

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION**

<p><b>In re:</b> )</p> <p style="padding-left: 100px;">) )</p> <p><b>MISSISSIPPI PHOSPHATES</b> )</p> <p style="padding-left: 40px;"><b>CORPORATION, <i>et al.</i></b><sup>1</sup> )</p> <p style="padding-left: 100px;">) )</p> <p><b>Debtors</b> )</p> <hr style="width: 50%; margin-left: 0;"/>	<p><b>CASE NO. 14-51667-KMS</b></p> <p><b>Chapter 11</b></p> <p><b>Jointly Administered</b></p>
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**AMENDED DEBTORS’ RESPONSE TO UNITED STATES TRUSTEE’S OBJECTION  
TO FIRST AMENDED JOINT CHAPTER 11 PLAN OF DEBTORS AND  
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS**

[Dkt. ## 1168; 1641]

Mississippi Phosphates Corporation, *et al.*, the debtors and debtors-in-possession herein (the “*Debtors*”), by and through their attorneys, respectfully file this *Amended Debtors’ Response to United States Trustee’s Objection to First Amended Joint Chapter 11 Plan of Debtors and the Official Committee of Unsecured Creditors* (the “*Debtors’ Response*”) to the *United States Trustee’s Objection to First Amended Joint Chapter 11 Plan of Debtors and the Official Committee of Unsecured Creditors* [Dkt. # 1641] (the “*UST Objection*”). In support of the Debtors’ Response, the Debtors respectfully state as follows:

**BACKGROUND**

1. On July 1, 2016, the Debtors filed the *First Amended Joint Chapter 11 Plan of Debtors and the Official Committee of Unsecured Creditors* [Dkt. # 1168].
2. On August 22, 2016, the Office of the United States Trustee filed the UST Objection.

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<sup>1</sup> The chapter 11 cases of the following affiliated Debtors have been administratively consolidated for joint administration pursuant to that certain *Order Granting Motion of the Debtor for Order Directing Joint Administration of Affiliated Cases Pursuant to Bankruptcy Rule 1015(b)*, dated October 29, 2014 [Dkt. # 62]: Mississippi Phosphates Corporation (“*MPC*”), Case No. 14-51667, Ammonia Tank Subsidiary, Inc. (“*ATS*”), Case No. 14-51668 and Sulfuric Acid Tanks Subsidiary, Inc. (“*SATS*”), Case No. 14-51671. These chapter 11 cases are sometimes referred to herein as the “*Bankruptcy Cases*.”

**Response**

3. In the UST Objection, the Office of the United States Trustee raised six points, each of which will be addressed in this Response.

4. Objection 1. “The Debtors are currently delinquent in filing their monthly operating reports (“MORs”) and in paying their quarterly UST fees as required under 28 U.S.C § 1930(a)(6).”

**Response.** The Debtors have filed their monthly operating reports and now are current. The Debtors also have paid their quarterly UST fees currently as well.

5. Objection 2. “Under Section 6.5 of the First Amended Joint Plan, the UST requests clarification on who will be responsible for filing post-confirmation reports and for paying post-confirmation quarterly UST fees as required under 28 U.S.C § 1930(a)(6).”

**Response.** The MPC Plan Trustee will be responsible for filing post-confirmation reports and for paying post-confirmation quarterly UST fees as required under 28 U.S.C. § 1930(a)(6). The Debtors will clarify this in the Order confirming the Chapter 11 Plan.

6. Objection 3. “If the Court confirms the First Amended Joint Plan, the UST requests that language be included in any confirmation order that the Confirmed Debtor, and/or the MPC Plan Trustee (Berkeley Research Group), shall timely file with the Court and submit to the UST any operating reports (“MORs”) and all post-confirmation MORs in accordance with the UST’s *Chapter 11 Operating Guidelines and Reporting Requirements* (“OGRR-11”) up to and including the date of conversion, dismissal, or closing of the case.”

**Response.** The Debtors agree to include language in the confirmation order that the MPC Plan Trustee (Berkeley Research Group) shall timely file with the Court and submit to the

UST any operating reports (“MORs”) and all post-confirmation MORs in accordance with the UST’s *Chapter 11 Operating Guidelines and Reporting Requirements* (“OGRR-11”) up to and including the date of conversion, dismissal, or closing of the case.

7. Objection 4. “If the Court confirms the First Amended Joint Plan, the UST requests that language be included in any confirmation order that the Confirmed Debtor, and/or the MPC Plan Trustee (Berkeley Research Group), shall timely pay to the UST the appropriate sum for quarterly UST fees required under 28 U.S.C. § 1930(a)(6) for each calendar quarter up to and including the calendar quarter containing the date of conversion, dismissal, or closing of the case.”

