

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:)	
)	Chapter 11
)	
VERTEX ENERGY, INC., <i>et al.</i> , ¹)	Case No. 24-90507 (CML)
)	
Debtors.)	(Jointly Administered)
)	
)	Re: Docket Nos. 141, 344, 345, 372,
)	373, 375

DEBTORS' REPLY IN
SUPPORT OF THE DEBTORS' MOTION FOR
ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY
OF THE DISCLOSURE STATEMENT, (II) APPROVING THE
SOLICITATION AND NOTICE PROCEDURES WITH RESPECT
TO THE CONFIRMATION OF THE DEBTORS' PROPOSED JOINT
CHAPTER 11 PLAN, (III) APPROVING THE FORMS OF BALLOTS AND
NOTICES IN CONNECTION THEREWITH, (IV) SCHEDULING CERTAIN
DATES WITH RESPECT THERETO, AND (V) GRANTING RELATED RELIEF

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) submit this reply (this “Reply”) to the objections to the relief requested in the *Debtors’ Motion for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to the Confirmation of the Debtors’ Proposed Joint Chapter 11 Plan, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 141] (the “Motion”).² In support of this Reply, and in further support of the order approving the Motion (the “Order”), the Debtors respectfully state as follows:

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.veritaglobal.net/vertex>. The location of Debtor Vertex Energy, Inc.’s corporate headquarters and the Debtors’ service address in these chapter 11 cases is 1331 Gemini Street, Suite 250, Houston, Texas 77058.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion, the *Disclosure Statement for the First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and its*



Preliminary Statement

1. In the approximately two months since the Petition Date, the Debtors, the Required Consenting Term Loan Lenders, and their respective advisors have worked constructively to move swiftly towards confirmation of a chapter 11 plan that will maximize the value of the Debtors' estates for the benefit of all stakeholders. On October 8, 2024, the U.S. Trustee appointed the Committee [Docket No. 151] and immediately thereafter, the Debtors began sharing diligence and engaging with the Committee regarding the key components of these Chapter 11 Cases. These efforts proved successful as the Debtors, the DIP Lenders, the Required Consenting Term Loan Lenders, and the Committee were able to consensually resolve the Committee's concerns regarding the Debtors' marketing process, the Final DIP Order, the Final Intermediation Order, and most recently, the Plan and the Disclosure Statement.

2. Specifically, on November 15, 2024, the Debtors, the DIP Lenders, the Required Consenting Term Loan Lenders, and the Committee entered in the Committee Settlement. Pursuant to the terms of Committee Settlement, holders of General Unsecured Claims at Debtors other than Vertex will receive their *pro rata* share of the beneficial interests of the GUC Trust, comprised of \$2,250,000 of GUC Cash and the GUC Causes of Action. In exchange for the consideration being provided under the Committee Settlement to unsecured creditors, the Committee is now fully supportive of the Plan and related Disclosure Statement. With this global resolution and the support of the Debtors' key stakeholders, the path to Confirmation is clear.

3. Pursuant to the Motion, the Debtors seek approval of the Disclosure Statement and authority to commence solicitation of the Debtors' proposed Plan. In response to the Debtors'

Debtor Affiliates [Docket No. 426] (as amended, supplemented, or otherwise modified from time to time, the "Disclosure Statement"), or the *First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and its Debtor Affiliates* [Docket No. 425] (as amended, supplemented, or otherwise modified from time to time, the "Plan"), as applicable.

Motion, the Debtors received four formal objections and one reservation of rights.³ The Debtors worked diligently to resolve the Committee Objection and the USW Reservation of Rights through the inclusion of additional disclosures in the Disclosure Statement and the Plan, as applicable. The Debtors also engaged with Lexon and Liberty Mutual, and the parties agreed that the underlying issues raised in the Lexon Objection and the Liberty Mutual Joinder regarding the treatment of Lexon and Liberty Mutual's surety bonds would be more appropriately addressed in connection with Confirmation of the Plan. Accordingly, the Debtors, Lexon, and Liberty Mutual consensually agreed to defer consideration of the matters raised in the Lexon Objection and the Liberty Mutual Joinder to Confirmation, with all rights of the respective parties reserved. Accordingly, the only remaining Objection is the U.S. Trustee Objection.

