IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
VER TECHNOLOGIES HOLDCO LLC, *et al.*,[1]	)	Case No. 18-10834 (KG)
Debtors.	)	(Jointly Administered)

JOINDER IN SUPPORT OF CONFIRMATION OF PLAN OF REORGANIZATION

Production Resource Group ("PRG"), by and through its undersigned counsel, hereby files this Joinder (the "Joinder") to the *Debtors' Memorandum of Law in Support of Confirmation of the Third Amended Joint Chapter 11 Plan of Reorganization of VER Technologies HoldCo LLC and its Debtor Affiliates and Omnibus Reply to Objections Thereto* [Docket No. 623] (the "Confirmation Brief") and respectfully provides as follows:

PRELIMINARY STATEMENT

1. PRG joins in the Debtors' arguments supporting granting PRG the limited exculpation provided for in the Plan. As the Debtors explain, at all times, PRG's interests were aligned with the overarching goals of the Debtors and Creditors' Committee—namely avoiding liquidation, ensuring the company's success as a going concern, maximizing distribution to creditors, keeping a stable and motivated workforce, and maintaining company relationships with vendors and other third-party beneficiaries. PRG's actions have had, and will have, a significant positive impact on stakeholders. Liquidation is being avoided, jobs are being saved,

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: VER Technologies HoldCo LLC (7239); CPV Europe Investments LLC (2533); FAAST Leasing California, LLC (7857); Full Throttle Films, LLC (0487); Maxwell Bay Holdings LLC (3433); Revolution Display, LLC (6711); VER Finco, LLC (5625); VER Technologies LLC (7501); and VER Technologies MidCo LLC (7482). The location of the Debtors' service address is: 757 West California Avenue, Building 4, Glendale, California 91203.

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and relationships and contracts are being preserved. Moreover, unlike in a liquidation scenario which would only partially satisfy and provide no distribution beyond prepetition secured debt, the funding obtained by PRG will satisfy the senior and junior secured debt,[2] satisfy the administrative and priority claims against the estates, and contribute to a meaningful distribution to general unsecured creditors.

2. PRG's meaningful participation in this case was the *sine qua non* of its willingness to support a plan process whereby the Debtors would be merged into PRG as a subsidiary. In order to effectuate this result, it was therefore recognized by all parties to the RSA and by the Committee that PRG be protected by exculpation for taking steps requested by the Debtors, acting pursuant to Court orders, and preparing for the very difficult, time consuming, and expensive task of integrating the businesses. PRG has in good faith and in benefit to the estate already invested significant time and funds preparing for the integration and will ultimately invest approximately $1.15 billion into the combined business. PRG expected to avail itself of exculpation through the Plan,[3] gaining protection from recourse by parties that may be upset with results of actions taken during the course of the proceeding.

[2] The junior debt is being satisfied by equity in Reorganized HoldCo.

[3] The Plan seeks to exculpate certain parties, including PRG, each of which has been essential and critical to the success of the Debtors' cases, has contributed to the Plan process, and has made a confirmable Plan feasible. The Plan provides the following definition of Exculpated Parties at Article I.A.69:

> "*Exculpated Parties*" means, collectively, in each case in its capacity as such: (a) the Debtors, (b) the Reorganized Debtors, (c) the Committee and any member thereof, (d) PRG, to the extent it has provided services or made decisions in accordance with the RSA, court orders, or that relate to the operation of the estate, and (e) to the extent provided in section 1125(e) of the Bankruptcy Code, each of the Released Parties, and (f) with respect to each of the foregoing entities in clauses (a) through (e), such entity's current and former affiliates, and such entities' and their current and former affiliates' current and former directors, managers, members (including the Independent Member), officers, principals, equity holders, (regardless of whether such interests are held directly or indirectly), predecessors, participants, successors, and assigns, subsidiaries, affiliates, managed accounts or funds, and each of their respective current and former equity holders, officers, directors, managers, principals, shareholders, members, management companies, fund advisors, employees, agents, advisory board members, financial advisors, partners, attorneys,

3. The U.S. Trustee's position, that exculpation is strictly limited to estate fiduciaries, is neither an accurate reflection on the state of the law nor an equitable result. Where, as here, a court has authorized a party to exercise control over and direct the course of aspects of a case, has done so in full view of all parties in interest, has operated in such capacity for the benefit of the estate, is funding the plan and process to avoid liquidation and satisfy secured, administrative, and priority claims and provide a distribution to general unsecured claimholders, and has done all of this with the expectation of receiving exculpation as part of its negotiated-for consideration, exculpation is proper.

