IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
TRIANGLE USA PETROLEUM CORPORATION, *et al.*,	:	**Case No. 16-11566 (MFW)**
	:	**(Jointly Administered)**
Debtors.[1]	:	**Hearing Date: 3/10/17 at 10:30 a.m. (ET)** **Re: Docket Nos. 585, 598**

CALIBER'S OBJECTION TO THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF TRIANGLE USA PETROLEUM CORPORATION AND ITS AFFILIATED DEBTORS

Caliber Measurement Services LLC, Caliber Midstream Fresh Water Partners LLC, and Caliber North Dakota LLC (together, "**Caliber**"), by and through their undersigned counsel, submit this objection (the "**Objection**") to the Second Amended Joint Chapter 11 Plan of Reorganization of Triangle USA Petroleum Corporation and its Affiliated Debtors, dated January 12, 2017 (as it may be further amended, modified, or supplemented, the "**Amended Plan**")[2] (Docket No. 598), filed by the above-captioned debtors (collectively, "**TUSA**" or the "**Debtors**"). In support of the Objection, Caliber respectfully represents:

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are: Triangle USA Petroleum Corporation (0717); Foxtrot Resources LLC (6690); Leaf Minerals, LLC (9522); Ranger Fabrication, LLC (6889); Ranger Fabrication Management, LLC (1015); and Ranger Fabrication Management Holdings, LLC (0750). The address of the Debtors' corporate headquarters is 1200 17th Street, Suite 2500, Denver, Colorado 80202.

[2] Capitalized terms used but not defined herein shall have the meaning attributed to them in the Amended Plan.

PRELIMINARY STATEMENT

1. From the outset of these chapter 11 cases, rather than working to reach a consensual restructuring of the Specified Caliber Contracts, the Debtors chose not to negotiate reasonably with Caliber and instead attempted to dismiss Caliber's prepetition litigation pending in North Dakota. The Debtors' high stakes strategy was based on the erroneous belief that they could threaten rejection of these contracts in bankruptcy to create negotiating leverage over Caliber.

2. Consistent with their actions towards Caliber during these cases,[3] the Debtors now seek confirmation of an Amended Plan that would eviscerate statutory protections afforded to Caliber under sections 1123(b)(2) and 365 of the Bankruptcy Code by allowing the Debtors to have an unlimited post-confirmation extension of the time to assume or reject the Specified Caliber Contracts through a manufactured toggle provision in Section 6.03 of the Amended Plan (the "**Toggle Provision**"). The Toggle Provision, which violates applicable bankruptcy law, conveniently allows the Debtors to (i) emerge from bankruptcy now and (ii) delay for potentially years the decision to assume or reject the Specified Caliber Contracts, thus forcing Caliber to bear, among other things, the uncertainty of not knowing whether customers and potential financiers will continue to do business in the ordinary course with a company whose primary source of revenue could be rejected at an unknown date. This is part of the Debtors' continuing strategy to add leverage over Caliber in contract negotiations and directly contravenes the certainty afforded to contract counterparties under the Bankruptcy Code. Indeed, the Legislative history concerning section 365 makes it clear that it was designed "to

[3] The Debtors' approach has proven ineffective. *See, e.g.,* Docket No. 210 (order denying Debtors' motion for order approving plan support agreement); Docket No. 519 (notice of withdrawal of Debtors' motion seeking to estimate and cap Caliber's claims).

prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate." H. Rep. No. 595, 95th Cong., 1st Sess. 348 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978). The fact that the Bankruptcy Code offers no guidance on how to address the plethora of potential unintended consequences of the Toggle Provision underscores that it is not permissible as a matter of law.

3. The Toggle Provision also contravenes sound bankruptcy policy. If permitted, rather than addressing executory contracts prior to confirmation, the door would be open for debtors to request a deemed assumption or rejection of such contracts in a plan of reorganization, receive a free option to wait out market conditions post-effective date, and determine then, with full information, whether rejection or assumption inures to their benefit. Caliber is also unaware of any chapter 11 case or bankruptcy law authorizing a debtor to estimate rejection damages before a contract is actually rejected.

4. In addition to the infirmities with the Toggle Provision, the Amended Plan also unfairly discriminates against Caliber by requiring it to deposit cash based on a $75 million "Caliber Rejection Damages Cap" (an amount arbitrarily invented by the Debtors with no relation to Caliber's potential rejection damages claims)[4] now if it wishes to participate in the Rights Offering at some point in the future. Caliber will not know if it is entitled to participate in the Rights Offering until a final order on the Caliber North Dakota litigation and satisfaction of additional contingencies in the Toggle Provision, but will be forced to part with a substantial amount of cash for an unknown period of time. This is an economic result that is only intended to cause hardship on Caliber. The Amended Plan also discriminates against Caliber by not permitting the cash that it purportedly requires Caliber to deposit to earn any interest. Finally,

[4] *See* Ex. A; Deposition of John R. Castellano dated February 28, 2017, at 128:4–129:4 (testifying $75 million is an economic tradeoff that benefits the Reorganized Debtors and the new equity holders).

the Amended Plan contains impermissible releases and exculpation provisions that do not comport with established case law in this District. The Amended Plan is unconfirmable for each of these reasons.

5. Caliber continues to analyze information relating to the issues identified above and reserves the right to amend or supplement this objection in advance of the confirmation hearing as additional facts become available.

