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Debtors-in-Possession*

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Case No. 22-80000-11
	§	
CCC WIND DOWN, INC., F/K/A	§	
CHRISTIAN CARE CENTERS, INC. and	§	
CHRISTIAN CARE CENTERS FOUNDATION,	§	Chapter 11
INC. ¹	§	
Debtors.	§	

**DEBTORS' RESPONSE TO UNITED STATES TRUSTEE'S OBJECTION TO
DEBTOR'S CHAPTER 11 PLAN OF LIQUIDATION
(Relates to Docket No. 402)**

Debtors CCC Wind Down, Inc., F/K/A Christian Cares Center, Inc. ("CCCI"), and Christian Care Centers Foundation, Inc. (the "Foundation") (CCCI and the Foundation are

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are CCC Wind Down, Inc., f/k/a Christian Care Centers, Inc. (9664) and Christian Care Centers Foundation (3572). The Debtors' mailing address is 900 Wiggins Parkway, Mesquite TX 75150.

collectively the “Debtors”), as debtors and debtors-in-possession, respectfully submit to the Court their Response to United States Trustee’s (“UST”) Objection to Debtor’s Chapter 11 Plan of Liquidation (the “Objection”) (Dkt. No. 402), and in support respectfully states as follows:

I. SUMMARY

1. Within these Cases², the Exculpation Provisions contained in the Plan do not provide a release, but rather set forth the standard for liability for such acts or omissions under the Bankruptcy Code that go beyond ordinary negligence. Even if the Court found that the Exculpation Provisions are a form of third-party releases, Section 524(e) of the Bankruptcy Code is not implicated because the Plan does not provide the Debtors’ discharge. Further, if the Court approves the Plan as being in the best interest of the Estates and permits confirmation of the same, the Exculpated Parties involved in the transaction should not be subject to claims that undermine the Court’s determination. For the reasons set forth below, the Debtors pray the Court deny the Trustee’s Objection and confirm the Plan as filed.

II. ADDITIONAL FACTUAL BACKGROUND

A. **Procedural Background of the Cases**

2. On May 23, 2022 (the “Petition Date”), Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in this Court.

3. On June 3, 2022, the Office of the United States Trustee appointed the Unsecured Creditors Committee pursuant to Section 1102(a)(1) of the Bankruptcy Code in these Chapter 11 cases (the “Cases”). Dkt. No. 98. No trustee or examiner has been appointed.

4. On July 21, 2022, the Court entered its Order Authorizing the Sale of Assets of Debtors, Approving Assumption and Assignment of Executory Contracts, and Granting Other

² Capitalized terms within the Summary have the same definitions ascribed to the terms defined within the Additional Factual Background of this Response.

Related Relief (the “Sale Order”), authorizing the Debtors to sell substantially all of their assets under section 363 the Bankruptcy Code (the “Sale”). Dkt. No. 31.

5. The Sale closed on Friday, December 1, 2022. Dkt. No. 397. The Debtors are no longer doing business.

6. On December 7, 2022, the Court conditionally approved the Disclosure Statement and Plan Solicitation procedures. Dkt. No. 377.

7. On January 17, 2023, Debtors filed Debtors’ Frist Amended Chapter 11 Plan of Liquidation Dated January 17, 2023 (the “Plan”). Dkt. No. 404.

8. On January 17, 2023, the United States Trustee (the “UST”) filed his Objection to Debtor’s chapter 11 Plan of Liquidation (the “Objection”). Dkt. No. 402.

B. Applicable Provisions of the Plan³

9. Sections 9.5 and 11.8 of the Plan (the “Exculpation Provisions”) include the following language:

9.5 Exculpation:

The Exculpated Parties shall not have or incur liability for, and each Exculpated Party is hereby released and exculpated from, any Cause of Action arising in connection

³ Section 9.4 of the Plan is not intended to effectuate a third-party release.

with or out of the filing of these Cases, the administration of the Cases, the assumption and rejection of Executory Contracts and Unexpired Leases of Real Property, the planning of the Cases, the formulation, negotiation, or implementation of the Plan, the good faith solicitation of acceptances of the Plan in accordance with section 1125(e) of the Bankruptcy Code, pursuit of Confirmation of the Plan, the Consummation of the Plan, or the administration of the Plan or the Acquired Assets sold pursuant to the Sale Documents or to be distributed under the Plan, except for (a) intentional fraud, criminal conduct, gross negligence, or willful misconduct as determined by a Final Order of the Bankruptcy Court or other court of competent jurisdiction, and (b) obligations under the Plan, the Plan Supplement, and the Confirmation Order. All holders of Claims and Membership Interests are enjoined from asserting or prosecuting any Claim or Cause of Action against any Exculpated Party as to which such Exculpated Party has been exculpated from liability pursuant to the preceding sentence.