4. The U.S. Trustee argues that the Debtors should not be authorized to move these cases forward and commence solicitation of a Plan because the Plan is not confirmable as a matter of law. Among other things, the U.S. Trustee argues that the injunction, exculpation, and release provisions of the Plan are improper and that the Plan improperly limits police and regulatory powers of governmental agencies. While the Debtors strongly disagree with the arguments raised by the U.S. Trustee in the U.S. Trustee Objection, the issues are "confirmation issues" that should not hold up the Debtors from pursuing their stated goal of expeditiously pursuing a value maximizing transaction through confirmation of a chapter 11 plan. The Debtors submit that the Disclosure Statement contains "adequate information" as required under section 1125 of the

³ The objections were filed by: Lexon Insurance Company ("Lexon" and such objection, the "Lexon Objection") [Docket No. 344]; Liberty Mutual Insurance Company ("Liberty Mutual" and such objection, the "Liberty Mutual Joinder") [Docket No. 345]; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, along with its Local 9-00265-01 (collectively, the "USW" and such response, the "USW Reservation of Rights") [Docket No. 372]; United States Trustee for the Southern District of Texas (the "U.S. Trustee" and such objection, the "U.S. Trustee Objection") [Docket No. 373]; and the Official Committee of Unsecured Creditors (the "Committee" and such objection, the "Committee Objection" and collectively, the "Objectors") [Docket No. 375], (collectively the "Objections").

Bankruptcy Code⁴ and none of the issues raised by the U.S. Trustee render the Plan patently unconfirmable.

5. The Debtors agree that the Plan must comply with the confirmation requirements set forth in section 1129 (as well as other applicable provisions) of the Bankruptcy Code and are prepared to demonstrate as much at the appropriate time—the Confirmation Hearing. The Debtors will continue to engage with the U.S. Trustee on their objection and hope to consensually resolve the outstanding issues in advance of the Confirmation Hearing, however, to the extent the parties are unable to reach an agreement, the U.S. Trustee will have ample opportunity to prosecute its objection at the Confirmation Hearing. Nevertheless, to aid the Bankruptcy Court’s analysis, the Debtors briefly address the confirmation issues raised by the U.S. Trustee herein to eliminate any doubt that such issues could render the Plan patently unconfirmable.

6. Accordingly, for the reasons set forth herein, the Debtors respectfully request that the Bankruptcy Court overrule the U.S. Trustee Objection and enter the Order approving the Disclosure Statement, approving the proposed timeline and solicitation procedures, and authorizing the Debtors to commence solicitation in accordance therewith.

⁴ The Disclosure Statement contains extensive and detailed descriptions of, among other things, the Debtors, these Chapter 11 Cases, the key terms of the Plan, the considerations proposed to be distributed to various constituencies, including Holders of General Unsecured Claims, the conditions precedent necessary to confirm the Plan and exit from chapter 11, the risks attendant to Confirmation, emergence and proposed recoveries, the terms of the Committee Settlement, and the potential tax consequences for the Debtors and their stakeholders. The Disclosure Statement also includes the Plan’s release, injunction, and exculpation provisions, informs creditors that they may opt-in to the proposed Third-Party Release and how they may opt-in, financial projections, and a hypothetical liquidation analysis, as well as additional disclosures to address certain informal comments received and to provide an update on these Chapter 11 Cases since the Petition Date.

Reply

I. The U.S. Trustee Objection (a) Raises Confirmation Issues That Are Premature and (b) Fails to Demonstrate that the Plan Is Patently Unconfirmable.

7. The U.S. Trustee Objection is a preliminary Confirmation objection, premature for consideration as to whether the Disclosure Statement contains adequate information. Further, the U.S. Trustee Objection does not present any basis for the Bankruptcy Court to delay approval of the Disclosure Statement and solicitation of the Plan. A disclosure statement that provides adequate information should be denied only in the rare circumstances where the corresponding plan is “patently unconfirmable”—or so “fatally flawed” as to render confirmation “*impossible*.” *See In re U.S. Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996) (emphasis added).⁵ “[A] plan is patently unconfirmable where (1) confirmation ‘defects [cannot] be overcome by creditor voting results’ and (2) those defects ‘concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.’” *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154-55 (3d Cir. 2012) (quoting *In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987)); *see also Phoenix Petroleum*, 278 B.R. at 394 (“The question whether a plan meets requirements for confirmation is usually answered at confirmation hearings. . . . [T]he disclosure statement should be disapproved at the threshold only where the plan it describes displays fatal facial deficiencies or the stark absence of good faith”); *see also In re U.S. Brass Corp.*, 194 B.R. at 422 (“Disapproval of the adequacy of a disclosure