BACKGROUND

A. Formulation of the Amended Plan and the Amended Disclosure Statement

6. On July 5, 2016, the Debtors commenced an adversary proceeding against Caliber (Adv. Proc. 16-51023) (the "**TUSA Adversary Proceeding**"), in which the Debtors filed a Complaint for Declaratory Judgment. The Debtors also filed a motion for authority to reject the Specified Caliber Contracts (Docket No. 67) (the "**TUSA Motion to Reject**"). The Debtors have never scheduled a hearing to consider the TUSA Motion to Reject, and do not intend to do so prior to the confirmation hearing.

7. On August 19, 2016, Caliber filed (i) a motion to dismiss TUSA's Complaint for Declaratory Judgment or, in the alternative, transfer the TUSA Adversary Proceeding to the North Dakota Federal Court for improper venue, or based on abstention pursuant to 28 U.S.C. § 1334(c)(1) and (c)(2), or, in the alternative, for abstention and stay of the TUSA Adversary Proceeding and (ii) a memorandum in support thereof (Adv. Docket Nos. 8, 9).

8. On October 21, 2016, Caliber filed a motion to lift the automatic stay to permit the prepetition Caliber Declaratory Judgment Action to proceed in North Dakota. (Docket No. 353) (the "**Caliber Lift Stay Motion**").

9. On November 14, 2016, the Debtors filed a motion for an order under section 502(c) of the Bankruptcy Code and Bankruptcy Rule 3018 asking the Court to estimate

the maximum amount of Caliber's potential rejection damages claims with respect to the Specified Caliber Contracts (Docket No. 396) (the "**Estimation Motion**").

10. On November 15, 2016, the Debtors filed a Joint Chapter 11 Plan of Reorganization of Triangle USA Petroleum Corporation and Its Affiliated Debtors (Docket No. 407) and a Disclosure Statement with Respect to the Joint Chapter 11 Plan of Reorganization of Triangle USA Petroleum Corporation and Its Affiliated Debtors (Docket No. 408).

11. On November 23, 2016, the Court entered an order granting the Caliber Lift Stay Motion (Docket No. 436) and a separate order dismissing the TUSA Adversary Proceeding with prejudice (Adv. Docket No. 15).

12. At a hearing before the Court on December 14, 2016, the Debtors stated their intent to withdraw the Estimation Motion and file an amended plan of reorganization. On December 15, 2016, the Debtors filed a Notice of Withdrawal of the Estimation Motion (Docket No. 519).

13. On January 12, 2017, the Debtors filed the Amended Plan (Docket No. 585) and the Second Amended Disclosure Statement With Respect to the Second Amended Joint Chapter 11 Plan of Reorganization of Triangle USA Petroleum Corporation and Its Affiliated Debtors (Docket No. 586) (the "**Amended Disclosure Statement**").

14. On January 13, 2017, the Court entered an order approving solicitation of the Amended Disclosure Statement (Docket No. 597). On the same date, the Debtors filed solicitation versions of the Amended Plan and the Amended Disclosure Statement (Docket No. 598).

B. Summary of Material Sections of the Amended Plan Concerning Caliber

15. Section 6.03(b) of the Amended Plan provides that the Specified Caliber Contracts shall be deemed automatically rejected pursuant to sections 365 and 1123 of the Bankruptcy Code as of the Effective Date, subject only to the satisfaction of each of the following conditions subsequent: (i) the entry of a Final Order or judgment in the Caliber Declaratory Judgment Action determining that the Specified Caliber Contracts do not constitute or contain a covenant running with the land, and (ii) the entry of a Final Order or judgment determining the Allowed amount of the Caliber Rejection Damages Claim, or estimating the maximum amount thereof, in an amount less than or equal to the Caliber Rejection Damages Cap (*i.e.*, $75 million). Amended Plan, § 6.03(b).[5]

16. To the extent this Court or a court of competent jurisdiction issues a Final Order or judgment resulting in the failure of one or both of the conditions under Section 6.03(b), the Amended Plan provides that the Specified Caliber Contracts shall be automatically deemed assumed. *Id*. at § 6.03(c). The Debtors have asserted that the Amended Plan is feasible even if the Specified Caliber Contracts are assumed. *See* Amended Disclosure Statement at 84.

17. However, if the Specified Caliber Contracts are deemed automatically assumed pursuant to Section 6.03(c), Section 6.01(e) states that any Cure in excess of $100,000 must be reasonably acceptable to the Required Participating Noteholders. Caliber currently has prepetition liquidated, non-contingent, undisputed claims totaling approximately $9.7 million, regardless of whether the Specified Caliber Contracts are assumed or rejected. *See* Amended

[5] The reference to a "Final Order or judgment" in Section 6.03(b) renders clauses (i) and (ii) vague and ambiguous because the Amended Plan defines "Final Order" to mean "an order or judgment, the operation or effect of which has not been reversed, stayed, modified, or amended ..." and is no longer subject to appeal. Amended Plan, § 1.71. Caliber presumes this is an oversight and not that the Debtors intend to rely on an appealable, non-final judgment to satisfy Section 6.03(b) or (c). For the avoidance of doubt, each reference to "Final Order or judgment" in Section 6.03 should be replaced with the term "Final Order."

Schedules of Assets and Liabilities for Triangle USA Petroleum Corporation (Docket No. 412). The Debtors' Chief Restructuring Officer testified in a deposition that Caliber's $9.7 million prepetition claim will be treated and paid on the Effective Date as a Class 2 Other Secured Claim under the Amended Plan.[6] Caliber reserves all rights to object at any time if the Debtors fail to satisfy the $9.7 million prepetition claim as a Class 2 Other Secured Claim.

