity regarding the controlling release and
 5 definitions of "Released Parties;" (6) fails to state whether or not the release of individual creditor
 6 claims against nondebtors will have any effect on the claims of creditors who do not vote on the
 7 Plan; and (7) fails to disclose and analyze whether or not the proposed liquidating trust will have a
 8 sufficient number of record holders and assets to trigger the registration requirement under
 9 Section 12(g) of the Securities Exchange Act of 1934.

10 For the reasons stated herein, the Commission respectfully requests that the court deny
 11 approval of the Disclosure Statement.

12 II.

13 DISCUSSION

14 A. The Disclosure Statement Should Not Be Approved Because It Fails to Provide 15 Adequate Information.

16 Section 1125(b) of the Bankruptcy Code requires that a plan proponent soliciting
 17 acceptance of a plan of reorganization provide those voting on a plan a disclosure statement
 18 approved by the court as containing "adequate information." *In re Phoenix Petroleum Co.*, 278
 19 B.R. 385, 392 (Bankr. E.D. Pa. 2001). Section 1125(a)(1) defines adequate information as:

20 [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in
 21 light of the nature and history of the debtor and the condition of the debtor's books
 and records . . . that would enable . . . a hypothetical investor of the relevant class to
 make an informed judgment about the plan

22 11 U.S.C. §1125(a)(1). The requirement that the disclosure statement contain adequate
 23 information is to ensure that creditors and interest holders have the information necessary to
 24 enable them to make an informed decision when voting to accept or reject a proposed plan.

25 *California Fidelity, Inc. v. United States Trustee (In re California Fidelity, Inc.)*, 198 B.R. 567,
 26 571 (9th Cir. BAP 1996); *In re Main Street AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999);
 27 *Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 507 (Bankr. D. N.J. 2005); *Phoenix*
 28 *Petroleum Co.*, 278 B.R. at 392.

1 What constitutes adequate information is committed to the bankruptcy court's discretion
2 and is determined on a case-by-case basis. *Burns v. MacGibbon (In re Deborah J. MacGibbon)*,
3 2006 Bankr. LEXIS 4875 (9th Cir. BAP 2006) (unpublished); *In re Brotby*, 303 B.R. 177, 193 (9th
4 Cir. B.A.P. 2003); *Lisanti*, 329 B.R. at 507. The *Lisanti* court noted that adequate information "is
5 not a static concept." 329 B.R. at 507. The *Phoenix Petroleum* court found the following passage
6 from H.R. Rep. No. 595, 95th Cong., 1st Sess., 408-409 (1977) instructive:

7 Precisely what constitutes adequate information in any particular instance will
8 develop on a case-by-case basis. Courts will take a practical approach as to what is
9 necessary under the circumstances of each case, such as the cost of preparation of
the statements, the need for relative speed in solicitation and confirmation, *and, of*
course, the need for investor protection.

10 278 B.R. at 393 (citation omitted and emphasis added).

11 Here, the need for investor protection is critical, as investor claims comprise the
12 overwhelming majority of claims in this bankruptcy. The disclosure deficiencies detailed below
13 require that the court deny approval of the Disclosure Statement. *See In re Malek*, 35 B.R. 443,
14 444 (Bankr. E.D. Mich. 1983).

15 1. The Disclosure Statement Fails to Provide a Full Account of the Creditors
16 Committee's Investigation of Polhill's Relationship with APFC and the Potential
Claims against Polhill and Affiliated Persons and Entities.

17 The settlement agreement refers to the Creditors Committee's investigation of Polhill's
18 relationship with APFC. Neither it nor the Disclosure Statement defines its scope or summarizes,
19 let alone provides a full account of, its findings. Similarly, the settlement agreement refers to
20 potential claims against Polhill and others, but the only potential claim that is identified is the
21 allegedly misappropriated corporate opportunity relating to the equity stake in Capital Foods.
22 Because the creditors are not fully informed of the results of the Creditors Committee's
23 investigation and the nature and extent of the potential claims that the settlement agreement would
24 release, it is impossible for creditors to know what they are giving up and thus to evaluate the
25 merits of the proposed settlement and to cast an informed vote on the Plan.

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1 2. The Disclosure Statement Fails to Explain Why the Proposed Settlement Satisfies
2 the Applicable Ninth Circuit Standard.

