Docket #0312 Date Filed: 07/25/2018

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ENDURO RESOURCE PARTNERS LLC, *et al.*,	Case No. 18-11174 (KG)
Debtors.[1]	(Jointly Administered)
	Ref. Docket Nos. 202, 294, 296 & 297

DEBTORS' OMNIBUS REPLY TO OBJECTIONS TO CONFIRMATION OF THE JOINT PLAN OF LIQUIDATION OF ENDURO RESOURCE PARTNERS LLC AND ITS DEBTOR AFFILIATES UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

The above-captioned debtors and debtors-in-possession (collectively, the "***Debtors***") hereby submit their omnibus reply (the "***Reply***") to the Objections (as defined below) to confirmation of the *Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (as modified or amended, the "***Plan***").[2] In support thereof, the Debtors respectfully represent as follows:

BACKGROUND

1. The Plan is the culmination of months of extensive discussions and negotiations with each of the Debtors' key constituencies in these Chapter 11 Cases, including the First Lien Agent, the Consenting First Lien Lenders, and the lenders under the Second Lien Credit Facility

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's United States federal tax identification number, if applicable, or other applicable identification number, are: Enduro Resource Partners LLC (6288); Enduro Resource Holdings LLC (5571); Enduro Operating LLC (7513); Enduro Management Company LLC (5932); Washakie Midstream Services LLC (7562); and Washakie Pipeline Company LLC (7798). The debtors' mailing address is 777 Main Street, Suite 800, Fort Worth, Texas 76102.

[2] Capitalized terms used but not otherwise defined herein shall have those meanings ascribed to them in the *Debtors' Memorandum of Law in Support of Confirmation of the Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (the "***Confirmation Brief***"), filed contemporaneously herewith.

(the "***Second Lien Lenders***"[3] and, collectively, the "***Key Constituencies***"). Those extensive negotiations, led by the Debtors and their management team, enabled the filing of these Chapter 11 Cases not only with the consensual use of cash collateral to fund the conclusion of the sale process commenced months prior to the Petition Date, but also the funding and filing of a chapter 11 plan immediately following the Petition Date. Now, just ten weeks into these Chapter 11 Cases, 100 percent of the lenders under the First Lien Credit Facility (the "***First Lien Lenders***"), 100 percent of the Debtors' Second Lien Lenders, and every one of the seventy Holders of General Unsecured Claims that submitted a ballot has voted in favor of the Plan.

2. More specifically, the Plan reflects the exact agreed-to terms of the Debtors and their Key Constituencies, who represent the largest economic interests in these Chapter 11 Cases. Pursuant to the Plan:

- the Debtors' First Lien Lenders will receive a cash recovery on account of their debt;
- each of the Debtors' Second Lien Lenders will receive the share of the Second Lien Claims Reserve Amount that it is entitled to in accordance with the Second Lien Credit Agreement and the Plan Administration Process and a Pro Rata share of the Excess Net Sale Proceeds, if any, up to payment in full of its Second Lien Claim;
- the Holders of General Unsecured Claims will receive a Pro Rata distribution of Cash from the Unsecured Claims Reserve Amount, a significant increase over the zero sum recovery they would otherwise have been entitled to; and
- certain parties, including the Debtors' Consenting First Lien Lenders, Second Lien Lenders, and their officers, directors, managers, and Professionals, among other Affiliates, will receive the full benefit of releases of potential claims or causes of action of the Debtors.

[3] Riverstone Holdings LLC (the "***Sponsor***"), a significant equityholder in the Debtors through its affiliate, is one of the Debtors' Second Lien Lenders. The Sponsor's Second Lien Claims are subordinate in priority to the other Second Lien Claims and the Sponsor took on this debt in 2016 – along with a $22 million equity investment of which the Sponsor will see no recovery.

3. Further underscoring the broad consensus behind the Debtors' Plan is the fact that no unsecured creditors' committee was formed in these Chapter 11 Cases because no unsecured creditors expressed interest in being on a committee. This is a direct result of the Debtors' careful management of expenses and liabilities leading up to the Petition Date, negotiation with the purchasers of the Debtors' assets regarding assumption of liabilities, and the Debtors negotiation of favorable settlements before and after the Petition Date with certain unsecured creditors.

