UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

In Re:	**§**	
	§	**Case No. 14-10447-tmd**
FIRED UP, INC.	**§**	**(Chapter 11)**
Debtor	**§**	
	§	

OMNIBUS RESPONSE TO OBJECTIONS TO CONFIRMATION OF PLAN OF REORGANIZATION

TO THE HONORABLE U.S. BANKRUPTCY JUDGE:

COMES NOW, Fired Up, Inc., Debtor and Debtor-in-Possession and the Official Committee of Unsecured Creditors ("the Plan Proponents) in the above captioned and numbered proceeding, and file this its *Omnibus Response to Objections to Confirmation of Plan of Reorganization* and would respectfully show the Court as follows:

1. There were initially five objections filed to the confirmation of the Joint Plan of Reorganization.

   a. Objection by Arlington ISD, et al (Dkt. #606);

   b. Objection of Bexar County, et al (Dkt. #609);

   c. Objection to Texas Comptroller of Public Accounts (Dkt. #612);

   d. Objection by the U.S. Trustee (Dkt. #613); and

   e. Objection of Independent Bank (Dkt. #614).

The Debtor reached agreements with Arlington ISD, et al and Bexar County, et al and those creditors withdrew their objections. The Debtor also reached agreement with Independent Bank. All three of these creditor groups have now voted in favor of the Plan as modified. This Response will address the two remaining live objections.

2. **Response to the United States Trustee:**

a. Third Party Releases (Para. 2.16 and 8.06)

The United States Trustee objects to paragraphs 2.16 and 8.06 as impermissible third party releases. The U.S. Trustee contends that the provisions contained within the Plan are prohibited by 11 U.S.C. §§524(e) and (g). However, this is misleading. Section 524(e) does not prohibit third party releases. Rather, it simply describes the effect of a bankruptcy discharge. As explained by the Seventh Circuit:

> (S)ection 524(e) provides only that a discharge does not affect the liability of third parties. This language does not purport to limit or restrain the power of the bankruptcy court to otherwise grant a release to a third party. While a third-party release, like the one in Union Carbide releasing a co-debtor from liability, may be unwarranted in some circumstances, a se rule disfavoring all releases in a reorganization plan would be similarly unwarranted, if not a misreading of the statute.

In re Specialty Equipment Companies, 3 F.3d 1043, 1047 (7th Cir. 1993). The Fifth Circuit has stated that "the statute (Section 524(e)) does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization." *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987). The Second, Fifth, Sixth and Seventh Circuits have all allowed third party releases under certain circumstances. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2nd Cir. 2005); *In re Dow Corning Corporation*, 280 F.3d 648 (6th Cir. 2002); *Republic Supply Co. v. Shoaf, supra; In re Ingersoll, Inc.*, 562 F.3d 856 (7th Cir. 2009); *Matter of Specialty Equipment Companies, Inc., supra.* Thus, the question is when third party releases and modifications should be allowed rather than whether they are ever permissible.

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Committee (Matter of Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009) and *Ad Hoc Group of Vitro Noteholders v. Vitro SAB de CV*, 701 F.3d 1031 (5th Cir. 2012) are not to the contrary. The *Vitro* case is distinguishable because it involved a Mexican *concurso* in which the votes of insiders were used to approve a plan over the objection of the third party creditors. The *Vitro* case distinguished its facts from other cases where plans had been approved by a substantial majority of third party creditors. *Pacific Lumber* involved an exculpation clause rather than a release or modification of the liability of third parties jointly liable with the debtor. The Court also stated that its ruling related to "non-consensual non-debtor releases." The plain distinction between this case and those cited by the U.S. Trustee is that this plan, including the release and modification provisions, has been overwhelmingly approved by the creditors. Indeed, only two creditors out of over 1,000 have objected to the provisions.

Furthermore, the release provision in Para. 8.06 is part of a compromise negotiated between the Debtor, FRG Capital and the Official Committee of Unsecured Creditors. Settlements are an integral part of the plan process and the Court's approval of a settlement will not be disturbed absent an abuse of discretion. *Matter of Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988). Judge Jeff Bohm has written a thoughtful opinion on the subject of third party releases in a plan following the *Pacific Lumber* case. *In re Bigler, LP*, 442 B.R. 537 (Bankr. S.D. Tex. 2010). Judge Bohm notes that while third party releases have not been approved under Section 524(e), they may be permissible under Section 1123(b)(3)(A) which authorizes the settlement or adjustment of any claims belonging to the estate.