11.8 Exculpation of Liability:

To the extent that the Plan Administrator and any Debtors' or Plan Administrator's professionals obtain orders approving final fee applications, the Plan Administrator and/or the Debtors' professionals will be released from liability for any acts taken during the Case to the extent allowed under controlling Fifth Circuit law.

10. The Plan includes the following definition for exculpated parties (the "Exculpated Parties"):

66. Exculpated Parties: Each of the following parties, solely in its capacity as such: (a) the Released Parties; (b) the Debtors' Professionals, including Husch Blackwell, LLP, GlassRatner Advisory & Capital Group, LLC d/b/a B. Riley Advisory Services, and Houlihan Lokey Capital, Inc.; (c) the Creditors' Committee and members of the Creditors' Committee; (d) the Creditors' Committee's Professionals, including Kane Russell Coleman Logan PC; (e) the Plan Administrator; and (f) any Professionals retained by the Plan Administrator.

C. **The UST's Objection**

11. In brief summation, the UST's Objection states that the Exculpation Provisions related to the Exculpated Parties, excepting the individual members of the Official Committee of Unsecured Creditors (the "Committee"), violate section 524(e) of the Bankruptcy Code and applicable Fifth Circuit precedent, primarily the case *Nextpoint Advisors, LP v. Highland Capital*

Mgmt., LP (In re Highland Capital Mgmt., LP, 48 F.4d 419 (5th Cir. 2022).⁴ See Dkt. No. 402, ¶ 13. Debtors assert that *Highland* is distinguishable and not mandatory authority for this Court to follow.

III. ARGUMENT AND AUTHORITIES

A. **The Court is not Bound to Highland when Approving the Plan.**

12. In *Highland*, an opinion published for five months, the Fifth Circuit interpreted a more stringent standard in connection with Section 524(e) of the Bankruptcy Code for reorganizing debtors than outlined in *Pacific Lumber*:

In sum, our precedent and § 524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties. And so, excepting the Independent Directors and the Committee members, the exculpation of non-debtors here was unlawful. Accordingly, the other non-debtor exculpations must be struck from the Plan.

Matter of Highland Capital Management, L.P., 48 F.4th 419, 437-38 (5th Cir. 2022) (Internal Citations Omitted).

13. Within *Highland*, the Fifth Circuit court of appeals specifically determined the plan was properly classified as a reorganization plan. *Id.* at 437. The Fifth Circuit addressed how Highland Capital was a reorganized debtor because it was to continue business for several years, and therefore, “the bankruptcy court correctly held Highland Capital was eligible for automatic discharge of its debts” *Id.* at 437.

14. The *Highland* Court did not specifically state that the Bankruptcy Code prohibits third-party exculpations, but rather it held that “[Section] 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code[]” and that

⁴ The UST and Debtors have reach agreement in regard to the further objection raised in Paragraph 56 of the Objection. As such, this Response solely focuses on the objection raised by the UST related to the Exculpation Provisions.

“[Section] 105(a) provides no statutory basis for a non-debtor exculpation [a]nd the same logic extends to [Section] 1123(b)(6), which allows a plan to ‘include any other appropriate provision *not inconsistent* with the applicable provisions of this title.” *Id.* at 437.

15. Within the Cases before the Court, the Plan is a liquidating plan and confirmation will not result in the entry of discharge. As indicated by the title “Effect of Discharge” for Section 524, Section 524(e) of the Bankruptcy Code is inapplicable within the Cases. As such, “exculpations of post-petition liability for certain critical third-party non-debtors are lawful ‘appropriate’ or ‘necessary’ actions for the bankruptcy court to carry out the proceeding through its statutory authority under § 1123(b)(6) and § 105(a).” *Id.* at 436.

16. As one bankruptcy judge within the Fifth Circuit explained last year within a liquidating chapter 11 case, Section 524(e) of the Bankruptcy Code is not “implicated at all” when it comes to exculpation provisions. Confirmation Hrg. Tr. at 57, *In re S. Foods Grp.*, LLC, No. 19-36313 (Bankr. S.D. Tex. Mar. 18, 2021), Dkt.3572. Significantly, this bankruptcy judge has approved a chapter 11 plan containing an exculpation provision post-*Highland*. See *In re Talen Energy Supply, LLC*, No. 22-90054 (Bankr. S.D. Tex), Dkt. No. 1745.⁵

17. Because the *Highland* case and its analysis are so distinguishable from the facts presented to the Court in this Plan, the Court is not bound to *Highland* when approving the Plan. Therefore, the Court should use its authority under the Bankruptcy Code and *Pacific Lumber* and confirm the Plan with the Exculpation Provisions as drafted.