4. The Plan is the product of intense arms' length negotiations and extensive efforts (and concessions) by the Debtors, the Consenting First Lien Lenders, and the Second Lien Lenders, and represents the best available alternative to resolve the Chapter 11 Cases, responsibly wind down the Debtors' operations, and maximize creditor recoveries. In addition, as set forth in further detail in the *Debtors' Memorandum of Law in Support of Confirmation of the Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (the "***Confirmation Brief***") and the *Declaration of Kimberly Weimer in Support of Support of Confirmation of the Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (the "***Weimer Declaration***"), filed contemporaneously herewith, the Debtors' Plan is confirmable and comports with all of the applicable sections of the Bankruptcy Code, the Bankruptcy Rules, and other applicable law.

5. The Plan contains, as contemplated by the Sale and Plan Support Agreement, certain consensual releases by the Debtors, the First Lien Lenders and First Lien Agent, the Second Lien Lenders and the Second Lien Agent, and other creditors that do not properly opt out or object. Under the Plan, these releasing parties will consensually release causes of action

against the Debtors, the First Lien Agent and First Lien Lenders, the Second Lien Agent and the Second Lien Lenders, and each of their current or former subsidiaries and Affiliates, and its and their managed accounts or funds, officers, directors, managers, managing members, principals, partners, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other Professionals. As set forth below, the Debtors do not believe that there are any causes of action against the Released Parties, but the releases themselves remain a valuable piece of the overall settlement reached. They are representative of the consensual nature of the Plan itself and the finality that it is designed to achieve.

6. The main resistance to the Plan has been lodged by the Office of the United States Trustee (the "***U.S. Trustee***") on two broad bases. (*See* [Docket No. 294] (the "***UST Objection***").) First, the U.S. Trustee objects to the exculpation, releases, and related provisions in the Plan as either inconsistent with the law or unsupported by the record. Second, the U.S. Trustee argues that the Debtors must establish that the Plan provides for payment in full of Administrative Claims and Priority Tax Claims. As set forth herein, in the Confirmation Brief, in the Weimer Declaration, and in the *Declaration of Jan Baker, Independent Manager of Enduro Resource Holdings LLC*, filed contemporaneously herewith (the "***Baker Declaration***"), and as will be further adduced at the Confirmation Hearing, these objections are incorrect.

7. The Debtors also received objections from the United States, on behalf of the Department of Interior [Docket No. 297] (the "***DOI Objection***"), and from U.S. Specialty Insurance Company [Docket No. 296] (the "***Surety Objection***," and collectively with the UST Objection and the DOI Objection, the "***Objections***"). The Surety Objection is limited in nature, seeking to ensure that language for the Confirmation Order that the Debtors previously agreed would be included is, in fact, included, which it will be. The DOI Objection raises certain

concerns regarding the Plan's treatment of its claims and executory contracts and argues against the Plan's release, exculpation, and injunction provisions on grounds similar to those raised in the UST Objection. The Debtors will continue to communicate with all of the objecting parties to try to alleviate their concerns and pave the way to confirmation, but in the event those discussions are not successful, the Debtors respectfully request that the Objections be overruled and the Plan be confirmed at the Confirmation Hearing, for the reasons set forth herein.

RESPONSE

8. The only outstanding objections are the U.S. Trustee's and the Department of Interior's. As to the U.S. Trustee, it raises five arguments against confirmation of the Plan:

- ***first***, it asserts that the Plan's exculpation provisions are too broad as to who is protected by them and what claims are included in their ambit;
- ***second***, it asserts that the releases to be provided by the Debtors also are too broad, also as to who is protected and what claims are captured;
- ***third***, it asserts that the releases to be provided by certain holders of claims and interests are too broad, based on the categories of parties providing them;[4]
- ***fourth***, it asserts that the Plan provides an impermissible discharge of a liquidating corporate debtor; and
- ***fifth***, it asserts that the Plan may not provide for payment in full of all Administrative Claims and Priority Tax Claims.

Each of these arguments, addressed in turn below, is wrong.