**Response.** The Debtors agree to include language in the confirmation order that the MPC Plan Trustee (Berkeley Research Group) shall timely pay to the UST the appropriate sum for quarterly UST fees required under 28 U.S.C. § 1930(a)(6) for each calendar quarter up to and including the calendar quarter containing the date of conversion, dismissal, or closing of the case.

8. Objection 5. “Under Section 6.12 of the First Amended Joint Plan, the Plan states, “The United States Trustee may replace the MPC Plan Trustee, after notice and a hearing, for any grounds provided in Section 1104(a) of the Bankruptcy Code.” The UST objects to this language because the UST has no authority to replace a post-confirmation plan trustee under § 1104. The UST requests that this Plan language be removed.”

**Response.** The Debtors agree to remove this Plan language in the confirmation order.

9. Objection 6. Under Section 14.3 of the First Amended Joint Plan, the UST objects to the Exculpation language to the extent it fails to comply with the Fifth Circuit’s

decision in *New York Trust Co., N.A. v. Official Uns. Cred. Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009).

**Response.** The Debtors submit that the exculpation provisions of Section 14.3 comply with the Fifth Circuit’s decision in *New York Trust Co., N.A. v. Official Uns. Cred. Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009). The Debtors would show that numerous Mississippi and Texas Bankruptcy Courts have approved similar exculpation provisions in post-*Pacific Lumber* cases to cover both the Debtors’ professionals and the Committee’s professionals, in addition to Committee members. Those cases include the following:

**Mississippi Bankruptcy Cases:**

(a) *In re: Odyssey Petroleum Corp. (US)*, United States Bankruptcy Court for the Southern District of Mississippi, Case No. 10-01482-NPO (Judge Olack):

- (i) Plan [Dkt. # 651] – No Objection by United States Trustee.
  - (1) “Covered Parties” – Section 1.23 – page 4 of 51.
  - (2) “Exculpation” – Section 12.4 – page 18 of 51.
- (i) Confirmation Order [Dkt. # 752] – Section I. – page 7 of 16.

(b) *In re: O&G Leasing, LLC*, United States Bankruptcy Court for the Southern District of Mississippi, Case No. 10-01851-EE (Judge Ellington):

- (ii) Plan [Dkt. # 916] – No Objection by United States Trustee.
  - (1) “Covered Parties” – Section 1.19 – page 3 of 38.
  - (2) “Exculpation” – Section 13.8 – page 23 of 38.
- (i) Immaterial Modifications [Dkt. # 979]
- (ii) Confirmation Order [Dkt. # 988] – Section O. – page 10 of 28.

(b) *In re: Superior Boat Works, Inc.*, United States Bankruptcy Court for the Northern District of Mississippi, Case No. 09-15836-NPO (Judge Olack):

- (i) Plan [Dkt. # 449] – Exculpation Provision – Section O., Paragraph 6 – page 16 of 25 – No Objection by United States Trustee.
- (ii) Memorandum Opinion [Dkt. # 500].
- (iii) Confirmation Order [Dkt. # 506].

**Texas Bankruptcy Cases:**

(c) *In re: ERG Intermediate Holdings, LLC*, United States Bankruptcy Court for the Northern District of Texas, Case No. 15-31858-hdh (Judge Hale):

- (i) Plan [Dkt. # 518].
  - (1) Exhibit A – Definitions:
    - a. “Exculpated Parties” – Section 58 - page 54 of 75.
    - b. “Released Parties” – Section 125 - page 60 of 75.
  - (2) “Exculpation” - Article XIV, Section 14.3 - page 41 of 75.
- (ii) United States Trustee’s Objection to Confirmation [Dkt. # 597].

“15. ... The holding of *Pacific Lumber* is clear: this court does not possess the authority to approve third party releases in the context of a chapter 11 plan in the face of an objection. The United States Trustee objects to the third party releases contained in the Plan.

16. The United States Trustee, however, does not object to the third party releases in the Plan only insofar as those releases pertain to members of the Official Committee of Unsecured Creditors appointed by the United States Trustee in this case, and only with regard to actions taken in the scope of their duties as members of the Committee. *See*, 11 U.S.C. 1103(c), *Pacific Lumber*, 584 F.3d at 253.”)

Page 5 of 7.

(i) Confirmation Order [Dkt. # 663] “Approval of the Release and Exculpation Provisions in the Plan” – Section D – page 27 of 29.

(“The release and exculpation provisions set forth in Article XIV of the Plan (as approved in the Confirmation Order) ... [were] approved by an overwhelming majority of holders of Claims against the Debtors that voted on the Plan, and (iv) given and made after notice and opportunity for hearing.

