FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIMOTHY L. BLIXSETH, *Appellant*, v. CREDIT SUISSE, *Appellee.*	No. 16-35304 D.C. No. 2:11-cv-00065-SEH OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted June 17, 2019
San Francisco, California

Filed June 11, 2020

Before: Richard A. Paez, Marsha S. Berzon,
and Jay S. Bybee, Circuit Judges.

Opinion by Judge Berzon

SUMMARY*

Bankruptcy

The panel affirmed, on different grounds, the district court's dismissal of a challenge to an exculpation

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

clause approved by the bankruptcy court as part of a settlement and confirmation plan in Chapter 11 proceedings.

The Chapter 11 proceedings were filed by Yellowstone Club companies founded by appellant Timothy Blixseth and his then-wife. The exculpation clause released certain non-debtors, including Credit Suisse, from liability for acts or omissions arising out of the Chapter 11 proceedings. In a prior appeal, this court affirmed the district court in part and reversed in part, holding that Blixseth had standing to challenge the bankruptcy court's order approving the plan and that Blixseth's challenge to the exculpation clause was not equitably moot.

As an initial matter, the panel declined to dismiss Blixseth's appeal as a sanction for his failure to respond to an order to show cause for why his appeal should persist in the wake of a purported global settlement.

The panel held that, on remand, the district court erred by dismissing Blixseth's challenge on the ground that it was barred by equitable mootness. The panel held that its prior holding on equitable mootness was law of the case and was sound.

The panel nonetheless affirmed on the ground that the exculpation clause was valid, and the bankruptcy court properly released Credit Suisse, a creditor, from liability for certain potential claims against it. Consistent with the Third Circuit, the panel held that 11 U.S.C. § 524(e), providing that discharge of a debt of

the debtor does not affect the liability of any other entity on such debt, did not bar the exculpation clause, which narrowly focused on actions of various participants in the plan approval process and related only to that process.

COUNSEL

Becky S. James (argued) and Rachael A. Robinson, James & Associates, Calabasas, California, for Appellant.

Christopher J. Cariello (argued), Orrick Herrington & Sutcliffe LLP, New York, New York; Robert M. Loeb, Orrick Herrington & Sutcliffe LLP, Washington, D.C.; J. Richard Orizotti, Poore Roth & Robinson P.C., Butte, Montana; Evan R. Levy, Mark A. McDermott, and Shaud G. Tavakoli, Skadden Alps Slate Meagher & Flom LLP, New York, New York; for Appellee.

OPINION

BERZON, Circuit Judge:

We have been here, or nearly here, before. Timothy Blixseth ("Blixseth") appeals the district court's dismissal of his challenge to an exculpation clause (the "Exculpation Clause" or the "Clause") approved by the bankruptcy court as a part of a settlement plan to which Blixseth objected. The district court dismissed the challenge because it determined that Blixseth's case is equitably moot, even though we previously held

his challenge to the Exculpation Clause not equitably moot. Although the court erred in doing so, we hold the Exculpation Clause valid, and so affirm the dismissal.

I

Timothy Blixseth and Edra Blixseth, his wife at the time, founded the Yellowstone Club in 2000 as an "exclusive ski and golf community" in Big Sky, Montana. In 2005, representing that he was planning to take the Yellowstone Club global, Blixseth borrowed $375 million from Credit Suisse and other lenders. *See Blixseth v. Kirschner (In re Yellowstone Mountain Club, LLC)*, 436 B.R. 598, 607, 60913. (Bankr. D. Mont. 2010), *amended in part by* No. 0861570-11, 2010 WL 3504210 (Bankr. D. Mont. Sept. 7, 2010). To secure the loan, Blixseth offered the assets of companies related to the Club—Yellowstone Mountain Club, LLC; Yellowstone Development, LLC; Big Sky Ridge, LLC; and Yellowstone Club Construction Company, LLC. *Id.* at 608–13.

Blixseth and Edra Blixseth divorced in 2008. As a result of the divorce proceedings, Edra Blixseth became the indirect owner of the Yellowstone companies. *Id.* at 632. The companies had entered "a downward spiral," *id.* at 618, largely because Blixseth mismanaged and misused the money from the 2005 loan, *see id.* at 613–15. As a result, repayment of that loan was no longer viable. *Id.* at 620. Edra Blixseth decided to take the companies (collectively, the "Debtors") through Chapter 11 bankruptcy proceedings, with the intention of selling the Debtors' assets to CrossHarbor

Capital Partners, LLC, a real estate management company that had purchased residential lots in the Yellowstone Club and had offered to buy the Club. *Id.* at 619–21, 630–31.

The bankruptcy proceedings were contentious. The Debtors, Blixseth, CrossHarbor, Credit Suisse—the Debtors' largest creditor—and a committee of unsecured creditors battled over the companies' assets. As the bankruptcy court noted, "litigation and the threat of litigation is and was plentiful in this case." *In re Yellowstone Mountain Club, LLC*, 460 B.R. 254, 274 (Bankr. D. Mont. 2011).

Settlement negotiations narrowed the scope of the litigation. On April 3, 2009, the Debtors filed a Second Amended Reorganization Plan and Disclosure Statement, which included an exculpation clause releasing certain non-debtors from liability for acts or omissions arising out of the Chapter 11 proceedings. Credit Suisse was not included as an exculpated party. It objected to the plan and, specifically, the Clause, on the ground that "such releases are strictly forbidden in the Ninth Circuit and grounds for denial of confirmation of the Plan." Blixseth, who was also not included as an exculpated party, adopted and joined Credit Suisse's objections.

Credit Suisse's objection threatened the confirmation of the plan and set off another intense round of negotiations. Over the course of a weekend in May 2009, Credit Suisse, CrossHarbor, and the Debtors negotiated a "global settlement" that allowed the Debtors

to avoid liquidating their assets. *Id.* at 264–65. This settlement formed the basis for the Third Amended Joint Plan (the "Plan"). The Plan resolved lingering litigation between the parties and, relevant here, included the Exculpation Clause at issue, which now covered Credit Suisse as an exculpated party. The full Clause, set out in Section 8.4 of the Plan, provides:

> None of [the Exculpated Parties, including Credit Suisse, CrossHarbor, and Edra Blixseth], shall have or incur any liability to any Person for any act or omission in connection with, relating to or arising out of the Chapter 11 Cases, the formulation, negotiation, implementation, confirmation or consummation of this Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document entered into during the Chapter 11 Cases or otherwise created in connection with this Plan; provided, however, that nothing in this Section 8.4 shall be construed to release or exculpate any Exculpated Party from willful misconduct or gross negligence as determined by a Final Order or any breach of the Definitive Agreement or any documents entered into in connection therewith.

Blixseth, who was not covered by the revised exculpation clause, again objected to the Plan. The bankruptcy court approved the Plan on June 2, 2009, and Blixseth appealed. The district court reversed the bankruptcy court's confirmation of the Plan because of the breadth of the Exculpation Clause. The court

instructed the bankruptcy court to "explicitly identify and delineate those persons or representatives determined to be within the scope of the release parameters of Section 524(e)."

On remand, the bankruptcy court conducted two days of evidentiary hearings and argument on the Exculpation Clause. On September 30, 2011, the court confirmed the plan once more, not modifying the Plan but construing the Clause to be "narrow in both scope and time." *In re Yellowstone Mountain Club, LLC*, 460 B.R. at 272.

Blixseth appealed again. The district court rejected the Plan proponents' argument that Blixseth's appeal was barred by the doctrine of equitable mootness but concluded that Blixseth did not have standing to appeal the bankruptcy court's approval of the Plan. Blixseth and the Plan proponents cross appealed to this Court. In an unpublished disposition, we affirmed the district court in part and reversed in part, holding (1) that Blixseth was a "person aggrieved" by the bankruptcy court's order and thus had standing to challenge that order, and (2) that Blixseth's challenge to the Exculpation Clause was not equitably moot because it was "apparent that one or more remedies is still available." *Blixseth v. Yellowstone Mountain Club, LLC*, 609 F. App'x 390, 391–92 (9th Cir. 2015) (citation omitted). We remanded to the district court with instructions to consider the merits of Blixseth's challenge to the Clause.

But on remand, the district court did not rule on the merits of Blixseth's challenge to the Clause. Instead, it dismissed Blixseth's challenge on the ground that it was barred by equitable mootness.

This appeal followed.

II

As an initial matter, we face a procedural question: Credit Suisse contends Blixseth's appeal should be dismissed outright because of his failure to respond to our order requiring him to show cause for why his appeal should persist in the wake of a purported global settlement.

During the pendency of this appeal, we became aware that settlement negotiations among the parties to the dispute had been ongoing and the parties might have reached a settlement. We issued an order stating:

> It appears that these appeals may be moot because of settlement or should otherwise be dismissed. Within 21 days after the filing date of this order, appellant shall move to voluntarily dismiss these appeals or show cause why these appeals should not be dismissed. If appellant fails to respond to this order, these appeals will be automatically dismissed by the Clerk for failure to prosecute. See 9th Cir. R. 42-1. If appellant files a response, appellees shall file a response or an appropriate motion within 14 days after service of appellant's filing. Further briefing is stayed pending resolution of this order.

It turned out that Blixseth had settled with two parties, CrossHarbor and Yellowstone Mountain Club, LLC, but not with Credit Suisse. In response to our order, Blixseth moved to dismiss CrossHarbor and Yellowstone Mountain Club; he did not explain why he made no motion concerning Credit Suisse, nor did he explain why his appeal with regard to Credit Suisse was not moot.

Our order had stated that Blixseth's appeal would be "automatically dismissed by the Clerk," if he failed to respond to the order. In fact it was not dismissed. Blixseth did respond to the order, albeit incompletely, by moving to dismiss two defendants but not responding with regard to Credit Suisse.

Blixseth finally did respond as to mootness with regard to Credit Suisse—a month and a half later than required by our order—after Credit Suisse moved to dismiss his appeal.[1] Given Blixseth's belated response with regard to Credit Suisse, we have the authority to dismiss Blixseth's appeal now for incomplete compliance with our order. But equitable factors persuade us not to do so.

Under our Circuit's rules,

> [w]hen an appellant fails to file a timely record, pay the docket fee, file a timely brief, or otherwise comply with rules requiring processing the appeal for hearing, an order *may*

[1] According to Blixseth, Credit Suisse contributed to his failure to respond by unexpectedly refusing to sign the settlement release the other parties executed.

> be entered by the clerk dismissing the appeal. In all instances of failure to prosecute an appeal to hearing as required, the Court *may* take such other action as it deems appropriate.

9th Cir. R. 42-1 (emphases added). In general, "[d]ismissal is a harsh penalty and is to be imposed only in extreme circumstances," because, *inter alia,* "public policy favor[s] disposition of cases on their merits." *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). We routinely dismiss cases pursuant to Rule 42-1 when an appellant fails to file an opening brief. *See, e.g.*, *Hinds & Shankman, LLP v. Lapides*, No. 19-56236, 2020 WL 1943511, at *1 (9th Cir. Mar. 24, 2020). But in circumstances closer to those here, we have chosen not to dismiss.

Radici v. Associated Insurance Cos., for instance, involved an appellant who filed a Civil Appeal Docketing Statement late, in violation of an order that "specifically provided that failure to file [the statement] in timely manner would result in dismissal." 217 F.3d 737, 746 (9th Cir. 2000). We nonetheless declined to dismiss the appeal in *Radici*, because "Appellees' counsel conceded that Appellants' delay . . . did not prejudice or harm her clients' interests," making dismissal "appear[ ] harsher than necessary." *Id.*

Credit Suisse does not concede that Blixseth's delay caused it no prejudice, but we cannot identify any interest of Credit Suisse's that was harmed as a result of the delay. And, like the appellant in *Radici*, Blixseth did respond—if incompletely—to our order, by moving

to dismiss CrossHarbor and Yellowstone Mountain Club. In light of those factors, and given the extensive litigation that has occurred to date over the validity of the Exculpation Clause, dismissal "appears harsher than necessary." *Id.* Rather than sanction Blixseth for his incomplete compliance with our directive, we consider the substance of his appeal.

III

A

On remand from Blixseth's earlier appeal, the district court dismissed his case on the ground that Blixseth's challenge to the Exculpation Clause was equitably moot. In reaching this conclusion the district court disregarded our earlier holding that "Blixseth's appeal as to the exculpation clause is not equitably moot, because it is apparent that one or more remedies is still available." *Blixseth*, 609 F. App'x. at 392. Our holding bound the district court, and it binds us now, as the law of the case. *See Herrington v. Cty. of Sonoma*, 12 F.3d 901, 904–05 (9th Cir. 1993).

Even if we were not bound by our earlier decision, we remain convinced that it was sound. Credit Suisse argues, and the district court concluded, that Blixseth's appeal is moot because his only proposed remedy, invalidating the Exculpation Clause, "would require that the [Bankruptcy] Plan be vacated and constructed anew, thereby creating 'an uncontrollable situation for the bankruptcy court.' *Blixseth v. Yellowstone Mountain Club, LLC*, CV-11-65-BU-SEH, slip op. at 4 (D.

Mont. Mar. 23, 2016) (quoting *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 881 (9th Cir. 2012)). But equitable mootness involves the capacity of courts, not parties, to fashion a remedy. As *In re Thorpe* stated, "[b]ecause traditional equitable remedies are extremely broad and vest great discretion *in a court devising a remedy*, we expect that if there is violation of Appellants' legal rights from the plan, the *bankruptcy court* should be able to find a remedy that is appropriate." 677 F.3d at 883 (emphases added). There are "plan modifications adequate to give" Blixseth at least some relief—for example, the bankruptcy court could modify the Plan to make even more express the limited temporal and substantive scope of the Exculpation Clause. *Id.* "Where equitable relief, though incomplete, is available, the appeal is not moot." *Id.*

B

Because it improperly dismissed the case as equitably moot, the district court did not determine whether the Exculpation Clause is valid. We could remand the case once more, but will not do so. "We are in as good a position to review the bankruptcy court's decision as is the district court." *Sousa v. Miguel (In re United States Tr.)*, 32 F.3d 1370, 1372 (9th Cir. 1994) (citation and internal quotation marks omitted). "Whether a bankruptcy court has the power to release claims against a non-debtor is a question of law which we review de novo." *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995)

(citation omitted). We hold that the Clause, as applied to Credit Suisse, is valid.

The question before us is whether the bankruptcy court could release Credit Suisse, a creditor, from liability for certain potential claims against it by approving the Exculpation Clause.[2]

The liability release here is "narrow in both scope and time," *In re Yellowstone Mountain Club*, 460 B.R. at 272, limited to releasing the parties from liability for "any act or omission in connection with, relating to or arising out of the Chapter 11 cases" or bankruptcy filing, *id.* at 267. It does not affect obligations relating to the claims filed by creditors and discharged through the bankruptcy proceedings, as it exclusively exculpates actions that occurred during the bankruptcy proceeding, not before. And, during that time period, the Clause's release applies only to negligence claims; it does not release parties "from willful misconduct or gross negligence." *Id.* Further, the Clause covers only parties "closely involved" in drafting the Plan—as relevant here, Credit Suisse. *Id.* at 277. The bankruptcy court reasoned that Credit Suisse should be covered because, as the largest creditor, it "had the ability to single-handedly disrupt the entire confirmation process," but had become a "plan proponent[]" through its direct participation in the negotiations that preceded the adoption of the Plan. *Id.* at 275–77. Altogether, as

[2] As Blixseth has settled with the other parties covered by the Clause, we discuss the validity of the clause only as it releases Credit Suisse from liability.

the bankruptcy court noted, the Exculpation Clause is not "a broad sweeping provision that seeks to discharge or release non-debtors from any and all claims that belong to others." *Id.* at 270.[3]

Blixseth primarily contends the Exculpation Clause violates 11 U.S.C. § 524(e). Subject to exceptions not relevant here, § 524(e) establishes 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." We have interpreted the section generally to prohibit a bankruptcy court from discharging the debt of a non-debtor. *See In re Lowenschuss*, 67 F.3d at 1402.[4]

We conclude, however, that § 524(e) does not bar a narrow exculpation clause of the kind here at issue—that is, one focused on actions of various participants in the Plan approval process and relating only to that process.

Section 524(e) establishes that "discharge of a *debt* of the debtor does not affect the liability of any other

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[3] Neither party contests on appeal the bankruptcy court's interpretation of the Clause.

[4] There is a long-running circuit split on this issue. Other circuits do allow bankruptcy plans to "discharge the debts of certain non-debtor third parties." *Deocampo v. Potts*, 836 F.3d 1134, 1143 (9th Cir. 2016) (citing *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4th Cir. 1989)). *See generally* Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Dev. J. 13 (2006).

entity on . . . *such debt*." 11 U.S.C. § 524(e) (emphases added). In other words, "the discharge in no way affects the liability of any other entity . . . for the *discharged* debt." 4 Collier on Bankruptcy 11524.05 (emphasis added). By its terms, § 524(e) prevents a bankruptcy court from extinguishing claims of creditors against non-debtors over the very debt discharged through the bankruptcy proceedings. *See In re PWS Holding Corp.*, 228 F.3d 224, 245–46 (3d Cir. 2000) (making the same point).

That § 524(e) confines the debt that may be discharged to the "debt of the debtor"—and not the obligations of third parties for that debt—conforms to the basic fact that "a discharge in bankruptcy does not extinguish the debt itself but merely releases the debtor from personal liability. . . . The debt still exists, however, and can be collected from any other entity that may be liable." *Landsing Diversified Props.-II v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund)*, 922 F.2d 592, 600 (10th Cir. 1990) (alteration in original) (quoting *In re Lembke*, 93 B.R. 701, 702 (Bankr. D.N.D. 1988)); *see also Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir. 1996). As § 524(a) elucidates, a discharge

> voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . [;] operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such [discharged] debt as a

> personal liability of the debtor . . . [;] and operates as an injunction against the commencement or continuation of an action . . . to collect or recover from, or offset against, property of the debtor.

11 U.S.C. § 524(a). A bankruptcy discharge thus protects the debtor from efforts to collect the debtor's discharged debt indirectly and outside of the bankruptcy proceedings; it does not, however, absolve a non-debtor's liabilities for that *same* "such" debt.

The legislative history of § 524(e) makes clearer the distinction between claims for the underlying debt and other claims, such as those relating specifically to the bankruptcy proceedings. As *Underhill v. Royal* summarized, § 524(e) is a

> reenactment of Section 16 of the 1898 Act which provided that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Act of July 1, 1898, ch. 541, § 16, 30 Stat. 550 (formerly codified at 11 U.S.C. § 34 (1976)).

769 F.2d 1426, 1432 (9th Cir. 1985) (alteration in original). The emphasis on the liability of co-debtors and guarantors, but not creditors or other third parties, indicates the intended scope of Section 16 and, by extension, § 524(e). "The import of Section 16 [of the 1898 Act] is that the mechanics of administering the federal bankruptcy laws, no matter how suggestive, do not operate as a private contract to relieve co-debtors of the bankrupt of their liabilities." *Id.* (alterations in

original) (quoting *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (per curiam)). Like its predecessor provision in the 1898 Bankruptcy Act, § 524(e) prevents a reorganization plan from inappropriately circumscribing a creditor's claims against a debtor's co-debtor or guarantors over the discharged debt, and so does not apply to the Clause before us.