3 Section 1123(b)(3)(A) of the Bankruptcy Code allows the court to confirm a plan that
4 provides for the settlement “of any claim or interest belonging to the debtor or to the estate.” 11
5 U.S.C. § 1123(b)(3)(A). However, in order for the court to confirm a plan that includes a
6 settlement, the settlement of the estate’s claims must satisfy the Ninth Circuit standard for
7 approval of a settlement of claims in bankruptcy. *See In re A & C Properties*, 784 F.2d 1377,
8 1381-82 (9th Cir. 1986). The plan proponents bear the burden of proof to establish by a
9 preponderance of the evidence that the proposed settlement is “reasonable, adequate, fair and
10 equitable.” *In re WCI Cable, Inc.*, 282 B.R. 457, 469 (Bankr. D. Or. 2002), citing *A & C*
11 *Properties*, 784 F.2d at 1381.

12 The Disclosure Statement does not explain why the proposed settlement is a reasonable
13 and just settlement of the estate’s claims. Perhaps most troubling is the fact that the settlement
14 agreement calls for APFC and creditors who accept the settlement to relinquish all of their claims
15 against Polhill in exchange for the settlement of only one claim in their favor. Furthermore, the
16 consideration from Polhill is not cash now but is contingent – it may never come into being – and
17 it will be years before the creditors will be able to pursue their remedies if the consideration does
18 not materialize. This imbalance and the breadth of the releases may foreclose a finding that the
19 settlement agreement is reasonable, adequate, fair, and equitable, and thus may prevent
20 confirmation of the Plan. The Disclosure Statement is deficient in its failure to disclose this risk
21 and to address the standard that the settlement agreement must satisfy.

22 3. The Disclosure Statement Does Not Discuss Impediments under Ninth Circuit
23 Precedent to Confirmation of a Plan that Releases Third-Party Claims against
24 Nondebtors.

25 The Plan proponents seek bankruptcy court approval of a Plan that incorporates, and seeks
26 bankruptcy court authority to enforce, releases of third-party claims against nondebtors, both
27 through the settlement agreement and through the Plan’s overly broad exculpation clause at
28 Article XI.A. and its injunction at Article VII.D.

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1 The Ninth Circuit has consistently held that bankruptcy courts lack authority to free
2 nondebtors from liability to third parties through its power to confirm a plan. The Ninth Circuit
3 has interpreted Section 524(e) of the Bankruptcy Code in conjunction with Bankruptcy Code
4 Section 1129(a)(1) to prevent bankruptcy courts from confirming Chapter 11 plans that would
5 discharge, release, or enjoin post-confirmation pursuit of non-debtor liability. *Resorts*
6 *International, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995), *cert.*
7 *denied*, 517 U.S. 1234, 116 S. Ct. 2497 (1996) (“The bankruptcy court lacks the power to confirm
8 plans of reorganization which do not comply with applicable provisions of the Bankruptcy Code.
9 . . . This court has repeatedly held, without exception, that §524 precludes bankruptcy courts from
10 discharging the liabilities of non-debtors.”); *In re American Hardwoods, Inc.*, 885 F.2d 621, 625
11 (9th Cir. 1989) (holding that because Section 524(e) specifically prohibits the discharge of non-
12 debtor liability through confirmation of a plan, the court cannot utilize its Section 105(a)
13 injunctive power inconsistently with that prohibition to permanently enjoin post-confirmation
14 pursuit of non-debtor liability); *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) (finding
15 that “[t]he bankruptcy court has no power to discharge the liabilities of a nondebtor pursuant to
16 the consent of creditors as part of a plan of reorganization”).

17 In *Lowenschuss*, the Ninth Circuit examined the then-recent addition to the Bankruptcy
18 Code, Section 524(g), which provided bankruptcy courts explicit authority to enjoin third-party
19 litigation in the narrow confines of asbestos cases. The court reasoned that the addition of this
20 section reinforced its conclusion that Section 524(e) does not permit bankruptcy courts to release
21 third-party claims against nondebtors. 67 F.3d at 1402. Other than Section 524(g), there is no
22 provision within Title 11 that empowers the bankruptcy court to give effect to a permanent release
23 of third-party claims against nondebtors. Although Section 1123(b)(3)(A) allows the court to
24 confirm a plan that would settle “any claim or interest belonging to the debtor or to the estate,” it
25 does not give the court authority to settle the claims belonging to third parties against nondebtors,
26 whether by consent or otherwise.

