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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

OBJECTION OF THE SECURITIES AND EXCHANGE COMMISSION TO THE CONFIRMATION OF THE DEBTORS' AMENDED JOINT CHAPTER 11 PLAN

The United States Securities and Exchange Commission (the "SEC" or "Commission") objects to confirmation of the Debtors' Amended Joint Chapter 11 Plan (Dkt. #226) (the "Plan") 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 524(e) and 1141(d)(3) of the Bankruptcy Code and applicable law. 11 U.S.C. §§524(e) and 1141(d)(3). In support of its objection, the Commission respectfully states as follows:

PRELIMINARY STATEMENT

On August 22, 2019, the Commission objected to the approval of the Disclosure Statement on numerous grounds, including that: (i) the Disclosure Statement lacked adequate information to support the overly broad release, exculpation, and injunction provisions in the

Plan; (ii) the release and exculpation provisions in the Plan did not require affirmative consent, in contravention of Section 524(e) and applicable law; (iii) the release provisions did not include a carve-out for scienter-based conduct; and (iv) the liquidating Debtors were improperly receiving a discharge. At the hearing on approval of the Disclosure Statement on August 26, 2019, this Court overruled the Commission's objection, stating that the releases here are specific, consensual, integral to the Plan, and given for substantial consideration. The Court was "really persuaded by the unique context we have here of there having been a class action." (Tr. at 36).

To the extent that the Court did not grant final approval of the release provisions at the Disclosure Statement hearing, the Commission wishes to raise the following objections that were not fully addressed at the hearing. First, even if the Court determines that certain releases may be imposed, the releases do not have a carve-out for scienter-based behavior. As a result, they could protect non-debtors from actual fraud, willful misconduct and gross negligence, including violations of federal securities laws. With respect to the adequacy of an opt-out to establish consent, the Court seemed to rely on the comparison to class action procedure. But the Court did not apply the legal standard for the approval of a class action settlement to the purported settlement here. And the Court's finding that there was adequate consideration appeared to turn on a forthcoming showing by the Debtors that the class claims here were derivative claims. In the Commission's view, that showing has not been made. Further, the Plan also contains a provision that effectively discharges the liquidating Debtors in contravention of Section 1141(d)(3) of the Bankruptcy Code.

The Commission urges the Court to require the Debtors: (i) to delete the release provision from the Plan or, at a minimum, to amend the provision to carve out actual fraud, willful misconduct, and gross negligence; and (ii) to delete the provisions in the Plan that provide a discharge to the Debtors, or, to order a provision be added to the Plan stating that the Debtors are not entitled to a discharge pursuant to Section 1141(d)(3) of the Bankruptcy Code

BACKGROUND

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. The Plan includes an extensive list of "Released Parties" who will benefit from the Releases.[1] 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. It is not clear what consideration is being provided by <u>each</u> Released Party in exchange for their respective releases

The Plan also includes a broad injunctive provision that enjoins claim and interest holders, who do not opt out of the settlement, from various actions including the pursuit of claims that have been released, discharged, or exculpated against the Debtors and other parties. 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 Releases are overly broad and lack sufficient consideration.

[1] *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")…"

While the Court has held that certain release provisions are permissible in the Fifth Circuit, Releases that grant immunity for scienter-based behavior, such as fraud, willful misconduct, and gross negligence, go too far. Here, scienter-based claims may be released by limited partners who have not even received the solicitation materials and thus are not afforded a meaningful opportunity to opt out. Moreover, the Debtors have not shown that each released party is providing consideration. Nor have the Debtors made a sufficient showing that the claims being released are of limited value because they are derivative claims. Thus, the Releases should be denied both as a matter of law—because the majority of parties that benefit from such extraordinary relief did not provide independent and substantial consideration to the Releasing Parties—and as a matter of public policy—because they deprive public investors of critical protections under the federal securities laws.

A. The Releases fail under the Bankruptcy Code and applicable law because they lack independent consideration.

The Releases here fail to meet the most basic requirement of a valid settlement: separate and valuable consideration from each Released Party. *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 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. The Released Parties include the Debtors, the Post-Confirmation Debtors, the Responsible Party, PDC, the Limited Partners and, with respect to each named party, fifteen additional categories of parties. Of these named parties, only PDC has provided consideration for the Plan and certain Releasing Parties. The remaining named parties and their numerous additional parties are not providing specific consideration in return for their respective Releases.

The Debtors' argument that the Released Parties are providing consideration in exchange for the Releases by giving mutual releases to all other Released Parties is also not persuasive. There is little information about the nature of any potential claims that could exist against the limited partners. It is hard to imagine that such claims could be significant. To the extent that Debtors intend to show that the limited partners are also releasing claims of limited value because their claims are derivative claims, they have not yet made a sufficient showing to support this argument. These so-called "mutual releases" certainly do not warrant granting a release with respect to actual fraud, willful misconduct, and gross negligence.

B. The Releases violate public policy by preventing investors from pursuing legitimate claims against wrongdoers.

Because of the lack of a carve-out here for actual fraud, willful misconduct, and gross negligence, investors may be precluded from bringing suits against these non-debtors for violations of the federal securities laws and other fraud-based claims. Granting releases of securities laws violations under a Chapter 11 plan awards the released parties a benefit that they could not obtain in their own individual bankruptcy cases because securities fraud claims are deemed non-dischargeable under Section 523(a)(19) of the Bankruptcy Code.

C. The settlement here, including the Releases, does not satisfy the legal standard to be approved as a class action settlement.

At the Disclosure Statement hearing, in support of the opt-out election, Debtors' counsel compared the proposed settlement to a class action settlement. (Tr. at 15). The Court stated that "facts matter" (Tr. at 18, 26, 31) and continued "…I am really persuaded by the unique context we have here of there having been a class action." (Tr. at 36). However, there has been no factual showing that the proposed settlement, including the release of claims for actual fraud, willful misconduct and gross negligence, is fair, reasonable, and adequate, or that the putative class was adequately represented, as required by the statutes governing class action settlements. Fed. Rules Bankr. Proc. Rule 7023, 11 U.S.C.A.; Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A .

Typically, the review of a proposed class action settlement involves two steps. First the settlement must be preliminarily approved, and then it must be approved on a final basis after a fairness hearing. In the interim, notice is provided to potential class members. For a settlement to be approved in a bankruptcy court, the settlement must be both procedurally and substantively fair under Fed. Rule Civ. Proc. Rule 23 and Fed. Rule Bankr. Proc. Rule 9019. *See McNamara v. Bre–X Minerals Ltd., 214 F .R.D. 424, 427 n. 2 (E.D.Tex.2002); In re WorldCom,* 347 B.R. 123, 143-49 (Bankr. S.D.N.Y. 2006). The Court assesses the fairness of the settlement by examining its terms and the negotiation process leading to the settlement. *See D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2nd Cir. 2001).

Here, there has been neither an assessment by the Court as to the fairness, reasonableness and adequacy of the proposed settlement as required by Rule 23(e), nor a showing by the Debtors that these factors are satisfied by the proposed settlement. And there has been no judicial determination that the LP Plaintiffs and their counsel adequately represented the putative class of limited partners as required by Fed. Rule Civ. Proc. 23(e)(2)(a).

The Court's treatment of this settlement as analogous to a class action should be informed by the statutes governing class action settlements, generally Fed. Rule Civ. Proc. 23, and specifically, Fed. Rule 23(e). But the Debtors have not provided factual support for the proposition that the consideration being offered to the limited partners is fair, reasonable and adequate, where the limited partners are being asked to release causes of action against PDC and others constituting actual fraud, willful misconduct and gross negligence without a meaningful showing as to the value of these claims.

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

The exculpation, release and injunctive provisions set forth in Articles 11.2, 11.4 and 11.5 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.[2] "Congress designed Section 1141(d)(3) to discourage trading in corporate shells." *In re Fairchild Aircraft Corp*., 128 B.R. 976, 981-82 (Bankr. W.D. Tex. 1991) (citing H.R. Rep. No. 595, 95th Cong. 1st Sess. 384 (1977)). "It 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*.

The Debtors' assets are being purchased by PDC and the Debtors will not engage in business after the consummation of the plan. Thus, pursuant to Section 1141(d)(3), the Debtors

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[2] 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.

should not receive a discharge, including a discharge disguised as an injunction. "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.*

CONCLUSION

WHEREFORE, for the reasons stated above, the Commission respectfully requests that the Court require the Debtors: (i) either to delete the release provision from the Plan or to amend the provision to carve out actual fraud, willful misconduct and gross negligence: and (ii) to delete the provisions that effectively provide a discharge to the Debtors, or, to order a provision be added to the Plan stating that the Debtors are not entitled to a discharge pursuant to Section 1141(d)(3) of the Bankruptcy Code.

Dated: September 27, 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 THE CONFIRMATION OF THE DEBTORS' AMENDED JOINT CHAPTER 11 PLAN has been served by the Electronic Case Filing System for the Northern District of Texas on this 27nd day of September, 2019.

/s/ Jolene M. Wise
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