Consistent with our analysis, the Third Circuit has upheld an exculpation clause similar to the one here at issue. *PWS*, 228 F.3d at 245–46. In doing so, the court took into account that the exculpated non-debtors there were members of the creditors' committee and related professionals and individuals. At the same time, and more broadly, *PWS* stated that "Section 524(e), by its terms, *only* provides that a discharge of the debtor does not affect the liability of non-debtors on claims by third parties against them *for the debt discharged in bankruptcy*," *id.* at 245 (emphasis added), and held that the partial exculpation for acts committed during the process of developing and confirming a Chapter 11 plan did not "affect the liability of another entity on a debt of the debtor within the meaning of § 524(e)," *id.* at 247.

Contesting this limited view of § 524(e), Blixseth directs us toward broad language we have used in three cases in which we interpreted § 524(e) to bar nondebtor releases. The first of these cases, *Underhill*, stated that "the bankruptcy court has no power to discharge the liabilities of a nondebtor pursuant to the consent of creditors as part of a reorganization plan." 769 F.2d at 1432, *rejected on other grounds by Reves v.*

Ernst & Young, 494 U.S. 56 (1990). *In re American Hardwoods, Inc.* added that "Section 524(e) . . . limits the court's equitable power under section 105 to order the discharge of the liabilities of nondebtors." 885 F.2d 621, 626 (9th Cir. 1989). Finally, based on *Underhill* and *American Hardwoods, Lowenschuss* declared "[t]his court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." 67 F.3d at 1401.

But *Underhill, American Hardwoods*, and *Lowenschuss* all involved sweeping nondebtor releases from creditors' claims on the debts discharged in the bankruptcy, not releases of participants in the plan development and approval process for actions taken during those processes. *Underhill*, for example, disapproved a release provision that discharged "*all* claims against the debtor, *any* affiliate of the Debtor, and *any* insider of the debtor," including for securities law violations that occurred prior to the bankruptcy filing. 769 F.2d at 1429–30 (emphases added) (internal quotations marks omitted). *American Hardwoods* involved an injunction that, like a release provision, would have permanently prevented a creditor from collecting any debt from American Hardwoods' guarantors—the president and vice president of American Hardwoods—on American Hardwoods' discharged debts. 885 F.2d at 622. And *Lowenschuss* dealt with a "Global Release" provision that, true to its title, "released numerous parties . . . from all claims." 67 F.3d at 1397, 1401. In each of these cases, the breadth of the coverage—the "Global Release" in *Lowenschuss*; the permanent

injunction in *American Hardwoods*; and the "all claims" exculpation in *Underhill*—would have affected the ability of creditors to make claims against third parties, including guarantors and co-debtors, for the debtor's discharged debt.

In contrast, the Exculpation Clause here deals only with the highly litigious nature of Chapter 11 bankruptcy proceedings.[5] As one of the bankruptcy attorneys in this case stated during the bankruptcy court's hearing on the Exculpation Clause, in bankruptcy proceedings lawyers "battle each other tirelessly. . . . oxes [sic] are gored." 460 B.R. at 274 (internal quotation marks omitted). Rather than provide an unauthorized "fresh start" to a non-debtor, *Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 251–53 (5th Cir. 2009), the Clause does nothing more than allow the settling parties—including Credit Suisse, the Debtors' largest creditor—to engage in the give-and-take of the bankruptcy proceeding without fear of subsequent

[5] Notably, Blixseth has never shown that the Exculpation Clause impermissibly releases Credit Suisse—or anyone—from any potential viable claims he might bring. At oral argument, Blixseth raised the dismissal of a breach of contract claim against Credit Suisse in a separate suit he filed in the District of Colorado. *See Blixseth v. Cushman & Wakefield of Colo., Inc.*, 2013 WL 5446791 (D. Colo. 2013). The district court there did determine that the Exculpation Clause barred his claim, but the claim involved Credit Suisse's participation in the bankruptcy proceedings, not its conduct outside those proceedings. *Id.* at *9.

litigation over any potentially negligent actions in those proceedings.[6]

Under 11 U.S.C. § 105(a), which empowers a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Chapter 11]," and 11 U.S.C. § 1123, which establishes the appropriate content of a bankruptcy plan, the bankruptcy court here had the authority to approve an exculpation clause intended to trim subsequent litigation over acts taken during the bankruptcy proceedings and so render the Plan viable. Section 524(e) constrains this power by ensuring that no third party is released from its obligation for the underlying debt. *See* 11 U.S.C. § 1123(a); *Am. Hardwoods*, 885 F.2d at 625–26. But, as we have discussed, the Exculpation Clause does not affect claims for that debt, and so it was within the bankruptcy court's power to approve the Exculpation Clause as a part of the Plan.[7]

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[6] Blixseth does not challenge the Exculpation Clause on the grounds that it violates the "hallmarks of permissible non-consensual releases—fairness, necessity to the reorganization, and specific factual findings to support these conclusions." *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000). We therefore do not consider that possibility in detail, but we do note that, based on the bankruptcy courts findings, *In re Yellowstone Mountain Club, LLC*, 460 B.R. at 272, the Clause almost certainly displays these hallmarks.

[7] The Fifth Circuit has reached a conclusion opposite ours. *In re Pacific Lumber Co.* held that § 524(e) barred a release provision that would have released non-debtors who were not "co-liable for the Debtors' pre-petition debts. . . . from any negligent conduct that occurred during the course of the bankruptcy," except insofar as the release covered negligent conduct of members of the creditors' committee already protected by a limitation on liability

According to *PWS*, similar limited exculpatory clauses focused on acts committed as part of the bankruptcy proceedings are "apparently a commonplace provision in Chapter 11 plans," 228 F.3d at 245; *see also In re Yellowstone Mountain Club*, 460 B.R. at 271, 274, presumably because of the features of bankruptcy litigation just noted.[8]

Aside from his § 524(e) argument, Blixseth also argues he is not bound by the Plan's settlement because there was no consideration for the settlement and he was not in privity with the parties. These arguments misunderstand the source of a bankruptcy court's power. As *Underhill* explained, "When a bankruptcy court discharges the debtor, it does so by operation of the bankruptcy laws, not by consent of the creditors. . . . [T]he payment which effects a discharge is not consideration for any promise by the creditors, much less for one to release non-party obligators." 769 F.2d

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implied from the bankruptcy code. 584 F.3d at 252. *In re Pacific Lumber Co.* reasoned that "[t]he fresh start § 524(e) provides to debtors is not intended to serve this purpose." *Id.* at 252–53. But, as we have discussed, the Exculpation Clause does not provide a "fresh start" to Credit Suisse, because it affects only claims arising from the bankruptcy proceedings themselves.

[8] Unlike the creditors committee in *PWS*, one of the exculpated parties in that case, Credit Suisse, the Debtors' largest creditor, does not have an implied fiduciary duty derived from the statute to the participants of the bankruptcy proceedings. 228 F.3d. at 246; *see also* 11 U.S.C. § 1103(c). But the fundamental point remains that the Clause, as applied to Credit Suisse, does not reach "such debt" within the meaning of § 524(e)—it merely releases Credit Suisse from some potential liability that might arise from its actions in the bankruptcy proceedings.

at 1432 (internal quotation marks omitted) (quoting *Union Carbide Corp.*, 686 F.2d at 595). Whether or not there was consideration and privity, the bankruptcy court had the power to confirm the Plan.

IV

In sum, we shall not dismiss Blixseth's appeal because of his failure to reply to our show cause order. We remain bound by our earlier decision that Blixseth's challenge to the Exculpation Clause is not equitably moot. Considering the merits of Blixseth's challenge, we hold that § 524(e) does not prohibit the Exculpation Clause at issue, because the Clause covers only liabilities arising from the bankruptcy proceedings and not the discharged debt. Perhaps we have reached the end of this matter.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

TIMOTHY L. BLIXSETH, Appellant, vs. YELLOWSTONE MOUNTAIN CLUB, LLC, YELLOWSTONE DEVELOPMENT, LLC, BIG SKY RIDGE, LLC, YELLOWSTONE CLUB CONSTRUCTION CO., LLC, Appellees,	No. CV-11-65-BU-SEH **MEMORANDUM AND ORDER** (Filed Mar. 23, 2016) On appeal from Bankruptcy Case No. 08-61570-11

This matter is before the Court on remand following the Circuit's determination that Blixseth's appeal as to the exculpation clause of the Third Amended Plan of Reorganization ("the Plan") was not equitably moot. Instruction to this Court "to consider Blixseth's challenges to the exculpation clause in the first instance"[1] was provided. Those challenges have been fully considered and, for the stated reasons which follow, have been resolved.

Whether and when equitable mootness may be invoked to preclude review of an order confirming a

[1] Doc. 134 at 5.

reorganization plan was directly addressed in the Circuit's memorandum of May 1, 2015:

> Equitable "mootness is a jurisdictional issue which [this Court] review[s] de novo. *Baker & Drake, Inc. v. Pub. Serv. Comm 'n of Nev. (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351 (9th Cir. 1994). Considerations in determining whether an appeal of an order confirming a reorganization plan is equitably moot include: whether the party seeking relief has diligently sought a stay; whether the plan has been substantially consummated; and whether the rights of third parties have intervened. *In re Thorpe*, 677 F.3d at 880. Of particular relevance is "whether the bankruptcy court can [still] fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court." *Id.; see also Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006 (9th Cir. 1993).[2]

The Circuit's memorandum addresses and resolves two of the three significant considerations of equitable mootness contrary to the position asserted by Blixseth: (1) "whether the party seeking relief has diligently sought a stay,"[3] Blixseth sought no stay in the district court. None was requested in the Circuit;[4] and, (2) "whether the plan has been substantially

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[2] Doc. 134 at 4.

[3] Doc. 134 at 4.

[4] Doc. 134 at 4.

consummated."[5] To this latter consideration, the Circuit spoke directly—"[T]he plan has been substantially consummated[.]"[6]

The record before the Bankruptcy Court when it issued its order reconfirming the Plan on September 30, 2011, clearly answered, adversely to Blixseth, the core question in the third consideration of equitable mootness analysis, namely "whether the bankruptcy court [could] still fashion effective and equitable relief short of vacating the Plan."[7]

Judge Kirscher's September 30, 2011, Memorandum of Decision is exhaustive in its detailed description of the efforts expended by the parties in the process of negotiating and reaching resolution of the myriad of issues encompassed by the Plan. The exculpation clause, like the Settlement Term Sheet, was an essential and cornerstone component of the Plan itself.[8] Moreover, absent resolution of the numerous disputes memorialized in the Plan and incorporated in the Settlement Term Sheet, no successful reorganization would have been feasible. Any upset or set aside of the exculpation clause or the Settlement Term Sheet would have doomed the Plan itself to failure, and at this juncture, effectively would require that the Plan be vacated and constructed anew, thereby creating "'an uncontrollable situation for the bankruptcy court.'

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[5] Doc. 134 at 4.

[6] Doc. 134 at 5.

[7] Doc. 134 at 4.

[8] *See* discussion, Doc. 1-8 at 32-33, 35.

[*In re Thorpe*, 677 F.3d at 880]; *see also In re Spirtos*, 992 F.2d 1004, 1006 (9th Cir. 1993)."[9] Indeed, as the Circuit's Memorandum of May 1, 2015, reflects, issues Blixseth had raised claiming "that the bankruptcy court erred in approving the Settlement Term Sheet and in denying Blixseth's Rule 60(b) motion for relief from the Confirmation Order and that Blixseth [was] therefore entitled to be restored to the 's*tatus quo ante*,'" were rejected for the reason that the relief sought "would [have] require[d] unraveling the Plan entirely."[10] Rejection of the exculpation clause would require that same unraveling of the Plan.

Judge Kirscher's decision adopting and ratifying his approval of the "Memorandum of Decision and order entered June 2, 2009, [and] approving the Settlement Term Sheet and confirming the Debtors' Third Amended Joint Plan of Reorganization" was fully supportable and in compliance with all requirements of law.[11] All unresolved claims advanced by Blixseth in this appeal are barred from assertion by equitable mootness.

ORDERED:

This appeal is DISMISSED.

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[9] Doc. 134 at 4.

[10] Doc. 134 at 5.

[11] Doc. 1-8 at 41.

DATED this 23rd May of March, 2016.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY L. BLIXSETH, Appellant, v. YELLOWSTONE MOUNTAIN CLUB, LLC; YELLOWSTONE CLUB CONSTRUCTION COMPANY, LLC; YELLOWSTONE DEVELOPMENT, LLC, Debtors - Appellees, BRIAN A. GLASSER, Esquire, Trustee of Yellowstone Club Liquidating Trust, Appellee, BLUE SKY RIDGE, LLC, Debtor - Appellee, CROSS HARBOR CAPITAL PARTNERS, LLC; CREDIT SUISSE, Appellees.	No. 13-35190 D.C. No. 2:11-cv-00065-SEH **MEMORANDUM*** (Filed May 1, 2015)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

YELLOWSTONE MOUNTAIN CLUB, LLC; YELLOWSTONE CLUB CONSTRUCTION COMPANY, LLC; YELLOWSTONE DEVELOPMENT, LLC, Debtors - Appellants, BRIAN A. GLASSER, Esquire, Trustee of Yellowstone Club Liquidating Trust, Appellant, BLUE SKY RIDGE, LLC, Debtor - Appellant, CROSS HARBOR CAPITAL PARTNERS, LLC, Appellant, v. TIMOTHY L. BLIXSETH, Appellee.	No. 13-35245 D.C. No. 2:11-cv-00065-SEH

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted August 4, 2014
Pasadena, California

Before: KOZINSKI, PAEZ, and BERZON, Circuit Judges.

Appellant Timothy L. Blixseth ("Blixseth") appeals the district court's order dismissing, for lack of appellate standing, his appeal from the bankruptcy court's order confirming the Third Amended Plan of Reorganization ("the Plan"). In a cross-appeal, Yellowstone Mountain Club, LLC, et al. ("the Debtors") argue that the district court erred in denying their motion to dismiss Blixseth's appeal on grounds of equitable mootness. We reverse in part, affirm in part, and remand.

(1) To have standing to appeal an order of the bankruptcy court, an appellant must show he is a "person aggrieved"—that is, that he is "directly and adversely affected by the order of the bankruptcy court—that it diminish the appellant's property, increase its burdens, or detrimentally affect its rights." *Motor Vehicle Casualty Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 884 (9th Cir. 2012). One need not be a creditor of the estate to be a person aggrieved. *See*, *e.g.*, *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442 (9th Cir. 1983).

The exculpation clause strips Blixseth of identifiable, affirmative legal claims, which are property. Called "choses in action" at common law, they have potential economic value. *See C.I.R. v. Banks*, 543 U.S. 426, 435-36 (2005); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *United States v. Stonehill*, 83 F.3d 1156, 1159 (9th Cir. 1996). Blixseth is therefore directly and adversely affected pecuniarily by the order confirming the Plan and so has standing to appeal it. *See In re Thorpe*, 677 F.3d at 884. Accordingly, we

REVERSE the district court's order dismissing Blixseth's appeal for lack of standing.

(2) Equitable "[m]ootness is a jurisdictional issue which [this Court] review[s] de novo." *Baker & Drake, Inc. v. Pub. Serv. Comm 'n of Nev. (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351 (9th Cir. 1994). Considerations in determining whether an appeal of an order confirming a reorganization plan is equitably moot include: whether the party seeking relief has diligently sought a stay; whether the plan has been substantially consummated; and whether the rights of third parties have intervened. *In re Thorpe*, 677 F.3d at 880. Of particular relevance is "whether the bankruptcy court can [still] fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court." *Id.; see also Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006 (9th Cir. 1993).

Blixseth did not seek a stay in this Court, and the Plan has been substantially consummated. Whether Blixseth's appeal as to the propriety of the exculpation clause is equitably moot thus depends on whether the bankruptcy court can still fashion effective and equitable relief short of vacating the Plan, an inquiry the district court did not undertake in denying the Debtors' motion to dismiss Blixseth's appeal as equitably moot.

We hold Blixseth's appeal as to the exculpation clause is not equitably moot, because it is apparent that one or more remedies is still available. *See In re Thorpe*, 677 F.3d at 880.

We therefore AFFIRM, albeit on different grounds, the district court's conclusion that Blixseth's challenge to the exculpation clause is not equitably moot. We REMAND with instructions to consider Blixseth's challenges to the exculpation clause in the first instance.

(3) As to Blixseth's arguments that the bankruptcy court erred in approving the Settlement Term Sheet and in denying Blixseth's Rule 60(b) motion for relief from the Confirmation Order and that Blixseth is therefore entitled to be restored to the "*status quo ante,*" his appeal is equitably moot. The relief Blixseth seeks as to these issues would require unraveling the Plan entirely. Because the Plan has been substantially consummated, it is not now possible to give Blixseth the broad remedies he seeks "without knocking the props out from under the Plan." *See In re Thorpe*, 677 F.3d at 880. His appeal as to these issues is therefore equitably moot.

The parties shall bear their own costs on appeal.

AFFIRMED in part; REVERSED and REMANDED in part.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY L. BLIXSETH, Appellant, v. YELLOWSTONE MOUNTAIN CLUB, LLC, YELLOWSTONE DEVELOPMENT, LLC, BIG SKY RIDGE, LLC, YELLOWSTONE CLUB CONSTRUCTION CO., LLC, Appellees,	No. 16-35304 D.C. No. 2:11-cv-00065-SEH District of Montana, Butte **ORDER** (Filed Aug. 20, 2020)

Before: PAEZ and BERZON, Circuit Judges, and BYBEE, Senior Circuit Judge.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Paez and Judge Berzon have voted to deny the petition for rehearing en banc, and Judge Bybee so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

11 U.S.C. § 105. Power of court

Effective: December 22, 2010

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest –

> **(1)** shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and
>
> **(2)** unless inconsistent with another provision of this title or with applicable Federal Rules of

Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that –

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title –

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

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11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if –

> **(1)(A)** the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and
>
> **(B)** the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or
>
> **(2)(A)** the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and
>
> **(B)** a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if –

> **(1)** such agreement was made before the granting of the discharge under section 727, 1141, 1192, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that –

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of –

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this

subsection, the court approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1192, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall –

(1) inform the debtor –

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of –

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, 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.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions

as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph **(B)** are met at the time an injunction described in paragraph **(1)** is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that –

> **(i)** the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization –
>
> > **(I)** is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;
> >
> > **(II)** is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of –

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that –

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan –

(aa) the terms of the injunction proposed to be issued under paragraph

(1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan –

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court

except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to –

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its

authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of –

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to –

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means –

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in –

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if –

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights

of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that –

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to existing injunctions. – For purposes of subsection (g) –

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if –

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims –

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to

such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if –

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

> **(A)** The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";
>
> **(B)** Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be –

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements –

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.".

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as –

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then –

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if

no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then –

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such

disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is

reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following –

> **(i)** by making the statement: "Your first payment in the amount of $___ is due on ___ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;
>
> **(ii)** by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or
>
> **(iii)** by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this

agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.".

