IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

In re:	)	**Chapter 11**
	)	
FIBRANT, LLC, *et al.*,[1]	)	**Case No. 18-10274 (SDB)**
	)	
	)	
Debtors.	)	**Jointly Administered**
	)	

THE CHEMICAINVEST PARTIES' STATEMENT IN SUPPORT OF CONFIRMATION OF THE SECOND AMENDED AND RESTATED PLAN OF LIQUIDATION

The ChemicaInvest Parties[2] hereby submit this Statement in Support of Confirmation of the Second Amended and Restated Plan of Liquidation (the "Plan") as set forth below.

I. INTRODUCTION

After months of arm's-length, good-faith negotiations, the Debtors, the Committee, the United States Environmental Protection Agency ("EPA"), the Environmental Protection Division of Georgia's Department of Natural Resources ("EPD"), and the ChemicaInvest Parties reached a global settlement that enjoys support from creditors holding *99.98%* by value (and 94.12% by number) of the claims in Class 4. Furthermore, in the last month since adjournment of the confirmation hearing previously set for April 17, 2019, the Debtors and the ChemicaInvest Parties have engaged in further arm's-length, good-faith negotiations with all parties that filed objections

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Fibrant, LLC (6694); Evergreen Nylon Recycling, LLC (7625); Fibrant South Center, LLC (8270); and Georgia Monomers Company, LLC (0042).

[2] The ChemicaInvest Parties are ChemicaInvest Holding, B.V., CAP I B.V., CAP II B.V., Fibrant Holding, B.V., and Augusta Holdco, Inc.

to the Plan and are in the process of finalizing the documentation for a consensual resolution of all or virtually all of such objections. In general terms, the settlement is as follows:

- The ChemicaInvest Parties will pay approximately $17.3 million to achieve the Plan's primary objectives—*i.e.*, to return value to creditors and to provide the funds needed for environmental remediation of the Environmental Real Property[3];
- The ChemicaInvest Parties will receive whatever rights the Debtors had to seek coverage under the Debtors' insurance policies that relate to the remediation of the Environmental Real Property, and will also receive releases of claims related to the Debtors or the Estates (the "Third-Party Release") to assure the ChemicaInvest Parties that their $17.3 million payment will be the final, total payment they will be required to make concerning the Debtors or the bankruptcy.

It is precisely under these circumstances, where the only entities willing to fund the Plan (justifiably) insist on releases of claims related to the bankruptcy and the debtors, that courts inside and outside the Eleventh Circuit approve third-party releases. Indeed, the grounds for the Third-Party Release here are more compelling than the typical case because there is *no party*—a creditor or otherwise—that has objected to the Plan on the basis that it has an existing, non-contingent and cognizable claim against the ChemicaInvest Parties that should not be released.[4] The Plan, including the Third-Party Release, should be confirmed.

II. THE LIMITED SCOPE OF THE THIRD-PARTY RELEASE

The Third-Party Release is narrowly focused on the Debtors and this bankruptcy, as it releases the ChemicaInvest Parties and certain affiliates only with respect to claims "arising from" or related to "the Debtors, the Estates and their business operations, assets and liabilities, including

[3] All capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

[4] Only two objections were filed in response to the Plan that were aimed at the Third-Party Release—by the United States Trustee (the "UST") and by Certain Insurers (the "Insurers"). *See* Dkt. Nos. 577 (UST), 786 (Insurers). It is the understanding of the ChemicaInvest Parties that both of those objections will be resolved in advance of the plan confirmation hearing. In any event, neither the UST nor the Insurers identified an existing, cognizable claim against the ChemicaInvest Parties that would be released by the Plan.

those in any way related to the Bankruptcy Cases or the Plan[.]" Plan, Art. 10.3. In other words, claims against the ChemicaInvest Parties that are unrelated to the bankruptcy or the Debtors will not be extinguished by the Plan. As defined in the Plan, the "Releasing Parties" does not include the United States of America or any department, agent or instrumentality thereof, including the United States Trustee, except as specifically negotiated with the U.S. Department of Justice (including the United States Trustee), the EPA, and the EPD.

The ChemicaInvest Parties are not aware of any lawsuit or claim currently pending against the ChemicaInvest Parties that would be barred by the Third-Party Release.

