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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	
Rockies Region 2006 Limited Partnership and Rockies Region 2007 Limited Partnership	**Case No. 18-33513-sgj-11**
	(Jointly Administered)
	Chapter 11
Debtors.	

OBJECTION OF THE SECURITIES AND EXCHANGE COMMISSION TO THE APPROVAL OF THE DEBTORS' DISCLOSURE STATEMENT

1. The United States Securities and Exchange Commission (the "Commission") objects to the approval of the Disclosure Statement for Debtors' Joint Chapter 11 Plan (Dkt. #227) (the "Disclosure Statement") filed by Rockies Region 2006 Limited Partnership ("RR 2006") and Rockies Region 2007 Limited Partnership ("RR 2007") (collectively "Rockies Region" or the "Debtors") pursuant to Sections 1125(b), 524(e) and 1141(d)(3) of the Bankruptcy Code and applicable law. 11 U.S.C. §§1125(b), 524(e), 1141(d)(3).[1] In support of its objection, the Commission respectfully states as follows:

[1] While some of these issues may appropriately constitute an objection to confirmation, because of the potential waste of time and resources, the Commission believes it is appropriate to raise these objections to the plan at the disclosure stage.

PRELIMINARY STATEMENT

2. The Commission objects to the approval of the Disclosure Statement on the grounds that: (i) the Disclosure Statement lacks adequate information, as required under Section 1125(b) of the Bankruptcy Code, to support the overly broad release, exculpation, and permanent injunction provisions in the Debtors' Amended Joint Chapter 11 Plan (the "Plan") (Dkt. #226); (ii) the Plan contains provisions that release, exculpate, and discharge the liability of an extensive list of non-debtor third parties and does not require the limited partners subject to these provisions to affirmatively consent to such releases in contravention of Section 524(e) of the Bankruptcy Code and controlling law in the Fifth Circuit; and (iii) the Plan and Disclosure Statement contain provisions that provide a discharge to the liquidating Debtors in contravention of Section 1141(d)(3) of the Bankruptcy Code.

3. Section 524(e) of the Bankruptcy Code provides that only the debts of the debtor are affected by the Chapter 11 discharge provisions. Yet the Plan includes releases that allow non-debtors to benefit from the Debtors' bankruptcy by effectively obtaining their own discharges with respect to potential claims arising from past wrongdoing. The releases do not have a carve-out for scienter-based behavior and, as a result, they potentially protect non-debtors from actual fraud, willful misconduct and gross negligence, including violations of federal securities laws that may have occurred prior to and during the Chapter 11 cases. The exculpation clause in the Plan is also overly broad. The release and exculpation provisions are at odds with sound public policy considerations underlying the rights of creditors to pursue legitimate claims against wrongdoers. Additionally, the Plan provides an impermissible discharge to the liquidating Debtors.

4. The Commission urges the Court to deny approval of the Disclosure Statement or, in the alternative, to require the Debtors to revise the Plan and Disclosure Statement to provide: (i) that limited partners will not be bound by the release provisions unless they "opt in;" (ii) that actual fraud, willful misconduct and gross negligence will be carved out of the third party release; (iii) that the exculpation provision will be consistent with Fifth Circuit precedent; and (iv) that the provisions effectively providing a discharge to the Debtors will be deleted.

BACKGROUND

5. The Debtors have approximately 3700 limited partners.[2] The limited partnership interests were initially offered through a private placement and subsequently registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act.[3]

6. The limited partnership interests of each Debtor are held by its limited partners and a general partner, with the general partner also serving as the managing partner.[4] The general/managing partner, PDC Energy, Inc. ("PDC"), serves as the operator for each of the wells in which the Debtors have a working interest. PDC markets and sells the oil, gas, and natural gas liquids, pays all applicable operating expenses and royalty interests, and, after reimbursing itself for expenses incurred, allocates the net distributable income to partnership unit holders. PDC is the Debtors' only creditor.

