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Stephen P. McKitt,
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
ROCKIES REGIONS 2006 LIMITED	§	**Case No. 18-33513-SGJ-11**
PARTNERSHIP AND ROCKIES REGION	§	
2007 LIMITED PARTNERSHIP	§	**Jointly Administered.**
	§	
Debtors-in-Possession.	§	

United States Trustee's Objection to Debtors' Disclosure Statement Under Chapter 11 of the Bankruptcy Code
(Docket Entry No. 227)

To the Honorable Stacy G. Jernigan,
United States Bankruptcy Judge:

The United States Trustee for Region 6 files this Objection (the "Objection") to Debtors' Disclosure Statement Under Chapter 11 of the Bankruptcy Code (the "Plan," Docket Entry No. 226). In support of the relief requested, the United States Trustee would show:

Summary

The United States Trustee objects to for the following reasons:

a. The Plan contain impermissible release and exculpation provisions in contravention of Fifth Circuit authority.

b. The Plan contains impermissible releases of estate professionals in contravention of professional ethics rules.

c. The release provisions are "opt-out" releases and, therefore, nonconsensual for those parties who do not return ballots opting out because there is no meeting of the minds with regard to the releases;

d. The Court may not even have the jurisdiction required to approve the releases proposed in the Debtors' disclosure statement;

e. The Debtors' disclosure statement suggests that the Debtors' seeks an impermissible discharge as a result of a liquidating plan;

f. The United States Trustee requests that language be added to the Confirmation Order and Plan that provides that no party shall be released from any causes of action or proceedings brought by any governmental agencies in accordance with their regulatory functions.

Facts

Release and Exculpation Provisions

1. Article V, Section A.3 of Disclosure Statement sets forth the following Third Pary Releases:

> **3. Third Party Releases**
>
> ***Upon the Effective Date, except as otherwise provided in the Plan and except for the right to enforce the Plan, all Persons who are entitled, directly or indirectly, to receive a distribution under the Plan, and who have not specifically opted out of this release on the Ballot by submitting the Ballot prior to the Voting Deadline in the manner set forth in the Ballot itself (the "Releasing Parties"), shall be deemed to forever release, waive and discharge 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, representatives, attorneys, professionals, advisors,***

affiliates, funds, successors, predecessors, and assigns (the "Released Parties") of and from any and all Liens, Claims, obligations, suits, judgments, damages (including consequential, punitive or exemplary damages), rights, remedies, causes of action, liabilities, encumbrances, security interests, Equity Interests or charges of any nature or description whatsoever, arising out of, relating to or connected with the following (collectively, the "Released Claims")

(i) the subject matter, allegations, or claims in the Colorado Action, and any allegations or claims that could have been raised in the Colorado Action,

(ii) the Debtors,

(iii) the Chapter 11 Cases, or

(iv) affecting property of the Debtors' Estates,

whether known or unknown, discovered or undiscovered, scheduled or unscheduled, contingent, fixed, unliquidated or disputed, matured or unmatured, contingent or noncontingent, senior or subordinated, whether assertable directly or derivatively by, through, or related to the Debtors, against successors or assigns of the Debtors and the individuals and entities listed above, whether at law, in equity or otherwise, based upon any condition, event, act, omission, occurrence, transaction or other activity, inactivity, instrument or other agreement of any kind or nature occurring, arising or existing prior to the Effective Date, all regardless of whether (a) a proof of Claim or Equity Interest has been filed or is deemed to have been filed, (b) such Claim or Equity Interest is Allowed or (c) the holder of such Claim or Equity Interest has voted to accept or reject the Plan.

The foregoing shall cover all claims, known or unknown, and the Releasing Parties waive the protections of any statute or law similar to California Civil Code Section 1542, which provides:

> **A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or settlement with the debtor or released party.**

The Releasing Parties shall acknowledge that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those that they now know or believe exist with respect to the Released Claims, but that it is their intention to hereby fully, finally, and forever settle and release all of the Released Claims known or unknown, suspected or unsuspected, that they have against the Released Parties.

