IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Homer City Generation, L.P.,[1]	Case No. 17-10086(MFW) Jointly Administered
Debtor.	**Hearing Date: February 15, 2017 at 10:30 a.m.** **Objections Due: February 9, 2017 at 4 p.m.** **(for U.S. Trustee)**
	Related to Docket Nos. 9, 10, 50, and 54

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF THE DEBTOR'S PREPACKAGED CHAPTER 11 PLAN

Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), by and through his undersigned attorneys, hereby objects to confirmation of the Debtor's Prepackaged Chapter 11 Plan Of Reorganization (Docket No. 9; the "Plan") and states as follows:

PRELIMINARY STATEMENT

1. The Debtor has worked with the U.S. Trustee to resolve almost all of his objections. The parties were unable to resolve two remaining objections (1) the Plan contains non-consensual third party releases that are contrary to applicable law; and (2) the Plan impermissibly seeks to provide "exculpation" to the Reorganized Debtor for any claims "arising out of the discharge of the powers and duties" conferred onto it, including making distributions to holders of pass-through claim.

[1] The last four digits of the Debtor's federal tax identification number are 3693. The location of the Debtor's principal place of business is 1750 Power Plant Road, Homer City, Pennsylvania 15788.

JURISDICTION

2. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine this objection.

3. Pursuant to 28 U.S.C. § 586(a)(3), the U. S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U. S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the "U. S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the "U. S. Trustee as a "watchdog").

4. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U. S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment on such plans and disclosure statements.

5. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Plan and Disclosure Statement and the issues raised in this objection.

FACTUAL BACKGROUND

6. On January 11, 2017 (the "Petition Date"), the Debtor filed for relief under chapter 11 of the Bankruptcy Code.

7. On January 9, 2017, the Debtor, a group of holders of approximately seventy percent (70%) of the Debtor's secured notes (the "Consenting Noteholders"), and certain

affiliates of General Electric Company (collectively, the "RSA Parties") entered into a Restructuring Support Agreement (the "RSA") with respect to the Plan.[2]

8. Also on January 9, 2017, the Debtor began the solicitation of votes on the Plan through the Disclosure Statement.

9. Holders of claims in Classes 1 (Other Priority Claims), 2 (Other Secured Claims) and 4 (General Unsecured Claims), who were listed as unimpaired, were not solicited and did not receive solicitation packages.

10. At the first day hearing, the Bankruptcy Court set February 15, 2017, as the date for a combined hearing to approve the Debtors' Plan and entered its Order (A) Scheduling A Combined Hearing On (I) Adequacy Of Disclosure Statement And Solicitation Procedures And (II) Confirmation Of Plan; (B) Establishing Procedures For Objecting To Disclosure Statement, Solicitation Procedures, And Plan; (C) Approving Form, Manner, And Sufficiency Of Notice Of Combined Hearing And Commencement Of Chapter 11 Case; (D) Extending Time, And Upon Plan Confirmation, Waiving Requirements To (II) Convene Section 341 Meeting And (I) File Statement Of Financial Affairs And Schedules Of Assets And Liabilities; And (E) Granting Related Relief (the "Plan Solicitation Order;" Docket 50).

11. The Plan Solicitation Order conditionally approved the Disclosure Statement and solicitation procedures, among other documents and procedures, but expressly preserved the rights of all parties in interest to object at the combined hearing, to the Disclosure Statement, solicitation procedures and any other documents or procedures that were conditionally approved by such Order. *See id*.

12. The Plan Solicitation Order further approved the Debtor's proposed Notice Of Commencement Of Case Under Chapter 11 Of The Bankruptcy Code -And- Summary Of

[2] Over 96% of the Noteholders voted in favor of the Plan.

Chapter 11 Plan And Notice Of Hearing To Consider (A) Adequacy Of Disclosure Statement And Solicitation Procedures; (B) Confirmation Of Prepackaged Plan Of Reorganization; And (C) Related Materials (the "Plan Notice").

