

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

**In re:**

**LYDIA CLADEK, INC.,**

**Debtor.**

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**CASE NO. 3-10-bk-02805-PMG  
CHAPTER 11**

**REPLY TO CHAPTER 11 TRUSTEE'S RESPONSE IN OPPOSITION TO MOTION  
OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO  
COMBINE DISCLOSURE STATEMENT AND CONFIRMATION HEARING**

The Official Committee of Unsecured Creditors (the "Committee") hereby files its Response to the Chapter 11 Trustee's Response in Opposition to Motion of the Official Committee of Unsecured Creditors to Combine Disclosure Statement and Confirmation Hearing (Doc. No. 315; the "Objection") and, in support thereof, states as follows:

**Introduction**

The Committee has spent a significant amount of time and effort in preparing a proposed plan of reorganization in which each unsecured creditor<sup>1</sup> will have the opportunity to receive both cash distributions from the Cladek Creditor Trust and shares in a new corporation which will administer the loan portfolio, with the goal of growing the loan portfolio and allowing potential distributions to unsecured creditors (who would be shareholders of the new corporation). The Committee firmly believes that the Committee's Plan of Reorganization (Doc. No. 295; the "Committee Plan") is in the best interests of all creditors and has the best chance for yielding a significant return for creditors.

The Committee has filed a Motion seeking to have the Disclosure Statement conditionally approved so creditors may have an opportunity to read and consider the Committee's Plan and have an opportunity to vote on the plan. The Disclosure Statement proposed by the Committee

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<sup>1</sup> Each unsecured creditor with an Allowed Claim, which is not eligible to and does not elect to participate in Class 8 as provided for specifically in the Plan.

complies with the requirements of 11 U.S.C. § 1125 of the Bankruptcy Code as it provides adequate information to creditors to enable them to decide whether to accept or reject the proposed plan.

Although the Chapter 11 Trustee's opposition alleges numerous unfounded allegations of "improprieties" of the Committee and its counsel, these allegations are not only baseless and irrelevant to the merits of the motion but merely serve as a litigation tactic to hinder the Committee's approval of the Disclosure Statement and slow the voting process. In his Objection, the Chapter 11 Trustee repeatedly advocates for an alternative plan, one which he has repeatedly urged the Committee to support. After reviewing the terms of the proposed "opt out" plan supported by the Trustee, the Committee did not feel that it was in the best interests of creditors and filed its own Plan. To the extent that the Trustee supports an alternative plan the Committee urges the Trustee to file his own plan and provide the creditors with an opportunity to vote.

#### **Procedural Background**

1. On April 2, 2010, several petitioning creditors filed an involuntary Chapter 11 petition against Lydia Cladek, Inc. (the "Debtor"), Case No. 10-bk-02800-PMG, in the United States Bankruptcy Court, Middle District of Florida, Jacksonville Division (the "Involuntary Case").
2. Subsequently, on April 5, 2010, Lydia Cladek, Inc. filed the instant voluntary Chapter 11 petition (the "Voluntary Case").
3. On April 7, 2010, several creditors filed an Emergency Motion to Consolidate the Involuntary and Voluntary Chapter 11 cases of Lydia Cladek, Inc. (Doc. No. 13) along with an Emergency Motion to Appoint a Chapter 11 Trustee (Doc. No. 11).
4. On April 12, 2010, the Court entered its Order Granting Motion to Consolidate providing that the Voluntary Case shall be the lead case. On that date, the Court also entered

its Order Granting Motion to Appoint Chapter 11 Trustee (Doc. No. 32), appointing Michael Phelan as Chapter 11 Trustee (the "Trustee").

5. On June 1, 2010, the Court entered a Notice of Appointment of an Unsecured Creditors' Committee of Lydia Cladek, Inc. (Doc. No. 111).

6. On July 2, 2010 the Trustee filed a Motion to Approve the Sale of Substantially All of the Debtor's Performing Assets (Doc. No. 152; the "Sale Motion"), pursuant to which the Trustee requested authority to sell all of the car loans less than 180 days past due.

