

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:

WESCO AIRCRAFT HOLDINGS, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 23-90611 (MI)

(Jointly Administered)

LIMITED OBJECTION OF UNITED STATES TRUSTEE
TO THE MODIFIED FIRST AMENDED JOINT CHAPTER 11 PLAN OF
WESCO AIRCRAFT HOLDINGS, INC. *ET AL.*

TO THE HONORABLE MARVIN ISGUR,
UNITED STATES BANKRUPTCY JUDGE:

Kevin M. Epstein, the United States Trustee for Region 7 (the “U.S. Trustee”), files this Limited Objection to the *Modified First Amended Joint Chapter 11 Plan of Wesco Aircraft Holdings, Inc. et al.* (the “Amended Plan”)² [ECF 1223], and represents as follows:

I. Preliminary Statement

The Amended Plan improperly provides overly broad exculpation coverage to the Reorganized Debtors, any independent director of a Debtor, and the Retained Professionals in violation of Fifth Circuit case law. *NexPoint Advisors, L.P. v. Highland Capital Management L.P. (In re Highland Capital Management, L.P.)*, 48 F.4th 419, 437-38 (5th Cir. 2022). This controlling decision is unequivocal: only debtors, an official committee and its members, and any independent directors, appointed post-petition by court order to act as a bankruptcy trustee, may receive exculpation coverage for actions taken during

¹ The Debtors operate under the trade name Incora and have previously used the trade names Wesco, Pattonair, Haas, and Adams Aviation. A complete list of the Debtors in these chapter 11 cases, with each one’s federal tax identification number and the address of its principal office, is available on the website of the Debtors’ noticing agent at <http://www.kcellc.net/incora/>. The service address for each of the Debtors in these cases is 2601 Meacham Blvd., Ste. 400, Fort Worth, TX 76137.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.



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the bankruptcy case. While a debtor may choose to release its claims against third parties consistent with its business judgment, the Code and controlling precedent prohibit non-consensual third-party limitations of liability against *non*-debtors.

Unless the Debtors conform the Amended Plan's exculpation provision to this mandate, the Plan violates section 1129(a)(1) and the Court should deny confirmation.

II. Jurisdiction, Venue & Constitutional Authority to Enter a Final Order

1. The Court has jurisdiction to consider this matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper in this district under 28 U.S.C. § 1408.

2. This Court has constitutional authority to enter a final order in this matter. If it is determined that the bankruptcy judge does not have the constitutional authority to enter a final order or judgment in this matter, the U.S. Trustee consents to the entry of a final order or judgment by this Court in this matter.

3. Kevin M. Epstein is the duly appointed U.S. Trustee for Region 7. The U.S. Trustee has standing to raise, appear and be heard on any issue in a case or proceeding under the Bankruptcy Code. 11 U.S.C. § 307.

4. The U.S. Trustee has a statutory duty to monitor the administration of cases commenced under the Bankruptcy Code. 28 U.S.C. § 586(a)(3). In chapter 11, the U.S. Trustee's supervisory responsibilities include monitoring plans and disclosure statements and filing comments with the court. 28 U.S.C. § 586(a)(3)(B).

III. Factual Background

A. General Information

5. On January 12, 2024, the Court entered the *Order (i) Approving the Disclosure Statement, (ii) Approving the Solicitation and Voting Procedures, (iii) Approving Forms of Ballots, (iv) Scheduling a Confirmation Hearing, and (v) Establishing Notice and Objection Procedures*. See [ECF 1228]. The confirmation hearing is scheduled to be held on May 16, 2024 at 9:30 a.m.

B. The Amended Plan

7. Article I.A.97 of the Amended Plan defines “Exculpated Parties” as follows:

118. “Exculpated Parties” means, collectively, and in each case in their capacities as such and, in each case, to the maximum extent permitted by law: (a) the Debtors, (b) the Reorganized Debtors, (c) the Committee and its members, (d) any independent director of a Debtor (including Patrick Bartels as independent director of Wolverine Intermediate Holding), and (e) in each case, the Retained Professionals and other professional advisors of the foregoing.

Amended Plan, Art. I.A.97 (emphasis added).

8. The Amended Plan would exculpate the Exculpated Parties for any claims or causes of action arising out of certain transactions, agreements, events, or occurrences relating to the Debtors and the Chapter 11 Cases from occurring during the period following the Petition Date. See Amended Plan, Art. VIII.F.

9. Unlike the releases provided in Article VIII.E., which allow for third-parties to opt out, third-parties may not opt out of the exculpations and releases provided in Article VIII.F. of the Amended Plan.

IV. Argument

A. Statutory Standards

10. Section 1129(a) of the Bankruptcy Code sets forth the requirements for confirming a chapter 11 plan. Among other things, a plan must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1).

11. The Debtors bear the burden of establishing that the Plan complies with all elements of section 1129(a). *In re Cypresswood Land Partners, I*, 409 B.R. 396, 422 (Bankr. S.D. Tex. 2009) (“The Debtor, as the proponent of the [plan], has the burden of proving that all elements of 11 U.S.C. § 1129(a) are satisfied.”) (citing *In re Internet Navigator Inc.*, 289 B.R. 128, 131 (Bankr. N.D. Iowa 2003)).

