

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
SOUTHERN AIR	:	Case No. 12-12690 (CSS)
HOLDINGS, INC., et al.,	:	
	:	Obj. Deadline: March 1, 2013 at 4:00 p.m.
Debtors	:	Hearing Date: March 14, 2013 at 10:00 a.m.

**UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF THE
SECOND AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO
CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE**

In support of her Objection (the "Objection") To Confirmation of the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, Roberta A. DeAngelis, the United States Trustee for Region 3, through her undersigned counsel, states as follows:

1. This Court has jurisdiction to hear this Objection.
2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").
3. Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to be heard with regard to this Objection.



BACKGROUND

4. On September 28, 2012, the Debtors¹ filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

5. The U.S. Trustee appointed a statutory committee of unsecured creditors on November 21, 2012 (the "Committee").

6. On October 18, 2012, the Debtors filed (i) their Joint Chapter 11 Plan (the "Plan") and (ii) Disclosure Statement for the Plan (the "Disclosure Statement").

7. On January 18, 2013, the Debtors filed their Second Amended Plan and Disclosure Statement. The Disclosure Statement was approved on January 29, 2013.

PRELIMINARY STATEMENT

8. A chapter 11 plan may not be confirmed unless the Court can find that the plan complies with the provisions of 11 U.S.C. § 1129 (a). A plan proponent bears the burden of proof with respect to each and every element of 11 U.S.C. § 1129 (a). *See In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001). As discussed below, the Plan is not confirmable because it contains an exculpation provision that is contrary to applicable law in this District.

ARGUMENT

9. The exculpation provision contained in section 31.8 of the Plan is overbroad and thus impermissible. It provides exculpation to the Released Parties and the members of the Committee and its professionals. Released Parties is defined in Section 1.132 of the Plan as "collectively, each of the Debtors and their Affiliates, each of the Reorganized Debtors, the

¹ All capitalized terms not defined herein shall have the meaning ascribed to them in the Plan and Disclosure Statement.

Oak Hill Entities, the DIP Agent, the DIP Lenders, the Prepetition Agent, the Consenting Lenders, and, except with respect to the Lender Parties, each of their respective current and former (to the extent employed or serving at any time during the Chapter 11 Cases) direct and indirect members, direct and indirect partners, officers, shareholders, directors, employees, managers, attorneys, consultants, advisors and agents.” The list of parties receiving exculpation should be limited to those parties who served in the capacity of estate fiduciaries, i.e., estate professionals and the Debtors' directors and officers. *See In re PTL Holdings, LLC*, 2011 WL 5509031 *12 (Bankr. D. Del. Nov. 10, 2011); *In re Washington Mutual Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011).

10. In *PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000), the United States Court of Appeals for the Third Circuit examined the question of whether limited exculpation for official committee members and professionals retained by the debtors was appropriate. The Third Circuit ruled that the exculpation was appropriate because the provision at issue correctly stated the standard of liability for fiduciaries including official committee members and debtor professionals. *See also In re Coram Healthcare Corp.*, 315 B.R. 321, 337 (Bankr. D. Del. 2004) (stating that “[third party release provisions against Trustee, Equity Committee and their respective agents and professionals] are not permissible except to the extent they are limited to post-petition activity which does not constitute gross negligence or willful misconduct.”

WHEREFORE, the U.S. Trustee requests that this Court issue an order denying confirmation of the Plan as written and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

ROBERTA A. DeANGELIS
UNITED STATES TRUSTEE

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Dated: March 1, 2013

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on March 1, 2013, the United States Trustee’s Objection To Confirmation of the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code was caused to be served via electronic mail to the following persons:

Brian Rosen Weil Gotshal & Manges LLP 767 Fifth Avenue New York, NY 10153	M. Blake Cleary Young Conaway Stargatt & Taylor, LLP 1000 North King Street Wilmington, DE 19801
Matthew Barr Milbank Tweed One Chase Manhattan Plaza New York, NY 10005	Mark Collins Richards Layton & Finger One Rodney Square Wilmington, DE 19801
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/s/ Jane Leamy

Trial Attorney