IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
AEROSOL PACKAGING, LLC, **A Georgia Limited Liability Company,**	**CHAPTER 11**
Debtor.	**CASE NO. 06-67096-MHM**
BLUE RIDGE INVESTORS, II, LP,	**CONTESTED MATTER**
Movant,	
vs.	
WACHOVIA BANK, N.A. and **AEROSOL PACKAGING, LLC,**	
Respondents.	

DEBTOR'S RESPONSE IN OPPOSITION TO BLUE RIDGE INVESTORS II, LP'S MOTION REQUESTING (1) DETERMINATION OF VOTING RIGHTS AND ALLOWANCE OF BALLOT CAST (2) VALUATION OF COLLATERAL AND (3) HEARING

COMES NOW, Aerosol Packaging, LLC (the "Debtor"), and files this its Response in Opposition to Blue Ridge Investors II, LP's ("Blue Ridge") Motion Requesting (1) Determination of Voting Rights and Allowance of Ballot Cast (2) Valuation of Collateral and (3) Hearing ("Motion"). In support of Debtor's response, Debtor shows the Court as follows:

Relevant Underlying Facts

1. Before the Court is Debtor's Revised Second Amended Plan of Reorganization (the "Plan"), which is currently scheduled for a hearing on its confirmation on December 20, 2006, at

10:00 a.m., the same time that the Motion filed by Blue Ridge is currently scheduled for hearing. The Motion raises some critical threshold issues that will require the Court to resolve before it can consider confirmation of the Plan. Consequently, Debtor agrees and acknowledges that the Motion should be addressed by the Court prior to the scheduled hearing on confirmation of the Plan.

2. On December 13, 2006 at 1:45 p.m., Blue Ridge filed a Class 5 Ballot voting to *Reject* the Plan, and a Statement Concerning Ballot in which Blue Ridge asserts that it is rejecting the Class 3A treatment provided by the Plan for Blue Ridge, and is seeking the alternative treatment under the Plan for the claims Blue Ridge currently holds against Debtor and its estate.

3. On December 13, 2006 at 1:42 p.m., just moments in time prior to the filing by Blue Ridge of its ballot and statement, Wachovia Bank, National Association ("Wachovia"), filed a Class 3A Ballot, in the name of Blue Ridge pursuant to the terms of a certain subordination agreement, voting to *Accept* the Plan, thereby agreeing to the primary treatment proposed by Debtor under the Plan for the claims Blue Ridge currently holds against Debtor and its estate.

4. Consequently, as a threshold issue, the parties look to the Court to make a determination as to which of the two ballots filed with respect to the claims of Blue Ridge against Debtor should be considered at the hearing on confirmation of the Plan. If the Court determines that the ballot filed by Wachovia should be recognized as valid, then Blue Ridge will be deemed to have accepted the treatment provided for Blue Ridge as the holder of the claims in Class 3A with the attendant requirements and distributions as set forth in the Plan. To the contrary, if the Court determines that the ballot filed by Blue Ridge should be recognized as valid, then Blue Ridge will be deemed to have rejected the primary treatment provided for Blue Ridge's claim under the

Plan and the alternative treatment provided under the Plan would be applicable. This alternative treatment includes the need to hold a valuation hearing to determine the value of any collateral that allegedly secures the claim that Blue Ridge holds against Debtor and its estate with the attendant requirements and distributions under the Plan being given to any such secured claim, to the extent ultimately allowed by the Court. Any portion of Blue Ridge's claim that is not deemed a secured claim will, pursuant to §506 of the Bankruptcy Code, be treated as an unsecured claim to the extent ultimately allowed by the Court, and included in Class 5 under the Plan with general unsecured creditors.

5. On December 13, 2006, pursuant to Section 502(a) of the Bankruptcy Code, Debtor filed an objection to the proof of claim filed by Blue Ridge, thereby putting the allowed amount of Blue Ridge's claim in question. The actual amount of any allowed claim of Blue Ridge cannot be determined until after a hearing is held by the Court specifically for this purpose. For purposes of the confirmation hearing, however, notwithstanding the objection filed by Debtor, the Court can estimate the amount of Blue Ridge's claim and may temporarily allow such claim in an amount the Court deems proper for purposes of accepting or rejecting the Plan. *See* Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

6. In its Motion, Blue Ridge acknowledges and admits that on or about December 5, 2002, Blue Ridge, Wachovia (as successor to SouthTrust Bank), and Debtor entered into a Subordination Agreement, as subsequently amended and modified twice by the parties (the "Subordination Agreement"). As a consequence Wachovia is a party to and is entitled to rely upon the terms of the Subordination Agreement for which it negotiated in good faith at the time Wachovia agreed to make a loan to Debtor. Additionally, Debtor is a party to, and an intended

third party beneficiary of, the Subordination Agreement and should likewise be entitled to rely upon its enforcement as set forth therein. A copy of the Subordination Agreement, as amended, is attached as Exhibit "A" to the Motion.

7. Pursuant to the express terms of the Subordination Agreement, Blue Ridge irrevocably authorized and empowered Wachovia, as the senior secured party, to take certain actions in Wachovia's own name and in the name of Blue Ridge, to the detriment of Blue Ridge, as the junior secured party subordinate to the claims of Wachovia. This broad grant of authority affects significant substantive rights otherwise possessed by Blue Ridge, including (i) the right to vote the claims of Blue Ridge in any bankruptcy proceeding of Debtor, (ii) the right to demand, sue, collect or receive any distribution of any assets of Debtor distributed to creditors of Debtor, and (iii) the right to recover any amounts payable on the Blue Ridge claims until such time as the Wachovia claims are paid in full, and to the extent it does receive any distributions, Blue Ridge does so in trust for the benefit of Wachovia.

