UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: EXPRESS GRAIN TERMINALS, LLC, *et al.* **CASE NO. 21-11832-SDM**

DEBTOR(S) (Jointly Administered) **CHAPTER 11**

THE MISSISSIPPI DEVELOPMENT AUTHORITY'S OBJECTION TO PLAN OF LIQUIDATION [DKT. #2932]

COMES NOW the Mississippi Development Authority ("MDA"), a creditor and party-in-interest herein, and files this its' Objection to the Plan of Liquidation [Dkt. #2932], and would show unto the Court as follows:

RELEVANT PROCEDURAL HISTORY

1. On September 29, 2021, Express Grain Terminals, LLC ("the Debtor") filed a voluntary petition under Chapter 11 (the "Main Case").

2. On June 2, 2022, the MDA initiated an Adversary Proceeding seeking a judgment against the Debtor that the Debtor's indebtedness to the MDA in the amount of $750,000.00 constitutes a nondischargeable debt pursuant to 11 U.S.C. § 1141(d)(6)(A) and/or (B) (Adversary Proceeding No. 22-01010-SDM) (the "Adversary Case"); S*ee also* Main Case [Dkt. #2865]).

3. On July 5, 2022, the Debtor filed its Answer in the Adversary Case. The Debtor did not deny any of the allegations of the Complaint, and thus the allegations asserted in the MDA's Complaint are admitted, including that the debt owed to the MDA is nondischargeable. (Adversary Case, Answer of Express Grain, LLC [Adversary Case Dkt. #18]). Moreover, the Debtor expressly admitted in its Answer that: "At this stage, the underlying bankruptcy case is a liquidating Chapter 11 case . . . Corporations liquidating under Chapter 11 do not receive a discharge and, as a result,

the Complaint is unnecessary . . .” Adversary Case, Answer of Express Grain, LLC [Dkt. #18] (emphasis added).

4. Shortly thereafter, on August 15, 2022, the Debtor filed in the Main Case its Disclosure Statement [Dkt. #2931] and Plan of Liquidation [Dkt. #2932] (the “Plan”), and although the Debtor had expressly admitted in its Answer in the Adversary Case that “Corporations liquidating under Chapter 11 do not receive a discharge,” and restated the same in the Disclosure Statement, the fact of the matter is that all benefits of a discharge are being given under the Plan, in that the Debtor’s assets would become assets of a “liquidating trust” free and clear of all claims of the MDA, and the MDA would be enjoined from collecting from those assets or otherwise.

SUMMARY OF OBJECTIONS TO DEBTOR’S LIQUIDATING PLAN

5. The MDA objects to the Plan on the grounds that the Plan contains release and injunction provisions that are so overbroad in scope and subject matter that the Plan effectively grants all of the benefits of a discharge to the Debtor, which is unlawful because the Plan is a liquidating plan. *See* 11 U.S.C. § 1141(d)(3).

6. More specifically, the Plan transfers all property and assets of the Debtor and of the Debtor’s estate to the Liquidating Trust “*free and clear of all liens, encumbrances, claims and interests*,” and also permanently enjoins the MDA from collecting on the assets that are being transferred by extending the protections of the permanent injunction to non-debtor third parties, “*(including without limitation, the Liquidating Trust) and their respective properties or interests in property*.” (*See the* Plan pp. 6, 13) (emphasis added).

7. The release and injunction provisions of the Plan effectively give all rights of a discharge to the Liquidating Trust (a non-debtor). In turn, the MDA has no right to pursue the debt owed to it and is enjoined from pursuing/collecting on the assets, as the MDA would be

entitled to do if, in reality, there was no discharge. It is illogical, and certainly not consistent with the provisions and intent of Title 11, for non-debtor third parties to obtain a discharge or release and exculpation when no discharge is available to the Debtor.

8. As more fully set forth below, the Fifth Circuit has expressly rejected the notion that bankruptcy proceedings may discharge the debts or liabilities of parties other than the debtor, and has consistently found non-consensual non-debtor release and permanent injunction provisions to run afoul of Section 524(e). The MDA objects to and does not consent to the release and injunction provisions as they are a violation of Section 524(e) and binding Fifth Circuit law.

APPLICABLE LAW AND ANALYSIS

I. A Liquidating Chapter 11 Debtor May Not Receive a Discharge

9. Bankruptcy Code Section 1141(d)(3) reads in full:

> "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."

10. The Main Case and the Adversary Case are replete with the Debtor's admissions throughout that this is a liquidating plan of a non-individual, that the Debtor will not be engaged in business after the plan is consummated, and that the Debtor is not entitled to a discharge. Yet, the Plan contains non-debtor, non-consensual release clauses and permanent injunction clauses which attempt to circumvent Section 1141(d)(3) by transferring all property and assets "free and clear" of the MDA's claims to a liquidating trust and permanently enjoining the MDA from collecting from those assets that are part of the liquidating trust. Similar clauses have been flatly rejected by the Fifth Circuit, and the MDA should be exempt from such clauses.

