IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
PES HOLDINGS, LLC, *et al.*,[1]	)	Case No. 19-11626 (KG)
Debtors.	)	(Jointly Administered)
	)	**Objection Deadline: November 27, 2019@ 4:00p.m.** **Hearing Date: December 11, 2019 @ 11:00 a.m.**

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY OF INFORMATION IN THE DISCLOSURE STATEMENT, (II) APPROVING THE SOLICITATION AND NOTICE PROCEDURES, (III) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, (IV) SCHEDULING CERTAIN DATES WITH RESPECT THERETO, AND (V) GRANTING RELATED RELIEF (D.E. 464, "Motion")

Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), through his undersigned attorneys, objects to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving The Forms Of Ballots And Notices In Connection Therewith, (IV) Scheduling Certain Dates With Respect Thereto, And (V) Granting Related Relief (D.E. 464, "Motion") and states as follows:[2]

PRELIMINARY STATEMENT

The Disclosure Statement in its present form does not satisfy the adequate information standard of 11 U.S.C. § 1125 and should not be approved. The Disclosure Statement omits material financial disclosures, was filed without a liquidation analysis or other supporting

[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 GP, LLC (5458); North Yard Logistics, L.P. (5952); PES Administrative Services, LLC (3022); PES Energy Inc. (0661); PES Intermediate, LLC (0074); PES Ultimate Holdings, LLC (6061); and Philadelphia Energy Solutions Refining and Marketing LLC (9574). The Debtors' service address is: 1735 Market Street, Philadelphia, Pennsylvania 19103.

[2] Terms shall have the same meaning given them in the Plan, Disclosure Statement or Motion unless otherwise noted herein.

financial disclosures.[3] The Disclosure Statement does not provide adequate information concerning the Plan's feasibility or whether the Plan will pay to the creditor body not less than it would receive if the case were a case under Chapter 7 of the Bankruptcy Code. The Disclosure Statement also fails to provide adequate information about the proposed post-confirmation oversight and operations, because materials germane to the funding and performance of the Plan and issues affecting executory contracts are being withheld until the Plan Supplement is filed. For these reasons, the United States Trustee urges that the Court not approve the Disclosure Statement as drafted, and require its amendment so as to provide adequate information to voters as required by 11 U.S.C. § 1125. The United States Trustee also urges that certain problematic aspects of the Plan be addressed at this time, so that the various requirements of 11 U.S.C. § 1129 can be satisfied if the Debtors obtain the necessary acceptances from those who cast votes on the Plan.

JURISDICTION

1. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine this objection.

2. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U.S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U.S. Trustee has "public interest

[3] On November 26, 2019, the Debtors filed D.E.613, entitled "Notice of Filing of Exhibit C Liquidation Analysis to Corrected Disclosure Statement for the Joint Chapter 11 Plan of PES Holdings, LLC and its Debtor Affiliates." This document states opinions and conclusions but provides no facts.

standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

3. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment on such plans and disclosure statements.

4. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Plan and Disclosure Statement and the issues raised in this objection.

PLAN OVERVIEW

5. The Plan proposes what is referred to as an Asset Sale Restructuring or Equitization Restructuring.[4] The former contemplates a sale of all or substantially all assets. The latter contemplates a recapitalization and reorganization of the existing Debtors. However, as of the preparation of this objection, no buyer has materialized, nor is there evidence of any commitment to make an equity investment in or provide exit financing to the Debtors. Without one or the other transaction, there is no way of knowing whether either or both will support a feasible plan that can meet the confirmation conditions of 11 U.S.C. §1129(a). In short, the Disclosure Statement is premature.

[4] The definition of Asset Sales (Plan I.A.7) means: "…the sale or sales of all, or substantially all, or certain of the Debtor's assets under this Plan pursuant to an Asset Purchase Agreement…" The definition of Equitization Restructuring (Plan I.A.52) means: "the transactions and reorganization contemplated by, and pursuant to, this Plan in accordance with Article IV.E. of this Plan, under which the new PES Interests are distributed, among other things."