DISCUSSION

A. PRG Satisfies the Expansive Definition of Fiduciary Applied in Bankruptcy Cases

4. The Trustee's only contention is that PRG is not a "fiduciary" and therefore not entitled to exculpation. Assuming, *arguendo*, that exculpation is so limited, which it is not, PRG certainly fits within the broad scope of parties that have been considered a fiduciary for bankruptcy purposes.

5. The concept of fiduciary for the purposes of bankruptcy is not clearly defined, but is similarly not limited to those parties who serve traditional fiduciary roles.[4] Indeed, bankruptcy courts, recognizing that the definition is "'elastic' and 'anything but clear, have broadly construed whether an entity is a "fiduciary."[5] For example, in determining whether a party is a "fiduciary" for the purposes of non-dischargeability under section 523(a)(4), courts look beyond

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accountants, investment bankers, consultants, representatives, restructuring advisors, and other professionals; provided that a 2014 Transaction Party or its Representative shall not be an Exculpated Party unless such party has executed the Restructuring Support Agreement.

[4] *Snyder v. Murphy (In re Snyder)*, 2018 U.S. Dist. LEXIS 67475, *16 (D. Conn. Apr. 23, 2018) ("[T]he concept of fiduciary duty is 'elastic' and 'anything but clear.'") (*citing United States v. Chestman*, 947 F.2d 551, 567, 570 (2d Cir. 1991)).

[5] *Id.*

the traditional roles and examine whether the relationship "'involve[s] a difference in knowledge or power between fiduciary and principal which gives the former a position of ascendancy over the latter.'"[6] This broad definition of "fiduciary" is not limited to bankruptcy cases. Indeed, state courts routinely recognize these "quasi-fiduciary" relationships.[7]

6. While PRG is not a "fiduciary" in the traditional sense, PRG's role in these cases clearly satisfies the broad definition of fiduciary applied in bankruptcy cases. Notably, PRG has, in full view of the Court and all parties to these cases, meaningfully contributed to the Debtors' exercise of their fiduciary duties. For example, the Court granted PRG the express authority under the KEIP and KERP motions and orders to consider, with the Debtors' consent, which

[6] *Snyder*, 2018 WL 1914923 at *9 (*quoting In re Hayes*, 183 F.3d 162, 167 (2d Cir. 1999)).

[7] The quasi-fiduciary concept exists in other areas of law where a party acts in a capacity similar to or on behalf of a fiduciary. The term "quasi-fiduciary" is a useful construct for delineating between customary behavior of non-estate fiduciary parties in bankruptcy, and actions that cause a party to occupy the same space as an estate fiduciary. *See, Lynch v. Vickers Energy Corp*., 429 A.2d 497, 503 (Del. 1979) (describing the terms fiduciary, quasi-fiduciary, trust, and confidence as "relative terms describing broad equitable concepts") (*quoting Mansfield Hardwood Lumber Co. v. Johnson*, 263 F.2d 748, 754 (5th Cir. 1959)); *see also, Copesky v. Superior Court*, 229 Cal. App. 3d 678, 693 (Cal. Ct. App., 4th App. Dist. 1991) (concluding that another court's use of the term "quasi-fiduciary" was intended as "only a shorthand phrase to describe attributes in the relationship which are similar to some of the attributes of a true fiduciary relationship" and noting "some contractual features . . . 'seem like' or are 'in the nature of' (to refer to our dictionary definition) obligations resulting from a true fiduciary relationship"). Courts have found a quasi-fiduciary relationship can arise through circumstances particular to that individual transaction whose nature inherently requires such a duty regardless of the parties' intentions, (*Highlands Ins. Co. v. Hobbs Group, LLC*, 373 F.3d 347, 355 (3d Cir. 2004); *see also, Goldman v. Goldman, Sachs & Co*., 2010 U.S. Dist. LEXIS 132593, at *17 (D.N.J. 2010); *Bonnieview Homeowners Ass'n, LLC v. Woodmont Builders, L.L.C.*, 655 F. Supp. 2d 473, 518 (D.N.J. 2009); *Wanland & Assoc. v. Nortel Networks Ltd. (In re NorVergence, Inc.)*, 384 B.R. 315, 360 (Bankr. D.N.J. 2008)) or a circumstance of dependence or other situation. *Peyton v. William C. Peyton Corp.*, 7 A.2d 737, 752 (Del. 1939) (*citing Du Pont v. Du Pont*, 19 Del. Ch. 131, 149 (Del. Ct. Chancery 1933)). The concept most often arises in the context of majority shareholders having a quasi-fiduciary relationship toward minority shareholders, but has been raised in other circumstances. *See, e.g., Mitchell Partners, L.P. v. Irex Corp*., 656 F.3d 201 (3d Cir. 2011); *Campbell v. Pennsylvania Industries, Inc.*, 99 F. Supp. 199 (D. Del. 1951)). Bankruptcy courts have held that directors and officers of a corporation occupy a quasi-fiduciary relation to the corporation and its stockholders. *See, e.g., Centra Bank, Inc. v. Burton (In re Burton)*, 416 B.R. 539 (Bankr. N.D.W.V. 2009); *Ginsburg ex rel. Vertical Group, Inc. v. Birenbaum (In re Birenbaum)*, 2006 Bankr. LEXIS 1335 (Bankr. W.D. Pa. 2006); *Daley v. Chang (In re Joy Recovery Tech. Corp.)*, 257 B.R. 253 (Bankr. N.D. Ill. 2001); *Le Mire v. Galloway*, 130 Fla. 101 (Sup. Ct. Fla. 1937). This quasi-fiduciary duty requires the directors and officers to act loyally and in good faith (*Paddock v. Siemoneit*, 214 S.W.2d 651 (Ct. Civ. App. Tex. 1948)), not assume positions in conflict with the interests of the corporation (*id*.), exercise powers solely in the interest of the corporation (*Tampa Waterworks Co. v. Wood*, 97 Fla. 493 (Sup. Ct. Fla. 1929)), not profit from their official position (*id*.), subordinate their personal interests to those of the corporation (*Belcher v. Birmingham Trust Nat'l Bank*, 348 F. Supp. 61 (N.D. Ala. 1968)), not trade for their own benefit in the corporation's assets (*In re Philadelphia & W. R. Co.*, 64 F. Supp. 738 (E.D. Pa. 1946)), and be accountable for profits realized from the acquisition of them by adverse claims and interests (*id*.).

