IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
TRIAD GUARANTY INC.	:	Case No. 13-11452 (MFW)
	:	
Debtor.	:	**Objection deadline: November 22, 2017**[1] **Hearing date: January 9, 2018 at 10:00 a.m.**

UNITED STATES TRUSTEE'S OBJECTION TO AMENDED JOINT PLAN OF REORGANZATION OF TRIAD GUARANTY INC. AND WOLFGANG HOLDINGS, LLC PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

In support of his Objection to the Amended Joint Plan of Reorganization of Triad Guaranty Inc. and Wolfgang Holdings, LLC Pursuant to Chapter 11 of the United States Bankruptcy Code, Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), by and through his undersigned counsel, states as follows:

1. This Court has jurisdiction to hear this Objection.

2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that 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").

3. Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to be heard with regard to this Objection.

[1] The objection deadline was extended by agreement of the parties.

BACKGROUND

4. On June 3, 2013, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. The U.S. Trustee has not appointed a statutory committee of unsecured creditors in this case.

6. On September 5, 2017, the Debtor filed the Amended Joint Plan of Reorganization of Triad Guaranty Inc. and Wolfgang Holdings, LLC Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Plan").

PRELIMINARY STATEMENT

7. A chapter 11 plan may not be confirmed unless the Court can find that the plan complies with the provisions of 11 U.S.C. § 1129 (a). A plan proponent bears the burden of proof with respect to each and every element of 11 U.S.C. § 1129 (a). *See In re Genesis Health Ventures, Inc*., 266 B.R. 591 (Bankr. D. Del. 2001). As discussed below, the Plan is not confirmable because it contains a third party release provision that is contrary to applicable law in this District.

ARGUMENT

8. Section 12.4 of the Plan, Releases by Holders of Claims (Third Party Release), states in pertinent part that:

> AS OF THE EFFECTIVE DATE, TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, FOR GOOD AND VALUABLE CONSIDERATION, **EACH HOLDER OF A CLAIM OR EQUITY INTEREST SHALL BE DEEMED TO RELEASE**, AND FOREVER WAIVE AND DISCHARGE ANY AND ALL CLAIMS, OBLIGATIONS, SUITS, JUDGMENTS, DAMAGES, DEMANDS, DEBTS, RIGHTS, CAUSES OF ACTION, AND LIABILITIES (OTHER THAN THE RIGHTS TO ENFORCE THE DEBTOR'S OR THE REORGANIZED DEBTOR'S OBLIGATIONS UNDER ANY ORDER OF THE BANKRUPTCY COURT, THIS PLAN AND THE SECURITIES, CONTRACTS, INSTRUMENTS, RELEASES, AND

> OTHER AGREEMENTS AND DOCUMENTS DELIVERED THEREUNDER), WHETHER LIQUIDATED OR UNLIQUIDATED, FIXED OR CONTINGENT, MATURED OR UNMATURED, KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, THEN EXISTING OR THEREAFTER ARISING, IN LAW, EQUITY, OR OTHERWISE **THAT ARE BASED IN WHOLE OR IN PART ON ANY ACT, OMISSION, TRANSACTION, EVENT, OR OTHER OCCURRENCE TAKING PLACE ON OR PRIOR TO THE EFFECTIVE DATE IN ANY WAY RELATING TO THE DEBTOR, THE CHAPTER 11 CASE, OR THIS PLAN AGAINST ANY CREDITOR AND DEBTOR RELEASEE**, EXCEPT FOR ACTS CONSTITUTING FRAUD, WILLFUL MISCONDUCT, OR GROSS NEGLIGENCE AS DETERMINED BY A FINAL ORDER**; PROVIDED, HOWEVER, AS TO THE CREDITOR RELEASEES,[2] THIS RELEASE SHALL NOT BE BINDING ON ANY HOLDER OF AN EQUITY INTEREST WHO TIMELY SUBMITS A BALLOT TO VOTE AGAINST THE PLAN. FOR THE AVOIDANCE OF DOUBT, HOLDERS OF EQUITY INTERESTS WHO RECEIVE THE DISCLOSURE STATEMENT AND PLAN AND ELECT NOT TO TIMELY RETURN A BALLOT ARE DEEMED TO CONSENT TO THE RELEASES OF THIS SECTION 12.4.**
>
> (emphasis added).

