SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: October 21, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:	**MISSISSIPPI PHOSPHATES CORPORATION, *et al***	**CASE NO. 14-51667-KMS**
	DEBTORS	**CHAPTER 11**

ORDER SUSTAINING U.S. TRUSTEE'S OBJECTION TO CONFIRMATION

Before the Court is the Objection to Confirmation of Plan (Dkt. No. 1641) filed by the United States Trustee ("US Trustee"). The Court held a confirmation hearing and permitted the Debtors to file an amended response to the US Trustee's objection. Dkt. No. 1680. Having considered the arguments and evidence, the Court finds that the Objection of the US Trustee, to the extent that it has not been resolved by agreement with the Debtors, is sustained.

I. Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L), & (O).

II. Findings of Fact[1]

Mississippi Phosphates Corporation[2] ("MS Phosphates") filed its petition for Chapter 11 bankruptcy on October 27, 2014. Dkt. No. 1. MS Phosphates filed its Modified Chapter 11 Plan on July 1, 2016. Dkt. No. 1168. The US Trustee objected to the language of the Plan, including an exculpation clause. Dkt. No. 1641. The Court held a hearing on confirmation of the Plan on September 1, 2016, and allowed MS Phosphates to amend its response to the US Trustee's objection. Dkt. No. 1680. MS Phosphates filed its amended response, and the US Trustee replied. Dkt. Nos. 1686, 1698. The Court then took the matter under advisement.

III. Conclusions of Law

The US Trustee raised six objections in its brief, and MS Phosphates has agreed to resolve five of them to the US Trustee's satisfaction in its responsive briefing. Dkt. No. 1686 at 2-3. This leaves the US Trustee's final objection to be resolved by the Court: "Under Section 14.3 of the First Amended Joint Plan, the [US Trustee] objects to the Exculpation language to the extent it fails to comply with . . . Fifth Circuit[case law]." Dkt. No. 1641 at 2. MS Phosphates argues that the exculpation language complies with this Circuit's precedents and that other bankruptcy courts in the Fifth Circuit have approved similar language over objection by the US Trustee. Dkt. No. 1686 at 4-13.

The Court reproduces the relevant language in full:

> 14.3 Exculpation. None of the Covered Parties shall have or incur any liability to, or be subject to any right of action by, any of the Debtors or any holder

[1] Pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rules of Bankruptcy Procedure 9014(c) and 7052, the following constitutes the findings of fact and conclusions of law of the Court.

[2] This case consolidated bankruptcies filed by several related entities. *See* Dkt. No. 1168 at 21 (defining "Debtors" as "collectively, Mississippi Phosphates Corporation, Ammonia Tank Subsidiary, Inc., and Sulfuric Acid Tanks Subsidiary, Inc."). The Court refers to them collectively by the name of the lead debtor, Mississippi Phosphates Corporation.

> of a Claim or Interest or the Committee[3] or any other party in interest in the Cases, or any of their respective owners, members, officers, directors, managers, employees, agents, representatives, attorneys, advisors or other professional representatives, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of (i) the Cases, (ii) any act taken or omitted to be taken on or after the Petition Date in connection with the Cases, or (iii) the Disclosure Statement, the Plan or the documents and actions necessary to perform the Plan, except for obligations of any of the Covered Parties expressly arising under or in accordance with the Plan and Confirmation Order, and except for their willful misconduct or gross negligence; and each of the Covered Parties shall be entitled to rely reasonably upon the advice of counsel with respect to their duties and responsibilities under the Plan and Confirmation Order. The Debtors believe the exculpation provision contained in the Plan is appropriate and reasonable.
>
> The Plan, however, incorporates, and does not affect or impair in any respect, the releases, discharges, covenants not to sue, and other covenants contained in the Environmental Settlement Agreement or the Committee Settlement Agreement. Nothing in this Order or the Plan discharges, releases, precludes, or enjoins any liability to a Governmental Unit on the part of any Person other than Debtors.

Dkt. No. 1168 at 80-81. The Plan defines "Covered Parties" as

> (i) all of the present or former attorneys and professionals of any of the debtors whose retention has been approved by the Bankruptcy Court, before or after the Petition Date up to and including the Effective Date, and (ii) the Committee, and any of their respective present or former members, officers, directors, employees, agents, advisors, attorneys and professionals or other representatives, before or after the Petition Date up to and including the Effective Date; provided, however, that as to the Committee and any of its present and former members, agents, advisors, attorneys and professionals or other representatives, said time period shall include from and after the Petition Date through and including the date of entry of a final decree closing these Cases.

Dkt. No. 1168 at 20.