9. The DOI Objection likewise raises arguments concerning the propriety of the Plan's release, exculpation, and injunction provisions that should be overruled. These arguments are addressed below. In addition, the DOI Objection asserts that: (a) the Debtors cannot be permitted to assume or assign any contracts with the United States under the Plan without its

[4] As to both the Debtors' releases and releases by third parties, the Debtors have revised the Plan to limit the scope thereof to conduct related to the Debtors, the Disclosure Statement, the Plan, or the Chapter 11 Cases. The Debtors believe these revisions sufficiently address the U.S. Trustee's objection as to the substantive scope of the releases.

consent; (b) the Plan is inconsistent with the sale approval orders entered by this Court in that it contemplates rejection of all of the Debtors' remaining executory contracts and unexpired leases; and (c) the Plan may need to provide for interest to be paid on the United States' claims. To address these latter concerns briefly: (x) the Debtors will not assume or assign any contracts under the Plan; (y) the Plan's contract rejection provision does not encompass contracts assigned in connection with any asset sale, so the Plan and sale approval orders are not inconsistent; and (z) interest will not be payable on unsecured claims in these cases, as the Debtors are not solvent. The Debtors reserve all rights and arguments as to the assertions made by the DOI Objection, but the balance of this Reply focuses on the Objections' arguments regarding the Plan's release, exculpation, and injunction provisions.

I. The Exculpation Provisions of the Plan Are Appropriate.

10. The U.S. Trustee argues that the exculpation to be provided under the Plan for certain parties is overly broad, in that (a) no parties other than estate fiduciaries may receive exculpation under the Plan and (b) no prepetition conduct may be the subject of exculpation. Both of these arguments are wrong.

11. First, chapter 11 plans may exculpate parties other than estate fiduciaries. While certain courts in this District have established seeming bright-line rules that only estate fiduciaries may be exculpated, no binding precedent exists that mandates such a rule. To the contrary, the Third Circuit's ruling in *PWS Holding*, to which other courts and the U.S. Trustee have looked, stands for the proposition that exculpation may be appropriate for a party so long as it "does not affect the liability of third parties, but rather sets forth the appropriate standard of liability."[5]

[5] *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000).

12. What is seemingly missed by the U.S. Trustee in making this argument is that it is not the ***fiduciary duties*** of the committee members in *PWS Holding* that caused the Third Circuit to permit the exculpation there, but the "***limited grant of immunity***" provided to committees under applicable law.[6] Without the immunity, the committee members would have been subject a lower threshold for liability, and the Third Circuit would seemingly have ruled against the exculpation.[7] But because the Third Circuit found that committee members were entitled to immunity for conduct other than willful misconduct and *ultra vires* acts, the parallel exculpation provision there was appropriate.[8] Put differently, if the existence of a fiduciary duty were the basis for permitting exculpation of claims, the *PWS Holding* opinion would be internally inconsistent because fiduciary duties impose ***higher*** standards than merely not engaging in willful misconduct or *ultra vires* acts.

13. Second, the same principles apply as to prepetition conduct versus postpetition conduct as they do to estate fiduciaries and other parties. The Third Circuit made no ruling that only postpetition conduct could be exculpated, nor is the U.S. Trustee's argument based on a logical extension of *PWS Holding*. The happenstance that a creditors' committee, which was the exculpated party at issue in *PWS Holding,* only exists during a chapter 11 case does not require that exculpation only be available for conduct during a chapter 11 case. Indeed, the Third Circuit expressly stated that the exculpation was appropriate as to "participation in the ***reorganization***," not participation in the chapter 11 cases.[9]

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[6] *See id.* at 246 ("This immunity covers committee members for actions within the scope of their duties.... [H]owever, [committee members] do remain liable for willful misconduct or *ultra vires* act.").

[7] *See id.* at 247 (noting precedent would have required prohibiting exculpation provision if it had "affect[ed] the liability" of exculpated parties).

[8] *See id.* at 247.

[9] *Id.* at 246–47.

14. Thus, the controlling question, as expressly stated by the Third Circuit, is whether the exculpation "sets forth the appropriate standard of liability that would apply to actions against the [exculpated parties] in the event that they were sued for their participation in the reorganization."[10] Here, the exculpation provisions of the Plan parallel the standards of liability that would apply to all the Exculpated Parties—in particular, the Consenting First Lien Lenders, who the Debtors believe are the only parties at issue—for acts related to their participation in the Debtors' restructuring. More specifically, because the Consenting First Lien Lenders are ***not*** fiduciaries of the Debtors' estates, they are under no duty to other parties in interest vis-à-vis the Debtors that could give rise to liability for simple negligence in the Debtors' restructuring.[11] On the other hand, the Consenting First Lien Lenders (or any of the other Exculpated Parties) could be liable for fraud, willful misconduct, or criminal conduct[12] notwithstanding the Plan's exculpation, each of which would be a source of liability despite the absence of any duty flowing from them to the Debtors, their estates, or other parties in interest. The exculpation provisions, therefore, comport with *PWS Holding* and with the "appropriate standard of liability" applicable to the Consenting First Lien Lenders.