27 The bankruptcy court’s injunctive power under Section 105(a) is derivative of and
28 bounded by substantive provisions of the Bankruptcy Code. *American Hardwoods*, 885 F.2d at

1 625. It does not “create substantive rights that would otherwise be unavailable under the
2 Bankruptcy Code.” *WCI Cable*, 282 B.R. at 468, quoting *In re Continental Airlines*, 203 F.3d
3 203, 211 (3d Cir. 2000). Thus, the court’s authority under Section 105(a) cannot be used to enjoin
4 the pursuit of third-party claims against a nondebtor as part of a Section 1123(b)(3)(A) settlement
5 *except* to the extent that the third-party claims are derivative of the estate’s claims or affect the
6 estate. *See WCI Cable*, 282 B.R. at 469. This is reflective of the bankruptcy court’s “related to”
7 subject matter jurisdiction, succinctly stated by the dissent in *Travelers Indemnity Co. v. Bailey*,
8 557 U.S. 137; 129 S. Ct. 2195 (2009):

9 When a bankruptcy proceeding is commenced, the bankruptcy court
10 acquires control of the debtor’s assets and the power to discharge its
11 debts. A bankruptcy court has no authority, however, to adjudicate,
12 settle, or enjoin claims against nondebtors that do not affect the
13 debtor’s estate.

12 129 S. Ct. at 2210.²

13 Moreover, to the extent that the individual claims to be released under the Plan’s
14 settlement agreement may be for securities fraud, they may be automatically nondischargeable
15 under Section 523(a)(19) of the Bankruptcy Code if certain of the “Released Parties” were to file
16 their own bankruptcy case under Chapter 11 or Chapter 7. *See* 11 U.S.C. § 523(a)(19). It would
17 be anomalous and inequitable to allow a nondebtor to release claims through a corporation’s
18 Chapter 11 bankruptcy when the nondebtor may not be able to receive this benefit in its own
19 bankruptcy case. Such a result would create an incentive for corporate insiders “to push a failing
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21 ² Courts outside of the Ninth Circuit have examined the bankruptcy court’s subject matter
22 jurisdiction to effect the permanent release of third-party claims against nondebtors. *See, e.g.*
23 *The Matter of Zale Corporation*, 62 F.3d 746, 757 (5th Cir. 1995) (finding that the bankruptcy
24 court lacked subject matter jurisdiction to enjoin third-party tort claims against debtor’s insurer
25 because the claims did not belong to the estate and did not affect the estate); *In re Congoleum*
26 *Corporation*, 362 B.R. 167, 190 (Bankr. D. N.J. 2007) (record did not permit the court to
27 determine whether it had subject matter jurisdiction to enter non-debtor releases); *In re Digital*
28 *Impact, Inc.*, 223 B.R. 1, 15 (Bankr. N.D. Okl.1998) (holding that even were the release the
result of a valid contract between the creditors and the debtor’s principal, who was funding the
plan, the court lacked the “related to” subject matter jurisdiction to permanently release the
creditors’ individual claims against the debtor’s principal because their adjudication would not
affect the estate).

1 enterprise into bankruptcy not for the debtor's sake, but for their own interests." *The Matter of*
 2 *Zale Corporation*, 62 F.3d 746, 757, n. 28. (5th Cir. 1995).

3 The Disclosure Statement's failure to address Ninth Circuit precedent regarding the
 4 court's authority to confirm a plan that includes the release of third-party claims against
 5 nondebtors prevents a finding that it contains adequate information. Further, if the court
 6 concludes that the Plan's inclusion of the releases prevents its confirmation, the court on that basis
 7 alone may refuse to approve the Disclosure Statement. See *In re Main Street AC, Inc.*, 234 B.R.
 8 771, 775 (Bankr. N.D. Cal. 1999); *In re Allied Gaming Management, Inc.*, 209 B.R. 201, 202
 9 (Bankr. W.D. La. 1997); *In re Curtis Center Ltd. Partnership*, 195 B.R. 631, 638 (Bankr. E.D. Pa.
 10 1996); *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1002 (Bankr. D. Mass. 1991).

11 4. Other Disclosure Deficiencies Prevent the Court's Approval of the Disclosure
 12 Statement As Containing Adequate Information.