(J)(1) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate

reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the property securing the lien if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you must make a single payment to the creditor equal to the amount of

the allowed secured claim, as agreed by the parties or determined by the court.".

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.".

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below. "Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that, in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $ ___, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $ ___, leaving $ ___ to make the required payments on this reaffirmed debt. I understand that if

my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ___.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.".

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A) (iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.".

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement.".

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above.".

(1) Notwithstanding any other provision of this title the following shall apply:

> **(1)** A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.
>
> **(2)** A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.
>
> **(3)** The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or

such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b) (1)(A)(iv) of the Federal Reserve Act.

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11 U.S.C. § 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall –

> **(1)** designate, subject to section 1122 of this title, classes of claims, other than claims of a kind

specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as –

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may –

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for –

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's

principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MONTANA

In re	)	
	)	
YELLOWSTONE MOUNTAIN CLUB, LLC, et al.,	)	Case No. 08-61570-11
	)	Jointly Administered
Debtors	)	
	)	

ORDER CONFIRMING DEBTORS' PROPOSED PLAN OF REORGANIZATION

At Butte in said District this 2nd day of June, 2009.

A hearing under 11 U.S.C. § 1128(a) and Bankruptcy Rules 9019 and 3020(b)(2) to consider the confirmation of the Plan of Reorganization (the "Plan") for the YELLOWSTONE MOUNTAIN CLUB LLC, YELLOWSTONE DEVELOPMENT LLC, BIG SKY RIDGE LLC and YELLOWSTONE CLUB CONSTRUCTION COMPANY, INC. ("Debtors"), after due and proper notice, was held on May 18, 2009, (the "Confirmation Hearing"), in Butte. Appearances at the confirmation hearing were as indicated in the Memorandum of Decision setting forth findings of fact and conclusions of law regarding Debtors' proposed plan of reorganization entered this same date. In this Confirmation Order ("Order") capitalized terms not defined herein have the meaning ascribed to them in the Plan or in the Findings of Fact and Conclusions of Law entered concurrently herewith unless otherwise noted.

Based on the Findings of Fact and Conclusions of Law, the other pleadings and records on file in this case, including, *inter alia* and without limitation, the Plan, the arguments of counsel, and the evidence presented at the Confirmation Hearing, and throughout these cases, the Court has determined that entry of this Order confirming the Plan is appropriate. Therefore,

IT IS ORDERED as follows:

1. The Third Amended Joint Plan of Reorganization filed by the Debtors at Docket Entry Numbers 947 and 995, and which incorporates the Modifications identified in the Findings of Fact and Conclusions of Law and the terms of the Yellowstone Club Settlement Term Sheet, satisfies all of the requirements of confirmation set forth in 11 U.S.C. § 1129 and is hereby confirmed.

2. The Debtors, Reorganized Debtors and Liquidation Trustee are authorized to and directed to take all actions which they deem reasonably necessary or appropriate to implement the Plan and any agreements or settlements embodied therein, including the Yellowstone Club Settlement Term Sheet and Trust Agreement, in accordance with the terms thereof.

3. The provisions of the Plan and the Yellowstone Club Settlement Term Sheet bind the Debtors, the Reorganized Debtors, the Trustee, the Disbursing Agent, New CH YMC Acquisitions LLC, the First Lien Agent and the First Lien Lenders and any Person receiving property under the Plan, and any holder of a Claim

against or Interest in the Debtors or the Reorganized Debtors whether or not the Claim or Interest is impaired under the Plan and whether or not such holder has accepted the Plan.

4. On the Effective Date, Claims against and Interests in the Debtors shall be deemed satisfied and released to the fullest extent permitted by the Bankruptcy Code, other than the rights of Holders of Allowed Claims and Interests to receive the treatment specified in the Plan for such Holders. The rights afforded in the Plan, and the treatment of all Claims and Interests thereunder shall be in exchange for, and in complete satisfaction and release of any and all Claims and Interests that arose prior to the Confirmation Date.

5. The provisions of the Plan and the Yellowstone Club Settlement Term Sheet are binding upon and govern the acts of all Persons including, without limitation, all holders of Claims, Unclassified Claims and Interests, all filing agents or officers, title agents or companies, recorders, registrars, administrative agencies, governmental units and departments, agencies or officials thereof, secretaries of state, and other persons who may be required by law, the duties of their office or contract to accept, file register, record or release any document or instruments, or who may be required to report or insure any title or state of title in or to any of the assets transferred to the Reorganized Debtors or any purchaser approved pursuant to the terms of the Plan

6. If any provision of the Plan shall be determined to be unenforceable, that determination shall not affect any other provision of the Plan.

7. The Court shall retain jurisdiction as provided in the Plan.

8. The provisions of Bankruptcy Rule 7062(c) shall not apply to this Order. Further, notwithstanding any provisions of the Plan to the contrary, the provisions of this Order and the Trust Agreement with respect to the appointment of the Trustee and other provisions with respect to his duties under the Liquidation Trust are authorized and shall be effective immediately. The Trustee of the Liquidating Trust shall have the authority to act or refrain from acting as set forth in the Trust Agreement.

9. The Trustee may open and maintain such bank accounts as may be necessary for the deposit of any monies collected or received by the Trustee.

10. Except as otherwise expressly provided by further order of the Court, the Trustee shall administer the Liquidation Trust out of the funds paid into the Liquidation Trust, and the proceeds of liquidation of the property transferred to the Trust which property shall be all property of the Debtors other than the Project, as more particularly described in the Plan. Notwithstanding the foregoing, the Trustee shall have the authority to borrow funds as permitted by and in accordance with the provisions of the Liquidation Trust Agreement.

11. The Trustee is authorized to pay, as or after they have become due, all valid obligations properly incurred in connection with administration of the Trust Assets or the exercise of his duties under this Order and the Liquidation Trust, including, without limitation, such fees as may be payable to the office of the United States Trustee under 28 U.S.C. § 1930.

12. In order to perform his responsibilities, the Trustee is authorized to contract or otherwise provide for goods, materials, services, and supplies as determined by the Trustee to be necessary and appropriate, and to pay such sums as the Trustee determines to be reasonable for such goods, materials, services and supplies. The Trustee may employ as non-professional consultants such persons as the Trustee deems appropriate, under such terms of employment as the Trustee may deem appropriate.

13. No obligation incurred by the Trustee in the good faith performance by the Trustee of his duties in accordance with the orders of this Court, except to the extent such services are found to have resulted from willful misconduct, gross negligence, or fraudulent behavior, whether pursuant to any contract, by reason of any tort, or otherwise shall be his personal obligation; rather, the recourse of any person or entity to whom the Trustee become obligated in connection with the performance of the responsibilities, shall be solely against the Trust Assets.

14. The Trustee is authorized to do all things determined by him to be necessary or appropriate to

protect and preserve the Trust Assets and to maintain or enhance their value or income-producing potential, including but not necessarily limited to retaining agents and consultants, and exercising all of the powers, duties and other authorities as may be provided by law or which may be necessary or appropriate in the fulfillment of his duties, and all powers which the owner of the Trust Assets itself might exercise with respect thereto or with respect to the prosecution of any claims against third parties.

15. The Trustee may appoint attorneys, accountants and other professional services to assist in carrying out his obligations as Trustee. The Reorganized Debtors shall reasonably cooperate with the Trustee's reasonable requests for information needed by the Trustee in the performance of his duties.

16. The Trustee shall conduct a final accounting and winding up of the Trusteeship upon his termination and shall be responsible for securing the entry of final decrees in the Debtors' cases.

17. The Trustee' fees shall be based upon the usual and customary hourly rates and the usual and customary hourly rates of personnel to whom the duties or functions are delegated.

18. Upon the Effective Date and Closing, (as defined in the Definitive Agreement) in accordance with Article VI, 6.12 of the Plan, Section 2 of the Definitive Agreement and 11 U.S.C. § 1141(b) and (c), the Debtors shall transfer (as defined in the Plan) all the Debtors' rights, title and interest in and to all the Debtors'

limited liability companies memberships, free and clear of all liens, claims, encumbrances, charges and interests to New CH YMC Acquisition LLC.

19. Upon entry of this Order and in accordance with the Plan, the Debtors are authorized and directed to execute the Membership Interests Purchase Agreement and all its exhibits and attachments as described in the Membership Interests Purchase Agreement. This Order hereby approves the Membership Interests Purchase Agreement and all of its exhibits and attachments and all documents contemplated in the Membership Interests Purchase Agreement.

20. The Plan and this Order shall constitute sufficient documentation to evidence any of the transfers to New CH YMC Acquisitions LLC called for by, in and under the Plan or Membership Interests Purchase Agreement. No further documentation shall be necessary to give effect to such transfers of the memberships' interests to New CH YMC Acquisition LLC as described in the Membership Interests Purchase Agreement. After the Effective Date and Closing the Debtors shall prepare and execute any document, agreement or instrument necessary to effectuate the transfers to New CH YMC Acquisitions LLC as contemplated under the Plan, the Membership Interests Purchase Agreement or this Order.

21. Pursuant to § 1125(e) of the Bankruptcy Code, the Debtors' transmittal of solicitation materials and its solicitation of acceptances of the Plan are not, and will not be, governed by or subject to any otherwise

applicable law, rule or regulation governing the solicitation of acceptance of a Chapter 11 plan or the offer, issuance, sale or purchase of securities.

22. To the extent interests in the Equity Purchase Note, the Liquidation Trust and/or the New Membership Interests may be deemed to constitute securities issued in accordance with the Plan, pursuant to, and to the fullest extent permitted under § 1145 of the Bankruptcy Code, any issuance or resale of such securities will be exempt from Section 5 of the Securities Act of 1933, as amended, and any state or local low requiring registration for offer or sale of a security or registration or licensing of an issuer or underwriter of, or broker or dealer in, a security.

23. The notice provided by the Debtors of the Modifications was adequate and appropriate under the circumstances and, accordingly, is approved. The Modifications: (1) comply in all respects with § 1127 of the Bankruptcy code, Bankruptcy rule 3019 and all other provisions of the Bankruptcy Code, and with respect to the Claims in Classes 3 and 8, such classes were resolicited and have voted as Classes to accept the Plan as modified in accordance with the Yellowstone Club Settlement Term Sheet; and (2) do not adversely change, in any material respect, the treatment under the plan of any Claims or Interests. In light of the technical or immaterial nature of each of the Modifications, no additional disclosure under § 1125 of the Bankruptcy Code is required with respect to the Modifications and the notification. Therefore, pursuant to § 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all

holders of Claims that have accepted or are conclusively presumed to have accepted the Plan as filed on May 22, 2004 are deemed to have accepted the Plan, as modified by the Modifications.

24. As of the Effective Date and the Closing, the release provisions, exculpation, provisions, and injunction provisions contained in the Plan are hereby approved and shall be immediately effective on the Effective Date without further act or order of the Court.

25. Should the sale provided for in the Membership Interests Purchase Agreement fail to close by June 30, 2009, substantially in the form and manner contemplated by the Plan, then the provisions of the Plan shall be null and void, and the Debtors retain all of their rights against all parties to those agreements, and in such event, nothing herein is intended to, or should be construed as, waiving or releasing (a) whatever rights the Debtors have for any and all amounts due thereunder or any and all other rights and remedies.

26. Pursuant to 11 U.S.C. § 1129(a)(12) all fees payable under 28 U.S.C. § 1930 have been paid or shall be paid pursuant to the Plan on the Effective Date, and any fees payable under such section payable after the Effective Date shall be paid by the Trustee. All tax returns for which extensions have not been timely requested shall be filed with the appropriate agencies.

27. Disbursements after the Effective Date and before the entry of a closing order shall be based on disbursements from the Trustee.

28. James A. Patten is appointed Disbursing Agent pursuant to Article VII of the Plan and shall make such disbursements of Required Plan Payments in accordance with Article VII of the Plan.

29. Upon the Closing or the first business day on which a Claim entitled to receive a Required Plan Payment becomes an Allowed Claim, the Disbursing Agent shall make the Required Plan Payment.

30. Pursuant to Article V, 5.1.2 of the Plan, the assumption of the Assumed Obligations listed in Schedule 1.34, Contract Assumption Schedule, is approved.

31. Pursuant to Article V, 5.1.3 of the Plan, the assumption of the Club Membership Agreements listed in Schedule 1.87, Member Assumption Schedule, is approved.

32. Pursuant to Article V, 5.1.4, 5.1.5, 5.1.6, and 5.1.7, the rejection of the Pioneer/Frontier Membership Agreements listed on Schedule 1.94, of the Plan the Honorary Membership Agreement listed on Schedule 1.78 of the Plan, the Founder's Circle Membership Agreements listed on Schedule 1.72 of the Plan, and the Company Member Agreements listed on Schedule 1.2.7, is approved.

33. Pursuant to Article V, 5.4, all Rejection Claims must be filed with the Court within thirty days after entry of this Order. Any Rejection Claim that is not timely filed shall be forever barred and such Rejection Claim shall not be enforceable against the Debtors or

the Reorganized Debtors, the Liquidation Trust, or New CH YMC Acquisitions LLC, unless otherwise ordered by this Court.

34. As of the Effective Date, the discharge provided for under applicable law and under Article VIII, 8.3, of the Plan and the injunction provided for under applicable law shall be effective and binding upon all persons and to the fullest extent provided for in the Plan and applicable law.

35. Pursuant to Article VIII, 8.1 of the Plan, on the Effective Date all property of the Debtors, except as explicitly provided in the Plan and the Yellowstone Club Settlement Term Sheet, shall revert with the Reorganized Debtors free and clear of all liens, claims and equity interests.

36. The Third Amended Plan is without prejudice to the rights and standing of holders of any Class A or Class B Equity Interest in the Debtors to (i) object to any claims asserted or held by insiders, (ii) object to the allowance or priority of any other Equity Interest, and (iii) seek equitable subordination of any distribution rights of other Equity Interests.

37. Except as may otherwise be expressly provided in the Plan, on the Effective Date: (a) all credit agreements, promissory notes, mortgages, security agreements, invoices, contracts, agreements and any other documents or instruments evidencing Claims against the Debtors, together with any and all Liens securing the same, shall be deemed canceled, discharged and released without further act or action by and any Person

under any applicable agreement, law, regulation order or rule, (b) the obligations of the Debtors thereunder shall be deemed cancelled, discharged and released, and (c) all of the right, title, and interest of any holder of such mortgages, deeds of trust, liens or other security interests, including any right to any collateral thereunder, will revert to the Reorganized Debtors. To the extent deemed necessary or admissible by the Reorganized Debtors, any holder of a Claim shall promptly provide the Reorganized Debtors with an appropriate instrument of cancellation, discharge or release, as the case may be, in suitable form for recording wherever necessary to evidence such cancellation, discharge or release, including the cancellation, discharge or release of any Lien securing such Claim.

38. In accordance with § 1146(c) of the Bankruptcy Code: (a) the issuance, transfer or exchange of any security under the Plan or the making or delivery of any instrument of transfer pursuant to, in implementation of, or as contemplated by the Plan, including, without limitation, the Equity Purchase Note, the Liquidation Trust, the New Membership Interests, any merger agreements or agreements of consolidation, deeds, bills of sale or assignments executed in connection with any of the transactions contemplated under the Plan, or the re-vesting, transfer or sale of any real or personal property of the Debtor pursuant to, in implementation of, or as contemplated by the Plan; (b) the making, delivery, creation, assignment, amendment or recording of any note or other obligation for the payment of money or any mortgage, deed of trust or other

security interest under, in furtherance of, or in connection with the Plan, and/or the issuance, renewal, modification or securing of indebtedness by such means; and (c) the making, delivery or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan, including, without limitation, the Order, shall not be subject to any document recording tax, stamp tax, conveyance fee or other similar tax, mortgage tax, real estate transfer tax, mortgage recording tax or other similar tax or governmental assessment. Each recorder of deeds or similar official for any county, city or governmental unit in which any instrument under the Plan is to be recorded shall be, and hereby is, ordered and directed to accept such instrument, without requiring the payment of any documentary stamp tax, deed stamps, transfer tax, intangible tax or similar tax.

39. Upon the Effective Date, the Debtors, the Reorganized Debtors and the Committee for themselves and the Debtors' estates shall, and shall be deemed to, dismiss, waive and forever release with prejudice all actual, potential or threatened claims, causes of action and challenges that have been, might have been or might be asserted by the Committee, the Reorganized Debtors, the Debtors or their estates against the Prepetition Agent and Prepetition Lenders with respect to any and all acts and omissions occurring prior to the satisfaction of the Effectiveness Conditions excluding, however, enforcement of this Term Sheet and the Modified Plan. The foregoing includes, without limitation, the release of any Reserved Actions, Retained Actions

and Transferred Actions, the dismissal with prejudice of all claims, causes of action and challenges asserted in Adversary Proceedings against the Prepetition Lenders and Prepetition Agent or against their claims and liens under the Prepetition Loan and any adequate protection liens of the Prepetition Agent and Prepetition Lenders; and the waiver and release of all possible claims under 11 U.S.C. § 506(c) against the Prepetition Agent, the Prepetition Lenders, the Prepetition Loan Collateral and any adequate protection liens of the Prepetition Agent and Prepetition Lenders.

40. This Court approves each and every term, provision, and condition of the Plan and the Yellowstone Club Settlement Term Sheet and the same shall be enforceable by and binding upon the Debtors, Reorganized Debtors', Trustee, New CH YMC Acquisitions LLC, the First Lien Agent and First Lien Lenders and any Person receiving property under the Plan, and any holder of a Claim against or Interest in the Debtors or the Reorganized Debtors. The failure to specifically include any particular provision of the Plan, the Yellowstone Club Settlement Term Sheet, or the Definitive Agreement in this Order shall not diminish or impair the efficacy of such provision, it being understood the intent of this Court is that the Plan be confirmed and approved in its entirety.

41. Pursuant to the provisions of Bankruptcy Rule 9019 the Yellowstone Club Settlement Term Sheet is approved.

42. The substantive consolidation of the Debtors for distributional purposes as provided in the Third Amended Plan is approved.

43. The bar dates for filing Administrative Claims set forth in the Third Amended Plan are approved and the Debtors shall promptly provide notice of such dates to all known Holders of Administrative Claims.

44. The Plan Supplements are approved.

45. The Debtors shall promptly provide notice of the entry of this Confirmation Order in accordance with the applicable Bankruptcy Rules.

46. Pursuant to Bankruptcy Rule 3020(e), this Order shall not be stayed and shall be effective upon its entry.

47. The provisions of this Order are nonseverable and mutually dependent.

48. This Order shall be, and hereby is, deemed in recordable form, and any and all recording authorities are directed to accept this Confirmation Order for filing.

BY THE COURT

/s/ Ralph B. Kirscher
HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States
Bankruptcy Court
District of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Timothy L. Blixseth, Appellant, Yellowstone Mountain Club, LLC, Yellowstone Development LLC, Big Sky Ridge, LLC Yellowstone Club Construction Co., LLC Appellees.	Bankruptcy Case Nos. 08-61570; 08-61571; 08-61572; 08-61573 No. CV-09-47-BU-SEH **ORDER**

Pending before the Court is Appellees Yellowstone Mountain Club, LLC and New CH YMC Acquisition, LLC's Motion to Dismiss Appeal as Moot. The motion is opposed on grounds "this Court may fashion effective relief [which] precludes a dismissal on 'mootness' grounds" and the "appeal is not [otherwise] equitably moot."[1]

ORDERED:

The Motion to Dismiss Appeal as Moot[2] is DENIED. The merits of the issues raised by the appeal will be addressed to the extent necessary and appropriate to do so.