7. On July 6, 2010 the Trustee filed a Motion to Approve the Sale of Substantially All of the Debtor's Non-Performing Assets (Doc. No. 158; "Non-Performing Sale Motion"), pursuant to which the Trustee requested authority to sell all of the car loans greater than 180 days past due. On August 9, 2010, the Committee filed an Objection to the Non-Performing Sale Motion (Doc No. 215), which was subsequently withdrawn (Doc. No. 217).

8. On August 9, 2010, the Committee filed an Objection to the Motion to Approve the Sale of Substantially All of the Debtor's Performing Assets (Doc. No. 214; "Sale Objection"). As set forth in the Sale Objection, the Committee did not believe that it was in the best interest of creditors to liquidate the performing accounts, especially when those accounts were generating cash flow for the estate. After a diligent review of the Trustee's information relied upon and alleged in the Sale Motion, the Committee determined that there were fatal flaws in the Trustee's analysis and if the cash collected from the accounts were reinvested in new notes and properly managed through reorganization (as opposed to the liquidation of option sought by the Trustee), the estimated return to investors would be substantially more than that obtained through the liquidation of the performing accounts.

9. Prior to the hearing on August 12, 2010, the Committee requested information from the Trustee relating to the sale of the assets and the loan portfolio in order to assess the proposed sale and determine whether the continued administration of the loan portfolio through reorganization would generate a better return for creditors. The Trustee freely provided information relating to the loan portfolio to the Committee without restrictions or the need for a confidentiality agreement. Using the information provided by the Trustee the Committee, with the assistance of Thomas Imler and Charles Ellyson, prepared projections which were subsequently used as exhibits at the evidentiary hearing described below.

10. On August 12, 2010, an evidentiary hearing was held on the Sale Motion and the Committee's Objection. The Court heard testimony from the Trustee and Thomas Imler and Charles Ellyson, who testified as expert witnesses on behalf of the Committee.

11. On August 12, 2010, Judge Glenn ruled on the Sale Motion and the Committee's Objection to the Sale Motion, and stated that:

So I think it's appropriate, although, this decision was made with sound business judgment by the trustee, ***I think the unsecured creditors have given an analysis to that, have shown that there are other possibilities with substantially greater returns. And I believe they should have the opportunity to develop those.***

So I don't think that we should have the sale of the performing assets on August 19, and that motion should be denied.

I hope that there will be continued cooperation. I believe that there will be continued cooperation, and I hope that there will be continued cooperation.

And if a subsequent sale seems best, then file a motion. If it's necessary to have that subsequent sale by September 1, come in with an agreement on an emergency motion or with subsequent analyses. And, as you know, we will hear those because it is all of our goal to maximize the assets.

***But it appears that the unsecured creditors should have the opportunity to evaluate maximizing these assets.*** If selling is appropriate, that's one thing. If a plan is appropriate, that's another. ***If competing plans are appropriate, that gives all the unsecured creditors the opportunity to vote. But it is the unsecured creditors that have their funds at risk.***

August 12, 2010 Hearing Transcript Excerpt, 9:12-10-17, a copy of which is attached to the Objection as Exhibit "A" (emphasis added).

12. Since the hearing on the Sale Motion, the Committee and the Trustee, though their counsel, have attempted to negotiate a joint plan of reorganization. In order to negotiate the terms of a potential plan, it was anticipated that the Committee may obtain information from the Trustee, such as analysis relating to claims, preferences and fraudulent transfers. In fact the Confidentiality Agreement provides that:

WHEREAS, in order to facilitate the Committee's participation in the formation of a plan, it will be necessary for the Committee to obtain information related to the amount of monies received and disbursed by the Debtor to perpetuate the alleged Ponzi scheme, which may be in a form compiled and prepared by the Trustee's counsel or other professionals employed in the Bankruptcy Case, and which may also contain confidential, privileged, or proprietary information.<sup>2</sup>

13. On October 1, 2010, the Committee sent to the Trustee a copy of the proposed joint disclosure statement and plan of reorganization in the hopes that the parties could reach a consensus on terms.

