

1 DAN WOODS (SBN 78638)
2 WHITE & CASE LLP
3 633 West Fifth Street, Suite 1900
4 Los Angeles, California 90071-2007
5 Telephone: (213) 620-7700
6 Facsimile: (213) 687-0758

50-295/323

7 HOWARD S. BELTZER
8 DANIEL P. GINSBERG (Admitted *Pro Hac Vice*)
9 WHITE & CASE LLP
10 1155 Avenue of the Americas
11 New York, New York 10036
12 Telephone: (212) 819-8200
13 Facsimile: (212) 354-8113

14 Attorneys for Deutsche Bank AG New York
15 Branch, as Issuing and Administrative Agent

16 UNITED STATES BANKRUPTCY COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 In re
20 PACIFIC GAS AND ELECTRIC
21 CORPORATION, a California corporation,
22 Debtor.

Case No. 01 30923 DM

Chapter 11 Case

OBJECTION OF DEUTSCHE BANK AG
NEW YORK BRANCH, AS ISSUING AND
ADMINISTRATIVE AGENT, TO
DEBTOR'S PROPOSED DISCLOSURE
STATEMENT

DECLARATION OF STEVEN A. COHEN
FILED CONCURRENTLY HEREWITH

Date: December 19, 2001
Time: 9:30 a.m.
Place: 235 Pine Street
San Francisco, California

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1 TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY
2 JUDGE:

3 I.

4 INTRODUCTION

5 Deutsche Bank AG New York Branch, as Issuing and Administrative Agent
6 (“Deutsche Bank”), hereby objects to approval of the proposed Disclosure Statement for
7 Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and
8 Electric Company (the “Debtor”) proposed by the Debtor and PG&E Corporation (the
9 “Disclosure Statement”), as well as to the solicitation procedures proposed by the Debtor in
10 the Disclosure Statement.

11 The Disclosure Statement fails to include, among other things, (a) sufficient
12 detail regarding information necessary to make a credit determination as to the treatment
13 proposed under the Debtor’s proposed Plan of Reorganization Under Chapter 11 of the
14 Bankruptcy Code (the “Plan”), (b) any mention of the stipulation entered into by, *inter alia*,
15 the Letter of Credit Issuing Banks¹ (including Deutsche Bank) and the Debtor with respect to
16 the post-petition treatment of the LC Backed PC Bonds (as defined below), (c) adequate
17 disclosure regarding the effect of a waiver by the Debtor of the conditions to confirmation
18 and/or consummation of the Plan on, among other things, the feasibility of the Plan, and (d)
19 sufficient detail regarding the mechanism by which the Debtor seeks to ensure that the debt
20 securities to be issued under the Plan will trade at par. Without such information, the
21 Disclosure Statement does not provide “adequate information” to allow a hypothetical
22 creditor to make an informed decision regarding the Plan and, as such, should not be
23 approved.

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25
26 ¹ Capitalized terms used but not defined herein shall have the meanings ascribed to such
27 terms in the Plan.

1 Furthermore, the solicitation procedures proposed by the Debtor in the
2 Disclosure Statement violate section 1125(b) of the Bankruptcy Code in that the Debtor
3 proposes to commence the solicitation of votes on the Plan prior to providing parties in
4 interest with Court approved adequate information. Finally, the Disclosure Statement also
5 should not be approved because the proposed Plan is patently unconfirmable under section
6 1129 of the Bankruptcy Code.

7 II.

8 BACKGROUND

9 Deutsche Bank is the issuer (in such capacity, the "Issuing Agent") of
10 irrevocable, direct pay transferable letter of credit number 839-54377 dated September 16,
11 1997 (the "DB Letter of Credit"). The DB Letter of Credit provides credit and liquidity
12 support for \$148,550,000 aggregate principal amount of California Pollution Control
13 Financing Authority Pollution Control Refunding Revenue Bonds (Pacific Gas and Electric
14 Company) 1997 Series B (the "DB Bonds"). See Declaration of Steven A. Cohen in
15 support hereof (the "Cohen Declaration"), at ¶ 3; Exhibit A to Cohen Declaration.