⁵ While exculpation provision in *In re Talen Energy* does not include directors and officers, it does separately shield global settlement parties, which includes directors and officers. The confirmation order included a gatekeeper provision requiring the bankruptcy court’s approval before any party could bring an action against any global settlement party.

B. The Bankruptcy Code Permits Exculpation Provisions in a Chapter 11 Liquidating Plan.

18. Moreover, as a threshold issue, the Bankruptcy Code and precedent in the Fifth Circuit does not prohibit a bankruptcy court from approving a liquidating plan that contains an exculpation provision.

19. Bankruptcy courts are “courts of equity, [and] have broad authority to modify creditor-debtor relationships.” *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990). As the multiples circuits have noted, exculpatory clauses are “a commonplace provision in Chapter 11 plans.” *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020) (quoting *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3rd Cir. 2000)).

20. Consistent with the bankruptcy court being a court of equity, under section §105(a) of the Bankruptcy Code, a court may “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” Similarly, the Bankruptcy Code grants the bankruptcy court broad authority in approving plans. *See Energy Res. Co.*, 495 U.S. at 549. Section 1123(b)(6) of the Bankruptcy Code explicitly provides that “a plan may ... include *any other appropriate provision* not inconsistent with the applicable provisions of [Chapter 11].” Both provisions read together provide Bankruptcy Code authority in approving an exculpation provision. *In re Dow Corning Corp.*, 280 F.3d 648, 656-57 (6th Cir. 2002).

21. A required finding of good faith under section 1129 of the Bankruptcy Code also supports the inclusion of the Exculpation Provisions within the Plan. 11 U.S.C. § 1129(a)(3). Good faith and willful conduct both share duties of care and loyalty underlying the better business judgment rule. *See In re H&M Oil & Gas, LLC*, 514 B.R. 790, 815 (Bankr. N.D. 2014)

22. Notably, the Exculpation Provisions within the Plan “differ from estate and third-party releases, which are also often included in Chapter 11 plans and are contained in the Plan.”

In re Murray Metallurgical Coal Holdings, LLC, 623 B.R. 444, 500–501 (Bankr. S.D. Ohio 2021). “Estate and third-party releases provide for the relinquishment of claims held by the debtor or third parties against certain nondebtor parties; by contrast, exculpatory clauses establish the standard of care that will trigger liability in future litigation by a non-releasing party against an exculpated party for acts arising out of a debtor's restructuring,” *Id.* (citing *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020)). The Exculpation Provisions in this Plan merely protect the Exculpated Parties when acting in their authority in good faith, as any willful misconduct will still subject the Exculpated Parties to liability.

23. As a second issue, Section 524(e) of the Bankruptcy Code states the following: “Except as provided in subsection (a)(3) of this section, discharge 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.” Section 524(e) of the Bankruptcy Code can be read no other way: “this language explains the effect of a debtor's discharge. It does not prohibit the release of a non-debtor.” *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002). Section 524(e) of the Bankruptcy Code is *only* implicated if a plan contains a debtor’s discharge.

24. A discharge is not provided to a liquidating debtor pursuant to section 1141(d)(3)(a) of the Bankruptcy Code (“The confirmation of a plan does not discharge a debtor if [] the plan provides for the liquidation of all or substantially all of the property of the estate.”). Both provisions within the Bankruptcy Code, applied together, demonstrate that a discharge may be granted only to a debtor in a chapter 11 reorganization. Since this Plan is a plan of liquidation, the Debtors will not receive a discharge, making section 524(e) of the Bankruptcy Code inapplicable in these Cases.

25. Collectively interpreting sections 105(a), 1123(b)(6), 1129, 524(e), and 1141(d)(3)(a) of the Bankruptcy Code together suggests that this Court can approve the Exculpation Provisions if it confirms the Plan. Within the Cases before the Court, the Plan is a plan of liquidation. Therefore, the Debtors in these Cases will not receive a discharge under section 1141(d)(3)(a) of the Bankruptcy Code. The Plan's Exculpation Provisions are consistent with all applicable provision of Chapter 11, as required for plan confirmation under section 1123(b)(6) of the Bankruptcy Code. The Court will also find that the Plan was proposed in good faith under Section 1129 of the Bankruptcy Code, a similar requirement for the Exculpated Parties to act for the Exculpation Provisions to be applicable.