14. On October 4, 2010, the Trustee sent to the Committee proposed provisions for a joint plan of reorganization which he referred to as "Key Provisions<sup>3</sup>."

15. On October 6, 2010, a meeting was held at the offices of the Debtor which was attended by the Trustee, counsel for the Trustee, accountant for the Trustee, counsel for the Committee, and the accountant for the Committee. At that time, the parties reviewed and discussed extensively the Trustee's proposed Key Provisions, but the Trustee was not in a

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<sup>2</sup> The Trustee repeatedly alleges that the Committee has breached the Confidentiality Agreement by using certain information "in connection with its Disclosure Statement and Plan" but at no point in the Objection does the Trustee state the facts which support this allegation. The information set forth in the Disclosure Statement, such as the cash on hand (which is from Doc. No. 277) and preferences (which is from Doc. No. 201) are based on documents filed by the Trustee with the Bankruptcy Court or are projections.

<sup>3</sup> Counsel for the Trustee had sent to counsel for the Committee a document identifying the Key Provisions (the "Key Provisions Document"); however, the Key Provisions Document was stamped as "confidential." The Committee disputes the confidentiality of the Key Provisions Document, but out of abundance of caution, the Committee will not attach the Key Provisions document.

position to discuss the proposed joint disclosure statement and plan previously furnished by the Committee. Ultimately, the parties were not able to agree to adopt the Key Provisions required by the Trustee, nor were the parties able to agree to terms of a joint disclosure statement and plan.

16. The Trustee continued to demand a separate "opt out" alternative, as well as a \$350,000 carve-out for a proposed creditor agent, although the Committee viewed these demands as harmful to an effective reorganization of the Debtor. An additional "key provision" included estimating values and later true-up, which the Committee also believes are likewise convoluted and unworkable<sup>4</sup>. Thus, the Committee did not agree with the key provisions including the requirement of an "opt out" class. Accordingly, counsel for the Committee informed, Trustee's counsel, Jacob Brown, that the Committee did not agree with the key terms and would be filing their own plan and disclosure statement.

17. On October 21, 2010, the Committee Chairperson Noel Yell sent an e-mail to the creditors informing them that the Committee was working on a plan which the creditors would receive in the mail and would need to read before the creditor could vote. A copy of the e-mail was attached to the Objection as Exhibit "C" (the "Creditor Email").

18. On October 28, 2010, the Committee filed its Plan of Reorganization (Doc. No. 295; the "Plan") and the Disclosure Statement (Doc No. 294).

19. On October 28, 2010, the Committee filed a Motion by the Official Committee of Unsecured Creditors to Combine Disclosure Statement and Confirmation Hearing (Doc No. 296; the "Motion to Combine").

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<sup>4</sup> These issues were discussed in emails between counsel for the Committee and Trustee, which were published to third parties, and therefore, cannot be considered confidential.

**LEGAL ARGUMENT**

**A. The Court has the Authority to Grant Conditional Approval of a Disclosure Statement and Grant a Combined Hearing**

20. The Bankruptcy Court has the authority to grant a conditional approval of the disclosure statement and schedule a combined hearing pursuant to Bankruptcy Code Section 105(d). In fact, such relief has been routinely granted in large bankruptcy cases in the Middle District of Florida.

21. Bankruptcy Code Section 105(d) specifically provides for the combination of the hearing on the disclosure statement and confirmation of the plan. Bankruptcy Code Section 105(d) provides, in relevant part, as follows:

- (d) The court, on its own motion or on the request of a party in interest-
- (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—
- (B) in a case under chapter 11 of this title—
- (vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

22. Furthermore, Bankruptcy Courts in the Middle District of Florida have routinely approved motions to combine the hearings on the disclosure statement and plan. See, In re Amelia Island Company, Bankruptcy Case No. 09-9601 (Doc. No 659); In re Clarkliff of Orlando, Inc., Bankruptcy Case No. 07-03154 (Doc. No. 278). In fact, Chief Judge Paul M. Glenn entered an order granting the conditional approval of a Disclosure Statement (Doc. No. 659) in the bankruptcy case entitled In re Amelia Island Company, Bankruptcy Case No. 09-9601 pending before the Bankruptcy Court for the Middle District of Florida, Jacksonville Florida. Amelia Island, was not a small business case and did not involve a pre packaged plan.

