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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: Chapter 11
Case No. 14-22503-rdd

MPM SILICONES, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court
300 Quarropas Street
White Plains, New York

B E F O R E:
HON. ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

1 Notice of Requisite First Lien Noteholders' Motion Pursuant to
2 Bankruptcy Rule 9006(c)-1 for Entry of an Order Shortening Time
3 with Respect to Motion Pursuant to Bankruptcy Rule 3018(a) to
4 Change Votes Relating to Debtors' Joint Chapter 11 Plan of
5 Reorganization.

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7 Motion to Allow / Motion Requesting Authority for the Requisite
8 1.5 Lien Noteholders to Change their Votes from Rejecting to
9 Accepting the Debtors' Proposed Plan of Reorganization.

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10 ALSO PRESENT:

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12 US Bank, Trustee

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14 Sina Toussi, VR Capital, Creditor

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1 I have two motions before me by representatives of certain
2 first and 1.5 lien holders, who seek to change their votes on
3 the debtors' Chapter 11 plan pursuant to Bankruptcy Rule 3018.

4 Based on the declarations attached to the motions or
5 admitted into evidence, it appears clear that if the motions
6 were granted, both Class 4 and Class 5 under the plan would,
7 instead of having rejected the plan, accept the plan.

8 The premise of the motions is that, by having the
9 votes changed, the movants would have the benefit of the so-
10 called toggle or carrot-and-stick or fish-or-cut-bait or death-
11 trap provision in the plan, in Sections 5.4, with respect to
12 the first lien notes, and 5.5 with respect to the 1.5 lien
13 notes, which provides that if Class 4 or 5, as the case may be,
14 votes to accept or is presumed to have accepted the proposed
15 plan, such class will receive payment in full in cash on
16 account of their secured claims without any premium or make-
17 whole amount.

18 The plan sections that I've referred to then go on to
19 state that if the respective classes vote to reject the
20 proposed plan, Classes 4 and 5 will receive replacement notes
21 issued by Momentive Performance Materials Inc. in the amount of
22 their allowed claim, including, if the Court so determines, a
23 make-whole amount.

24 The plan was resoundingly rejected by the votes of
25 Classes 4 and 5, comprising first and 1.5-lien noteholders,

1 including in large respect by the same institutions that wish
2 to change their votes at this time.

3 As a result of that rejection, the debtors, as
4 proponents of the plan, proceeded to seek confirmation on a
5 cramdown basis under Section 1129(b)(1) and (2) of the
6 Bankruptcy Code over those two classes.

7 The Court issued a bench ruling at the conclusion of
8 the four-day confirmation hearing which held that it would not
9 allow, as part of the first and 1.5 lien holders' allowed
10 claim, a make-whole claim or other premium for being paid
11 earlier than the original maturity date of their notes, and
12 also concluded that the plan could be confirmed, albeit with a
13 change to the interest rate in the proposed replacement notes
14 provided for therein. The plan has since been amended to
15 conform to the Court's ruling with respect to the proper
16 interest rate.

17 It is only in that context, and as also, I believe,
18 implicitly clarified by Mr. Chou's declaration, which states
19 that thereafter the trading prices of the first lien notes
20 substantially decreased, that the movants have sought to change
21 their votes.

22 Bankruptcy Rule 3018(a) provides in pertinent part
23 that "[f]or cause shown, the court, after notice and hearing
24 may permit a creditor or equity security holder to change or
25 withdraw an acceptance or rejection," that is, an acceptance or

1 rejection of a Chapter 11 plan.

2 Before the 1991 amendments of the Bankruptcy Rules,
3 Bankruptcy Rule 3018(a) also required that any motion to change
4 or withdraw a vote be made before the deadline for voting had
5 passed, but this was repealed in the form of the current
6 version of the rule, which retained, however, the "for cause
7 shown" requirement. See Advisory Committee Notes to the 1991
8 amendments.