18. Moreover, Section 6.03(d) of the Amended Plan provides that beginning with the Effective Date, and through the date the Specified Caliber Contracts are conclusively deemed rejected pursuant to Section 6.03(b) or deemed assumed pursuant to Section 6.03(c), the Reorganized Debtors shall perform their obligations under the Specified Caliber Contracts in accordance with their terms, and Caliber shall be entitled to exercise all remedies available under applicable non-bankruptcy law with respect to a breach or default by the Reorganized Debtors occurring thereunder during such period. Amended Plan, § 6.03(d).

19. Section 7.06 of the Amended Plan states that postpetition interest shall not accrue or be paid on Claims and no holder of a Claim shall be entitled to interest accruing on or after the Petition Date. *Id*. at § 7.06. Additionally, interest shall not accrue or be paid on any Disputed Claim in respect of the period from the Effective Date to the date a final distribution is made, when and if such Disputed Claim becomes an Allowed Claim. *Id*. Finally, Sections 9.04 and 9.05 of the Amended Plan provide debtor releases to "Released Parties" and third-party releases for the "Debtors, the Reorganized Debtors, their Estates, non-Debtor Affiliates, and the Released Parties." *Id*. at §§ 9.04, 9.05. Released Parties are defined broadly as:

> [E]ach of the following in their respective capacities as such: (a) the Debtors; (b) the Reorganized Debtors; (c) the Prepetition Secured Parties; (d) the Backstop Parties; (e) the Senior Notes Indenture Trustee; (f) the members of the Ad Hoc Noteholder

[6] *See* Ex. A; Deposition of John R. Castellano dated February 28, 2017, at 155:3–15.

> Group; and (g) with respect to each of the above-named Entities described in the foregoing clauses (a) through (f), *such Entity's respective predecessors, successors and assigns, members, limited partners, general partners, and its and their subsidiaries, principals, partners, managed funds, members, employees, agents, officers, directors, managers, trustees, professionals, representatives, advisors, attorneys, financial advisors, accountants, investment bankers, and consultants;* and (h) solely with respect to the above-named Entities described in the foregoing clauses (c) through (f), *such Entity's respective current and former stockholders, equity holders, Affiliates, and parents*. For the avoidance of doubt, and notwithstanding anything herein to the contrary, in no event shall an Entity that checks the box on the ballot and returns such ballot in accordance with the Disclosure Statement Order to opt out of the third-party releases contained in Section 9.05 hereof be a Released Party.

Amended Plan, § 1.130 (emphasis added).

OBJECTION

I. SECTION 6.03 OF THE AMENDED PLAN RENDERS THE AMENDED PLAN UNCONFIRMABLE

20. Section 1129(a)(1) of the Bankruptcy Code requires that the Amended Plan comply with all applicable provisions of title 11 of the Bankruptcy Code, including sections 365 and 1123 of the Bankruptcy Code, which govern assumption and rejection of executory contracts. *See* 11 U.S.C. § 1129(a)(l). The Debtors bear the burden of establishing that each of the requirements for plan confirmation under section 1129 of the Bankruptcy Code has been satisfied. *See In re Exide Techs.*, 303 B.R. 48, 58 (Bankr. D. Del. 2003); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 656 (Bankr. D. Del. 2003). As set forth more fully herein, the Debtors have not and cannot satisfy this burden because the provisions governing treatment of the Specified Caliber Contracts, along with the Amended Plan's releases and exculpations, are inappropriate and not supported by the Bankruptcy Code. Thus, the Amended Plan is unconfirmable.

A. The Toggle Provision Contravenes Express Requirements Under Sections 365 and 1123(b)(2) of the Bankruptcy Code

21. A chapter 11 debtor may seek authority from the bankruptcy court to assume or reject an executory contract "at any time before the confirmation of a plan." 11 U.S.C. § 365(d)(2). A debtor may also assume or reject an executory contract pursuant to a confirmed chapter 11 plan. *See id*. at § 1123(b)(2). When a debtor relies on section 1123 to assume or reject an executory contract, it still must comply with section 365 which, as interpreted by various courts,[7] does not permit a debtor to defer its decision to assume or reject an executory contract beyond confirmation. *See id*. (providing that a chapter 11 plan "may . . . *subject to section 365* . . . provide for the assumption, rejection, or assignment of any executory contract") (emphasis added).

22. In the alternative, if a "contract is neither accepted nor rejected, it will 'ride through' the bankruptcy proceeding and be binding on the debtor even after a discharge is granted." *Bildisco*, 465 U.S. at 546 n.12 (citations omitted). Based on the foregoing, the Bankruptcy Code generally provides chapter 11 debtors with the following options: (i) assume an executory contract contract prior to confirmation or in the plan; (ii) reject an executory contract prior to confirmation or in the plan; or (iii) take no action such that the executory contract rides through the bankruptcy. In this case, the Debtors seek approval of a novel fourth option (the Toggle Provision) — an unlimited extension of the time to assume or reject the Specified Caliber Contracts, while Caliber bears the market uncertainty section 365 of the

[7] *See*, *e.g.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 (1984) ("In a Chapter 11 reorganization, a debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract, although a creditor may request the Bankruptcy Court to make such a determination within a particular time."); *see also Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 46 (2008) ("We agree with *Bildisco*'s commonsense observation that the *decision* whether to reject a contract or lease must be made before confirmation."); *Univ. Med. Ctr. v. Sullivan,* 125 B.R. 121, 124 (E.D. Pa. 1991) ("A debtor under Chapter 11 must elect to assume or reject any executory contract by the time a reorganization plan is confirmed, or, upon motion by the creditor, at an earlier time specified by the court.").

Bankruptcy Code is supposed to prevent.[8] *See* H. Rep. No. 595, 95th Cong., 1st Sess. 348 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978) (stating section 365 was designed "to prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate.").