...

Without limiting the generality of the foregoing, the exculpation provisions in section 14.3 of the Plan, as approved in the Confirmation Order, are appropriate. ...”).

(d) *In re: Sears Methodist Retirement System, Inc.*, United States Bankruptcy Court for the Northern District of Texas, Case No. 14-32821-sgj (Judge Jernigan):

(i) Plan [Dkt. # 770-1] – No Objection by United States Trustee.

(1) “Exculpated Claim” – pages 14-15 of 96.

(2) “Exculpated Party” – page 15 of 96.

(3) “Released Parties” – page 21 of 96.

(4) “Releasing Parties” – page 21 of 96.

(5) “Exculpation” – Section 11.6 – page 77 of 96.

(ii) Confirmation Order [Dkt. # 801].

(1) “K. Good Faith Solicitation.” – pages 16-17.

(2) “N. Plan Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(1)).” – pages 17-18.

(3) “P. Plan Proposed in Good Faith (11 U.S.C. § 1129(a)(3)).” – pages 22-23.

(4) “JJ. Injunction, Exculpation, and Releases.” – pages 28-29.

(e) *In re: CSMG Technologies, Inc.*, United States Bankruptcy Court for the Northern District of Texas, Case No. 14-31320-hdh (Judge Hale):

(i) Plan [Dkt. # 2] – “Exculpation” – Article IX, Section B. – page 46 of 58 – No Objection by United States Trustee.

(ii) Confirmation Order [Dkt. # 56] – “Releases and Exculpation.” – Section 5 – page 20 of 28.

(f) *In re: Xtreme Iron Holdings, LLC*, United States Bankruptcy Court for the Northern District of Texas, Case No. 12-33832-hdh (Judge Hale)

(i) Plan [Dkt. # 488] – “Exculpation” – Article X, Section 10.6 – page 32 of 46 – No Objection by United States Trustee.

(ii) Confirmation Order [Dkt. # 547].

(1) “Other Appropriate Provisions (11 U.S.C. § 1123(b)(6).” – Section J, Subsection xiii. – page 8 of 43.

(2) “Exculpations, Injunctions, and Releases” – Section MM – page 17 of 43.

(“MM. The Bankruptcy Court has jurisdiction under sections 1334(a) and (b) of title 28 of the United States Code to approve the exculpation, injunctions, and releases set forth in Article X of the Plan. Section 105(a) of the Bankruptcy Code permits issuance of the injunctions and approval of the releases and exculpations set forth in Article X of the Plan. Such provisions are fair and reasonable and are in the best interests of the Debtors, the Estates, and parties-in-interest. Further, the exculpation provisions in the Plan do not relieve any party of liability for an act or omission to the extent such act or omission is determined by a Final Order to have constituted willful misconduct or gross negligence. Based on the record of these Bankruptcy Cases and the evidence proffered, adduced, and/or presented at the Confirmation Hearing, this Court finds that the injunctions, exculpations, and releases set forth in Article X of the Plan are consistent with the Bankruptcy Code and applicable law.”)

(g) *In re: Reddy Ice Holdings, Inc.*, United States Bankruptcy Court for the Northern District of Texas, Case No. 12-32349-sgj (Judge Jernigan):

(i) Plan [Dkt. # 429].

(1) “Exculpated Claim” – Article I, Section 69 – pages 14-15 of 96.

(2) “Exculpated Party” – Article I, Section 70 – page 15 of 96.

(3) “Exculpation” – Article I, Section 71 – page 15 of 96.

(4) “Exculpation” – Article IX, Section F – page 61-62 of 96.

“F. Exculpation.

Notwithstanding anything contained in the Plan to the contrary, no Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from, any Exculpated Claim, obligation, cause of action or liability for any Exculpated Claim, except for gross negligence or willful misconduct (to the extent such duty is imposed by applicable non-bankruptcy law), but in all respects such Persons shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The Debtors and the Reorganized Company (and each of their respective Affiliates, agents, directors, officers, employees, advisors and attorneys) have, and upon Confirmation of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code with regard to the solicitation and distribution of the Plan securities pursuant to the Plan, and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.”

(ii) Objection of United States Trustee [Dkt. # 377].

“13. *Releases and Exculpation*: Section 524(e) bars releases for third parties. *11 U.S. C. §524(e)*. The Fifth Circuit has held that claim preclusion allows plans to modify section 524(e) when no one objects. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5<sup>th</sup> Cir. 1987); *see also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. —, 130 S.Ct. 1367 (2010) (holding claim preclusion allows modification of student loan



discharge statute). It has also upheld releases for creditors' committee members and their professionals, holding that section 1103(c) contemplates such protections as long as willful and intentional conduct are excluded from the release. *Pacific Lumber*, 584 F.3d 229, 253 (5<sup>th</sup> Cir. 2009) (citing 11 U.S.C. §1103(c)).