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[2] RR 2006 has 1,977 limited partners holding 4,497 units and RR 2007 has 1,755 limited partners holding 4,470 units

[3] According to their public filings with the Commission, the Debtors raised almost $180 million from investors in connection with their initial offerings of the limited partnership interests.

[4] The general/managing partner owns approximately 39% of each debtor's limited partnership interests (1753 units of RR 2006 and 1743 units of RR 2007).

7. In 2017, a group of limited partners (the "LP Plaintiffs") filed a lawsuit in the District Court of Colorado[5] against PDC and certain of its officers and directors, alleging derivative claims on behalf of the Debtors and class claims on behalf of a putative class of all limited partners. The LP Plaintiffs alleged, among other things, breach of fiduciary duty, waste of partnership assets, and breaches of the limited partnership agreement. On October 30, 2018, the Debtors filed voluntary petitions for relief under Chapter 11 in the U.S. Bankruptcy Court for the Northern District of Texas. The LP Plaintiffs' lawsuit was stayed by the bankruptcy filing and a class was never certified.

8. During the bankruptcy case, the LP Plaintiffs filed a motion to dismiss the bankruptcy, alleging, among other things, that the bankruptcy was filed in bad faith and without proper authority. PDC and the Debtors dispute these allegations. Prior to the hearing on the motion to dismiss, the parties began settlement discussions and reached an agreement in principle resolving the issues both in the motion to dismiss and in the LP Plaintiffs' lawsuit.

9. The Plan incorporates this global settlement among PDC, the Debtors, and the LP Plaintiffs. Generally, the settlement provides that PDC will pay administrative claims, purchase the Debtors' assets, make a "Settlement Payment" in the amount of $11.3 million in exchange for a release, and waive its pre-petition creditor claim against RR 2006. The settlement further provides that limited partners who do not opt out of granting the third party releases, including the release of PDC, will share in the Settlement Payment, and that on the effective date of the Plan, the LP Plaintiffs will dismiss the Colorado lawsuit and withdraw the motion to dismiss filed in the present case, in both cases with prejudice

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5 *Dufresne et al. v. PDC Energy Inc.*, Case No 1:17-cv-03079 (D. Colo.)

10. In support of their Plan, the Debtors assert that requiring the limited partners to opt out in order to avoid being bound by the releases is appropriate because it is similar to the opt-out mechanism in a class action settlement. Here, they claim, the Plan essentially settles the LP Plaintiffs' purported class action suit, and so the opt-out mechanism is appropriate

11. The release provision at Article 11.4 of the Plan (the "Releases") generally provides for the release and discharge of liabilities of numerous non-debtor third parties with respect to any claims, whether known or unknown, based on or relating to the Debtors, the restructuring documents, and the Chapter 11 cases, including acts or omissions constituting actual fraud, willful misconduct or gross negligence.

12. The Plan includes an extensive list of "Released Parties," who will benefit from the Releases.[6] The definition includes the Debtors' current officers, directors, principals, employees, members, managers, representatives, and professionals, including unnamed individuals and entities that do not appear to have any direct connection or relationship to the Debtors or the Chapter 11 cases. The Disclosure Statement does not indicate what consideration is being provided by each Released Party in exchange for their respective releases.

13. The Plan also includes an exculpation provision providing that numerous and various non-debtor third parties (many of whom are also Released Parties) ("Exculpated Parties")[7] shall have no liability to creditors and interest holders for any acts or omissions taken

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6 *Article 11.4 provides: ...* "the Debtors, the Post-Confirmation Debtors, the Responsible Party, PDC, the LP Plaintiffs and each of their respective constituents, principals, officers, directors, employees, members, managers, partners, affiliates, agents, representative, attorneys, professionals, advisors, affiliates, funds, successors, predecessors, and assigns (the "Released Parties")…"

7 *The Plan at Article 11.2 provides:* "Neither the Debtors, the Responsible Party, PDC, the LP Plaintiffs, nor any of their respective present or former members, managers, officers, directors, employees, equity holders, partners, affiliates, funds, advisors, attorneys or agents, or any of their predecessors, successors or assigns shall have or incur any liability ,…"

in connection with the bankruptcy case, or consummation of the Plan, except for acts or omissions constituting willful misconduct, actual fraud, or gross negligence.