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[1] Document No. 43, p. 7

[2] Document No. 36

DATED this 12th day of November, 2009.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Timothy L. Blixseth, Appellant, Yellowstone Mountain Club, LLC, Yellowstone Development LLC, Big Sky Ridge, LLC Yellowstone Club Construction Co., LLC Appellees.	Bankruptcy Case Nos. 08-61570; 08-61571; 08-61572; 08-61573 No. CV-09-47-BU-SEH **MEMORANDUM AND ORDER**

INTRODUCTION

Appellant Timothy L. Blixseth (Blixseth) appeals from the final order of the United States Bankruptcy Court for the District of Montana confirming the third Chapter 11 Reorganization Plan (the Plan) of the Debtors and Appellees, Yellowstone Mountain Club, LLC, Yellowstone Development LLC, Big Sky Ridge, LLC, and Yellowstone Club Construction Co., LLC, (collectively the Debtors). On May 22, 2009, the Debtors filed a Third Amended Joint Plan of Reorganization. On June 2, 2009, Bankruptcy Judge Ralph B. Kirscher issued his Memorandum of Decision and Order confirming the Plan. This appeal followed. This Court has jurisdiction under 28 U.S.C. § 158(a).

ISSUES PRESENTED

Three issues are presented on appeal:

1. Whether the Bankruptcy Court erred in approving the Plan's exculpatory clauses and releases in favor of third parties in the Plan?

2. Whether the Bankruptcy Court erred in determining the Plan was proposed in good faith when the question of Debtors' bad faith remained as an unresolved factual issue in a pending adversary proceeding?

3. Whether the Bankruptcy Court erred in approving the settlements incorporated into the Plan without a motion to approve the settlement, notice of motion, and hearing as required under Fed. R. Bankr. P. 9019(a)?

STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed for clear error. Fed. R. Bankr. P. 8013. Its conclusions of law are reviewed *de novo.* See In re Rains, 428 F.3d 893, 900 (9th Cir. 2005); In re Urban, 375 B.R. 882, 887 (B.A.P. 9th Cir. 2007).

DISCUSSION

I.

Approval of a settlement in bankruptcy is governed by Fed. R. Bankr. P. 9019 and 2002. Rule 9019(a) provides:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement, Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Rule 2002(a) and (3) require that:

> (a) . . . the debtor, the trustee, all creditors and indenture trustees [be given] at least 21 days' notice by mail of:
>
> . . .
>
> (3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent.

Local Bankruptcy Rule 9013-I also prescribes particulars of form and content for motions and notice of opportunity to respond.

The language and directives of the rules are clear and unambiguous and not to be disregarded. In this case, settlements which had been negotiated were approved by the Court at the confirmation hearing without notices in the form and as required under the applicable rules. Appropriate opportunity to be heard and to object was not afforded. The failure to provide required notice and opportunity to respond was plain error.

II.

Section 8.4 of the Plan purports on its face to identify certain persons and entities none of whom shall:

> [I]ncur any liability to any Person for any act or omission in connection with, relating to or arising out of the Chapter 11 Cases, the formulation, negotiation, implementation, confirmation or consummation of this Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document entered into during the Chapter 11 Cases otherwise created in connection with this Plan; provided, however, that nothing in this Section . . . shall be construed to release or exculpate any Exculpated Party from willful misconduct or gross negligence as determined by a Final Order or any breach of the Definitive Agreement or any documents entered into in connection therewith.

It is a basic tenant of statute (11 U.S.C. § 524(e)) 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." The Ninth Circuit Court of Appeals has consistently recognized and applied this rule. See In re American Hardwoods, Inc., 885 F.2d 621, 626 (9th Cir. 1989); In re Lowenschuss, 67 F.3d 1394, 1401-02 (9th Cir. 1995). Here, the language of Section 8.4, whatever its intended scope may have been, goes well beyond the limitation of Section 524(e). Its approval was plain error. See In re Lowenschuss, 67 F.3d at 1401-02.

On remand, the Bankruptcy Court is encouraged, to the extent feasible, to explicitly identify and delineate those persons or representatives determined to be within the scope of the release parameters of Section 524(e) and to state the reasons why it reached such conclusions. Such delineation could significantly reduce the probability of further litigation directed to the scope of exculpation and release.

III.

Appellant also contends the Bankruptcy Court erred in its finding that the debtor acted in good faith in filing the Plan, citing an unresolved adversary proceeding raising bad faith issues as precluding such a good faith filing. Given the Court's ruling on issues I and II, determination of this issue on the present record is premature and unnecessary at this time. The Bankruptcy Court, on remand, will have a full and appropriate opportunity to address and act upon all issues relating to the Plan, following appropriate notice and opportunity for hearing.

ORDER

Upon *de novo* review, this Court finds that the Bankruptcy Court erred when it proceeded to confirmation of the Plan without appropriate notice and opportunity to object, and in releasing persons, firms and entities from liability contrary to 11 U.S.C. § 524(e). The decision of the Bankruptcy Court is REVERSED

and REMANDED for further proceedings consistent with this Memorandum and Order.

DATED this 2nd day of November, 2010.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re	
YELLOWSTONE MOUNTAIN CLUB, LLC,	**Case No. 08-61570-11**
Debtor.	
In re	
YELLOWSTONE DEVELOPMENT, LLC,	**Case No. 08-61571-11**
Debtor.	
In re	
YELLOWSTONE CLUB CONSTRUCTION COMPANY, LLC,	**Case No. 08-61573-11**
Debtor.	
In re	
BIG SKY RIDGE, LLC,	**Case No. 08-61572-11**
Debtor.	

MEMORANDUM of DECISION

At Butte in said District this 30th day of September, 2011.

The Court is tasked with writing yet another chapter in the Yellowstone Club bankruptcy saga, which has been ongoing for almost three years. If this were a book, the reader would most likely read the chapters of the saga in sequence and in a relatively

compressed period of time. But this is not a novel and one cannot thumb through a prior chapter to glean a forgotten fact. Thus, the Court directs the reader to prior chapters (Memoranda of Decision and Orders) that provide some insight as to why another chapter is necessary. Relevant facts may be found in this Court's Memorandum of Decision and Order entered in this case at docket entry nos. 1025 and 1026. One may also look at the Memoranda of Decision, Order and Judgment found at docket entry nos. 292, 293, 575 and 582 in related Adversary Proceeding 09-00014, *Timothy L. Blixseth v. Marc S. Kirschner, Trustee of the Yellowstone Club Liquidating Trust.* Along these same lines, the Court also granted various requests for judicial notice found at docket entry nos. 2203, 2209, 2224 (including its attached Exhibit A summarizing the claims processed or prosecuted by the Liquidating Trustee under the plan), 2228 and 2240.

The matter presently before the Court stems from a Memorandum of Decision and Order entered by the Court in the above-referenced Chapter 11 bankruptcy cases on June 2, 2009, at docket entry nos. 1025 and 1026 approving the Yellowstone Club Settlement Term Sheet and confirming the Debtors' Third Amended Joint Plan of Reorganization filed May 29, 2009, at docket entry no. 995. Timothy L. Blixseth ("Blixseth") appealed this Court's June 2, 2009, Order to the United States District Court for the District of Montana on three separate grounds: (1) whether this Court erred in approving the Plan's exculpatory clauses and releases in favor of third parties in the Plan; (2) whether

this Court erred in determining the Plan was proposed in good faith when the question of the Debtors' bad faith remained as an unresolved factual issue in a pending adversary proceeding; and (3) whether this Court erred in approving the settlement incorporated into the Plan without a motion to approve the settlement, notice of motion, and hearing as required under F.R.B.P. 9019(a). In a Memorandum and Order entered November 2, 2010, United States District Judge Sam E. Haddon declined to rule on the issue of good faith, stating "determination of this issue on the present record is premature and unnecessary at this time." On the other two questions presented, Judge Haddon reversed and remanded. First, Judge Haddon held this Court erred when it proceeded to confirmation of the Debtors' Plan without appropriate notice and opportunity for all parties to object to a certain settlement that was incorporated into the Plan. Judge Haddon also reversed and remanded, so this Court could, "to the extent feasible . . . explicitly identify and delineate those persons or representatives determined to be within the scope of the release parameters of Section 524(e) and to state the reasons why it reached such conclusions."

In an Order entered May 27, 2011, this Court scheduled a hearing for July 11, 2011,

1. To consider whether Debtors' Third Amended Joint Plan of Reorganization filed May 29, 2009, at docket entry no. 995 was proposed in good faith,

2. To identify and delineate those persons or representatives who are properly within the scope, under 11 U.S.C. § 524(e), of the exculpation and limitation of liability clause set forth in Section 8.4 of Debtors' Third Amended Joint Plan of Reorganization, and

3. To further consider approval of the Settlement Term Sheet found at docket entry no 947-12.

Upon motion of Blixseth, the Court entered an Order on June 16, 2011, continuing the July 11, 2011, hearing to July 25, 2011. By separate Order entered July 27, 2011, this Court vacated further hearing on whether the Debtors' plan was proposed in good faith, concluding nothing in Judge Haddon's November 2, 2010, Memorandum and Order required this Court to revisit the issue of good faith.

At the hearing held July 25 and 26, 2011, in Missoula, Blixseth was represented by Michael J. Flynn of Boston, Massachusetts ("Flynn"), Philip H. Stillman of Miami Beach, Florida ("Stillman"), Christopher J. Conant of Denver, Colorado and Patrick T. Fox of Helena, Montana; Debtors were represented by James A. Patten of Billings, Montana ("Patten") and Richard Birinyi and Larry Ream of Seattle, Washington; Credit Suisse, Cayman Island Branch ("Credit Suisse"), was represented by Evan Levy, Mark McDermott and Sean Marlaire of New York, New York and Richard J. Orizotti of Butte, Montana; the Ad Hoc Group of Class B Unit Holders was represented by Clark Whitmore of Minneapolis, Minnesota and Ronald A. Bender of Missoula, Montana; CrossHarbor Capital Partners LLC

("CrossHarbor"), New CH YMC Acquisition LLC, CrossHarbor Institutional Partners LP and CIP Yellowstone Lending LLC were represented by Paul D. Moore ("Moore") and Barry D. Green of Boston, Massachusetts and Benjamin P. Hursh of Missoula, Montana; Robert Sumpter ("Sumpter") was represented by Stephen Mackey of Billings, Montana; Normandy Hill Capital, LP was represented by Robert G. Burns of New York, New York and Quentin M. Rhoades of Missoula, Montana; Marc S. Kirschner, Trustee ("Liquidating Trustee") of the Yellowstone Club Liquidating Trust ("YCLT"), was represented by John Turner of Amarillo, Texas, Brian Glasser of Charleston, West Virginia and Shane Coleman and Charles Hingle of Billings, Montana; attorney Thomas L. Hutchinson was represented by Robert F. James of Great Falls, Montana; attorney J. Thomas Beckett ("Beckett") was represented by Trent M. Gardner of Bozeman, Montana; the law firm of Garlington, Lohn & Robinson was represented by Dale Cockrell of Kalispell, Montana; Creditor Liquidity LP was represented by Dean A. Stensland of Missoula, Montana; Debtors' attorney Patten was represented by Mike McMahon of Helena, Montana; and Big Sky Shuttle, Inc. was represented by Jon Binney of Missoula, Montana. Patten, Matthew Kidd, Stephen R. Brown ("Brown"), Larry Ream, and Beckett testified. The Court agreed to admit the transcript of Ronald Greenspan's ("Greenspan") – the

Debtors' chief restructuring officer – Rule 2004 examination as part of the record.[1]

As noted earlier, certain matters are, at the direction of Judge Haddon's November 2, 2010, Memorandum and Order, once again before this Court. Judge

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[1] Counsel for CrossHarbor represented at the hearing that the parties had agreed prior to the hearing that Greenspan's Rule 2004 examination transcript could be admitted into evidence and used for all purposes. Blixseth's counsel disagreed, arguing Blixseth did not agree that Greenspan's Rule 2004 examination transcript could be used at hearing for every purpose. Greenspan lives in California and was not available at the time of the July 25th hearing. Additionally, CrossHarbor's counsel, Moore, sent various parties an email on July 19, 2011, that reads:

> Since it appears that our colloquy yesterday concerning signing the deposition and its admission at the hearing on Monday was not memorialized by the court reporter, Phil and I just spoke regarding confirming it by this email. We ordered the transcript on an expedited basis agreed that, since Ron will be travelling [sic] to New York on Sunday, he will attempt to review and sign it, and make any corrections before he leaves, in which case Andy will provide us changes at or before the hearing. If Ron is unable to do so, we all agreed that the deposition can nevertheless be used at the hearing on Monday as if signed by Mr. Greenspan.
>
> Andy-Let us know if this differs in any way from your recollection, and Phil, feel free to advise if I got it wrong in any way. Otherwise, just reply all to this email confirming our agreement"

Patten responded on July 19, 2011: "That is my recollection and understanding." Stillman did not respond, prompting Moore to send another email the following day asking Stillman "did you confirm email yesterday?" Stillman responded: "I didn't, but I do." The email exchange clearly establishes that Blixseth's counsel was agreeable to using Greenspan's deposition for all purposes at the hearing scheduled for July 25, 2011.

Haddon's Memorandum and Order is clear, unambiguous and, in this Court's opinion, quite narrow. First, Judge Haddon held this Court erred when it proceeded to confirm the Debtors' Third Amended Joint Plan of Reorganization without appropriate notice and opportunity for all parties to object to the Yellowstone Club Settlement Term Sheet ("Settlement Term Sheet") filed May 22, 2009, at docket entry 947-12, which Settlement Term Sheet was incorporated into the Debtors' Third Amended Joint Plan of Reorganization. The Court's Orders of May 27, 2011, and June 16, 2011, setting approval of the Settlement Term Sheet for hearing on July 25, 2011, satisfy any notice required by F.R.B.P. 2002 and F.R.B.P. 9019.

I. The Settlement Term Sheet.

In response to this Court's notice and presumably in an effort to satisfy F.R.B.P. 9019, Debtors, CrossHarbor and New CH YMC Acquisition, LLC filed on June 10, 2011, a Joint Motion for Order Pursuant to Bankruptcy Rule 9019 Authorizing and Approving the Yellowstone Club Settlement Term Sheet *Nunc Pro Tunc* ("Rule 9019 Motion"). Sumpter (dkt 2186), Red Rock Investments, LLC (dkt 2189), Creditor Liquidity, LP (dkt 2196), K & L Gates LLP (dkt 2197) and Blixseth filed objections to the Debtors, CrossHarbor and New CH YMC Acquisition, LLC's Rule 9019 Motion.

Sumpter objects to approval of the Settlement Term Sheet on three grounds. First, Sumpter argues that the Settlement Term Sheet vacates the Court's

Partial and Interim Order in Adversary Proceeding 09-00014. Second, Sumpter takes issue with the composition of YCLT's liquidating trust board. Finally, Sumpter raises several arguments that challenge the Settlement Term Sheet's treatment of Class 4 claims. In particular, Sumpter argues the Settlement Term Sheet "is not fair and equitable or in the best interests of the estate" because of the treatment of Class 4 creditors who were not designated as trade creditors: "the unpaid, unsecured claim holders are now partially put into the fourth tranche on a *pari passu* basis with Credit Suisse and subordinate to the purchaser of the Trade Creditor claims." Red Rock Investments, LLC and K&L Gates LLP's skeletal objections echo Sumpter's objection that the Settlement Term Sheet provides for disparate treatment of Class 4 creditors. Creditor Liquidity, LP also objects to approval of the Settlement Term Sheet on grounds it violates the requirements of 11 U.S.C. § 1123(a)(4). In addition, Creditor Liquidity, LP argues the Settlement Term Sheet inequitably modified the Debtors' Second Amended Plan, the plan upon which ballots were cast. Finally, Creditor Liquidity, LP argues the Settlement Term Sheet does not result in each holder of an impaired class receiving or retaining equal or greater value than the holder would have received under a Chapter 7 liquidation in violation of 11 U.S.C. § 1129(a)(7)(A).

The Court notes that none of the aforementioned parties appeared at the duly noticed confirmation hearing held May 18, 2009. Moreover, Red Rock Investments, LLC, K&L Gates LLP and Credit Liquidity, LP

did not, prior to these additional proceedings, oppose confirmation of the Debtors' plan and more importantly, were involved in subsequent proceedings that ratified the confirmation process and preclude said parties from taking a contrary position at this time. For instance, Red Rock Investments, LLC, through counsel, entered into a Stipulation dated May 27, 2010, with the Liquidating Trustee of YCLT, which Stipulation was intended "to completely resolve all claims of Red Rock in the Consolidated Cases and all objections to the Red Rock Claim by [YCLT]." Specifically, the parties stipulated post-confirmation that "Red Rock['s] Claim shall be allowed as a Class 4 General Unsecured Claim, pursuant to 11 U.S.C. § 502, in the Consolidated Cases in the amount of $136,174.00. The balance of the Red Rock Claim shall be denied. Red Rock shall have no further claims in the Consolidated Cases." In an Order entered May 28, 2010, the Court approved the stipulation between the Liquidating Trustee and Red Rock Investments, LLC.

Similarly, on December 21, 2009, the Liquidating Trustee objected to Proof of Claim No. 632 filed by K&L Gates LLP. The Liquidating Trustee and K&L Gates LLP subsequently entered into a stipulation on March 29, 2010, wherein they agreed:

> 3. The Trustee has reviewed the Claim, the supporting and opposing arguments and related documentation and has conferred with the Claimant and its counsel. The Trustee has determined, and the Claimant does hereby agree, (a) the Claim shall be allowed in

> the amount of $91,640.03 and (b) the balance of the Claim, in the amount of $10,182.23 shall be deemed withdrawn and disallowed. Allowance of the Claim in part and withdrawal of the remainder of the Claim as set forth in the proceeding sentence shall fully settle the Claim on its merits.
>
> 4. In addition, the Trustee and the Claimant agree that the Claim shall be treated as a Class 4 claim, without prejudice to Claimant's rights to seek payment of such Claim from the Trade Creditor Fund established under the confirmed Plan.
>
> 5. Pursuant to Section 7.7.6 of the Third Amended Plan of Reorganization (Dkt. 995), the Trustee is "authorized to compromise and settle any Disputed Claim and to execute all necessary documents, including a stipulation of settlement or release, in [his] sole discretion, without notice to any party, and without the need for Bankruptcy Court's [sic] approval." Accordingly, this Stipulation shall be filed without notice of the right to object or a request for Court approval.
>
> 6. Nevertheless, the Trustee and Claimant believe the settlement proposed herein is fair, reasonable and adequate. F.R.Bankr.P., Rule 9019; *Martin v. Kane (In re JUG Properties)*, 784 F. 2d 1377, 1380-81 (9th Cir. 1986).