2. Article I, Section E.2 of the Disclosure Statement describes the "Opt Out Rights" of third parties as follows:

> **2. Opt-Out Rights**
>
> The Plan provides for certain third-party releases for PDC and others, as more fully described in section IV.C.3(b) hereof captioned "Global Settlement" and in section 11.4 of the Plan. If any holder of an Equity Interest does not wish to consent to a release of its individual claims and causes of action (if any) against the third parties proposed to be released, the Ballot accompanying this Disclosure Statement allows you to "opt-out" of the third party releases. If you choose to opt-out, you will forfeit your allocation of the $11,130,000 payment being offered by PDC as consideration for the third party release. It is estimated that each unit holder in RR 2006 and RR 2007 who accepts the third party releases will receive an additional cash payment of approximately $800 and $880 per unit, respectively.

3. Article V, Section A.1. of the Disclosure Statement sets forth the following Exculpation provision:

> **1. Exculpations**
>
> 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 to any holder of a Claim or an Equity Interest, or any other party-in-interest, or any of their respective agents, employees, equity holders, partners, members, affiliates, funds, advisors, attorneys or agents, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of the administration of the Chapter 11 Cases, the negotiation and pursuit of approval of the Disclosure Statement, the preparation of the Plan, the solicitation of acceptances of the Plan, the pursuit of confirmation of the Plan, the funding of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, and shall be deemed to have acted in good faith in connection therewith and entitled to the protections of section 1125(e) of the Bankruptcy Code. Notwithstanding anything to the contrary contained in the Plan, section 11.2 of the Plan shall not exculpate any party from any liability based upon gross negligence or willful misconduct.

Discharge in Liquidating Plan

4. The Disclosure Statement makes clear that the Debtors' Plan is to liquidate. However, despite proposing a liquidation, the Plan provides for broad releases and exculpations for the Debtors that effectively act as a discharge.

Argument and Authority

I. The Court should decline to approve the Disclosure Statement because it is patently unconfirmable.

5. If there is a defect that makes a plan patently or inherently unconfirmable, the Court may consider and resolve that issue at the disclosure statement stage before requiring parties to proceed with solicitation of the plan and a contested confirmation hearing. *In re American Capital Equipment, LLC*, 688 F.3d 145, 153-54 (3d. Cir. 2012). *See also, In re United States Brass Corp*., 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996). The Court's equitable powers under 11 U.S.C. § 105 permit the Court to control its own docket and, therefore, to decline to approve a disclosure statement when the plan it supports may not be confirmable. *In re American Capital Equipment*, LLC, 688 F.3d at 154. A plan is patently unconfirmable when confirmation defects cannot be overcome by creditor voting and the confirmation defects relate to matters upon which the material facts are not in dispute or have been fully developed at the disclosure statement hearing. Id. at 154-55. The Plan it patently unconfirmable because it contains impermissible release and exculpation provisions, and because it attempts to give liquidating Debtors a discharge.

II. The proposed releases are impermissible under 11 U.S.C. § 524(e) and Fifth Circuit authority.

A. The proposed releases grant releases of third party claims against non-debtor third parties.

6. The Plan contains release provisions covering myriad non-debtors including: the Responsible Party, PDC, the LP Plaintiffs, and each of their respective constituents, officers, directors, principals, employees, members, predecessors, successors, managers, partners, agents, advisors, affiliates, attorneys, representatives, funds, and other professionals.

B. Article V, Section A.3 of the Disclosure Statement proposes releases of claims of non-debtor third parties against non-debtors.

7. The Fifth Circuit struck down all non-debtor releases except those releasing the unsecured creditors' committee and its members because "its members are the only disinterested volunteers" to be released. *Bank of N.Y. Trust Co. v. Off'l Unsecured Creditors' Comm. (In re Pacific Lumber Co.),* 584 F.3d 229, 253 (5th Cir. 2009) ("*Pacific Lumber*"). *See also United Artists Theatre Co. v. Walton (In re United Artists Theatre Co.),* 315 F.3d 217, 227 (3d Cir. 2003)(holding that plan release provisions did not render moot United States Trustee's appeal of indemnity provisions of financial advisor's employment agreement). The Fifth Circuit reasoned that the release of the debtors' officers, directors, and professionals should be disallowed because there was no evidence that they "were jointly liable for any…pre-petition debt. They are not guarantors or sureties, nor are they insurers." *Id.* at 252. The Fifth Circuit held that 11 U.S.C. § 524(e) was never intended to protect non-debtor parties from "any negligent conduct that occurred during the course of the bankruptcy." *Pacific Lumber,* 584 F.3d at 252. *See also In re Zale Corp.*, 62 F.3d 746, 759-60 (5th Cir. 1995) (overturning the bankruptcy court's injunction against pursuing claims against non-debtor third parties as effectively discharging a non-debtor).