14. But when parties challenge modifications to section 524(e), the Fifth Circuit enforces section 524(e). *In re Pacific Lumber Co.*, 584 F.3d (5<sup>th</sup> Cir. 2009). Because the Court has a "mandatory independent duty" to evaluate whether a plan meets the standards of section 1129, the Court can still consider whether a release is proper, even if no one objects. *In re Williams*, 850 F.2d 250, 253 (5<sup>th</sup> Cir. 1988) (citation omitted).

...

18. Here, when assessing the third party releases, the Court should evaluate jurisdiction and the standards for granting an injunction.

19. Releases involving conduct arising in connection with the bankruptcy case rather than other torts should follow the Fifth Circuit's construction in *Pacific Lumber*. *In re Pilgrim's Pride*, 2010 WL 20000 (Bankr. N.D. Tex. 2010)."

Pages 4-6.

(iii) Confirmation Order [Dkt. # 432]

(1) "BBB. Release, Exculpation and Injunction. This Court has jurisdiction under sections 1334(a) and (b) of title 28 of the United States Code to approve the injunction, exculpation and releases set forth in Article IX of the Plan. Section 105(a) of the Bankruptcy Code permits issuance of the injunction and approval of the releases and exculpation set forth in Article IX of the Plan. Such provisions are an integral part of and critically important to the success of the Plan, and are fair and reasonable and are in the best interests of the Debtors, their Estates and parties in interest. Further, the exculpation provision in the Plan does not relieve any party of liability for an act or omission to the extent such act or omission is determined by a final order to have constituted willful misconduct or gross negligence. Based upon the record of these Chapter 11 Cases and the evidence proffered, adduced and/or presented at the Combined Hearing, this Court finds that the injunction, exculpation and releases set forth in Article IX of the Plan are consistent with the Bankruptcy Code and applicable law. All holders of Claims and Interests received adequate notice of such provisions and had sufficient opportunity to object to such provisions."

pages 20-21 of 73.

(2) “3. Confirmation Objections. All parties have had a full and fair opportunity to litigate all issues raised, or that might have been raised, by any objections, including, without limitation, any objections that could have been raised to any documents contained in the Plan Supplement or related thereto, and any and all comments thereto have been considered by the Bankruptcy Court. To the extent that any objections to confirmation of the Plan have not been withdrawn prior to entry of this Confirmation Order, are not cured by the relief granted herein or resolved as stated by the Debtors on the record of the Combined Hearing, all such objections, including, but not limited to any objections set forth in the United States Trustee’s Comment in Connection With Disclosure Statement and Plan [Dkt. No. 377], shall be, and hereby are, overruled.

pages 20-21 of 73.

(h) *In re: Jetstar Partners, Ltd.*, United States Bankruptcy Court for the Northern District of Texas, Case No. 12-31444-hdh (Judge Hale) – No Objection by United States Trustee.

(i) Plan [Dkt. # 116] – “Release.” – Section 8.03 – page 17 of 29.

(ii) Confirmation Order [Dkt. # 129] – “Additional Plan Provisions (11 U.S.C. § 1123(b)) – page 4 of 14.

(i) *In re: Crescent Resources, LLC*, United States Bankruptcy Court for the Western District of Texas, Case No. 09-11507-cag (Judge Gargotta) – No Objection by United States Trustee.

(i) Plan [Dkt. # 1729] – “Exculpation.” – Section 9.3 – pages 22-23 of 40.

(ii) Confirmation Order [Dkt. # 2019].

### **“G. Exculpations, Injunctions, and Releases**

1. The Bankruptcy Court has jurisdiction under Sections 1334(a) and (b) of title 28 of the United States Code to approve the exculpation, injunctions, and releases set forth in Article 9 of the Plan. Section 105(a) of the Bankruptcy Code permits issuance of the injunctions and approval of the releases and

exculpations set forth in Article 9 of the Plan. Such provisions are fair and reasonable and are in the best interests of the Debtor, its estate, and other parties in interest. Further, the exculpation provisions of the Plan do not relieve any party of liability for an act or omission to the extent such act or omission is determined to have constituted willful misconduct or gross negligence. Based upon the record of the Chapter 11 Cases and the evidenced proffered, adduced, and/or presented at or before the Confirmation Hearing on the Plan, this Court finds that the injunctions, exculpations, and releases set forth in Article 9 of the Plan are consistent with the Bankruptcy Code and applicable law.

page 12 of 17.