The Court approved the stipulation between Marc S. Kirschner and K&L Gates LLP by Order entered March 29, 2010.

While Creditor Liquidity, LP did not, like Red Rock Investments, LLC or K & L Gates LLP, enter into any agreement with the Liquidating Trustee, it did not appear in this case until June 9, 2009, when it filed a Notice of Transfer of Claim, giving notice that it was the transferee of a claim held by Border States Electric Supply, Inc. Creditor Liquidity, LP filed similar notices on: (1) June 30, 2009, giving notice that it was the transferee of a claim held by Advanced Chemical Solutions; (2) July 13, 2009, giving notice that it was the transferee of a claim held by Cypress Hotel & Spa LLC; (3) July 16, 2009, giving notice that it was the transferee of claims held by PFG Ventures d/b/a Proforma Infosystems, Robert Marx, Fastenal Company, Brower Timing Systems and Okner Supply Co.; (4) July 17, 2009, giving notice that it was the transferee of claims held by Overland West, Inc., S. Claus Commercial, Ralph Dunning Design, Inc., and Smith & Tweed; and (5) July 28, 2009, giving notice that it was the transferee of a claim held by Hagen O'Connell LLP. Creditor Liquidity, LP purchased the claims of the above-referenced creditors after this Court confirmed Debtors' Third Amended Joint Plan of Reorganization. Creditor Liquidity, LP purchased said claims with full knowledge of the terms of the confirmed Third Amended Joint Plan of Reorganization. Additionally, on July 31, 2009, the Official Committee of Unsecured Creditors ("Committee") of Yellowstone Mountain Club, LLC, and its filed affiliates (collectively, the "Debtors"), and the "CrossHarbor entities," which included YC Holdings LLC, sought entry of an Order allowing certain "trade creditor claims." Creditor Liquidity, LP filed an

objection to the request to allow certain trade creditor claims arguing "it would be an abuse of discretion for the Committee not to identify the claims of Boulder [sic] and Hagen to be paid from the Trade Creditor Fund." Following a hearing held September 15, 2009, the Court entered an Order on September 17, 2009, overruling Credit Liquidity, LP's objection and holding "the Committee shall not be obligated to pay Liquidity, LP any amount on its claims." Creditor Liquidity, LP did not appeal the Court's September 17, 2009, Order and such Order is now final.

Even if the Court sustained the pending objections of Creditor Liquidity, LP, Red Rock Investments, LLC and K & L Gates LLP to approval of the Rule 9019 Motion, the parties would still be bound by the prior Orders of this Court entered September 17, 2009, May 28, 2010, and March 29, 2010. Creditor Liquidity, LP, Red Rock Investments, LLC and K & L Gates LLP's objections to the pending Rule 9019 Motion are nothing more than attempts to circumvent the effects of other final Orders entered by this Court. Because of the final and binding Orders discussed above, the Court deems it appropriate to overrule the objections to approval of the Rule 9019 Motion lodged by Creditor Liquidity, LP, Red Rock Investments, LLC and K & L Gates LLP.

Sumpter's opposition to approval of the Rule 9019 Motion suffers from a similar defect in that Sumpter entered into a stipulation of settlement and allowance of claim with the Liquidating Trustee dated February 1, 2010, which stipulation of settlement provides in relevant part:

3. The Trustee has reviewed the Claim, the supporting and opposing arguments and related documentation and has conferred with the Claimant and his counsel. The Trustee has determined, and the Claimant does hereby agree, (a) the Claim shall be allowed in the amount of $393,908.20 and (b) that portion of the Claim for penalties under state law, totaling $434,343.90, shall be deemed withdrawn. Except as provided in paragraph 4(c), allowance of the Claim in part and withdrawal of the remainder of the Claim as set forth in the proceeding sentence shall fully settle the Claim on its merits.

4. Notwithstanding anything in this Stipulation to the contrary, Claimant may (a) maintain and assert his Class 1 priority claim of $10,950 against the Disbursing Agent, (b) may assert claims or causes of action, if any, against third parties other than the Debtors, and (c) may assert in this case a claim, subject to the Trustee's right to object, for the then-current market value of the 2004 Porsche Cayenne in this case if he is determined not to be the lawful owner of said vehicle in Adversary Proceeding No. 09-00098; provided, such claim must be asserted by written notice not less than 30 days prior to final distribution by the Trustee.

5. In addition, the Trustee and the Claimant agree that the Claim shall be treated as a Class 4 claim. The Trustee does not oppose payment of the Claim from the Trade Creditor Fund.

> 6. Pursuant to Section 7.7.6 of the Third Amended Plan of Reorganization (Dkt. 995), the Trustee is "authorized to compromise and settle any Disputed Claim and to execute all necessary documents, including a stipulation of settlement or release, in [his] sole discretion, without notice to any party, and without the need for Bankruptcy Court's [sic] approval." Accordingly, this Stipulation shall be filed without notice of the right to object or a request for Court approval.
>
> 7. Nevertheless, the Trustee and Claimant believe the settlement proposed herein is fair, reasonable and adequate. F.R.Bankr.P., Rule 9019; *Martin v. Kane (In re JUG Properties)*, 784 F. 2d 1377, 1380-81 (9th Cir. 1986).

The above settlement was approved by the Court on February 2, 2010. Sumpter's claim to the 2004 Porsche Cayenne was resolved in a Memorandum of Decision and Judgment entered June 20, 2010, in Adversary Proceeding No. 09-00098. Sumpter did not appeal that decision. Finally, the Court entered a Memorandum of Decision and Order on October 14, 2010, granting Sumpter a separate unsecured nonpriority claim in the amount of $250,000. Sumpter appealed the Court's October 14, 2010, decision. In a Memorandum and Order entered March 31, 2011, Judge Haddon affirmed this Court's October 14, 2010, decision.

While the Court has entered post-confirmation decisions involving Sumpter, such decisions do not necessarily preclude Sumpter from pursuing his objections to approval of the Rule 9019 Motion. However,

Sumpter's arguments fail to consider another post-confirmation decision this Court entered in Adversary Proceeding 09-00014 wherein the Court determined that Blixseth was required to pay: "(1) all allowed claims of Class 1 (priority non tax claims), Class 2 (other secured claims), Class 4 (general unsecured claims, except claims attributable to the First Lien Lender, if any), Class 5 (convenience claims), Class 6 (intercompany claims), Class 9 (pioneer/frontier member rejection claims), Class 10 (American bank claims), Class 11 (allowed Prim secured claims), Class 12 (honorary member rejection claims), Class 13 (founder's circle member rejection claims), Class 14 (company member rejection claims) and those claims that Blixseth identifies as "not classified" on Exhibit A attached to his Post-Trial Brief filed March 19, 2010, at docket entry no. 571, and (2) YCLT for the fees and costs it has incurred, and will incur, objecting to and liquidating such claims." Based upon a subsequent pleading, the Court entered an amended judgment concluding that the sum of all claims previously mentioned was $40,067,962.43. Sumpter should receive payment in full of all his allowed claims when Blixseth pays the foregoing judgment.

Blixseth raises four objections to approval of the Rule 9019 Motion. Blixseth first argues the Debtors are no longer debtors-in-possession and therefore, are precluded from filing the pending Rule 9019 Motion. Blixseth next argues Judge Haddon's Memorandum and Order of November 2, 2010, requires the Debtors to "amend the Plan, revise the Disclosure Statement,

and set a confirmation hearing, at which time the settlement can potentially be incorporated into a Fourth Amended Plan." Third, Blixseth asserts that the existing Settlement Term Sheet can not be approved because Judge Haddon rejected this Court's approval "of an 'extraordinarily broad' exculpation clause contrary to 11 U.S.C. § 524(e)[.] Finally, Blixseth argues the Debtors "failed to meet their burden of demonstrating that the Settlement Term Sheet is reasonable, equitable and in the best interests of the estate and its creditors[.]"

Relevant exhibits identified by the parties with respect to the Rule 9019 Motion included CrossHarbor's Exhibits 16, 32, 33, 41, 45, 52, 58, 59, 60, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 96, 99, 106, 107, 109, 110, 112, 113, 114 and 118, Sumpter's Exhibits 2, 3, 5, 7, 8, 9, 11, 12, 13, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 29, Exhibits 1000, 1001 and 1002, along with docket entry 299 in Adversary Proceeding 09-00014 and docket entry nos. 908, 1049 and 1411 in this case. The Court also took judicial notice of the documents filed at docket entry nos. 2199-1, 2199-3, 2240-1 and 2240-2 in this case.

The Court has no doubt that this Court's June 2, 2009, Confirmation Order and the Third Amended Joint Plan of Reorganization have been substantially consummated.[2] Given the substantial consummation

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[2] Substantial consummation is defined in 11 U.S.C. § 1101 as "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of

of the Debtors' Third Amended Joint Plan of Reorganization, the Debtors are admittedly no longer debtors-in-possession. In an email dated June 28, 2011, Stillman asked the Debtors' counsel "[w]ho is actually acting as the DIP currently?" Patten responded that "there is no dip, there is a reorganized debtor." Blixseth's Exhibit 1001. Based upon the foregoing and relying on Judge Haddon's Memorandum and Order, Blixseth argues that neither a debtor in possession nor a trustee exists to file and prosecute the pending Rule 9019 Motion. This Court disagrees.

First, the Settlement Term Sheet was part of and incorporated into the Debtors' Third Amended Joint Plan of Reorganization. The Settlement Term Sheet with the attached Credit Agreement was filed as a standalone and complete pleading on May 28, 2009, at docket entry no. 985. Further consideration of the Settlement Term Sheet is before this Court as a result of Judge Haddon's decision entered November 2, 2010. Consequently, the Rule 9019 Motion filed on June 10, 2011, is irrelevant and unnecessary. Blixseth's argument that no party exists to file the Rule 9019 Motion, or defend confirmation for that matter, elevates form over substance.

Blixseth also maintains that Patten is no longer the Debtors' counsel and has no authority to act on the Debtors' behalf. Debtors filed an application to employ

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the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan."

Patten and the law firm of Patten, Peterman, Bekkedahl & Green on November 10, 2008, to serve as attorneys for the Debtors. Absent an objection, the Court entered an Order on November 26, 2008, approving the Debtors' employment of Patten and the law firm of Patten, Peterman, Bekkedahl & Green. Patten is still listed as the Debtors' counsel of record in this case. The Debtors, who were the debtors-in-possession prior to substantial consummation of the Third Amended Joint Plan of Reorganization are now the Reorganized Debtors, as that term is defined in ¶ 1.107 of the Third Amended Joint Plan of Reorganization, and are entitled to representation. As one would expect, the Reorganized Debtors are represented at this time by the same attorney who represented them from their petition date through substantial consummation of the Plan.

As noted above, the Settlement Term Sheet was part of the Debtors' Third Amended Joint Plan of Reorganization. As such, the Court's June 2, 2009, Memorandum of Decision and Order not only approved the Settlement Term Sheet, but also confirmed the Debtors' Third Amended Joint Plan of Reorganization. Unfortunately, while concluding that the Settlement Term Sheet was proposed in good faith and not by any means forbidden and that its provisions were reasonable and represented an appropriate compromise of disputed matters and should be approved pursuant to the provisions of Bankruptcy Rule 9019, the Court did not provide any meaningful discussion to support such ruling. Nevertheless, this Court did consider all "factors

relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

In reaching its June 9, 2009, decision, the Court considered the factors articulated in *Martin v. Kane (In re A&C Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986):

> (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

As explained in *A & C Properties*:

> The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims. The law favors compromise and not litigation for its own sake, and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed.

Id. at 1380-81 (citations omitted). Considering all relevant factors, this Court found that the Settlement Term Sheet was "fair and equitable" as required by *In re A&C Properties.*

As aptly explained by the proponents of the Settlement Term Sheet, the fact that the settlement was finally reached in the early hours of May 18, 2009, the date of the confirmation hearing, after around the clock negotiations during the preceding 48 hours, is symptomatic of the obstacles and disputes that had to be resolved if the Debtors were to achieve a successful reorganization.[3] Indeed, when the multi-day auction was concluded on the evening of Friday, May 15, 2009, without declaring either Credit Suisse or CrossHarbor the successful bidder, no assurances existed that the Debtors' plan would be confirmed on Monday, May 18, 2009, and in fact, it was quite possible the Debtors' cases could be converted to chapter 7. Absent a resolution, the Debtors faced numerous obstacles to confirmation, including issues under Sections 1111(b) and 1129 of the Bankruptcy Code that could have proven insurmountable absent a consensual resolution of Credit Suisse's claims. In Greenspan's words, confirmation without the global settlement: "[W]ould have been extremely difficult, if not impossible." Furthermore, absent confirmation of a plan by late May of 2009, the

[3] Blixseth makes some incorrect declarations with respect to the Settlement Term Sheet. For instance, in a Reply Brief filed July 5, 2011, Blixseth's counsel argues "the Settlement Term Sheet had not even been finalized at the conclusion of the May 18, 2009 hearing," and then later maintains in the same Reply Brief that when the parties announced their settlement at the May 18, 2009, hearing, it "was still not even reduced to writing[.]" The foregoing assertions are incorrect. I recall, and the record confirms, that the Debtors, Committee, CrossHarbor and Credit Suisse presented the Court with a fully executed copy of the Settlement Term Sheet at the May 18, 2009, hearing.

Debtors would have no further access to debtor in possession financing. As Greenspan testified:

> For all practical purposes, we had none. We did not have rights to cash collateral, we had no more DIP capacity, and we had operating and administrative expenses that very substantially exceeded our recurring income.

Absent the settlement, the Debtors in all likelihood would not have survived as going concerns. In the face of those daunting threats to confirmation, and indeed to the Debtors' very existence as going concerns, the settlement forged a consensual resolution among all of the Debtors' principal constituencies. Among other things, the Settlement Term Sheet paved the way to confirmation of the Debtors' Third Amended Join Plan of Reorganization which: (i) increased payments by CrossHarbor for payment of administrative expenses and to Credit Suisse; (ii) doubled the amount of the Trade Creditor Fund from $7.5 million to $15 million; and (iii) provided a $2 million increase, from $375,000 to $2.375 million, in the funding of the Yellowstone Club Liquidating Trust. Credit Suisse, likewise, made substantial concessions critical to confirmation of the Plan, including accepting an $80 million note in satisfaction of its $232 million secured claim and agreeing to a "waterfall" that subordinated its remaining unsecured deficiency claim to up to $27 million of other claims, an amount significantly greater than that provided under this Court's Interim and Partial Order.

As discussed above, rather than an exhaustive investigation or a mini-trial on the merits, this court need only find that the settlement was negotiated in good faith and is reasonable, fair and equitable. *A & C Properties*, 784 F.2d at 1381. The testimony elicited with respect to the Settlement Term Sheet prior to the Hearing, at earlier hearings before this Court, and during Greenspan's deposition demonstrates that the Settlement Term Sheet was, and remains, fair and equitable. The Court, therefore, once again approves the Settlement Term Sheet in all respects.

II. Identification and delineation of those persons or representatives within the scope of ¶ 8.4 of the Debtors' Third Amended Joint Plan of Reorganization.

In addition to requiring proper notice under the Bankruptcy Rules, Judge Haddon reversed and remanded confirmation of the Debtors' Third Amended Joint Plan of Reorganization so this Court could, "to the extent feasible . . . explicitly identify and delineate those persons or representatives determined to be within the scope of the release parameters of Section 524(e) and to state the reasons why it reached such conclusions." Relevant exhibits identified by the parties with respect to the exculpation clause found in the Debtors' Third Amended Joint Plan of Reorganization included CrossHarbor's Exhibits 1, 2, 3, 4, 5, 32, 44, 50, 56, 118, the Debtors' Exhibits 1 and 3, Beckett and Parsons Behle & Latimer's Exhibit 1, along with the Orders and pleadings found at docket entry nos. 220,

494, 591, 596, 1186, 1224, 1612 and 1702 in this case, and docket entry no. 292 in Adversary Proceeding 09-00014.

A recurring argument raised by Blixseth in written pleadings and during oral argument is that this Court could not conduct the hearing as scheduled because, according to Blixseth, some party would have to file a "mysterious and as-yet undisclosed new exculpation clause[.]" Blixseth argues in an objection to the July 25, 2011, hearing, that Debtors were required to first submit a new disclosure statement and further amended plan: "Because at the very least, ¶ 8.4 of the Third Amended Plan must be changed, the Third Amended Plan can no longer be the operative plan for the Court to confirm." Objection of Timothy Blixseth to July 25, 2011 Hearing, Dkt. 2198, p.5. Continuing, Blixseth asserts: "Instead of "patching up" the existing, defective Plan, a new plan must be proposed that complies with the appellate court's mandate." *Id.*, p.7. In that same Objection, p.6., Blixseth offers the following argument in support of his contention that the Debtors' Third Amended Joint Plan of Reorganization is a nullity that cannot be modified:

> Section 1127(b) also prohibits modification of a substantially consummated plan. *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 982 F.2d 721, 747 (2nd Cir. 1992). The modification required by the District Court can only be considered a material one, given that the Third Amended Plan is premised on the Term Sheet and the exculpation clause.

The Court need only look at Credit Suisse's own words in responding to Highland Capital's Objection to the Yellowstone Term Sheet, p. 4 [Docket No. 966], stating that alteration of the "highly negotiated" material terms of, among things, the scope of the exculpation clause would require resolicitation of creditors.

Although the issue normally arises in the context of determining the equitable mootness of an appeal – an exclusively appellate remedy already rejected by both the District Court and the Ninth Circuit – courts have has been repeatedly held that modifying the scope of releases is a prohibited material change in a confirmed plan. In [*In re Delta Airlines, Inc.*, 374 B.R. 516 (S.D.N.Y. 2007], as here, the releases were an integral part of the entire Settlement and cannot be undone in isolation from other portions of the plan that were not reversed. *In re Delta Air Lines, Inc.*, 374 B.R. at 524. In *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1049 (7th Cir. 1993), the court refused to nullify non-debtor releases because such a remedy "would amount to imposing a different plan of reorganization on the parties." Similarly, in *In re Metromedia*, 416 F.3d 136 (2nd Cir. 2005), the court prohibited an appeal which would have eliminated releases which were essential to the bargain between the parties. *See also*, *In re Enron Corp.*, 326 B.R. at 503 (finding appeal of exculpation provision moot where the bankruptcy court found the provision necessary for the negotiation of the reorganization plan); *In re Texaco Inc.*, 92 B.R.

> 38, 45-50 (S.D.N.Y. 1988) (finding appeal seeking to sever and rescind releases moot because releases were part of an "integrated settlement" and their rescission would "undermine the entire reorganization"). The underlying theme of these cases is that altering one important component of an approved plan is tantamount to "imposing a different plan of reorganization on the parties" and therefore requires a new, Fourth Amended Plan to be properly proposed for confirmation.