STATEMENT OF FACTS

6. On July 21, 2019, the Debtors filed their petitions. All of the cases have been ordered jointly consolidated for administrative purposes. On August 5, 2019, the U.S. Trustee appointed an Official Committee of Unsecured Creditors.

7. The Debtors filed the Plan on October 10, 2019 ("Plan," D.E. 462). The Disclosure Statement, with no financial exhibits, was also filed on October 10, 2019. A corrected Disclosure Statement was filed on October 10, 2019 ("Disclosure Statement", D.E. 465), also with no financial exhibits. The Motion was filed on October 10, 2019.

8. The Claims Bar Date was October 21, 2019. The Governmental Claims Bar Date is January 17, 2020 (See D.E. 255). According to the website maintained for the Debtors' by its Claims and Noticing Agent, Omni, as of November 27, 2019, 506 claims have been filed in the aggregate amount of $1,759,120,764.40, including approximately $42 million in administrative claims, $38.7 million in priority claims and $813 million in unsecured claims. According to the Declaration of Jeffrey S. Stein, Chief Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Motions ("Stein Declaration", D.E. 32), the aggregate secured debt existing on the Petition Date was $1,750,081.016.

9. The Debtors filed their various Schedules of Assets and Liabilities on September 6, 2019 at Docket Entries 308-323. Only two of the eight Debtors listed assets with a value in their Schedules. Debtor North Yard Logistics, L.P. (19-11628) scheduled assets with a value of $64,787,686.99 (D.E. 310). Debtor Philadelphia Energy Solutions Refining and Marketing LLC (19-11633), the Debtor's primary operating entity, scheduled assets with a value of $903,413,030.37 (D.E. 473). The aggregate value of the scheduled assets is $968,200,717.36.

The value of the scheduled assets does not account for potential insurance claims recoverable by the Debtors.

10. The Plan divides claimants into four unclassified and nine classified groups of claims. Administrative, Priority, and Other Secured Claims are unimpaired. Intercompany Claims and Interests are unimpaired if the Plan results in an Equitization Restructuring. Intercompany Claims and Interests are impaired if the Plan results in an Asset Sale Restructuring. Secured and General Unsecured Claims are impaired irrespective of the means of performance the Plan ultimately takes.

11. The definition of Exculpated Parties includes direct and indirect equityholders (Plan I.A.54).

12. The Plan defines a number of reserve funds including a GUC Distribution Reserve (Plan I.A.66), Other Secured Claims Reserve (Plan I.A.100), Priority Claims Reserve (Plan I.A.118), Professional Fee Reserve (Plan I.A.123), and a Wind Down Reserve (Plan I.A.170). The Disclosure Statement does not disclose how much money will be deposited into or required for each of these funds. See Article VIII.B of the Plan.

13. The definition of Releasing Parties (I.A.128) includes: "…all Holders of Claims and Interests not described in the foregoing clauses (a) through (j); ***provided however,*** **that any Holder of a Claim or Interest that opts out of the releases in the Plan shall not be a releasing party."** (emphasis in original).

14. Plan section IV.A. reads in full as follows:

> Pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, distributions, releases, and other benefits provided under the Plan, on the Effective Date, the provisions of the Plan shall constitute a good-faith compromise and settlement of all Claims, Interests, Causes of Action, and controversies released, settled, compromised, discharged, satisfied, or otherwise resolved pursuant to the Plan. The Plan shall be deemed a motion to

approve the good-faith compromise and settlement of all such Claims, Interests, Causes of Action, and controversies pursuant to Bankruptcy Rule 9019, and the entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of such compromise and settlement under section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, as well as a finding by the Bankruptcy Court that such settlement and compromise is fair, equitable, reasonable, and in the best interests of the Debtors and their Estates.

15. Plan Section X.A reads in full as follows:

Pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019 and in consideration for the distributions and other benefits provided pursuant to the Plan, the provisions of the Plan shall constitute a good-faith compromise and settlement of all Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that a Holder of a Claim or Interest may have, or any distribution to be made on account of such Allowed Claim or Allowed Interest. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all Claims, Interests, and controversies, as well as a finding by the Bankruptcy Court that such compromise or settlement is in the best interests of the Debtors, their Estates, and Holders of Claims and Interests and is fair, equitable, and reasonable. In accordance with the provisions of the Plan, pursuant to Bankruptcy Rule 9019, without any further notice to or action, order, or approval of the Bankruptcy Court, after the Effective Date, the Reorganized Debtors or the Plan Administrator, as applicable, may compromise and settle anyClaims and Causes of Action against other Entities.

16. Section X.B of the Plan provides for a discharge of the Debtors irrespective of whether an Asset Sale Restructuring or Equitization Restructuring takes place as the means to perform the Plan.

17. Plan Section X.F reads in pertinent part as follows:

Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the third-party release set forth above, which includes by reference each of the related provisions and definitions contained herein, and further, shall constitute the Bankruptcy Court's finding that the third-party release set forth above is: (1) in exchange for the good and valuable consideration provided by the Released Parties; (2) a good faith settlement and compromise of the claims released by the Releasing Parties;(3) in the best interests of the Debtors and all Holders of Claims and Interests; (4) fair, equitable, and reasonable; (5) given and made after notice and opportunity for hearing; and (6) a bar to any of the Releasing Parties asserting any Claim released by the third-party release set forth above against any of the Released Parties. (Emphasis in original).

18. Plan Section X.G provides for exculpation of estate fiduciaries. This provision includes the following language: "…in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan."

SUMMARY OF ARGUMENT

19. Until the Debtors receive a binding bid for prosecution of the Plan as Asset Sale Restructuring, or one or more commitments for exit financing and/or new investment capital for prosecution of an Equitization Restructuring, the Disclosure Statement is premature. It is not presently possible to provide claimants and parties in interest with the most fundamental information required in a disclosure statement, namely how much will a creditor receive and when will they receive it? The Disclosure Statement is devoid of any meaningful information in this regard and will be until a transaction materializes. The Disclosure Statement provides no meaningful dividend projections, provides no record to aid in determining whether the Plan is feasible and contains no material disclosures to aid in determining if the Plan will pay creditors not less than they would receive if the case were one under chapter 7 of the Bankruptcy Code. In addition to the material flaws of the Disclosure Statement, the Plan is not confirmable because, among other things, it provides for a discharge when the Debtors may not be entitled to a discharge attempts to impose a 9019 settlement standard upon parties who have not agreed to a settlement, seeks to exculpate non-estate fiduciaries and seeks to deprive claimants of their rights of recoupment.

ARGUMENT

I. The Disclosure Statement Fails to Provide Adequate Disclosure

A. General Considerations

20. Section 1125 of the Bankruptcy Code prohibits solicitation of votes on a

reorganization plan prior to court approval of a written disclosure statement, which contains "adequate information." *See* 11 U.S.C. § 1125(b).

21. "Adequate information" is defined in section 1125 as being:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of debtor's books and records, that would enable a reasonable hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan.

11 U.S.C. § 1125(a)(1).

22. The disclosure statement requirements of Section 1125 are "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (*citing Oneida Motor Freight, Inc. v. United Jersey Bank* (*In re Oneida Motor Freight, Inc.*), 848 F.2d 414 (3d Cir. 1988)).

23. "Adequate information" under § 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with debtors over proposed plans. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94 (3d Cir. 1988).

24. The Disclosure Statement was filed devoid of any material financial disclosures. There is no disclosure as to the estimated amount of claims for either any class of claims identified in the Disclosure Statement, whether classified or unclassified. There is no liquidation analysis. The purported liquidation analysis filed on November 26 contains no financial information. All of this information is germane to a party in interest's decision to accept or

reject the Plan. Without this information, no one can determine what they may receive and when they may receive it. Without this information there is an inadequate record to determine whether or not the Plan is feasible or if it will satisfy the best interests of creditor test. Unsupported opinions and conclusions are not facts.

25. The U.S Trustee cannot overemphasize the materiality of the omitted facts. Among other things, financial disclosures will disclose the amounts necessary to pay unclassified administrative and priority claims which are required to be paid in full except to the extent a claimant agrees to accept a lesser amount pursuant to Bankruptcy Code section 1129(a)(9). Unless claimants entitled to priority treatment are paid in full, the Plan is not confirmable. The amount necessary to fund the various reserve funds defined in the Plan should be shown in the Disclosure Statement. The disclosure of material financial information is as important in this case as the text of the Disclosure Statement. One function of the elongated 28 day objection period is so that a disclosure statement, including its exhibits, can be vetted with parties in interest. When the material financial information that should be included in a Disclosure Statement is not filed in a timely manner, a full vetting process is not possible.

26. The U.S. Trustee has made numerous recommendations to the Debtors regarding revisions to the Disclosure Statement, including the following:[5]

a) Provide estimates of the amount of claims in each category and project the percentage of recovery;

b) Provide a liquidation analysis;

c) Provide future projections so parties in interest can assess the prospects for future recoveries if the Plan results in an Equitization Restructuring as opposed to an Asset Sale;

[5] Many of these items are not presently addressed in the Disclosure Statement, or are addressed in the form of conclusions without any supporting facts. See, for example, page 54 of the Disclosure Statement.

27. Section 1129(a)(7) of the Bankruptcy Code requires as a condition of confirmation that creditors will receive not less than they would receive if the case were one under chapter 7 of the Bankruptcy Code. Section 1129(a)(11) requires as a condition of confirmation that a plan be feasible. Feasibility includes that priority claims will be paid in full. The Disclosure Statement does not contain adequate information on either of these points. Indeed, it contains no information on these points. Without this information, creditors entitled to vote on the Plan will be unable to make an informed judgment as to whether to vote to accept or reject the Plan.

28. The Plan appears to provide for the Debtors' discharge irrespective of whether the ultimate means of performance takes the form of an Asset Sale or Equitization Restructuring. In the former situation the Debtor may not be entitled to a discharge. The Disclosure Statement should address this situation. This is discussed further at Section , below.

II. Confirmation Issues

29. There are numerous ways in which the third party releases, the Debtor releases and exculpation provisions set forth in the Plan are contrary to the standards set forth by this Court in *In re Tribune Company*, 464 B.R. 126 (Bankr. D. Del. 2011), *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), and other applicable law. Certain opt mechanisms must also be clarified or amended before the voting solicitation process begins.

A. Third Party Releases

30. Some Courts in this District have determined that third party releases of non-debtors should be allowed provided that they are consensual. *See In re Wash. Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011), *citing, inter alia, In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be

based on consent of the releasing party); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (holding that the release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan); *In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan). *See Cont'l,* 203 F.3d at 215 ("[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"); *Wash. Mut.*, 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) . . . ."); *In re Genesis Health Ventures*, Inc., 266 B.R. 606–07 (Bankr. D. Del. 2001) ("[T]he officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization."). The same logic is also applicable to third party releases of the Debtors' professionals who, like the Debtors' directors and officers, will be protected by the exculpation provision. *See Wash. Mut.*, 442 B.R. at 354.

31. Section X.F of the Plan provides that all Releasing Parties are providing the Debtors with a release and discharge. Section I.A.129 defines Releasing Parties to include: "…all Holders of Claims and Interests not described in the foregoing clauses (a) through (j); ***provided however,* that any Holder of Claim or Interest that opts out of the releases in the Plan shall not be a "Releasing Party."** (emphasis in original).

32. The Plan definitions of Exculpated Parties (I.A.54), Released Parties (I.A.128) and Releasing Parties (I.A.129) includes a list of identified entities followed by various categories of persons and entities including:

> "…each such Entity's current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), subsidiaries, direct and indirect equityholders, funds, portfolio companies, and management companies; and…with respect to each of the foregoing Entities in clauses (a) through (j), each of their respective current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives principals, professionals, consultants, financial advisors, attorneys, accountants, trustees investment bankers, and other professional advisors…"

33. The Debtors have the burden of justifying the validity of the non-consensual third party releases for each and every party to be released. Because an evidentiary predicate is necessary to approve the third party releases, the U.S. Trustee reserves argument on this issue until the record at the confirmation hearing is closed.

B. Debtors' Releases

34. The Plan provides releases by the Debtors and their estates of many non-debtor parties. Pursuant to this Court's decision in *Tribune*, 464 B.R. 126 (Bankr. D. Del. 2011), and *Washington Mutual*, 442 B.R. 314 (Bankr. D. Del. 2011), among others, the five factors set forth in In re *Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del 1999) and *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994) should be considered to determine whether, notwithstanding § 524(e) of the Code, a plan may provide for releases by debtors of non-debtor entities. *See Tribune* 464 B.R. at 186; *Wash. Mut.*, 442 B.R. at 346; *In re Spansion*, 426 B.R. 114, 142-43, n. 47 (Bankr. D. Del. 2010); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004).

35. In the present cases, neither the Plan nor the Disclosure Statement address whether any of the *Zenith* factors are met for any of the parties who will receive releases from

the Debtors or claimants. Absent a showing, and appropriate finding by the Court, that each proposed Released Party has made a substantial contribution to the Plan,[6] and that the other elements of *Zenith* have been met, the releases given by the Debtors render the Plan not confirmable. For each and every one of the various entities enumerated in the various definitions, the Debtors must show who they are and what they have contributed to the success of this case. For example, what has the financial advisor of an indirect equityholder contributed to this case?

C. Exculpation

36. Plan Section X.G proposes to exculpate parties from conduct taking place during the case. The definition of Exculpated Party includes direct and indirect equity security holders. Equity security holders are not estate fiduciaries simply by virtue of holding equity in the Debtors. As currently drafted, the exculpation provision is overbroad as to parties covered. The definition should be revised to remove listed entities that are not estate fiduciaries. The list of parties receiving exculpation should be limited to those parties who served in the capacity of estate fiduciaries, *i.e.*, the creditors' committee, its members, estate professionals and the Debtor's directors and officers. *See In re Indianapolis Downs, LLC,* 486 B.R. 286 (Bankr. D. Del. 2013); *In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del. 2011)*; In re PTL Holdings, LLC*, 2011 WL 5509031 *12 (Bankr. D. Del. Nov. 10, 2011); *In re Washington Mutual Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011). See also *PWS Holding Corp*, 228 F.3d 224 (3d Cir. 2000).

[6] An example of a "substantial contribution" can be found in *Coram*, where this Court, after examining the *Zenith* factors, allowed the debtors to release noteholders who had contributed $56 million in funding to the plan, which funds allowed the debtors to repay in full all creditors other than the noteholders, as well as make a significant distribution to the debtors' shareholders. 315 B.R. at 335.

37. Plan Section X.G proposes that Exculpated Parties: "…shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan." This provision should be stricken. It is available at common law without having to be included within the provision. Including this language in the provision tends to elevate a defense into an immunity. Further, to the extent the advice of counsel is unlimited, it should nominally be restricted to written advice.

D. The Plan is Not Feasible

38. The Plan in its present form does not satisfy the feasibility requirement of Bankruptcy Code section 1129(a) (11) because there is no present bidder for an Asset Sale and no Plan Sponsor for an Equitization Restructuring. At the moment, this Plan is speculation. A Chapter 11 plan based upon speculation is not feasible because the Court cannot find that confirmation will not be followed by liquidation, or the need for further financial reorganization. A plan that hinges on uncertainty and speculation is not feasible. Where a proposed plan's sole source of funding would come from wholly speculative litigation proceeds, the Third Circuit upheld lower court rulings denying approval of a disclosure statement because the plan was patently unconfirmable: "A plan will not be feasible if its success hinges on future litigation that is uncertain and speculative, because success in such cases in only possible, and not reasonably likely. See *In re American Capital Equipment LLC*, 688 F.3d 145, 156 (3d Cir. 2012). A plan is not feasible if its funding source is "…speculative at best and visionary at worst." (*In re Quigley Co., Inc.*, 437 B.R. 102 (Bankr. S.D.N.Y. 2010).

39. Until either a potential Stalking Horse or Plan Sponsor emerges, the Plan is premature.

E. Bankruptcy Code Section 1141 Controls the Debtors' Discharge

40. Section 1141(d)(3) of the Bankruptcy Code states:

> "The confirmation of a plan does not discharge a debtor if-
> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
> (B) the debtor does not engage in business after consummation of the plan; and
> (C) the debtor would be denied a discharge under Section 727(a) of this title if the case were a case under chapter 7 of this title."

41. The Debtors here are not be entitled to a discharge under Section 727(a)(1), which provides: "The court shall grant the debtor a discharge, unless the debtor is not an individual...". The Debtors are not individuals.

42. If the means for the Plan's performance is an Asset Sale resulting in a sale of all or substantially all of the Debtor's assets, then the Debtors may not be entitled to a discharge.

43. The U.S. Trustee has requested that the Disclosure Statement address the prospect that if the Plan results in an Asset Sale the Debtors may not be entitled to a discharge. The U.S. Trustee proposes that the following paragraph be added at an appropriate location in the Disclosure Statement:

> X. Will the Debtors be entitled to a discharge? Section 1141(d)(3) of the Bankruptcy Code provides that a non-individual debtor is not entitled to a discharge if the plan provides for the liquidation of all or substantially all of the property of the estate; the debtor 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 if the case is a case under chapter 7. If an Equitization Restructuring takes place the Debtors will be entitled to a discharge. If an Asset Restructuring takes place, the Debtors may not become entitled to a discharge.

The Debtors have proposed the following language: " . . . *The United States Trustee asserts that,* [i]f an Asset Sale Restructuring takes places, the Debtors may not become entitled to a discharge." The U.S. Trustee asserts that this proposal does not accurately explain the Debtor's potential entitlement to a discharge for reasons that include the statutory language of 1141(d)(3). The Debtors may become entitled to a discharge in

certain reorganization scenarios but not in others. The Disclosure Statement in its present form should account for each scenario.

F. FRBP 9019 is Limited to Parties Who Have Expressly Agreed to Settlement

44. The first paragraph of Plan Section IV.A, and similar language contained in Sections IX.A and IX.B of the Plan, purport to impose the settlement standards of FRBP 9019 upon all claims and interests. The settlement of claims against a debtor subject to FRBP 9019 should be limited solely to those parties who have expressly entered into a settlement agreement. Bankruptcy Code Section 1123(b)(3) allows a Debtor to settle claims it has against others but not claims against the Debtor. Claims against a Debtor are subject to the standards of Bankruptcy Code Sections 1129 and 1141.

45. FRBP 9019 reads in pertinent part: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." The standard for approval of a settlement is subject to the sound discretion of the court guided by the following criteria as set forth in *In re Martin*, 91 F. 3d 389 (3rd Cir. 1996): "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." 91 F.3d at 393 (citations omitted).

46. Black's Law Dictionary defines compromise or settlement as follows: "An agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other." Black's Law Dictionary, 10th ed.

47. Bankruptcy Code Section 1123(b)(3)(A) allows for a plan to: "…provide for- the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."

However, the converse is not true. This provision does not permit the Debtor to settle claims against it. That is, absent an express settlement agreement between parties, the standards of Bankruptcy Code Section 1129 prevail over the standards of FRBP 9019. The court must find that the compromise is fair and equitable and the plan otherwise satisfies the provisions of Bankruptcy Code Section 1129. Included within Bankruptcy Code Section 1129(b)(1) is the requirement that the court find a plan to be "fair and equitable."

48. In denying confirmation, Judge Walsh observed in *In re Nutritional Sourcing Corporation*, 398 B.R. 816 (Bankr. Del. 2008): "When evaluating a settlement provided for under a plan of reorganization, 'the Bankruptcy Court must determine that a proposed compromise forming part of a reorganization plan is fair and equitable'." 398 B.R. at 832. Accord: *In re New Century TRS Holdings*, 390 B.R. 140 (Bankr. Del. 2008); *In re Coram Healthcare Corp.*, 315 B.R. 321 (Bankr. Del. 2004).

49. Except for any express settlement entered into between a debtor and claimant that is subject to approval pursuant to FRBP 9019, Bankruptcy Code Section 1141 governs a debtor's discharge. In denying approval of a proposed third party release provision in a plan where the court had previously approved a settlement agreement pursuant to FRBP 9019, the non-debtor contended that language in the approved settlement resolved the issue, but the court disagreed, holding: "Thus, the 9019 Order did not resolve with finality the treatment of the Bondholders in the Debtor's plan of reorganization. That could be accomplished only through the plan confirmation process…" (*In re Lower Bucks Hospital*, 471 B.R. 419, 457 (Bankr. E.D. PA. 2012)). In *Coram Healthcare Corp.*, supra, the Court found the standards of FRBP 9019 inapplicable to proposed third party releases: "…a release of claims by third parties against a non-debtor cannot be approved under the above standards." (315 B.R. at 335). The Court also

disapproved a release proposed by the Trustee of the Debtor finding: "No release of the Debtors is appropriate, since the Debtors are entitled only to the discharge provided by section 1141(d)." (315 B.R. at 337).

50. The second paragraph of Section IV.A. of the Plan, and Sections X.A and X.B should be revised to clearly indicate that the settlement standards of FRBP 9019 apply only to the express settlement agreements entered into between the Debtors and a settling party, and not, as presently proposed, to the entire universe of claims and interests. Sections IX.A and IX.B of the Plan should be similarly revised. The Debtors' discharge is governed solely by Section 1141(d).

CONCLUSION

51. The Disclosure Statement should not be approved, and the Plan should not be confirmed. The Disclosure Statement was filed without any Financial Disclosures, which are at the heart of the disclosures required in this case. Without them creditors are bereft of the information they need to make an informed decision to vote for or against the Plan. To the extent that a primary purpose of a disclosure statement is to tell creditors what they are going to get and when they are going to get it the Disclosure Statement here is a failure. Finally, the Plan presents confirmation issues, as it contains non-consensual third party releases from the many millions of creditors in this case, in favor of non-debtors, and the Plan also contains exculpation provisions that are contrary to applicable law.

52. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter 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.

WHEREFORE, the U.S. Trustee respectfully requests that this Court issue an order denying approval of the Disclosure Statement, denying the Solicitation Procedures Motion, and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: November 27, 2019
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE
Region 3

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
PES Holdings, LLC, *et al.*,	)	
	)	Case No. 19-11626 (KG)
Debtor-in-Possession.	)	
	)	

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on November 27, 2019, the United States Trustee's Objection to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (III) Approving The Forms Of Ballots And Notices In Connection Therewith, (IV) Scheduling Certain Dates With Respect Thereto, And (V) Granting Related Relief (D.E. 464, "Motion") was served via First Class United States Mail in the manner indicated to the following persons:

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