15. Further, and as explained in the Confirmation Brief and the Weimer Declaration, the exculpation provisions are proper because, among other things, they are the product of arm's-length negotiations, have been critical to obtaining the support of the Key Constituencies for the Plan, and, as part of the Plan, have received unanimous support from the creditors that voted,

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[10] *Id.* at 246–47.

[11] *See Coast Auto. Grp., Ltd. v. VW Credit, Inc.*, 34 Fed. App'x 818, 827 (3d Cir. 2002) (affirming dismissal of breach of fiduciary duty claim against lender on grounds that "no independent fiduciary duty is generally owed from a lender to a borrower"); Am. Jr. 2d Negligence § 73 (collecting cases).

[12] The Plan's exculpation provision also carves out gross negligence, which would be relevant to the Debtors' managers, officers, and employees as owing fiduciary duties to the estates but less relevant for the Consenting First Lien Lenders, for whom no duty is implicated.

including those creditors who would otherwise benefit from the proceeds of the potential Claims and causes of action proposed to be exculpated. These provisions are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors, their Estates, and their creditors.

II. The Releases by the Debtors Are Appropriate.

16. The U.S. Trustee asserts that the Debtors have not established the evidentiary predicate necessary to approve the Debtor Releases pursuant to the five-factor test set forth in *In re Master Mortgage Investment Fund, Inc.*[13] and applied in *In re Zenith Electronics Corp.*[14] As demonstrated in the Confirmation Declarations and as will be adduced at the Confirmation Hearing, the Debtors have amply demonstrated the propriety of the Debtor Releases.

17. Under this Court's well-established case law, the debtor is "given considerable latitude" to settle and release potential claims as part of its plan,[15] and, as explained in the Confirmation Brief, the Debtor Releases satisfy the test enumerated by the Third Circuit Court of Appeals for settlements under Bankruptcy Rule 9019: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors."[16]

18. The Debtor Releases fall well "within a reasonable range of litigation possibilities"[17] because there are no potential causes of actions with any likelihood of succeeding

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13 168 B.R. 930, 937-38 (Bankr. W.D. Mo. 1994).

14 241 B.R. 92, 110 (Bankr. D. Del. 1999).

15 *See id.* at 45.

16 *Meyers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (finding that the *Martin* factors are useful when analyzing a settlement of a claim against the debtor as well as a claim belonging to the debtor); *see also TMT Trailer Ferry, Inc.*, 390 U.S. 414, 424 (1968) (proposed settlement held in best interest of the estate).

17 *In re Penn Cent. Transp. Co.*, 596 F.2d 1102, 1114 (3d Cir. 1979) (citations omitted).

that the Debtors are releasing in the Debtor Releases, as detailed in the Baker Declaration.[18] The Debtors' three independent managers formed a special committee (the "***Special Committee***") and investigated and evaluated any potential causes of action that may exist against the Released Parties, concluding that there likely are no such causes of action and the pursuit of any such cause of action would be a poor use of estate resources.[19] These individuals, Kenneth Beer, D.J. "Jan" Baker, and Marshall Dodson, each were appointed to the board in late 2017. Mr. Beer has served on multiple boards, including for debtors in chapter 11 proceedings, and was the chief financial officer of an upstream oil and gas company that undertook a chapter 11 sale and plan process in early 2017. Mr. Dodson, likewise, helped steer an upstream oil and gas company through a chapter 11 process in recent years and has brought his experience to bear for the Debtors' benefit in these Chapter 11 Cases. Mr. Baker is a retired restructuring attorney, who spent decades advising distressed companies and their constituents in situations like the present one.