⁵ *See also In re Sanders*, Case No. 14-02271-NPO, 2015 WL 7568469, at *5 (Bankr. S.D. Miss. Nov. 23, 2015) (“Here, however, the Court does not consider the [d]ebtor’s [p]lan to be so ‘fatally flawed’ as to render confirmation impossible.”); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 172 (Bankr. S.D. Ohio 1988) (“If the creditors oppose their treatment in the plan, but the [d]isclosure [s]tatement contains adequate information, issues respecting the plan’s confirmability will await the hearing on [c]onfirmation. Therefore, the [d]ebtor need not obtain creditors’ approval of the plan; it need only provide them with adequate information as that term is defined in 11 U.S.C. § 1125(a)(1).”).

statement . . . is discretionary and must be used carefully so as to not convert the disclosure statement hearing into a confirmation hearing.”).

8. As previewed above, the U.S. Trustee Objection asserts that: (a) the Exculpation provision of the Plan is too broad; (b) the definition of 1125(e) Exculpated Parties is overly broad; (c) the Plan attempts to predetermine the applicability of protections under section 1125(e) of the Bankruptcy Code; (d) the Plan exculpation and release provisions for professionals are impermissible; (e) the injunction provision improperly extends to exculpations; (f) the Bankruptcy Court should not enforce the injunction provision by barring claims against non-Debtors; (g) to the extent the Debtors pursue an Asset Sale, the Debtors would not be entitled to a discharge under section 1141(d)(3); and (h) the Debtors should modify the Plan to clarify that no party shall be released from any causes of action or proceeding brought by a governmental entity in accordance with its regulatory functions.

9. Each of the foregoing objections relate to the confirmability of the Plan and are not appropriate at this juncture. As noted above, the Debtors acknowledge and agree that the Plan must comply with the confirmation requirements set forth in section 1129 of the Bankruptcy Code (and all other applicable provisions). The Debtors will be prepared to carry their burden to support Confirmation of the Plan at the appropriate time, *i.e.*, at the Confirmation Hearing. The issues raised in the U.S. Trustee Objection are not relevant to assessing whether a disclosure statement contains “adequate information” and such objections do not render the Plan patently unconfirmable.

10. Courts in this District have consistently held that objections to the chapter 11 plan itself, including objections to release, injunction and exculpation provisions, are not proper disclosure objections, but rather plan objections that should be addressed at confirmation. *See e.g.*,

Discl. Stmt. Hr’g Tr. at 22:21–22, 23:7–10, *In re Diamond Sports Grp., LLC*, No. 23-90116 (CML) (Bankr. S.D. Tex. Oct. 9, 2024) (“obviously plan confirmation issues are separate than what we’re doing today” and that the U.S. Trustee’s objection to “the content of the release parties and the scope of the release parties . . . [is] a plan confirmation objection as well.”); Discl. Stmt. Hr’g Tr. at 136:4-5, *In re Envision Healthcare Corp.*, No. 23-90342 (CML) (Bankr. S.D. Tex. Aug. 2, 2023) (noting that the official committee of unsecured creditors’ objection to the Debtors’ releases, injunction, discharge, and exculpation provisions of the Plan should be appropriately addressed at confirmation); Discl. Stmt. Hr’g Tr. at 17:4–19, *In re iHeartMedia, Inc.*, No. 18-31274 (Bankr. S.D. Tex. Sept. 13, 2018) (noting that objections to releases are best addressed at confirmation); *In re Drexel Burnham Lambert Group*, 1992 WL 62758, at *1 (Bankr. S.D.N.Y. Mar. 5, 1992) (stating that objections to a plan of reorganization’s releases and injunction provisions were in the nature of confirmation objections and therefore improperly raised as objections to the disclosure statement).

