

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
PES HOLDINGS, LLC, et al¹)	Case No. 18-10122 (KG)
)	
Debtors.)	(Jointly Administered)
)	
)	<u>Hearing Date:</u>
)	March 26, 2018 at 10:00 a.m.
)	
)	<u>Objection Deadline:</u>
)	March 19, 2018 at 4:00 p.m.
)	
)	Re: Docket No. 9, 240, 245, 257.
)	

**UNITED STATES TRUSTEE’S OBJECTION TO THE FIRST AMENDED
JOINT PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION
OF PES HOLDINGS, LLC AND ITS DEBTOR AFFILIATES**

I. Preliminary Statement

Generally a plan divides creditors into classes, describe each class’s treatment, and permits impaired classes to vote. Under the Debtors’ plan, general unsecured creditors’ claims are to be either paid in full in cash on the Effective Date or paid on the “date due” in accordance with the underlying contract or agreement. Here, general unsecured creditors’ claims are treated as if they “pass through” the bankruptcy cases as if they were never filed, but they never had the opportunity to vote on the Plan as their claims are deemed unimpaired. However, the Plan’s releases, injunctions, exculpations, discharge and asset vesting provisions apply upon the Effective Date, and forcing such creditors to grant releases, enjoining them from taking action,

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: PES Holdings, LLC (8157); North Yard Financing, LLC (6284); North Yard GP, LLC (5458); North Yard Logistics, L.P. (5952); PES Administrative Services, LLC (3022); PES Logistics GP, LLC (9202); PES Logistics Partners, L.P. (1288); PESRM Holdings, LLC (2107); and Philadelphia Energy Solutions Refining and Marketing LLC (9574). The Debtors’ service address is: 1735 Market Street, Philadelphia, Pennsylvania 19103.

limiting the fora in which they can pursue claims, curtailing rights otherwise available under state law (like interest, setoff, recoupment, and the right to amend claims because of later-discovered evidence) and vesting property out of their reach unequivocally impairs their claims. Since the Plan deems these claims as unimpaired, and these creditors did not have the opportunity to vote (and in some cases may not even know about the Debtors' bankruptcy cases), the Debtors' solicitation was improper and their Plan is unconfirmable.

Releases may only be granted if they are allowed under the law, reasonable, and in the best interests of the bankruptcy estates. The Plan acts to release unknown, future, and undiscoverable claims against a broad swath of related persons and entities. The releases act to release not only the claims of the Debtors (who themselves have consented and are aware), but those of their creditors and shareholders, who have not.

The Plan's releases are only appropriate (if they can be granted at all) if the released parties demonstrate that they have all provided consideration and all releasing parties have knowledge of and an opportunity to object to the releases. Not so here. Most unsecured creditors in these cases have had no notice of the releases. The releases act to bar future claims, even if parties later discover them and would otherwise be permitted (outside of bankruptcy) to pursue them. The Debtors have not met their burden and may not grant or receive the requested releases. The Plan therefore cannot be confirmed as proposed.

II. Jurisdiction and Factual Background

1. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to Title 11 of the United States Bankruptcy Code. Section 586(a)(3)(G) mandates that the U.S. Trustee monitor "...the progress of cases under title 11" and further requires that the U.S. Trustee take "such actions as the United States trustee

deems to be appropriate to prevent undue delay in such progress.” Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to be heard in this matter.

2. On January 21, 2018, PES Holdings, LLC and 8 affiliates filed voluntary chapter 11 bankruptcy cases. They filed their Plan of Reorganization (D.I. 9) with their petitions and other first day pleadings. Before filing their petitions, the Debtors solicited votes on their Plan from the Term Loan A and the Term Loan B claimants, the only classes entitled to vote. The Plan classified unsecured creditors’ claims as “unimpaired”—they are described by the Plan and the solicitation materials as receiving cash in an amount equal to their Allowed General Unsecured Claim² on the later of: (i) the Effective Date; or (ii) the date due in the ordinary course of business in accordance with the terms and conditions of the particular transaction or agreement giving rise to such Allowed General Unsecured Claim. These cash payments are in full and final satisfaction of the general unsecured claims and these creditors were presumed to accept the Plan and were not entitled to vote. The Debtors also filed a motion asking for approval of their proposed post-petition solicitation procedures and plan confirmation timeline. (D.I. 37).

3. On January 29, 2018, this Court entered an order approving the Debtors’ Disclosure Statement, the post-petition solicitation procedures, approving the Confirmation Hearing Notice, and granting other related relief. (D.I. 125).

4. On March 16, 2018, the Debtors filed a Notice of Filing of First Amended Joint Prepackaged Chapter 11 Plan of Reorganization and submitted a First Amended Joint Prepackaged Chapter 11 Plan of Reorganization for confirmation (D.I. 257) (“First Amended Plan”).

² “General Unsecured Claim” means any Claim other than an Administrative Claim, a Professional Fee Claim, a Secured Tax Claim, an Other Secured Claim, a Priority Tax Claim, an Other Priority Claim, a Refining ABL Claim, a Term Loan Claim, an NGL Facility Claim, an Intermediation Claim, or a DIP Facility Claim. See Article I, ¶ 74 of the First Amended Plan.

5. The Debtors' First Amended Plan contains provisions concerning the discharge, release, exculpation, limitation of liability that, among other things³:

- Discharges the Debtors from any and all claims, interests and causes of action (including the RIN Liabilities) of any nature whatsoever from and after the Petition Date, whether known or unknown as of the Effective Date and the Confirmation Order shall act as a judicial determination of such discharge:
- Compromises and settles all claims, interests, causes of action, and controversies otherwise released, settled, compromised, discharged, satisfied, or resolved under the Plan and the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise and settlement of all such claims, interests, causes of action, and controversies;
- Releases the Debtors, Reorganized Debtors and many other non-debtor parties from any and all causes of action, that such creditors and parties would have been legally entitled to assert;
- Permanently enjoins all Entities from taking any actions and enforcing their rights against the Debtors, the Reorganized Debtors, Exculpated Parties, or the Released Parties from enforcing any and all of their rights and remedies in connection with or with respect to, among other things, claims or interests and asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such claims or interests unless such Entity has timely asserted such setoff right in a document filed with the Bankruptcy Court explicitly preserving such setoff, and notwithstanding an indication of a claim or interest or otherwise that such Entity asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise.

6. Although the Debtors' intent is to essentially allow unsecured creditors to "pass through" as though the Debtors had not filed for bankruptcy⁴, the effect of the above provisions are to convert a "pass-through" plan into a "pay-in-full" plan. The former allows claims to pass through the bankruptcy as if it had never been filed, while the latter pays 100% of all filed claims after the Debtors file schedules, attend a section 341 meeting to be examined about their

³ See, e.g., Article I, A, ¶¶ 10, 18, 25, 56, 66, 159, 212; Article IV, Sections A, F; Article VIII, Sections A-C, E-F, of the First Amended Plan.

⁴ General unsecured claims against the Debtors, including trade claims, will be paid in full as they come due in the ordinary course of business. See, Debtors' Disclosure Statement at p. 32 (D.I. 10).

financial affairs, set a bar date, and review and object to filed claims. The Debtors must choose – they cannot pick elements from both. Based on these issues, the U.S. Trustee brings this objection.

III. Law and Argument

A. Unimpaired classes under the Plan are impaired and entitled to vote.

7. Unless a Plan “leaves unaltered the legal, equitable, and contractual rights” to which a claimant is entitled, that claim is impaired.⁵ Impaired claims are entitled to vote.⁶

8. The Debtors’ First Amended Plan provides that general unsecured claims will receive, in theory, a cash distribution in full and final satisfactions of their claims. But the Court waived the requirement that the Debtors file schedules, and the Debtors have not moved to set a bar date. Thus, the Plan cannot operate as a “pay in full” plan – to do so, the Debtors would have to file schedules, set a bar date, allow creditors to file proofs of claim, and object if necessary. Otherwise, the Debtors do not know the universe of claims against them, and creditors and other parties in interest do not know what the Debtors think they are owed. This leaves the Debtors to proceed with the Plan as a “pass through” plan. Under this type of Plan, the Debtors must leave the legal, equitable, and contractual rights of unimpaired creditors completely and wholly unaltered. The First Amended Plan does not.

9. Instead, the Plan’s releases, injunctions, discharge, and asset-vesting provisions are effective upon the Effective Date, while supposedly unimpaired creditors, who may not necessarily be paid on the Effective Date, but paid if such claims are otherwise allowed.⁷ In

⁵ 11 U.S.C. §1124(1).

⁶ 11 U.S.C. §1126(a).

⁷ General Unsecured Creditors are slated to be paid the later of: (i) the Effective Date; or (ii) the “date due” in the ordinary course of business of such particular transaction or agreement giving rise to such claim. Since the Effective

addition, these creditors lose the right to pursue any exculpated or released party, or a wide universe of people and entities related to those parties for any claims (even claims that do not yet exist). Outside of bankruptcy, these creditors would retain all claims against any party that might be liable to them legally or equitable until fully paid (and possibly beyond). The Plan's release provisions fundamentally alter these creditors' rights and impairs their claims. As impaired claimants, they are entitled to vote. But this First Amended Plan does not allow it.

10. However, there is a simple fix for this problem. If the releases, injunctions, discharge and other provisions that alter claimants' rights do not become effective until these creditors are fully paid, the problem is resolved. If the following definition of "Unimpaired" (substantially similar to language approved *In re Everyware Global, Inc.* (15-10743-LSS) (Bankr. D. Del.) and *In re Allen Systems*, (15-10332) (Bankr. D. Del.) is substituted, the Debtors can truly state that unimpaired creditors are truly unimpaired:

Unimpaired Claims. Despite any term of the Plan or Plan Documents to the contrary, until a pre-Effective Date Claim in Class 9 has been (x) paid in full in accordance with applicable law, or on terms agreed to between the holder of such Claim and the Debtors or Reorganized Debtors, or in accordance with the terms and conditions of the particular transaction giving rise to that Claim or (y) otherwise satisfied or disposed of as determined by a court of competent jurisdiction: (a) the provisions of Article IV, Section A and Article VIII, Sections A through E of the Plan shall not apply or take effect with respect to that Claim, (b) that Claim shall not be deemed settled, satisfied, resolved, released, discharged, or enjoined by any provision of the Plan or the Plan Documents, and (c) the property of each of the Debtors' Estates that vests in the applicable Reorganized Debtor pursuant to Article IV, Section F of the Plan shall not be free and clear of that Claim. Holders of Claims in Class 9 shall not be subject to any claims resolution process in Bankruptcy Court in connection with their Claims. Holders of Claims in Class 9 shall retain all their rights under applicable non-bankruptcy law to pursue those Claims

Date is the first business day after the Confirmation Date when all of the conditions precedent to the occurrence of the Effective Date have either been satisfied or waived, it appears that many of the general unsecured claims will be satisfied on the "date due" of each claim. However, the term "date due" is not defined and will undoubtedly be subject to interpretation, negotiation and dispute.

against the Debtors or Reorganized Debtors in any forum with jurisdiction over the parties and all parties shall retain all defenses, counterclaims, rights to setoff, and rights to recoupment as to those Claims. If the Debtors or the Reorganized Debtors dispute any Claims in Class 9 such dispute shall be determined, resolved or adjudicated as if the Debtors had not filed their Chapter 11 Cases.

11. Unless and until the Debtors either insert similar language or solicit unimpaired creditors' votes, the Plan cannot be confirmed.

B. The Plan's Releases are inappropriate because they are prospective, too broad, and largely non-consensual.

12. In general, Debtors and third parties may grant releases to non-debtors if the releases are consensual.⁸ However, non-consensual third party releases of non-debtors may be approved under "special circumstances" if the releases are fair, necessary to the reorganization, and the Debtors present facts sufficient to enable the Court to make those findings.⁹ Courts use five factors, none of which are exclusive or conjunctive, to evaluate fairness: identity of interest between the debtor and non-debtor, substantial contribution by the non-debtor, the necessity of the release to the reorganization, overwhelming acceptance of the release by creditors, and payment of all claims and interest holders under the plan.¹⁰ Simply performing duties that the bankruptcy process requires, such as negotiating and proposing a plan, is not a contribution that

⁸ *In re Washington Mutual, Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) ("any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases").

⁹ *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000) ("[W]e have found no evidence that the non-debtor D & Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability").

¹⁰ *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del 1999).

entitles a third party to a non-consensual release.¹¹ Without evidence of contribution, and the identification of each party receiving a release, non-consensual third party releases should not be approved.¹²

13. The Plan grants broad releases to many non-Debtor parties both by the Debtors and by creditors and other parties in interest. Unimpaired creditors, including general unsecured creditors who cannot vote, did not consent to these releases. These parties are not only unknowingly releasing their present claims; they are releasing claims that do not yet exist, but that may exist in the future (“existing or hereafter arising”). They are also releasing a multitude of wide-ranging and tangential claims, which may have only nominal relation to the Debtors. The Plan’s release language further releases claims that parties may not yet know about, may discover in the future, or about which they may discover new information. In other words, creditors that cannot vote, and who are told they are “unimpaired”, are releasing all past, present, and future claims that may in any way, however remote, relate to the Debtors, regardless of whether they know about them and are doing so before the Debtors are required to pay them. Even worse, these releases (and injunctions, and exculpations) take effect on the Effective Date, yet the Debtors not only retain all of their own rights but get an immediate discharge. It cannot be that any party forced to give these releases and that is thereby affected is unimpaired. The Plan’s releases are inappropriate and too broad, both in the parties being released, the parties doing the releasing, and the time period covered. The Debtors have the burden of proving that

¹¹ *Washington Mutual, Inc.*, 442 B.R. at 354 (“[T]here is no basis for granting third party releases of the Debtors’ officers and directors, . . . [as] [t]he only ‘contribution’ made by them was in the negotiation of the Global Settlement and the Plan, [which] activities are nothing more than what is required of directors and officers of debtors in possession (for which they have received compensation and will be exculpated) . . .”).

¹² *See id.* (disallowing releases in favor of unidentified affiliates because of lack of evidence as to the identity of the affiliates and why each should get a discharge without its own bankruptcy case).

each release is fair and necessary, that each releasing party consented, and that each released party contributed to the reorganization. The Debtors have failed to meet that burden. Thus, the releases should not be approved.

C. The Plan contains other, equally problematic, provisions.

14. Other provisions of the Plan also act to impair creditors that the Debtors claim are otherwise unimpaired:

- The disputed claims provision under Article VII acts to impose an involuntary bar date upon creditors without notice or due process.
- The Bankruptcy Court's exclusive retention of jurisdiction under Article XI also deprives creditors of the right to select a forum and forces them into bankruptcy court.
- Article VIII, K acts to abridge rights of creditors to assert subordination rights among each other, and also precludes those creditors' creditors (who could not possibly have received notice of the Plan) from exercising their rights.

IV. Conclusion

15. The Plan impairs supposedly unimpaired creditors and does not allow them to vote. It contains release provisions that are too broad and that are not supported by the evidence. The Plan should not be confirmed in its present form.

16. The U.S. Trustee reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter, amend and/or modify this Objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery and cross-examine any and all witnesses in support of the Motion.

WHEREFORE, the U.S. Trustee respectfully requests that this Court grant relief consistent with this Objection and/or granting such other relief as this Court deems appropriate, just and appropriate.

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE
REGION THREE

Dated: March 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2018, I caused to be served a copy of the United States Trustee’s Objection to the First Amended Joint Prepackaged Chapter 11 Plan of Reorganization of PES Holdings, LLC and its Debtor Affiliates via email and/or regular mail upon the following persons:

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