Docket #0650 Date Filed: 10/07/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: FISKER, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 24-11390 (TMH) (Jointly Administered) **Objection Deadline Extended to Monday, October 7, 2024 at 12:00 pm (noon) EST**

UNITED STATES' OBJECTION TO THE AMENDED COMBINED DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF LIQUIDATION OF FISKER INC. AND ITS DEBTOR AFFILIATES

The United States of America, on behalf of the National Highway Traffic Safety Administration ("NHTSA"), an operating administration of the U.S. Department of Transportation, objects to the above captioned Debtors' *First Amended Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Fisker Inc. and its Debtor Affiliates* ("Amended DS and Plan" or "Plan") [Dkt. No. 588]. In support of its objection, the United States avers as follows:

BACKGROUND

1. On June 17 and 19, 2024 (collectively, the "Petition Date"), each of the Debtors (collectively, with their non-Debtor affiliates, "Fisker") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases").

2. Fisker is an automotive company that manufactures and sells electric vehicles. It is regulated by NHTSA, which administers the National Traffic and Motor Vehicle Safety Act ("Safety Act"), 49 U.S.C. Chapter 301. Under the Safety Act, a manufacturer must institute the notice and remedy

[1] The debtors and debtors in possession in these chapter 11 cases (collectively, the "Debtors," and together with their non-Debtor affiliates, "Fisker"), along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors' corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

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measures specified in the Act—collectively referred to as a recall—if the manufacturer's vehicles do not comply with a federal motor vehicle safety standard ("FMVSS") issued by NHTSA or if the vehicles contain a defect related to motor vehicle safety. 49 U.S.C. §§ 30118-30120. Most recalls are initiated by manufacturers, though NHTSA may order a recall. 49 U.S.C. §§ 30118(a)-(b), 30166.

3. Manufacturers must remedy vehicle defects or noncompliance, *without charge to the consumer*, by repairing the vehicle, by replacing the vehicle with an identical or reasonably equivalent vehicle, or by refunding the purchase price, less reasonable depreciation. 49 U.S.C. § 30119-30120. A manufacturer that fails to comply with the Safety Act's recall requirements is subject to civil penalties. 49 U.S.C. § 30165.

4. As detailed in Article IV.E of the Plan, the Debtors have issued five different recalls, including recalls related to Fisker vehicle door handles (the "Door Handle Stop-Sale Hold") and electric water pumps (the "June 26 Stop-Sale Hold") (together with the other recalls, the "Stop-Sale Holds"). The Debtors issued over-the-air operating system updates to address the other three recalls. The Door Handle and June 26 Stop-Sale Holds, however, require physical repairs.

5. The Debtors' Plan creates a Liquidating Trust to liquidate and distribute certain estate assets after the Effective Date. [Dkt. No. 588, Exh. A at 53.] Article VIII.D of the Plan provides that the Liquidating Trustee "shall take all actions reasonably practicable to address or facilitate remediation of the Stop-Sales Holds as of the Effective Date," but only to the extent the cost of such action "does not exceed $750,000."

6. The Plan does not guarantee funding for all costs required to address the Door Handle and June 26 Stop-Sale Hold recalls. Instead, the Plan provides in Article VIII.E.4 that vehicle owners cover labor expenses for recall repairs and then, at some later point, they may be reimbursed for their out-of-pocket costs through the Fisker Owners Association, using funds the Liquidating Trust might recover in future litigation against the Debtors' parts suppliers. [Dkt. No. 526, Exh. A at 30].

Since providing notice of the Door Handle and June 26 Stop-Sale Holds, Debtors represent that a small number of Fisker customers have already paid the labor costs to repair their vehicles' defective water pumps and outer doors.[2]

7. Prior to the filing of this objection, undersigned counsel for the United States contacted counsel for the Debtors, CVI, the Unsecured Creditors Committee and the United States Trustee to discuss the Government's concerns with the Amended DS and Plan, and proposed revisions to the Plan and the Plan's confirmation order resolve this objection. Due to today's deadline for filing objections, however, the United States files this objection to preserve its rights. Counsel for the United States will continue to work with the Debtors, the United States Trustee, and any other interested party to try to resolve its concerns.

OBJECTION

8. **The Amended DS and Plan are forbidden by the Safety Act.** Pursuant to section 1129(a)(3) of the Bankruptcy Code, a court shall confirm a plan only if it (among other requirements) is not "by any means forbidden by law." The Debtor's amended Plan includes provisions forbidden by the Safety Act, which specifically requires manufacturers to remedy defective and noncompliant vehicles "without charge when the vehicle . . . is presented for remedy." 49 U.S.C. § 30120(a). Notwithstanding its filing of a bankruptcy petition, a manufacturer is obligated to comply with the Safety Act to ensure that consumers are protected from any harm caused by safety defects or noncompliances in the manufacturer's product. *See* 49 U.S.C. § 30120A ("a manufacturer's filing of a petition in bankruptcy under chapter 7 or chapter 11 does not negate the manufacturer's duty to comply" with the Safety Act). The Amended DS and Plan, however, impermissibly restrict the Debtors' ongoing obligation to implement recalls under the Safety Act.

[2] Although this reimbursement scheme is not in accordance with the Safety Act, the United States does not object to those customers being reimbursed for any out-of-pocket expenses that they already paid to get their defective vehicles remedied, as they should not have had to pay for that work in the first place.

9. Article VIII.D violates this core Safety Act provision by capping the amount of funds available for remedies—which lacks any basis in law—*and* also caps these funds in an amount that Debtors have represented are, and will continue to be, insufficient to cover all consumer costs. Article VIII.D of the Plan limits the funds available for the Liquidating Trust to fulfill the Debtors' Safety Act obligations to $750,000. The Debtors are unable to represent to the United States that the cost of implementing recalls will not exceed $750,000; in fact, the Debtors have represented that total costs may be nearly twice that amount.[3] Any restriction of a manufacturer's ongoing obligation to comply with the Safety Act lacks any basis in law and violates a core Safety Act requirement that recall remedies be "without charge" to consumers. 49 U.S.C. § 30120(a).

10. Article VIII.E, perhaps in an attempt to comply with the Safety Act, impermissibly provides that consumers will—at some future date—be reimbursed for the costs they pay when their vehicles are presented for remedy. Specifically, Article VIII.E.4 of the Plan provides that consumers will continue to pay for some portion of the relevant recall remedies and will be reimbursed if and when funds are recovered in a contemplated (but not yet even initiated) litigation by the Liquidating Trustee against the Debtors' (defective) part suppliers. Importantly, the Plan does not authorize the Liquidating Trustee to cover labor expenses for outstanding recalls. As noted above, section 30120 of the Safety Act requires manufacturers—not vehicle owners—to cover all remediation expenses. This "owner reimbursement" scheme compounds Fisker's ongoing violation of § 30120(a) of the Safety Act.[4] Therefore, the Amended DS and Plan should not be confirmed.

[3] The Debtors have represented that $750,000 is sufficient funding to cover the cost of the physical parts needed to remedy the two relevant recalls but not sufficient to (additionally) cover the costs of the labor associated with replacing these parts. While the part versus labor divide may be helpful context for the Court, it is of no legal significance that the Debtors have categorized and divided the costs this way. The Safety Act is clear that all costs associated with remedying defective and noncompliant vehicles must be covered by the manufacturer; the Act makes no distinction between parts and labor.

[4] As noted *supra*, the United States does not object to the Debtors' reimbursing those consumers who have already paid remediation costs out of pocket.

11. To comply with the Safety Act, the Debtors must amend the Plan to permit Fisker's ongoing remediation efforts, without any financial caps, including remedying its prior violations through the repayment of owners who paid out-of-pocket for recall services.

12. Should Fisker fail to provide for these ongoing remediation efforts, NHTSA may have a priority claim against the Estate. Congress provided that NHTSA has the right to file a claim against the estate for the Debtors' outstanding or incomplete recall obligations, and that claim will have priority above, at least, priority and general unsecured claims: In any bankruptcy proceedings a manufacturer's obligations under the Safety Act "shall be treated as a claim of the United States Government against such manufacturer…and given priority pursuant to section 3713(a)(1)(A)" of title 31 of the United States Code (the "Federal Priority Statute") "to ensure that consumers are adequately protected from any safety defect or noncompliance determined to exist in the manufacturer's products."[5] 49 U.S.C. § 30120A. The Federal Priority Statute elevates a claim of the United States so that it must "be paid first." 31 U.S.C. § 3713(a)(1).

13. **Non-Debtor Releases.** The United States opts out of any third party non-debtor limitation of liability, discharge, injunction, exculpation and release provisions set forth in Article XII and elsewhere in the Plan. Although this is a liquidating Plan and the Debtors are not entitled to a discharge, *see* 11 U.S.C. § 1141(d)(3), the Plan currently provides for broad third-party injunctions, exculpations and releases. Recently, the Supreme Court has held that the Bankruptcy Code does not permit non-consensual third-party releases. *Harrington v. Purdue Pharma, L.P.*, 603 U.S. --, 144 S.Ct. 2071, 2081 (2024). To the extent that Plan and the confirmation order operate as non-consensual third-party releases, the Plan cannot be confirmed.

[5] This priority applies "notwithstanding section 3713(a)(2)," which normally makes the Federal Priority Statute inapplicable in chapter 11 proceedings. The United States acknowledges that outside of the Safety Act, the Federal Priority Statute does not apply to chapter 11 or chapter 7 bankruptcy proceedings.

14. While concluding non-concensual third-party releases are impermissible, the Supreme Court left open the question of what constitutes consent. *Id.* at 2087-88. Without delving into whether opt-out releases are consensual, the United States opt-outs of any releases and, to the extent that they seek to exculpate liability for or ability to enforce any police and regulatory action, exculpations.

15. **Setoff and Recoupment.** The United States objects to the Plan to the extent it fails to preserve the setoff and recoupment rights of the United States. Confirmation of a plan does not extinguish setoff claims when they are timely asserted. *In re Continental Airlines*, 134 F.3d at 542 (3d Cir. 1998). Like other creditors, the United States has the common law right to setoff mutual debts. "The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234, 239 (1947) (*citing Gratiot v. United States*, 15 Pet. 336, 370, 10 L.Ed. 759 (1841). The United States can setoff mutual prepetition debts and claims as well as postpetition debts and claims. *Zions First Nat'l Bank, N.A. v. Christiansen Bros*. (In re Davidson Lumber Sales, Inc.), 66 F.3d 1560, 1569 (10th Cir. 1995); *Palm Beach County Bd. of Pub. Instruction* (In re Alfar Dairy, Inc.), 458 F.2d 1258, 1262 (5th Cir.), *cert. denied*, 409 U.S. 1048 (1972); *Mohawk Indus., Inc. v. United States* (In re Mohawk Indus., Inc.), 82 B.R. 174, 178-79 (Bankr. D. Mass. 1987).

16. The Plan makes no provision for these rights. Such treatment is impermissible, because Section 553 of the Bankruptcy Code preserves the right of setoff in bankruptcy as it exists outside bankruptcy, *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995), neither expanding nor constricting it, *United States v. Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998). "[T]he government of the United States suffers no special handicap under § 553 of the Bankruptcy Code," *id.* at 1103, that alters this principle. Moreover, because "[s]etoff occupie[s] a favored position in our history of jurisprudence," *Bohack Corp. v. Borden*, Inc., 599 F.2d 1160, 1164 (2d Cir. 1979), courts do not interfere with its exercise absent "the most compelling circumstances," *Niagara Mohawk Power Corp.*

v. Utica Floor Maintenance, Inc. (*In re Utica Floor Maintenance, Inc.*), 41 B.R. 941, 944 (N.D.N.Y. 1984). Compelling circumstances generally entail criminal conduct or fraud by the creditor. *In re Whimsy, Inc*., 221 B.R. 69 (S.D.N.Y. 1998). No such compelling circumstances are present here, and accordingly, the Plan must provide for and preserve the federal government's setoff rights. Failure to do so violates Section 1129(a)(1) ("The court shall confirm a plan only if . . . the plan complies with the applicable provisions of this title.").

17. Similarly, the Plan improperly fails to preserve recoupment rights of the United States. Recoupment is unaffected by discharge even where it is available to debtors who are not liquidating. *Megafoods Stores, Inc. v. Flagstaff Realty Assocs*. (*In re Flagstaff Realty Assocs.*), 60 F.3d 1031, 1035-36 (3rd Cir. 1995) (holding that recoupment survives discharge following confirmation and implementation of chapter 11 plan even if creditor did not object to plan or seek a stay pending appeal); *see also Beaumont v. Dep't of Veteran Affairs* (In re Beaumont), 586 F.3d 776 (10th Cir. 2009); *Saif Corp. v. Harmon* (*In re Harmon*), 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995) ("Because recoupment only reduces a debt as opposed to constituting an independent basis for a debt, it is not a claim in bankruptcy, and is therefore unaffected by the debtor's discharge."). For the same reasons as stated above with respect to setoff rights, this Plan provision dispensing creditors' recoupment rights is impermissible and impairs the United States.

18. **Police and Regulatory Powers.** The United States objects to the Plan to the extent that it improperly bars the United States from exercising its police or regulatory powers. As a liquidating Plan, the Debtors are not entitled to a discharge or injunction. The Plan may not enjoin the United States from seeking nonmonetary relief. *See In re Torwico Elecs., Inc.,* 8 F.3d 146, 151 (3d Cir. 1993) To the extent that the Plan purports to enjoin proceedings that are not provided for in 11 U.S.C. § 524, it is invalid and may not be confirmed.

19. **Exclusive Jurisdiction**. The United States objects to the retention of exclusive jurisdiction provided for in Article XIV of the Plan. *See* 28 U.S.C. § 1334. While "the bankruptcy court plainly [may retain] jurisdiction to interpret and enforce its own prior orders," *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009), it may not divest other courts of their concurrent jurisdiction to interpret bankruptcy court orders. The United States reserves the right to assert that the Court lacks jurisdiction over any matter set forth in Article XIV.

20. As proposed by the United States' counsel, the Plan's confirmation order should include language preserving the Government's federal interests outline above, including the United States opt-out of the Plan's third party releases; the Government's set off and recoupment rights; and its police and regulatory powers.

21. **Reservation of Rights.** The United States reserves all its rights and objections with respect to any revised plan that might be filed and any order confirming the Plan.

CONCLUSION

For the foregoing reasons, the United States requests (1) the Amended DS and Plan either be revised so that it complies with the Safety Act, or otherwise rejected; (2) the Plan's confirmation order include language preserving the United States' federal interests; and (3) any and further relief as the Court deems necessary and just.

Dated October 7, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

/s/ *Cortney R. Robinson*
KIRK MANHARDT

RODNEY MORRIS
CORTNEY R. ROBINSON
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington D.C. 20044
Tel. (202) 616-2265
cortney.robinson@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2024, a true and correct copy of the forgoing has been served upon all ECF participants in these cases electronically through the Court's ECF noticing system, at their respective email addresses registered with the Court.

Dated: October 7, 2024

/s/ *Cortney Robinson*
Cortney Robinson