III. THE PLAN, INCLUDING THE THIRD-PARTY RELEASE, SHOULD BE CONFIRMED

A. The Third-Party Release Should Be Approved Because It Is Necessary And Fair

The Eleventh Circuit has adopted the majority view that bankruptcy courts have discretion to grant third-party nonconsensual releases when it is "fair and equitable under all the facts and circumstances." *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015) (finding that, "[c]onsistent with the majority view," nonconsensual third-party releases are permissible, and holding that the bankruptcy court did not abuse its discretion by approving the non-debtor releases); *Munford v. Munford, Inc. (Matter of Munford, Inc.)*, 97 F.3d 449, 454-55 (11th Cir. 1996) (upholding injunction of non-debtor releases and noting there is "ample authority" for allowing nonconsensual third-party releases "where such orders are integral to settlement" in a bankruptcy); *In re Transit Group*, 286 B.R. 811, 818 (Bankr. M.D. Fla. 2002) (granting third-party release because it was "fair and necessary"); *In re Scrub Island Development Group Limited*, 523 B.R. 862, 876 (Bankr. M.D. Fla. 2015) ("On these facts, it is highly unlikely that the district court on appeal would conclude that this Court's finding that this is an unusual case and that the bar order is fair and necessary to the Debtors' reorganization is somehow clearly erroneous.").

In *Seaside*, the Eleventh Circuit adopted the Sixth Circuit's seven-factor assay in *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002) for deciding whether a third-party release should be granted. *Seaside*, 780 F.3d at 1079. The non-exhaustive list of factors include, in summary:

1. The identity of interests between the debtor and the third party;
2. Whether the non-debtor contributed substantial assets;
3. Whether the injunction is essential to the plan;
4. Whether the impacted class overwhelmingly voted to accept the plan;
5. Whether the plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
6. The plan provides an opportunity for those claimants who choose not to settle to recover in full; and
7. The bankruptcy court made a record of specific factual findings that support its conclusions.

The Eleventh Circuit stressed that while it adopted the seven-factor analysis, bankruptcy courts enjoy substantial discretion (1) "to determine which of the *Dow Corning* factors will be relevant in each case," (2) to consider factors other than the seven *Dow Corning* factors, as the seven factors are "nonexclusive," and (3) to apply the factors "flexibly" to ensure that such releases are granted "where essential, fair, and equitable." *Id*.

The *Dow Corning* factors weigh decisively in favor of approval of the Third-Party Release here. The fact that *there is no objector to the Third-Party Release* underscores that the Third-Party Release is "essential, fair and equitable."

B. <u>The Seven Factors Heavily Favor Granting The Third-Party Release</u>

1. <u>Factor One: There Is An Identity Of Interests Because The Third-Party Release Applies Only To Claims Related To The Debtors Or The Bankruptcy</u>

There is an identity of interests between a debtor and the released parties where a lawsuit against the released parties could somehow negatively affect the debtor or its estate. *See Seaside*,

780 F.3d at 1079-80 (finding that possible distraction for debtors' employees was a sufficient basis to conclude that the first factor favored granting releases). This factor should be applied "flexibly," to account for all types of circumstances. *Id*. at 1080 ("[a]pplying this first factor flexibly").

Here, there is an identity of interest between the ChemicaInvest Parties and the Debtors because any future lawsuit brought against the ChemicaInvest Parties could precipitate a contribution or indemnification claim against the Debtors. Indeed, because the Third-Party Release applies only to those claims that arise from or relate to the Debtors or this bankruptcy, it is likely that, to the extent a plaintiff could establish wrongful conduct, the Debtors and not the ChemicaInvest Parties would be the primary culprits. As part of the global settlement embodied in the Plan, and in partial consideration of the Third-Party Release, the ChemicaInvest Parties agreed to waive all claims against the Debtors' estates. *See* Plan, Art. 2.3.

Of course, it is impossible to predict precisely what claims *might be* asserted against the ChemicaInvest Parties because there are no pending claims against them that would be barred by the Third-Party Release. Regardless, courts have repeatedly granted nonconsensual third-party releases where the released party has a much more attenuated relationship with the debtor than here, where the ChemicaInvest Parties and Debtors are affiliates. *See, e.g.*, *In re Transit Group*, 286 B.R. at 818-19 (approving release of the debtor's investor); *In re Scrub Island*, 523 B.R. at 876 (granting third-party release even though "there is no identity of interest between the Debtors" and those funding the plan).