8. In the Motion, Blue Ridge attempted to cite relevant language from Section 4 of the Subordination Agreement; however the cited language in its Motion was incomplete with significant language intentionally or unintentionally omitted. *See Motion*, paragraph 23. The actual complete text of Section 4 of the Subordination Agreement to which Blue Ridge has expressly agreed when it executed the Subordination Agreement on December 5, 2002 (which was entered as part of the consideration for Wachovia's predecessor bank to agree to make its initial loans to Debtor on the same date) is as follows:

> Section 4. *In Furtherance of Subordination.* The Subordinated Creditor [Blue Ridge] agrees as follows:

(a) Upon any distribution of all or any of the assets of the Borrower [Debtor] to creditors of Borrower upon the dissolution, winding up, liquidation, arrangement or reorganization of the Borrower, whether in bankruptcy, insolvency, arrangement, reorganization or receivership proceedings or upon an assignment for the benefit of creditors or any other marshalling of the assets and liabilities of the Borrower or otherwise, any payment of distribution of any kind (whether in cash, property or securities) which otherwise would be payable or deliverable upon or with respect to the Subordinated Debt [the Blue Ridge claims] shall be paid or delivered directly to the Lender [Wachovia] for application (in the case of cash) to or as collateral (in the case of non-cash property or securities) for the payment or prepayment of the Obligations [the Wachovia claims] until the Obligations shall have been paid in full.

(b) If any proceeding of the type referred to in subsection (a) above is commenced by or against the Borrower [Debtor],

(i) the Lender [Wachovia] is hereby irrevocably authorized and empowered (in its own name or in the name of the Subordinated Creditor [Blue Ridge] or otherwise), but shall have no obligation, to demand, sue for, collect and receive every payment or distribution referred to in subsection (a) above and give acquittance therefore and to file claims and proofs of claim and take such other action (including without limitation voting the Subordinated Debt or enforcing any security interest or other lien securing payment of the Subordinated Debt) as it may deem necessary or advisable for the exercise or enforcement of any of the rights or interests of the Lender hereunder; and

(ii) the Subordinated Creditor [Blue Ridge] shall duly and promptly take such action as the Lender [Wachovia] may request (A) to collect the Subordinated Debt for account of the Lender [Wachovia] and to file appropriate claims or proofs of claim in respect of the Subordinated Debt, (B) to execute and deliver to the Lender [Wachovia] such powers of attorney, assignments or other instruments as it may request in order to enable it to enforce any and all claims with respect to, and any security interests and other liens securing payment of, the Subordinated Debt, and (C) to collect and receive any and all payments or distributions which may be payable or deliverable upon or with respect to any security fro the Subordinated Debt.

(emphasis added)

9. As is clear from the plain and unambiguous language of Section 4 of the Subordination Agreement, Wachovia is entitled to stand in the shoes of Blue Ridge and take broad actions, in the name of Blue Ridge and against Blue Ridge's own self interests, if Wachovia believes, in its discretion, that taking such action is in Wachovia's own self interest, benefit and necessary to

satisfy Wachovia's claims against Debtor, "including without limitation voting the [Blue Ridge claim]...as it may deem necessary or advisable for the exercise or enforcement of any of the rights or interests of the Lender [Wachovia]" and to "receive every payment or distribution referred to in subsection (a) above and give acquittance therefore." This would include, as Wachovia did, filing the Class 3A Ballot to accept the Plan, and when appropriate providing a written release of Debtor and other parties obligated on the Blue Ridge claims as a condition precedent to receiving the distribution that would otherwise be payable to Blue Ridge under the Plan as the holder of the Class 3A claims (i.e., the Blue Ridge claim). Blue Ridge negotiated away these rights and obligated itself to Wachovia until the Wachovia claim is paid in full. If the Court determines that Wachovia is properly entitled to vote Blue Ridge's Class 3A Ballot to accept the Plan, no valuation hearing will be necessary to determine the value of Blue Ridge's secured claim, if any, because Blue Ridge will have been deemed to have accepted the primary treatment provided for Class 3A under the Plan, which distribution will be payable to Wachovia unless and until the Wachovia claim is paid in full.

Argument and Citation of Authority

A. Voting Transfer Provisions Are Enforceable Under Traditional Principles of Contract Law.

10. Section 510(a) of the Bankruptcy Code expressly provides that "[a] subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law." 11 U.S.C. §510(a).

11. Many courts have been in agreement and have enforced provisions in subordination agreements giving the senior creditor the right to vote on a chapter 11 plan on behalf of a junior

subordinated creditor. *See In re Curtis Center Limited Partnership*, 192 B.R. 648 (Bankr. E.D.Pa. 1996); *In re Inter Urban Broadcasting Cincinnati, Inc.*, 1994 WL 646176 (E.D.La. 1994); in *In re Davis Broadcasting, Inc.*, 169 B.R. 229 (Bankr. M.D.Ga. 1994), *rev'd on other grounds*, 176 B.R. 290 (M.D.Ga. 1994); and *Matter of Itemlab, Inc.*, 197 F. Supp. 194 (E.D.N.Y. 1961).

12. Courts have enforced subordination agreements based on traditional contract law principles. Junior creditors voluntarily enter subordination agreements with provisions assigning their voting rights to a senior creditor in order to receive the benefit from a senior creditor who agrees to offer credit, a loan or some other form of consideration to the debtor. In exchange for the consideration, the senior creditor should be entitled to rely on the voting transfer provisions assigned to the senior creditor by the junior creditor. Accordingly, subordination agreements should be enforced in accordance with the parties' intent and the plain language in them to "the extent such agreement is enforceable under applicable nonbankruptcy law." 11 U.S.C. §510(a).

