IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: THE WEINSTEIN COMPANY HOLDINGS LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 18-10601 (MFW) **Hearing Date: October 20, 2020 at 10:30 a.m. (ET)** **Re: D.I. 2884, 2891, 2892, 2994, 3007 and 3025**

REPLY TO:

DEBTORS' AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS' RESPONSE TO MOTION TO CONVERT CHAPTER 11 CASES TO CHAPTER 7

Wedil David, Dominque Huett and Alexandra Canosa (collectively, the "Non-Settling Plaintiffs"), by and through their undersigned counsel, hereby submit this Reply to the *Debtors' And Official Committee Of Unsecured Creditors' Response To Motion To Convert Chapter 11 Caess To Chapter 7* [D.I. 3007] (the "Objection" or "Obj."), and respectfully state as follows:

Reply

1. The Debtors' chapter 11 cases are the most notorious corporate cases precipitated by allegations (and convictions) that board member Harvey Weinstein engaged in rape, sexual harassment and sexual misconduct while other board members allegedly and negligently looked the other way. The morally reprehensible behavior of Harvey Weinstein and his fellow board members caused the financial destruction of the Debtors. The sexual victims of Harvey Weinstein

[1] The last four digits of The Weinstein Company Holdings LLC's federal tax identification number are 3837. The mailing address for The Weinstein Company Holdings LLC is 99 Hudson Street, 4th Floor, New York, New York 10013. Due to the large number of debtors in these cases, which are being jointly administered for procedural purposes only, a complete list of the Debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at http://dm.epiq11.com/twc.

have few principal goals: (a) to tell their stories as proud survivors of Harvey Weinstein before a jury of their peers; (b) to hold Weinstein and his woefully negligent board members fully accountable for the ignominy that is Harvey Weinstein and (c) to receive an economic recovery to the full extent of available insurance proceeds.

2. Those goals are entirely in jeopardy by the proposed Plan funded by the Insurance Companies. But that was not always the case. These cases were always liquidation cases, and the most efficient way to liquidate and monetize post-sale assets is to convert the cases to chapter 7. The Debtors, acting as estate fiduciaries, reached that conclusion on May 14, 2019 when they filed their own *Motion for an Order (I) Converting Their Chapter 11 Cases to Cases under Chapter 7 of the Bankruptcy Code and (II) Granting Related Relief* [D.I. 2357] ("Debtors' Conversion Motion"). At that time, the Debtors sought to convert their cases to chapter 7 and retain Bernstein Litowitz Berger & Grossmann, LLP [D.I. 2337] to prosecute, on a contingency basis, the Debtors' primary remaining asset: the D&O Claims. This would have been an acceptable result to the Non-Settling Plaintiffs. Tort victims would be able to obtain stay relief and pursue Insurance Companies to full extent of available insurance.

3. However, it appears that the prospect of victimized women seeking justice through continued tort litigation was not in the best financial interests of the Insurance Companies. Insurance Companies are very adept at sophisticated cost-benefit analyses. Recognizing that they fared far better using the Debtors' chapter 11 process, the Insurance Companies became the financial proponent on how best to conclude these cases through a Plan. Not surprisingly, the proposed Plan provides enormous and unwarranted advantages and protections to the Insurance Companies, especially *against* the Holders of Sexual Misconduct Claims. Among other things, the Plan permits the Insurance Companies to re-write existing policies and offer a fraction of

policy coverage that is available. Adopting the fiction the Debtors somehow are a going concern business struggling with a mass tort problem, the Plan provides a section 524(g) style super discharge Channeling Injunction that channels Holders of Sexual Misconduct Claims and future claims to a pathetically meager Sexual Misconduct Fund that is a small fraction of available insurance. An abundance of relief for a mordant company not even entitled to a discharge. *See* 11 U.S.C. § 1141(d)((3). The proposed Plan immunizes an ultra-affluent Board and an overly broad range of Former Representatives from *any* accountability.