2. Factor Two: The ChemicaInvest Parties Are Contributing Substantial Assets To The Plan

Where, as here, the released party provides the capital necessary to fund the plan, this factor heavily favors approval of third-party releases in a plan. *See In re Transit Group*, 286 B.R. at 818 (finding the plan could not have been completed without funder's "substantial contributions").

There is no genuine dispute about whether the ChemicaInvest Parties will contribute (or have contributed) substantial assets to effectuate the Plan. In addition to the approximately $30 million the ChemicaInvest Parties provided to the Debtors prior to their petition dates to fund the wind down of the Debtors' business, the ChemicaInvest Parties are paying an additional $17.3 million pursuant to the Plan.[5] This funding will provide a guaranteed return to general unsecured creditors, projected to be over $4.5 million (of which $2.5 million will be paid directly by the ChemicaInvest Parties), and will fund the only viable option for environmental remediation of the Environmental Real Property without relying on government intervention and public funds. These contributions far exceed the minimum "substantial assets" necessary to satisfy this factor. *See In re Adams Produce Co., LLC*, 2013 WL 1914795 (Bankr. N.D. Ala. May 6, 2013) (contribution of approximately $1.3 million was sufficient to warrant approval of third-party release); *In re Scrub Island*, 523 B.R. at 876 (contribution of partially constructed villas was sufficient); *In re Transit Group*, 286 B.R. at 818 (DIP financing of more than $16 million and exit financing of $22 million revolving loan were sufficient); *Seaside*, 780 F.3d at 1080 (contribution of "labor" was sufficient); *see also Matter of Fansteel Foundry Corp.*, 2018 WL 5472928, at *8 (Bankr. S.D. Iowa Oct. 26, 2018) ($2.4 million note was sufficient).

Consequently, this factor weighs heavily in favor of granting the Third-Party Release.

3. Factor Three: The Third-Party Release Is Essential To The Plan

The Third-Party Release is a critical aspect of the global settlement reached by the Debtors, the ChemicaInvest Parties, the Committee, EPA, and EPD after extensive arm's-length

[5] Courts in this Circuit grant third-party releases where the released party *both* provides financing *and* "extend[s] substantial new monies needed to fund [the] Chapter 11 case[.]" *Id.* at 818.

negotiations. It is precisely under these circumstances that courts find that a third-party release is "essential to the Plan":

> Section VI.D.4 of the Plan releasing the Non-Debtor Released Parties is essential to the Plan because without the releases being granted to the Non-Debtor Released Parties and the attending assurance that any possible liability with regard to the claims released thereby, including the Employees' claims, was fully and finally addressed, the Non-Debtor Released Parties would not contribute any assets to the Debtors' estates, and the payments to be made to Kontos and the Holders of Class 1 – Priority Employee Claims pursuant to the Plan would not be possible. . . . The release provisions incorporated in the Plan are integral to the structure of the Plan and formed part of the settlement reached by the parties thereto.

In re Adams, 2013 WL 1914795 (applying the *Dow Corning* factors and approving the third-party release where the released parties insisted on a third-party release as part of the plan).

Like the third-party release in *In re Adams*, the Third-Party Release here is essential to the Plan because the ChemicaInvest Parties have (rightfully) insisted on assurances that the $17.3 million payment will be the *total* amount they will have to pay with respect to the Debtors or the bankruptcy. While there likely are no meritorious claims that could be asserted against the ChemicaInvest Parties—as evidenced by the lack of objectors—even a future frivolous lawsuit related to the Debtors or the bankruptcy would require the ChemicaInvest Parties to expend additional time and resources defending itself in what could be protracted litigation. The finality that accompanies the Third-Party Release is thus part of the bargain and a principal reason that the ChemicaInvest Parties are willing to fund the Plan.

This factor accordingly weighs substantially in favor of granting the Third-Party Release.

4. <u>Factors Four And Five: The Impacted Class Overwhelmingly Voted To Accept The Plan In Large Part Because It Is The Only Way The Plan Would Provide A Mechanism To Pay Creditors</u>

The classes affected by the Third-Party Release will be the Class 3 Environmental Claims (and specifically the EPD), and the Class 4 creditors. The Plan enjoys the support of Class 3 and over *99.98%* by value (and 94.12% by number) of the claims in Class 4. Indeed, the Committee was actively involved in negotiating the Plan and is a proponent of the Plan. Factor four therefore heavily favors approval of the Third-Party Release.

Further, as demonstrated by their overwhelming support for the Plan, the Plan will achieve the best possible results for Classes 3 and 4. The ChemicaInvest Parties' payment will be used (1) to remediate the Environmental Real Property, thus satisfying the claims of the EPA and EPD, and (2) to distribute substantial amounts to the Class 4 claimants.

In the absence of contributions from the ChemicaInvest Parties, the Debtors would not have any basis to confirm a plan or to fund remediation of the Environmental Real Property. In that scenario, the Debtors would be forced to convert their chapter 11 cases to chapter 7 cases, and the State of Georgia and the United States would exercise control over remediation of the Environmental Real Property at substantial expense to taxpayers. The resulting administrative expense claims of the State of Georgia and the United States would swamp whatever resources remained in the Debtors' estates and leave zero recovery for general unsecured creditors. *See* Disclosure Statement for Amended and Restated Plan of Liquidation (Docket No. 601 at 3).

As a result, both factors favor approval of the Third-Party Release as an essential element of the Plan.

5. Factor Six: This Factor Favors Approval Because There Is No Objector

In assessing whether to grant third-party releases, courts consider whether there is an opt-out provision for objectors. This factor weighs in favor of approval because there are no objectors, and thus there is no need for an opt-out provision. In any event, courts have approved third-party

releases even where there *is* an objector and the plan does *not* include an opt-out provision. *See, e.g., In re Adams*, 2013 WL 1914795 ("The Court believes that the lack of an opt-out provision for the sole objector does not provide a basis to find that the third-party releases are not necessary and fair and deny confirmation of the Debtors' Plan.").

6. Factor Seven: This Court Should Make Specific Factual Findings That Support The Conclusion That The Releases Are Necessary And Fair

The Court can and should enter an order that contains a complete record of its factual findings and conclusions of law, thus satisfying the final *Dow Corning* factor.

7. The Court Should Exercise Its Discretion To Consider The Public Interests That Will Be Served By Approving The Plan

In *Seaside*, the Eleventh Circuit advised that the *Dow Corning* "factors should be considered a *nonexclusive list of considerations*[.]" *Seaside*, 780 F.3d at 1079 (emphasis added). Here, the Court should also take into account the significant public interest in approving this Plan, which will provide for the best, most efficient remediation of the Environmental Real Property.

Specifically, the Plan, including the Third-Party Release as an essential element of the global settlement embodied in the Plan, avoids the need for the government to control remediation and engage in litigation that would inevitably ensue from those efforts, both of which—*i.e.*, the remediation and litigation—would be paid for by taxpayers. This unusual circumstance, where approval of the Plan is in the *public's* interests, further justifies approval of the Third-Party Release as part of confirmation of the Plan and a successful resolution of these chapter 11 cases.

In sum, although it is not required for the seven *Dow Corning* factors (and the additional public interest factor) to weigh unanimously in favor of approval of the Third-Party Release, that is precisely the case here. Consequently, this Court should enter an Order confirming the Plan.

C. The Court Has Jurisdiction And Authority To Confirm The Plan, Including The Third-Party Release

1. The Court Has Subject Matter Jurisdiction To Approve The Third-Party Release

It is settled Eleventh Circuit law that this Court has subject matter jurisdiction to consider and confirm the Plan. Pursuant to 28 U.S.C. § 1334(b), this Court has "arising in" subject matter jurisdiction to consider and confirm the Plan, and plan confirmation is a "core" proceeding under 28 U.S.C. § 157(b)(2)(L) that involves the administration of the bankruptcy estate. *See, e.g., In re AOV Industries, Inc.*, 792 F.2d 1140, 1145 (D.C. Cir. 1986) (confirming plan with nonconsensual third-party releases because confirmation proceedings are "at the core of bankruptcy law"); *Celotex Corp. v. AIU Ins. Co.*, 152 B.R. 667, 673 (M.D. Fla. 1993) ("It must be presumed that any proceeding pertaining to the property of the estate is a core proceeding."). This alone is sufficient to establish the Court's jurisdiction.

This Court's jurisdiction is further supported by the many Eleventh Circuit cases recognizing bankruptcy courts' subject matter jurisdiction to consider third-party releases in a plan and approve that plan. *See, e.g., In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015); *Munford v. Munford, Inc. (Matter of Munford, Inc.)*, 97 F.3d 449, 454-55 (11th Cir. 1996); *In re Transit Group*, 286 B.R. 811 (Bankr. Fla. M.D. 2002); *In re Adams Produce Co., LLC*, 2013 WL 1914795 (Bkrtcy. N.D. Ala. May 06, 2013); *In re Scrub Island Dev. Group Ltd.*, 523 B.R. 862, 876 (Bankr. M.D. Fla. 2015).

Accordingly, this Court has jurisdiction to approve the Third-Party Release.

2. The Court Has Constitutional Authority To Enter A Final Order Granting The Third-Party Release

Courts in this Circuit have repeatedly held that bankruptcy courts have constitutional authority to enter a final order approving a plan that contains a third-party release. Importantly, as

demonstrated by *Seaside*'s extensive discussion of third-party releases, the Eleventh Circuit's position has not changed since the United States Supreme Court issued its "narrow" decision in *Stern v. Marshall*, 564 U.S. 462 (2011)—four years before *Seaside*—in which the Supreme Court held that a bankruptcy court does not have authority to finally adjudicate a debtor's state law counterclaim that is unrelated to the bankruptcy. *See id*. at 502 (cautioning that the *Stern* decision is "narrow" and "does not change all that much").

Stern is simply irrelevant to the circumstances here, where the only matter before the Court is whether to enter an order confirming the Plan. Indeed, "[t]here has never been any doubt about the constitutional authority of a" bankruptcy judge "to enter final orders in" confirmation proceedings. 1 COLLIER ON BANKRUPTCY ¶ 3.02[3][a] (Alan N. Resnick & Henry J. Somme eds., 16th ed.). "This has been true since the regime of the Bankruptcy Act and remains true today, even under *Marathon* [*Pipeline Co. v. N. Pipeline Constr. Co.*, 458 U.S. 50, 76 (1982)], *Granfinanciera, S.A.* [*v. Nordberg*, 492 U.S. 33, 50 (1989)], and *Stern v. Marshall*." *Id.*; *see also In re Land Res., LLC*, 505 B.R. 571, 582 (M.D. Fla. 2014) ("*Stern* should not be extended beyond its narrow holding . . . there is no reason to believe that *Stern* intended to limit bankruptcy courts' authority to approve settlements of claims"); *In re MPM Silicones, LLC*, 2014 WL 4436335, at *2 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015) (bankruptcy courts "continue to have the power . . . on a Constitutional basis under *Stern*" to confirm a plan with third-party releases because "[t]he issues all involve fundamental aspects of the adjustment of the debtor/creditor relationship"); *In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 271 (Bankr. D. Del. 2017), *aff'd*, 591 B.R. 559 (D. Del. 2018) (affirming bankruptcy court's confirmation order approving third-party releases because "*Stern* is inapplicable as confirmation of a plan is not a state law claim of any type."); *In re Charles St. African Methodist Episcopal Church of Bos.*, 499

B.R. 66, 99 (Bankr. D. Mass. 2013) ("the merits of" released claims "are not in controversy" because "[c]onfirmation of a plan is not an adjudication of the various disputes it touches upon").

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IV. CONCLUSION

WHEREFORE, the ChemicaInvest Parties respectfully request that this Court (i) enter an order confirming the Plan, (ii) overrule all objections to the Plan (if any), and (iii) grant such other and further relief as may be just and proper.

The ChemicaInvest Parties hereby reserve their rights to amend and supplement this Statement in Support of Confirmation of the Plan as may be necessary or appropriate.

Dated: May 17, 2019

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IN RE:	)	**CHAPTER 11**
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Debtors.	)	**(Jointly Administered Requested)**
	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of *The ChemicaInvest Parties' Statement in Support of Confirmation of the Second Amended and Restated Plan of Liquidation* either electronically through the CM/ECF system or by causing it to be deposited in the United States Mail in a properly addressed envelope with adequate postage affixed thereon to the parties listed below:

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This 17th day of May, 2019.

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