13. The court in *In re Curtis* upheld the voting provision in a subordination agreement thereby allowing the senior creditor to vote the ballot of a junior subordinated creditor, and stated "the language of the subordination agreement is plain and unambiguous. The terms of this pre-petition agreement are fully enforceable in this Bankruptcy case pursuant to 11 U.S.C. § 510(a)...." *In re Curtis, supra* at 660. The voting provision in that subordination agreement provided as follows:

> Sumitomo [the senior creditor] is authorized on behalf of Mellon [the junior creditor] to file all claims, proofs of debt, petitions and other documents required in such statutory or non-statutory proceedings for the full outstanding amount of [junior creditor's] debt and prove and vote or consent in any proceedings with respect to any and all claims of [junior creditor] relating to [junior creditor's]

debt, in each case as Sumitomo [senior creditor] may deem advisable, in its sole discretion.

In re Curtis, supra at 660 (emphasis added).

The intention of the parties in the *Curtis* case was abundantly clear by the express language of the subordination agreement between them. The *Curtis* court correctly recognized that the junior creditor agreed to assign all of its rights, including its right to vote or consent in any proceeding with respect to its claims. The language in the subordination agreement in *Curtis* is substantively very similar to the language in Section 4 of the Subordination Agreement between the parties.

14. The district court in *In re Inter Urban Broadcasting* also upheld the assignment of voting rights provided in a subordination agreement between a senior creditor and junior subordinated creditor. As a condition precedent to the senior creditor's loan to the debtor, the junior subordinated creditor executed a subordination agreement and assigned and subordinated to the senior creditor all its claims, collateral, interests and rights until the senior creditor was paid in full, including the junior subordinated creditor's right to vote in connection with any plan of reorganization. *In re Inter Urban Broadcasting, supra* at 646176. In *Inter Urban* both the debtor and senior creditor filed plans of reorganization. The senior creditor voted its and the junior creditor's claims for the senior creditor's plan and the debtor objected. The underlying bankruptcy court denied debtor's objection, confirmed the senior creditor's plan, thereby enforcing the voting transfer provisions of the subordination agreement. Debtor appealed the bankruptcy court's denial of its objection to the district court. The district court affirmed the bankruptcy court and acknowledged that the underlying bankruptcy court held that in enforcing the voting transfer provision "[u]nder the Subordination Agreement with Firstmark [junior

creditor], Barclays [senior creditor] is granted the right to vote the claim of Firstmark in this bankruptcy case. Firstmark has been given notice of the bankruptcy proceeding, has appeared through its counsel of record, and has raised no objection to Barclays' voting of Firstmark's claim. Barclay's acceptance of Barclays' plan on behalf of Firstmark is consistent with its rights under the Subordination Agreement...." Id. at 646176. The fact that the junior creditor raised no objection to the senior creditor's right to vote went arguably to the bona fide nature of the subordination agreement and was irrelevant to the bankruptcy court's determination and willingness to enforce the voting transfer provisions in the subordination agreement in accordance with its intended purpose. There is no indication that the junior creditor's failure to object was dispositive of the senior creditor's underlying right to vote the claim of the junior creditor as provided for in the subordination agreement, but rather it appears to be the plain and unambiguous language in the subordination agreement itself that caused the district court to uphold the senior creditor's right to vote the claim of the junior creditor for the senior creditor's plan, clearly to the detriment of the junior creditor. The district court, in its application of traditional theories of contract law, further noted the junior creditor benefited from the senior creditor's loan to the debtor and in exchange for that benefit assigned and subordinated all its claims and interests to the senior creditor. *Id.*

15. Moreover, in *In re Davis Broadcasting, Inc.,* 169 B.R. 229 (Bankr. M.D.Ga. 1994), *rev'd on other grounds*, 176 B.R. 290 (M.D.Ga. 1994), the bankruptcy court for the Middle District of Georgia denied a junior creditor's motion to reopen a chapter 11 case and request to modify the order confirming the plan of reorganization. The junior creditor executed a subordination agreement with a senior creditor and agreed to subordinate its claim, including its right to vote in

a bankruptcy proceeding. The senior creditor voted on its own behalf and on behalf of the junior creditor to accept the debtor's plan of reorganization and in doing so did not protect the interest of the junior creditor. The junior creditor failed to object to confirmation and did not appeal the confirmation order. Instead, it filed a motion to change the provisions of the plan after confirmation and after substantial consummation. While the court did not expressly rule on the validity of the voting transfer provisions in the subordination agreement, it stated in dicta that:

> The Court must keep in mind that Broadcast [junior creditor] was not forced to loan money to the Debtor and enter into the Subordination Agreement with AmeriTrust [senior creditor]. In essence Broadcast is saying that it should not suffer any ill effects from AmeriTrust's not protecting its interests as it would have preferred, although Broadcast freely entered into the Subordination Agreement that put it into this situation. In other words, Broadcast does not want to be held responsible for its own actions.
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> *Id.* at 234.