23. In the Objection, the Trustee asserts that the Committee impermissibly requests to combine the hearings on the approval of its Disclosure Statement and the Plan because a Bankruptcy Court may only combine the hearings on approval of a disclosure statement and plan in two limited circumstances: (i) in cases involving small business debtors; and (ii) in cases involving prepackaged plans. In support of this position, the Trustee relies on Amster Yard Associates, 214 B.R. 122 (Bankr. S.D.N.Y. 1997), which held that Bankruptcy Code Section 105(d) was inconsistent with Bankruptcy Code 1145(f) and; therefore, the Court could not preliminarily approve the disclosure statement if the debtor was not a small business.

24. Bankruptcy Code Section 1145(f) provides, in relevant part, that:

(f) Notwithstanding subsection (b), in a small business case—  
(3) (A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;  
(B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the date of the hearing on confirmation of the plan; and  
(C) the hearing on the disclosure statement may be combined with the hearing on confirmation of a plan.

25. Amster Yard Associates, however, is not binding precedent in the Eleventh Circuit and is contrary to the decisions of numerous Bankruptcy Courts in the Middle District of Florida, all of which have conditionally approved disclosure statements and combined hearings on disclosure statements and confirmation of plans in bankruptcy cases which are not small business cases and did not involve pre-packaged plans. See, In re Amelia Island Company, Bankruptcy Case No. 09-9601 (Doc. No 659); In re Clarklift of Orlando, Inc., Bankruptcy Case No. 07-03154 (Doc. No. 278). At least one court outside of the Middle District of Florida has recognized that "section 1125(f) authorizes combined plans and disclosure statements [hearings] in small business cases and section 105(d) authorizes the court to combine them in other cases." In re Gulf Coast Oil Corp., 404 B.R. 407, 425 (Bankr. S. D. Tex. 2009). In fact, the interpretation of Section

1125(f) and 105(d) which is set forth in Amster Yard Associates, would render Section 105(d) meaningless.

26. In accordance with Bankruptcy Code Section 105 and the decisions rendered by the Bankruptcy Courts for the Middle District of Florida, the Committee respectfully requests that the Court conditionally approve the Disclosure Statement and schedule a combined hearing on the Disclosure Statement and confirmation of the Plan.

**B. The Disclosure Statement Contains Adequate Information**

27. "The purpose of a disclosure statement is to provide adequate information to creditors to enable them to decide whether to accept or reject the proposed plan. The phrase adequate information has been deliberately left vague by Congress to give a bankruptcy court wide discretion to determine on a case by case basis whether the disclosure is reasonable." In re Ferretti, 128 B.R. 16, 18 (Bankr. D. N. H. 1991)(internal quotations omitted).

28. Section 1125 (a)of the Bankruptcy Code, provides that:

"adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor and success or the debtor, and a hypothetical investor typical of the holders of claims of interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

29. In determining whether a disclosure statement provides adequate information,

Courts have considers factors such as:

- (1) the events which let to the filing of the bankruptcy petition;
- (2) a description of the available assets and their value;
- (3) the anticipated future of the company;
- (4) the course of information stated in the disclosure statement;
- (5) a disclaimer;
- (6) the present condition of the debtor while in Chapter 11;
- (7) the scheduled claims;
- (8) the estimated return to creditors under a Chapter 7 liquidation;

- (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information;
- (10) the future management of the debtor;
- (11) the Chapter 11 plan or summary thereof;
- (12) the estimated administrative expenses, including attorneys' and accountants' fees;
- (13) the collectability of accounts receivable;
- (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan;
- (15) information relevant to the risks posed to creditors under the plan;
- (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;
- (17) litigation likely to arise in a nonbankruptcy context;
- (18) tax attributes of the debtor with the affiliates.