13 a. Unclear Provisions and Undefined Terms

14 The Disclosure Statement relates that the Plan at Article XI.A. includes a provision
 15 releasing the Debtor, the Committee, the Members of the Committee, and the Released Parties
 16 from liability to any Entity for any act taken or omission made in good faith in connection with or
 17 related to the Chapter 11 Case or the Estate. DS, p. 48, lines 3-9. This provision exceeds the
 18 scope of protection Section 1125(e) of the Bankruptcy Code affords persons soliciting acceptance
 19 of a plan and the offer, sale, and purchase of securities under a plan. See 11 U.S.C. § 1125(e).

20 The provision's meaning is unclear – it uses terms that either are not defined in the
 21 Disclosure Statement or Plan (e.g., "Entity") or are defined differently in the Plan and in the
 22 settlement agreement (e.g., "Released Parties"). The Plan's definition of "Released Parties" states
 23 that in the event of a conflict between the Plan definition and a release in the Plan, on the one
 24 hand, and the release in the settlement agreement on the other hand, the settlement agreement
 25 shall control. Further clouding the meaning of the definitions and the releases is the "Injunction"
 26 at Article VII.D. of the Plan. It states: "Holders of Claims against and Equity Interest[sic] in the
 27 Debtor may not pursue . . . (2) the Released Parties. Plan, p. 22, lines 27-28; p. 23, lines 1-2.
 28 This injunction seemingly swallows the "Limitation of Liability and Release" at Article XI.A. of

1 the Plan. Somewhat reminiscent of a logic game on the law school entrance examination, these
2 release provisions and definitions are very difficult to decipher.

3 b. The Disclosure Statement Fails to State the Effect of the Settlement
4 Agreement's Release, If Any, on Creditors Who Do Not Vote on the Plan.

5 The Disclosure Statement describes the effect of the release in the settlement agreement on
6 creditors voting on the Plan. The Disclosure Statement also should specify the effect, if any, of
7 the settlement agreement's release on the individual claims of creditors who do not vote on the
8 Plan.

9 c. The Disclosure Statement Fails to Address Whether or Not the Liquidating
10 Trust Will Be Required to Register with the Commission Pursuant to
11 Section 12(g) of the Securities Exchange Act of 1934.

12 The Disclosure Statement indicates that the liquidating trust will issue beneficial interests
13 in the liquidating trust to holders of claims and equity security interests. The Disclosure
14 Statement analyzes securities registration laws under Section 5 of the Securities Act of 1933,
15 respecting the issuance of the beneficial interests. The Disclosure Statement fails to, but should,
16 address whether or not the liquidating trust's number of record holders and the dollar amount of
17 its assets would require it to register with the Commission as a reporting company under Section
18 12(g) of the Securities Exchange Act of 1934.

19 **III.**

20 **CONCLUSION**

21 For the reasons discussed above, the Commission objects to approval of the Disclosure
22 Statement and respectfully requests that the court deny approval of the Disclosure Statement.

23 Dated: January 26, 2012

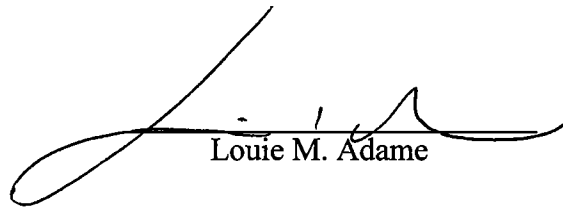
24 Respectfully submitted,

25 /s/ SARAH D. MOYED
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27 Bankruptcy Counsel
28 U.S. SECURITIES AND
EXCHANGE COMMISSION

CERTIFICATE OF SERVICE

On January 26, 2012, I served the following document: **U.S. SECURITIES AND EXCHANGE COMMISSION'S OBJECTION TO APPROVAL OF DISCLOSURE STATEMENT [Docket No. 542]; MEMORANDUM OF POINTS AND AUTHORITIES**. The document was served by the following means to the persons as noted on the attached service list as printed from the Court's ECF filing system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 26, 2012 at Los Angeles, California.



Louie M. Adame

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Mailing Information for Case 10-27855-bam

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Creditor List

Click the link above to produce a complete list of creditors only.

Mailing Matrix

Click on the link above to produce a list of all creditors and all parties in the case. User may sort in columns or raw data format.