9 There is no explanation as to why the change was made.
10 However, notwithstanding the deleted clause, several cases
11 decided before the 1991 amendment ignored the timing limitation
12 upon a sufficient showing of cause, which suggests that the
13 committee concluded that under the right circumstances, as was
14 consistent with practice already, a post-ballot deadline vote
15 could be changed. See *Texas Extrusion Corp v. Lockheed Corp.*
16 (*In re Texas Extrusion Corp.*), 844 F.2d 1142, 1146 (5th Cir.
17 1988), cert. denied, 488 U.S. 926 (1988); *In re Jartran Inc.*,
18 44 B.R. 331, 363 (Bankr. N.D. Ill. 1984); and *In re American*
19 *Solar King Corp.*, 90 B.R. 808, 827 (W.D. Tex. 1988); see
20 generally *In re Eastern Systems Inc.*, 118 B.R. 223 (Bankr.
21 S.D.N.Y. 1990).

22 "Cause" is not defined in Rule 3018. It is instead
23 left up to the court to determine in the exercise of its
24 discretion. See *In re J.C. Householder Land Trust #1*, 502 B.R.
25 602, 605-606 (Bankr. M.D. Fla. 2013).

1 It is clear from the cases that the test for cause
2 very much depends on the context. As stated by the editors of
3 Collier on Bankruptcy, "The test for determining whether cause
4 has been shown for purposes of Bankruptcy Rule 3018(a) should
5 often not be a difficult one to meet. As long as the reason
6 for the vote change is not tainted, the change should usually
7 be permitted. The court must ensure only that the change is
8 not improperly motivated." 9 Collier on Bankruptcy, paragraph
9 3018.01[4] (16th ed. 2014).

10 Thus, certain types of "cause" are obvious and covered
11 by the "should not often be difficult to meet" language in
12 Collier's. As illustrations, Collier gives three hypothetical
13 examples, all of which are attributable to human error, where
14 it is clear "the vote should be changed in order to allow the
15 voting entity to intelligently express its will," In re Kellogg
16 Square Partnership, 160 B.R. 332, 334 (Bankr. D. Minn. 1993):
17 (1) a breakdown in communications at the voting entity for the
18 creditor, (2) a misreading of the terms of the plan, and (3)
19 execution of the ballot by someone who did not have authority,
20 identified within a reasonable time by someone who did have
21 such authority. 9 Collier on Bankruptcy ¶ 3018.01[4].

22 That statement is clearly consistent with the case
23 law, although those facts do not normally make their way into
24 the reported decisions. The reported decisions more often deal
25 with a more difficult type of asserted cause and address

1 whether the vote change is somehow tainted. They involve
2 instances where the creditor believes the change in the vote
3 will benefit it, based on new facts.

4 Those types of decisions have been cited by both sides
5 in connection with the motions before me. Those decisions have
6 reached, I believe, a proper and general consensus.

7 First, the courts have held, I believe uniformly, that
8 changing a vote based on the creditor's subsequent assessment
9 that the vote will actually have meaning, if changed, will not
10 be permitted unless the change is supported or agreed to by the
11 plan proponent.

12 Often, this issue comes up in the context of a party
13 who opposed the plan acquiring the claim of a creditor who
14 voted in favor of the plan and then seeking to change that
15 creditor's vote to enhance the objector's leverage in opposing
16 confirmation, such as by being able to force a cramdown. See,
17 for example, the Eastern Systems case that I've previously
18 cited, and *In re Windmill Durango Office, LLC*, 481 B.R. 51
19 (B.A.P. 9th Cir. 2012), where the Rule 3018 motions were
20 denied.

21 On the other hand, where the plan proponent does not
22 oppose the vote being changed, the courts generally support the
23 change over the objection of a still-dissenting creditor, in
24 furtherance of the courts' and the Code's policy in favor of
25 consensual negotiation of Chapter 11 plans. See, for example,

1 In re Dow Corning, Corp., 237 B.R. 374 (Bankr. E.D. Mich.
2 1999).

3 Even in that context, some courts have looked askance
4 at such a change, however, worried about the effect on the
5 bankruptcy process of the after-the-fact alteration of the
6 vote. See In re MCorp Financial Inc., 137 B.R. 237 (Bankr.
7 S.D. Tex. 1992), which, however, I will note may have been
8 influenced by the fact that the pre-1991 version of Rule 3018
9 was being considered.