16. In the instant case, this Court should enforce the voting transfer provisions of the Subordination Agreement between Blue Ridge, Wachovia and Debtor because it was clearly the intention of all three parties involved that Blue Ridge was to irrevocably assign material substantive rights to Wachovia, including Blue Ridge's right to vote with respect to any plan in Debtor's case. Blue Ridge received the benefit of Wachovia's loan to Debtor in exchange for, among other things, an assignment of Blue Ridge's voting and other rights as a senior creditor. Wachovia is entitled to protect Wachovia's senior creditor rights and status even to the detriment of Blue Ridge. As outlined above and expressly provided in 11 U.S.C. § 510(a), courts have applied traditional theories of contract law to enforce voting transfer provisions in subordination agreements. This Court too should enforce the voting transfer provisions of the Subordination Agreement, as intended by all three interested parties. Just as the junior creditor attempted in the

Davis case, Blue Ridge, as the junior creditor, is asking this Court to ignore the clear unambiguous language in the Subordination Agreement so that Blue Ridge should not suffer any ill effects from Wachovia not protecting Blue Ridge's interest as Blue Ridge would have preferred (i.e., by accepting the plan instead of rejecting it like Blue Ridge desires) although Blue Ridge freely entered the Subordination Agreement that put Blue Ridge into this situation. In other words, Blue Ridge does not want to be held responsible for its own actions and desires a course of action that will put Wachovia's recovery at risk, something the subordination agreement was intended to prevent.

17. Contrary to the line of cases noted above, Blue Ridge cites *Bank of America, N.A. v. North LaSalle Limited Partnership*, 246 BR 325 (Bankr. N.D. Ill. 2000), in which the court took painstaking efforts to ignore the clear language of the subordination agreement in that case and held that for various reasons the junior creditor was entitled to vote its claim in the relevant bankruptcy case. Debtor more fully discusses and distinguishes the *LaSalle* decision in Section D of this response.

B. Blue Ridge Has No Interest In Its Claim Until Wachovia Is Paid In Full And Therefore Is Not Entitled To Vote.

18. A second rationale for why this Court should enforce the voting transfer provisions of the Subordination Agreement is that Blue Ridge has no interest in its claim until Wachovia is paid in full. Pursuant to the applicable provisions of the Subordination Agreement, Blue Ridge agreed that it was not entitled to any recovery from Debtor until Wachovia's claims were fully paid. Sections 2 and 3 of the Subordination Agreement directly address this point and state as follows:

Section 2. *No Payment on the Subordinated Debt.* The Subordinated Creditor [Blue Ridge] agrees not to ask, demand, sue for, take or receive from the Borrower [Debtor], directly or indirectly, in cash or other property or by set-off or in any other manner (including without limitation from or by way of collateral), payment of all or any of the Subordinated Debt [the Blue Ridge claims] which may now or hereafter be owing by the Borrower, or any successor or assign of the Borrower (including, without limitation a receiver, trustee or debtor-in-possession) (the term "Borrower" shall hereinafter include any such successor or assign of Borrower) unless and until the Obligations [the Wachovia claims] shall have been paid in full; provided, however, that unless and until Lender [Wachovia] gives Subordinated Creditor [Blue Ridge] notice of the occurrence of an event of default under the Loan Agreements, the Subordinated Creditor may receive regularly scheduled payments of interest only on the Subordinated Debt.

Section 3. *Subordination of Liens.* All liens and security interests of the Subordinated Creditor, whether now or hereafter arising and howsoever existing, in any assets of the Borrower or in any other assets securing the Obligation shall be and hereby are subordinated to the rights and interests of the Lender in those assets; the Subordinated Creditor shall have no right to possession of any such assets or to foreclose upon any such assets, whether by judicial action or otherwise, unless and until all of the Obligations shall have been paid in full.

(emphasis added)

19. Notwithstanding the broad acknowledgment of Wachovia's rights in the Subordination Agreement that were clearly drafted and contemplated a detrimental effect on Blue Ridge, Blue Ridge asserts that it is the holder of the claim and therefore is entitled to vote the claim pursuant to §1126(a) of the Bankruptcy Code which states that "[t]he holder of a claim or interest allowed under section 502 of this title may accept or reject a plan...." 11 U.S.C. §1126(a). It is Blue Ridge's position that only "Blue Ridge should and must be afforded an opportunity to preserve and protect its rights against Wachovia, the Debtor, and third parties. Blue Ridge should be allowed to fully participate in the plan process including, without limitation, voting its claim." *See Motion*, paragraph 35. Blue Ridge further goes on to claim that "[n]either Wachovia nor the Debtor has any interest in preserving or protecting Blue Ridge's interests. The bankruptcy and

non-bankruptcy rights which the Debtor proposes to waive and/or impair certainly affect Blue Ridge and Blue Ridge has a substantial interest to protect such rights, including, without limitation, seeking a determination as to its secured claim under Section 506 of the Bankruptcy Code and preserving its rights, claims, defenses, and causes of action against non-debtor entities." *See Motion*, paragraph 37.

20. While Blue Ridge is correct that Wachovia has no interest in protecting Blue Ridge's interest, it is this specific "benefit of the bargain" that Blue Ridge agreed to when it signed the Subordination Agreement. Wachovia was irrevocably granted the right to take whatever actions it needs to protect Wachovia's interests, to the direct detriment of Blue Ridge's interests. How is this any different then when a party gives a general release? Such releasing party acts at their own peril. When they sign such a release they may be giving up a valuable substantive right. So too when a creditor signs a subordination agreement.

21. Blue Ridge's position is clearly at odds with the express provisions of the Subordination Agreement. Wachovia is the true holder of Blue Ridge's claim because it has a superior interest to any recovery that Blue Ridge would be entitled until Wachovia is paid in full. This is no different then a junior holder of a non-recourse mortgage that runs the risk of seeing its lien and claim extinguished when the senior mortgage holder forecloses on the underlying property. If the junior lien holder wants to protect its interest in the property, what does it do? It pays off the first lien holder to step in its shoes to protect the junior lien holder's interest. Blue Ridge can do the same thing in this case. It can take steps to protect its interest; however, it has declined to do so. Rather, Blue Ridge has requested the Court to totally ignore the Subordination Agreement as if it never existed in the first instance. The fact that Blue Ridge irrevocably assigned to

Wachovia the rights that Blue Ridge is now trying to exercise is irrelevant to Blue Ridge and ignores the fact that it was part of the consideration for Wachovia making the loan to Debtor and part of the benefit that it bargained with Blue Ridge in an arm's length negotiated agreement. Should Blue Ridge be able to vote its claim, it could put the proposed plan in jeopardy and can materially impact and negatively affect Wachovia's senior interest and any recovery it can expect to receive from Debtor in this case. The Subordination Agreement was intended to avoid this potentially adverse scenario to Wachovia.

