

HAEJI HONG, ATTORNEY #198503
TRIAL ATTORNEY
OFFICE OF THE UNITED STATES TRUSTEE
402 West Broadway, Suite 600
San Diego, CA 92101
(619) 557-5013

Attorneys for

TIFFANY L. CARROLL
ACTING UNITED STATES TRUSTEE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

<p>In re:</p> <p>SAN DIEGO HOSPICE & PALLIATIVE CARE CORPORATION,</p> <p>Debtor.</p>	<p>) Case No.: 13-01179-MM11</p> <p>) UNITED STATES TRUSTEE'S OBJECTION TO THE FIRST AMENDED LIQUIDATING PLAN FOR SAN DIEGO HOSPICE AND PALLIATIVE CARE CORPORATION (JUNE 24, 2013) JOINTLY PROPOSED BY THE DEBTOR AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS</p> <p>) Date: September 4, 2013</p> <p>) Time: 10:00 a.m.</p> <p>) Place: Dept 1</p> <p>) Judge: Honorable Margaret Mann</p>
--	--

The Acting United States Trustee (the "United States Trustee" or "UST"), by and through counsel, files this objection (the "Objection") to the First Amended Liquidating Plan for San Diego Hospice and Palliative Care Corporation (June 24, 2013) Jointly Proposed by the Debtor and the Official Committee of Unsecured Creditors (the "Plan") proposed by San Diego Hospice & Palliative Care Corporation (the "Debtor") and Official Committee of Unsecured Creditors ("OCC"). The Court should not confirm the Plan because of the broad release, exculpation, injunction, and indemnification contained in the Plan and the Liquidating Trust Agreement (the "Agreement"). This Objection will point to each objectionable provision and request that the Court strike these provisions before confirming the Plan.

1 **1. Plan Provision at Article VI, Paragraph D, Section 7 of “No Liability of**
2 **Liquidating Trustee” Is Not Reasonable.**

3 The Plan provides at Article VI, Paragraph D, Section 6 that the Liquidating Trustee and
4 the Liquidating Trustee’s Agents will not be liable for administration of the Liquidating Trust
5 Assets. This provision releases the Liquidating Trustee and Agents (not defined anywhere) from
6 any Person, which is defined as any natural person or entity. Because of the way the provision is
7 written, in effect, the Debtor and anyone else are providing releases prior to the Liquidating
8 Trustee actually performing any duties. This provision is problematic because (1) the provision
9 attempts to impermissibly release liabilities of non-debtors and (2) the broad prospective release
10 of a fiduciary that is not yet existent is unreasonable.

11 The Ninth Circuit Court of Appeals has consistently held that 11 U.S.C. § 524(e)¹
12 prohibits bankruptcy courts from discharging liabilities of non-debtors. *Resorts International,*
13 *Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-02 (9th Cir. 1995)(citing *American*
14 *Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 626
15 (9th Cir. 1989); *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985); *Commercial*
16 *Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800, 801 (9th Cir. 1949)). The
17 bankruptcy court is prohibited from releasing liabilities of non-debtors even if creditors consent
18 to such release because the bankruptcy court discharges the debtor by operation of the
19 bankruptcy laws, not by creditors’ consent. *See Underhill*, 769 F.2d at 1432 (stating that
20 “[w]hen a bankruptcy court discharges the debtor, it does so by operation of the bankruptcy laws,
21 not by consent of the creditors” and further holding that “the bankruptcy court has no power to
22 discharge the liabilities of a nondebtor pursuant to the consent of creditors as part of a

23
24
25
26
27
28 ¹ Unless otherwise indicated, all sections references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
and all rule references are to the Federal Rules of Bankruptcy Procedure, 1001-9037.

1 reorganization plan.”), *rev'd on other grounds, Reves v. Ernst & Young*, 494 U.S. 56
2 (1990)(rejecting the Ninth Circuit Court of Appeals’ definition of “security”). The provision in
3 question attempts to release non-Debtor’s liabilities. And while §1123(b)(3)(A) allows the
4 Debtor to settle its interest or claim, there is no Bankruptcy Code section that allows non-Debtor
5 to settle its claim.