14. In addition the Plan includes an injunctive provision that permanently enjoins claim and interest holders who do not opt out of the settlement, from, among other actions: (i) the commencement of any action or other proceeding; (ii) the enforcement, recovery or collection of any judgment: and (iii) the pursuit of any claim released pursuant to the Releases, against any post confirmation debtor or other entity released, discharged or exculpated under the Plan.

15. Together, the overly broad release, exculpation and injunctive provisions have the effect of providing a discharge to the Debtors in contravention of Section 1141(d)(3) of the Bankruptcy Code.

DISCUSSION

I. The Disclosure Statement lacks adequate information, as required under Section 1125(b) of the Bankruptcy Code, to support the Releases.

16. Section 1125(b) of the Code provides in relevant part that "[a]n acceptance or rejection of a plan may not be solicited . . . from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder… a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. 1125(b). Adequate information, in turn, is defined as "information of a kind, and in sufficient detail . . . that would enable a hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . . ." 11 U.S.C. 1125(a)(1).

17. The Disclosure Statement is silent as to what specific contributions were made by each of the Released Parties and exculpated parties for the benefit of the Releasing Parties.

Under applicable case law, if the Debtors are seeking to have the court approve the Releases as consensual, they need to establish that the Releases are being given in exchange for independent consideration. *In re Bigler,* 442 B.R. 537, 543-44 (Bankr. S,D, Tex. 2010); *In re Wool Growers Central Storage Co.,* 373 B.R. at 776 (Bankr. N.D. Tex. 2007). Except for the contribution by PDC, the Disclosure Statement fails to adequately describe the specific consideration being provided by each of the Released Parties to the Releasing Parties. Further, the Disclosure Statement fails to disclose even the identities of many of the Released Parties. The Disclosure Statement and Plan list the various released parties who are identified only by category, such as "agents," "attorneys," or "principals," and extends beyond professional parties involved with the Debtors and the bankruptcy proceedings to include unrelated parties like successors and assigns. *See Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed App'x 281, 287-88 (5th Cir. 2016) (plan that did not identify released party by name was not specific enough to release creditor's claim), citing *In re Applewood Chair Co*., 203 F. 3d 914, 919 (5th Cir. 2000) (party's status as an officer combined with boilerplate release language was not sufficiently specific to release claims).

18. In addition, the Disclosure Statement is silent as to why the Exculpation Clause is legally permissible with respect to the exculpated parties other than the official committees and their members. *See* 11 U.S.C. 1125(e).

II. The Releases contravene Section 524(e) and Fifth Circuit law.

19. One of the fundamental tenets of bankruptcy law is the granting of a discharge of a corporate debtor's remaining liabilities once creditors are paid in accordance with a reorganization plan. Section 524(e) addresses the scope of a bankruptcy discharge and states, in relevant part, that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). The purpose of

Section 524(e) is to ensure that the benefits of the bankruptcy laws are afforded only to those who submit to the burdens of the bankruptcy laws. *See, e.g.*, *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995), cert. denied, 517 U.S. 1243 (1996); *Feld v. Zale Corp.*, 62 F.3d 746 (5th Cir. 1995); *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992); *In re Western Real Estate Fund*, Inc., 922 F.2d 592, 600 (10th Cir. 1980), modified sub nom., *Abel v. West*, 932 F.2d 898 (10th Cir. 1991).