19. The Special Committee's investigation was diligent and thorough. The Special Committee interviewed four individuals—the Debtors' chief executive officer, the Debtors' chief financial officer, the team leader for the Debtors' restructuring advisor, and a partner at the Debtors' primary equity sponsor (who is also a member of the Debtors' ultimate board of managers).[20] The Special Committee reviewed dozens of public and non-public documents, including records of board meetings and resolutions, financial statements, records of payments

[18] *See In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) (KJC) (noting that "the record does not reflect that there is any pending litigation in [that] case that would be discontinued by such a release" and *citing In re DBSD North America, Inc.*, 419 B.R. 114, 143 (Bankr. S.D.N.Y. 2009), which "approv[ed] a debtor's release of third parties when the debtor testified that it was unaware of any significant potential claims that were being released"); Tr. of Hr'g Held on Jan. 18, 2006 at 44, *In re AAI Pharma*, No. 05-11341 (noting that there was "nothing in this case that would suggest that there is any serious cause of action out there that the debtor is giving up").

[19] *See* Baker Decl. ¶ 25-26.

[20] *See id.* at ¶ 7.

made to the Released Parties, and others.[21] And the Special Committee enlisted the help of counsel to the Debtors in these efforts, to ensure sufficient time and attention could be afforded to the investigation by the independent directors.[22] Ultimately, the Special Committee determined that there are no known claims against any of the Released Parties and that any potential claims or causes of action are "not significant and that the cost of pursuing any such potential claim would outweigh the potential benefit to the Debtors' estates."[23]

20. The Debtor Releases obviate the expense, delay, inconvenience and uncertainty that would attend any litigation regarding the Released Parties. Furthermore, voting creditors have spoken as to whether the Debtor Releases serve their "paramount interest" in unanimously approving the Plan. Thus, the Debtor Releases in the Plan are fair, equitable, and in the best interests of the Debtors' estates.

21. In addition, the Debtor Releases satisfy all five of the *Master Mortgage/Zenith* factors. The five factors are:

- An identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
- Substantial contribution by the non-debtor of assets to the reorganization;
- The essential nature of the release to the reorganization to the extent that, without the release, there is little likelihood of success;
- An agreement by a substantial majority of creditors to support the release, specifically if creditors in the impaired class or classes overwhelmingly vote to accept the plan; and

[21] *See id.* at ¶ 6.

[22] *See id.* at ¶ 6.

[23] *See id.* at ¶¶ 25-26.

- A provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the release.[24]

No single *Zenith* factor is dispositive, nor must all of the factors be satisfied for the release to be approved.[25]

22. Nevertheless, all of the factors weigh in favor of approving the Debtor Releases under the Plan. In particular:

- the Released Parties all may be entitled to indemnification, reimbursement of professional fees, and other claims against the Debtors in connection with any claims that may be brought against them arising out of this restructuring;

- the substantial prepetition and postpetition work of the Debtors' directors, officers, employees, and professionals was critical to the $115 million purchase price for the sale of substantially all of the Debtors' assets, including finding a new stalking horse postpetition and bringing in six new bidders for an auction, the ability of the Debtors to file their Plan and Disclosure Statement shortly after the Petition Date, and management's general planning and foresight that allowed for efficient and cost-effective Chapter 11 Cases, all with sufficient liquidity;

- the compromises and concessions of the Debtors' first lien creditors, including committing to and seeing through a chapter 11 process with recoveries made available from their collateral, have been pivotal to the success of these Chapter 11 Cases, and without them, the recoveries contemplated by the Plan for holders of Second Lien Claims and General Unsecured Claims likely would not exist;

- the agreement of the Debtors' second lien lenders to a dramatically reduced recovery on the principal amount of their claims represents a material contribution in that it eliminated the potential for substantial litigation over valuation, the Debtors' sale process, and other aspects of these cases;

- the Debtor Releases have been essential to the Plan throughout the Debtors' negotiations with the Released Parties, going back to the initial discussions that led to the Sale and Plan Support Agreement and continuing through the negotiations that led to the Second Lien Lenders joining that agreement, and constitute an important aspect of the consideration each Released Party is to receive;

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[24] *Zenith*, 241 B.R. at 110.

[25] *In re Wash. Mut., Inc.*, 442 B.R. 314,346 (Bankr. D. Del. 2011) (noting the factors "are neither exclusive nor conjunctive requirements but simply provide guidance in the [c]ourt's determination of fairness"); *see also In re Indianapolis Downs, LLC*, 486 B.R. 286, 305 (Bankr. D. Del. 2013) (approving the debtors' releases despite not meeting the third and fifth Zenith factors).