10 As stated in the Windmill Durango case, which
11 sustained the bankruptcy court's decision not to permit the
12 vote change when the change was intended to further the
13 movant's objection to the Chapter 11 plan, "'Cause' under Rule
14 3018(a) required something more than a mere change of heart,"
15 481 B.R. at 66, and should not be permitted where it "did the
16 [confirmation] process violence." Id.

17 The movants here argue that they are, or their vote
18 change would be, in line with cases that permit a vote change
19 in furtherance of a consensual plan, such as the cases I've
20 cited for that proposition, as well as In re Cajun Electric
21 Power Coop., 230 B.R. 715 (Bankr. M.D. La. 1999), and In re CGE
22 Shattuck, LLC., 2000 Bankr. LEXIS 1806 at *9 (Bankr. D.N.H.
23 November 28th, 2000), which state the apple-pie proposition in
24 bankruptcy cases that "the goal after all is consensual plans.
25 Such being the goal, what greater evidence of cause exists than

1 where major parties in a chapter 11 proceeding negotiate a
2 settlement." *Cajun Electric*, 230 B.R. at 744 (quoting *In*
3 *American Solar King*, 90 B.R. at 825).

4 If it were the case here that the plan proponents
5 supported the requested vote change as part of a consensual
6 resolution of the parties' disputes (and the facts did not
7 indicate any extra consideration being offered for the changed
8 vote--although I would in all likelihood hold a hearing focused
9 on that issue), I would approve the changed vote. That is, I
10 would not follow *MCorp Financial*.

11 However, it is clear to me that this is not the case.
12 Here, the changed vote in the present context would not be in
13 furtherance of a consensual plan. As I noted, the plan
14 provided a choice for the first and 1.5 lien holders. Either
15 they could vote in favor of the plan and receive the treatment
16 that they are looking to have now although they instead voted
17 against the plan; or, alternatively, if they voted against the
18 plan, they would have the treatment that they're trying to
19 avoid now although they did in fact vote against the plan.

20 Such fish-or-cut-bait, death-trap, or toggle
21 provisions have long been customary in Chapter 11 plans. See
22 *In re Drexel Burnham Lambert Group*, 138 B.R. 714, 717 (Bankr.
23 S.D.N.Y. 1992), and *In re Adelpia Communications Corp.*, 368
24 B.R. 140, 275 (Bankr. S.D.N.Y. 2007). There is a clear
25 rationale behind such provisions, as stated by the court in *In*

1 re Zenith Electrics Corporation: "If the class accepts, the
2 plan proponent is saved the expense and uncertainty of a
3 cramdown fight," which is in keeping with the Bankruptcy Code's
4 overall policy of fostering consensual plans of reorganization.
5 241 B.R. 92, 105 (Bankr. D. Del. 1998). That is, such
6 provisions offer a choice to avoid the expense and, more
7 importantly, the uncertainty of a contested cramdown hearing.

8 The first and 1.5 lien holders clearly are
9 sophisticated institutions represented by knowledgeable and
10 sophisticated professionals. They made the choice to vote
11 against the plan, and I believe it would not be proper, and
12 that they have not shown cause now, to change that vote in
13 order to undo its consequences.

14 I do not believe the plan's toggle or fish-or-cut-bait
15 offer is still open. If it were, the debtors would have
16 accepted it. Instead, I'm advised that if I were to grant the
17 motions, rather than look to consummate the plan with the cash-
18 out provision in it, the debtors would seek to amend the plan
19 under Bankruptcy Rule 3019 and Section 1127 of the Bankruptcy
20 Code. I assume, in addition, that the second lien holders who
21 voted in favor of the plan and who are backstopping the rights
22 offering and have various rights based on the timing of
23 confirmation and the reasonable nature of the order confirming
24 the plan would seek to support that attempt to amend the plan
25 and potentially withdraw their support of the plan and the

1 backstop of the rights offering.