8. Applying *Pacific Lumber*, the United States District Court for the Northern District of Texas, Judge A. Joe Fish, found that the bankruptcy court's approval of non-debtor releases, a permanent injunction, and exculpation provisions was "clear error." *Dropbox, Inc. v. Thru, Inc., et al. (In re Thru, Inc.),* 2018 WL 5113124, *23 (N.D. Tex. 2018) ("*Thru, Inc.*"). The *Thru, Inc.* plan released the debtor, "its officers, directors, and various other personnel from liability, except for acts or omissions made in bad faith 'in connection with or related to formulating, negotiation, implementing, confirming or consummating' the plan, disclosure statement or any plan

document." *Id*. at *22. The District Court reversed "the bankruptcy court's decision concerning the plans' injunction and exculpation provisions, and [remanded the] case to the bankruptcy court with instructions to strike aspects [of the plan paragraphs] concerning improper releases of non-debtor third parties." *Id*. at *23.

9. Article V, Section A.3. of the Disclosure Statement in these cases discusses an even broader range of released parties and even broader range of claims released. This Court should similarly require that the release, exculpation, and injunction provisions in the Plan be excised or modified so that they comply with Fifth Circuit authority and should deny confirmation until and unless such excisions or modifications are made to the Plan.

C. Release and exculpation provisions of professionals violate professional ethical obligations.

10. Attorneys practicing in federal courts in this circuit are subject both to federal and state ethics canons. The Fifth Circuit has held that federal law applies to attorney conduct in federal court. *In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992). In *Dresser Industries*, the Fifth Circuit applied the ABA Model Rules of Professional Conduct, the ABA Model Code of Professional Responsibility, and the American Law Institute's *Restatement of the Law Governing Lawyers. Id.* at 544-45. In *Dresser*, the Fifth Circuit held, after examining relevant federal ethics canons, that an attorney may not sue a client he represents in another matter. *Id.* at 544.

11. ABA Model Rule of Professional Conduct 1.8(h)(1) prohibits lawyers from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Similarly, Texas Disciplinary Rule 1.08(g) of Professional Conduct provides:

> (g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

Texas Disciplinary Rule of Professional Conduct 1.08(g).

12. The parties proposed to be released in the Disclosure Statement include financial advisors, attorneys, accountants, representatives, and other professionals, including those of the Debtors. The proposed releases therefore prospectively limit various counsels' liability to the Releasing Parties, and as such are not permissible. *In re Thru, Inc.*, 2018 WL 5113124 at *22 (finding that plan's exculpatory provisions releasing professionals and other third parties from liability incurred in connection with, among other actions, in formulating or implementing plan, were improper).

13. Furthermore, Debtors cannot unilaterally release Debtors' counsel from prospective liability given that counsel owes a duty not only to Debtors but also to the bankruptcy estate. While the Bankruptcy Code does not specifically impose a fiduciary requirement on counsel for debtors-in-possession, "[i]t is undisputed that counsel of a debtor-in-possession owes certain fiduciary duties to both the client debtor-in-possession and the bankruptcy court." *ICM Notes, Ltd. V. Andrews & Kurth, LLP*, 278 B.R. 117, 124 (S.D. Tex. 2002), *aff'd.* 324 F.3d 768 (5th Cir. 2003). Thus, while "counsel to a debtor in possession may not owe a duty directly to creditors, counsel does have an obligation to ensure the debtor properly maintains the estate." *In re Texasoil Enterprises, Inc.*, 296 B.R. 431, 435 (Bankr. N.D. Tex. 2003). *See, e.g., Pacific Lumber*, 584 F.3d at 252 (striking third-party releases of attorneys in conjunction with confirmation of plan of reorganization).

14. Finally, professionals are protected by fee review under section 330 of the Bankruptcy Code, under which the Court evaluates the reasonableness of a professional's services, including whether they were necessary to the administration of the estate or beneficial at the time the services were rendered.