4. This is not an unexpected result when non-estate fiduciaries—the Insurance Companies—are at the financial helm of the Plan. The Insurance Companies hijacked the plan process to pursue their own economic interests, not the best interests of the Debtors, their estates or (and especially) Holders of Sexual Misconduct Claims. This is not a mass tort case[2] and broad sweeping relief against the Holders of Sexual Misconduct Claims is not appropriate. The Non-Settling Plaintiffs do not wish "to express their views of the Plan." Obj. at ¶ 3. They want stay relief, to have their day in court and to pursue tortfeasors—including the Former Representatives—and seek recompense *to the full extent provided by insurance.* The Plan proposed by the Insurance Companies is inapposite to what the Debtors' believed was in the best interests of the Estates when the Debtors sought to convert their own cases and seeks to end the goals of the Non-Settling Plaintiffs.

5. The Plan cannot be viewed as a restructuring of the debtor-creditor relationship. There is no debtor-creditor relationship in these cases. The Debtors are defunct, and have no assets

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[2] Judge Hellerstein made clear there will never be a certified class in *Geiss v. Weinstein Co. Holdings LLC*, No. 17 CV. 9554 (AKH), 2020 WL 4266925 (S.D.N.Y. July 24, 2020), and it is actually misleading for the Debtors to continue to refer to "Proposed Class Counsel." Proposed Class Counsel represented only three (3) victims with active claim against the Debtors. *Id.* at *2.

to pay general unsecured creditors. In either a chapter 11 or 7 scenario, *the Debtors' Estates* lack sufficient cash to pay anything to trade creditors. That is a fair outcome. Trade creditors voluntarily agreed to transact business with the Debtors and took the credit risk. Tort victims certainly did not, and they should now have the *full benefit* of insurance. The Plan, however, "restructures" that result. It artificially limits the amount of available insurance, and devotes many millions of dollars in insurance proceeds—that should be available *exclusively* to tort victims—to, among others, general unsecured creditors and potentially Professionals. There certainly is nothing fair or equitable in taking a remedy available to Holders of Sexual Misconduct Claims and making it available to others, especially considering the reprehensible conduct giving rise to those claims. But that is exactly what the Plan does, so it is properly viewed as a restructuring of the legal relationship between the Insurance Companies and Holder of Sexual Misconduct Claims.

6. The statement that the Debtors and Committee "strongly believe [the Plan] provides the greatest potential recovery for all creditors, especially Holders of Sexual Misconduct Claims[,]" Obj. at ¶ 1, should not be credited. First, unless and until the Debtors fully disclose the number, identity and types of insurance policies available to satisfy the claims of tort victims and the aggregate amount of insurance available under the towers of insurance available, the Court will have been provided with no basis for that assertion. Second, the Debtors and the Committee wrongly group all Holders of Sexual Misconduct Claims into one category, as if a rape or sexual assault victim of Harvey Weinstein who have timely filed claims, including the Non-Settling Plaintiffs, should just be lumped together with women who suffered significantly less harm or women who have no prospect of prevailing in litigation because their claims are plainly barred by the statute of limitations. Indeed, this one of the same problems identified by Judge Hellerstein in rejecting a settlement of a purported class of Harvey Weinstein's victims, and the Debtors and

Committee have done nothing to fix it. *See Geiss v. Weinstein Co. Holdings LLC*, No. 17 CV. 9554 (AKH), 2020 WL 4266925, at *4 (S.D.N.Y. July 24, 2020). To the contrary, the proponents of the Plan are *counting* on the fact that enough women with marginal or untimely claims will vote in favor of the Plan because, for them, recovering against TWC's insurance may be unlikely. But for the Non-Settling Plaintiffs and other similarly situated survivors who have timely claims of rape or sexual assault, the Plan and Disclosure Statement put forth a false and misleading comparison. Neither compare what such women would receive under the Plan, which contains an artificial limitation on the policies, versus a chapter 7, where the full proceeds would be available.