- ***every creditor that voted on the Plan voted to accept it, including the Debtor Release***;

- general unsecured creditors, while not being paid in full, are receiving a generous recovery under the Plan as compared to their position under a strict application of the absolute priority rule; and

- holders of First Lien Claims, who actually stand to gain or lose from the pursuit of causes of action (which will vest in the Plan Administration Trust, the final assets of which will be distributed to them), were pivotal in negotiating the Debtor Releases in the first instance and now have voted unanimously to accept them.

23. Importantly, the *Master Mortgage/Zenith* analysis must be conducted in light of the potential value of the Claims to be released[26]—and the Debtors have no reason to believe that the Debtor Releases include any large or significant potential Claims or that such Claims are likely to be pursued. As explained in the Baker Declaration, the Debtors' independent directors investigated potential causes of action against the Released Parties and concluded that no such causes of action likely exists and that the benefit of pursuing any such actions is so *de minimis* it would not be beneficial to the Estates to pursue them.[27]

24. The U.S. Trustee acknowledges that the *Master Mortgage/Zenith* factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness; yet the U.S. Trustee treats the factors in argument as a rigid, conjunctive test. The Weimer Declaration and the Baker Declaration provide ample evidentiary support that the Debtor Releases are fair and appropriate and given for sufficient consideration, and, if necessary, the Debtors will supplement the record at the Confirmation Hearing.

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[26] *See In re Tribune Co.*, 464 B.R. 126, 187 (Bankr. D. Del. 2011) ("Because I have already decided that the Settlement meets the standard for approval [under Bankruptcy Rule 9019], I likewise conclude that the Settling Parties' consideration for the Debtors' Release is sufficient.").

[27] Baker Decl. ¶ 26 ("[T]he Special Committee has concluded that any potential claim or cause of action that the Debtors may conceivably have against a Released Party is not significant and that the cost of pursuing any such potential claim would outweigh the potential benefit to the Debtors' estates.").

Therefore, the Debtors respectfully that the Objection regarding the Debtor Releases should be overruled.

III. The Third Party Releases Are Appropriate.

25. The releases to be provided by holders of Claims and Interests (the "***Third Party Releases***") satisfy the standards for approval of third-party releases employed in the Third Circuit, are appropriate, and are consistent with the applicable provisions of the Bankruptcy Code. Therefore, they should be approved.[28]

26. "Courts in this jurisdiction have consistently held that a plan may provide for a release of third party claims against a nondebtor upon consent of the party affected."[29] In this case, the Disclosure Statement, the Ballots, and the notices issued to all creditors provided recipients with timely, sufficient, appropriate, and adequate notice of the Third Party Releases, including that all voting holders of Claims would be deemed to grant the Third Party Releases unless they rejected the Plan and affirmatively elected not to grant the Third Party Releases or, with respect to holders of unimpaired Claims who were not entitled to vote, objected to the Third Party Releases. Thus, by definition, the Releasing Parties each consented either expressly or impliedly to the Third Party Releases. As described in the Voting Report, creditors holding 100 percent in amount and number of the First Lien Claims and the Second Lien Claims voted to accept the Plan, thereby expressly consenting to the Third Party Release.[30] Moreover, each holder of a Claim in Class 1 (Other Secured Claims) is Unimpaired and therefore deemed to accept the Plan and, in turn, deemed to consent to the Third Party Releases; and no objections

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[28] 11 U.S.C. § 1123(b)(6).

[29] *Indianapolis Downs*, 486 B.R. at 305 (citing *In re Zenith Elecs.*, 241 B.R. at 111; *In re Spansion*, 426 B.R. at 144).

[30] *See In re Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004) (finding that voting in favor of a plan of reorganization that provides for a third-party release indicates consent to the release, even without an explicit election opting to accept the third-party release provision).

were received from any such parties.[31] Finally, the Debtors will carve out the United States from the Third Party Release via the Confirmation Order, in light of receipt of the DOI Objection—precisely as contemplated by the Plan and solicitation process. Because the Releasing Parties have consented to the Third Party Releases (and the only party properly objecting thereto has been excluded), the Third Party Releases should be approved.

27. Even if the Third Party Releases were not consensual, they would nonetheless satisfy the standard used in the Third Circuit for non-consensual third-party releases. In the Third Circuit, courts approve non-consensual releases of claims held by and against non-debtors when specific factual findings support the conclusion that the proposed releases are fair and necessary to the debtor's restructuring.[32] To determine whether the foregoing standard is satisfied by the circumstances of a case, a court will consider an array of factors, including the factors identified in the *Zenith* case and discussed above in connection with the Debtor Releases.[33] For all the reasons explained above, the facts and circumstances of this case satisfy the five factors set forth in *Zenith*. Accordingly, even if the Court were to find that the Third Party Releases are not consensual as to any holders of Claims or Interests, the Court should still approve the Third Party Releases under the standard for non-consensual releases.