16 The DB Bonds are one of 15 series of revenue bonds (collectively, the "PC
17 Bonds") issued by the California Pollution Financing Authority, a public instrumentality and
18 political subdivision of the State of California (the "Issuer"). Of the 15 series of PC Bonds,
19 eight (8) series, including the DB Bonds, were credit-enhanced revenue bonds supported by
20 letters of credit. Four (4) of these eight (8) series, again including the DB Bonds, remain
21 outstanding (collectively, the "LC Backed PC Bonds").² See Cohen Declaration, at ¶ 4.

22 _____
23 ² All of the LC Backed PC Bonds were sold in the capital markets on the basis that,
24 assuming the Debtor continues to comply with certain covenants contained in the Loan
25 Agreements and certain of the PC Bond Documents and with certain exceptions, interest
26 on such series of LC Backed PC Bonds would not be includable in the gross income of
27 the holders thereof for federal income tax purposes and that such interest is also exempt
28 from California personal income taxes. Such tax-exempt status of the LC Backed PC
Bonds has allowed such bonds to be issued at favorable interest rates, thus allowing the
Debtor to finance and refinance certain of its capital improvements and other qualified
costs at rates substantially below comparable conventional taxable financing alternatives
available to the Debtor.

1 The DB Letter of Credit was issued to Bankers Trust Company, as indenture
2 trustee (in such capacity, the "Bond Trustee"), for the account of the Debtor, to provide for
3 the payment of the principal of and interest on the DB Bonds and to support the payment of
4 the purchase price of any DB Bonds tendered for purchase in accordance with the terms of
5 the related Indenture. In connection with the issuance of the DB Letter of Credit, the
6 Debtor, Deutsche Bank and four other banks (the "Banks") entered into that certain
7 Reimbursement Agreement (Series B), dated as of September 1, 1997, as amended from
8 time to time (the "DB Reimbursement Agreement"). Section 2(a) of the DB Reimbursement
9 Agreement provides that the Debtor is obligated to reimburse Deutsche Bank, for the benefit
10 of the Banks, for all amounts drawn under the DB Letter of Credit. Section 3(a) of the DB
11 Reimbursement Agreement provides that Deutsche Bank may either consent or not consent
12 to any requested extension of the DB Letter of Credit. See Cohen Declaration, at ¶ 5;
13 Exhibit B to Cohen Declaration.

14 Since April 6, 2001 (the "Petition Date"), each scheduled interest payment
15 due on the DB Bonds has been fully and timely made by the Bond Trustee through the use
16 of draws made on the DB Letter of Credit. Following each such drawing, Deutsche Bank
17 and the Banks have allowed the interest portion of the DB Letter of Credit to automatically
18 reinstate in accordance with the terms thereof each month, which has resulted in automatic
19 reinstatements in May, June, July, August, September, October and November 2001. Since
20 the Petition Date, Deutsche Bank and the Banks have paid approximately \$3,180,801 on
21 account of draws under the DB Letter of Credit to fund scheduled interest payments. The
22 Debtor, however, has not reimbursed any of these payments. See Cohen Declaration, at ¶
23 6.

24 As a result of the Debtor's failure to reimburse these amounts, Deutsche Bank
25 has the right upon the passage of time, the giving of notice or both, (i) to declare a default
26 under the DB Reimbursement Agreement, (ii) to notify the Bond Trustee of such default,
27 and (iii) to direct the Bond Trustee to call an "Event of Default" under the terms of the
28

1 related Indenture and, in accordance with the terms of such Indenture, to cause the Bond
2 Trustee to declare the DB Bonds immediately due and payable. In such event, the Bond
3 Trustee would, in accordance with the terms of the related Indenture, draw upon the DB
4 Letter of Credit and apply such drawn funds to the full payment and cancellation of the
5 outstanding DB Bonds, with the end result that this tax-preferred financing would no longer
6 be outstanding and the Debtor would be obligated to reimburse all amounts then due and
7 owing in accordance with the DB Reimbursement Agreement. See Cohen Declaration, at ¶
8 7.