13. No official committee of unsecured creditors has been appointed in these cases.

Third Party Release

14. The Plan provides for broad releases of numerous non-debtor parties. The releases are granted by:

> i. each holder of an Impaired Claim or Interest that is not a Released Party, except any such holder that voted to reject, **or abstained from voting on, the Plan and also checked the box on the applicable ballot or notice** indicating that they opt out of granting the releases provided in the Plan;
>
> ii. each holder of an **Unimpaired Claim that does not timely object to the releases provided for in the Plan**;[3]

Plan at 10.6(b) (emphasis added).

15. The release provides not just a release of any claim that is satisfied in full by the Debtor or Reorganized Debtor pursuant to the Plan, but instead extends to:

> any and all Claims, interests, obligations, rights, suits, damages, Causes of Action, remedies and liabilities whatsoever, including any derivative Claims asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, that such Entity would have been legally entitled to assert (whether individually or collectively), based on, relating to, or arising from, in whole or in part, the Debtor, the Debtor's restructuring, the Chapter 11 Case, purchase, sale or rescission or the purchase or sale of any security of the Debtor or the Reorganized Debtor, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between the Debtor and any Released Party (except for future or continuing performance obligations in connection with such business or

[3] The Plan includes a long list of entities related to those entities in (i) – (iii). *See* Plan at 10.6(b)iv. The Debtor have agreed to limit these entities such that they are only providing releases "to the extent that any such person or entity is asserting a claim by, through or on behalf of any Entity in clauses (i) through (iii)." Thus, if the persons and entities granting releases in clauses (i) – (iii) are all granting consensual releases, section (iv), with the additional language agreed upon by the Debtor, is not problematic.

> contractual arrangement), the restructuring of Claims and Interests before or during the Chapter 11 Case, the negotiation, formulation, preparation, or consummation of the Restructuring Support Agreement, the Plan (including the Plan Supplement), the Definitive Documents, the Exit Facility Engagement Letter, or any related agreements, instruments, or other documents, the solicitation of votes with respect to the Plan, and upon any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date *relating to the Debtor or Reorganized Debtor . . .*[4]

Plan at Section 10.6(b).

Exculpation of the Disburing Agent

16. Section 6.4 of the Plan provides:

> All Distributions under the Plan shall be made by the Reorganized Debtor, as Disbursing Agent, . . .

17. Section 6.5 of the Plan provides an exculpation of the Disbursing Agent:

> From and after the Effective Date, the Disbursing Agent, solely in its capacity as Disbursing Agent, shall be exculpated by all Entities, including, without limitation, holders of Claims against and Interests in the Debtor and other parties in interest, from any and all Claims, Causes of Action, and other assertions of liability arising out of the discharge of the powers and duties conferred upon such Disbursing Agent by the Plan or nay order of the Bankruptcy Court entered pursuant to or in furtherance of the Plan, or applicable law, except for actions or omissions to act arising out of the gross negligence or willful misconduct, fraud, malpractice, criminal conduct, or *ultra vires* acts of such Disbursing Agent.

ARGUMENT

18. In *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001), the court held that the plan proponent bears the burden of proof with respect to confirmability of a Plan: "The Code imposes an independent duty upon the court to determine whether a plan satisfies each element of § 1129, regardless of the absence of valid objections to confirmation." 266 B.R. at 599. Here, the Debtors fail to meet these standards.

[4] The italicized language was not contained in the as-filed Plan, but the Debtor has indicated that this was an oversight and such limitation will be included in an amended plan.

A. The Plan's Third Party Releases Are Impermissible Under Applicable Law

19. Section 546 (e) of the Bankruptcy Code provides 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. § 546(e). Nevertheless, some Courts, including this Court, have allowed releases by creditors and interest holders of a debtor in favor of non-debtor parties. However, in this District, third party releases of non-debtors may be allowed only if they are consensual. *See In re Washington Mutual, Inc.,* 442 B.R. 314, 352 (Bankr. D. Del. 2011), *citing, inter alia*, *In re Coram Healthcare Corp.,* 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Zenith Electronics Corp.,* 241 B.R. 92, 111 (Bankr. D. Del. 1999) (release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan); *In re Exide Technologies*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan).

20. The third party releases in the Plan benefit each RSA party, the Prepetition Trustee, MetLife, each Noteholder that votes for the Plan, the Exit Arranger, Exit Agents, and Exit Lebnders, and with respect to each of the foregoing, their predecessors, successors, assigns, subsidiaries, Affiliates, managed accounts or funds, current or former officers, directors, principals, shareholders, members, partners, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisor, and other professionals. The number of parties being released is unknown, but likely numbers in the thousands.