B. The Exculpation Provision Violates Fifth Circuit Law

12. The Fifth Circuit affirmed that, in accordance with *Bank of New York Trust Company, NA v. Official Unsecured Creditors’ Committee (In re Pacific Lumber Co.)* 584 F.3d 229 (5th Cir. 2009), and section 524(e) of the Bankruptcy Code, “any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors’ committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties” *In re Highland Cap. Mgmt., L.P.*, 48 F.4th at 437 (5th Cir. 2022).

13. Specifically, the Fifth Circuit in *Highland Capital* analyzed whether the independent directors could be exculpated and concluded:

That leaves one remaining question: whether the bankruptcy court can exculpate the Independent Directors under *Pacific Lumber*. We answer in the affirmative. As the bankruptcy court’s governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together as the bankruptcy trustee for Highland Capital. Like a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee. *See* 11 U.S.C. § 1107(a); 7 COLLIER ON BANKRUPTCY ¶ 1101.01. It follows that the Independent Directors are entitled to the limited qualified immunity for any actions short of gross negligence. *See In re Hilal*, 534 F.3d at 501. Under this unique governance structure, the bankruptcy court legally exculpated the Independent Directors.

In re Highland Cap. Mgmt., L.P., 48 F.4th at 437. Unlike the “Independent Directors” at issue in *Highland Capital*, the independent directors in these Chapter 11 Cases were appointed prior to bankruptcy. Furthermore, during the pendency of these Chapter 11 Cases, the bankruptcy court

did not issue any order appointing the independent directors, or any of the other directors, to act together as the bankruptcy trustee for the Debtors such as was the case in *Highland Capital*. These Chapter 11 Cases lack any evidence of a unique corporate governance structure put in place by the court that would warrant exculpation of independent directors. Thus, to be consistent with *Pacific Lumber* and *Highland Capital*, the definition of “Exculpated Parties” in the Amended Plan must exclude the parties set forth in subsection (iii) of the definition. *See* Art. I.A.118.

14. The Fifth Circuit in *Highland Capital* also rejected any exculpation for reorganized debtors and professionals holding:

As it stands, the Plan’s exculpation provision extends to Highland Capital and its employees and *CEO*; Strand; the Reorganized Debtor and HCMLP GP LLC; the Independent Directors; the Committee and its members; the Claimant Trust, its trustee, and the members of its Oversight Board; the Litigation Sub-Trust and its trustee; professionals retained by the Highland Capital and the Committee in this case; and all “Related Persons.” *Consistent with § 524(e), we strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors.*

In re Highland Cap. Mgmt., L.P., 48 F.4th at 438 (emphasis added). Therefore, the Reorganized Debtors and Retained Professionals should also be excluded from the definition of “Exculpated Parties.”

C. The Temporal Limits in the Exculpation Clause Are Insufficient

15. In addition to specific party limitations, exculpations must be temporally limited to the period from the Petition Date to the Effective Date. Extending exculpations outside those parameters is impermissible and contrary to *Pacific Lumber* and *Highland Capital*. “[O]ur precedent and § 524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors’ committee and its members for conduct *within the scope of their duties*, 11 U.S.C. § 1103(c), and the trustees *within the scope of their duties . . .*” *In re Highland Cap.*

Mgmt., L.P., 48 F.4th at 437 (emphasis added).

16. The exculpation clause in the Amended Plan violates the Bankruptcy Code because it expands exculpation to transactions, agreements, events, or other occurrences taking place after the Effective Date. *See* Amended Plan, Art. VIII.F. Examples include “the administration and implementation of the Plan or the property to be distributed under the Plan; the issuance or distribution of securities under or in connection with the Plan; the issuance, distribution, purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Reorganized Debtors under or in connection with the Plan[.]” *Id.* The exculpation clause should include a temporal limitation so that the scope of the exculpation is consistent with the Bankruptcy Code and precedent.³

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³ This revision could easily be accomplished by adding the phrase “from the Petition Date to the Effective Date” to Article VIII.F. of the Amended Plan.

V. Conclusion

For the reasons above, this Court should deny confirmation absent the modifications detailed herein, and grant such other and further relief as it may deem just and proper.

Dated: May 3, 2024

Respectfully Submitted,

KEVIN M. EPSTEIN
UNITED STATES TRUSTEE
REGION 7, SOUTHERN and WESTERN
DISTRICTS OF TEXAS

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CERTIFICATE OF CONFERENCE

I hereby certify that on February 6, 2024, a conference was held pursuant to BLR 9013-1(g) with Benjamin Schak, Esq. of Millbank, counsel for the Debtors, but the parties were unable to resolve the matter. The parties will continue to work to resolve the Limited Objection prior to confirmation.

/s/ Jayson B. Ruff
Jayson B. Ruff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic means on all Pacer System participants in these bankruptcy cases, on the 3rd day of May 2024.

/s/ Jayson B. Ruff
Jayson B. Ruff