9 While during the first several months of this Chapter 11 case Deutsche Bank
10 and the other Letter of Credit Issuing Banks refrained from taking the actions described in
11 the preceding paragraph, Deutsche Bank at the same time indicated to the Debtor that it
12 required some type of comfort agreement with the Debtor that would need to be approved
13 by the Bankruptcy Court if it was to consider any further such restraint. Accordingly,
14 Deutsche Bank, the Banks, the other Letter of Credit Issuing Banks, various additional
15 banks, MBIA and the Debtor entered into a stipulation dated as of August 10, 2001 (the
16 "Stipulation"). The Stipulation was subsequently approved by the Court pursuant to an
17 order entered by the Court on September 7, 2001. See Cohen Declaration, at ¶ 8.

18 Paragraphs 2-4 of the Stipulation provide that the post-Petition Date interest
19 drawings under the Letters of Credit, as well as, to the extent provided for under the
20 applicable documents and subject to certain limitations contained in the Stipulation, the fees
21 and expenses of the Letter of Credit Issuing Banks (including Deutsche Bank), the other
22 banks party to the Stipulation and MBIA (including, to the extent incurred post-petition in
23 connection with this Chapter 11 case, the fees and expenses of unrelated third-party
24 professionals retained by the Letter of Credit Issuing Banks, the other banks party to the
25 Stipulation and MBIA) constitute allowed claims against the Debtor and its bankruptcy
26 estate. See Cohen Declaration, at ¶ 9; Exhibit C to Cohen Declaration.

1 Paragraph 6 of the Stipulation provides that the Letter of Credit Issuing Banks
2 (including Deutsche Bank) and MBIA have the continuing right, at any time there is an
3 "Event of Default" (as defined in the Reimbursement Agreements), to notify the Bond
4 Trustee of the occurrence or existence of such Event of Default and to direct the Bond
5 Trustee to declare an "Event of Default" under the related Indenture, notwithstanding their
6 failure to exercise such right at any time. See Cohen Declaration, at ¶ 10; Exhibit C to
7 Cohen Declaration.

8 Paragraph 7 of the Stipulation provides that each Letter of Credit Issuing Bank
9 (including Deutsche Bank) has the continuing right, so long as it has not been reimbursed in
10 full for drawings it has honored under the Letter of Credit issued by it, to notify the Bond
11 Trustee of such failure to be reimbursed in full and to state that the amount available to be
12 drawn under the Letter of Credit to pay interest on the LC Backed PC Bonds has not been
13 reinstated, notwithstanding the failure of such Letter of Credit Issuing Bank to exercise such
14 right at any time. See Cohen Declaration, at ¶ 11; Exhibit C to Cohen Declaration.

15 Paragraph 8 of the Stipulation provides that, significantly in respect of issues
16 addressed below concerning the confirmability of the Plan, the Letter of Credit Issuing
17 Banks (including Deutsche Bank) and the other banks party to the Stipulation have the
18 continuing right to refuse to extend the terms of the Letters of Credit upon their respective
19 maturities. See Cohen Declaration, at ¶ 12; Exhibit C to Cohen Declaration.

20 III.

21 ARGUMENT

22 **A. THE COURT SHOULD NOT APPROVE THE DISCLOSURE STATEMENT**
23 **BECAUSE IT DOES NOT CONTAIN "ADEQUATE INFORMATION"**
24 **UNDER 11 U.S.C. § 1125(a)**

25 Section 1125(b) of the Bankruptcy Code provides that a party may not solicit
26 acceptances or rejections of a plan "unless, at the time of or before such solicitation, there is
27 transmitted to such holder the plan or a summary of the plan, and a written disclosure
28 statement approved, after notice and a hearing, by the court as containing adequate

1 information.” 11 U.S.C. § 1125(b). In this instance, the Debtor has failed to comply with
2 section 1125(b) because the disclosure statement proposed to be distributed to holders of
3 claims and interests fails to contain adequate information as defined in section 1125(a) of the
4 Bankruptcy Code.

5 The purpose of a disclosure statement is to provide information which will
6 allow creditors to make an informed choice when rejecting or approving a plan. See Duff v.
7 U.S. Trustee (In re California Fidelity, Inc.), 198 B.R. 567, 571 (Bankr. 9th Cir. 1996); In
8 re Diversified Investors Fund XVII, 91 B.R. 559, 560 (Bankr. C.D. Cal. 1988) (quoting In
9 re Monnier Bros., 755 F.2d 1336, 1342 (8th Cir. 1985)). Moreover, “[b]ecause creditors
10 and the bankruptcy court rely heavily on the debtor’s disclosure statement in determining
11 whether to approve a proposed reorganization plan, the importance of full and honest
12 disclosure cannot be overstated.” Ryan Operations G.P. v. Santiam-Midwest Lumber Co.,
13 81 F.3d 355, 362 (3d Cir. 1996) (citation omitted); see also In re Scioto Valley Mortgage
14 Co., 88 B.R. 168, 170 (Bankr. S.D. Ohio 1988) (“One of the fundamental policies
15 underlying the chapter 11 reorganization process is disclosure.”).

16 In order for a disclosure statement to be approved by a bankruptcy court for
17 the purposes of soliciting votes on a plan, the disclosure statement must contain adequate
18 information. 11 U.S.C. § 1125(b). “Adequate information” is defined in section 1125(a)
19 of the Bankruptcy Code as:

20 information of a kind, and in sufficient detail, as far as is
21 reasonably practicable in light of the nature and history of
22 the debtor and the condition of the debtor’s books and
23 records, that would enable a hypothetical reasonable
24 investor typical of holders of claims or interests of the
25 relevant class to make an informed judgment about the
26 plan, but adequate information need not include such
27 information about any other possible or proposed plan[.]

28 11 U.S.C. § 1125(a). Whether a disclosure statement contains adequate information is
determined on a case-by case basis. See In re Scioto Valley Mortgage Co., 88 B.R. at 170;
In re Oxford Homes, Inc., 204 B.R. 264, 269 (Bankr. D. Me. 1997) (“The precise contours
of ‘adequate information’ were vaguely drawn by Congress so that bankruptcy courts might

1 exercise their discretion to limn [sic] them in view of each case's peculiar circumstances.");
2 H.R. Rep. No. 595, 95th Cong., 1st Sess. 409 (1977), reprinted in 1978 U.S.C.C.A.N 5787,
3 6365.

4 Some courts, however, have set forth specific types of information to be
5 included. These factors include, among others, the following: (1) a complete description of
6 the available assets and their value; (2) the anticipated future of the debtor, with
7 accompanying financial projections; (3) the source of the information provided in the
8 disclosure statement; (4) information regarding claims against the estate, including those
9 allowed, disputed, and estimated; (5) a liquidation analysis setting forth the estimated return
10 that creditors would receive under chapter 7; (6) the accounting and valuation methods used
11 to produce the financial information in the disclosure statement; (7) a summary of the plan
12 of reorganization; (8) any financial information, valuations or pro forma projections that
13 would be relevant to creditors' determinations of whether to accept or reject the plan; (9)
14 information relevant to the risks being taken by the creditors and interest holders; and (10)
15 the relationship of the debtor with affiliates. See, e.g., In re Ferretti, 128 B.R. 16, 18-19
16 (Bankr. N.H. 1991); In re Scioto Valley Mortgage Co., 88 B.R. at 170-71. This list is not
17 meant to be either exclusive or exhaustive, however. See In re Ferretti, 128 B.R. at 19. In
18 fact, at least one court has stated that "a case may arise in which disclosure of all the
19 foregoing type of information is still not sufficient to provide adequate information upon
20 which the holders of claims or interests may evaluate a plan." In re Scioto Valley Mortgage
21 Co., 88 B.R. at 171.

22 In this instance, the Debtor has failed to include, among other things,
23 information necessary to perform a credit assessment of the treatment proposed under the
24 Plan, information regarding the allowability of the claims of the Letter of Credit Issuing
25 Banks and certain risks relating to the Plan. Thus, based on the tests set forth above, the
26 Disclosure Statement does not contain adequate information and should not be approved.

1 1. The Disclosure Statement Fails to Include Information Necessary
2 to Make a Credit Assessment of the Treatment Proposed in the Plan

3 As discussed above, the basic purpose of a disclosure statement is to allow a
4 creditor to make an informed decision as to whether to vote to accept or reject a plan. One
5 aspect of such a decision is an assessment of the credit risk associated with the treatment
6 proposed under such plan. In this instance, the Debtor has failed to provide sufficient
7 information to allow Deutsche Bank to make such an assessment. In particular, the
8 Disclosure Statement (and the exhibits thereto) fails to include the following:

- 9 • sufficient detail regarding the allocation of specific assets and
10 liabilities to each of the successor entities;
- 11 • *pro forma* historical financials on an entity by entity basis for each
12 of the successor entities;
- 13 • a bridge analysis that identifies significant changes in projected
14 financial performance versus historical financial performance on a
15 specific revenue and expense basis and sets forth explanations for
16 such changes;
- 17 • a reconciliation of sources and uses of cash on an entity by entity
18 basis for each of the successor entities; and
- 19 • sufficient detail regarding the future capital expenditures for each of
20 the successor entities, including whether such expenditures are
21 mandatory or discretionary.

22 See Cohen Declaration ¶ 13. As such, the Disclosure Statement does not contain adequate
23 information for Deutsche Bank to make a credit assessment and should not be approved.

24 2. The Disclosure Statement Fails to Include
25 Information Regarding the Stipulation

26 The Disclosure Statement also fails to make any mention of the Stipulation.
27 As discussed above, the Letter of Credit Issuing Banks (including Deutsche Bank), certain
28 other banks and the Debtor entered into a Stipulation which governs the post-petition
treatment of the LC Backed PC Bonds. In particular, the Stipulation provides, *inter alia*,
that any amounts drawn under the Letters of Credit will constitute allowed claims against the
Debtor and its estate and that, so long as an "Event of Default" is occurring, the Letter of

1 Credit Issuing Banks can direct the Bond Trustee to declare an "Event of Default" under the
2 applicable Indentures and redeem the LC Backed PC Bonds. The Disclosure Statement,
3 however, does not set forth either the fact that such claims are allowed or the risk that
4 certain of the Letter of Credit Issuing Banks could take steps to redeem the LC Backed PC
5 Bonds (which could have an adverse affect on the Debtor's ability to maintain this source of
6 valuable tax-free financing), both of which would seem to be relevant to a creditor's
7 decision in evaluating the merits of the Plan. As such, the Debtor should be compelled to
8 include a description of the Stipulation as well as the risk that the Letter of Credit Issuing
9 Banks may take steps to have the LC Backed PC Bonds redeemed.