II. The Plan's Release and Injunction Clauses Violate the Code and Fifth Circuit Precedent

11. Section 524(e) addresses the scope of a bankruptcy discharge and states, in relevant part, that "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." 11 U.S.C. § 524(e). The purpose of Section 524(e) is to ensure that the benefits of the bankruptcy laws are afforded only to those who submit to the burdens of the bankruptcy laws. *See e.g.*, *Feld v. Zale Corp*., 62 F.3d 746 (5th Cir. 1995); *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992).

12. The Fifth Circuit has consistently rejected non-debtor releases because they contravene Section 524(e). In numerous cases, and in a variety of contexts, the Fifth Circuit has made clear that Section 524(e) releases only the debtor, not third parties, and it prohibits non-debtor releases. *See e.g*., *Matter of Highland Capital Management, L.P*., 48 F.4th 419 (5th Cir. 2022) ("§ 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." (citations omitted); *Feld*, 62 F.3d 746, 760 ("Section 524(e) prohibits the discharge of debts of non-debtors"); *Hall v. Natl. Gypsum Co*., 105 F.3d 225, 229 (5th Cir. 1997), citing *Matter of Edgeworth*, 993 F.2d 51, 53-54 (5th Cir. 1993) (Section 524(e) "specifies that the debt still exists and can be collected from any other entity that might be liable"); *In re Vitro S.A.B. de C.V*., 701 F.3d 1031, 1061 (5th Cir. 2012) (the Fifth Circuit has "firmly pronounced its opposition to such releases").

13. *In re Pacific Lumber Co*., 584 F.3d 229 (5th Cir. 2009) is the bedrock Fifth Circuit case on this issue, as it re-affirmed the Circuit's prior decisions and clarified its' stance on extending protections to non-debtors, stating in pertinent part:

> We find little equitable about protecting the released non-debtors from negligence arising out of the reorganization. In a variety of contexts, this court has held that **Section 524(e) only releases the debtor**, not co-liable third parties. [citations

> omitted]. **These cases seem to broadly foreclose non-consensual non-debtor releases and permanent injunctions**.

Id. at 252 (emphasis added).

14. In the case of *In re Bigler,* 442 B.R. 537 (Bankr. S.D. Tex. 2010), Judge Jeff Bohm sustained an objection to the debtor's liquidating plan because the plan contained impermissibly broad releases in violation of §524(e) of the Bankruptcy Code and because the plan violated §1141(d)(3) of the Bankruptcy Code by effectively providing for a discharge for a liquidating debtor.

15. Referring to the controlling *Pacific Lumber* case, Judge Bohm explained that the "Fifth Circuit's language restricting non-debtor releases is strong." *Id*. at 543. For non-debtor releases to be effective, in light of the *Pacific Lumber* case, "such releases must satisfy the requirements of a valid settlement of claims under the Code. It would require, inter alia, consent and consideration by each participant in the agreement to be valid." *Id*. at 544. Because the plan provision in question applied to non-consenting parties and, potentially, even to non-parties, the plan provision violated "the requirements of consent and consideration for a valid settlement of claims." *Id*.

16. Judge Bohm further explained that "when a plan is a liquidating plan, a debtor is not eligible for discharge." *Id*. at 548. And even in cases where a reorganizing debtor might be eligible for a discharge, "any discharge in a rehabilitative plan is limited to claims which arose pre-petition or are specifically enumerated post-petition claims; the Chapter 11 process is not intended to provide an ongoing, all-encompassing, and generic liability shield for debtors." *Id*.

17. In *Bigler,* the Court also rejected an injunctive provision very similar to the one in the case at bar that also extended to the liquidating trust, stating: **"**The injunction is inappropriate as applied to the Debtors because a liquidating Chapter 11 plan may not provide for the discharge

of the debtor. § 1141(d)(3). An injunction preventing the post-confirmation prosecution of claims would certainly operate as a discharge of the Debtors." Moreover, "**[t]he Liquidating Trust is a third-party who is not entitled to discharge under the plain language of § 524(e) and *Pacific Lumber.*"** 584 F.3d at 253 (emphasis added). *See also*, *In re Midway Gold US, Inc*., 575 B.R. 475, 515 (Bankr. D. Colo. 2017) (denying confirmation of debtor's chapter 11 plan) finding the plan's third-party release provision to be unlawful because "the essence of this provision is to grant the Debtors a release from any debts and other claims arising prior to the Effective Date of the Plan. Such releases are impermissible under § 1141(c) and (d)(3) because a liquidating Chapter 11 plan may not provide for the discharge of a debtor or enjoin actions against property of the debtor's estate." (citing §1141(c) and *In re Bigler, LP*, 442 B.R. at 544–56).

18. In 2012, two years after Judge Bohm's decision in *Bigler,* the Fifth Circuit was presented with the issue of non-consensual, non-debtor releases yet again in *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1059 (5th Cir. 2012). There, the Fifth Circuit affirmed the bankruptcy court's decision that denied the enforceability of a foreign bankruptcy judgment which approved the debtor's plan of reorganization that acted to discharge and extinguish the obligations of non-debtor guarantors. In *In re Vitro,* the Fifth Circuit acknowledged that Chapter 15 provides limited circumstances requiring recognition and enforcement of a foreign bankruptcy proceeding, none of which were applicable there, and went on to further affirm this Circuit's position that non-consensual, non-debtor releases are not lawful: "a non-consensual, non-debtor release through a bankruptcy proceeding is generally not available under United States law. Indeed, [the Fifth Circuit] has explicitly prohibited such relief." *In re Vitro,* 701 F.3d at 1059 (emphasis added) (citing *In re Pacific Lumber Co.,* 584 F.3d 229, 251–52 (5th Cir.2009)*; In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir.1995)).