After much deliberation, I see nothing in the record that requires this Court to, as Blixseth suggests, put the tooth paste back in the tube. First, as Blixseth correctly acknowledges, the Debtors' plan is substantially consummated and the Court sees no conceivable or equitable way to put the parties back to their pre-confirmation position. *See In re BearingPoint, Inc.*, 453 B.R. 486, 495 (Bankr. S.D.N.Y. 2011) ("the Trustee is also correct in pointing out that the request for modification of the Confirmation Order here would have no adverse effect on creditor expectations under the plan, or raise issues as to the unscrambling of eggs that often are a concern (typically considered in mootness analysis) in modifying confirmation orders after the fact"); and *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 475 (1st Cir.1992) ("unraveling the substantially consummated . . . reorganization plan would work incalculable inequity to many . . . who have extended credit, settled claims, relinquished collateral and transferred or acquired property in legitimate reliance on the unstayed order of confirmation").

Second, the exculpation clause was not a last minute provision added to the Debtors' Third Amended Joint Plan of Reorganization without notice to all parties. Debtors filed their first Chapter 11 Plan on February 13, 2009, at docket entry no. 384. The Plan filed February 13th contained the following Exculpation and Limitation of Liability clause:

> None of (a) the Debtors or the Reorganized Debtors, (b) the Committee, (c) the individual members of the Committee in their capacities as such, (d) the DIP Lender, any other lenders of (or participants in) the DIP Loan and any agent thereof, (e) the Current Equity Owners, (f) CrossHarbor Capital Partners and all affiliates thereof, (g) the Acquirer, and (h) with respect to each of the foregoing Persons, each of their respective directors, officers, employees, agents (including Edra Blixseth, as managing member of the Current Equity Owners), representatives, shareholders, partners, members, attorneys, investment bankers, restructuring consultants and financial advisors in their capacities as such (collectively, the "Exculpated Parties"), shall have or incur any liability to any Person for any act or omission in connection with, relating to or arising out of the Chapter 11 cases, the formulation, negotiation, implementation, confirmation or consummation of this Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document entered into during the Chapter 11 Cases or otherwise created in connection with this Plan; provided, however, that nothing in this

> Section 8.4 shall be construed to release or exculpate any Exculpated Party from willful misconduct or gross negligence as determined by a Final Order or any breach of the Definitive Agreement or any documents entered into in connection therewith.

Debtors' First Amended Joint Plan of Reorganization filed March 3, 2009, at docket entry no. 516, and Debtors' Second Amended Joint Plan of Reorganization filed April 3, 2009, at docket entry no. 691 contained the same exculpation clause found in the Plan filed February 13, 2009, except that the acronym "LLC" was added as follows: "(f) CrossHarbor Capital Partners *LLC* and all affiliates thereof[.]" The exculpation clause was finally amended in the Third Amended Joint Plan of Reorganization filed May 29, 2009, at docket entry no. 995 to read as follows:

> None of (a) the Debtors or the Reorganized Debtors, (b) the Committee, (c) the individual members of the Committee in their capacities as such, (d) the DIP Lender, any other lenders of (or participants in) the DIP Loan and any agent thereof, (e) the Current Equity Owners, (f) CrossHarbor Capital Partners and all affiliates thereof, (g) the Acquirer, *(h) the First Lien Lenders and the First Lien Agent, and (i)* with respect to each of the foregoing Persons, each of their respective directors, officers, employees, agents (including Edra Blixseth, as managing member of the Current Equity Owners), representatives, shareholders, partners, members, attorneys, investment bankers, restructuring consultants

> and financial advisors in their capacities as such (collectively, the "Exculpated Parties"), shall have or incur any liability to any Person for any act or omission in connection with, relating to or arising out of the Chapter 11 cases, the formulation, negotiation, implementation, confirmation or consummation of this Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document entered into during the Chapter 11 Cases or otherwise created in connection with this Plan; provided, however, that nothing in this Section 8.4 shall be construed to release or exculpate any Exculpated Party from willful misconduct or gross negligence as determined by a Final Order or any breach of the Definitive Agreement or any documents entered into in connection therewith.

The latter amendment to ¶ 8.4 was specifically highlighted in a redline version of the Third Amended Joint Plan of Reorganization filed May 22, 2009, at docket entry no. 945-1.

Blixseth first objected to confirmation of the Debtors' Second Amended Joint Plan of Reorganization on May 11, 2009, at docket entry no. 860. In that objection, Blixseth joined the previously filed objections of Credit Suisse and also objected on grounds the Debtors' Second Amended Plan was not filed in good faith. Credit Suisse subsequently resolved and withdrew its objections to confirmation, leaving Blixseth with his good faith objection. However, on May 24, 2009, Blixseth

filed a response to the Debtors' post-confirmation hearing report arguing that ¶ 8.4 of the Debtors' Plan was unlawful and contrary to Ninth Circuit law:

> The Court will recall the reason stated for these exculpatory provisions – that threats were made to Mr. Greenspan about legal action against to be taken against him and other members of the Debtors' professional team. *He testified that the threats were made by Credit Suisse.* Now after the Debtors having settled with Credit Suisse and delivered mutual releases, the exculpatory language not only remains in the Plan, but *includes* Credit Suisse.
>
> The Ninth Circuit prohibits such non-debtor third party releases. *Resorts International, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-2 (9th Cir. 1995) ("*Lowenschuss*"). The Third Amended Plan is not confirmable with these exculpatory provisions. The Ninth Circuit in *Lowenschuss* stated that "this court has repeatedly held, without exception, that Section 524(e) [of the Bankruptcy Code] precludes bankruptcy courts from discharging the liabilities of non-debtors." *Lowenschuss*, 67 F.3d at 1401-2. *In re American Hardwoods*, 885 F.2d 621 (9th Cir. 1989); *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985).

Blixseth's response filed May 24, 2009, at docket entry no. 956, p.12.

Contrary to Blixseth's argument, the exculpation clause, which was a "highly negotiated" component of

the resolution between the Debtors, the Committee, Credit Suisse and CrossHarbor, does not violate Ninth Circuit precedent. The Ninth Circuit, in *In re American Hardwoods, Inc.*, 885 F.2d 621, 626 (9th Cir. 1989), and *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995), held that under § 524(e), a bankruptcy court does not have the authority to permanently enjoin a creditor from continuing with and enforcing a state court judgment against non-debtor guarantors.[4] The ruling articulated in *American Hardwoods*, as reiterated in *Lowenschuss, is* not implicated here.

In *American Hardwoods*, a chapter 11 debtor sought to permanently enjoin a creditor from enforcing a state court judgment against the debtor's guarantors, who also happened to be the debtor's president and vice president. The Ninth Circuit held that the bankruptcy court lacked jurisdiction and power to permanently enjoin a creditor, beyond confirmation of the plan, from enforcing a state court judgment against

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[4] In bankruptcy, a discharge is an involuntary release by operation of law of asserted and non-asserted claims by a creditor against an entity who has filed a petition under the Bankruptcy Code and who has abided by its rules. *In re Arrowmill Development Corp.*, 211 B.R. 497, 504 (Bankr. D.N.J. 1997). Upon confirmation of a plan, a Chapter 11 debtor receives a discharge of its debts which arose before confirmation. 11 U.S.C. § 1141(d)(1). Subsection § 524(e) limits the scope of the discharge. A "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. § 524(e).

the nondebtor guarantors. In reaching its decision, the Ninth Circuit explained:

> Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105 empowers the court to enjoin preliminarily a creditor from continuing an action or enforcing a state court judgment against a nondebtor prior to confirmation of a plan. *In re A.H. Robins Co.*, 828 F.2d 1023, 1026 (4th Cir.1987), *cert. denied*, 485 U.S. 969, 108 S.Ct. 1246, 99 L.Ed.2d 444 (1988); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002-03 (4th Cir.) (*Piccinin*), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986). Furthermore, section 105 permits the court to issue both preliminary and permanent injunctions after confirmation of a plan to protect the debtor and the administration of the bankruptcy estate. *See Burstein–Applebee*, 63 B.R. at 1020-21 (principals of debtor permanently enjoined from continuing state court action against creditors' committee); *In re Askew*, 61 B.R. 87, 89 (Bankr. S.D.Ohio 1986) (creditor permanently enjoined from continuing state court action regarding discharged debt). American, however, points to no case, and we are aware of none, in which a court permanently enjoined, past confirmation of a plan, a creditor from enforcing a state court judgment against a nondebtor guarantor of a contract liability. Deutsche argues, and the district court held, that its power under section 105(a) to order

> the relief sought by American ends at confirmation of the plan.

American Hardwoods, 885 F.2d at 624-25. The analysis in *American Hardwoods* focused on § 105 of the Bankruptcy Code, which the Court concluded "does not authorize relief inconsistent with more specific law." *Id.*, at 625, citing with approval *In re Golden Plan of California, Inc.*, 829 F.2d 705, 713 (9th Cir.1986); and *Johnson v. First National Bank of Montevideo, Minnesota*, 719 F.2d 270, 273 (8th Cir.1983), *cert. denied* 465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984). The Court rejected the semantic distinction between a permanent injunction and a discharge and viewed a permanent injunction of actions against the debtor's guarantors as being contradictory to the specific provisions of § 524(e). The Court in *American Hardwoods* thus concluded the court had no power to issue the injunction sought by the debtor:

As we succinctly explained in *Underhill v. Royal*, 769 F.2d 1426 (9th Cir.1985):

> Generally, discharge of the principal debtor in bankruptcy will not discharge the liabilities of codebtors or guarantors. . . . [Section 524(e)] of the 1978 Bankruptcy Reform Act was a reenactment of Section 16 of the 1898 Act which provided that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of

> such bankrupt." Act of July 1, 1898, ch. 541, § 16, 30 Stat. 550 (formerly codified at 11 U.S.C. § 34 (1976)).
>
> In addition, the Bankruptcy Act of 1898, as amended, provided that 23 a corporation's discharge in bankruptcy "shall not release its officers, the members of its board of directors or trustees or of other similar controlling bodies, or its stockholders or members, as such, from any liability under the laws of a State or of the United States." Act of June 22, 1938, ch. 575, § 4(b), 52 Stat. 845 (formerly codified at 11 U.S.C. § 22(b) (1976)). Thus, under the old Act, stockholders or directors could remain liable for substantive violations despite discharge of the corporate entity. 1A J. MOORE COLLIER ON BANKRUPTCY 1116.14, at 1551 (14th ed. 1978).

Id. at 1432; *see also id.* ("The bankruptcy court 'has no power to discharge the liabilities of a bankrupt's guarantor.' "), *quoting Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir.1982); *id.* (" 'The bankruptcy court can affect only the relationships of debtors and creditor. It has no power to affect the obligations of guarantors.' "), *quoting R.I.D.C. Industrial Development Fund v. Snyder*, 539 F.2d 487, 490 n. 3 (5th Cir.1976), *cert. denied*, 429 U.S. 1095, 97 S.Ct. 1112, 51 L.Ed.2d 542 (1977).

> Section 524(e), therefore, limits the court's equitable power under section 105 to order the discharge of the liabilities of nondebtors[.]

Id. at 625-26. At that time, the Ninth Circuit reasoned, in dicta, that adoption of the rationale discussed in in *Menard–Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959, 110 S.Ct. 376, 107 L.Ed.2d 362 (1989), would not dictate a different result because the facts in *American Hardwoods* were distinguishable from the unusual facts found in *A.H. Robins. Id.* at 626. In so stating, the Ninth Circuit enumerated five factors which it considered critical to the *A.H. Robins* holding:

> (1) the reorganization plan, which included the injunction, was approved by over 94% of the claimants . . . , (2) the plan provided for full payment of creditors' claims, . . . ; (3) the injunction affected only about 1.5% of the claimants, . . . ; (4) it was "essential" to the plan that claimants "either resort to the source of funds for them in the Plan . . . or not be permitted to interfere with the reorganization and thus with all other creditors, . . . ; and (5) "the entire reorganization hing[ed] on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor."

American Hardwoods, 885 F.2d at 626.

Six years later, in *In re Lowenschuss*, 67 F.3d 1394, the Ninth Circuit again revisited the scope of § 524(e)

and reiterated "that bankruptcy courts do not have the equitable power under § 105(a) to discharge the liabilities of nondebtors through chapter 11 plan confirmation, contrary to the provisions of § 524(e). *Id.* at 1401-02. The Ninth Circuit clarified that in *American Hardwoods*, it "expressly declined to adopt the approach set forth in *In re A.H. Robins*[.]"

This court is bound by, and does not dispute the legal precedent established in *Lowenschuss, American Hardwoods*, and *Underhill*, that liabilities of nondebtors cannot be discharged through a plan. Such legal precedent, however, is inapplicable here because, unlike in *Lowenschuss, American Hardwoods*, and *Underhill*, ¶ 8.4 of the Debtors' Third Amended Joint Plan of Reorganization is not a broad sweeping provision that seeks to discharge or release nondebtors from any and all claims that belong to others.

Blixseth's counsel disputes that ¶ 8.4 contains a temporal component.[5] During direct examination, Beckett described the temporal component of the exculpation clause as follows: "generally with respect to the exculpation, it was negotiated carefully. And the idea was not to overreach but to capture the time period from the filing of the petition generally until the consummation – confirmation of the plan." The

[5] Blixseth also argued in a Reply Brief filed July 5, 2011, that "[a] s written, Section 8.4 releases the Exculpated Parties from liability for pre and post-petition conduct which violates not only Section 524(e) by also Mr. Blixseth's due process rights."

temporal limitation of the exculpation clause was further discussed during Flynn's questioning of Beckett:

FLYNN. So please indicate to the Court where the time limitation is in the – that you were concerned about.

BECKETT. Yes. Docket No. 995, page 40 – or it says, upper right, "48 of 58," Section 8.4. About eight lines down on the left is the definition of "exculpated party." And so let's just – "exculpated parties." Let's just start with that (quoted as recorded): "The exculpated parties shall have or incur – none of the exculpated parties shall have or incur any liability to any person for any act or omission in connection with, relating to, or arising out of the Chapter 11 cases."

Now, let's just stop right there for a second. That doesn't give you any dates, okay, but that's the typical language which is intended to define that we're not talking about anything that happened a year before the bankruptcy, we're not even talking about things probably that happened two days before the bankruptcy, and we're not

talking about stuff that happens after confirmation or consummation.

We're talking about things that arise and relate to the Chapter 11 cases. Then continuing (quoted as recorded): "Or" – I think is implied there – "the formulation, negotiation, implementation, confirmation, or consummation of this plan, the disclosure statement, or any contract, instrument, release, or other agreement or document entered into during the Chapter 11 case or otherwise created in connection with this plan."

And my, my point is that the doctrine of quasi-judicial immunity really pertains to a professional's activities, you know, during the pendency of the bankruptcy case, and that's really the best way here that lawyers have found over the years to define that temporal duration. So all I'm saying is that we're talking about what happened during the case, and that's how we say it.

FLYNN. In fact, there is no, as you put it, "temporal" recitation in 8.4

by date or time limit, is there, Mr. Beckett?

BECKETT. Yes, there is.

FLYNN. No, other than this language that you've stated –

BECKETT. Other, other than –

FLYNN. – there's no recitation of a specific "60-day," "90-day," "from the date of filing the petition until the date of the confirmation of the plan." There is no such language, is there, sir?

BECKETT. You know, I can't change my testimony. There is, but I understand, we're arguing about how that time period is defined. I'm saying it's defined there; you're saying it's not defined by dates and times or specific duration. You're right.

The Court agrees with Beckett's observation that ¶ 8.4 only protects those acts that occurred in connection with the Debtors' Chapter 11 cases between November 10, 2008, and July 17, 2009. Acts falling outside the foregoing dates are not protected.

The exculpation clause is also narrow in scope. The following colloquy between Beckett and Flynn highlights the limited scope of the exculpation clause:

FLYNN. The term that's used in 8.4, "relating to" or "arising out of

> the Chapter 11 cases," that's a very broad term, is it not, Mr. Beckett?
>
> UNIDENTIFIED SPEAKER: Objection; vague.
>
> THE COURT: I'm going to overrule and allow him to answer if he is able.
>
> BECKETT. You know, I think, I think it comes from 28 U.S.C. § 1334(b), is my recollection. And I think that there are hundreds of cases defining what "related to," "arising under," or "in connection" – or not "in connection"; with – what that means. I think it's an exacting phrase.

Blixseth disagrees that the exculpation clause is limited in scope, arguing ¶ 8.4 impermissibly releases claims belonging to both the Debtors and Blixseth. Blixseth's belief that Debtors are seeking to impermissibly release claims belonging to the Debtors is evidenced by Blixseth's motions for derivative standing filed July 19 and 20, 2011, wherein Blixseth seeks leave of this Court to pursue alleged claims belonging to the Debtors against Credit Suisse and CrossHarbor. Notwithstanding what claims ¶ 8.4 may or may not release, 11 U.S.C. § 1123(b)(3)(a) permits a plan to settle or adjust any claim belonging to the debtor or to the estate. Subsection 524(e) does not come into play with respect to any claims belonging to the Debtors or the bankruptcy estates that may have been released by ¶ 8.4 of the Plan against Credit Suisse or CrossHarbor.

Blixseth's counsel also elicited testimony at the hearing held July 25th and 26th suggesting that ¶ 8.4 of the Debtors' Plan impermissibly releases claims Blixseth may have against certain of the parties, including CrossHarbor, Credit Suisse and Brown. After Blixseth intervened in Adversary Proceeding 09-00014, he steadfastly maintained that the Debtors' bankruptcy filings were orchestrated by his ex-spouse, Edra, and CrossHarbor. Blixseth likewise contends he has claims against Credit Suisse stemming from a 2005 loan agreement between Blixseth, on behalf of the Debtors, and Credit Suisse

Finally, Blixseth takes issue with the actions of Brown, who admittedly served as counsel for both the Debtors and Blixseth prior to November 10, 2008. Brown is a partner in the law firm of Garlington, Lohn & Robinson. Garlington, Lohn & Robinson was owed in excess of $300,000 by the Debtors on their petition date. Because of the substantial unsecured claim owed Garlington, Lohn & Robinson, Brown agreed to and in fact did serve as chairman of the Committee.

Blixseth contends Brown breached Blixseth's attorney-client privilege when Brown divulged information, protected by Blixseth's attorney-client privilege, to the Committee. Blixseth complains that ¶ 8.4 of the Debtors' Plan now exculpates Brown and that Blixseth is foreclosed from pursuing a claim against Brown for breach of Blixseth's attorney-client privilege. Blixseth also takes issue with advice Brown provided to Credit Suisse in 2005 with respect to the Credit Suisse loan transaction and advice Brown

provided to Blixseth prior to August 2008 in connection with Blixseth's marital settlement agreement.

While the Court cannot anticipate every claim Blixseth may have against the parties involved in this case, the specific claims discussed during testimony are outside the scope of the release provision at issue. The release provision in this case is narrow in both scope and time, and applies only to an "act or omission in connection with, relating to or arising out of the Chapter 11 cases, the formulation, negotiation, implementation, confirmation or consummation of this Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document entered into during the Chapter 11 Cases or otherwise created in connection with this Plan[.]" For instance, any claim Blixseth may have stemming from Brown's advice with respect to Blixseth's marital settlement agreement or the Credit Suisse loan transaction is clearly outside the scope of the exculpation clause. Moreover, while not specifically before the Court, this Court would find any question as to whether Brown breached Blixseth's attorney-client privilege as separate and distinct from the Debtors' confirmation process. The aforementioned acts took place prior to the Debtors' petition date and have no connection whatsoever with the chapter 11 bankruptcy process.