10 3. The Disclosure Statement Fails to Prominently Indicate
11 the Ability of the Debtor to Waive the Conditions to
12 Confirmation and Consummation of the Plan and Fails
to Disclose the Effect of Such a Waiver

13 Additionally, the Debtor has failed to adequately disclose the fact that it can,
14 without any outside approval, waive any of the conditions to confirmation and/or
15 consummation set forth in the Plan and the effect that the waiver of any such conditions
16 would have. The Plan is subject to the satisfaction of a long list of conditions which are
17 integral to the success of the Plan, including the entry by the Court of a variety of orders,
18 the receipt of numerous regulatory and other approvals, and the establishment of sufficient
19 credit ratings for each of the securities to be issued by each of the successor companies
20 under the Plan. Yet, the Debtor retains the right to unilaterally waive any of these
21 conditions. Although such an act may be within the Debtor's prerogative, the Debtor should
22 be compelled to more prominently disclose this ability. Such a fact is relevant because it
23 essentially provides the Debtor with the ability to invalidate the analysis undertaken by a
24 creditor or interest holder in determining whether or not to vote in favor of the Plan by
25 allowing the Debtor, at its sole discretion, to cancel one of the assumptions underlying the
26 Plan. Moreover, given the stated importance of the conditions to the Plan, the Debtor
27 should be required to disclose the effect that a waiver of such conditions would have on,
28 among other things, the feasibility of the Plan and the treatment provided thereunder.

1 4. The Disclosure Statement Fails to Include Sufficient
2 Information Regarding the Mechanism by which the
 Debt Securities to be Issued Under the Plan Will Trade At Par

3 Another way in which the Disclosure Statement is deficient is that it fails to
4 contain any detail regarding the ways in which the Debtor will ensure that the debt securities
5 to be issued under the plan will trade at par. All that the Disclosure Statement states is that
6 “[t]he Proponents shall take all commercially reasonable actions prior to the date on which
7 all debt securities issued or sold under the Plan are freely tradable to ensure that such debt
8 securities will be structured, marketed, priced and sold in such a manner to trade at par” and
9 that the Committee will be given reasonable oversight over such process. See Disclosure
10 Statement, at p.116-17. This is nowhere near sufficient for a creditor to determine whether
11 such steps are likely to ensure that the debt securities will in fact trade at par. Instead, the
12 Debtor should be required to disclose with more detail those steps which it is intending, or
13 at least willing, to take since a determination as to the likelihood of whether such securities
14 will trade at par is basic to a determination as to the merits of the treatment being afforded
15 under the Plan and, therefore, whether to vote to accept or reject the Plan.

16 For the foregoing reasons, the Disclosure Statement does not contain adequate
17 information as required by section 1125 of the Bankruptcy Code and, therefore, should not
18 be approved.

19 **B. THE COURT SHOULD PROHIBIT THE PROPOSED SOLICITATION**
20 **PROCESS BECAUSE IT VIOLATES 11 U.S.C. § 1125(b)**

21 As discussed above, the Disclosure Statement does not contain adequate
22 information. The Debtor, however, proposes to supplement its disclosure by providing
23 additional information to creditors and equity holders in the schedules to the “Plan
24 Supplement”, which will be “filed with the Clerk of the Bankruptcy Court at least ten (10)
25 days prior to the last day upon which holders of Claims and Equity Interests may vote to
26 accept or reject the Plan.” See Plan § 11.18. Although it is unclear what information will
27 be contained on such schedules, assuming arguendo that creditors and interest holders will
28 not have received adequate information until they have received (at a minimum) the Plan

1 Supplement, the solicitation process proposed by the Debtors violates section 1125(b) of the
2 Bankruptcy Code.

3 Under section 1125(b), a plan proponent may not solicit votes until the
4 creditors have received “the plan or a summary of the plan, and a written disclosure
5 statement approved, after notice and a hearing, by the court as containing adequate
6 information.” 11 U.S.C. §1125(b); see also In re Oxford Homes, 204 B.R. at 269 (“[a]
7 plan of reorganization may not be submitted to a debtor’s creditors unless and until a
8 disclosure statement has been approved by the court as containing ‘adequate information.’”).
9 Thus, section 1125(b) attempts to guarantee that a creditor will have adequate information
10 before he casts his vote. See Duff, 198 B.R. at 571. In this instance, however, the Debtor
11 proposes to commence solicitation prior to the receipt of adequate information by parties in
12 interest (assuming parties in interest will not have received adequate information until they
13 have received (at a minimum) the Plan Supplement) because the Debtor proposes to
14 commence the voting period prior to providing the Plan Supplement. This violates section
15 1125(b)’s express prohibition against commencing solicitation until creditors and interest
16 holders have received adequate information. As such, the Debtor should be prohibited from
17 commencing the voting period until after it distributes the Plan Supplement.

18 The solicitation process proposed by the Debtor also violates section 1125(b)
19 because it violates that section’s requirement that the adequate information provided to
20 parties in interest “be approved ... by the court”. 11 U.S.C. § 1125(b); In re Rook
21 Broadcasting of Idaho, Inc., 154 B.R. 970, 976 (Bankr. D. Idaho 1993); see also In re
22 Cramer, Inc., 100 B.R. 63, 66 (Bankr. D. Kan. 1989) (changes in disclosure should be
23 approved by the court). In this instance, the Plan Supplement, which will contain
24 information upon which the creditors and equity holders are to rely when making their
25 decisions whether to vote to accept or reject the Plan, and, therefore, should be considered
26 part of the Disclosure Statement for purposes of 1125(b), is not subject to approval by the
27 Court. This violates the prohibition in 1125(b) against soliciting votes using a disclosure
28

1 statement which was not approved by the bankruptcy court. Thus, the Debtor should be
2 required to modify its proposed solicitation process and should be prohibited from
3 commencing solicitation until it does so.

4 **C. THE COURT SHOULD NOT APPROVE THE DISCLOSURE STATEMENT**
5 **BECAUSE THE PLAN IS PATENTLY UNCONFIRMABLE**

6 Finally, the Disclosure Statement also should not be approved because the
7 Plan is unconfirmable under section 1129 of the Bankruptcy Code. It is well-established that
8 a court should deny approval of a disclosure statement where the underlying plan of
9 reorganization is clearly unconfirmable and that the hearing on the disclosure statement is a
10 proper time consider whether a plan is patently unconfirmable. See, e.g., In re Main Street
11 AC, Inc., 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) (denying approval of disclosure
12 statement because plan was unconfirmable as a matter of law); In re Allied Gaming
13 Management, Inc., 209 B.R. 201, 202 (Bankr. W.D. La. 1997) (same); In re Curtis Ctr.
14 L.P., 195 B.R. 631, 638 (Bankr. E.D. Pa. 1996) (holding that a disclosure statement should
15 be disapproved “where plan it describes is patently unconfirmable”); In re 266 Washington
16 Assoc., 141 B.R. 275, 288 (Bankr. E.D.N.Y.), aff’d 147 B.R. 827 (E.D.N.Y. 1992); In re
17 Eastern Maine Elec. Coop., Inc., 125 B.R. 329, 333 (Bankr. D. Me. 1991) (when a “plan’s
18 inadequacies are patent, they may, and should, be addressed at the disclosure statement
19 stage”) (citation omitted).

20 The rationale behind such decisions is that distributing a disclosure statement,
21 soliciting votes and voting on a plan that cannot be confirmed is a waste of estate assets.
22 See, e.g., In re Hillside Park Apts., L.P., 205 B.R. 177, 189-90 (Bankr. W.D. Mo. 1997)
23 (court denied approval of disclosure statement and stated “there is no need to spend time and
24 money on a confirmation hearing that will only prove to be futile...”); In re Allied Gaming
25 Management, 209 B.R. at 202; In re Atlanta West VI, 91 B.R. 620, 622 (Bankr. N.D. Ga.
26 1988).

27 In this case, as explained below, the Plan violates the Bankruptcy Code and
28 other applicable law because the treatment provided to the Letter of Credit Issuing Banks is

1 improper as a matter of law in that such banks cannot be compelled to modify the terms of
2 the Letters of Credit.