> *Pacific Lumber* is not explicit as to boundaries between the restriction of non-debtor releases under § 524(e) and the settlement of claims under §

> 1123(b)(3)(A). The Fifth Circuit's language restricting non-debtor releases is strong, and, with the exception of a provision for limited releases for committees, does not hedge on its limitation of non-debtor releases. But, as it is only directly addressing releases available under § 524, this Court concludes that it cannot be interpreted to restrict the availability of settlements of claims under §1123(b)(3)(A). To interpret the language of *Pacific Lumber* otherwise would more or less nullify § 1123(b)(3)(A), and, in this Court's view, run counter to Congress's intent to allow parties to agree to settle claims between them. The recognition that *Pacific Lumber* does not restrict the availability of settlements of claim under §1123(b)(3)(A) thus provides an avenue for a Chapter 11 plan to provide for releases of liability for non-debtors. But, 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.

Bigler, LP at 543-44.

Texas Bankruptcy Courts have approved third party releases where some combination of the following factors are present.

> (1) The third party has made an important contribution to the reorganization;
> (2) The release is "essential" or "important" to the reorganization;
> (3) A large majority of the impacted creditors has approved the plan containing the release;
> (4) A close connection between the cases against the third party and the case against the debtor exists; and
> (5) The plan provides for payment of substantially all of the claims affected by the release.
>
> These factors are not "rigid" and it is not necessary to establish all of them.

In re Seatco, Inc., 257 B.R. 469, 474 (Bankr. N.D. Tex. 2001)(Hauser, B.J.); *In re Bernhard Steiner Pianos USA, Inc.*, 292 B.R. 109 (Bankr. N.D. Tex. 2002)(Hale, B.J.).

This case fits squarely within the parameters established by existing case law as shown by the following:

1. The Ford Family and FRG Capital, LLC have agreed to make important contributions to the reorganization. The Fords are enabling the Debtor to obtain exit

financing in the amount of $5.3 million to fund the Plan. FRG has Capital agreed to reduce its debt by $2 million and to subordinate its liens to the new financing.

2. The release provisions were an integral part of the overall compromise negotiated between the Debtor, the Ford Family, FRG Capital and the Official Committee of Unsecured Creditors.

3. The Plan was approved by an overwhelming majority of creditors. The following chart summarizes the votes of the three classes of unsecured claims:

Class	**Number Accepting**	**Amount Accepting**
Class 11—Admin Convenience	99%	97%
Class 12—General Unsecured	88%	99%
Class 13—Lease Rejection	93%	93%

Of the creditors voting on the plan, over 120 voted to accept while only seven voted to reject. Only two creditors objected to the particular provisions.

4. There is a substantial identity between the Ford Family, which owns approximately 70% of the Debtor and serves as its principal officers and the Debtor.

5. All secured and priority creditors will receive 100% of their claims unless they have voluntarily agreed to take a reduced amount. Unsecured creditors will receive an estimated 25-30% which is a substantial distribution. Debtor estimates that the unsecured creditors would be receiving little if anything without the exit financing facilitated by Creed and Lynn Ford.

Two other points bear mentioning. First, the plan does not provide for an absolute release of third parties. Instead, the combined effect of paragraphs 2.16 and

8.06 is to provide that third parties who are currently liable with the Debtor on claims shall remain liable to the same extent and terms as the Debtor. This provision is intended to ensure that creditors who have recourse against the Debtor and a third party will look to the Debtor first for payment. This avoids the problem where creditors collect from third parties who then have indemnification claims against the Debtor. Second, consensual third party releases are allowed in the Fifth Circuit. The U.S. Trustee should not be allowed to assert the interest of individual creditors who could have chosen to vote against the plan or object but chose not to. The overwhelming majority of the creditors chose to accept the bargain negotiated by the Unsecured Creditors' Committee.

b. Section 1111(b) Election (Para. 2.18)

The U.S. Trustee objects to Para, 2.18 "which proposes to limit the time period for a §1111(b) election does not comply with the Bankruptcy Code requirements set forth in §1111(b)." The Plan provides for the 1111(b) election to be made by the Disclosure Statement hearing. This is entirely consistent with Fed.R.Bankr.P. 3014 which provides that any 1111(b) election be made by the conclusion of the hearing on the disclosure statement.

c. Cure/Rejection Claims (Para. 5.08)