23. Caliber is unaware of any court granting a post-effective date extension of the time to assume or reject contracts with anything similar to the proposed Toggle Provision, which conditions assumption or rejection on a set of unresolved contingencies that will be resolved after an unknown, but almost certainly lengthy, period of time. The Debtors, as they must, will ask this Court to rely on the holding in a handful of inapplicable and non-binding cases where courts granted a very limited post-confirmation extension of time to assume or reject an executory contract to resolve an anticipated short-term issue. *See*, *e.g.*, *In re Simplot*, 2007 WL 2479664, No. 06-00002 (Bankr. D. Idaho Aug. 28, 2007), *aff'd*, *DJS Props., L.P. v. Simplot*, 397 B.R. 493 (D. Idaho 2008) (hereinafter, "***Simplot***"); *Alberts v. Humana Health Plan, Inc. (Greater Se. Cmty. Hosp. Corp. I)*, 327 B.R. 26 (Bankr. D.D.C. 2005) (hereinafter, "***Alberts***"); *In re Gunter Hotel Assocs.*, 96 B.R. 696 (Bankr. W.D. Tex. 1988) (hereinafter, "***Gunter***") (noting after confirmation, a bankruptcy court's exercise of jurisdiction "should be utilized sparingly"). But a careful examination of these decisions reveals why these specific cases are rare exceptions to the general rule prohibiting post-confirmation assumption/rejection and why the Toggle Provision does not comport with applicable bankruptcy law.

24. In *Simplot*, the debtor's chapter 11 plan provided that a debtor could commence an adversary proceeding within 60 days of the plan effective date to litigate whether a

[8] In addition, none of the contingencies in Section 6.03(b) even require the Debtors to satisfy the business judgment test under section 365. Caliber and the Debtors have agreed that, if the Amended Plan is confirmed with the Toggle Provision, the parties will defer argument as to whether section 365 must be satisfied to reject the Specified Caliber Contracts until after a Final Order has been rendered on the Caliber Declaratory Judgment Action.

contract was executory. 2007 WL 2479664, at *16. If the court found the contract was executory, the debtor was required to assume or reject the contract within 60 days after such determination. *Id.* The contract counterparty objected to the plan arguing that sections 365(d)(2) and 1123(b)(2) of the Bankruptcy Code required the debtor to assume or reject the agreement at or before confirmation, even if only conditionally. 397 B.R. at 498. The bankruptcy court overruled the objection and confirmed the plan. 2007 WL 2479664, at *16. In affirming the confirmation order, the district court interpreted sections 365(d)(2) and 1123(b)(2) as "arguably" allowing the court to approve post-confirmation assumption or rejection of an executory contract, however, the court also acknowledged that such relief should be granted "sparingly." 397 B.R. at 498–500 (citing *Gunter*, 96 B.R. at 701). The facts in *Simplot* stand in stark contrast to this case where there is no threshold inquiry to assumption or rejection because the executory nature of the Specified Caliber Contracts is not at issue. Furthermore, the Debtors filed a motion to reject Specified Caliber Contracts approximately one week after the commencement of these chapter 11 cases, but never set it for hearing or attempted to prosecute it; and then the Debtors filed a motion to estimate rejection damages on Specified Caliber Contracts in December 2016, but withdrew that motion before a hearing could be held to seek approval of the Toggle Provision. The Court should not extend the time for the Debtors to assume or reject the Specified Caliber Contracts for an unknown period of time after the effective date to allow the Debtors to litigate certain matters they voluntarily elected to forego during these chapter 11 cases.

25. The *Alberts* case also does not support approval of the Toggle Provision. In that case, the trustee of a liquidating trust established under the debtors' confirmed chapter 11 plan contested the deemed assumption of contracts within 60 days of plan confirmation, subject

only to a retained right of rejection based on a determination of the applicable cure amount. 327 B.R. at 34. Not surprisingly, the bankruptcy court, interpreting the terms of a plan it had already confirmed, held that the conditional assumption of executory contracts in the plan was binding. *Id*. at 32. In contrast to the facts in *Alberts*, Caliber is properly challenging the legality of the Toggle Provision prior to plan confirmation. The 60-day assumption/rejection extension in the *Alberts* plan is also significantly more limited than the terms of the proposed Toggle Provision, which conditions a deemed assumption/rejection on a final determination in the Caliber Declaratory Judgment Action and then a final determination of Caliber's rejection damages. Requiring both issues to be resolved will result in a substantially longer delay — potentially years — before a final determination regarding the treatment of the Specified Caliber Contracts is reached.[9]

26. Finally, in *Gunter*, the court recognized that "an extension of the deadline for assumption or rejection beyond the confirmation hearing should be granted only rarely." 96 B.R. at 697, 701 (citing *In re J.M. Fields*, 26 B.R. 852, 854 (S.D.N.Y. 1983) ("[P]ost-confirmation authority is restricted to only those matters pending at the time of confirmation. This grant is not one whichkeeps the debtor corporation in 'perpetual tutelage' to the Court, subject to Court supervision and control over all aspects of corporate conduct."). The court, however, relying on Bankruptcy Rule 9006, *sua sponte* enlarged the time during which a debtor hotel could assume or reject a licensing agreement by 60 days after the effective date of confirmation of the plan so that the debtor could negotiate and implement a replacement license agreement. *Id.* The court justified the holding, at least in part, because the feasibility of the

[9] The Debtors' Chief Restructuring Officer testified that the Debtors believe all litigation to satisfy the contingencies under the Toggle Provision by Final Order, which includes appeals, will only take a few months. *See* Ex. A; Deposition of John R. Castellano dated February 28, 2017, at 158:12–159:25. Caliber strongly disagrees and believes the Debtors have grossly underestimated this timeframe.

debtor's plan and the debtors' ability to reorganize would have been placed at risk if it was forced to immediately reject the contract. *Id.* at 698. The Debtors have already asserted to the Court that assumption or rejection of the Specified Caliber Contracts does not impact the feasibility of the Amended Plan and there is no question that the outcome of the Toggle Provision will not be known within 60 days of plan confirmation. The *Gunter* court's reliance on Bankruptcy Rule 9006 is also questionable and should not be used to grant the Debtors an unknown extension of the time to assume or reject the Specified Caliber Contracts.

27. In sum, there is no statutory or case law support for the Toggle Provision. The assumption of the Specified Caliber Contracts will not impact feasibility. The Debtors and the new equity owners have arbitrarily set the $75 million hurdle as the toggle without any bankruptcy law support. Thus, the Court should deny confirmation of the Amended Plan.

B. The Toggle Provision Makes for Bad Policy

28. Not only is the Toggle Provision impermissible under the Bankruptcy Code, but sanctioning its use here would make for bad bankruptcy policy. If permitted, debtors would simply provide for assumption or rejection of executory contracts in a plan of reorganization under section 1123(b)(2) — leaving their contractual counterparties in the lurch for an indefinite period of time following plan confirmation — and then evade their obligation to satisfy the business judgment standard. Additionally, allowing the Toggle Provision will allow debtors to receive a free option to wait out market conditions post-confirmation and determine then, with full information, whether rejection or assumption inures to their benefit, especially since, as explained below, Section 6.01(e) of the Amended Plan allows the Required Consenting Noteholders to reject an undisputed Cure. Confirming the Amended Plan with the Toggle Provision will also unfairly subject Caliber to significant, ongoing uncertainty regarding the status of the Specified Caliber Contracts for an indefinite period of time during which Caliber's

performance under those same contracts will be compelled by an order of the Court.[10] *See, e.g.*, Amended Plan, § 6.03(d).

29. Moreover, the Amended Plan seems to contemplate that Caliber will not receive any distribution under the Amended Plan until the contingencies in the Toggle Provision are satisfied. Under that interpretation, Caliber will be forced to bear both opportunity costs and the risks associated with collecting any Rejection Damages Claim that is ultimately awarded to it during the duration of the contingencies. In contrast, an extended delay will essentially provide the Debtors with a free, long-term option during which they can observe market conditions to determine at any point whether assumption best serves their interests (at which point they could simply concede the North Dakota litigation).[11] Caliber's rights should not be infringed post-effective date for any indefinite period of time. Caliber is entitled to the same rights and certainty afforded to other contract counterparties in these chapter 11 cases, and absent effective assumption or rejection of the Specified Caliber Contracts, should be entitled to enforce its contractual rights.

30. The Bankruptcy Code is silent on how to address all of these unanswered questions and potential unintended consequences of granting the proposed post-effective date extension of the time to assume or reject the Specified Caliber Contracts. The reason is simple: a debtor is supposed to make a decision on assumption or rejection prior to plan confirmation and is not supposed to have a prolonged post-effective date period of time to make such

[10] An additional unknown issue is the status and/or treatment of the Specified Caliber Contracts if the Debtors were to commence new chapter 11 cases prior to assumption or rejection under the Amended Plan.

[11] The Debtors' contention that the Specified Caliber Contracts are being assumed or rejected pursuant to a plan, in accordance with Bankruptcy Code section 1123, thus rings hollow, because despite the Toggle Provision, which the Debtors portray as self-implementing, in reality the Debtors would have the option of "toggling" in favor of assumption if future market conditions dictate that choice. The Bankruptcy Code does not grant a debtor this type of option, nor does it permit a debtor to defer assumption and rejection decisions in this manner, at the expense of contract counterparties.

determinations so that the debtor, contract counterparties, and parties in interest have clarity on a chapter 11 plan and the reorganized debtors' operations post-effective date.[12] Accordingly, the Court should deny confirmation of the Amended Plan on this basis alone.

C. Provisions in the Amended Plan Subjecting Cure Payments to Approval by the Required Participating Noteholders Must Be Removed

31. To satisfy the requirements of sections 365 and 1123(b)(2), the Amended Plan must provide for the payment of all required Cure. *See*, *e.g.*, *In re Eagle Bus Mfg., Inc.*, 134 B.R. 584, 597 (Bankr. S.D. Tex. 1991) (holding that sections 365 and 1123 were satisfied because, among other things, the debtors' plan provided for prompt cure of defaults). Section 6.01(e) must be stricken because it improperly vests the Required Participating Noteholders with the potential power to reject a Cure payment owed to Caliber and thereby block the purportedly "automatic" assumption of the Specified Caliber Contracts that would otherwise be triggered under Section 6.03(c). Caliber must have certainty that Cure in excess of $100,000 will be paid and not be subject to the reasonableness of the Required Participating Noteholders.