employees would participate in each program. Indeed, PRG used its experience and expertise to evaluate each plan participant individually, taking into consideration the effect each decision would have on other employees and on PRG's ongoing operation of the Reorganized Debtors. Even the letters mailed to employees regarding the KEIP and KERP were signed by PRG, exemplifying PRG's extensive oversight of this process. PRG has also been intimately involved in the selection of executory contracts that will be assumed and assigned on the Effective Date, has had significant input in most decisions of the Debtors with respect to the continuing operations and emergence from bankruptcy, and is operating in the best interests of the estates to protect its investment and ensure a smooth transition. PRG's relationship was necessarily one of trust and confidence and, by virtue of the pure mechanics of this case, operated beyond that of a mere arm's length transaction.

7. Notwithstanding its broad role in these cases, PRG has not requested a release of all possible claims via exculpation. Rather, PRG's exculpation is limited solely to its post-petition acts and involvement with the case. PRG at all times acted either pursuant to Court orders or with the agreement of the key economic stakeholders in these cases. PRG should be exculpated from claims arising from these decisions. Indeed, it would be incongruous to provide exculpation to all other parties involved in the operation of these Debtors through this wildly successful case, but leave PRG, the party funding the case and operating the Debtors going forward, open to exposure. Given PRG's relationship with these Debtors, the limited exculpation being sought is more than appropriate.

B. Exculpation May Also Be Granted To Parties Under Special Circumstances

8. Under certain special circumstances, a non-estate fiduciary can receive

exculpation.[8] Where this special circumstances doctrine applies, parties can be exculpated for the actions they took and decisions they made during the course of the case. PRG seeks exculpation because its actions have been essential and critical to the success of the Debtors' cases, have contributed to the Plan process, and have made a confirmable Plan feasible. To the extent PRG does not receive exculpation as a decision maker, it should still receive exculpation as a non-estate fiduciary under the special circumstances doctrine.

i. PRG's Provision Of $1.15 Billion Is, Alone, A Special Circumstance Warranting PRG's Exculpation

9. Where a party provides significant financial support to an estate which paves the way for a distribution or makes a plan viable, exculpation is appropriate. PRG, as the party seeking exculpation and the party who has the economic risk, should receive exculpation for its actions during the bankruptcy. PRG is funding the Plan and the case in the amount of $1.15 billion. Without this funding, the case would be administratively insolvent. It would be antithetical to the purpose of bankruptcy itself for a party who is openly and actively involved in the daily processes of the case to protect its investment of this extent to be exposed to liability for its actions in the process—the very actions which benefited the estates and its beneficiaries and were explicitly and implicitly approved by this Court.

[8] *See* Judge Walrath's post-*WaMu* plan confirmation in *HSH*, this Court's in *Fisker* and *In re PES Holdings, LLC, et al.*, Case No. 18-10122 (KG) (Bankr. D. Del.) ("*PES*"), and the plan confirmation in *Lab. Partners*. Despite WaMu's apparent limitation of exculpation to estate fiduciaries, nothing in the Bankruptcy Code or law of this District requires such a limited scope for exculpation clauses in chapter 11 plans. In fact, in the *PWS* decision itself, upon which *WaMu* relies, the Third Circuit expressly noted that its earlier decision in *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000) (upon which *PWS* relied), should not be seen as a "per se rule barring any provision in a reorganizing plan limiting the liability of third parties." *PWS*, 228 F.3d at 247. This Court, and others in this District, have made it clear that the limitation of exculpation clauses to estate fiduciaries as found in *WaMu* is not a bright-line rule.

ii. Courts Have Also Recognized Special Circumstances Where, As Here, Substantial Activities Provide Benefit To The Estate And Third Parties

10. Courts routinely give non-estate fiduciaries exculpation to recognize a significant contribution to a case, apart from a financial contribution.[9] Where the non-estate fiduciary exercises control over the bankruptcy process, where estate beneficiaries and third parties benefit from the non-estate fiduciary's actions, or where exculpation is a necessary and negotiated part of the settlement, deal, or plan, courts have determined exculpation is appropriate.

11. Assuming that PRG's relationship does not rise to the level of "fiduciary" for the purposes of exculpation, PRG's substantial contribution is a special circumstance warranting exculpation. As discussed above, PRG has, with the consent of the parties and, in certain instances approval of the Court, exerted control over the KEIP and KERP, worked with the Debtors and other parties to prepare the Plan, and has been involved in decisions regarding the ongoing operations of the reorganized debtors, including which contracts to assume and assign to the ongoing enterprise. The Plan, which is largely consensual, provides satisfaction of all secured, administrative, and priority claims and a significant recovery to general unsecured

[9] PRG is aware of the *dicta* at the confirmation hearing of *Emerald Oil, Inc. et al.*, Case No. 16-10704 (Bankr. D. Del. March 22, 2017) ("*Emerald Oil*"), where this Court stated that "in the future, I'm not going to allow such expansive rights of exculpation . . . . They will be limited to estate fiduciaries . . . ." *Id*. at p. 40. In *Emerald Oil*, the exculpation provision was revised in advance of the confirmation hearing to remove the non-estate fiduciaries. However, since *Emerald Oil*, this Court has confirmed *PES*. The exculpation provision in *PES* was revised to remove some—but not all—non-estate fiduciaries, thereby reaffirming that there is not a complete bar on non-estate fiduciaries receiving exculpation under a plan. Moreover, since March, 2017, at least two other courts have approved plans with broad exculpation provisions covering non-estate fiduciary parties. *See*, *In re Erickson Incorporated, at al.*, Case No. 16-34393 (Bankr. N.D. Tex. March 22, 2017) (exculpated parties included, *inter alia*: the Backstop Parties, the DIP Parties, the Indenture Trustee, and the Existing First Lien Parties); *In re rue21, inc. et al.*, Case No. 17-22045 (Bankr. W.D. Pa. August 30, 2017) (exculpated parties included, *inter alia*: the DIP Lenders, the DIP Agents, the Restructuring Support Parties, the Sponsor Entities, the Prepetition ABL Agent, the Prepetition Term Loan Agent, the Unsecured Notes Indenture Trustee, the Prepetition ABL Lenders, Term Loan Lender Group and each member thereof, and the Ad Hoc Cross-Holder Group and each member thereof). PRG respectfully suggests that while this Court might not have approved of the broad exculpation under the facts of *Emerald Oil*, had the issue been before it, exculpation of non-estate fiduciaries is acceptable where the exceptional circumstances warrant. The facts of this case *vis a vis* PRG are unique, and warrant an objective review and ultimately, approval of the exculpation of PRG.

creditors, and is almost entirely funded by PRG. Absent PRG, liquidation would occur and the estates would have sufficient funds to pay only a portion of the prepetition secured debt, leaving the Debtors insolvent, the employees unemployed, the vendors without a customer, and the creditors uncompensated. This exculpation was bargained for at arm's-length, and without it, a deal could not have been reached. It is reasonable and appropriate in this circumstance to provide PRG with exculpation for those decisions it made that permitted the Debtors to get to this point.

CONCLUSION

12. Where a party operates in an increased capacity, essentially substituting its own judgment and decisions for that of the estate fiduciary—in this case, the Debtors—it is entitled to no greater, but also no lesser, protections than those afforded to the estate fiduciary, either as a quasi-fiduciary or under the special circumstances doctrine. For its actions and intimate involvement with the Debtors in this case, PRG should be afforded the same protections as the Debtors, and the Court should approve PRG's inclusion in the exculpation provision in the Plan.

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WHEREFORE, for the reasons stated herein, PRG requests that this Court hereby (a) overrule the U.S. Trustee Objection, (b) confirm the Plan incorporating the exculpation provision which includes PRG, and (c) grant such other and further relief as is proper and just.

Dated: Wilmington, Delaware
July 24, 2018

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