D. The opt-out releases are not consensual.

15. In the Fifth Circuit, releases must be consensual. *See Pacific Lumber*, 584 F.3d at 252 (observing that prior Fifth Circuit authority "seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions").

16. Contract principals govern whether a release is consensual. *In re SunEdison, Inc*., 576 B.R. 453, 458 (S.D.N.Y. Bankr. 2017) ("*SunEdison*").

17. The *SunEdison* court, in applying New York state contract principles to opt-out releases, found that an opt-out provision in a ballot was not sufficient "consent" to the release to convert the failure to opt-out into affirmative consent to give the release. *Id.*

18. To the extent that the Debtors might argue that the laws of the State of Texas should apply to construction of the opt-out release, the laws of the State of Texas similarly hold that silence does not equal consent except under limited circumstances not applicable in this case.

19. "Courts generally agree that an affirmative vote to accept a plan that contains a third-party release constitutes an express consent to the release." *SunEdison*, 576 B.R. at 458 *Id*. "Consent through silence or inaction – 'deemed consent' – raises a more difficult question. Absent a duty to speak, silence does not constitute consent." *Id*.

20. The *SunEdison* court observed that, under New York state contract law, an offeror cannot transform an offeree's silence into acceptance when the offeree does not intend to accept the offer. *Id*. The only exceptions to this rule are (a) when the silence is misleading, (b) when

silence as consent is supported by the parties' ongoing course of conduct, or (c) when the offeree accepts the benefits of the offer despite reasonable opportunity to reject and understand that the offeror expects compensation. *Id*. at 458-59.

21. Texas law of implied-in-fact contracts is similar. "[I]n implied contracts as well as express contracts there must be shown the element of mutual agreement. But the only difference is that such agreement is expressly stated, in the one instance, and is inferred from the circumstances, in the other. A contract implied from the facts and circumstances in evidence is as binding as would be an expressed one." *Marr-Piper Co. v. Bullis*, 1 S.W.2d 572, 575 (Tex. Comm. App. 1928, judgment adopted).

22. Silence and inaction, however, will generally not be deemed assent to an offer because, with silence, there is generally no meeting of the minds. *Texas Ass'n of Ctys. Cty. 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)). "[A]s a matter of law, when a party is unilaterally informed of [a contract term], 'mere failure to object within a reasonable time . . ., without more, could not establish an agreement between the parties.'" *In re Couture Hotel Corporation*, 554 B.R. 369, 381 (Bankr. N.D. Tex 2016) (quoting *Triton Oil and Gas Corp. v. Marine Contractors and Supply, Inc.*, 665 S.W. 2d 443, 445 (Tex. 1982)). "'[A] meeting of the minds in an essential element of an implied in fact contract.'" *Id*. (quoting *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 49 (Tex. 2008)).

23. Conspicuous warnings of the effect of silence in the disclosure statement and on the plan ballots are not enough to convert a creditor's silence into consent to the release. In *SunEdison*, the debtors argued that the warning in the disclosure statement and on the ballots regarding the potential effect of silence gave rise to a duty to speak, and the nonvoting creditors'

failure to object to the plan or to reject the plan should be deemed their consent to the release. *SunEdison*, 576 B.R. at 460. The court rejected this argument because the debtors failed to show that the nonvoting creditors' silence was misleading or that the nonvoting creditors silence signified their intention to consent to the release (finding that silence could easily be attributable to other causes). *Id*. The debtors did not contend that an ongoing course of conduct between themselves and the nonvoting creditors gave rise to a duty to speak. *Id*.

24. "Charging all inactive creditors with full knowledge of the scope and implications of the proposed third-party releases, and implying a 'consent' to the third party releases based on the creditors' inaction, is simply not realistic or fair and would stretch the meaning of 'consent' beyond the breaking point." *In re Chassix Holdings, Inc.*, 533 B.R. 64, 88 (Bankr. S.D.N.Y. 2015).

25. As the court in *SunEdison* observed, parties who are solicited, but do not vote, may have failed to vote for reasons other than an intention to consent to the releases. *SunEdison*, 576 B.R. at 460.