In re United States Brass Corporation, 194 B.R. 420,424-425 (Bankr. E.D. Tx. 1996)

These factors are not meant to be comprehensive and the disclosure statement does not have to provide all of the information listed as the Court will decide what information is appropriate in the case. See, Id.

30. In applying the above referenced factors and considering the complexity of this case, it is apparent that the Disclosure Statement provides creditors with adequate information, within the meaning of section 1125, to enable creditors to decide whether to accept or reject the proposed plan.

**C. The Trustee's Allegations Relating to Feasibility of the Plan and the Best Interests of Creditors Are Properly Raised at the Confirmation Hearing**

31. As previously stated, the standard for approval of the disclosure statement is whether the disclosure statement provides adequate information to creditors to enable them to decide whether to accept or reject the proposed plan. The Trustee asserts that the disclosure statement should not be approved because the Committee Plan does not satisfy two requirements necessary for *confirmation* of the Committee Plan, under Bankruptcy Code Section 1129, as the Trustee alleges that the Committee Plan is not feasible and is not in the best interests of creditors. Contrary to the Trustee's unfounded allegations, it is abundantly apparent that the Committee's Plan is both feasible and in the best interests of

creditors. Nevertheless, the Trustee's objections are not appropriately raised in opposition to a disclosure statement, but are only to be litigated at confirmation.

32. "Disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible. However, such action is discretionary and must be used carefully so as not to convert the disclosure statement hearing into a confirmation hearing, and to insure that due process concerns are protected." United States Brass Corp., 194 B.R. 420, 422 (Bankr. E.D. Tx. 1996). The Trustee merely makes baseless allegations that the Disclosure Statement's projections are "pie-in-the-sky" and that the Committee has failed to demonstrate through "concrete evidence" that the reorganized entity will be able to fund and maintain the obligations under the Committee Plan. The Trustee has arbitrarily chosen the amounts for a liquidation rate and discount rate to obtain a desired result of his choosing. The Trustee does not refer to any factual evidence in its Objection, and fails to establish that the Committee Plan is so fatally flawed that it cannot be confirmed under any circumstances and is not confirmable on its face. See, In re United States Brass Corporation, 194 B.R. 420,428 (Bankr. E.D. Tx. 1996).

**D. The Trustee's Allegations Relating to Improper Solicitation**

33. The Trustee alleges in the Objection that the Creditor Email was an improper solicitation in violation of Bankruptcy Code Section 1125(b); however, bankruptcy law is clear that solicitation is more than merely exchanges of information.

34. "The Code does not define the term "solicited." The term must nevertheless be very narrowly interpreted to mean only specific requests for an official vote for or against the reorganization plan." In re Gilbert, 104 B.R. 206, 214 (Bankr. W.D. Mo. 1989). In interpreting the meaning of a solicitation, the Bankruptcy Court in Dow Corning Corp., 227 B.R. 111, 118 (Bankr. E.D. Mich. 1998) recognized that solicitation does not

mean "discussions, exchanges of information, negotiations, or tentative arrangements that may be made by various parties in interest in a bankruptcy case which may lead to the development of a disclosure statement or plan of reorganization or information to be included therein" Dow Corning Corp., 227 B.R. 111, 118 (Bankr. E.D. Mich. 1998). Solicitation refers to the formal polling process of rejection or acceptance of the plan and only occurs "when a party in interest makes a specific request for an official vote either accepting or rejecting a plan of reorganization." Id (internal quotations omitted). In short, "solicitation, then, is the process of seeking votes for or against a plan." Id at 118.<sup>5</sup>

35. Clearly, the Creditor Email was not a specific request for official votes for or against the plan and accordingly is not an unauthorized solicitation in violation of Bankruptcy Code Section 1125(b).

WHEREFORE, the Committee of Unsecured Creditors respectfully requests this Court enter an order approving the Disclosure Statement.

DATED this 19th day of November 2010.

Respectfully submitted,

/s/ Jon E. Kane

Jon E. Kane, Esq.