II. THE TOGGLE PROVISION AND RIGHTS OFFERING UNFAIRLY DISCRIMINATE BY REQUIRING CALIBER TO PUT UP MILLIONS OF DOLLARS WITHOUT INTEREST FOR AN UNKNOWN PERIOD

32. Compounding the limbo in which Caliber would be placed if the Toggle Provision is approved as it relates to the Specified Caliber Contracts, the Toggle Provision also has the effect of requiring Caliber to deposit cash based on the arbitrary Caliber Rejection Damages Cap ***now*** if it wishes to participate in the Rights Offering. However, because the nature of the Toggle Provision means that Caliber will not know if it is even entitled to

[12] The Debtors filed the TUSA Motion to Reject as part of their overall strategy to gain negotiating leverage over Caliber, but it is unclear whether they ever intended to actually prosecute it. Even if they had prosecuted, the Motion to Reject simply sought the ability to reject Specified Caliber Contracts by sending a notice of rejection to Caliber that could be withdrawn by the Debtors any time before to the proposed effective date of rejection listed on the notice.

participate in the Rights Offering until potentially years from now, Caliber will be subject to unfair discrimination as compared to other Rights Offering participants by being forced to part with a substantial amount of cash that it could otherwise put to use in its own business, with no assurance it will even participate in the Rights Offering. *See* Amended Plan, § 5.10(b) ("Each Rights Offering Participant shall pay its purchase price in Cash in accordance with the Rights Offering Procedures by the funding deadline set forth in the Rights Offering Procedures. Any Rights Offering Participant that fails to timely pay its respective purchase price shall be ineligible to receive Rights Offering Securities and will forfeit and void any exercise of subscription rights in the Rights Offering.").[13] Furthermore, if Caliber chooses to deposit the cash to preserve its contingent right to participate in the Rights Offering, the cash is not scheduled to receive interest during the pendency of multiple actions that must be finally resolved before the Toggle Provision is triggered.

33. Caliber should be allowed to participate in full in the Rights Offering at the time it knows whether its Specified Caliber Contracts will be rejected, resulting in a Rejection Damages Claim and the ability to participate in the Rights Offering to the full extent of that Claim. Accordingly, Section 5.10(b) of the Amended Plan should be revised to allow for Caliber to participate in the Rights Offering if, and when, it knows that the Specified Caliber Contracts have been rejected.

[13] Caliber has already been prejudiced by not being able to receive Rights Offering Securities at the same time as other Rights Offering Participants and, among other things, having the ability to retain or sell such securities. In contrast, unsecured consenting noteholders in the same plan Class as Caliber will have the right to (i) participate in the Rights Offering and, (ii) as equity holders in Reorganized TUSA, instruct the company to concede the North Dakota litigation if the market improves and they don't want to get diluted by Caliber.

III. THE AMENDED PLAN CONTAINS IMPERMISSIBLE RELEASES AND EXCULPATION PROVISIONS

34. In addition to the reasons set forth above, the Amended Plan cannot be confirmed in its current formulation because it provides overly broad releases in contravention of the Bankruptcy Code and applicable case law.

A. The Release of Claims by the Debtors Contravenes Applicable Law

35. The Debtors' proposed release to Released Parties (the "**Debtor Release**") does not comport with applicable law in this District and must be either revised or removed from the Amended Plan. The *Zenith* court identified five non-exclusive and non-conjunctive factors "that are relevant to determine whether a debtor's release of a non-debtor is appropriate:"

(1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources;

(2) a substantial contribution to the plan by the non-debtor;

(3) the necessity of the release to the reorganization;

(4) the overwhelming acceptance of the plan and release by creditors and interest holders; and

(5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan.

In re Washington Mut., Inc., 442 B.R. 314, 345 (Bankr. D. Del. 2011 (citing *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999)).

36. Here, the Debtor Release fails to meet these elements. First, there is no clear identity of interest between the Debtors and many of the Released Parties. The definition of Released Parties is incredibly expansive (*see* Amended Plan, § 1.130) and it is unlikely that the Debtors can even identify all of these parties, let alone show these parties, who are merely

related to the other Released Parties, have an identity of interest with the Debtors.[14] Second, the Released Parties have not made substantial contributions to the Amended Plan and it cannot be credibly argued that releasing all of these parties is necessary to the reorganization.

B. The Release of Claims Held by Non-Debtor Third Parties Contravenes Applicable Law

37. The Third Circuit, while not barring third-party releases, "has recognized that they are the exception, not the rule." *In re Washington Mut., Inc.*, 442 B.R. at 351–52 (citing *In re Continental Airlines*, 203 F.3d 203, 212 (3d. Cir. 2000) ("non-consensual releases by a non-debtor of other non-debtor third parties are to be granted only in 'extraordinary cases.'")). Here, the third-party releases purportedly granted by the Releasing Parties are overly broad because they include the expansive term Released Parties and also because subsection (d) of the defined term includes a claim holder's "current and former officers, directors, managers, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals" – none of whom are presumably solicited to vote on the Amended Plan.[15] *Id.* By including these related parties, the provision exceeds the permissible scope of a third-party release.[16]

[14] *See* Ex. A; Deposition of John R. Castellano dated February 28, 2017, at 166:3–25 (Chief Restructuring Officer does not know whether there is a list of the names and entities being released).

[15] This Court has been skeptical of releases applying to directors, officers, and professionals absent a strong demonstration of substantial consideration and necessity to the reorganization. *See In re Washington Mut. Inc*., 442 B.R. at 347–48 (denying approval of debtor release to debtors' directors, officers and professionals due to a lack of "substantial contribution" to the plan, or showing that their release was necessary to the reorganization). As this Court has made clear, engaging in tasks within the scope of one's duties as a director and officer of a debtor-in-possession company does not entitle such directors and officers to a release. *See e.g., id*. at 354; *see also* Ex. A; Deposition of John R. Castellano dated February 28, 2017, at 167:2–15 (testifying that consideration for directors and officer releases is normal day to day work).

[16] Moreover, it is unclear what release, if any, a creditor that abstained from voting is granting.

C. The Amended Plan's Discharge and Injunction Provisions are Impermissible

38. The Amended Plan's discharge and injunction provisions should also be struck from the Amended Plan because they are disguised, improper, non-consensual third-party releases and purport to extinguish setoff, subrogation, and recoupment rights and remedies.

39. Although the Amended Plan's third-party release purports to provide claimholders with the ability to "opt-out," the Amended Plan's discharge and injunction provisions gut the potentially consensual nature of that release. The discharge deems all Claims and Interests "satisfied, discharged and released in full" (Amended Plan, § 9.02), while the injunction bars all actions related to "any Claim, Interest or Cause of Action satisfied . . . under this Plan." *Id.* at § 9.08. As a result, a creditor could opt-out of the third-party release, but because its claim is treated and thus "satisfied" by the Amended Plan, the injunction would bar any further actions related to the claim by the creditor against third parties.

40. Further, the Amended Plan's injunction provision inappropriately restricts the proper exercise of setoff rights, subrogation rights or the defense of recoupment. To the extent setoff rights and remedies are appropriately asserted in proofs of claim (such as Caliber Proofs of Claim Nos. 338, 339, and 341), under section 553 of the Bankruptcy Code, or otherwise, such rights and remedies should not be vitiated by the injunction provision. Further, there is no legal basis to permit the Debtors to extinguish rights of recoupment because it is a defense or a remedy and not an affirmative claim. *In re DHP Holdings II Corp.*, 435 B.R. 220, 232 (Bankr. D. Del. 2010) ("The Third Circuit has held that recoupment is a defense, not a claim."). Creditors should be left with their possible defenses in the event the Debtors object to claims or take other actions.

D. The Amended Plan's Provision Regarding Payment of Interest on Disputed Claims Is Inconsistent with Section 502(j) of the Bankruptcy Code and Inappropriate Vis-à-Vis Caliber

41. The Amended Plan provides for no interest on Disputed Claims, regardless of how long such claims remain disputed. *See* Amended Plan, § 7.06. This provision is contrary to section 502(j) of the Bankruptcy Code. Moreover, Caliber is particularly prejudiced by the failure to pay interest while its claims remain disputed. As to interest on Disputed Claims, Section 7.06 of the Amended Plan provides that no interest shall be paid on Disputed Claims. As described above, the inherently flawed procedures relating to the Specified Caliber Contracts leave Caliber in unknown territory for an indefinite period of time until certain events occur. Caliber, however, does not have control over these events. Moreover, Caliber has not agreed to the procedures related to the Specified Caliber Contracts under the Toggle Provision. Rather, the potentially significant delay to any distribution to Caliber is entirely of the Debtors' making. Caliber is not facing the typical delay of awaiting a debtor claims review process, but has been singled out to wait an indefinite period of time until the events selected by the Debtors occur or do not occur. In this way, Caliber is actually receiving inferior treatment to other creditors in its class who will likely be paid significantly earlier than Caliber. Similarly, Section 7.06 is inconsistent with section 502(j) of the Bankruptcy Code in that even if Caliber's claims are eventually allowed, given the lack of interest payment, Caliber will not receive "payment on account of such claim proportionate in value to that already received by [other holders in the class]" (11 U.S.C. § 502(j)) before other creditors in the same class receive further distributions. Although, Caliber believes the Toggle Provision is impermissible, if the Court approves the Toggle Provision, it should only be with the requirement that Caliber will receive the true value of its claim including interest.

42. Finally, under Section 9.13 of the Amended Plan, the Debtors have removed the protections afforded by section 502(j) of the Bankruptcy Code, which provides that disallowed claims may be reconsidered for cause. *See* 11 U.S.C. § 502(j). The Debtors should not be permitted to remove the important protections provided by Bankruptcy Code section 502(j).

CONCLUSION

WHEREFORE, for the reasons set forth herein, Caliber respectfully requests the Court deny confirmation of the Amended Plan as a matter of law and grant such other relief as the Court may deem appropriate.

Dated: March 2, 2017
Wilmington, Delaware

/s/ Curtis S. Miller

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EXHIBIT A

JOHN CASTELLANO

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE	)	
	)	
TRIANGLE USA PETROLEUM	)	Chapter 11
CORPORATION, et al.,	)	Case No.
	)	16-11566 (MFW)
Debtors.	)	

ORAL DEPOSITION

JOHN CASTELLANO

FEBRUARY 28, 2017

VOLUME 2

ORAL DEPOSITION OF JOHN CASTELLANO, produced as a witness at the instance of Caliber Midstream Partners, LP and duly sworn, was taken in the above-styled and numbered cause on the 28th day of February, 2017, from 1:05 a.m. to 2:50 p.m., before Melinda Barre, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Skadden, Arps, Slate, Meagher & Flom LLP, 1000 Louisiana, Suite 6800, Houston, Harris County, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

Reported By: Melinda Barre

Job No: 119099

of 75 million. Is that correct?

A. That is correct, yes.

Q. So what is the $75 million Caliber rejection damages cap based upon?

A. The cap is based upon a tradeoff, an economic tradeoff, between the uplift in value from lower gathering, transportation and processing rates offset by the dilutive effect of a potential rejection damages claim from awarding equity for that claim.

Q. And this tradeoff, is this a tradeoff to the debtors? Is this a tradeoff in value or benefit to the debtors?

A. I guess I would view it as a tradeoff in benefit to the reorganized debtors/equity holders.

Q. And what's the debtors' basis for capping the Caliber rejection damages claim at a certain figure? Is there a legal basis? Is there a provision of the bankruptcy code you're relying upon?

MR. HOGAN: I'll object. That calls for a legal conclusion. We can write about that and argue that in front of the Judge.

A. So the basis for the cap is exactly what I just described. It is an economic tradeoff whereby at that level of a rejection damages cap our noteholders that

will be the future equity owners were willing to live with the tradeoff between an uplift of value offset by the dilutive effect of a damages claim.

Q. (By Ms. Alexander) Who came up with the idea of capping the Caliber rejection damages claim?

A. The concept of capping the claim has been around since prior to the filing as it relates to potential size of a damages claim.

Over the course of the case our thinking evolved as it relates to the tradeoff between the uplift that the company would receive from lower gathering, transportation and processing rates offset by a claim which would be dilutive to the existing owners.

So it's a concept that we, the debtors, started thinking about; but it was a conceptual framework that the advisors to the ad hoc noteholder group also were considering.

Q. And you said they were considering this prior to filing?

A. If you look at the plan support agreement, there was a termination provision for the size of a Caliber rejection damage claim. So the concept of a cap has been around for quite some time.

Q. So in the first plan that was filed by the

post-effective-date basis.

Q. Is there currently -- does Caliber currently possess a pre-petition, noncontingent claim?

A. Yes, it does.

Q. And do you know the amount of that?

A. It's about $9.7 million.

Q. And how is that 9.7 million being treated under the plan?

A. It's a class 2 claim.

Q. What does that mean?

A. I believe the categorization is Other Secured Claims.

Q. How will that class 2 claim be paid?

A. It will be paid on the effective date.

MS. ALEXANDER: This may be a good time for a quick five-minute break.

(Recess taken)

Q. (By Ms. Alexander) I want to circle back to our discussion of the Caliber rejection damages cap. How did the debtors and the noteholders calculate what you referred to as the value uplift from using lower cost providers?

A. Well, I didn't say lower cost providers. I said lower GTP rates.

says "the entry of a final order or judgment." Does that term "judgment" contemplate final judgment such as that appeals are resolved, if you know?

A. I don't. I don't know.

MR. HOGAN: I can tell you just so we -- to clear it up. The term "judgment" there is really superfluous. Go back to the definition of final order like you just pointed to, and that's got it. We can make that clear.

MS. ALEXANDER: No problem. Okay.

Q. (By Ms. Alexander) Now, earlier we also talked about the timing for the North Dakota action and how long it would take, potentially our best guess, to resolve the North Dakota action or get a final order. And you testified that the debtors had considered these issues and that, in your opinion, you thought it might take months, not necessarily a year but it might take months to get some sort of final order in North Dakota. Is that accurate paraphrasing?

A. Yes.

Q. Did the debtors consider the time for any potential appeals arising out of the North Dakota action?

A. We considered this in totality in terms of this

process should take months.

Q. Including the time to appeal any final judgment?

A. Yes. I mean, we're reviewing this as -- again, we think this is a more fact-based legal issue that shouldn't require a significant amount of time to reach a conclusion or a decision on.

Q. I just want to make sure. You took into account the amount of time it would take to brief the issue in front of the North Dakota state court?

A. We took into consideration, generally speaking, that we felt this was going to take months. Hopefully no more than that.

Q. And that included time to brief any potential appeals in the North Dakota appellate courts?

A. Yeah. The way we looked at it is the entire process.

Q. And what about any potential appeals of the estimation of Caliber's rejection damages claim in the bankruptcy court? Did the debtors consider that time that it might take to work through that appeals process?

A. We considered that Caliber would have whatever rights it's entitled to in the event of the outcome of both 6.03 condition 1 and condition 2.

A. That is correct, yes.

Q. Are the debtors aware of who each of the released parties is? Is there a list somewhere of the released parties?

A. Yeah. It's in the definition of 1.130.

Q. Are the debtors aware of the names of each of the released parties specifically?

A. I think so.

Q. Would the debtors be able to identify each of the released parties?

A. I don't see any reason why not because each one of these is a defined term.

Q. Okay. So, for example, if we look at 1.130, it lists the debtors, the reorganized debtors, the pre-petition secured parties, the backstop parties, the senior notes indentured trustee, the members of the ad hoc noteholder group and then with respect to each of the above-named entities, such entities' predecessor, successors, assigns, members, limited partners.

A. Okay.

Q. I'm just wondering if there's a list of the names of the entities, the people that are being released, if you know/don't know.

A. No. I don't know.

Q. Now, the debtors, directors and officers are defined as a released party under 1.130. Is that correct?

A. I think by the way it works is since the debtors have been defined, I think I see directors and officers that relate to them. So yes.

Q. So what consideration of the debtors, directors and officers contributed to the debtors or the plan necessary for the release?

MR. HOGAN: Object to the form.

A. They worked in good faith with all the constituents in this case to ensure that everyone gets treated as fairly as possible so that we can expeditiously get the company out of bankruptcy.

Q. (By Ms. Alexander) And when you say they worked in good faith with the constituents, what does that mean?

A. It means that they worked collaboratively. Obviously not everything is easy but they worked collaboratively with all other constituents to try and craft the best plan possible to get the company out of bankruptcy.

Q. You said they worked in good faith or worked collaboratively. Is that above and beyond what they

CERTIFICATE OF SERVICE

I, Erin R. Fay, certify that I am not less than 18 years of age, and that service of the foregoing **Caliber's Objection to the Second Amended Joint Chapter 11 Plan of Reorganization of Triangle USA Petroleum Corporation and its Affiliated Debtors** was caused to be made on March 3, 2017, in the manner indicated upon the entities identified on the attached service list.

Date: March 3, 2017

/s/ Erin R. Fay
Erin R. Fay (No. 5268)

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