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[31] *See Indianapolis Downs*, 486 B.R. at 306 ("In this case, the third party releases in question bind certain unimpaired creditors who are deemed to accept the Plan: these creditors are being paid in full and have therefore received consideration for the releases."); *In re Spansion, Inc.*, 426 B.R. at 144 (finding that a release was not overreaching to the extent it bound unimpaired classes deemed to have accepted the plan as those creditors had not objected to the release, were being paid in full, and had received adequate consideration for the release); *In re Offshore Grp. Inv. Ltd*, No. 15-12422 (BLS) (Bankr. D. Del. Jan. 15, 2016) (ECF No. 188) (confirming plan and approving third party releases where releasing creditor was unimpaired); *In re Optim Energy, LLC*, No. 14-10262 (BLS) (Bankr. D. Del. Oct. 14, 2015) (ECF No. 1318) (same).

[32] *See In re Cont'l Airlines*, 203 F.3d 203, 214 (3d Cir. 2000); Hr'g Tr. at 114–15, *In re W.R. Grace & Co.*, 446 B.R. 96, 138 (Bankr. D. Del. 2011) (approving third party release under *Cont'l Airlines* standard).

[33] *See In re Master Mortg. Inv. Fund., Inc.*, 168 B.R. 930 (Bankr. W.D. Mo. 1994); *see also Cont'l Airlines*, 203 F.3d at 217 n.17 (*Master Mortgage* factors appropriate in determining propriety of non-consensual third-party releases).

28. The Third Party Releases are clearly in the best interests of the Debtors' Estates and a sound exercise of the Debtors' business judgment. Without *ex ante* assurance of protection from liability, the Debtors' Key Constituencies would not have participated in the negotiations and compromises that led to the Plan. The Third Party Releases are also fair and reasonable. The releases include a carve-out for fraud, gross negligence, willful misconduct, or criminal conduct and, along with the Debtor Releases, are also similar to releases approved by courts in this jurisdiction.[34]

29. Additionally, as discussed in detail in the Baker Declaration, there is no evidence suggesting that the Third Party Releases include significant potential causes of action.[35] Under the circumstances and equities of these Chapter 11 Cases, particularly the existence of only one objection from a party with an economic interest in the Chapter 11 Cases, the Third Party Releases for the Released Parties.

IV. The Plan Does Not Provide for an Impermissible Discharge of the Debtors.

30. It is uncontroverted that the Plan does not actually provide the Debtors with a discharge under the Bankruptcy Code. However, the U.S. Trustee suggests that the Plan "effectively provide[s]" a discharge and that this is impermissible because the Bankruptcy Code does not provide for a discharge for liquidating corporate debtors. The Bankruptcy Code's prohibition on discharges for liquidating corporate debtors is motivated, as courts have found, by Congress's "desire to prevent businesses from evading liability by liquidating debtor

[34] *See, e.g.*, *In re Key Energy Servs. Inc.*, Case No. 16-12306 (BLS) (Bankr. D. Del. Dec. 6, 2016) [D.I. 245]; *In re Roadhouse Holding Inc.*, Case No. 16-11819 (BLS) (Bankr. D. Del. Nov. 9, 2016); *In re Halcon Res. Corp.*, Case No. 16-11724 (BLS) (Bankr. D. Del. Sept. 8, 2016) [D.I. 200]; *In re Dex Media, Inc.*, Case No. 16-11200 (KG) (Bankr. D. Del. July 15, 2016) [D.I. 320]; *In re New Gulf Res., LLC*, Case No. 15-12566 (BLS) (Bankr. D. Del. Apr. 20, 2016) [D.I. 514].