11. As noted above, the Debtors intend to continue to engage with the U.S. Trustee in advance of Confirmation and are hopeful to consensually resolve many of their concerns. Nevertheless, to aid in the Bankruptcy Court’s consideration of the requested relief in the Motion, for the reasons set forth below, the Debtors submit that the Disclosure Statement should be approved and the U.S. Trustee Objection should be overruled.

12. **First**, the U.S. Trustee argues that the Plan’s exculpation provision exceeds the scope allowed by Fifth Circuit precedent. The Debtors have revised the definition of “Exculpated Parties” to remove the inclusion of the Debtors’ independent director to ensure compliance with the scope allowed by Fifth Circuit precedent.

13. **Second**, the U.S. Trustee argues that the definition of “1125(e) Exculpated Parties” is overly broad. Specifically, the U.S. Trustee states, “to comply with section 1125(e) of the Bankruptcy Code, the definition of ‘1125(e) Exculpated Parties’ in the Plan must exclude ‘Related Parties’” and “to the extent the Debtors conduct an Asset Sale, the Post-Effective Date Debtors, the DIP Agent and DIP Lenders, and the Intermediation Counterparty must be excluded from the definition of ‘1125(e) Exculpated Parties’”. U.S. Trustee Obj., ¶ 30-31. The definition of 1125(e) Exculpated Parties is appropriate under Fifth Circuit law and courts in this District have routinely approved chapter 11 plans including “Related Parties” in the definition of “1125(e) Exculpated Parties”.⁶ Further, the Debtors contend that the definition of 1125(e) Exculpated Parties is appropriate and warranted under the circumstances because the Debtors seek authority to solicit votes to accept or reject a Plan providing for the offer, issuance, sale or purchase of a security and each of the Debtors, the DIP Agent, the DIP Lenders, and the Intermediation Counterparty are participating in such effort.

14. **Third**, the U.S. Trustee argues that the Plan attempts to predetermine the applicability and protections under section 1125(e) of the Bankruptcy Code. Section 1125(e) of the Bankruptcy Code states, “[a] person that solicits acceptance or rejection of a plan . . . or that participates . . . in the offer, issuance, sale, or purchase of a security, offered or sold under the plan . . . is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.” 11 U.S.C. § 1125(e). The Debtors are prepared to demonstrate to the Bankruptcy Court at Confirmation that the scope of the exculpation provisions

⁶ See, e.g., *Benefytt Technologies, Inc.*, No. 23-90566 (CML) (Bankr. S.D. Tex. Aug. 30, 2023) [Docket No. 481] (approving the debtors’ chapter 11 plan, which included “Related Parties” in the definition of “1125(e) Exculpation Parties”); *Venator Materials PLC*, No. 23-90301 (DRJ) (Bankr. S.D. Tex. July 25, 2023) [Docket No. 344] (same).

are warranted and appropriate under the circumstances. To the extent the U.S. Trustee determines that the Debtors have not met their burden at Confirmation, the U.S. Trustee may re-raise this issue at Confirmation, *i.e.*, before the Bankruptcy Court makes a finding regarding whether the applicable parties did act in accordance with section 1125.

15. **Fourth**, the U.S. Trustee argues that “[t]he Plan’s exculpation and release provisions for professionals are impermissible under Fifth Circuit authority and professional ethical obligations.” U.S. Trustee Obj., ¶ 1(iv). The Debtors’ proposed release and exculpation provisions are consistent with those routinely approved by courts in this District.⁷ As described in greater detail herein, the exculpation and release provisions in the Plan are narrowly tailored and appropriate under the circumstances. Importantly, the Debtors Plan provides for an opt in of the Third-Party Release. The opt in procedures and related considerations are described in clear, plain language in each of the (a) Plan, (b) Disclosure Statement, (c) Ballots, (d) Non-Voting Status Notices, and (e) Publication Notice. In addition, the text used to highlight the opt-in procedures is displayed in an attention-grabbing manner in bold or all caps. Accordingly, to the extent any party in interest finds the Third-Party Release too expansive, either in scope or with respect to the parties included as Released Parties, that party can choose to simply not check the opt-in box on their Ballot or Non-Voting Status Notice.

16. **Fifth**, the U.S. Trustee argues that the injunction provision improperly extends to enforce exculpations and the release provisions. Specifically, the U.S. Trustee provides “[i]f the

⁷ See, e.g., *Genesis Care Pty Limited*, No. 23-90614 (DRJ) (Bankr. S.D. Tex. Nov. 22, 2023) [Docket No. 1192] (granting a release to the Debtors’ professionals under the Debtors’ chapter 11 plan); *Envision Healthcare Corporation*, No. 23-90342 (CML) (Bankr. S.D. Tex. Oct. 11, 2023) [Docket No. 1687] (same); *Benefytt Technologies, Inc.*, No. 23-90566 (CML) (Bankr. S.D. Tex. Aug. 30, 2023) [Docket No. 481] (same); *Nielsen & Bainbridge, LLC*, No. 23-90071 (DRJ) (Bankr. S.D. Tex. June 30, 2023) [Docket No. 611] (same); *Qualtek Services, Inc.*, No. 23-90584 (CML) (Bankr. S.D. Tex. June 30, 2023) [Docket No. 234] (same); *Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 22, 2023) [Docket No. 350] (same).

release is truly consensual, there is no threatened litigation and no need for an injunction to prevent irreparable harm to either the estates of the released parties.” This position, however, is premised on a false assumption that the relationship between the parties at the time of granting the releases is fixed in perpetuity. The purpose of the injunction provision is to bind the agreement between the Debtors and their stakeholders, as embodied in the Plan, with finality, in the event that certain parties may one day change their mind or fail to honor the release that they affirmatively, and consensually, granted. Importantly, the injunction provision contained in the Plan is necessary, narrowly tailored, and in line with injunction provisions in chapter 11 plans approved by this Bankruptcy Court.⁸ The U.S. Trustee’s use of non-bankruptcy related case law to support its position regarding injunctive relief is not applicable here.

17. ***Sixth***, the U.S. Trustee argues that, to the extent the Debtors liquidate all or substantially all of their Estates, a discharge under section 1141(d) of the Bankruptcy Code is inappropriate. While this argument amasses to nothing more than a reservation of rights, if the Debtors pursue an Asset Sale, then such considerations will be addressed ahead of Plan Confirmation, as necessary.

18. ***Finally***, the U.S. Trustee requests certain language be added to the Plan to clarify that claims brought by any governmental entity, in accordance with its regulatory functions, are not released. Given the Debtors’ Plan includes an opt-in mechanism, no government entity will be releasing any claims against the Debtors unless such government entity affirmatively opts in to the third-party release. Nonetheless, the Debtors will continue to engage with the U.S. Trustee on

⁸ See, e.g., *Genesis Care Pty Limited*, No. 23-90614 (DRJ) (Bankr. S.D. Tex. Nov. 22, 2023) [Docket No. 1192]; *Envision Healthcare Corporation*, No. 23-90342 (CML) (Bankr. S.D. Tex. Oct. 11, 2023) [Docket No. 1687]; *Benefytt Technologies, Inc.*, No. 23-90566 (CML) (Bankr. S.D. Tex. Aug. 30, 2023) [Docket No. 481]; *Nielsen & Bainbridge, LLC*, No. 23-90071 (DRJ) (Bankr. S.D. Tex. June 30, 2023) [Docket No. 611]; *Qualtek Services, Inc.*, No. 23-90584 (CML) (Bankr. S.D. Tex. June 30, 2023) [Docket No. 234]; *Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 22, 2023) [Docket No. 350].

their objection and hope to consensually resolve this matter in advance of the Confirmation Hearing.

19. Accordingly, for the reasons provided herein, the U.S. Trustee's objections to the Debtors' releases, exculpation, discharge, and injunction provisions do not render the Plan "patently unconfirmable" and will be addressed at the appropriate time in connection with Plan Confirmation.

Conclusion

20. For all the foregoing reasons, the Debtors request that the Bankruptcy Court enter the Order and grant the relief requested in the Motion and such other relief as the Bankruptcy Court deems appropriate under the circumstances.

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Houston, Texas
November 17, 2024

/s/ Jason G. Cohen

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Certificate of Service

I certify that on November 17, 2024, I caused a copy of the foregoing document to be served via the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Jason G. Cohen

Jason G. Cohen