20. The Fifth Circuit has flatly rejected non-debtor releases because they contravene Section 524(e). In numerous cases, the Fifth Circuit has made clear that Section 524(e) releases only the debtor, not co-liable third parties, and prohibits non-debtor releases. *See, e.g., Feld v. Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995) ("Section 524(e) prohibits the discharge of debts of non-debtors"); *Hall v. Natl. Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997), citing *Matter of Edgeworth*, 993 F.2d 51, 53-54 (5th Cir. 1993) (Section 524(e) "specifies that the debt still exists and can be collected from any other entity that might be liable"); *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1061 (5th Cir. 2012) (the Fifth Circuit has "firmly pronounced its opposition to such releases"). In *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), the Fifth Circuit found that substantial consummation of a confirmed reorganization plan did not equitably moot consideration of non-debtor releases because such releases are "consequential to the integrity and transparency of the Chapter 11 process." *Id.* at 251. The court then proceeded to reaffirm its prior decisions and concluded:

> We find little equitable about protecting the released non-debtors from negligence arising out of the reorganization. In a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties. *[citations omitted]*. These cases seem to broadly foreclose non-consensual non-debtor releases and permanent injunctions.

Id. at 252.

21. Thus, the Fifth Circuit has rejected the notion that bankruptcy proceedings may discharge the debts or liabilities of parties other than the debtor. On its face, the Release

provision is contrary to controlling law and constitutes an impermissible violation of Section 524(e).

III. The Releases should not be approved as "consensual" because they lack independent consideration and affirmative consent.

22. The Disclosure Statement states that those voting on the Plan have an opportunity to "opt-out" of granting the Releases and that PDC is making a settlement contribution. However, a valid settlement, including a consensual release, requires: (1) affirmative consent by each Releasing Party and (2) separate and valuable consideration from each Released Party. *See, e.g.*, *In re Bigler LP*, 442 B.R. 537, 549 (Bankr. S,D, Tex. 2010) (finding that a release provision was an acceptable settlement of claims because it released claims only of parties who had consented and to whom consideration had been provided); *In re Wool Growers Central Storage Co.,* 371 B.R. 768, 776 (Bankr. N.D. Tex. 2007) (finding that releases do not violate Section 524(e) if they are consensual, given for consideration from the released parties, specific in language and integral to the plan), *citing Republic Supply Co., v. Shoaf*, 815 F. 2d 1046, 1050 (5th Cir. 1987); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 506 (Bankr. D.N.J. 1997) ("Where the creditor consents to the release, and presumably receives consideration in exchange for that agreement, it has not been forced by virtue of the discharge provisions of the code, to accept less than full value for its claim.")

A. The Releases are not consensual.

23. In the Commission's view, a release is consensual only when the affected parties are given an opportunity to grant the release separate and apart from voting on the plan by making a specific election on the ballot or non-voting notice to opt *in* to the release. By contrast,

the Plan here provides that limited partners who do not opt out are automatically bound by the Releases.

24. Courts have recognized that the determination of whether an action constitutes consent to a release is governed by contract principles. *See In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third party release,") (citations omitted); *see also Hernandez,* 628 Fed. App'x at 285 (courts regularly apply contract principles to interpret provisions of a plan) and *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 506-07 (Bankr. D.N.J. 1997) (validity of a release hinges on principles of contract law rather than the bankruptcy court's confirmation order). Under Texas law, silence and inaction generally are not sufficient to constitute acceptance of a contract. *Texas Ass'n of Ctys Gov't Risk Mgmt Pool v. Matagorda Cty.*, 52 S. W.3d 128, 132-33 (Tex. 2000), quoting 2 Williston on Contracts §6:49 (4th ed. 1991). This is because parties to a binding contract "must have a meeting of the minds and each must communicate his consent to the terms of the agreement.'" *Williford Energy Co. v. Submergible Cable Servs., In.*, 895 S. W. 2d 379, 384 (Tex. App. 1994); *see also In re Couture Hotel Corp.*, 554 B.R. 369, 381 (Bankr. N.D. Tex. 2016) ("a meeting of the minds is an essential element of an implied-in-fact contract"). And while acceptance to a contract may be implied by affirmative actions, the mere failure to object to a unilateral action does not establish agreement between two parties. *See Tubelite v. Risica & Sons, Inc., 819 S.W. 2d 801, 805 (Tex. 1991), citing Triton Oil and Gas Corp. v. Marine Contractors and Supply, Inc.,* 644 S.W. 2d 443,445 (Tex 1982).