7. The Debtors and Committee want Holders of Sexual Misconduct Claims to accept that only the Settlement Amount is available, that such amount should be, in part, devoted to pay uninsured claims, and tort victims are better off for it. The Non-Settling Plaintiffs do not accept that proposition. The Insurance Companies should not be able to rent this Court to re-write their policies to a fraction of the full coverage available in chapter 7. The Debtors have failed to demonstrate their proposition; *i.e.,* that Holders of Sexual Misconduct Claims—or at least those non-time barred claims such as the Non-Settling Plaintiffs—receive a better recovery under the Plan than if they were free to pursue all available insurance. Insurance Companies can be opaque, the Debtors cannot. This Motion to Convert is filed because neither the Debtors, the Disclosure Statement nor the Plan address or meaningfully account for what Holders of Sexual Misconduct Claims may recover from the Debtors' insurers, former directors, and others if the Debtors liquidated under Chapter 7 and survivors were allowed to litigate their own cases and recover from applicable insurance.

8. In talking down the value of the D&O claims, the Debtors point to the fact that three trial court decisions have dismissed claims against former directors, Obj. at 14, n.6, including

in cases by Non-Settling Plaintiffs Canosa and David. But those decisions have not yet been appealed, and the Debtors neglect to mention that another trial court denied a motion to dismiss by a Former Representative Robert Weinstein. *Rehal v. Weinstein*, No. 151738/2018, 2019 WL 2088435, at *5 (N.Y. Sup. Ct. May 13, 2019). In any case, these preliminary rulings should not forever close the door on any victim of Harvey Weinstein recovering from the insurance companies or the former directors, which is exactly what the Plan intend to do. The fact that the Insurance Companies are willing to fund the Settlement Amount is the best anecdotal evidence that the Plan[3] is in their own best interests, not the best interests of Holders of Sexual Misconduct Claims. Particularly disturbing, the Insurance Companies' Plan provides a death trap for rape victims forcing them to check a box that releases Harvey Weinstein or accept a dramatically reduced recovery from an already meager fund. *See* Second Amended Plan [D.I. 2994] at § 3.13.1.

9. Although the Objection contends that "[t]he Plan put forth by the Debtors and the Committee represents the culmination of more than two year of arm's length negotiations among the Debtors, the Committee, the Former Representatives, Harvey Weinstein and the Insurance Companies …[,]" Obj. at ¶ 4, that statement provides no comfort to the Non-Settling Plaintiffs. The Debtors are defunct, cannot confirm a Plan without funding from the Insurance Companies, and therefore have no leverage to meaningfully negotiate. The Committee is out of the money and beholden to the Insurance Companies to receive a trivial recovery for trade creditors. Moreover, there are only two alleged survivors of Harvey Weinstein out of the five-person Committee, and neither of those women has alleged that they were raped or similarly victimized by Harvey Weinstein, which places them in a very different position than the Non-Settling Plaintiffs and other

[3] Unless defined herein, capitalized terms shall have the meanings ascribed to them in the Second Amended Joint Chapter 11 Plan of Liquidation.

similarly situated victims. For their part, the Former Representatives wish to end litigation against them, be released from any liability and protected going forward with an entirely inappropriate Channeling Injunction. The risk and uncertainty is not equally spread among the parties and the settlement dynamic heavily favors the Insurance Companies, the Plan's financial proponent.

10. The Obj. also notes that Proposed Class Counsel had "substantial input." This too provides little comfort. Proposed Class Counsel represents Louisette Geiss, one of the Weinstein victims on the Committee. As such, she suffers from divided loyalty, which is compounded by the fact that Proposed Class Counsel is, for reasons unknown, listed as "exculpated party" in the Plan. *See* Second Amended Plan, Exhibit 1 at §§ 1.44 and 1.93. Finally, Professionals advocating the Plan need the Settlement Amount to ensure a 100% realization rate on their Professional Fee Claims.[5]

11. ***The Debtors' bankruptcy should not be used to reduce substantially the potential liability of Insurance Companies***. The Court should not artificially cap the Insurance Companies' exposure for tort claims. It is axiomatic the discharge of a debtor does not affect the liability of a third party. *See* 11 U.S.C. § 524(e) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."). Outside bankruptcy, or in a chapter 7, Holders of Sexual Misconduct Clams are free to pursue insurance to the full extent of coverage. But here, the Plan is premised on capping the exposure of Insurance Companies. This is not permitted by law, especially in a case where the Debtors themselves are not entitled to a discharge.

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[5] This calls into question whether they are no longer disinterested as required by section 327(a) of the Bankruptcy Code.

12. The Non-Settling Plaintiffs are not trying to "highjack [sic]" the process. Obj. at ¶ 2. They instead are shining a light on the fact the Debtors have abdicated their roles as fiduciaries allowing the Insurance Companies to propose a Plan primarily for the benefit of the Insurance Companies. The Debtors repeatedly state the Plan provides greater recoveries for Holders of Sexual Misconduct Claims than chapter 7. But the Debtors never fully describe the insurance available to Holders of Sexual Misconduct Claims in a chapter 7. Without that disclosure, the Debtors' promise rings hollow.

13. The Obj. remarks that "[t]he Motion is completely devoid of any analysis showing that a chapter 7 liquidation of the Estates would provide a greater opportunity for creditor recovery than the Plan." Obj. at ¶ 2. No analysis is possible because the Insurance Companies have not and will not publicly disclose the towers of insurance available to Holders of Sexual Misconduct Claims. Without that disclosure, the Non-Settling Plaintiffs maintain the Plan is not for survivors, it is for the benefit of the Insurance Companies, wealthy directors, defense lawyers, Harvey Weinstein, out of the money trade creditors and Professionals.

14. The Debtors reliance on *Blitz U.S.A.*, *Kaiser Aluminum* and *Caribbean Petroleum* to support its proposition that it is proper to fund the Plan and provide uninsured creditor constituencies with a recovery funded by insurance proceeds, is misplaced. In *In re Blitz U.S.A. Inc.*, No. 11-13603 (PJW), the confirmed plan specifically provides that the money funded by the insurance proceeds may only be used to pay claims of the personal injury victims; *i.e.*, intended beneficiaries covered under the insurance policies. *See* Blitz U.S.A.'s confirmed plan at § 4.5.2 [Case No. 11-13603 (PJW), D.I. 2007] ("Notwithstanding anything in the Plan to the contrary, no monies, choses in action, and/or Blitz Personal Injury Trust Assets that have been transferred, granted, assigned or otherwise delivered to the Blitz Personal Injury Trust shall be used for any

purpose other than for the payment, defense and/or administration of Blitz Personal Injury Trust Claims (including rights to payment of Blitz Personal Injury Trust Expenses related thereto)”). Similarly, in *In re Kaiser Aluminum Corp.*, No. 02-10429 (JKF), the insurance proceeds were used only for tort claims. Also, in *In re Caribbean Petr. Corp.*, No. 10-12553 (KG), relied on in the Obj., certain tort claimants objected to the insurance settlement on the grounds that insurance proceeds improperly were to be paid to parties who are not direct beneficiaries of the insurance proceeds (*e.g.*, administrative claims and other general unsecured creditors) under the Plan. The parties there settled and the court never ruled on the merits.

15. The Debtors contend that the Non-Settling Plaintiffs’ assertion that the Plan diverts insurance proceeds away from tort victims to non-insured parties (*i.e.*, trade creditors and professional fees) is unfounded because the “Insurance Companies have not agreed to coverage of any Claims and issues relating to insurance coverage have not been conclusively litigated as of the date of this Response. In fact, the Insurance Companies have taken the position that the Insurance Policies do not cover Sexual Misconduct Claims.” Obj. at 13, n. 4. The Non-Settling Plaintiffs dispute this contention which is belied by the willingness of the Insurance Companies to fund the Settlement Amount.