Larry Ream[6], by way of background, explained during his testimony that exculpation clauses are intended to "prevent parties – who are disappointed subsequent to the completion of a Chapter 11 case, from suing professionals and others that are directly involved in the process of reorganization. But they are limited, and they are intended solely to preclude litigation related to or acts and conduct related to the process of the reorganization itself" Larry Ream explained specifically what was not covered by the exculpation clause: "willful misconduct is not exculpated, nor are gross – conduct that constitutes gross negligence, nor is there anything within our exculpation clause . . . that affects . . . 524(e) and the discharge provision."

The parties in this case, including the Debtors, Credit Suisse, CrossHarbor, Blixseth and others, all had a lot at stake. According to Larry Ream, 101 of the interested parties in this case had significant issues and important positions, and they were all taken vigorously." The vigorous jockeying by the parties created an oftentimes contentious environment. Attorney Larry Ream referenced two pre-confirmation threats made by Credit Suisse against various of the professionals involved in this case, wherein Credit Suisse alleged that the Debtors and their professional were mismanaging this case and allowing value to dissipate.

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[6] Larry Ream was employed to represent the Debtors' in this bankruptcy case and was the person who drafted the Debtors' plans.

In another situation and prior to Blixseth's active involvement in either this case or any associated adversary proceeding, Beckett, who served as lead counsel for the Committee, sent Flynn a courtesy email to advise Flynn and Blixseth that Blixseth was named in a complaint the Committee had drafted, but not yet filed. Flynn responded to Beckett by email on February 7, 2009: "I strongly urge you NOT to file a lawsuit that will generate publicity that will potentially kill the deal that Tim has put together to insure full payment to the unsecured creditors comprised of the vendors, workers, contractors." Attached to Flynn's email to Beckett was correspondence between Blixseth and Flynn in which Blixseth told Flynn if the UCC filed its complaint and thereby killed Blixseth's almost completed deal, Flynn was instructed to "commence legal action against each and every person responsible, regardless of who they are." As a result of Flynn's email, the Committee removed Blixseth's name from the Complaint, leaving Credit Suisse as the sole named Defendant. However, Blixseth never proposed a deal to provide full payment to the unsecured creditors and in fact, subsequently requested leave to intervene in the Debtors and Committee's action against Credit Suisse. That action evolved into an action between Blixseth and the Liquidating Trustee. The Court eventually entered Judgment against Blixseth directing him to provide sufficient funds to pay the unsecured creditors.

As shown above, numerous parties were threatening others with lawsuits, and notwithstanding the exculpation clause, Blixseth, in 2009, filed a separate

action against CrossHarbor in California. In addition, prior to the July 25th hearing, Blixseth filed a complaint against: (1) Stephen Brown and his law firm, Garlington, Lohn & Robinson, PLLP; (2) James A. Patten and his law firm Patten, Peterman, Bekkedahl & Green, PLLC; (3) J. Thomas Beckett and his law firm Parsons, Behle & Latimer; (4) Thomas L. Hutchinson and his law firm Bullivant, Houser, Bailey, PC; (5) Samuel T. Byrne; and (6) CrossHarbor Capital Partners, LLC. As the record demonstrates, litigation and the threat of litigation is and was plentiful in this case.

An exculpation clause in this case was certainly advisable given the litigious posture of the parties. The only issue was who could legally be included in such a clause. During cross-examination, counsel for Sumpter specifically asked Beckett what "should an exculpation clause be?" Beckett responded:

> In my view, it should be at least as broad as the quasi-judicial immunity. The quasi-judicial immunity is there. It needs to be reduced to writing. And it is almost in the nature – it's a poor, poor reference – but it's almost in the nature of an oath where the purpose of it is to remind people of the paramount importance of repose in a bankruptcy case.
>
> Professionals and the people they represent in the cases – professionals, on behalf of the people they represent in cases, battle each other tirelessly for a period of time. And things are said, and feelings are hurt, and "oxes" are gored. And there needs to be repose

> at the end of the case. And the professionals, and the debtor, and the committee members, and the acquirer, the DIP lender, whoever else is put in there by contract need to know at the end of the case that everything about their behavior has been exposed, has been vetted, has been considered, and it's over.
>
> The reorganized company – in this case, the Yellowstone Club – and those of us who participated in this case need to go back to doing what we like to do: Working on other cases, selling lots and making people happy at the club, and Credit Suisse is back in its business of making loans. There needs to be that repose, and for me that's the most important thing, "This is the end of it, we're done."

Beckett continued by providing additional justification for inclusion of the exculpation clause in Debtors' Third Amended Joint Plan of Reorganization:

> Professionals ought to be able to do the best they can in a bankruptcy case, get a result, and then move on knowing that they're not subject to liability.
>
> My own view has another component to it, which is that, I agree, exculpation clause – claim – clauses are very common, and their function is like a stoplight at the end of a long straightaway. And it's really important when a plan is filed that it have an exculpation clause in it because if the plan isn't confirmed, the exculpation clause is not yet in effect, but you have a long period of time before –

> reasonably, a reasonable period of time before the plan is confirmed for people to think about the effect of the exculpation clause. And that exercise about thinking of the effect of the exculpation clause causes everybody to say, "Do I have some claim to bring?"
>
> Because this Court, when this Court gives professionals like us authority to do things, it is this Court that should review the proprietary of what we have done. And the existence of a pending exculpation clause has the function, the very important function of causing everyone to bring up everything they have to bring up before the case is confirmed, before the plan is confirmed and the exculpation clause is in effect. And so everyone brings up all the complaints they have about each other before that in this court and resolve them all. And then with that, then you have that repose, and professionals can go about their next case without being sued.
>
> * * *
>
> I think it's also true that there is a doctrine of quasi-judicial immunity which is parallel to the exculpation clause. I don't know the intersection of those two.

This Court agrees that the exculpation clause in this case does nothing more than provide quasi-judicial immunity to the Debtors, the Committee and their professionals.

Beckett also explained why it was necessary to include Credit Suisse and CrossHarbor:

> Every party was doing something very important and giving up something very important and making very important agreements to undertake going forward. And it was, it was very clear that every single party there had a deal point that they were to be within the exculpation clause of whatever plan came out of the term sheet.
>
> It was, it was a deal point, and it was a reasonable deal point, and – absolutely. CrossHarbor was acquiring the reorganized debtor, the plan assets. CrossHarbor was paying up to $15 million for unsecured creditor claims. Credit Suisse was standing down on its appeal, which would have destroyed the plan – or there would be no plan if Credit Suisse appealed. Credit Suisse was getting something in return.

The Court agrees that CrossHarbor should be included in the exculpation clause because of its involvement in this case by providing debtor in possession financing and because it served as the stalking horse bidder. Credit Suisse is also an expected candidate for coverage because it was, coming into this case, by far the largest creditor with a claim of $375 million. Credit Suisse was also seeking to appeal a partial and interim order entered by this Court on May 12, 2009. Credit Suisse had the ability to single-handedly disrupt the entire confirmation process.

In support of his position, Blixseth's counsel invited the Court to review *In re Lighthouse Lodge, LLC*, (slip opinion) 2010 WL 4053984 (Bankr. N.D.Cal. 2010), for "a very good analysis of just how limited these exculpation clauses need to be." *Lighthouse Lodge* provides support for approval of the instant exculpation clause. In *Lighthouse Lodge*, the court endorsed a bifurcated approach to examining release clauses contained in chapter 11 plans. *Id.* *8. According to the court in *Lighthouse Lodge*, the first prong of the analysis treats the release as "a settlement or adjustment of claims belonging to the debtor and the estate within the meaning of § 1123(b)(3)(A)" and examined such settlement or adjustment of claims under the factors articulated in *A & C Properties*, 784 F.2d 1377 (9th Cir. 1986). *Id.*, quoting *Edgewood Centre v. Flash Island, Inc. (In re Whispering Pines Estates, Inc.)*, 370 B.R. 452 (1st Cir. BAP 2007). The second part of the analysis looks at the release as n a release (or limitation of liability, or grant of immunity) of a party responsible for implementing the plan.' " *Id.* In reaching its decision to endorse the bifurcated approach, the court in *Lighthouse Lodge* explained,

> Section 1103(c) grants to official creditors' committees broad authority in formulating a plan of reorganization and performing "such other services as are in the interest of those represented." 11 U.S.C. § 1103(c). Section 1103(c) also gives rise to "an implicit grant of limited immunity." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717, 722 (Bankr. S.D.N.Y.1992). Hence, a plan may contain a release provision

insulating a committee and its members from liability except from gross negligence or willful misconduct. *See Vasconi & Associates, Inc. v. Credit Manager Association of California*, 1997 WL 383170, *4 (N.D.Cal.1997); *In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3rd Cir. 2000);

This release of liability except from gross negligence or willful misconduct has been extended to plan proponents other than a committee. *In In re WCI Cable, Inc.*, 282 B.R. 457 (Bankr. D.Or. 2002), the bankruptcy court was confronted with objections to the various release, exculpation, injunction and indemnification provisions in the debtor's plan. One of the exculpation provisions sought to limit the liability of the debtors, who were the plan proponents, "for any of their actions or omissions to act with respect to the [debtors'] bankruptcy proceedings, except for willful misconduct or gross negligence." *Id.*, at 477. Because the provision would release the debtors and their officers, members, directors, employees, representatives, attorneys, accountants, financial advisors, agents, among others, the bankruptcy court observed that "[d]ifferent liability standards may be appropriate and/or applicable under the Bankruptcy Code to these different entities and individuals in various circumstances in performing their respective functions postpetition in bankruptcy, and the lines separating actions protected by immunity from actionable conduct are neither clearly nor easily drawn." *Id.*, at 478. The court also pointed out that unlike a creditors' committee,

these parties did not have statutory immunity. *Id.*, at 478. Nevertheless, noting that the debtors had a legitimate concern because the cases were bitterly contested, the court approved the exculpation clause on the condition that the exculpation exceptions were extended to cover negligence and breaches of fiduciary duty, in addition to gross negligence and willful misconduct as already stated in the release. *Id.*, at 479-80.

Other courts have approved exculpation provisions that limited liability to gross negligence, willful misconduct, or breach of fiduciary duty. *See In re PWS Holding Corp.*, *supra* (approved exculpation provision releasing debtors, reorganized debtors, committee, and their officers, directors, employees, advisors, professionals or agents from liability except from willful misconduct or gross negligence); *In re Western Asbestos Co.*, 313 B.R. 832, 846-47 (Bankr. N.D.Cal. 2003) (approved release provision in favor of debtors, committee, futures representative, and their respective agents except for willful misconduct); *In re Firstline Corp.*, 2007 WL 269086 (Bankr. M.D.Ga. 2007) (approved exculpation clause for the debtor, trustee, the committee and its members, and their respective advisors, attorneys, consultants or professionals with exception for gross negligence, willful misconduct, or breach of fiduciary duty); *In re Enron Corp.*, 326 B.R. 497 (S.D.N.Y. 2005) (bankruptcy court approved exculpation provision in favor of debtors, creditors' committee, employee committee, trustees, and their respective officers, employees,

> attorneys, and agents that excluded gross negligence or willful misconduct).

Id. at *7. The court went on to approve a release provision, provided it was amended to add exceptions to cover gross negligence or willful misconduct. *Id.* at *9.

Applying that *Lighthouse Lodge* analysis to the facts of this case, this Court finds, for the reasons discussed earlier, that any release of claims by the Debtors was, and remains, fair and equitable and indeed, permissible under 11 U.S.C. § 1123(b)(3)(A). As for release of liability, the Court finds that the specific facts of this case compel approval of the exculpation clause as drafted and originally approved in the Third Amended Joint Plan of Reorganization. The Debtors, Committee, Credit Suisse and CrossHarbor were all major stakeholders in this case and each party was vigorously negotiating issues they deemed signification and positions important to the respective parties. The Plan in this case was originally proposed almost exclusively by the Debtors. However, during the countless hours of negotiations between 5:00 p.m. on Friday, May 15, 2009, and 9:00 a.m. on Monday, May 18, 2009, it is clear that the Third Amended Joint Plan of Reorganization and the incorporated Settlement Term Sheet became a collaborative effort of the Debtors, Committee, Credit Suisse and CrossHarbor, who all became, in essence, plan proponents. Because the Settlement Term Sheet and exculpation clause were the cornerstones of the Plan and were highly negotiated, the ruling in *Lighthouse Lodge* would suggest that the plan proponents, namely the Debtors, the Committee,

CrossHarbor and Credit Suisse, should be released pursuant to ¶ 8.4 of the Plan.

Unlike the exculpation clauses in *American Hardwoods* and *Lowenschuss*, the exculpation clause in the Debtors' confirmed Third Amended Joint Plan of Reorganization does not implicate 11 U.S.C. § 524(e). The exculpation clause in the case *sub judice* is not barred by Ninth Circuit Law. The exculpation clause is temporal in nature and covers those parties who were closely involved with drafting the Settlement Term Sheet, which became the cornerstone of the Debtors' Third Amended Joint Plan of Reorganization. As the testimony clearly shows, without the Settlement Term Sheet, it is doubtful the Debtors could have achieved confirmation of a Chapter 11 plan, and indeed it is very likely the Debtors' bankruptcies would have been converted to Chapter 7 and the assets liquidated.

Given the foregoing discussion, this Court need not correct an existing judgment or enter a new ruling and the Debtors need not start the confirmation process anew. The Court adopts in total and ratifies its earlier ruling on approval of the Settlement Term Sheet. The Rule 9019 Motion is technically irrelevant and unnecessary. The matter came before the Court, irrespective of the Rule 9019 Motion, as a result of Judge Haddon's ruling and to the extent feasible, this Court has defined the scope of the exculpation clause and the parties covered thereby.

III. Blixseth's pending Motion for Relief From Order Confirming Third Amended Plan of Reorganization.

Also pending is Blixseth's Motion for Relief From Order Confirming Third Amended Plan of Reorganization filed at docket entry no. 2054, together with the objections by the Liquidating Trustee at docket entry no. 2164, the Debtors, CrossHarbor and New CH YMC acquisition, LLC at docket entry no. 2184 and the Ad Hoc Group of Class B Unit Holders at docket entry no. 2191. Blixseth subsequently filed a related Motion to Strike YCLT's Opposition to Motion for Relief From Order Confirming Third Amended Plan of Reorganization on June 10, 2011, at docket entry no. 2167.

In the motion for relief, Blixseth requests that the Court void in its entirety and *nunc pro tunc* all downstream effects of the Debtors' Third Amended Joint Plan of Reorganization. Blixseth argues that such request is proper because the "Plan has now been reversed by the U.S. District Court for multiple 'plain errors' including the denial of Mr. Blixseth's fundamental due process rights." For the reasons discussed earlier in this Memorandum of Decision, the Court denies Blixseth's Motion for Relief From Order Confirming Third Amended Plan of Reorganization. Blixseth's motion to strike is similarly denied.

The Court would note that in a supplemental brief filed August 8, 2011, at docket entry no. 2295, Blixseth relies solely on *Stern v. Marshall*, 131 S. Ct. 2594, 2608, 2615, 2620 (2011) and *In re BearingPoint*, 453 B.R. 486,

in support his request for relief from the Order confirming the Debtor's Third Amended Joint Plan of Reorganization. More to the point, Blixseth contends this Court lacks the constitutional authority to approve the Debtors' plan because "the Exculpation Clause approved by order of this Court acted as a final order dismissing all common law causes of action against the Exculpated Parties." For reasons discussed below, the Court finds it has authority to enter binding decisions with respect to confirmation of a chapter 11 plan.

IV. Subject matter jurisdiction.

As just mentioned, Blixseth argues this Court lacks subject matter jurisdiction to hear the matters set on July 25 and 26, 2011, based upon the United States Supreme Court's recent ruling in *Stern v. Marshall*, 131 S.Ct. 2594. The "jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Battleground Plaza, LLC v. Ray (In re Ray)*, 624 F.3d 1124, 1130 (9th Cir. 2010) (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995)). A bankruptcy court's jurisdiction is, generally, prescribed by 28 U.S.C. § 1334(b). In addition to granting jurisdiction to bankruptcy courts over bankruptcy cases, the statute provides that "the district courts [and by reference pursuant to 28 U.S.C. § 157, the bankruptcy courts] shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

In recent years, various courts of appeal have articulated the limits on bankruptcy court jurisdiction over matters arising after confirmation of a debtor's reorganization plan. *See, e.g.*, *In re Resorts Int'l, Inc.*, 372 F.3d 154, 166-67 (3d Cir. 2004) ("the essential inquiry appears to be whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter"); *Bank of La. v. Craigs Stores of Tex., Inc.*, 266 F.3d 388, 390-91 (5th Cir. 2001) (post-confirmation bankruptcy jurisdiction limited to matters pertaining to implementation or execution of the plan). The Ninth Circuit has adopted the "close nexus" test of *Resorts Intl* for measuring post-confirmation related to bankruptcy court jurisdiction. *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005) (reasoning that while this test "recognizes the limited nature of post-confirmation jurisdiction, [it] retains a certain flexibility. . . ."). In *Resorts Int'l*, the Third Circuit considered what it perceived to be problems in its existing precedent, *Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984). In *Pacor*, the court had held that "the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Id.* at 994. The *Pacor* test, however, proved less than useful in determining related to jurisdiction after confirmation of a plan because the bankruptcy estate no longer exists. In *Resorts Int'l*, the court shifted the emphasis to whether "there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter." *Id.* Although

the Third Circuit never precisely defined what it meant by "close nexus," it cited numerous case examples of a nexus that would support jurisdiction. *In re Resorts Int'l, Inc.*, 372 F.3d at 161, citing *Donaldson v. Bernstein*, 104 F.3d 547, 552 (3d Cir. 1997) (post-confirmation proceeding concerning the reorganized debtor's failure to pay unsecured creditors according to terms in the plan); *U.S. Tr. v. Gryphon at the Stone Mansion*, 216 B.R. 764 (W.D. Pa. 1996), *aff'd* 166 F.3d 552 (3d Cir. 1999) (dispute interpreting attorney fee provision in the plan); *Bergstrom v. Dalkon Shield Claimants Trust (In re A.H. Robins Co.)*, 86 F.3d 364, 372-73 (4th Cir. 1996) (dispute over calculation of attorney fees that could affect treatment of remaining claims under the plan)). However, the import of the *Resorts Int'l* analysis is even more revealing by its citation of example cases where the facts did not establish a sufficiently close nexus to support bankruptcy jurisdiction. *In re Resorts Int'l, Inc.*, 372 F.3d at 168 citing *Falise v. Am. Tobacco Co.*, 241 B.R. 48, 52 (E.D.N.Y. 1999) (dispute between a plan liquidating trust and tobacco manufacturers would have "no impact on any integral aspect of the bankruptcy plan or proceeding"); *Grimes v. Graue (In re Haws)*, 158 B.R. 965, 970 (Bankr. S.D. Tex. 1993) (in an action by trustee against partner of the debtor, trustee failed to prove how any damages received from the defendant were "necessary to effectuate the terms of the plan.")). In short, under *Resorts Int'l*, as a condition for bankruptcy court post-confirmation jurisdiction, the outcome of a dispute must produce some effect on the reorganized debtor or a confirmed plan. Indeed, immediately following its review of this case law, the

Third Circuit concluded "where there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement, retention of post-confirmation bankruptcy court jurisdiction is normally appropriate." *Id.* at 168.