[35] *See* Baker Decl. ¶ 26.

corporations and resuming business free of debt."[36] Of course, there is no prohibition under the Bankruptcy Code or applicable law against a Plan providing liquidating corporate debtors with injunctive protection or against distributions under a liquidating plan constituting full settlement of the underlying claims, if appropriate, nor does the U.S. Trustee cite any such authority. Indeed, such provisions are entirely commonplace.[37]

31. These terms are appropriate here and are critical to the finality of the Debtors' chapter 11 process, which is both important and imminent for these particular Debtors. After transitioning their remaining assets, liabilities, and operations to the Plan Administration Trust, the Debtors will be wound down and dissolved as quickly and efficiently as possible, which is key to maximizing value here. If all Claims against the Debtors were ***not*** considered settled, but survived, and creditors could resume collection and enforcement actions against the Debtors after the Effective Date (with no injunction benefitting them), the Debtors' wind down could be unnecessarily dragged out and recoveries for Holders of First Lien Claims could be negatively affected. The settlement and injunction terms, in this regard, are absolutely critical to the Plan's efficacy. And although the Debtors here will ***not*** be discharged, it bears noting that, because the Debtors' assets have been sold in arms-length transactions and they will be promptly dissolved, the legislative concerns behind the prohibition on the discharge of a liquidating corporate debtor

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[36] *See N.L.R.B. v. Better Bldg. Supply Corp.*, 837 F.2d 377, 379 (9th Cir. 1988).

[37] *See, e.g., In re Rentech WP U.S. Inc.*, Case No. 17-12958 (CSS) (Bankr. D. Del. Apr. 4, 2018) (confirmed liquidating plan providing for injunction and compromise and settlement of claims); *In re CMTSU Liquidation, Inc., f/k/a CIBER, Inc.*, Case No. 17-10772 (BLS) (Bankr. D. Del. Dec. 20, 2017) (same); *In re AEI Winddown, Inc.*, Case No. 17-10500 (KJC) (Bankr. D. Del. Dec. 19, 2017) (same); *In re Emerald Oil, Inc.*, Case No. 16-10704 (KG) (Bankr. D. Del. Mar. 24, 2017) (same); *In re DNIB Unwind, Inc. (f/k/a Bind Therapeutics, Inc.)*, Case No. 16-11084 (BLS) (Bankr. D. Del. Sept. 26, 2016) (same); *In re Quicksilver Resources Inc.*, Case No. 15-10585 (LSS) (Bankr. D. Del. Aug. 16, 2016) (same); *In re RS Legacy Corp.*, Case No. 15-10197 (BLS) (Bankr. D. Del. Oct. 2, 2015) (same); *In re Dendreon Corp.*, Case No. 14-12515 (LSS) (Bankr. D. Del. June 2, 2015) (same).

are not present in these cases. In light of the clear path to a quick wind down and dissolution for the Debtors, they submit that the terms of the Plan are appropriate and permissible.

V. The Plan is Feasible.

32. The U.S. Trustee also suggests that the Plan may not be feasible unless the Debtors can establish they have sufficient funds to pay Administrative Claims and Priority Tax Claims in full. Foremost, the Debtors will receive approximately $115 million of sale proceeds before the Plan becomes effective. The Plan, in turn, provides clear, detailed mechanisms for determining the reserves that will be used to pay these Claims, which the Debtors submit are reasonable and satisfy the requirements of the Bankruptcy Code—namely, that the Plan is "not likely" to fail.[38]

33. In particular, these mechanisms are based on the Debtors' schedules and proofs of claim filed to date in these Chapter 11 Cases, and neither of these sources of data accounts for (a) the probability that many currently-extant Claims will ultimately not be Allowed or (b) the fact that the Plan Administration Trust is very likely to receive various further cash inflows (such as releases of cash held by the Surety or sitting in escrow from the Debtors' asset sales), meaning there is likely substantial flexibility in the projected reserves. The Purchasers may assume some of the Claims, others may be based on invalid factual or legal assertions, and others still may have already been paid by the Debtors under a Court order authorizing the same. Moreover, the Debtors have taken care to provide for additional reserves beyond the minimums contemplated by the Plan. Thus, the Debtors submit that the reserves to be established for Claims under the Plan appropriately and sufficiently protect against the Debtors retaining insufficient funds to comply with its terms.

[38] *See* 11 U.S.C. § 1129(a)(11) ("Confirmation of the plan is ***not likely*** to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . ." (emphasis added)).

CONCLUSION

34. In sum, the Objections fail to raise any arguments that, based on the facts here and applicable law, defeat the Debtors' case for confirmation of the Plan. Accordingly, the Objections should be overruled.

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Wilmington, Delaware

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