22. Further, Blue Ridge's reliance on § 1126(a) is inappropriate because this provision only provides that a holder "may accept or reject a plan". There is no requirement that is "shall" accept or reject a plan, nor is it clear that "may" doesn't mean that some other party can vote the junior creditor's claim on its behalf.

23. In *Matter of Itemlab, Inc.*, 197 F.Supp. 194 (E.D.N.Y. 1961), the junior creditor signed an agreement and agreed to subordinate its claim until the senior creditor was paid in full. Although there was no express language assigning the junior creditor's voting rights to the senior creditor, the district court interpreted the agreement as a "complete subordination agreement" which entitled the senior creditor to have "complete control over the claim." *Matter of Itemlab, supra* at 197. The court further stated after comparing other court's decisions on equitable approaches to uphold and enforce subordination agreements, that "[r]egardless of the approach, it is quite obvious that in each case substance and not form prevailed and that the intent of the parties was paramount." *Id.* at 197. After the court in *Itemlab* determined that the senior creditor had a right to collect the junior creditor's claim, the court was faced with the issue of whether the right to vote remains with the junior or senior creditor and held that:

> Since the vote attached to the claim is the only means of determining how and when the claim shall be enforced and the terms of payment, it would follow that the person entitled to collect the claim should be the person entitled to vote the claim; otherwise the result would be anomalous and would repose in the inferior creditor the power to use his vote to determine how the superior creditor shall collect a claim in which the inferior creditor no longer has an interest. . . To permit an assignee of a claim, even though it is only held by him as security, to vote the same to the extent of the amount due to the assignee, is not without precedent. *[citation omitted]*.
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> *Id.* at 198.

24. Blue Ridge's argument that it is the holder of the Blue Ridge claim and therefore it is the only party entitled to participate in the plan process, including without limitation its right to vote, is also without merit. As a subordinated creditor Blue Ridge has no interest in its claim until Wachovia is paid in full. It would be inequitable for Blue Ridge to be allowed to vote on a plan that will possibly negatively affect Wachovia, the senior creditor. As the *Davis* and *Itemlab* cases point out, Blue Ridge should not be entitled to simply ignore the Subordination Agreement as if it never existed. Wachovia should be entitled to vote on behalf of Blue Ridge because Wachovia's interest is superior to that of Blue Ridge and to do otherwise ignores the express purpose of the Subordination Agreement and the clear unambiguous intention of the parties.

C. Blue Ridge Is Estopped From Asserting Its Right To Vote Pursuant To The Terms Of The Subordination Agreement.

25. Wachovia's reliance on the Subordination Agreement should estop Blue Ridge from attempting to assert a right to vote, contrary to the terms of the Subordination Agreement. To establish a promissory estoppel claim, a party must show that (1) the promisor made certain promises, (2) the promisor should have expected that the party would rely on the promises, and (3) the party relied on those promises to its detriment. O.C.G.A. § 13-3-44(a). Pursuant to the terms of the Subordination Agreement, Blue Ridge made certain promises to subordinate its

claim and transfer its voting rights to Wachovia, upon which Wachovia relied upon when it extended its loan to Debtor. Consideration of the Subordination Agreement existed in the form of the benefits that flowed to Blue Ridge because of Wachovia's funding to Debtor. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *See Credit Alliance Corporation v. National Bank of Georgia*, N.A., 718 F.Supp. 954, 957 (N.D. Ga. 1989) *quoting Irvin v. Lowe's of Gainesville, Inc.*, 165 Ga.App. 828, 830 302 S.E.2d 734 (1983) (holding that a subordination agreement was supported by adequate consideration in the form of promissory estoppel wherein lessor leased equipment in reliance on bank's assurances in agreement).

26. Reliance to support promissory estoppel in the present case is evidenced by the language of the Subordination Agreement and Wachovia's conduct in loaning money to Debtor. Injustice can be avoided only by enforcement of Blue Ridge's promise to Wachovia. Accordingly, this Court should deny Blue Ridge's Motion and enforce the terms of the Subordination Agreement, including the voting transfer provisions assigned to Wachovia.

D. Blue Ridge's Reliance On The LaSalle Decision Is Misplaced.

27. Blue Ridge's reliance on *Bank of America, N.A. v. North LaSalle Limited Partnership*, 246 BR 325 (Bankr. N.D. Ill. 2000) is misplaced and a clear departure from the prior history of cases that enforce voting transfer provisions within subordination agreements. The court in *LaSalle* didn't even address the previous line of cases sited *supra* and refused to enforce a voting transfer provision included within a subordination agreement, reasoning that "subordination thus affects the order of priority of payment claims in bankruptcy, but not the transfer of voting

rights." Id. at 331. The court refused to allow the senior creditor to vote the subordinated claim because 11 U.S.C. § 510(a) does not expressly allow for waiver of voting rights. As can be seen from Debtor's discussion below, it is Debtor's position that the rationale supporting the *LaSalle* decision is flawed, therefore, *LaSalle* has limited, if any, precedential value and should be rejected by the Court.