25. This court, Judge Mullin sitting in Fort Worth, recently applied the reasoning in *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) when considering whether an opt-out election provided in connection with third party releases constituted consent. *In re Mac*

Churchill, Inc., Case No. 18-41988 –MXM-11. Judge Mullin concluded that "[t]he courts generally do agree that you have to have an affirmative opt-out and that silence really shouldn't be deemed consent." *See* Mac Churchill Transcript at 14, line 1 to 3. Accordingly, Judge Mullin ruled that the relevant release provisions, which are similar to the releases here—requiring parties to opt *out* in order to avoid being bound—violated Section 524(e) and he denied confirmation of the plan. The court noted that, unlike an opt out provision, an opt in provision is "clearly an affirmative action taken on behalf of the creditor[.]" *See* Mac Churchill Transcript at 16, line 23 to 24. The court went on to conclude, "[w]hereas if the box isn't checked, or they don't file a ballot, then it's not a release of those particular creditors' claims[.]" *See* Mac Churchill Transcript at 17, line 14 to 20.

26. Following the *Mac Churchill* decision, Judge Hale, in *In re PHI, Inc., et al.* Case No. 19-19-30923-HDH-11, concluded, "a party who does not vote one way or the other has not expressed his consent, and this court does not have the ability to force the release of a non-debtor against another non-debtor" and ruled that those parties who did not vote on the Plan could not be bound by the non-debtor third party release provisions. *See*, *PHI, Inc*. transcript at 161, line 16-25

27. Bankruptcy courts in other circuits have agreed. In *In re Chassix Holdings, Inc.,* 533 B.R. 64 (Bankr. S.D.N.Y. 2015), the bankruptcy court specifically found that where creditors and interest holders who were deemed to reject the plan, voted to reject the plan, or abstained from voting were not provided with an "opt in" mechanism, such parties had not consented to the releases proposed in the plan. *Id.* At 80-81. In doing so, the court noted that to approve releases with an "opt out" requirement for creditors who vote to reject the plan would be "little more than a court-endorsed trap for the careless or inattentive creditor," and that to imply

consent to releases based on inaction of a creditor who abstained from voting "would stretch the meaning of 'consent' beyond the breaking point." *Id.* at 79, 81, citing *In re Washington Mutual, Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011). The court concluded that with respect to creditors and interest holders who were deemed to reject the plan and hence were given no opportunity to vote or "opt in" to the releases, it would "defy common sense to conclude that those parties had 'consented' to releases." *Id.* at 81. *See also Arrowmill,* 211 B.R. at 507 (finding that a court must determine whether the creditor "unambiguously manifested assent to the release of the non-debtor from liability on its debt" in order to determine whether a release is consensual).

28. The Debtors assert that the global settlement is, in effect, a class action settlement for which an opt-out mechanism is appropriate. The Commission disagrees. The limited partners being asked to grant the release are not a certified class. For public policy reasons, the rules governing class actions require a plaintiff to opt-out to retain the right to bring a cause of action. But in the bankruptcy context, particularly in this jurisdiction, affirmative consent is required for a creditor or interest holder to give up their right to bring a cause of action by granting a release. As explained in *Chassix*, "… people who fail to respond to class action notices are bound because it is a legal consequence that the Rule specifies, and not on the theory that their inaction is the equivalent of an affirmative joinder in an action." *See*, *Chassix at 78*.

29. An opt-in mechanism allows the limited partners themselves to decide if the consideration being tendered is sufficient to convince them to release their claims. While the Debtors may argue that an opt-out mechanism allows limited partners who fail to respond to still receive their portion of the Settlement Payment, they ignore the fact that this arrangement allows the parties to the settlement agreement to determine the worth of the limited partners' claims. Here, the limited partners initially contributed nearly $180 million dollars and are now being

asked to give up claims against a number of potentially liable non-debtor parties for less than 10% of their initial investment. An interest holder's inaction, for whatever reason, should not strip them of their rights.