26. In fact, Courts within the Fifth Circuit and across the country, routinely approve similar exculpation provisions in plans of confirmation in reliance on the authority provided by sections 105(a) and 1123(b)(6) of the Bankruptcy Code. *See In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *Blixseth*, 961 F.3d at 1084; *accord In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3rd Cir. 2000); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

27. Note that while some Courts have limited exculpations provisions to debtor fiduciaries, each of the proposed Exculpated Parties here are fiduciaries of the Debtors' Estate. *See. e.g., In re Washington Mut.*, 442 B.R. 314, 350–51 (Bankr. D. Del. 2011) (“The exculpation clause 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.”).

28. In sum, the Bankruptcy Code permits this Court to grant the Plan with the Exculpation Provisions, as the Plan is a plan of liquidation proposed in good faith and contains no provisions inconsistent with any provision of Chapter 11 of the Bankruptcy Code.

C. *Pacific Lumber* Does Not Categorically Prohibit Third-Party Exculpation.

29. In addition to being permitted under the Bankruptcy Code, the precedent established within the Fifth Circuit does not prohibit the Court from confirming the Debtors' Plan with the Exculpation Provisions.

30. The leading case regarding third-party exculpations within the Fifth Circuit is *In Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). Within *Pacific Lumber*, the Fifth Circuit's analysis exclusively focuses on the limitations set by section 524(e) of the Bankruptcy Code. *Id.* at 251-52. In applying this provision to disallow the proposed exculpation the Fifth Circuit relied solely upon the fact that the proposed exculpated parties were not "jointly liable" for the debtors' prepetition debts. *Id.*

31. Importantly, even if there were a discharge in this Plan and these Cases, the *Pacific Lumber* decision does not state that section 524(e) of the Bankruptcy Code is a bar to all exculpations – and itself looked to section 1103 of the Bankruptcy Code as the basis to provide an exculpation for a creditors' committee and its members. *Id.* at 253. The Exculpated Parties in this case should be granted exculpation in evaluating the factors described in *Pacific Lumber* to warrant an exculpation clause in a plan. *Id.* at 251-53. First, there are no co-debts or joint liability between the Exculpated Parties and the Debtors, distinguishing the analysis set forth in *Pacific Lumber*. Second, all Exculpated Parties are disinterested parties, as determined by multiple orders issued by the Court. *See* Dkt. Nos. 286, 284, 320. Third, as previously discussed, the Plan is a liquidating plan, so no debt will be discharged.

32. Anomalous to the volunteer members of an unsecured creditors committee, the same policy motivations weighted by the Fifth Circuit in *Pacific Lumber* justify providing the Exculpated Parties with protections in their roles. *See Pacific Lumber*, 584 F.3d at 253 (“If members of the committee can be sued by persons unhappy with the committee’s performance during the case or unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee.”) If parties like the Exculpated Parties were subjected to defending litigation in a liquidating case, it would create a chilling effect in finding individuals to serve such debtors in a similar capacity as the Exculpated Parties have served the Debtors in these Cases, the exact concern the Fifth Circuit had when granting exculpation to the committee in *Pacific Lumber*. And as the bankruptcy court pointed out in *In re Chemtura Corp.*, 439 B.R. 561, 610 (Bankr. S.D.N.Y. 2010), “exculpation provisions are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decisionmakers in the chapter 11 case.” *See also In re Health Diagnostic Lab., Inc.*, 551 B.R. 218, 232 (Bankr. E.D. Va. 2016 (“The practical effect of a proper exculpation provision is not to provide a release for any party, but to raise the standard of liability of fiduciaries for their conduct during the bankruptcy case.”))

33. Since *Pacific Lumber* does not categorically prohibit third-party exculpation, this Court should follow its reasoning and confirm the Plan with the Exculpations Provisions.

IV. CONCLUSION

The Exculpation Provisions represent an integral component of the Plan, are the product of good faith and arm’s length negotiations among various parties who have worked with extreme cooperation to get the Cases to confirmation today, are appropriately and narrowly tailored in time

and scope, and are authorized pursuant to the Court's authority under sections 105, 1123(b), and 1129 of the Bankruptcy Code. The Exculpation Provisions relate only to acts or omissions in connection with, or arising out of, the administration of the Cases and their restructuring. The Exculpation Provisions are not blanket releases, but rather another safeguard and provide a degree of finality that the challenged conduct rises to the level of gross negligence.

WHEREFORE, the Debtors respectfully request that the Court approve the Amended Plan with the Exculpation Provisions included, and for any additional relief to which the Debtors may be justly entitled.

Dated this 26th day of January 2023.

Respectfully Submitted

/s/Bufey E. Klein

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