Florida Bar No. 814202

Burr & Forman, LLP

450 S. Orange Avenue, Suite 200

Orlando, FL 32801

Telephone: (407) 244-0888

Fax: (407) 244-0889

Email: [jkane@burr.com](mailto:jkane@burr.com)

**ATTORNEYS FOR THE OFFICIAL  
COMMITTEE OF UNSECURED  
CREDITORS**

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<sup>5</sup> To the extent that the Court accepts the broad meaning of solicitation advocated by the Trustee, communications by the Trustee to Committee's counsel, which copies a creditor and counsel for creditors, which advocates for an unfiled alternative plan to be proposed by the Trustee could be interpreted as a solicitation for votes against the Committee's Plan.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the forgoing has been served on November 19, 2010 via U.S. Mail and/or the court's electronic CM/ECF electronic mail upon all parties and counsel on the attached Amended Official Service List as of November September 20, 2010.

/s/ Jon E. Kane  
Jon E. Kane. Esq.

Lydia Cladek, Inc.  
Case No.: 3:10-bk-2805-PMG  
**AMENDED OFFICIAL SERVICE LIST**  
**(amended as of September 20, 2010)**

Michael Phelan  
Chapter 11 Trustee  
3613 North 29th Ave.  
Hollywood, FL 33020

Jacob A. Brown, Esq.  
Akerman Senterfitt  
50 North Laura Street, Suite 2500  
Jacksonville, FL 32202

Lydia Cladek, Inc.  
108 Seagrove Main Street  
St. Augustine, FL 32080

Lawrence Lilly, Esq.  
336 Redwing Lane  
St. Augustine, FL 32080-7979

Lydia I. Cladek  
189 Sea Colony Parkway  
St. Augustine, FL 32080

Lydia I. Cladek  
1001 Lindgren Blvd.  
Sanibel, FL 33957

Elena L. Escamilla, Esq.  
United States Trustee  
135 W. Central Blvd., Suite 620  
Orlando, FL 32801

Mac D. Heavener, III, Esq.  
Bonnie A. Glober, Esq.  
United States Attorney's Office  
300 North Hogan Street, Suite 700  
Jacksonville, FL 32202

Jon E. Kane, Esq.  
Burr & Forman, LLP  
450 S. Orange Avenue, Suite 200  
Orlando, FL 32801

Gary L. Alligood  
115 Sunset Harbor Way #202  
St. Augustine, FL 32080

Rudolph J. Danowski  
127 Hogsback Road  
Oxford, CT 06478

David J. Rees  
4219 Bunker Dr.  
Quincy, IL 62305

Robert F. Helfferich  
21409-60th Street  
Bristol, WI 53104-9732

Bennett Yell Agency, Inc.  
c/o Bennett Yell  
9075 June Lane  
St. Augustine, FL 32080

Andrea Levinson &  
Michael Egelman  
c/o Michael Egelman  
127 Bonita Road  
St. Augustine, FL 32086

RAD Management Company  
c/o Donald R. Radbill  
221 N. Forest Dune Dr.  
St. Augustine, FL 32080

Internal Revenue Service  
Centralized Insolvency Operations  
PO Box 21126  
Philadelphia, PA 19114-0326

Internal Revenue Service  
Special Procedures – Stop 5720  
400 W Bay Street Suite 35045  
Jacksonville, FL 32202

Alan M. Weiss, Esq.  
50 North Laura Street, Suite 3900  
Jacksonville, FL 32202

Wm. Patrick Fulford, Esq.  
505 Maitland Avenue, Suite 100  
Altamonte Springs, FL 32701

Florida Department of Revenue  
5050 W. Tennessee Street  
Tallahassee, FL 32399-0145

U.S. Securities & Exchange  
Commission  
Reorganization Branch, Atlanta  
3475 Lenox Rd., NE, Ste. 1000  
Atlanta, GA 30326-3235

Charles B. Jimerson, Esq.  
2124 Park Street  
Jacksonville, FL 32204

John R. Stiefel, Jr., Esq.  
One Independent Drive, Suite 2301  
Jacksonville, FL 32202

Undine C. Pawlowski, Esq.  
4075 A1A S., Ste. 200D  
St. Augustine, FL 32080

David W. Barrett, Esq.  
Fowler White Boggs P.A.  
50 N. Laura Street, Suite 2800  
Jacksonville, FL 32202