The Ninth Circuit most recently visited related to jurisdiction after confirmation in a chapter 11 case in *In re Ray*, 624 F.3d at 1124. In *Ray*, the bankruptcy court had approved the sale of a parcel of property owned by the debtor and his nondebtor co-owner, free and clear of the first refusal rights previously granted by them to Battle Ground Plaza, LLC. After the debtor's plan was confirmed and the bankruptcy case was closed, Battle Ground Plaza sued the reorganized debtor, the nondebtor co-owner, the purchaser, and the purchaser's successor in state court for breach of its contractual right of first refusal. Because the sale was originally authorized under a bankruptcy court order, the state court, in its words, "remanded" the action to the bankruptcy court, and stayed proceedings in state court pending the bankruptcy court's determination whether it retained jurisdiction over the transaction and dispute. *In re Ray*, 624 F.3d at 1129. The bankruptcy court assumed jurisdiction and proceeded to construe the sale order and resolve the parties' claims.

When the dispute finally reached the Ninth Circuit, the court decided that the bankruptcy court lacked jurisdiction to decide a dispute between two nondebtors over the meaning of the bankruptcy court's

sale order entered in a since-closed chapter 11 bankruptcy case. Applying *Valdez Fisheries*, the court concluded that, because the claims were all based upon Washington law, could exist entirely apart from the bankruptcy proceeding, and could not impact the closed bankruptcy case, the state court, not the bankruptcy court, should construe the sale order and adjudicate the parties' rights. *Id.* at 1134-35.

This Court distills an important lesson from these decisions for application of the close nexus test as developed in *Resorts Int'l*, and as adopted and refined by the Ninth Circuit. In particular, to support jurisdiction, there must be a close nexus connecting a proposed post-confirmation proceeding in the bankruptcy court with some demonstrable effect on the debtor or the plan of reorganization. Applying the Ninth Circuit case law to the facts of this case, it is clear that consideration of the Settlement Term Sheet and defining the scope of the exculpation clause in the Debtors' Third Amended Joint Plan or Reorganization directly impact the Debtors, the bankruptcy estates and implementation of the Debtors' Third Amended Joint Plan of Reorganization. This Court's retention of jurisdiction in this instance is appropriate, notwithstanding the decision in *Stern v. Marshall*. Therefore, Blixseth's standing objection to this Court's subject matter jurisdiction is overruled.

For the reasons discussed above, the Court will enter a separate order providing as follows:

IT IS ORDERED that Blixseth's Request for Judicial Notice filed July 22, 2011, at docket entry no. 2268 is granted.

IT IS FURTHER ORDERED that the Court adopts and ratifies its Memorandum of Decision and Order entered June 2, 2009, approving the Settlement Term Sheet and confirming the Debtors' Third Amended Joint Plan of Reorganization.

IT IS FURTHER ORDERED that Blixseth's Motion for Relief From Order Confirming Third Amended Plan of Reorganization filed at docket entry no. 2054, is denied.

IT IS FURTHER ORDERED that Blixseth's Motion to Strike YCLT's Opposition to Motion for Relief From Order Confirming Third Amended Plan of Reorganization Filed at Docket No. 2164 filed June 10, 2011, at docket entry no. 2167, is denied.

IT IS FURTHER ORDERED the Joint Motion for Order Pursuant to Bankruptcy Rule 9019 Authorizing and Approving the Yellowstone Club Settlement Term Sheet *Nunc Pro Tunc* filed by the Debtors, CrossHarbor Capital Partners, LLC and New CH YMC Acquisition, LLC on June 10, 2011, at docket entry no. 2165 is denied as moot.

BY THE COURT

/s/ Ralph B. Kirscher
HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States
Bankruptcy Court
District of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

TIMOTHY L. BLIXSETH, Appellant, vs. YELLOWSTONE MOUNTAIN CLUB, LLC et al., Appellees,	No. CV-11-65-BU-SEH **ORDER** On appeal from Bankruptcy Case No. 08-61570-11

Upon the record made in open court on January 27, 2012,

ORDERED:

Appellees' Joint Motion to Dismiss Appeal on Grounds of Equitable Mootness[1] is DENIED.

DATED this 27th day of January, 2012.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge

[1] Document No. 42

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

TIMOTHY L. BLIXSETH, Appellant, vs. YELLOWSTONE MOUNTAIN CLUB, LLC, YELLOWSTONE DEVELOPMENT, LLC, BIG SKY RIDGE, LLC, YELLOWSTONE CLUB CONSTRUCTION CO., LLC, Appellees,	No. CV-11-65-BU-SEH **MEMORANDUM AND ORDER** On appeal from Bankruptcy Case No. 08-61570-11

INTRODUCTION

Appellant, Timothy L. Blixseth (Blixseth), has appealed from the September 30, 2011, Order of the United States Bankruptcy Court for the District of Montana, adopting and ratifying its Memorandum of Decision and Order of June 2, 2009, which confirmed Debtors' Third Amended Plan of Reorganization. This Court has jurisdiction under 28 U.S.C. § 158(a).

BACKGROUND

Blixseth was one of the principal founders of Yellowstone Mountain Club, LLC. In November 2008, Yellowstone Mountain Club, LLC, Yellowstone Development, LLC, Big Sky Ridge, LLC, and Yellowstone

Club Construction Company, LLC (collectively Debtors) filed for Chapter 11 bankruptcy protection.[1] Debtors' submitted a Third Amended Plan of Reorganization on May 22, 2009. It was confirmed by the Bankruptcy Court on June 2, 2009.

An unsecured claim in favor of Blixseth for $26,000 was listed in Amended Schedule F to the Amended Voluntary Petition of Debtor Yellowstone Mountain Club, LLC.[2] This scheduled claim was superseded by Blixseth's filing of Proof of Claim No. 714 in the amount of $250,000 for a lifetime club membership.[3] On September 14, 2010, Blixseth and others filed an "Agreed Motion to Allow Withdrawal of Proofs of Claim."[4] The Bankruptcy Court granted the motion on September 15, 2010,[5] ending Blixseth's standing as a creditor in the proceedings.

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[1] Bankruptcy Case 08-61570-11.

[2] See Bankruptcy Case 08-61570-11, Document 407-6 at 32. The basis for this claim was described by the Trustee as "unknown" as the Trustee lacked sufficient information to evaluate whether the scheduled claim represented a legitimate claim against Debtor's bankruptcy estate. See Bankruptcy Case 08-61570-11, Document 1432 at 2.

[3] The Bankruptcy Court's Claims Register in Bankruptcy Case 08-61570-11 reflects that Blixseth filed Proof of Claim No. 714 on March 18, 2009.

[4] See Bankruptcy Case 08-61570-11, Document 1952.

[5] See Bankruptcy Case 08-61570-11, Document 1956.

DISCUSSION

This appeal asserts numerous challenges to the actions and decisions of the Bankruptcy Court in re-approving Debtors' Third Amended Plan of Reorganization on September 30, 2011, following remand.[6] Extensive briefs and record excerpts have been submitted by the parties. On October 18, 2012, the Court conducted a joint hearing in this appeal and the appeal in Cause 11-66-BU-SEH. The Court heard approximately 31/2 hours of oral argument. However, none of the issues presented are appropriate for resolution as Blixseth lacks standing to assert them on appeal.

Standing to appeal a decision of a Bankruptcy Court is to be distinguished from standing to appear and participate in proceedings before the Bankruptcy Court. See Motor Vehicle Casualty Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 883-84 (9th Cir. 2012). A party has standing to contest a Bankruptcy Court order on appeal only if he can show that the order being appealed has a present, direct and adverse affect on his pecuniary interests. Id.;

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[6] The appeal issues as stated by Blixseth are:

1. Was it reversible error for the bankruptcy court to confirm the Plan containing identical exculpatory clauses that this Court previously held violated Ninth Circuit law?
2. Was it reversible error for the bankruptcy court to approve the Settlement Term Sheet without a proper Rule 9019 Motion before it and without applying the *A &C Properties* factors to the present circumstances?
3. Did the bankruptcy court err in denying Blixseth's Rule 60(b) Motion?

Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C.. Inc.), 177 F.3d 774, 777 (9th Cir. 1999); Fondiller v. Robertson, 707 F.2d 441, 443 (9th Cir. 1983); In re Combustion Engineering, Inc., 391 F.3d 190, 214-17 (3rd Cir. 2005). Future, contingent or potential adverse pecuniary developments do not suffice. Fondmiller, 707 F.2d at 443; In re Combustion Engineering, Inc., 391 F.3d at 215.

Blixseth, having withdrawn his claims, is no longer a creditor. He has no standing as such to challenge the Bankruptcy Court's re-confirmation of the Third Amended Plan of Reorganization as the Plan has no direct and immediate impact on his property or his rights. The Plan's exculpation clause language neither creates nor imposes any liability on him. He is beyond the ambit of its reach and application. Similarly, Blixseth can claim no immediate adverse effect upon his property or his pecuniary interests by reason of any compliance or non-compliance with Bankruptcy Rule 9019 in the approval of the Settlement Term Sheet as he is not a creditor.

Consideration of any issue related to the motion denominated "Motion for Relief from Order Confirming Third Amended Plan of Reorganization" filed November 30, 2010, and characterized in Blixseth's brief as a Rule 60(b) motion is, by definition, dependent upon standing to claim capacity to assert the issue in the first instance. That standing is absent. Neither how the Bankruptcy Court addressed the matters asserted in the motion, nor how it resolved them, resulted in a present adverse affect on Blixseth's pecuniary interests.

CONCLUSION

Blixseth lacks standing to challenge the Bankruptcy Court's Memorandum of Decision and Order of September 30, 2011.

ORDER

This appeal is DISMISSED.

DATED this 6th day of March, 2013.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY L. BLIXSETH, Appellant, v. YELLOWSTONE MOUNTAIN CLUB, LLC; YELLOWSTONE CLUB CONSTRUCTION COMPANY, LLC; YELLOWSTONE DEVELOPMENT, LLC, Debtors - Appellees, BRIAN A. GLASSER, Esquire, Trustee of Yellowstone Club Liquidating Trust, Appellee, BLUE SKY RIDGE, LLC, Debtor - Appellee, CROSS HARBOR CAPITAL PARTNERS, LLC; CREDIT SUISSE, Appellees.	No. 13-35190 D.C. No. 2:11-cv-00065-SEH MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

YELLOWSTONE MOUNTAIN CLUB, LLC; YELLOWSTONE CLUB CONSTRUCTION COMPANY, LLC; YELLOWSTONE DEVELOPMENT, LLC, Debtors - Appellants, BRIAN A. GLASSER, Esquire, Trustee of Yellowstone Club Liquidating Trust, Appellant, BLUE SKY RIDGE, LLC, Debtor - Appellant, CROSS HARBOR CAPITAL PARTNERS, LLC, Appellant, v. TIMOTHY L. BLIXSETH, Appellee.	No. 13-35245 D.C. No. 2:11-cv-00065-SEH

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted August 4, 2014
Pasadena, California

Before: KOZINSKI, PAEZ, and BERZON, Circuit Judges.

Appellant Timothy L. Blixseth ("Blixseth") appeals the district court's order dismissing, for lack of

appellate standing, his appeal from the bankruptcy court's order confirming the Third Amended Plan of Reorganization ("the Plan"). In a cross-appeal, Yellowstone Mountain Club, LLC, et al. ("the Debtors") argue that the district court erred in denying their motion to dismiss Blixseth's appeal on grounds of equitable mootness. We reverse in part, affirm in part, and remand.

(1) To have standing to appeal an order of the bankruptcy court, an appellant must show he is a "person aggrieved" – that is, that he is "directly and adversely affected by the order of the bankruptcy court – that it diminish the appellant's property, increase its burdens, or detrimentally affect its rights." *Motor Vehicle Casualty Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 884 (9th Cir. 2012). One need not be a creditor of the estate to be a person aggrieved. *See*, *e.g.*, *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442 (9th Cir. 1983).

The exculpation clause strips Blixseth of identifiable, affirmative legal claims, which are property. Called "choses in action" at common law, they have potential economic value. *See C.I.R. v. Banks*, 543 U.S. 426, 435-36 (2005); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *United States v. Stonehill*, 83 F.3d 1156, 1159 (9th Cir. 1996). Blixseth is therefore directly and adversely affected pecuniarily by the order confirming the Plan and so has standing to appeal it. *See In re Thorpe*, 677 F.3d at 884. Accordingly, we REVERSE the district court's order dismissing Blixseth's appeal for lack of standing.

(2) Equitable "[m]ootness is a jurisdictional issue which [this Court] review[s] de novo." *Baker & Drake, Inc. v. Pub. Serv. Comm'n of Nev. (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351 (9th Cir. 1994). Considerations in determining whether an appeal of an order confirming a reorganization plan is equitably moot include: whether the party seeking relief has diligently sought a stay; whether the plan has been substantially consummated; and whether the rights of third parties have intervened. *In re Thorpe*, 677 F.3d at 880. Of particular relevance is "whether the bankruptcy court can [still] fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court." *Id.*; *see also Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006 (9th Cir. 1993).

Blixseth did not seek a stay in this Court, and the Plan has been substantially consummated. Whether Blixseth's appeal as to the propriety of the exculpation clause is equitably moot thus depends on whether the bankruptcy court can still fashion effective and equitable relief short of vacating the Plan, an inquiry the district court did not undertake in denying the Debtors' motion to dismiss Blixseth's appeal as equitably moot.

We hold Blixseth's appeal as to the exculpation clause is not equitably moot, because it is apparent that one or more remedies is still available. *See In re Thorpe*, 677 F.3d at 880.

We therefore AFFIRM, albeit on different grounds, the district court's conclusion that Blixseth's challenge

to the exculpation clause is not equitably moot. We REMAND with instructions to consider Blixseth's challenges to the exculpation clause in the first instance.

(3) As to Blixseth's arguments that the bankruptcy court erred in approving the Settlement Term Sheet and in denying Blixseth's Rule 60(b) motion for relief from the Confirmation Order and that Blixseth is therefore entitled to be restored to the "*status quo ante*," his appeal is equitably moot. The relief Blixseth seeks as to these issues would require unraveling the Plan entirely. Because the Plan has been substantially consummated, it is not now possible to give Blixseth the broad remedies he seeks "without knocking the props out from under the Plan." *See In re Thorpe*, 677 F.3d at 880. His appeal as to these issues is therefore equitably moot.

The parties shall bear their own costs on appeal.

AFFIRMED in part; REVERSED and REMANDED in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

TIMOTHY L. BLIXSETH, Appellant, vs. YELLOWSTONE MOUNTAIN CLUB, LLC, YELLOWSTONE DEVELOPMENT, LLC, BIG SKY RIDGE, LLC, YELLOWSTONE CLUB CONSTRUCTION CO., LLC, Appellees,	No. CV-11-65-BU-SEH **MEMORANDUM AND ORDER** On appeal from Bankruptcy Case No. 08-61570-11

This matter is before the Court on remand following the Circuit's determination that Blixseth's appeal as to the exculpation clause of the Third Amended Plan of Reorganization ("the Plan") was not equitably moot. Instruction to this Court "to consider Blixseth's challenges to the exculpation clause in the first instance"[1] was provided. Those challenges have been fully considered and, for the stated reasons which follow, have been resolved.

Whether and when equitable mootness may be invoked to preclude review of an order confirming a

[1] Doc. 134 at 5.

reorganization plan was directly addressed in the Circuit's memorandum of May 1, 2015:

> Equitable "mootness is a jurisdictional issue which [this Court] review[s] de novo. *Baker & Drake, Inc. v. Pub. Serv. Comm'n of Nev. (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351 (9th Cir. 1994). Considerations in determining whether an appeal of an order confirming a reorganization plan is equitably moot include: whether the party seeking relief has diligently sought a stay; whether the plan has been substantially consummated; and whether the rights of third parties have intervened. *In re Thorpe*, 677 F.3d at 880. Of particular relevance is "whether the bankruptcy court can [still] fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court." *Id.*; *see also Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006 (9th Cir. 1993).[2]

The Circuit's memorandum addresses and resolves two of the three significant considerations of equitable mootness contrary to the position asserted by Blixseth: (1) "whether the party seeking relief has diligently sought a stay,"[3] Blixseth sought no stay in the district court. None was requested in the Circuit;[4] and, (2) "whether the plan has been substantially

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[2] Doc. 134 at 4.

[3] Doc. 134 at 4.

[4] Doc. 134 at 4.

consummated."[5] To this latter consideration, the Circuit spoke directly – "[T]he plan has been substantially consummated[.]"[6]

The record before the Bankruptcy Court when it issued its order reconfirming the Plan on September 30, 2011, clearly answered, adversely to Blixseth, the core question in the third consideration of equitable mootness analysis, namely "whether the bankruptcy court [could] still fashion effective and equitable relief short of vacating the Plan."[7]

Judge Kirscher's September 30, 2011, Memorandum of Decision is exhaustive in its detailed description of the efforts expended by the parties in the process of negotiating and reaching resolution of the myriad of issues encompassed by the Plan. The exculpation clause, like the Settlement Term Sheet, was an essential and cornerstone component of the Plan itself.[8] Moreover, absent resolution of the numerous disputes memorialized in the Plan and incorporated in the Settlement Term Sheet, no successful reorganization would have been feasible. Any upset or set aside of the exculpation clause or the Settlement Term Sheet would have doomed the Plan itself to failure, and at this juncture, effectively would require that the Plan be vacated and constructed anew, thereby creating "'an uncontrollable situation for the bankruptcy court.'

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[5] Doc. 134 at 4.

[6] Doc. 134 at 5.

[7] Doc. 134 at 4.

[8] *See* discussion, Doc. 1-8 at 32-33, 35.

[*In re Thorpe*, 677 F.3d at 880]; *see also In re Spirtos*, 992 F.2d 1004, 1006 (9th Cir. 1993)."[9] Indeed, as the Circuit's Memorandum of May 1, 2015, reflects, issues Blixseth had raised claiming "that the bankruptcy court erred in approving the Settlement Term Sheet and in denying Blixseth's Rule 60(b) motion for relief from the Confirmation Order and that Blixseth [was] therefore entitled to be restored to the 's*tatus quo ante*,'" were rejected for the reason that the relief sought "would [have] require[d] unraveling the Plan entirely."[10] Rejection of the exculpation clause would require that same unraveling of the Plan.

Judge Kirscher's decision adopting and ratifying his approval of the "Memorandum of Decision and order entered June 2, 2009, [and] approving the Settlement Term Sheet and confirming the Debtors' Third Amended Joint Plan of Reorganization" was fully supportable and in compliance with all requirements of law.[11] All unresolved claims advanced by Blixseth in this appeal are barred from assertion by equitable mootness.

ORDERED:

This appeal is DISMISSED.

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[9] Doc. 134 at 4.

[10] Doc. 134 at 5.

[11] Doc. 1-8 at 41.

DATED this 23rd day of March, 2016.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge