

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

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In re:	:	Chapter 11
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ADVANTAGE HOLDCO, INC., <i>et al.</i> ,	:	Case No. 20-11259 (CTG)
	:	Jointly Administered
	:	
Debtors.	:	Re: D.I. 1001 & 1035
	:	Hearing Date: Dec. 10, 2021, at 10:00 a.m.
-----	o	Obj. Deadline: Dec. 3, 2021, at 4:00 p.m.

**OBJECTION OF THE UNITED STATES TRUSTEE TO  
CONFIRMATION OF THE DEBTORS' CHAPTER 11 PLAN**

Andrew R. Vara, United States Trustee for Region 3 (the “U.S. Trustee”), through his undersigned counsel, objects to confirmation of the Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation of Advantage Holdco, Inc. et al. (D.I. 1001) (the “Plan”), and in support of his objection respectfully states as follows:

**PRELIMINARY STATEMENT**

1. Confirmation should be denied because the Plan and plan supplement would provide prospective, post-effective date exculpation. In addition, the members of the liquidating trust committee should not receive exculpation because they are disclaiming their status as fiduciaries.

**JURISDICTION**

2. Pursuant to 28 U.S.C. § 1334, applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and resolve this objection.

3. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with monitoring the federal bankruptcy system, including the confirmation of chapter 11 plans. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that 11 U.S.C. § 307 gives the U.S. Trustee “public interest standing”); *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”); 28 U.S.C. § 586(a)(3)(B) (authorizing the U.S. Trustee to monitor chapter 11 plans and file comments about them).

4. The U.S. Trustee has standing to be heard on confirmation of the Plan pursuant to 11 U.S.C. § 307.

### **BACKGROUND**

5. On May 26, 2020, the above-captioned debtors (the “Debtors”) filed chapter 11 petitions in this Court. On June 9, 2020, the U.S. Trustee appointed an official committee of unsecured creditors.

6. The Debtors previously operated a rental car business. *See* D.I. 15 ¶ 6. The Debtors have surrendered or sold their fleet of rental cars. *See* Plan § III.A.

7. On October 26, 2021, the Debtors filed the Plan. The Plan is a plan of liquidation. *See id.* § I.B. Under it, the Debtors will be deemed dissolved on the effective date. *See id.* § XVII.H. Two post-confirmation entities—the DIP lender and a liquidating trust (together, the “PCEs”)—will make plan distributions. The DIP lender will administer a priority claims reserve that pays administrative and priority claims. *See id.* § VIII.A. The liquidating trust will administer cash and certain causes of action for the benefit of general unsecured creditors. *See id.* §§ VII.A.13 & IX.B.

8. Article X.D.2.d of the Plan provides in relevant part:

The DIP Lender or PCR Disbursing Agent, as well as the employees, professionals, advisors, consultants, independent contractors, representatives, and other agents of the DIP Lender or PCR Disbursing Agent, shall have no liability for any and all actions, awards, suits, proceedings, obligations, judgments, liabilities, penalties, interest, violations, fees, fines, claims, losses, costs, demands, direct damages, deficiencies, liens, encumbrances and expenses, including reasonable attorneys' fees and costs, to the extent connected with the Priority Claims Reserve or arising or resulting from the administration of the Priority Claims Reserve, including, without limitation, the resolution of any Disputed Claims against the Priority Claims Reserve; *provided, however*, the foregoing exculpation is inapplicable for acts or omissions found to be the result of gross negligence or willful misconduct.

9. On November 23, 2021, the Debtors filed the Plan supplement (D.I. 1035) (the "Plan Supplement"). Exhibit A of the Plan Supplement is the liquidating trust agreement (the "LTA"). The LTA is incorporated into the Plan by reference. *See* Plan § IX.B.

10. Article 4.07 of the LTA provides in relevant part:

All of the Covered Persons shall be, and hereby are, exculpated by all Persons, including the Beneficiaries, from any and all claims, causes of action and other assertions of liability arising out of the discharge of the powers and duties conferred upon them by the Plan, this Agreement, or any Order of the Bankruptcy Court entered pursuant to, or in furtherance of, the Plan, or by applicable law, except for actions or omissions that are determined by a Final Order to have arisen out of his, her, its or their own bad faith, willful misconduct, reckless disregard of duty, criminal conduct, gross negligence, fraud, or self-dealing.

11. Article 4.05 of the LTA defines "Covered Persons" to mean the liquidating trustee and the employees, professionals, agents, and representatives of the liquidating trustee and liquidating trust.

12. Article 6.08 of the LTA provides in relevant part:

The members of the Liquidating Trust Committee shall be, and hereby are, exculpated by all Persons, . . . including the Beneficiaries, from any and all claims, causes of action and other

assertions of liability arising out of the discharge of the powers and duties conferred upon them by the Plan, this Agreement, or any Order of the Bankruptcy Court entered pursuant to, or in furtherance of, the Plan, or by applicable law, except for actions or omissions that are determined by a Final Order to have arisen out of his, her, its or their own willful misconduct, gross negligence, bad faith, self-dealing, breach of fiduciary duty, or *ultra vires* acts.

## ARGUMENT

### **A. Exculpation Is Too Broad**

13. Article X.D.2.d of the Plan and articles 4.07 and 6.08 of the LTA are objectionable because they would extend after the Plan's effective date and exculpate various entities prospectively. In addition, LTA § 6.08 would exculpate members of the liquidating trust committee, even though LTA § 6.01 disclaims their status as fiduciaries.

14. Exculpation "must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers." *In re Washington Mutual, Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011). *See also In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del. 2011) (same); *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (holding Section 1103(c) "limits the liability of a committee to willful misconduct or *ultra vires* acts."); *In re PTL Holdings LLC*, 2011 WL 5509031 at \*11-12 (Bankr. D. Del. 2011) (BLS) (holding exculpation "must be reeled in to include only those parties who have acted as estate fiduciaries and their professionals."); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) (holding exculpation "limited so as to apply only to estate fiduciaries" was consistent with applicable law).

15. The members of the liquidating trust committee are not eligible to receive exculpation because the LTA specifically disclaims their status as fiduciaries: "This Agreement

is not intended to create a fiduciary duty with respect to the Liquidating Trust Agreement, and neither the Liquidating Trust Committee nor any of its members shall be deemed to be or be treated in any way as fiduciaries of the Beneficiaries.” LTA § 6.01. Thus, the exculpation in LTA § 6.08 should be stricken.

16. No entity should receive prospective exculpation. Just as post-effective date entities cannot receive prospective debtor releases, so too they cannot receive prospective exculpation. *See Washington Mutual*, 442 B.R. at 348 (“The Liquidating Trust and its Trustee have not done anything yet for which they need a release. They will not even come into existence until the Plan is confirmed.”).

17. The Plan and LTA would prospectively exculpate the liquidating trustee, the members of the liquidating trust committee, the DIP lender, the PCR Disbursing Agent (as defined in the Plan), and related entities and agents, potentially years<sup>1</sup> in advance. Professionals who are retained under Sections 327 and 1103 and are subject to Rule 2014 disclosures and Court oversight during the case do not receive this immunity in advance. There is no reason to give such immunity in advance to professionals and others who will be subject to significantly less, if any, Court oversight. If creditors who depend on the PCEs to liquidate assets, hold money, and make distributions become aggrieved by the PCEs’ negligence, then they should be able to petition the Court for relief.

18. Unless the confirmation order provides that exculpation, both in the Plan (§ X.D.2.d) and LTA (§§ 4.07 & 6.08), shall not apply to any post-effective date acts or

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<sup>1</sup> *See* LTA § 8.01 (“The Trust shall be dissolved . . . no later than the fifth anniversary of the Effective Date” unless extended up to three additional years).

omissions, and shall not apply to the members of the liquidating trust committee, confirmation should be denied.

**B. Reservation of Rights**

19. Article X.J of the Plan pertains to quarterly fees under 28 U.S.C. § 1930(a). The U.S. Trustee's counsel has been working with the parties' counsel to resolve a few remaining informal comments the U.S. Trustee has about § X.J and hopes a resolution can be reached. If resolution is not reached, the U.S. Trustee reserves his right to present his concerns about § X.J at the confirmation hearing.

**RESERVATION OF RIGHTS**

20. The U.S. Trustee reserves any and all rights, remedies and obligations to complement, supplement, augment, alter and/or modify this objection, file an appropriate motion or conduct any and all discovery as may be deemed necessary or as may be required, and to object on such other grounds as may become apparent upon further factual discovery.

21. WHEREFORE, the U.S. Trustee respectfully requests that the Court deny confirmation of the Plan unless the confirmation order provides that exculpation (1) both in the Plan (§ X.D.2.d) and LTA (§§ 4.07 & 6.08) shall not apply to any post-effective date acts or omissions; and (2) shall not apply to members of the liquidating trust committee.

Dated: December 3, 2021  
Wilmington, Delaware

Respectfully submitted,

**ANDREW R. VARA**  
**UNITED STATES TRUSTEE,**  
**REGIONS 3 & 9**

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