**Louisiana Bankruptcy Case:**

(j) *In re: Piccadilly Restaurants, LLC*, United States Bankruptcy Court for the Western District of Louisiana, Case No. 012-51127 (Judge Summerhays) – No Objection by United States Trustee.

(i) Plan [Dkt. # 1241] – “Exculpation.” – Section 11.7 – pages 54-55 of 62.

(ii) Confirmation Order [Dkt. # 1420].

(1) “(iv) Other Appropriate Provisions (11 U.S.C. § 1123(b)(6)). The Plan’s other provisions are appropriate and consistent with the applicable provisions of the Bankruptcy Code, including, without limitation, provisions for (i) distributions to Holders of Claims and Interests, (ii) resolution of Disputed Claims, (iii) allowance of certain Claims, (iv) indemnification obligations, (v) releases by the Debtors of certain parties, (vi) consensual releases by certain third parties, (vii) exculpations of certain parties, (viii) the settlement and compromise of the Atalaya Adversary Proceeding; (ix) releases, exculpation and injunctions under the Plan; and (x) retention of Bankruptcy Court jurisdiction, thereby satisfying the requirements of Section 1123(b)(6).”

Section M., 13, h., (iv), at page 13 of 46.

(2) **“MM. Jurisdiction With Respect to Release, Exculpation, and Injunction Provisions.**

43. The Bankruptcy Court has jurisdiction under Sections 1334(a) and (b) of Title 28 of the United States Code to approve the exculpations, injunctions, and releases set forth in Article XI of the Plan. Based upon the record of the Chapter 11 Cases, the Bankruptcy Court finds that the

exculpations, injunctions, and releases set forth in Article XI of the Plan are consistent with the Bankruptcy Code and applicable law. Further, the releases, injunctions and exculpations contained in Article XI of the Plan are integral components of the Plan.”

Section MM., at page 23 of 46.

(3) **“PP. Exculpation.**

49. The exculpation provisions set forth in Article XI of the Plan (the “Exculpation Provisions”), were proposed in good faith, are essential to the Plan, and are intended to promote finality and prevent parties from attempting to circumvent the Plan’s discharge injunction. The Exculpation Provisions are consistent with Section 1125(e) of the Bankruptcy Code and are appropriately tailored to protect the Exculpated Parties from inappropriate litigation and to exclude any causes of action determined by a Final Order to arise from acts or omissions that constitute gross negligence or willful misconduct.”

Section PP., at page 25 of 46.

(4) **“QQ. Injunction.**

...

51. Each of the Debtor Release, Consensual Release, Exculpation Provisions and Injunction Provisions set forth in the Plan: (a) is within the jurisdiction of the Bankruptcy Court under 28 U.S.C. §§ 1334(a), 1334(b), and 1334(d); (b) is an essential means of implementing the Plan pursuant to Section 1123(a)(6) of the Bankruptcy Code; (c) is an integral element of the transactions incorporated into the Plan; (d) confers material benefits on, and is in the best interests of, the Debtors, the Estates and their creditors; (e) is important to the overall objectives of the Plan to finally resolve all Claims among or against the parties in interest in the Chapter 11 Cases with respect to the Debtors; and (f) is consistent with Sections 105, 1123 and 1129 of the Bankruptcy Code, any other provisions of the Bankruptcy Code and any other applicable law. The record of the Confirmation Hearing and the Chapter 11 Cases is sufficient to support the Debtor Release, the Consensual Release, the Exculpation Provisions, and the Injunction Provisions contained in Article XI of the Plan.

Section QQ., paragraph 51, at pages 25-26 of 46.

Further, unlike *Pacific Lumber* where certain creditors and parties with a financial interest objected to the broad release and exculpation provisions, in the present case, no creditor or party with a financial interest objected to the proposed exculpation provision in the Plan.

WHEREFORE, the Debtors respectfully request that this Court confirm the First Amended Joint Plan and grant such further relief as may be equitable and just.

Dated: September 6, 2016.

Respectfully submitted,

MISSISSIPPI PHOSPHATES CORPORATION, *et al.*

By: /s/ Stephen W. Rosenblatt

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ATTORNEYS FOR THE DEBTORS

**CERTIFICATE OF SERVICE**

I certify that the foregoing pleading was filed electronically through the Court's ECF system and served electronically on all persons who are registered users of the CM/ECF System for the Bankruptcy Cases.

Dated: September 6, 2016.

*/s/ Stephen W. Rosenblatt*  
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STEPHEN W. ROSENBLATT

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