Carolyn S. Fortner, Trustee  
George W. Fortner Credit Trust  
3123 S. Ponte Vedra Blvd.  
Ponte Vedra, FL 32082

Sidney Abelski, Esq.  
Abelski & Associates, Ltd.  
180 N. Michigan Ave., Suite 1800  
Chicago, IL 60601

Thomas D. Summerhays  
3615 Pearl Ln  
Waterloo, IA 50702-5507

A. Girouard  
225 North Forest Dune  
St. Augustine, FL 32080

Ben Bolling  
1921 Fleetwood Drive  
Kingsport, TN 37660

Robert L. and H. Joyce MacFie  
148 Spartina Avenue  
St. Augustine, FL 32080

Glenn A. Lanzer Jr.  
1710 Timber Ridge Circle  
Corinth, TX 76210

R. Carter Burgess, Esq.  
McGlinchey Stafford, PLLC  
10752 Deerwood Park Blvd.  
Suite 100  
Jacksonville, FL 32256

Bernard Reller  
4728 NW 38th Street  
Gainesville, FL 32608

Thomas W. Herren  
12815 Huntley Manor Dr.  
Jacksonville, FL 32224

Peter G. Henry  
111 Cardiff Place  
Chapel Hill, NC 27516

Alma Obinger  
29 Bayberry Court  
Deptford, NJ 08096

George O. Kelbert  
9134 June Lane  
St. Augustine, FL 32080

Thomas and Marianne Gilligan  
546 Race Place  
Oakdale, NY 11769

Brigitte and Steven Neiswender  
14 King Eider Way  
Taylors, SC 29687

Harold W. Thompson  
Irene E. Thompson  
12 King Eider Way  
Taylors, SC 29687

Tennessee Department of Revenue  
c/o Tennessee Attorney General's Office  
Bankruptcy Division  
P.O. Box 20207  
Nashville, TN 37202-0207

Marshall B. Hall  
3123 S. Ponte Vedra Blvd.  
Ponte Vedra, FL 32082-4535

Cynthia Bailey Pyle  
1112 Southeast 22nd Avenue  
Ocala, FL 34471

Polly Anne Cox  
Betty T. Crisco  
c/o Robbin C. Vernon  
2608 Stratford Drive  
Greensboro, NC 27408

Gregory G. Cook, D.P.M.  
1543 Lakeland Hills Blvd., Suite B  
Lakeland, FL 33805-3246

Yvonne Rodriguez  
3424 Serendipity Drive  
Raleigh, NC 27616

Barbara L. Volkmann  
P.O. Box 23914  
San Diego, CA 92193

Kenneth and Marcia Cerotzke  
4010 Grand Vista Blvd., Unit 132  
St. Augustine, FL 32084

Michael A. Tapio  
112 Lex Ct.  
Greer, SC 29651

Thomas H. Grimm  
Carolyn R. Grimm  
5605 Elwood Circle  
Flowery Branch, GA 30542

Robert D. Wilcox, Esq.  
800 W. Monroe Street  
Jacksonville, FL 32202

John E. Bonjean and  
Joyce A. Bonjean  
1182 Melagano St.  
Deltona, FL 32725

Debbie Cisar  
4204 Wetzell Avenue  
Cleveland, OH 44109

Nina M. LaFleur, Esq.  
LaFleur Law Firm  
Post Office Box 861128  
St. Augustine, FL 32086

Stuart Wilson-Patton, Esq.  
PO Box 20207  
Nashville, TN 37202-0207

Allen and Wendy Harralson  
1571 Doyle Road  
Deltona, FL 32725

Kenneth Hollingsworth  
c/o Laura Beth Faragasso, Esq.  
P.O. Box 14079  
Tallahassee, FL 32317-4079

Michael J. McCabe, Esq.  
Eric S. Vaughn, Esq.  
1400 Prudential Drive, Suite 5  
Jacksonville, FL 32207

Don-Fran Page  
3316 Parkridge Rd. #137  
Waterloo, IA 50701