3 1. The Plan Impermissibly Attempts to Modify the
4 Terms of the Letters of Credit

5 The Plan is patently unconfirmable as it proposes to force the Letter of Credit
6 Issuing Banks to modify the terms of the Letters of Credit, agreements to which the Debtor
7 is not even a party. In particular, the Debtor is attempting to modify these agreements to
8 extend the expiration date of the Letters of Credit to a date five (5) years after the Effective
9 Date.³ See Plan § 4.11. For the reasons discussed below, it is axiomatic that the Debtor
10 cannot undertake this action and, therefore, that the Plan cannot be confirmed as a matter of
11 law.

12 First, section 3(a) of the Deutsche Bank Reimbursement Agreement expressly
13 provides that Deutsche Bank, as Issuing Agent, may either consent or not consent to any
14 requested extension of the Letter of Credit by the Debtor. See Exhibit B to Cohen
15 Declaration. Accordingly, Deutsche Bank is under no obligation to extend the Letter of
16 Credit and any compelled extension would be an impermissible modification of the
17 Reimbursement Agreement. Indeed, the Debtor, in the Stipulation (which, as noted above,
18 was previously approved by this Court), has already agreed that the Letter of Credit Issuing
19 Banks (including Deutsche Bank) “have the continuing right to refuse to extend the terms of
20 the Letters of Credit upon their respective maturities.” See Exhibit C to Cohen Declaration,
21 at ¶ 8. Thus, the Debtor has no basis to now seek to compel the extension of the Letters of
22 Credit.

23 Moreover, there is no legal basis for the Debtor to compel such an extension.
24 First, there is no authority under the Bankruptcy Code for the proposed extension. See

25 _____
26 ³ It should be pointed out that the DB Letter of Credit, for example, expires no later than
27 September 16, 2002, a date well before any contemplated Effective Date. See Exhibit
28 A to Cohen Declaration.

1 White Motor Corp. v. Nashville White Trucks, Inc. (In re Nashville White Trucks, Inc.), 5
2 B.R. 112, 117 (Bankr. M.D. Tenn. 1980) (court finding “nothing in the [Bankruptcy] Code
3 which enlarges the rights of [the debtor] under the contract or which prevents the
4 termination of the contract on its [sic] own terms”) (emphasis added). Second, the Debtor is
5 not even a party to the Letters of Credit and the Letters of Credit are independent from the
6 associated Reimbursement Agreements. See, e.g., American Bank of Martin County v.
7 Leasing Service Corp. (In re Air Conditioning, Inc. of Stuart), 845 F.2d 293, 296 (11th
8 Cir.) (“a letter of credit is an undertaking between the issuing bank and the beneficiary, and
9 is independent of the relationship between the bank and the account party”), cert. denied,
10 488 U.S. 993 (1998). Finally, it has been “long recognized that strict regard for the
11 expiration dates in letters of credit is critical to their continuing commercial viability.” See
12 B.E.I. Int’l, Inc. v. Thai Military Bank, 978 F.2d 440, 442 (8th Cir. 1992) (citation
13 omitted). Thus, to permit the Debtor to compel an extension of the Letters of Credit would
14 violate this policy and should be avoided.

15 For the foregoing reasons, the Debtor is prohibited from preventing the
16 termination of the Letters of Credit over the objections of the Letter of Credit Issuing Banks.
17 As such, the Plan is patently unconfirmable and the Disclosure Statement should not be
18 approved.

19 IV.

20 RESERVATION OF RIGHTS

21 Deutsche Bank hereby reserves its right to raise any and all objections to the
22 Plan or the confirmation thereof on or before the objection deadline for the hearing to
23 approve confirmation of the Plan.

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V.

CONCLUSION

For all of the foregoing reasons, Deutsche Bank respectfully submits that the Court should not approve the Disclosure Statement.

Dated: November 26, 2001

WHITE & CASE LLP

By: Daniel P. Ginsberg
Daniel P. Ginsberg (Admitted *pro hac vice*)

Attorneys for Deutsche Bank AG New York
Branch, as Issuing and Administrative Agent