2 The debtors and the second lien holders might or might
3 not win, ultimately, on those attempts. And I suppose it is
4 conceivable that they would eventually change their minds and
5 negotiate a resolution.

6 On the other hand, it is crystal clear that the
7 requested vote change is not, in effect, a consensual
8 settlement. It is seeking to undo a choice that had originally
9 been made. I believe that there is not sufficient cause for
10 that result.

11 As I noted during oral argument, the best discussion
12 of Rule 3018 appears in *In re J.C. Householder Land Trust #1*,
13 502 B.R. 602 (Bankr. M.D. Fla. 2013), in which Judge Williamson
14 goes to great length to discuss the importance of an orderly
15 voting process, noting that permitting tactical or strategic
16 changes in a vote would "sharply shift the balance toward the
17 creditor that has obtained a blocking position," *id.* at 607
18 (or, I would say in this case, has forced a cramdown fight),
19 and, moreover, that such a process "creates a huge risk of
20 opportunistic behavior" that would "negatively impact the
21 otherwise orderly reorganization process." *Id.* at 608.

22 Continuing on with that quote, "No creditor could ever
23 be confident in investing either their time or money in any
24 debtor-proposed plan so long as a blocking creditor might
25 arise. Other creditors, moreover, might decide to change their

1 ballots for strategic reasons to gain leverage in what would be
2 never-ending negotiations. All this leads to one unmistakable
3 conclusion. Changing a vote to block confirmation cannot
4 constitute cause under Rule 3018." Id.

5 Now, as noted, Judge Williamson in J.C. Householder
6 was dealing with a creditor who sought to change its vote to
7 block confirmation, but I think someone who wants to change
8 their vote to obtain an after-the-fact tactical advantage that
9 would not resolve confirmation on a consensual basis with the
10 plan proponent raises the same concerns with respect to the
11 plan confirmation process, regardless that Rule 3018 is silent,
12 as it is now, on the ability to seek to change one's vote after
13 the voting deadline has passed.

14 The noteholders also argue or come close to arguing,
15 at least, that even if the debtors and their allies are opposed
16 to the forced settlement--which I believe would not be a
17 complete settlement for the reasons I've stated--based on the
18 requested vote change, I should force it on them for various
19 facially appealing reasons cited by the movants, such as that
20 it would result in the end of litigation, the end of appeals
21 and, as stated on the record, the end of litigation not only in
22 the bankruptcy case with regard to the confirmation hearing,
23 but also in the intercreditor litigation that is pending before
24 me.

25 I think, however, that this is a choice that the

1 debtors and their allies should have the right to make on their
2 own. I don't believe it is "cause" for me to, in such a
3 parochial way, force on plan proponents a "consensual" result
4 that the Court, but not the proponents themselves, believes is
5 advisable (even if I believed that, in fact, a settlement
6 ignoring the results of the confirmation hearing as if the
7 movants had originally voted to accept the plan would be fair,
8 which, as I stated during oral argument, I do not believe).

9 So, while there is, obviously, a high premium placed
10 on consensus, and I have repeatedly urged the parties, starting
11 well before the disclosure statement hearing, to reach
12 consensus, they have chosen not to do so. I do not believe
13 these motions are, in fact, a choice to achieve consensus.

14 Accordingly, based on the exercise of my discretion
15 and my review of the applicable case law, I conclude that there
16 has not been a sufficient showing of cause to permit the votes
17 to be changed.

18 So I would ask the debtors to submit two orders
19 denying the relief.

20

21 Dated: White Plains, New York
 September 17, 2014

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/s/ Robert D. Drain

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Hon. Robert D. Drain
United States Bankruptcy Judge

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