28. The court in *LaSalle* began its analysis by referring to § 1126(a) of the Bankruptcy Code which states that: "[t]he holder of a claim or interest allowed under section 502 of this title may accept or reject a plan." 11 U.S.C. 1126(a). The *LaSalle* court then went on to state that the parties acknowledged that the junior creditor is the holder of the claim arising under its loan and that unless there is some reason to deviate from the plain language of § 1126(a) the junior creditor (as the holder) should therefore be allowed to vote its claim in the confirmation process. *LaSalle* at 331. Unfortunately, what is plain language to the *LaSalle* court may not be so plain. Rule 3018(c) of the Federal Rules of Bankruptcy Procedure states in relevant part that "[a]n acceptance or rejection shall ... be signed by the creditor or equity holder or an authorized agent..." As is clear by this rule, it is contemplated that a party other than the creditor or equity holder of a claim or interest can vote the claim. This creates two threshold questions – (1) Who really is the "holder" of a claim?; and (2) Did the creditor authorize someone other than the creditor to vote on his behalf? The *LaSalle* court reached the wrong conclusion on both inquires.

29. The court in *In re Southland Corporation*, 124 B.R. 211 (Bankr. N.D.Tex. 1991) had to address whether solicitation of a plan should be made to the record holder of certain claims of creditors and preferred shareholders that held such claims in a legal capacity as is done with

public securities held by a brokerage house that hold such claims in "street" name, or whether the beneficial owners were the parties entitled to vote for the plan (i.e., the customers of the brokerage house for whose benefit the interest was held although their names were not reflected in the company's books and records). The *Southland* court stated that:

> "[t]aking the plain words of Congress in § 1126, only the holder of a claim, or a creditor, or the holder of an interest, may accept or reject a plan. If the record holder of a debt is not the owner of a claim, or a true creditor, he may not vote validly to accept or reject, unless he is an authorized agent of the creditor, and this authority is established under appropriate Bankruptcy law and rules."
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> *In re Southland, supra* at 227.

As a consequence the *Southland* court held that the beneficial owner of the claim was the proper party to vote the claim and the "holder" for purposes of § 1126 rather than the legal holder as reflected in the company's records. *Id.* If we take this conclusion and analogize it to our case one could easily question who the record holder is (i.e., the legal owner), and who really is the true creditor (i.e., the beneficial owner). If we were to look at Debtor's books and records they would reflect that Blue Ridge is the legal owner of the Blue Ridge claim, the maker of the loans to Debtor, the party that executed the loan documents. However, because of the negotiated Subordination Agreement Wachovia is the true beneficial holder of the claim. As noted *supra*, sections 2, 3 and 4 of the Subordination Agreement, very clearly provide that until Wachovia is paid in full it is the beneficial holder of the claim entitled to receive all payments and exercise dominion and control over that claim as it deems appropriate to protect its own interests to the detriment of Blue Ridge. Consequently, like the customers of the brokerage house who were the

beneficial holders of their claims, Wachovia is likewise the beneficial holder of the Blue Ridge claim and should be entitled to vote that claim on behalf and in the name of Blue Ridge regardless of who is the legal owner of the claim.

30. The *LaSalle* court also analyzed the operative language in Rule 3018(c) that provides that the acceptance or rejection of a plan may be filed by an "authorized agent" of the holder of the claim. *LaSalle* at 331. The *LaSalle* court rejected the senior creditor's argument that it was an "authorized agent" of the subordinated creditor by virtue of the subordination agreement and stated the general premise of agency law that "[a]n 'agent' is commonly understood to act at the direction of a principal." *Id.* "The test of agency is the existence of the right to control the method or manner of accomplishing a task by the alleged agent". *Id.* at 332, quoting *Brunswick Leasing Corp. v. Wisconsin Central Ltd.*, 135 F.3d 521, 526 (7th Cir.1998). The *LaSalle* court noted that the senior creditor would not be voting at the direction of the subordinated creditor, but that it would be "acting in its own interests, quite possibly contrary" to those of the junior creditor. *Id.* at 332. As a consequence the *LaSalle* court then erroneously concluded that the senior creditor could not be seen to be the agent of the junior creditor. *Id.* Unfortunately, the Court's hasty conclusion fails to acknowledge that there are a multitude of situations in which someone is made an authorized agent to act in the stead of the principal when the purpose is not necessarily to protect the interest of the principal (such as a lender who is authorized under a deed to secure debt to exercise the power of attorney in the document in order to foreclose in the name of the borrower to the detriment of the borrower).

31. The *LaSalle* court's failure to recognize the senior creditor as an agent of the junior creditor by virtue of a subordination agreement paralyzes the true premise of agency principles

and the underlying purpose of entering the subordination agreement in the first instance. Furthermore, one of the primary underlying purposes of a subordination agreement is to allow a senior creditor the right to vote a subordinated creditor's claim, and to receive payment on behalf of the junior creditor for the benefit of the senior creditor; in each case in an effort to protect the interests of the senior creditor, not the interests of the junior creditor. Subordination agreements confer an agency relationship between the senior and junior creditors. In consideration of a senior creditor extending credit to a debtor, the junior creditor subordinates its claim and assigns its right to vote to the senior creditor. Accordingly, there would be limited purpose for a subordination agreement if a senior creditor could not act for its own interest in voting but rather had to defer to the junior creditor who will have no interest in protecting the senior creditor if it negatively impacted the junior creditor. Without the voting transfer provision, the junior creditor can vote for or against the plan in a manner that could have a negative affect on the senior creditor and jeopardize the plan and senior creditor's priority interest.