21. The parties who will be forced to grant these releases without having affirmatively granted consent are (a) Impaired Creditors who abstained from voting and did not return a ballot or notice opting out of the release; and (b) Unimpaired Creditors who did not file an objection to the Plan.

22. The claims being released are broadly worded to include not only claims that are to be satisfied by the Debtor pursuant to the Plan, but also any claim based "upon any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date relating to the Debtor or Reorganized Debtor."

23. Some Courts in this District have determined that third-party releases of non-debtors should be allowed only to the extent the releasing parties have given affirmative consent. *See In re Washington Mutual, Inc*., 442 B.R. 314 (Bankr. D. Del. 2011). In *Washington Mutual* the Court held that "any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases." *Id*. at 355 (emphasis added). The Court clarified that merely having an opt out mechanism is not enough, holding that an "opt out mechanism is not sufficient to support the third party releases . . . particularly with respect to parties who do not return a ballot (or are not entitled to vote in the first place). Failing to return a ballot is not a sufficient manifestation of consent to a third party release." *Id*. (emphasis added), *citing In re Zenith Electronics Corp.,* 241 B.R. 92, 111 (Bankr. D. Del. 1999).

24. Other decisions from Court in this District are in accord with *Washington Mutual*. *See In re Coram Healthcare Corp*., 315 B.R. 321, 335 (Bankr. D. Del. 2004)(holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Exide*

Technologies, 303 B.R. 48, 74 (Bankr. D. Del. 2003)(approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan); *Zenith*, 241 B.R. at 111 (release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan).

25. Under the holding of *Washington Mutual*, and the other cases cited above, the third-party release provision in the Plan renders it unconfirmable because it releases claims against non-debtor parties held by (a) impaired creditors who did not vote; and (b) unimpaired creditors who did not file a written objection to confirmation of the plan. The failure to return a ballot with an opt-out or the failure to file an objection is simply not a sufficient manifestation of consent. *Washington Mutual*, at 355.

26. As to impaired creditors who abstain from voting, or unimpaired parties that are not entitled to vote, there is no proof of their affirmative consent to the release. Presuming affirmative consent by the failure to return a ballot or an opt-out notice turns due process on its head. There are a myriad of reasons why a ballot or opt-out notice is not returned that would not be a manifestation of affirmative consent. The Debtors may have an incorrect or outdated address. The Debtors may have placed an incorrect address on the mailing, such as by transposing numbers. The Debtors may have addressed the notice to an employee or agent who no longer represents the creditor. The mail may have been delivered to the wrong address, was delivered late, or was not delivered. The creditor's or equity holder's internal mail system may lose the mail or deliver it to the wrong person. The person receiving the mail may be on extended leave. And the list could go on and on. Presuming consent to an extraordinary remedy based on silence is inappropriate and renders the necessity for affirmative consent meaningless.

27. This presumed consent is even more problematic for the allegedly unimpaired creditors. The unimpaired creditors did not need to simply return an opt-out notice, but rather were required to file an objection to confirmation. For all corporate creditors, this would require retaining and paying an attorney. The extra cost and time may create an insurmountable hurdle for an otherwise unconsenting creditor.

28. The Debtor may try to defend the releases by stating that the unimpaired creditors are receiving payment in full of their claims against the Debtors, claims that they may not have been paid at all absent the Released Parties' (or some subsection of the Released Parties) agreement to permit the claims to be paid. While there is some case law in other jurisdictions supporting non-consensual third party releases in extraordinary cases, in this Court, such releases can only be approved upon a showing of affirmative consent.

29. Nevertheless, even assuming nonconsensual releases can be approved, they cannot be approved in this case. In *Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), the Court of Appeals for the Third Circuit surveyed cases from various circuits as to when, if ever, a non-consensual third party release is permissible. The Court acknowledged that a number of Circuits do not allow such non-consensual releases under any circumstances. *See id*. at 212. Other Circuits, the Court found, "have adopted a more flexible approach, albeit in the context of extraordinary cases," such as mass tort cases. *See id., citing Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 640, 649 (2d Cir. 1988). *See also, In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005)(third party release may be granted "only in rare cases").

30. The Third Circuit in *Continental Airlines* ultimately determined that the proposed releases in that case, which enjoined shareholder lawsuits against debtors' directors and officers, did "not pass muster under even the most flexible test for the validity of non-debtor releases." 203 F.3d at 214.

31. Because the Third Circuit in *Continental* determined that the non-consensual third party releases at issue there would not be acceptable under circumstances, the Court stated that it "need not speculate on whether there are circumstances under which we might validate a non-consensual release that is both necessary and given in exchange for fair consideration." *Id*. at 214, n.11 (emphasis added). However, the Court did describe the "hallmarks of permissible non-consensual releases" to be "fairness, necessity to the reorganization, and special factual findings to support these conclusions." *Id*. at 214.

32. As an initial matter, this is not a mass tort case or other extraordinary bankruptcy proceeding that would justify non-consensual releases. In addition, the "hallmarks of permissible non-consensual releases" are not present here.

33. In *In re Spansion, Inc*., 426 B.R. 114 (Bankr. D. Del. 2010) and *In re Genesis Health Ventures, Inc*., 266 B.R. 591 (Bankr. D. Del. 2001), this Court evaluated "whether a non-consensual release fit the 'hallmarks' discussed in *Continental Airlines*, by considering whether: (i) the non-consensual release was necessary to the success of the reorganization, (ii) the releases have provided a critical financial contribution to the debtor's plan, (iii) the releases' financial contribution is necessary to make the plan feasible, and (iv) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable consideration in exchange for the release." *Spansion, Inc*., 426 B.R. at 144 (emphasis added), *citing Genesis*, 266 B.R. at 607-08.

34. The releases here do not satisfy these standards. First and foremost, requiring non-consensual releases here will impair the allegedly unimpaired claims, and thus cannot be deemed fair to the non-consenting creditor. This is so for two reasons: first, the release is effective as of the Effective Date, and not upon payment in full of the underlying claim. The claimant's rights are impaired if it cannot seek to recover its claim against any entity that is liable to it. Second, the release releases more claims than just those that are being paid in full by the Debtor. Any claim in any way related to the Debtor is released; thus, even claims that the Debtor itself is not liable for, and therefore is not paying, will be released. This clearly impairs these creditors.

35. Second, the releases are not fair to the releasing party because such parties do not appear to be receiving *any* consideration in exchange for the release, let alone "reasonable consideration." *Genesis*, 266 B.R. at 607-08; *Spansion*, 426 B.R. at 144. As to the unimpaired parties, to the extent they are being deemed to release claims or interests other than their unimpaired claims, they are getting *no* consideration (e.g., for claims against third-parties as to which the Debtors have no liability, or claims or interests which are otherwise receiving nothing under the Plan).

36. The Debtors in these cases should not be allowed the unfettered discretion to force non-debtors to discharge thousands of other non-debtors from liability, because a permanent injunction limiting the liability of non-debtor parties is a rare thing that should not be considered, if ever, absent a showing of exceptional circumstances. *Continental*, 203 F.3d at 213, n.9, and cases cited therein. Not only are such exceptional circumstances present here, forcing these releases on the unimpaired classes results in an impairment.

B. The Exculpation of the "Disbursing Agent" is Inappropriate

37. The Reorganized Debtor is, itself, acting as the Disbursing Agent for all Unimpaired Claims. Unimpaired Claims are "passing through" and will be paid in the ordinary course of business.

38. The Plan provides the Reorganized Debtor, as the Disbursing Agent, an exculpation for acts taken in accordance with the Plan. This is inappropriate.

39. This constitutes a release for future conduct, which is impermissible. It also is nonsensical. The Reorganized Debtor is simply accepting the obligation of the Debtors to pay Claims in the ordinary course of business, and cannot be "exculpated" for this conduct.

CONCLUSION

40. The Plan should not be confirmed. The Plan also contains non-consensual third-party releases in favor of non-debtors, which impair otherwise unimpaired creditors, as well as an improper future exculpation in favor of the Reorganized Debtor.

41. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that this Court issue an order denying confirmation of the Plan, and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: February 9, 2017
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE
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