19. The Court in *In re Vitro* also pointed to the fact that numerous circuits also take the Fifth Circuit's firm stance categorically barring non-consensual non-debtor releases, and "those circuits not in agreement nevertheless prohibit such releases in all but the rarest of cases." *In re Vitro,* 701 F.3d 1031 at 1061. *See e.g. In re Lowenschuss,* 67 F.3d 1394, 1401 (9th Cir.1995) ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors."); *In re W. Real Estate Fund, Inc.,* 922 F.2d 592, 600–02 (10th Cir.1990); *In re Jet Fla. Sys., Inc.,* 883 F.2d 970, 972–73 (11th Cir.1989).

20. In the case at bar, Articles V and VII of the Plan contain similar impermissibly broad releases/exculpation for non-debtor third parties. Article V Section G of the Plan also contains an impermissibly broad permanent injunction against asserting claims.

21. This is precisely the type of overreaching and attempted circumvention of the Code to impermissibly reap the benefits of a discharge that the Fifth Circuit has expressly rejected. By extending release and injunction protections to non-debtors, including the Liquidating Trustee/ Liquidating Trust, this in effect precludes the MDA, who has not and does not consent to such provisions, from rightfully collecting on the assets as it would if no discharge was given. As stated in the Plan:

> "all entities who have held, hold or may hold claims against or interests in the Debtor are permanently enjoined . . . from (a) commencing or continuing in any manner any action or proceeding of any kind with respect to any such claim or interest, (b) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree or order against the Debtor on account of any such claim or interest . . . [and] [s]uch injunction shall extend to successors of the Debtor (including, without limitation, the Liquidating Trust) and their respective properties or interests in property. ."

The Plan p. 13 [Dkt. #2932] (emphasis added).

22. Thus, the Plan in its present version cannot be confirmed, and the MDA should be exempt from the non-debtor, nonconsensual release provisions and the permanent injunction

provision because those provisions violate the Code and controlling Fifth Circuit case law, and are contrary to the Debtor's admissions in the Disclosure Statement and in the Adversary Case, including that the Debtor does not receive a discharge in this Chapter 11 bankruptcy. *See* Adversary Case, Express Grain, LLC's Answer to Complaint [Adversary Case Dkt. #18]. Alternatively, confirmation of the Plan should be denied.

CONCLUSION

23. Given that the MDA filed an adversary proceeding to have its debt to be declared not discharged, and that the Debtor did not deny the allegations of the Complaint and admitted that it could not obtain a discharge of that debt, it is clear that the Debtor cannot now evade those admissions by these plan provisions, prohibited by the Fifth Circuit, which give the benefits of a discharge by transferring assets free and clear of any claims of the MDA and enjoining the MDA from trying to collect from those assets or otherwise.

24. Accordingly, those provisions which transfer the assets free and clear of the claims of the MDA, and enjoin the MDA from pursuing its claims, should not apply to the MDA. Therefore, the MDA should be entitled to pursue its claim post confirmation against the liquidating trust, the Debtor, the Debtor's assets and otherwise.

WHEREFORE, the MDA respectfully prays for an Order exempting the MDA from the Plan's non-debtor, non-consensual release and injunction provisions, or alternatively prays for an Order denying confirmation of the Plan. MDA further prays for all general and equitable relief to which it may be entitled.

RESPECTFULLY SUBMITTED, this the 7th day of March 2023.

THE MISSISSIPPI DEVELOPMENT AUTHORITY

BY: *s/William H. Leech*
WILLIAM H. LEECH, MSB NO.1175
C. PATRICK ROBERTS, MSB NO. 102002
CORY L. RADICIONI, MSB NO.101761
KAITLYN J. MCMELLON MSB. NO. 105704
Its Attorneys

OF COUNSEL:

C. PATRICK ROBERTS (MSB NO. 102002)
General Counsel
Mississippi Development Authority
P.O. BOX 849
Jackson, Mississippi 39205-0849
T: 601.359.2850
F: 601.359.3619
proberts@mississippi.org

WISE CARTER CHILD & CARAWAY, P.A.
WILLIAM H. LEECH (MSB NO.1175)
CORY L. RADICIONI (MSB NO. 101761)
KAITLYN J. MCMELLON (MSB. NO. 105704)
Post Office Box 651
Jackson, Mississippi 39205
T: 601.968.5500
F: 601.968.5519
whl@wisecarter.com
clr@wisecarter.com
kjm@wisecarter.com

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this day the foregoing was filed using the CM/ECF System which sent notice of the filing to all persons requesting notice.

THIS the 7th day of March 2023.

s/William H. Leech
WILLIAM H. LEECH