26. On June 4, 2019, this Court, Judge Mullin sitting in Fort Worth, adopted the reasoning of the *SunEdison* court in considering similar opt-out third party releases in *In re Mac Churchill, Inc.*, Case No. 18-41988-MXM-11 ("*Mac Churchill*"). Like in *SunEdison*, Judge Mullin found that inaction in connection with an opt-out provision set forth on a plan confirmation ballot is not sufficient an affirmative action on the part of the non-voting creditor to constitute consent. "The courts generally do agree that you have to have an affirmative opt-out and that silence really shouldn't be deemed consent." *See* Transcript of Confirmation Hearing, *Mac Churchill*, June 4, 2019, p. 14, ln. 1 to 3. Judge Mullin adopted the reasoning in the *SunEdison* opinion and sustained the United States Trustee's objection to confirmation. *Id*. at ln. 4 to 8.

27. Additionally, on July 30, 2019, this Court, Judge Hale sitting in Dallas, came to a similar conclusion in *In re PHI, Inc., et al*., Case No. 19-30923-HDH-11 ("*PHI*"). In *PHI,* Judge Hale ruled that an opt-out provision does not render a third party release consensual against a party who has not expressed consent to the release, stating "a party who does not vote on the plan one way or 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." *PHI* Transcript, p. 161, ln. 22-25.

28. In a colloquy with debtor's counsel in *Mac Churchill*, Judge Mullin observed than an opt-in release would be different "because that's clearly an affirmative action taken on behalf of the creditor" and that, under his reading, the opt-out release would not pass muster as a consensual release under *Pacific Lumber*." *Mac Churchill* Transcript, p. 16, ln. 9-24.[1]

29. The Fifth Circuit, in the context of an SEC receivership, recently reaffirmed that "[t]he prohibition on enjoining unrelated, third-party claims without the third parties' consent does not depend on the Bankruptcy Code, but is a maxim of law not abrogated by the district court's equity power to fashion ancillary relief measures." *SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 842 (5th Cir. 2019) ("*Stanford*"). "No matter the euphemism, a permanent bar order is a death knell intended to extinguish the [third-party] claims, which are a property interest." *Id.* at 848. Construing a creditor's failure to opt out of a release as affirmative consent to the release is every bit as euphemistic as the injunction in *Stanford*.

[1] Judge Mullin also distinguished *dicta* from a recent opinion from the Southern District of Texas, *Cole v. Nabors Corp. Serv., Inc. (In re CJ Holding Co.)*, 597 B.R. 597 (S.D. Tex. 2019) ("*CJ Holdings*") that seems to approve of non-debtor third party releases. *Mac Churchill* Transcript, p. 15, ln. 5 to 10. The Fifth Circuit in *Pacific Lumber* similarly distinguished *Republic Supply Company v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987) ("*Shoaf*") from other Fifth Circuit authority prohibiting, non-consensual third party releases. *See Pacific Lumber*, 584 F.3d at 252 n. 27. Like in *Shoaf, CJ Holdings* essentially involved a question of *res judicata* of a confirmation order, rather than an appeal of the confirmation order in the first instance. In a collateral attack to the confirmation order, the creditor in *CJ Holdings* challenged an order enforcing the confirmation order long past the time to appeal the confirmation order, rather than appealing the order confirming a plan in the first place. *CJ Holdings*, 597 B.R. at 602-05.

30. Additionally, the ruling in *Stanford* suggests that the Court may not have jurisdiction to approve the release or settlement of third-party claims without third party consent. In that case, the Fifth Circuit held that a "court may not exercise unbridled authority over assets belonging to third parties to which the receivership estate has no claim." *Id*. at 842 The Court went on to state that bankruptcy courts lack jurisdiction to enjoin certain third party claims, such as the claims of independent vendors that are additional insureds under a debtor's policy. *Id.* (citing *In re SportStuff, Inc.*, 430 B.R. 170, 175 (8th Cir. B.A.P. 20110)). While *Stanford* was decided in the context of a receivership, the Court made clear that bankruptcy law and the law governing equity receiverships are, at times, analogous. *Id.* at 841(stating, "Courts often look to the related context of bankruptcy when deciding cases involving receiverships estates").

31. Debtors' may argue that the third party releases in this case are permissible because PDC is offering an $11,113,000.00 payment in consideration for the third party releases. However, unlike the absolute priority rule in § 1129, there is no new value exception to the requirements of § 524(e). In both *Pacific Lumber* and *Mac Churchill*, the party that would benefit from the third party releases was offering some form of consideration towards the plan. The courts in those cases still struck the releases from the plans because the issue was not consideration for the releases, but instead consent and due process in regard to the releasing parties.

32. The Court in this case should similarly decline to extinguish third parties' rights – potential claims against non-debtor third parties – without the creditors' consent by way of the opt-out releases. Rather, the Court should decline to prove the Disclosure Statement unless the Debtors amend the Plan and Disclosure Statement to provide for truly consensual releases or to excise the releases in their entirety.

III. <u>The proposed exculpation provision violates Fifth Circuit law.</u>

31. The exculpation provision included in the Plan should be modified to clarify that it complies with 11 U.S.C. § 524(e), which was never intended to protect non-debtor parties from "any negligent conduct that occurred during the course of the bankruptcy." *Pacific Lumber*, 584 F.3d at 252. In *Pacific Lumber,* the Fifth Circuit disallowed the release of the debtors' officers, directors, and professionals because there was no evidence that they "were jointly liable for any…pre-petition debt. They are not guarantors or sureties, nor are they insurers." *Id.*

32. The Fifth Circuit struck down all non-debtor releases except those releasing the unsecured creditors' committee and its members because "its members are the only disinterested volunteers" seeking release. *Id.* at 253. *See also United Artists Theatre Co. v. Walton (In re United Artists Theatre Co.)*, 315 F.3d 217, 227 (3d Cir. 2003)(holding that plan release provisions did not render moot United States Trustee's appeal of indemnity provisions of financial advisor's employment agreement). Bankruptcy Courts within the Northern District of Texas have resolved objections to exculpation provisions by replacing such provisions with channeling injunctions. *See* Memorandum Opinion and Order, Docket Entry No. 4614, *In re Pilgrim's Pride Corporation, et al.*, Case No. 08-45664-DML-11 (January 14, 2010); Fourth Amended Joint Chapter 11 Plan of CHC Group Ltd. and its Affiliated Debtors (Section 10.8), Docket Entry No. 1701, *In re CHC Group, Ltd.*, Case No. 16-31854-BJH-11, United States Bankruptcy Court for the Northern District of Texas, Dallas Division (February 16, 2017).

IV. The broad releases and injunctions of the Debtor and the liquidation of its assets are the functional equivalent of a discharge, which is not permitted in a liquidating chapter 11 plan.

33. 11 U.S.C. § 1141(d)(3) of the Bankruptcy Code provides that a liquidating debtor may not 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. The broad releases, exculpation, and injunctive provisions proposed in the Disclosure Statement and Plan act effectively as a discharge for the Debtors. A liquidating plan may not provide a discharge for a debtor through such provisions. *See In re Bigler LP*, 442 B.R. 537, 546 (Bankr S.D. Tex. 2010).

V. The Debtors should clarify that claims of governmental agencies are not released.

34. The Debtors should modify the Plan to clarify that no party shall be released from any causes of action or proceedings brought by any governmental agencies in accordance with their regulatory functions, including but not limited to criminal and environmental matters. The United States Trustee requests that the Debtors include the following language in the Confirmation Order and Plan:

> *Nothing in the Confirmation Order or the Plan shall effect a release of any claim by the United States Government or any of its agencies or any state and local authority whatsoever, including without limitation any claim arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person, nor shall anything in the Confirmation Order or the Plan enjoin the United States or any state or local authority from bringing any claim, suit, action, or other proceedings against any party or person for any liability of such persons whatever, including without limitation any claim, suit or action arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against such persons, nor shall anything in the Confirmation Order or the Plan exculpate any party or person from any liability to the United States Government or any of its agencies or any state and local authority whatsoever, including any liabilities arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person.*

Wherefore, the United States Trustee requests that the Court deny approval of the Disclosure Statement and grant to the United States Trustee such other and further relief as is just and proper.

DATED: August 22, 2019

Respectfully submitted,

WILLIAM T. NEARY
UNITED STATES TRUSTEE

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Certificate of Service

There undersigned hereby certifies that on August 22, 2019, a copy of the foregoing pleading was served via ECF to parties requesting notice via ECF.

/s/Stephen P. McKitt
Stephen P. McKitt