6
7 Additionally, providing prospective release for a Liquidating Trustee was held to be
8 unreasonable in at least one case. A Delaware court in *In re Washington Mutual, Inc.*, 442 B.R.
9 314, 348 (Bankr.D.Del. 2011), found that release of Liquidating Trustee from any and all claims
10 was not reasonable. The court noted that the Liquidating Trustee in that case did not do anything
11 for which he/she needed a release. *Id.* In fact, the court pointed out that the Liquidating Trustee
12 would not even come into existence until the confirmation of the plan and therefore it would be
13 impossible to prospectively determine contributions made by the Liquidating Trustee that would
14 be worthy of release. *Id.*

15
16 Therefore, for above reasons, Article VI, Paragraph D, Section 7 provision should be
17 stricken from the Plan.²
18

19
20 ² Notwithstanding the United States Trustee’s position that this provision should be stricken because it is
21 not reasonable, if the Court is not willing to strike the provision in total, the United States Trustee
22 requests that the following revisions be made: (1) Deletion of “Liquidating Trustee’s Agents” throughout
23 this provision; (2) inclusion of the clause “,unless act taken or omission made was due to fraud,
24 negligence, willful misconduct, or breach of fiduciary duty” at the end of the first sentence; and (3)
25 deletion of “Entry of the Confirmation Order constitutes a judicial determination that the exculpation
26 provision contained in Section VIII.A. ... matters included in the exculpation provisions of the Plan.”
27 The following paragraph sets forth proposed deletions in strike through and proposed inclusions in bold
28 and double underline:

26 To the maximum extent permitted by law, the Liquidating Trustee ~~and the~~
27 ~~Liquidating Trustee’s Agents~~ will not have or incur liability to any Person for an act taken
28 or omission made in good faith in connection with or related to the administration of the
Liquidating Trust Assets, the implementation of the Plan and the Distributions made
thereunder, **unless act taken or omission made was due to fraud, negligence, willful
misconduct, or breach of fiduciary duty.** The Liquidating Trustee ~~and the Liquidating~~

2. **Plan Provision at Article VI, Paragraph E of “The SDH Trust Committee” Should be Revised.**

Article VI, Paragraph E contains a paragraph that states:

The SDH Trust Committee and its members will not be liable for any act any member may do or fail to do as a member of the SDH Trust Committee while acting in good faith and in exercise of the member’s best judgment. No member of the SDH Trust Committee will be liable in any event for claims, liabilities or damages unless they arise from such member’s personal gross negligence or willful misconduct.

The rationale in Paragraph 1 above applies with equal force to the SDH Trust Committee.

This language is too broad and attempts to impermissibly release non-Debtor liabilities. SDH Trust Committee, like the Liquidating Trustee, is not extant and would not be created until the Plan is confirmed. Therefore, providing prospective release is unreasonable. This portion of the Paragraph should be stricken.³

~~Trustee’s Agents will in all respects be entitled to reasonably rely on the advice of counsel with respect to their duties and responsibilities under the Plan and the Liquidating Trust Agreement. Entry of the Confirmation Order constitutes a judicial determination that the exculpation provision contained in Section VIII.A. of the Plan is necessary, *inter alia*, to facilitate Confirmation and feasibility of the Plan and to minimize potential claims arising after the Effective Date for indemnity, reimbursement or contribution from the Liquidating Trust or the Liquidating Trust Assets. The Confirmation Order’s approval of the Plan also constitutes a *res-judicata* determination of the matters included in the exculpation provisions of the Plan.~~

Notwithstanding the foregoing, nothing herein or in Section VIII.A. of the Plan will alter any provision in the Liquidating Trust Agreement that provides for the potential liability of the Liquidating Trustee to any Person.

As one court noted, the Ninth Circuit courts do not favor limitation of liabilities. *In re WCI Cable Inc.*, 282 B.R. 457, 479 (Bankr.D.Or. 2002). Thus, exception covering negligence and breaches of fiduciary duty, in addition to gross negligence and willful misconduct, would be more appropriate. *See id.* at 479-80.

³ Notwithstanding the United States Trustee’s position that this portion of the provision should be stricken because it is not reasonable, if the Court is not willing to strike the provision in total, the United States Trustee requests that the following revisions be made: (1) inclusion of the clause “,unless act taken or omission made was due to fraud, negligence, gross negligence, willful misconduct, or breach of fiduciary duty” at the end of the first sentence; and (2) deletion of the second sentence. The following paragraph sets forth proposed deletions in strike through and proposed inclusions in bold and double underline:

3. **Plan Provision at Article VIII, Paragraph A “Exculpation and Release of Committee and Its Professionals” Should be Stricken.**