32. An additional rationale that the *LaSalle* court used to justified its position was that "prebankruptcy agreements do not override contrary provisions of the Bankruptcy Code", and relied on a Seventh Circuit decision that held it is contrary to public policy to allow a debtor "to contract away the right to a discharge". *LaSalle, supra at 331 quoting Klingman v. Levinson*, 831 F.2d 1292, 1296 n. 3 (7th Cir.1987). The court in *LaSalle* then cited *Hayhoe v. Cole*, 226 B.R. 647, 652 n.7 (9th Cir.BAP1998) which held that a debtor's prepetition waiver of discharge was void as against public policy. The court in *Hayhoe* referenced numerous other decisions which refused to enforce prepetition waivers against debtors. *Hayhoe*, supra at 652 n. 7.

33. The decisions relied upon in *LaSalle*, including *Klingman* and *Hayhoe*, all stand for the proposition that, for public policy reasons, the Bankruptcy Code was intended to protect debtors from over reaching creditors in an effort to give the debtor an opportunity for a fresh start. As a result the Bankruptcy Code in various situations affords and protects the rights of debtors, including protecting debtors from prepetition agreements impinging their rights that the Bankruptcy Code was designed to protect. The issues regarding waiver and discharge are intrinsic in protecting the debtor not the creditor. However, when dealing with two creditors, there is no public policy consideration to consider in not enforcing a subordination agreement. Rather, the *LaSalle* court is ignoring this premise and is using the line of cases that dealt with protecting debtors as the underlying rationale to protect a junior creditor vis-à-vis a senior creditor. The greater public policy considerations in protecting debtors are not present when dealing with creditors. The underlying purpose of the Bankruptcy Code is not undermined by allowing third parties to transfer their voting rights in subordination agreements. In fact, the contrary proposition is true: If *LaSalle* becomes the law of the land, senior lenders may not continue to be willing to make loans to a borrower if a junior creditor is present if they fear that courts will fail to enforce all of the provisions of a negotiated subordination agreement between the creditors.

34. The misguided rationale of the *LaSalle* court is further evidenced by its narrow construction of 11 U.S.C. § 510(a), noting that this code section does not allow for waiver of voting rights under 11 U.S.C. § 1126(a). The court opined that "subordination thus affects the order of priority of payment of claims in bankruptcy, but not the transfer of voting rights." *Id.* at 331. To support its position, the court quoted the definition of subordination according to

Black's Law Dictionary, which includes "[t]he act or process by which a person's rights or claims are ranked below those of others." *Id.* at 331. In further support of its position, the court quoted *Beatrice Foods Co. v. Hart Ski Mgf. Co. (In re Hart Ski Mfg. Co.),* 5 B.R. 734 (Bankr. D.Minn.1980), for the following premise: "The intent of § 510(a) . . . is to allow the consensual and contractual priority of payment to be maintained between creditors among themselves in a bankruptcy proceedings. There is no indication that Congress intended to allow creditors to alter, by a subordination agreement, the bankruptcy laws unrelated to distribution of assets." Id. at 331, quoting *In re Hart Ski, supra* at 736. By using such a narrow definition of the term "subordination" the *LaSalle* court is attempting to pigeon hole every subordination agreement in to a limited and narrow construct. The broad and inclusive provisions of the Subordination Agreement contain provisions that are common in today's commercial finance transactions. To use such a limiting definition and interpretation of the general premise set forth in § 510(a) is without any reasonable basis in commercial transactions. One of the underlying purposes of entering into subordination agreements is in contemplation of the bankruptcy of the borrower so that the senior creditor can get the benefit of its bargain. That is why the parties contractually agree that it is the senior creditor not the junior creditor that dictates what happens in the case. The junior creditor has agreed to sit in the back of the bus and allow the senior creditor to decide to what destination the bus is headed. As the passenger, the junior creditor should not be entitled to complain when the bus stops in Chicago rather than Atlanta.

35. Lastly the *LaSalle* court decision is also inconsistent with the underlying purpose of a subordination agreement and modifies the relevant roles of the parties. By declining to enforce the voting transfer provisions the *LaSalle* court acknowledges that this allows the junior creditor

to participate in the negotiation and confirmation of the plan, and that this participation is a desirable result. However, the *LaSalle* court would allow a situation in which a junior creditor could vote to reject a plan regardless of whether or not the assets are sufficient for the junior creditor to receive a distribution after giving effect to subordination. This right to vote by the junior creditor would provide "leverage" in the plan negotiation and confirmation process to the detriment of the senior creditor even though the junior agreed that it would not use such leverage against the senior creditor's desires. Debtor is perplexed in trying to understand how this is a desirable result.

36. The Motion relies too heavily on the *LaSalle* decision to support its conclusion and states that "courts have concluded that such contractual obligations [the right of senior creditors to vote the claims of junior creditors] are unenforceable and the junior creditor retains the right to vote its claim in a chapter 11 case". (Emphasis supplied). *See Motion*, paragraph 29. Contrary to Blue Ridge's assertion, *LaSalle* is the only reported case that takes the position directly that voting rights agreements between two contracting creditors are unenforceable. There is no reported case post-*LaSalle* that has addressed the voting transfer issues addressed by *LaSalle*. As noted supra, *LaSalle* is contrary to a number of reported cases pre-*LaSalle* that reach the complete opposite conclusion. Several cases have referenced parts of the *LaSalle* decision, but those cases did not directly address the enforceability of a voting transfer provision within a subordination agreement but were cases in which the courts were addressing rights granted to a debtor that the Bankruptcy Code was specifically designed to protect, not the relationship between two contracting creditors. *See In re ABC-NACO, Inc.*, 331 B.R. 773 (Bankr. N.D.Ill. 2005) (holding that a mortgage agreement between a chapter 11 debtor and lender that provided

that it would be subject to avoidance only under bankruptcy law as it existed at the time mortgage was signed is unenforceable); and *In re American Sweeteners, Inc.*, 248 B.R. 271 (Bankr. E.D.Pa. 2000) (a release executed between debtor and creditor did not preclude debtor's claim of equitable subordination against creditor). It would be inappropriate to afford two contracting creditors the same protections that the Bankruptcy Code affords debtors. To do so would favor one creditor over the other when the clear intention of the parties were made known between the creditors in an arms length transaction.