Essentially, the exculpation clause protects MS Phosphates's attorneys and hired professionals and the unsecured creditors committee and its representatives from suit by MS Phosphates, the holders of a claim or interest in this bankruptcy, and the unsecured creditors

[3] The Plan defines the "Committee" as "the Official Committee of Unsecured Creditors appointed by the United States Trustee in these Bankruptcy Cases on November 12, 2014 [Dkt. # 161], or thereafter amended pursuant to Section 1102 of the Bankruptcy Code." Dkt. No. 1168 at 19.

committee for actions taken in this bankruptcy, excluding willful misconduct and gross negligence and anything related to two separate settlement agreements.

The Fifth Circuit has previously analyzed "third-party release and exculpation provisions" in a Chapter 11 plan. *See Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 239 (5th Cir. 2009). In *In re Pacific Lumber*, the plan released the "[p]lan proponents and current owners of the reorganized debtors" (who filed the plan after the exclusivity period had expired), two new entities created during the bankruptcy, "and the Unsecured Creditors' Committee (and their personnel) from liability—other than for willfulness and gross negligence—related to proposing, implementing, and administering the plan." *Id.* at 236, 237, 251. The plan proponents argued "the release clause is part of their bargain because without the clause neither company would have been willing to provide the plan's financing." *Id.* at 251-52. The Fifth Circuit struck the releases for the plan proponents and new entities, holding that "the essential function of the exculpation clause proposed here is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy. The fresh start § 524(e) provides to debtors is not intended to serve this purpose." *Id.* at 252-53. The Fifth Circuit, however, upheld the release for the unsecured creditors' committee, holding that "§ 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties." *Id.* at 253 (citing *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)); *see also* 7 Collier on Bankruptcy ¶ 1103.05[4][b] (16th ed.) ("Actions against committee members in their capacity as such should be discouraged . . . An active and involved committee is an important part of a chapter 11 case and if a committee can be intimidated by the threat of legal action seeking personal liability of its members, it will not be able to play its role in the case."). It is clear that the exculpation clause, insofar as it releases the unsecured creditors'

committee from liability for its negligent actions taken within the scope of its duties, is allowed. *In re Pacific Lumber*, however, does not specifically address a release of liability of a debtor's attorneys and professionals for actions taken during the pendency of the case.

MS Phosphates has cited several unpublished cases where a court approved exculpatory language in a plan. But "[u]npublished cases are not binding precedent. . . ." *United States v. Rodriguez-Bernal*, 783 F.3d 1002, 1008 (5th Cir. 2015). Further, the US Trustee did not object to the language in most of MS Phosphates's example cases, and they are, therefore, distinguishable. The Fifth Circuit has held "that when a bankruptcy plan has been confirmed by the bankruptcy court and gone unchallenged on direct appeal, a 'specific discharge or release' in such a plan can release claims against non-debtors." *Hernandez v. Larry Miller Roofing, Inc.*, 628 F. App'x 281, 286 (5th Cir. 2016) (citing *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914, 919 (5th Cir. 2000)). And "once the time for objecting to, or directly appealing, a plan has passed, parties may not challenge particular provisions of a plan as exceeding the bankruptcy court's authority." *Id.* at 281 n.4 (citing *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-54 (2009)). It is clear that when no party objects, a court may approve such language, but, here, the US Trustee has objected to the proposed exculpation clause.

One case cited by MS Phosphates, however, appears to be on point. *See In re Reddy Ice Holdings, Inc.*, No. 12-32349, slip op. at 20-21 (Bankr. N.D. Tex. May 22, 2012). In *In re Reddy Ice Holdings*, the debtor proposed a plan with language that released its attorneys and professionals from liability, except for gross negligence or willful misconduct, for their actions taken during the bankruptcy. The US Trustee objected. The court approved the language over objection finding the exculpation clause was "an integral part of and critically important to the success of the Plan, and [was] fair and reasonable and [was] in the best interests of the Debtors, their Estates and parties in

interest." *Id.* The court stated that its decision was based on the record, the evidence produced at a hearing, and the adequate notice provided to all participants in the bankruptcy. *Id.* The court, however, cited no case law to support its decision and did not elaborate on what occurred at the hearing. "[T]here is little persuasive value to [a] pronouncement" with "no accompanying analysis. . . ." *Rodriguez-Bernal*, 783 F.3d at 1008. The Court finds this unpublished and uncited decision to be unpersuasive. Further, the Court's analysis today echoes other courts that have analyzed the issue. *See Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031, 1061 (5th Cir. 2012) (finding that "th[e] conclusion [of *In re Pacific Lumber*] was consistent with prior rulings from this circuit that seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions") (internal quotations marks omitted). The exculpatory language for parties other than the unsecured creditors committee and its representatives must be struck from the Plan, and unless MS Phosphates conforms the language of its proposed Plan to this order, then the Plan cannot be confirmed. *See In re Pilgrim's Pride Corp.*, No. 08-45664-DML-11, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010) (denying exculpation clause in favor of debtor's attorneys and holding that "[b]ecause [*In re*] *Pacific Lumber* is binding precedent, the court may not, over objection, approve through confirmation of the Plan third-party protections, other than those provided to the Committees, members of the Committees, and the Committees' Professionals").

The Court acknowledges there may be more similarity than difference between the position of MS Phosphates's attorneys and hired professionals and that of the unsecured creditors committee. *See In re PWS Holding*, 228 F.3d at 246 (allowing exculpation clause for "members of the [unsecured creditors' c]ommittee and professionals who provided services to the Debtor"). Both groups are approved by the Court and have their actions closely monitored. And without

either group, the bankruptcy system would struggle to function. Just as the unsecured creditors are not best represented individually,[4] a debtor is not best represented pro se. And a corporate debtor can never appear pro se. *In re CorrLine Int'l, LLC*, 516 B.R. 106, 138 (Bankr. S.D. Tex. 2014) (citing *Sw. Express Co., Inc. v. Interstate Commerce Comm'n*, 670 F.2d 53, 55 (5th Cir. 1982)); *see also* Miss. Bankr. L.R. 9010-1(b)(2)(C) (listing limited circumstances in which corporations "may appear and act without counsel"). The essential functions performed by the debtor's attorneys and other professionals raise the question of whether the qualified immunity afforded to the unsecured creditors' committee should not be extended to other necessary players in this game.[5] S*ee In re Pac. Lumber*, 584 F.3d at 253. And indeed other jurisdictions have found that similar "[e]xculpation provisions in chapter 11 plans are not uncommon. . . ." *In re Health Diagnostic Lab., Inc.*, 551 B.R. 218, 232-33 (Bankr. E.D. Va. 2016) (citing *In re PWS Holding*, 228 F.3d at 246-47) ("The practical effect of a proper exculpation provision is not to provide a

[4] "These committees are designed to deal with the debtor in a more manageable way than the entire body of creditors could. They are representative bodies that must speak for groups of creditors with similar interest." H.R. Rep. No. 95-595 at 235 (1977). "Official unsecured creditor committees are provided for by 11 U.S.C. § 1102(a)(1). In general, the purpose of such committees is to represent the interests of unsecured creditors and to strive to maximize the bankruptcy dividend paid to that class of creditors." *In re Nationwide Sports Distribs., Inc.*, 227 B.R. 455, 463 (Bankr. E.D. Penn. 1998).

[5] The Court notes that the attorneys and professionals to be protected by the stricken language may be covered by the Barton Doctrine. *See Barton v. Barbour*, 104 U.S. 126, 127 (1881).

> Under this doctrine, "a court appointed trustee cannot be sued for actions taken in the trustee's official capacity unless leave is first obtained from the court that appointed the trustee." *In re WRT Energy Corp.*, 402 B.R. 717, 721–22 (Bankr. W.D. La. 2007) (setting out the history of the Barton doctrine and its applicability to bankruptcy trustees). Courts have held that this doctrine applies to suits against auctioneers and lawyers appointed by the trustee and approved by the court to represent the estate, reasoning that when these auctioneers and lawyers act at the direction of the trustee for the purpose of administering the estate or protecting its assets they are the "functional equivalent of a trustee." *Carter v. Rodgers*, 220 F.3d 1249, 1252 n. 4 (11th Cir. 2000); *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993).

In re CDP Corp., Inc., 462 B.R. 615, 635-36 (Bankr. S.D. Miss. 2011). And other courts have held that the Barton Doctrine extends to debtors-in-possession as well as their attorneys. *See, e.g., In re W.B. Care Ctr., LLC*, 497 B.R. 604, 610 (Bankr. S.D. Fla. 2013). Similarly, the court in *In re Pilgrim's Pride* retained jurisdiction over any claims against the debtor's hired professionals for their conduct during the course of the bankruptcy after striking from the plan a clause releasing them from liability for that conduct. *In re Pilgrim's Pride Corp.*, 2010 WL 200000, at *5. The US Trustee confessed no objection to the Court doing likewise here. Dkt. No. 1698 at 2-3.

release for any party, but to raise the standard of liability of fiduciaries for their conduct during the bankruptcy case. Exculpation is appropriate when it is solely limited to fiduciaries who have served a debtor through a chapter 11 proceeding.") (internal citations omitted). But the Court finds it is beyond its authority to extend the exculpation allowed by *In re Pacific Lumber* to a debtor's attorneys and hired professionals without further guidance from the appellate courts.

IT IS HEREBY ORDERED THAT the United States Trustee's Objection to Confirmation of Plan (Dkt. No. 1641) is SUSTAINED.

##END OF ORDER##