9. The last clause of section 12.4 of the Plan contemplates release by all holders of Equity Interests entitled to vote on the Plan, unless such parties opt out of the release. As currently drafted, the release does not appear to be voluntary. To the extent such parties do not return a ballot, they have not consented to a release, and cannot be compelled to involuntarily grant a release. *See In re Washington Mutual, Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011)(where Bankruptcy Court stated that "failing to return a ballot is not a sufficient manifestation of consent to a third party release," even in the presence of an opt out provision).

10. In *In re Zenith Electronics Corp.*, 241 B.R. 92 (Bankr. D. Del. 1999), this Court considered the permissibility of non-consensual non-debtor releases in a plan. This Court

[2] "Creditor Releasees" is defined in Exhibit A. 23. of the Plan as "the Debtor and its current and former directors, officers, employees, advisors, attorneys, professionals, and agents (but solely in their respective capacities as such and provided that they acted or were employed in such capacity during the Chapter 11 Case)."

considered the proposed release of the creditors' claims against the plan funder where a creditor voted to accept the plan, or was in a class that voted to accept the plan, or where the creditor was to receive a distribution under the plan. With respect to the latter two instances, this Court concluded that the release was inappropriate. This Court held that such release may only be obtained consensually with the affirmative agreement of the affected creditor. *Id. See also In re Washington Mutual, Inc.*, 442 B.R. 314 at 355. In *In re Continental Airlines*, 203 F.3d 203 (2d Cir. 2000), the Third Circuit noted that a permanent injunction in favor of non-debtors is a "rare thing" that should not be considered absent a showing of exceptional circumstances in which certain key factors are present. The Third Circuit determined that fairness requires a showing that sufficient consideration was given to creditors whose claims were to be released and that such consideration renders the plan feasible. *Id*. at 213-214. The Third Circuit noted that the success of the plan must be based on the releases, and that there be an identity of interest between the debtor and the non-debtor so that the debtor would likely bear the cost of the litigation against the non-debtor. *Id* at 216.

11. In *In re Genesis Health Ventures, Inc*., 266 B.R. 591 (Bankr. D. Del. 2001), this Court examined the release of a secured creditor by the unsecured creditors of the estate. To establish the necessity of such releases, the court declared that the debtors were required to demonstrate that the success of its reorganization was related to such non-consensual releases and the releases provided a "critical financial contribution" that was necessary to render the plan feasible. *Id.* at 607.

12. The court noted that unlike the approval of releases in cases such as *A.H. Robins*, in which the "the entire reorganization" of a massive and complex chapter 11 case hinged, the necessity of the release of the lenders in *Genesis* was more marginal. *Id*. at 607-608.

13. Absent a proper and appropriate factual scenario or basis sustained by credible evidence, the involuntary release provision may not be implemented or applied as to certain parties, under the circumstances of this case.

14. There is an insufficient showing that the releases sought to be conferred upon several of the Creditor Releasees complies with applicable law, and as such the requisite relief appears to run afoul of the ruling set forth in *In re Washington Mutual, Inc.*, 442 B.R. 314, 349-350 (Bankr. D. Del. 2011) (where the Bankruptcy Court held, *inter alia*, that under applicable law, there was no basis for the debtors to grant releases to the debtors' directors and officers or any professionals, current or former, because no evidence was presented with respect to, among other things, a "substantial contribution" having been made to the case by the parties seeking such releases).

15. In the instant case, the non-debtor release provision is overbroad and is impermissible under *Washington Mutual*, *Zenith*, *Continental* and *Genesis*. It does not appear that the vast majority of parties sought to be released have provided a critical financial contribution necessary to render the plan feasible. To the extent holders of Equity Interests do not affirmatively indicate their consent to the non-debtor releases, they should not be approved.

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

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE

By: */s/ Jane M. Leamy*

Jane M. Leamy (#4113)
Trial Attorney
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491
(302) 573-6497 (Fax)

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