16. The Debtors’ argument that they are not suffering continuing loss is without merit. They clearly are spending substantial amounts on professional fees. The Debtors’ claim that even if the Chapter 11 Cases are converted the estates still will be burdened by professional fees is misdirection. As the Debtors well know, the professional fees accrued in chapter 7 will be a fraction of what they are now. In the month of August 2020, the Debtors incurred no less than $336,000 in professional fees, not including fees of the Committee. In any event, the Non-Settling

Plaintiffs primarily are looking to the proceeds of insurance for their recovery, not estate assets which are insufficient in a chapter 11 or 7.

17. More to the point, the Debtors continue to incur Professional Fees and other chapter 11 administrative expenses, and produce no revenue to offset those expenses. The Debtors may argue they have sufficient cash in their Estates to pay Professional Fees alone. But no credible argument can be made they can confirm a standalone Plan. The Debtors are entirely dependent on the Insurance Companies to fund a Plan with insurance proceeds that only tort victims have an interest in. The Plan will devote insurance proceeds to satisfy the claims of *uninsured* creditors. That creates a natural divide between the Debtors and the Holders of Sexual Misconduct Claims. The more the Debtors need insurance proceeds to fund, for example, Professional Claims, the Debtors lose their "disinterestedness" to the Holders of Sexual Misconduct Claims. In other words, the Debtors cannot be viewed as serving the best interests of the Holders of Sexual Misconduct Claims while, at the same time, diverting insurance proceeds away from such Holders to fund a Plan to pay trade creditors and Professional Claims. As expenses of administration mount, the Debtors and Professionals increasingly become beholden to the Insurance Companies.

18. The Debtors' statement in ¶ 21 that "there is no other source of recovery" except insurance proceeds carefully bysteps any discussion of the value of prosecution of the D&O Claims to the Estates, a topic the Insurance Companies seek to avoid. Previously, The Debtors stated the primary assets of the estate consisted of the D&O Claims. *See* Debtors' Conversion Motion at ¶ 24 and Obj. at ¶ 27. The Debtors' (or Insurance Companies') decision now not to prosecute the D&O Claims is premised on the banal statement "the litigation will be costly and the outcome of such litigation is completely unknown." Obj. at ¶ 30. Cost should not be a primary factor considering the Debtors previously sought to retain Bernstein Litowitz Berger &

Grossmann, LLP to prosecute the D&O claims on a contingency basis. *See* D.I. 2337 at ¶ 11. Further, it will never be known how the Estates would have fared in settlement discussions if they commenced the D&O Claims first and brought the Insurance Companies to the settlement table in that manner.

19. Standing alone, the repeated mantra that the Plan provides a better recovery for the Non-Settling Plaintiffs than chapter 7 is a false promise. In chapter 7, the full amount of insurance proceeds is available, the Non-Settling Plaintiffs will have their day in court before a jury, and they will have the opportunity to publicly renounce the now imprisoned and disgraced Harvey Weinstein. Insurance Companies and tort victims are at opposite ends of the ideological spectrum. It appears virtually impossible that any Plan funded by Insurance Companies, based on analyses known only to them and not publicly disclosed, would be in the best interests of the Non-Settling Plaintiffs. The Plan provides largess to the Insurance Companies and Former Representatives and a meager tip for the actual victims of Harvey Weinstein.

WHEREFORE, for the reasons set forth in the Motion and this Reply, the Debtors' chapter 11 cases should be converted to chapter 7 as not being in the best interests of Holders of Sexual Misconduct Claims, including the Non-Settling Plaintiffs.

Dated: October 15, 2020
Wilmington, Delaware

Respectfully submitted,

THE ROSNER LAW GROUP LLC

<u>*/s/ Frederick B. Rosner*</u>

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