The U.S. Trustee objects that the Debtor did not file the schedule of cure amounts within ten days prior to the confirmation hearing as required by para. 5.08. However, the U.S. Trustee omits the fact that the Debtor requested and obtained a court order permitting an extension until November 24 to file the schedule. As a result, the schedule was timely filed. The U.S. Trustee's objection with regard to rejection claims does not

appear to naturally follow, since para. 5.08 applies to proposed cure amounts and not rejection claims.

d. Exculpation (Para. 6.02 and 8.07)

The U.S. Trustee objects that the Plan proposes to grant exculpation to certain unidentified parties and that this provision is somehow a third party release. The exculpated parties are set forth with particularity in para. 1.01.41 as: the Debtor, the Committee, the GUC Trustee and the Oversight Committee. The exculpation provision provides that the listed parties would not be liable for actions taken in connection with the bankruptcy case or the implementation of the Plan in the absence of gross negligence or willful misconduct. In *Matter of Pacific Lumber Company, supra*, the Fifth Circuit held that similar provisions were acceptable with regard to a Creditor's Committee but not the Debtor. Because three out of four parties proposed to be exculpated consist of the Committee, the Trustee named by the Committee and the Oversight Committee named by the Committee, the provision is permissible as to these parties. The provision is also acceptable as to the Debtor because no creditor objected to the provision. The *Pacific Lumber* case involved a creditor's objection to an exculpation provision and is therefore distinguishable. The Plan in this case was overwhelmingly approved by the creditors.

e. Timing of Payments by the GUC Trust (para. 2.14 and 10.04.02)

The U.S. Trustee objects that the Plan does not set forth the date of timing of payments to be made by the GUC Trust. After discussions with the U.S. Trustee, the Confirmation Order will address and resolve the U.S. Trustee's objection by providing that the initial distribution will be made on or before the 90th day following the Effective

Date or such other date as is reasonably practicable under the circumstances.

f. Absolute Priority Rule

The U.S. Trustee conditionally objected to the Plan on the basis that it did not comply with the absolute priority rule. Because no class of unsecured claims rejected the Plan, this objection does not arise.

g. Reporting Requirements (para. 12.04.02)

After discussions with the U.S. Trustee, the Confirmation Order will address and resolve the U.S. Trustee's objection by providing that the GUC Trust will file quarterly operating reports with the Court

h. Default Provisions (para. 15.01)

The U.S. Trustee objects that the default provisions of the plan are limited to applicable non-bankruptcy contract law. The Debtor agrees that the remedies for default should be expanded to remedies under applicable bankruptcy law and applicable non-bankruptcy law.

The U.S. Trustee also objects that the default provisions in para. 15.01 do not include a procedure for giving notice of a default by the GUC Trust. After discussions with the U.S. Trustee, the Confirmation Order will address and resolve the U.S. Trustee's objection by providing that any Beneficiary of the GUC Trust will be able to exercise whatever right or remedy it has by seeking relief in this Court.

3. **Response to Comptroller of Public Accounts**

a. Setoff (para. 8.05)

Debtor agrees that the Comptroller's right to set off should be preserved.

b. Third Party Releases and Modifications (para. 2.16 and 8.06)

The propriety of third party releases and modifications is addressed above. The Plan provides that the third parties will remain liable for the Comptroller's claims and the Plan provides that the claims will be paid in full with interest. Approximately 2/3 of the Comptroller's claim may be paid immediately through set off of an allowed refund claim.

c. Remedies for Default (para. 15.01)

The Debtor and the Comptroller have agreed to the following default language with regard to the State of Texas:

> A failure by the Debtor or Reorganized Debtor to make a plan payment to any agency of the State of Texas shall be an Event of Default. If the Debtor or Reorganized Debtor fails within fourteen (14) days after service of a written notice to cure an Event of Default as to an agency of the State of Texas or seek redress from the Courts if there is a dispute as to the alleged Event of Default within the time allotments set forth in paragraph 15.01 after service of written notice by email transmission with confirmation by United States Mail, CRRR, then that agency may enforce any and all rights and remedies available to it under applicable non-bankruptcy law and seek such relief as may be appropriate in the Bankruptcy Court.

d. Objected to Claims (para. 2.12 and 2.13)

The Comptroller objects that the Plan does not require that the Debtor escrow proposed payments on the Comptroller's claim in the event that an objection is filed. There is no provision in the Code which would require this relief. Therefore, Debtor should not be compelled to provide it.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served by electronic mail on December 3, 2014, to all parties listed on the Twelfth Master Limited Service List attached hereto and made a part hereof and electronically by the Court's ECF system to all parties registered to receive such service.

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