In the Ninth Circuit, courts disfavor exculpation or any other clauses “that limit liability for negligence or breaches of fiduciary duties.” *In re WCI Cable, Inc.*, 282 B.R. 457, 479 (Bankr.D.Or. 2002)(citing *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983) for the proposition that the trustee is liable for negligence; *In re Metricom, Inc.*, 275 B.R. 364 (Bankr.N.D.Cal. 2002) for the proposition that broad indemnification and exculpation provision of financial advisor was disapproved as unreasonable; *In re Mortgage & Realty Trust*, 123 B.R. 626 (Bankr.C.D.Cal. 1991) for the proposition that indemnification provision to acts other than negligence, gross negligence, or willful misconduct was disapproved; and *In re Allegheny Intern., Inc.*, 100 B.R. 244, 246-47 (Bankr.W.D.Pa. 1989) for the proposition that holding a fiduciary harmless ““for own negligence is shockingly inconsistent with the strict standard of conduct for fiduciaries””). In *In re WCI Cable, Inc.*, the court noted that professionals for the Creditors Committee were not included in the exculpation clause. *Id.* at 476. With respect to the exculpation clause for the Creditors Committee, the court concluded that it was a re-statement of the standard of immunity for the Creditors Committee members for performance of duty under § 1103(c). *Id.* Thus, the court allowed the exculpation clause for the Creditors Committee only. *Id.* at 477.

The SDH Trust Committee and its members will not be liable for any act any member may do or fail to do as a member of the SDH Trust Committee while acting in good faith and in the exercise of the member’s best judgment, unless act taken or omission made was due to fraud, negligence, gross negligence, willful misconduct, or breach of fiduciary duty. No member of the SDH Trust Committee will be liable in any event for ~~claims, liabilities or damages unless they arise from such member’s personal gross negligence or willful misconduct.~~

Again, exception that covers negligence and breaches of fiduciary duty is more appropriate given that the Ninth Circuit courts do not favor limitation of liabilities. *In re WCI Cable Inc.*, 282 B.R. 457, 479-80 (Bankr.D.Or. 2002).

1 The court then further reviewed the provision which exculpated the debtor, the trustee,
2 board of directors of the debtor's trust, and their respective officers, directors, employees and
3 agents, including professionals, for any of their actions or omissions to act with respect to the
4 debtors bankruptcy proceedings, except for willful misconduct or gross negligence. *Id.* at 477-
5 78. The court refused to approve the exculpation clause as set forth in the plan. The court
6 reasoned that different standards of liability may apply to different entities and individuals
7 covered by the exculpation provision. *Id.* at 478. The court also reasoned that interested parties
8 may negotiate indemnification and exculpation clauses to include in the plan, but the United
9 States Trustee and creditor who objected to the inclusion of the exculpation clause clearly had
10 not given consent to the exculpation provision. *Id.* at 479. The court further pointed out that
11 there was no evidence that insurance was not available or "prohibitively expensive" as to justify
12 including exculpation provision in the plan. *Id.* Therefore, the court required amendment to the
13 exculpation clause to exclude acts of negligence, breaches of fiduciary duty, gross negligence,
14 and willful misconduct from exculpation. *Id.* at 479-80.

15
16
17 The rationale of *WCI* case is appropriate here. Article VII, Paragraph A seeks more than
18 the immunity allowed under § 1103. The exculpation provision seeks exculpation of not only the
19 OCC members but OCC's professionals and OCC member's individual professionals, such as
20 attorneys. No other professional, including the Debtor's counsel, is given such broad
21 exculpation. Given that the courts in the Ninth Circuit do not favor broad exculpation without a
22 showing of reasonableness, this provision must be stricken.⁴
23
24

25
26
27 ⁴ Notwithstanding the United States Trustee's position that provision should be stricken entirely because
28 it is not reasonable, if the Court is not willing to strike the provision in total, the United States Trustee
requests that the following revisions be made: (1) inclusion of "fraud, breach of fiduciary duty,
negligence" before "willful misconduct" in the first sentence; and (2) deletion of reference to anyone
other than the Committee or Committee's officers, directors, employers, and employees. The following

1 **4. Exhibit B, Liquidating Trust Agreement, Article 6.1 and Article 6.2 Should**
2 **be Stricken.**

3 Articles 6.1 and 6.2 of the Liquidating Trust Agreement, attached as Exhibit B (filed as
4 Docket No. 499) expands the exculpation provision of the Liquidating Trustee and the oversight
5 committee, and their respective director, officer, affiliate, employee, employer, professional,
6 agent, or representative. Furthermore, Article 6.2 adds a new provision, indemnification
7 provision, for the same entities. For the reasons set forth previously in this Objection, the United
8 States Trustee objects to the inclusion of these provisions. These provisions are unreasonable
9 and should be stricken.⁵

10
11
12 paragraph sets forth proposed deletions in strike through and proposed inclusions in bold and double
13 underline:

14 Except to the extent arising from **fraud, breach of fiduciary duty, negligence,** willful
15 misconduct or gross negligence, any and all Claims, liabilities, causes of action, rights,
16 damages, costs and obligations held by any party against the Committee and/or the
17 individual members of the Committee (and their respective officers, directors, employees,
18 affiliates and agents), and/or each of their respective attorneys, accountants, agents and
19 other professionals, whether known or unknown, matured or contingent, liquidated or
20 unliquidated, existing, arising or accruing, whether or not yet due in any manner related
21 to the Postpetition administration of the Case, any Postpetition act or omission in
22 connection with, arising out of, or related to the Case, or the formulation, negotiation,
23 prosecution or implementation of the Plan, will be deemed fully waived, barred, released
24 and discharged in all respects, except as to rights, obligations, duties, claims and
25 responsibilities preserved, created or established by terms of this Plan.

26
27
28 ⁵ Notwithstanding the United States Trustee's position that the provisions should be stricken entirely
because they are not reasonable, if the Court is not willing to strike the provisions in total, the United
States Trustee requests that the following revisions be made: (1) deletion of any reference to anyone
other than the Liquidating Trustee, Oversight Committee, Oversight Committee members, and their
respective officers, directors, employers, and employees in Article 6.1; (2) deletion of the clause "by any
holder of a Claim or Interest or Beneficiary" in 16th line down in Article 6.1; (3) inclusion of
"negligence, breach of fiduciary duty" before "fraud, gross negligence or willful misconduct" in 18th line
down in Article 6.1; (4) inclusion of "unless the loss stems from negligence, gross negligence, breach of
fiduciary duty, fraud, or willful misconduct of the Exculpated Party" after "the Exculpated Parties shall
not be individually liable therefore" located at first line of PDF page 59 of Docket No. 499; (5) inclusion
of "unless the liability stems from negligence, gross negligence, breach of fiduciary duty, fraud, or willful
misconduct of Exculpated Party or Liquidating Trustee" at the end of the last sentence of Article 6.1; (6)
deletion of any reference to anyone other than the Liquidating Trustee, Oversight Committee, Oversight
Committee members, and their respective officers, directors, employers, and employees in Article 6.2;

1
2 and (7) inclusion of "negligence, breach of fiduciary duty" before "fraud, gross" in 17th line down in
3 Article 6.2. The following paragraph sets forth proposed deletions in strike through and proposed
4 inclusions in bold and double underline:

5 **6.1. Standard of Care; Exculpation.** Neither the Liquidating Trustee, the Members
6 of the Oversight Committee, nor any director, officer, ~~affiliate,~~ employee,
7 employer, ~~professional, agent or representative~~ of the Liquidating Trustee or any
8 Member of the Oversight Committee (the "Exculpated Party" and collectively, the
9 "Exculpated Parties") shall be liable for losses, claims, damages, liabilities,
10 obligations, settlements, proceedings, suits, judgments, causes of action, litigation,
11 actions, investigations (whether civil or administrative and whether sounding in tort,
12 contract or otherwise), penalties, costs, and expenses, including reasonable fees and
13 disbursements (collectively referred to herein as "Losses") whether or not in connection
14 with litigation in which any Exculpated Party is a party, or enforcing this Agreement
15 (including these exculpation provisions), as and when imposed on the Liquidating
16 Trustee, incurred, caused by, relating to, based upon or arising out of (directly or
17 indirectly) the Liquidating Trustee's or the Oversight Committee's execution, delivery,
18 and acceptance of or the performance or nonperformance of its powers, duties and
19 obligations under this Agreement, the Plan, or the Confirmation Order or as may arise
20 by reason of any action, omission or error of an Exculpated Party; provided, however,
21 that the foregoing limitation shall not apply to any Losses suffered or incurred ~~by any~~
22 ~~holder of a Claim or Interest or Beneficiary~~ that are found in a final judgment by a court
23 of competent jurisdiction (not subject to further appeal) to have resulted primarily and
24 directly from the **breach of fiduciary duty, negligence,** fraud, gross negligence or
25 willful misconduct of such Exculpated Party. Every act taken or omitted, power
26 exercised or obligation assumed by the Liquidating Trust or any Exculpated Party
27 pursuant to the provisions of this Agreement shall be held to be taken or omitted,
28 exercised, or assumed, as the case may be, by the Liquidating Trust or any Exculpated
Party acting for and on behalf of the Liquidating Trust and not otherwise; provided,
however, that none of the foregoing Entities or Persons are deemed to be responsible for
any other such Entities' or Persons' actions or inactions. Except as provided in the
first proviso of the first sentence of this Section 6.1, every Person, firm, corporation, or
other Entity contracting or otherwise dealing with or having any relationship with the
Liquidating Trust or any Exculpated Party shall have recourse only to the Liquidating
Trust Assets for payment of any liabilities or other obligations arising in connection
with such contracts, dealings or relationships and the Liquidating Trust and the
Exculpated Parties shall not be individually liable therefore, **unless the loss stems from
negligence, gross negligence, breach of fiduciary duty, fraud, or willful misconduct
of the Exculpated Party.** In no event shall the Liquidating Trustee or any
Exculpated Party be liable for indirect, punitive, special, incidental, or consequential
damage or loss (including but not limited to lost profits) whatsoever, even if the
Liquidating Trustee or any Exculpated Party has been informed of the likelihood of
such loss or damages and regardless of the form of action. Notwithstanding
anything to the contrary herein, in no event shall the liability of the Liquidating Trustee
or any Exculpated Party under this Liquidating Trust Agreement exceed the total amount
of fees paid to the Liquidating Trustee or any Exculpated Party under this Agreement,
**unless the liability stems from negligence, gross negligence, breach of fiduciary duty,
fraud, or willful misconduct of Exculpated Party or Liquidating Trustee.**