37. The Motion fails to cite any additional legal authority for the proposition that Blue Ridge is entitled to vote its claim, despite the contractual provision provided in the Subordination Agreement. Based on the earlier line of cases, *LaSalle* may be seen as an aberration and contrary to well settled contractual principles relating to enforcement of subordination agreements which, if § 510(a) is interpreted by its clear language, are enforceable to the same extent that such agreements are enforceable under applicable nonbankruptcy law. Any attempt to limit this effect as the *LaSalle* court did is inappropriate. Accordingly, this Court should (1) deny Blue Ridge's Motion to the extent that it seeks to preserve Blue Ridge's right to vote its ballot under the Plan in contravention of the express rights granted to Wachovia in the Subordination Agreement, (2) permit the Class 3A Ballot filed by Wachovia on behalf of Blue Ridge to stand and be counted in the tabulation of votes on the Plan; and (3) rule that Class 3A has voted in favor of the Plan thereby accepting the primary treatment provided thereunder for the Blue Ridge claims. If the Court recognizes the ballot filed by Wachovia for Class 3A, no valuation hearing will be necessary and this case may move quickly to confirmation.

E. Should The Court Determine That Blue Ridge Is Entitled To Vote Its Ballot Then a Valuation Hearing Will Be Necessary.

38. Blue Ridge's request for a valuation hearing is inappropriate. As outlined above, Blue Ridge is not entitled to vote to reject the Plan because it transferred that right to Wachovia pursuant to the express terms of the Subordination Agreement. Assuming arguendo that the Court allows the Blue Ridge Ballot to stand Class 3A will be deemed to have rejected the Plan. As a consequence the alternative treatment provided in the Plan would be applicable and Blue Ridge would be entitled to a valuation hearing.

39. Section 506(a) of the Bankruptcy Code provides in relevant part that:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest...is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property...and is an unsecured claim to the extent that the value of such creditor's interest...is less than the amount of such allowed claim."
>
> 11 U.S.C. § 506(a).

40. Debtor will show at the valuation hearing, if necessary, that the value of Debtor's collateral is insufficient to secure all of the alleged secured claims against Debtor. In particular, when taken in order of priority the Debtor will show that there is insufficient value to secure the claims of Blue Ridge. As a result, pursuant to § 506 Blue Ridge's claim will be deemed an unsecured claim against Debtor and its estate and therefor entitled to participate as an unsecured creditor in Class 5 under the Plan.

41. It is Blue Ridge's contention that the value of the collateral should be determined by the purchase priced paid by the Buyer. *See Motion*, paragraph 38. This valuation method is misleading and not a true indication of the value of Debtor's collateral for purposes of determining Blue Ridge's secured claim that it can assert in the case.

42. "When a business is in a precarious financial condition or on its financial deathbed, a liquidation valued should be used to value the assets." See Schwinn Plan Comm. V. AFS Cycle & Co. (In re Schwinn Bicycle), 192 B.R. 477, 487 (Bankr. N.D.Ill.1996) citing Matter of Taxman Clothing Co., Inc., 905 F.2d 166, 170 (7th Cir. 1990); Fryman v. Century Factors, Factor for New Wave (In re Art Shirt Ltd.), 93 B.R. 333, 341 (E.D.Pa.1988); Neuger v. Casgar (In re Randall Construction), 20 B.R. 183, 183-184 (N.D.Ohio 1981). "It is well-settled that if a company is only nominally extant, to treat it as a going concern would be misleading and would fictionalize the company's true financial condition." Gillman v. Scientific Research Products of Delaware, Inc. (In re Mama D'Angelo, Inc.) 55 F.3d 552, 555 (10th Cir. 1995) citing In re Randall Constrt. Inc., 20 B.R. 179, 184 (D.N.D. 1981). "Liquidation value is appropriate 'if at the time in question the business is so close to shutting its doors that a going concern standard is unrealistic'". In re Mama D'Angelo, supra at 555-556 quoting In re Vandais Lumber Supply, Inc. 100 B.R. 127, 131 (Bankr.D. Mass.1989).

43. Debtor reserves the right to present at any valuation hearing held evidence of the true value of the collateral securing the Blue Ridge claim.

CONCLUSION

44. For all of the above foregoing reasons, Debtor respectfully requests that this Court deny Blue Ridge's instant Motion in its entirety and enforce the terms of the subordination agreement,

specifically the voting transfer provisions, and allow Wachovia its right to vote the Class 3A Ballot on behalf of Blue Ridge.

Respectfully submitted this 19th day of December 2006.

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	
	)	**CHAPTER 11**
AEROSOL PACKAGING, LLC,	)	
A Georgia limited liability company,	)	**CASE NO. 06-67096- MHM**
	)	
Debtor.	)	
	)	

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of December, 2006, I caused to be served a true and correct copy of **Aerosol's Response In Opposition to Blue Ridge's Motion Requesting (1) Determination of Voting Rights and Allowance of Ballot Cast, (2) Valuation of Collateral, and (3) Hearing** upon the United States Trustee, all secured creditors, the twenty largest unsecured creditors and all parties requesting notice by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

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