B. All of the Released Parties are not providing separate consideration.

30. In order for a release to reflect a valid settlement, the creditor must receive independent consideration in exchange for its agreement to the release. *Bigler,* 442 B.R. 537, 543-44; *Wool Growers,* 373 B.R. at 776; *see also Arrowmill,* 211 B.R. at 506-07. In *Bigler,* the court found that *Pacific Lumber* did not restrict the availability of releases to settle claims but that such releases "would require, *inter alia*, consent and consideration by each participant in the agreement to be valid." *Bigler*, 442 B.R. at 544. The court proceeded to approve a release of estate claims where the released party, Amegy Bank, was providing all of the funding under the plan, including payments to unsecured creditors. *See Id.* The court concluded that the release was part of a settlement of claims "for consideration, pursuant to arms-length negotiations." *Id.* Here, it is not disclosed what, if any, separate consideration is being provided by each of the Released Parties in connection with the Release. The Releases should not be approved as consensual or as part of a valid settlement of claims because the Disclosure Statement fails to show that the Released Parties, other than PDC, have provided consideration in exchange for the Releases.

IV. The Exculpation Clause provides impermissible third-party releases.

31. The exculpation clause in the Plan also effectively grants overly broad releases in contravention of Section 524(e) by providing that numerous non-debtor third parties, including PDC's former and current officers and directors, shall not be liable with respect to acts taken or omitted in connection with or related to the Chapter 11 cases. Although claims related to acts or

omissions constituting actual fraud, willful misconduct, or gross negligence are excluded, the Exculpation Clause still releases the exculpated parties from various non-scienter claims arising from the Chapter 11 cases. For example, by eliminating liability for negligent conduct, the Exculpation Clause effectively releases parties from violations of the federal securities laws that are based on strict liability or simple negligence.

32. Section 1125(e) of the Bankruptcy Code provides a limited safe harbor to non-debtors with respect to the offer or issuance of securities under a plan, provided that such persons acted in good faith and in compliance with the applicable provisions of Title 11. 11 U.S.C. §1125(e). In *Pacific Lumber*, the Fifth Circuit made clear that Section 524(e) prohibits the exoneration of non-debtors, other than official committees and their members acting within the scope of their official duties, from negligence during the course of their participation in the bankruptcy. The court stated: "[T]he 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 of Section 524(e) provided to debtors is not intended to serve this purpose." *Pacific Lumber*, 584 F.2d at 252. But the Exculpation Clause here goes far beyond the safe harbor to encompass virtually all acts or omissions in connection with the Chapter 11 cases by current and former members of numerous categories of parties, including parties only tangentially connected, if at all, to the Chapter 11 cases. This provision thus effectively exculpates an unknown number of individuals who may not have any connection to the bankruptcy proceedings.

33. Relevant here, the District Court for the Northern District of Texas recently ruled that it was clear error for the bankruptcy court to approve the debtor's exculpation provision, which provided protection for not only the debtor, but also current officers, directors, employees,

agents, advisors, or affiliates, and any of its professionals. *Dropbox, Inc. v. Thru, Inc. (In re Thru, Inc.)*, No. 17 CV 1958, No 17 CV 1959, 2018 U.S. Dist. LEXIS 179769 at 19 (N.D. Tex. Oct. 19, 2018). The Court agreed with appellant that the debtor's exculpation provision was similar to the exculpation language struck down by the Fifth Circuit in *In re Pacific Lumber*. *Id.* at 19. The District Court remanded with instructions to strike the aspects of the provision concerning the improper release of non-debtor third parties. *Id.* at 19.

34. Here, the Debtors' Exculpation Clause, protecting current and former members of various categories of parties, is significantly more expansive than the exculpation provision criticized by the District Court in *Dropbox*. Thus, the exculpation clause in the present case contravenes Section 524(e) and applicable Fifth Circuit law to the extent that it exceeds the scope of Section 1125(e).