5. **Exhibit B, Liquidating Trust Agreement, Article 6.3 Should be Revised.**

This provision states in part that any successor Liquidating Trustee "shall have no duty to examine or inquire into the acts or omissions of its immediate or remote predecessor." This statement should be revised such that if a predecessor Liquidating Trustee has acted or failed to act because of negligence, gross negligence, fraud, willful misconduct or breach of fiduciary duty, the successor Liquidating Trustee should review such act for potential claim for the Liquidating Trust.

///

///

///

6.2. Indemnification. (a) Except as otherwise set forth in the Plan or Confirmation Order, the Liquidating Trustee, the Members of the Oversight Committee and any director, officer, affiliate, employee, employer, professional, agent, or representative of the Liquidating Trustee or the Members of the Oversight Committee (each, an "Indemnified Party" and collectively, the "Indemnified Parties") shall be defended, held harmless and indemnified from time to time by the Liquidating Trust against any and all losses, claims, damages, liabilities, penalties, obligations and expenses, including the costs for counsel or others in investigating, preparing, or defending any action or claim, whether or not in connection with litigation in which any Indemnified Party is a party, or enforcing this Agreement (including these indemnity provisions), as and when imposed on the Liquidating Trustee, incurred, caused by, relating to, based upon or arising out of (directly or indirectly) the Liquidating Trustee's or the Oversight Committee's execution, delivery, and acceptance of or the performance or nonperformance of its powers, duties, and obligations under this Agreement, the Plan, or the Confirmation Order or as may arise by reason of any action, omission, or error of an Indemnified Party; provided, however, such indemnity shall not apply to any such Losses to the extent it is found in a final judgment by a court of competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from the negligence, breach of fiduciary duty, fraud, gross negligence, or willful misconduct of such Indemnified Party. Satisfaction of any obligation of the Liquidating Trust arising pursuant to the terms of this Section shall be payable only from the Liquidating Trust Assets, shall be advanced prior to the conclusion of such matter and such right to payment shall be prior and superior to any other rights to receive a distribution of the Liquidating Trust Assets.

6. UST Quarterly Fees.

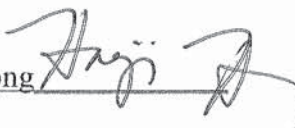
The Plan provides that the UST Quarterly Fees pursuant to 28 U.S.C. § 1930 will be made post-confirmation. The United States Trustee takes the position that if this case remains open after the confirmation of the Plan, then the UST Quarterly Fees should be paid based on disbursement made by the Liquidating Trust as constructive disbursement on behalf of the Debtor. To the extent that the Plan is not clear that the UST Quarterly Fees are being paid from the disbursement made by the Liquidating Trust, the Plan should be revised to clarify this point.

WHEREFORE, based upon the foregoing, the United States Trustee respectfully requests that this Court deny confirmation of the Plan.

Respectfully submitted,

TIFFANY L. CARROLL
ACTING UNITED STATES TRUSTEE

Dated: August 19, 2013

By: /s/ Haeji Hong 
Haeji Hong
Attorney for the Acting United States Trustee