V. The Releases effectively provide the liquidating Debtors with an impermissible discharge.

35. The exculpation, release and injunctive provisions set forth in Articles 11.2, 11.4 and 11.5, respectively, of the Plan benefit the Debtors by effectively providing them with a discharge in contravention of the Bankruptcy Code. Section 1141(d)(3) provides that a liquidating debtor cannot obtain a discharge if it has liquidated all or substantially all of its assets, does not engage in business after consummation of the plan, and the debtor would be denied a discharge under Section 727(a) of the Bankruptcy Code.[8] "[C]orporate debtors which are liquidated by [a]plan do not receive a discharge." *In re Fairchild Aircraft Corp.*, 128 B.R. 976, 981-82 (Bankr. W.D. Tex. 1991.) "Congress designed Section 1141(d)(3) to discourage trading in corporate shells." *Id.* (citing H.R. Rep. No. 595, 95th Cong. 1st Sess. 384 (1977)). "It

[8] Section 727(a)(1) of the Bankruptcy Code provides: "The court shall grant the debtor a discharge unless the debtor is not an individual". If the Debtors had filed under Chapter 7 (liquidation), they would be denied a discharge.

achieves that goal by freighting the shell with all the claims, so that any claims or portions of claims not paid by the liquidation will attach to the shell, making the shell much less attractive for use in starting up another enterprise." *Id.* As determined in *Bigler*, "An injunction preventing the post-confirmation prosecution of claims would certainly operate as a discharge of the Debtors. Accordingly, it is impermissible under the Code." See *Bigler at 545.*

36. The Debtors' assets are being purchased by PDC, and, as a result, the Debtors will not engage in business after the consummation of the plan. As a non-individual, the Debtors would be denied a discharge under Section 727(a) of the Bankruptcy Code. Thus, pursuant to Section 1141(d)(3), the Debtors should not receive a discharge.

CONCLUSION

37. WHEREFORE, for the reasons stated above, the Commission respectfully requests that the Court enter an order denying the approval of the Disclosure Statement unless: (i) limited partners will not be bound by the Releases unless they "opt in;" (ii) actual fraud, willful misconduct and gross negligence will be carved out of the Releases; (iii) the exculpation provision will be consistent with Fifth Circuit precedent; and (iv) the provisions that effectively provide a discharge to the Debtors will be deleted.

Dated: August 22, 2019
Chicago, Illinois

/s/ Jolene M. Wise
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CERTIFICATE OF SERVICE

I, Jolene Wise, do hereby certify that a copy of the foregoing OBJECTION OF THE SECURITIES AND EXCHANGE COMMISSION TO APPROVAL OF THE DEBTORS' DISCLOSURE STATEMENT has been served by the Electronic Case Filing System for the Northern District of Texas on this 22nd day of August, 2019.

/s/ Jolene M. Wise
Jolene M. Wise

Exhibit A

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (FORT WORTH)

In Re:	)	Case No. 18-41988-mxm11
	)	Fort Worth, Texas
MAC CHURCHILL, INC. D/B/A MAC CHURCHILL ACURA,	)	
	)	June 4, 2019
Debtor.	)	1:29 p.m.
----------	)	

TRANSCRIPT OF HEARING ON

AMENDED CHAPTER 11 PLAN FILED BY DEBTOR (142);

AMENDED DISCLOSURE STATEMENT FILED BY DEBTOR (143).

BEFORE THE HONORABLE MARK X. MULLIN

UNITED STATES BANKRUPTCY COURT

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PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING.

TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE

Exhibit A

is that what --

MR. BONDS: We'll check.

MR. EPPICH: We'll check with the client and --

THE COURT: I believe it's just simply 12.3 of the plan is the only provision that we're dealing with.

MR. EPPICH: Correct, Your Honor.

THE COURT: All right.

MR. EPPICH: Thank you.

THE COURT: And again, the Court's reading of the Pacific Lumber case indicates that the Fifth Circuit would probably find that -- to confirm this plan over the objection probably would not --

MR. EPPICH: Could I --

THE COURT: -- would not fare, if it were appealed in this circuit.

MR. EPPICH: Could I ask the Court the question outside of an order?

THE COURT: You may as the Court a question. Whether or not I answer it, it's a different issue.

MR. EPPICH: So I guess -- and the question would be, is an opt-in provision viewed distinctly from an opt-out provision?

THE COURT: Yes, clearly; because that's clearly an affirmative action taken on behalf of the creditor. In this case, even though the plan says if you don't approve the plan

or if you don't check the box opting out you're deemed to have opted in.

MR. EPPICH: Would that only be applicable to creditors who voted, if it's an opt-in provision, or would it be applicable to an entire class? Because it's unlikely to have a hundred percent voting.

THE COURT: It would only apply to creditors that actually checked the box to say they're agreeing not -- they're agreeing that their claims would be released.

MR. EPPICH: Thank you, Your Honor.

THE COURT: It's an affirmative action by the creditor saying I agree to the release.

MR. EPPICH: Thank you, Your Honor.

THE COURT: Whereas if the box isn't checked, or if they don't file a ballot --

MR. EPPICH: Then it's not an --

THE COURT: -- then it's not a release of those particular --

MR. EPPICH: -- it's not a release of claims.

THE COURT: -- creditors' claims.

MR. EPPICH: But they would still likely get the benefit of the payment, which is interesting to me.

THE COURT: Again --

MR. EPPICH: I'm not trying to argue. And I was just --

Exhibit B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	**Case No. 19-30923-hdh-11**
PHI, INC., et al.,	Dallas, Texas
	July 30, 2019
Debtors.	12:30 p.m.
	- DEBTORS' MOTION TO REJECT HELICOPTER LEASE WITH FIFTH THIRD EQUIPMENT FINANCE (413)
	- CONFIRMATION HEARING ON AMENDED CHAPTER 11 PLAN (687)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARLIN DEWAYNE HALE,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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The burden of proof on feasibility was on the Debtor. The standard of proof was preponderance of the evidence. The Debtor met the burden of proof clearly this afternoon. For those reasons, the Five Clients' objection is overruled.

That leaves two categories of objections. First, exculpation. The exculpation provision has been objected to by the United States Trustee and the SEC. And the United States Trustee has reached an agreement with the Debtors which limits the exculpation to Fifth Circuit precedent and also channels any claims brought against the protected persons to this Court. I accept those changes. I think those satisfy the requirements of *Pacific Lumber*. For those reasons, the SEC's objection is going to be overruled.

That brings us down to the releases. I fully understand that releases are expedient and helpful in this process. However, I cannot approve non-consensual third-party releases. The question then boils down to whether an opt-out in the Fifth Circuit would render the release consensual. That is, when a creditor votes on the plan and does not opt out, are they then bound by the release? And I think that that kind of creditor is. I think that's enough consent.

However, a party who does not vote on the plan one way or the other has not expressed his consent, and this Court does not have the ability to force the release of a non-debtor against another non-debtor.

There are two cases, I think, that are relevant that are fairly recent. The *Mac Churchill* case by Judge Mullin does a nice job of explaining this. Judge Bernstein's case in New York in *Sun Edison* does a good job of explaining that, too.

To the extent that a reviewing court reviews this ruling, the testimony of the Debtors' three witnesses was credible on the Section 1129 elements, on notice and on feasibility. I note for the record that no party in interest called a witness to put on evidence to refute the testimony of the Debtors' witnesses this afternoon.

Mr. Califano, if you want to take care of the one change about the releases in the form of an amended plan or in the confirmation order, whichever is more expedient for the Debtors, we'll be prepared to look at it either way. All right?

MR. CALIFANO: All right. Thank you, Your Honor.

THE COURT: All right. Let me just say a couple of things for the record here that I would absolutely remiss if I did not say this. We have two students sitting by me that I talked to a little bit about this case this week. This is an extraordinary result when you think about where you were. You know, just four months ago, there was potential chaos. And bringing about a reorganization in that amount of time, I think everyone that worked so hard -- and there's a number of folks that did -- should be very proud of themselves. And I

appreciate having you in my Court.

We'll be in recess.

(Conclusion of proceedings at 4:42 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling 08/01/2019

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber