

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re) Case No. 13-02354-B
Kahn Family, LLC) Chapter 11
) ORDER ON PLAN RELEASE
Debtor(s))

Before the Court is the Hearing on Confirmation of the Amended Plan filed by the Debtor in Possession on June 27, 2014, as modified on July 23, 2014, and August 26, 2014. The United States Trustee filed a Limited Objection to the Mutual Releases and Exculpation Provision contained in the Plan. These Mutual Releases affect the Debtor in this case, the Debtor in a related case, Alan B. Kahn, Case Number 13-02351-B ("Alan Kahn"), the Debtor in a related case, Kahn Properties South, LLC, Case Number 13-02355-B ("Kahn Properties"), as well as the following nondebtor parties: Charlotte S. Kahn, Charles B. Kahn, Kevin A. Kahn, and Monique B. Kahn (Collectively "Kahns") who are the Wife and Children of Alan Kahn respectively; Gibraltar BB4, LLC ("Gibraltar") a Creditor of the Debtor which purchased the debts of the original lender, BB&T. The Exculpation Provision encompasses acts in relation to the bankruptcy case by certain parties.

Findings of Fact¹

¹ To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the following conclusions of law constitute findings of fact, they are so adopted.

1. On April 22, 2013, the Debtor filed a voluntary petition under Chapter 11. (Docket # 1). On that same date, Alan Kahn and Kahn Properties filed petitions for relief under Chapter 11. The three cases, though related, were never jointly administered or substantively consolidated. No Unsecured Creditors' Committee was appointed.
2. The Debtor owns or manages thirty-seven entities. Amended Disclosure Statement page 4. Docket # 128. Debtor owns 85% of related Debtor Kahn Properties South, LLC. Kahn Properties South, LLC, Amended Disclosure Statement page 11. Docket # 148.
3. Alan Kahn is the Managing Member of the Debtor and serves in managerial capacities for other entities owned or managed by the Debtor. Amended Disclosure Statement page 4. Docket # 128. Alan Kahn has agreed to manage the Debtor post-confirmation without compensation. Amended Disclosure Statement page 20. Docket # 128.
4. On December 18, 2013, Gibraltar filed a Motion to Appoint a Chapter 11 Trustee ("Trustee Motion") in the individual case only. Docket # 81. Objections were filed by Alan Kahn, and several creditors including some of Alan Kahn's Family Members. Docket #86, 88, 91, 94, 96, 98. On March 28, 2014, the Court held a hearing on the Trustee Motion and after hearing and receiving evidence took the matter under advisement.
5. Alan Kahn, as Managing Member of the Debtor, and the Debtor's Attorney were concerned about the impact the

appointment of a Trustee in his personal case would have on the operations and reorganization of the Debtor.

6. The parties requested the Court defer ruling on the Trustee Motion, and over the ensuing months, the parties negotiated a settlement agreement addressing not only Gibraltar's Trustee Motion, but also payment of \$2,000,000 on Gibraltar's Claims in Plans to be proposed in the three Bankruptcy cases and a future additional payment of \$1,250,000 by the Kahns directly to Gibraltar. The Kahns did not have independent debts to Gibraltar, but voluntarily obligated themselves to pay Gibraltar in order to obtain a settlement on behalf of Alan Kahn. As part of the Mutual Releases, Gibraltar also demanded the Debtor, Alan Kahn, and Kahn Properties agree to a Mutual Cooperation Clause including, but not limited to, the execution of certain documents. In exchange for these payments and the Mutual Cooperation Clause, Gibraltar agreed to withdraw its Trustee Motion, agreed to support the reorganization efforts of the three related Debtors, and vote its unsecured claim of \$1,437,079.33 in favor of any Plan of the Debtor which provided for such payments and to do the same with its claims in the other two related cases. Gibraltar also agreed to release any claim Gibraltar may have against "Alan Kahn, Kahn Family LLC, Kahn Properties South, LLC, the Kahn Family Members, or persons and entities related to Alan Kahn arising from or in connection with the BB&T Loans or the Gibraltar Claims." Gibraltar also agreed to "assign all right title and interest under the BB&T Loan Documents and the Gibraltar Claims and any right to further payments under the BB&T Loan Documents and the Gibraltar Claims" to the Kahns.

Gibraltar also demanded some of the Mutual Release Language and the Mutual Cooperation Clause be included in the Amended Plans of Reorganization to be filed by Alan Kahn, Kahn Properties, and the Debtor. All three Debtors and the Kahns also demanded the Mutual Releases and Plans provide: "Each of the Chapter 11 Plans shall provide for treatment of the Gibraltar Claims which is neither less favorable, nor more favorable than the treatment and payment of other non-priority unsecured creditors under that Chapter 11 Plan." The Kahns also agreed to "release Gibraltar, its members, officers, employees, agents representatives, successors, assigns and affiliates (the 'Gibraltar Releasees') from all claims, demands, accounts, duties, damages, losses, expenses, costs, debts, obligations, causes of action and remedies therefor, choses in action, rights of indemnity and liability of any kind or nature whatsoever, whether known or unknown, suspected or unsuspected, which the Kahn Family Members, either individually or collectively, may have, may have had or might have had against the Gibraltar Releasees, and which in any manner arise out of, relate to or are based upon the BB&T Loans, the BB&T Loan Documents, the Gibraltar Claims, the Chapter 11 Cases or the issues raised in connection with the Motion for Appointment of Trustee, or which could have been raised or addressed in connection with the Motion for Appointment of Trustee" The Mutual Releases were executed by the Parties on June 18, 2014.

7. The Mutual Releases do not purport to bar any party but Gibraltar or the Kahns from pursuing any party and then only one as to the other. There is no provision in the Mutual Releases which prevents any other Creditor in the

Bankruptcy Case from pursuing Gibraltar, or any family member of Alan Kahn, or any officer or employee of the Debtor, or any nondebtor entity related to, or owned by, the Debtor.

8. On June 27, 2014, the Debtor filed an Amended Disclosure Statement (Docket #128) and an Amended Plan (Docket #129). The Amended Plan contained two paragraphs enumerated Article XI setting forth a portion of the Mutual Releases of Gibraltar and the Kahns and Article X setting forth the Mutual Cooperation Clause. The Amended Plan also provided for 100% payment to non-insider unsecured claims and for extinguishment of the equity interests. On July 24, 2014, the Court entered an Order Approving the Amended Disclosure Statement and setting the deadlines for filing Ballots and Objections to Confirmation. (Docket # 138). The Debtor served the required documents on all parties entitled to notice.
9. The Amended Plan (Docket #129) also contained an Exculpation Provision in Article X which stated as follows:
Releases.
On the Effective Date, the Debtor will release unconditionally, and hereby is deemed to release unconditionally (i) each of the Debtor's employees, consultants, attorneys, accountants, financial counsels, directors, shareholders, employees, consultants and attorneys, from any and all claims, obligations, suits, judgments, damages, rights, causes of action and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising in law, equity or otherwise, based on whole or in part upon any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to KF or the Plan.
10. On July 23, 2014, the Debtor filed an Addendum to the

Amended Plan which added two classes of secured claims and put the Mutual Releases and Exculpation Provision in bold type. Docket #137.

11. August 21, 2014, the United States Trustee filed a Limited Objection (Docket #145) questioning whether the Mutual Releases and Exculpation Provision were permissible under National Heritage Foundation, Inc. v. Highbourne Foundation, -- F.3d --, 2014 WL 3700582 (4th Cir. July 25, 2014) and if the Mutual Releases and Exculpation Provision were permissible requesting that sufficient evidence be presented to support such releases.
12. On August 26, 2014, the Debtor filed an Amended Addendum to the Amended Plan (Docket #149) which revised the Exculpation Provision to state:

Releases.

Except for acts of gross negligence and/or fraud on the Effective Date, the Debtor will release unconditionally, and hereby is deemed to release unconditionally (I) each of the Debtor's employees, consultants, attorneys, accountants, financial counsels, directors, shareholders, employees, consultants and attorneys, from any and all claims, obligations, suits, judgments, damages, rights, causes of action and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising in law, equity or otherwise, based on whole or in part upon any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to "Debtor" or the Plan.

Emphasis in original.

13. No other Party objected to Confirmation of the Debtor's Amended Plan. Class 1 Creditor, Wells Fargo, holding a non-insider secured claim filed one accepting Ballot totaling \$1,060,000.00. Docket #143. Class 3 Creditor, Gibraltar,

holding non-insider unsecured claims filed three accepting Ballots totaling \$1,437,079.33 (Docket #140) which constituted 100% of the total number and dollar amounts of Class 4 Claims.² A Class 5 Creditor holding an insider unsecured claim filed one accepting Ballot totaling \$6,591,385.11. Docket #142. Class 6 Creditors holding insider unsecured claims filed two accepting Ballots totaling \$4,338,237.02. Docket #146, 147. A Class 8 Creditor holding an insider unsecured claim filed one accepting Ballot totaling \$14,813,902.36. Docket #144. No Party filed a Rejecting Ballot. Class 2 consisting of priority claimants which Debtor did not believe existed did not cast a Ballot. Class 4 unsecured trade creditors did not cast Ballots. Class 7 consisting of the CASC, LLC did not cast a Ballot. Class 9 Equity Interests did not cast a Ballot. Class 10 Secured Creditor Regions Bank did not cast a Ballot. Class 11 Secured Creditor Standard Life did not cast a Ballot. See Ballot Tally. Docket #148.

Discussion and Conclusions of Law

I

A Bankruptcy Court ordinarily should not confirm a plan that permanently prohibits creditors from employing legal action

² 11 U.S.C. 1126(c) states: "A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan."

against nondebtor parties or that seeks to discharge obligations of nondebtor parties. See, Behrmann v. National Heritage Foundation, 663 F.3d 704, 712 (4th Cir. 2011) ("[W]e agree with Appellants that approval of nondebtor releases in this context should be granted cautiously and infrequently."); In re Metro media Fiber Network, Inc., 416 F.3d 136, 141 (2nd Cir. 2005) ("While none of our cases explains when a nondebtor release is 'important' to a debtor's plan, it is clear that such a release is proper only in rare cases."); In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004) (Bankruptcy Court and District Court erred in confirming plan which artificially impaired class of "stub claims" of asbestos claimants who participated in pre-petition settlement process that paid most of their claims and impermissibly encouraged stub claimants to override votes of those who were not entitled to participate in the pre-petition settlement process. Court also held neither § 105(a) nor § 524(g) permitted channeling injunction over independent, non-derivative third-party actions against nondebtor related companies.); Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203 (3d Cir. 2000) ("Considering the instant appeal in the context of the case law we have reviewed, we conclude that the provision in the Continental Debtors' plan releasing and permanently enjoining Plaintiffs' lawsuits against the nondebtor D&O defendants does not pass muster under even the most flexible tests for the validity of nondebtor releases. The hallmarks of permissible nonconsensual releases-fairness, necessity to the reorganization, and specific factual findings to support these conclusions-are all absent here."); United States v. Prescription Home Health Care, Inc. (In re Prescription Home Health Care, Inc.), 316 F.3d 542 (5th Cir. 2002) (Bankruptcy Court did not have jurisdiction to confirm a Chapter 11 Plan that enjoined IRS from assessing responsible

person penalty against Debtor's President while Debtor was current in payments under plan); In re PWS Holding Corp., 303 F.3d 308 (3d Cir. 2002); Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985); Union Carbide Corp. v. Newboles, 686 F.2d 593 (8th Cir. 1982) (*per curiam*); Copelin v. Spirco, Inc., 182 F.3d 174 (3d Cir. 1999) (In holding confirmation of Chapter 11 Plan did not discharge obligation of nondebtor parent corporation to former officer, the court stated, "Generally, independent obligations of a parent corporation are not discharged by its subsidiary's bankruptcy absent a general discharge provision.").

However, "under appropriate, limited circumstances a bankruptcy court has the power to issue a permanent injunction or third party release." In re Master Mortgage Inv. Fund, Inc., 168 B.R. 930 (Bankr. W.D. Mo. 1994) (Approving permanent injunction protecting third party which substantially contributed to the Plan). See, In re Ingersoll, Inc., 562 F.3d 856 (7th Cir. 2009) (Court of Appeals approved provision in Debtor's confirmed Chapter 11 plan which allegedly released Debtor's management from liability to non-creditor parties on any claims arising out of two specific prepetition suits since the release provision was critical to the Plan as a whole; the release acted to bar claims by law firm that had represented them in one of the named lawsuits. The Court of Appeals held ordinarily a release protecting a nondebtor party from claims by parties which were not creditors of the debtor would not be approved but would be approved under the "unique circumstances of this case."); In re Specialty Equip. Co., 3 F.3d 1043 (7th Cir. 1993) (Section 524(e) "does not purport to limit or restrain the power of a bankruptcy court to otherwise grant a release of third parties."); In re A.H. Robins Co., 880 F.2d 694, 702 (4th Cir. 1989) cert. denied, 493 U.S. 959, 110 S.Ct.

376 (1989) ("[W]e do not construe §524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits."); Republic Supply Co. v. Shoaf, 815 F.2d 1045, 1050 (5th Cir. 1987); In re Connector 2000 Association, Inc., 447 B.R. 752, 769 (Bankr. D.S.C. 2011) (Duncan, J.) (The Court approved Chapter 9 Plan Injunctions and Releases protecting third parties stating: "Thus, each of the release, injunction, exculpation and discharge provisions set forth in the Plan: (a) is within the jurisdiction of the Bankruptcy Court under 28 U.S.C. §§ 1334(a) and 1334(b); (b) is an essential means of implementing the Plan; (c) is an integral element of the settlements and transactions incorporated into the Plan; (d) is fair, equitable, appropriate, and reasonable; (e) confers material benefits on, and is in the best interests of, the Debtor and its creditors; (f) is important to the overall objectives of the Plan to finally resolve all claims among or against the parties-in-interest in this case with respect to the Debtor; and its organization, operation and reorganization; and (g) is consistent with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules. The record of the Confirmation Hearing and this case is sufficient to support the release, injunction, exculpation and discharge provisions contained in Article V of the Plan, and Article V of the Plan is hereby specifically approved."); In re Joe Gibson Automotive, Inc., 08-04216-B (Bankr. D.S.C. 6/30/09) (HB) (Chapter 11 Debtor filed Plan which proposed releases of various obligations of third parties which contributed to the Plan. An unsecured creditor objected arguing that if one of the contributing parties received protection, the unsecured creditor's ability to pursue its guaranty against the principal of the Debtor would be compromised. The Court held the Fourth Circuit, unlike some other circuits, had "adopted the 'permissive view on non-debtor

releases of direct claims The 'permissive view' courts generally hold that a bankruptcy court has the power to release non-debtor third parties under certain circumstances, even if there are certain creditors who object to the non-debtor releases." Citations omitted.).

On the first appeal in the National Heritage Foundation case, the Fourth Circuit Court of Appeals in remanding to the Bankruptcy Court the issue of the confirmation of a Plan which contained a Third Party Release Provision stated:

We find the Dow Corning and In re Railworks Corp. factors instructive and so commend them to a bankruptcy court when considering whether to approve nondebtor releases as part of a final plan of reorganization. That said, we agree with Appellants that approval of nondebtor releases in this context should be granted cautiously and infrequently Thus, while we are satisfied to leave to a bankruptcy court the determination of which factors may be relevant in a specific case, the meaningful exercise of appellate review at a minimum requires that the court make specific factual findings in support of its decision to grant equitable relief.

In this case, although the bankruptcy court did not explicitly state that it was applying the Dow Corning factors, it clearly considered the case in deciding whether to approve the Release Provisions. We find, however, that the bankruptcy court's ultimate decision to grant equitable relief lacks adequate factual support. Put simply, to conclude, as the bankruptcy court did, that the Release Provisions (1) were "essential" to NHF's reorganization and appropriate given NHF's "unique circumstances"; (2) were an "essential means" of implementing the confirmed plan; (3) were an "integral element" of the transactions contemplated in the Confirmed Plan; (4) conferred a "material benefit" on NHF, its bankruptcy estate and its creditors; (5) were "important" to the plan's overall objectives; and (6) were "consistent" with applicable provisions of the Bankruptcy Code, is meaningless in the absence of specific factual findings explaining why this is so. Indeed, without more, the court's conclusions could apply just as well to any number of reorganizing debtors. Because the present record does not allow us to assess—under any standard of review—whether NHF's circumstances entitle it to the benefit of the Release Provisions, we must vacate the district court's

judgment and remand the case to allow the bankruptcy court— if the record permits it—to set forth specific factual findings supporting its conclusions.

Behrmann v. National Heritage Foundation, 663 F.3d at 712-13.

The National Heritage Foundation Plan Third Party Release protected the Debtor; the Official Committee of Unsecured Creditors (the "Committee") and its Members; any designated representatives of the Committee; any officers, directors, or employees of the Debtor, the Committee, or their successors and assigns (collectively, the "Released Parties"). The Release Provision provided that the Released Parties:

shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to any party in interest who has filed a claim or who was given notice of the Debtor's Bankruptcy Case (the "Releasing Parties") for any act or omission before or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the operation of the Debtor's business, except to the extent relating to the Debtor's failure to comply with its obligations under the Plan.

On remand, a different Bankruptcy Judge in National Heritage Foundation held the Third Party Release Provision releasing the Debtor's officers, directors, employees and the Unsecured Creditor's Committee for acts arising out of operation of the Debtor's business before the filing of the petition and up to the effective date of the Plan should not be approved, because the evidence presented only satisfied one of the six Dow Corning factors; the Debtor appealed. On the second appeal, the Fourth Circuit affirmed the Lower Court Orders finding the Third Party Release Provisions unenforceable since the Release only satisfied one of the six Dow Corning factors. The Fourth Circuit Court of Appeals also held the Bankruptcy Court did not err in approving an Injunction enforcing a separate Exculpation Provision barring suits against the Debtor's officers, directors and the

Unsecured Creditor's Committee for acts or omissions in connection with the bankruptcy. National Heritage Foundation, Inc. v. Highbourne Foundation, 2014 WL 3700582 at 1, n. 2.

The Mutual Release Provisions in the instant case do not purport to bar non-consenting parties from pursuing nondebtor parties as in the National Heritage Foundation case. The Mutual Release Provisions in the instant case are more akin to a normal release that parties execute after negotiating a settlement. For this reason, National Heritage Foundation does not seem applicable.

Even though National Heritage Foundation may not be applicable, it is still prudent for the Court to examine the factors set forth in that case to determine whether those factors are relevant in deciding if the Mutual Releases in the instant case may be confirmed as a portion of the Debtor's Plan.

II

A

With respect to the first factor -identity of parties - the usual inquiry is whether the Debtor would be required to indemnify the third parties benefitting from the Third Party Release Provisions. In this case, the Debtor has no contractual obligation to indemnify the Kahns or Gibraltar. Nevertheless, none of the other Creditors are being barred from pursuing independent obligations owed by the Kahns or Gibraltar. This factor is neutral in the analysis.

B

With respect to the second factor - substantial contribution of assets to the reorganization by the protected

third parties - the Fourth Circuit Court of Appeals held the nondebtor parties to be protected should make "a cognizable and valid contribution to the debtor as part of the debtor's reorganization." National Heritage Foundation, Inc. v. Highbourn Foundation, 2014 WL 3700582 at 3. In discussing the sufficiency of the non-monetary contribution of continuing Board service by the insiders and not dismissing that type of contribution outright, the Court of Appeals seemed to leave open the possibility non-monetary contributions could be "cognizable and valid" so as to satisfy this requirement. The Kahns in this case have voluntarily assumed an obligation of \$1,250,000 to Gibraltar in order to facilitate the settlement. While these funds were not paid to the Debtor or the Debtor's Estate, the Debtor has benefitted from the Kahns' assumption of a liability which they did not have to incur. Gibraltar has agreed to forego its right to pursue the appointment of a Chapter 11 Trustee and other litigation against the Manager of the Debtor in his case, and possible actions against the Debtor and the related Debtor, Kahn Properties. While the Trustee Motion was not filed in the Debtor's case but in the case of the Debtor's Manager, Alan Kahn, the Debtor and Alan Kahn were concerned about how the appointment of a Chapter 11 Trustee in the Alan Kahn case would impact the Debtor's case especially in light of a recent opinion in this District which stated:

On the Petition Date, the Debtor's rights and powers as Manager of the Pavilack LLCs became property of the estate. "Once a managing member's interest in a limited liability company becomes part of the bankruptcy estate, the trustee is free to use, sell or lease that property pursuant to [] § 363(1)." In re Hickory Ridge, LLC, No. 07-1251, 2010 WL 1727968, at *6 (Bankr. N.D.W. Va. April 27, 2010). Likewise, even if Debtor was only a Member on the Petition Date, the Trustee succeeded to all of Debtor's rights as a Member in the Pavilack LLCs and, under § 363(1), he has "the use and benefit of its interest in the LLC and has the right to continue as a member of the LLC." Bensusan v.

Prebul (In re Prebul), C/A No. 09-14010, Adv. Pro. 09-1139, 2011 WL 2947045, at 11 (Bankr. E.D. Tenn. July 19, 2011) (citations omitted). **Therefore, the Trustee succeeded to all of Debtor's rights as a Manager, Member, and Liquidator of the Pavilack LLCs pursuant to the terms of the Operating Agreements and the Resolutions executed by the Trustee on or after the Petition Date. Furthermore, the Trustee is subject to all other provisions of the Operating Agreements which are not limited by the Bankruptcy Code and may exercise his rights as Manager, Member, and Liquidator of the Pavilack LLCs, as provided by the Operating Agreements and, if applicable, the SC LLC Act.**

In re Pavilack, 10-06503-W, Slip op. at 4-5 (Bankr. D.S.C. 11/2/12) (JW) (Footnotes omitted) (Emphasis added). See also, In re Antonelli, 92-2541 (4th Cir. 8/23/93) (Unpub.) (When general partner filed bankruptcy, "[b]oth the economic interest in the partnerships and the right to participation in the management of the partnerships' affairs vested in the estate.").

In National Heritage Foundation, the Released Parties did not make any financial contribution and did not even promise to continue to serve on the Board of the Debtor; in this case the Debtor's Amended Disclosure Statement stated Alan Kahn would continue to serve as the Manager of the Debtor without compensation. This factor favors the approval of the Mutual Releases in this case.

C

With respect to the third factor - the release is essential to the reorganization - Gibraltar and the Kahns both demanded the Mutual Releases be executed, and Gibraltar demanded the Mutual Releases be included in all three Amended Plans of Reorganization in the three related cases. As discussed above, Gibraltar's Class 3 Ballot was necessary for that Class to accept the Amended Plan under 11 U.S.C. §1126(c). Furthermore, the Kahns' voluntary contribution of \$1,250,000 directly to

Gibraltar as part of the settlement of the Trustee Motion was essential to the agreement of the parties. Without the payment by the Kahns and the cooperation of Gibraltar, it is unlikely a Plan of Reorganization would have been confirmed in the Alan Kahn case and instead liquidation would have been the probable outcome in his case. As discussed above, in light of the Pavilack case, the impact of the appointment of a Chapter 11 Trustee in the Alan Kahn case could have led to the Alan Kahn Trustee using his managerial rights in the Debtor to convert the Debtor's case to Chapter 7 or liquidate the Debtor in Chapter 11. Furthermore, unlike the "vague" possibility of Donor suits against insiders in National Heritage Foundation, Gibraltar had already filed and prosecuted its Trustee Motion. This factor favors the approval of the Mutual Releases in this case.

D

The fourth factor is whether the affected class overwhelmingly supports the Plan. If any Classes are likely to be affected by the Mutual Releases, those Classes would be: Class 1 the Wells Fargo non-insider Secured Claim; Class 4 the non-insider unsecured trade claims; Class 6 Insiders; Class 7 CASC, LLC; Class 8 Kahn Development Company insider claim; Class 10 non-insider Secured Creditor Regions Bank; Class 11 non-insider Secured Creditor Standard Life. Classes 1, 6 and 8 all voted unanimously to accept the Plan. Furthermore, in National Heritage Foundation, the affected Class of Donors was deemed to have accepted the Plan under 11 U.S.C. 1126(f)³ and was not

³ 11 U.S.C. §1126(f) states: "Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of

permitted to vote on the Plan. In National Heritage Foundation, the only accepting impaired class was a Class of "allowed Annuitant claims under Class III(B), and not ... any of the disallowed Donor claims." In re National Heritage Foundation, Inc., 478 B.R. 216, 230 (Bankr. E.D. Va. 2012) aff'd sub nom. National Heritage Foundation, Inc. v. Behrmann, 2013 WL 1390822 (E.D. Va. Apr. 3, 2013) aff'd sub nom. National Heritage Foundation, Inc. v. Highbourne Foundation, -- F.3d --, 2014 WL 2900933 (4th Cir. June 27, 2014) on reh'g, 2014 WL 3700582 (4th Cir. July 25, 2014) and aff'd sub nom. National Heritage Foundation, Inc. v. Highbourne Foundation, -- F.3d --, 2014 WL 3700582 (4th Cir. July 25, 2014). In fact the thousands of donors were discouraged from participating in the National Heritage Foundation case. See, National Heritage Foundation, Inc. v. Highbourne Foundation, 2014 WL 3700582 at 6 (Debtor's "disclosure statement provided that NHF would object to any donor-filed claims and that 'Donors are not creditors of the Debtor and will have no rights to vote or reject the Debtor's Plan or receive Distributions under the Plan.'"). This factor favors the approval of the Mutual Releases in this case.

E

With respect to the fifth factor - a mechanism to pay all or substantially all of the affected classes - the Amended Plan proposes to pay 100% to the unsecured affected classes. Most of the other affected classes voted in favor of the Amended Plan and no affected classes objected to the Amended Plan or voted against the Amended Plan. This factor favors the approval of the Mutual Releases in this case.

claims or interests of such class is not required."

F

With respect to the sixth factor - an opportunity for claimants not participating in the settlement to recover in full - the Amended Plan does not have a provision to pay affected claims outside of the bankruptcy proceedings. The Mutual Releases, however, do not seek to limit the liability of unrelated third parties but are releases between the Kahns and Gibraltar; between the Debtor, Alan Kahn, and Kahn Properties and Gibraltar. Unlike the Third Party Releases in National Heritage Foundation, the Mutual Releases are not intended to "'preclud[e] any recovery from third party sources outside of the Plan.'" National Heritage Foundation, Inc. v. Highbourne Foundation, 2014 WL 3700582 at 6. The Mutual Releases do not prevent any other creditor in the Bankruptcy Case from pursuing Gibraltar, or any officer, employee, or Manager of the Debtor, or any nondebtor entity related to, or owned or managed by, the Debtor, or any family member of Alan Kahn. This factor is neutral in the analysis.

Also relevant to this discussion is that the Manager of the Debtor, Alan Kahn, is himself a Chapter 11 Debtor who will be eligible for a discharge upon satisfaction of the requirements of 11 U.S.C. §1141(d). Thus, one of the main beneficiaries of any release or Exculpation Provision may well receive a discharge which may render any protection from the Mutual Releases in the Debtor's Amended Plan superfluous.

This factor is neutral in the analysis.

G

In summary, the six factor Dow Corning test, shows two factors are neutral, and four are favorable to approving the

Mutual Releases. While this could be deemed conclusive, further examination of the Mutual Releases is beneficial.

III

In addition to the Dow Corning six factor test, the Fourth Circuit Court of Appeals favorably referred to the following factors set forth in In re Railworks Corp., 345 B.R. 529, 536 (Bankr. D. Md. 2006), as also being helpful: (1) overwhelming approval for the plan; (2) a close connection between the causes of action against the third party and the causes of action against the debtor; (3) that the injunction is essential to the reorganization; and (4) that the plan of reorganization provides for payment of substantially all of the claims affected by the injunction.

A

As discussed above, the unanimous approval of the Debtor's Amended Plan and the large dollar amount of the affected Claims involved in that approval indicate the first factor is favorable to approving the Mutual Releases.

B

As discussed above, the Debtor has no contractual obligation to indemnify the Kahns or Gibraltar. None of the other Creditors, however, are barred from pursuing independent obligations owed by the Kahns or Gibraltar. This factor is neutral in the analysis.

C

As discussed above, both the Kahns and Gibraltar demanded the Mutual Releases be signed, and Gibraltar demanded the Mutual Releases be included in all three of the Amended Plans filed by

the three related Debtors. Without the payment by the Kahns and the cooperation of Gibraltar, it is unlikely a Plan of Reorganization would have been confirmed in the Alan Kahn case, and instead liquidation would have been the probable outcome in his case with possible negative impact on the Debtor's case. This factor favors the approval of the Mutual Releases in this case.

D

As discussed above, the Amended Plan proposes to pay 100% to the unsecured affected classes and most of the other affected classes voted in favor of the Amended Plan, and no affected Classes objected to the Amended Plan or voted against the Amended Plan. This factor favors the approval of the Mutual Releases in this case.

E

In summary, the four factor Railworks Corp. test, shows one factor is neutral, and three are favorable to approving the Mutual Releases.

IV

Despite referring to the specific factors set forth by other courts, the Fourth Circuit of Appeals is "satisfied to leave to a bankruptcy court the determination of which factors may be relevant in a specific case." Behrmann v. National Heritage Foundation, 663 F.3d at 712. Significantly, while the bankruptcy court appears to have discretion as to the factors it deems relevant to a specific case, the court is required to "make specific factual findings in support of its decision to grant equitable relief." Id. Furthermore, it is not sufficient to summarily conclude the release provisions are "essential,"

"important," "integral," "material," or the like, as such conclusions are "meaningless in the absence of specific factual findings explaining why this is so." Id. This leeway is granted to bankruptcy courts so to permit them to do equity when it is needed and warranted. As stated in Behrmann v. National Heritage Foundation, 663 F.3d at 711:

In our view, however, a bankruptcy court need not find a precise fit between the circumstances found in A.H. Robins and the case before it as a precondition to granting equitable relief. Rather, whether a court should lend its aid in equity to a Chapter 11 debtor will turn on the particular facts and circumstances of the case.

In this case the following reasons support the approval of the Amended Plan and in particular the Mutual Releases. The Mutual Releases are akin to those executed by a bankruptcy estate and a defendant sued by the estate, or even mutual releases executed by parties to a non-bankruptcy lawsuit or potential lawsuit. The Mutual Releases in this case do not purport to bar any party but Gibraltar or the Kahns from pursuing any party and then only one as to the other. There is no provision in the Mutual Releases which prevents any other Creditor in the Bankruptcy Case from pursuing Gibraltar, or any family member of Alan Kahn, or any officer or employee of the Debtor, or any nondebtor entity related to, or owned or managed by, the Debtor. Furthermore, the Kahns' payment to Gibraltar does not involve money of the Debtor but is a voluntary assumption of a heretofore non-existent obligation by them in order to facilitate confirmation of the Amended Plans of the three related Debtors - all of which benefit the other Creditors. The treatment which Gibraltar receives under the Plan is the same as other unsecured creditors; the treatment which the Kahns and other insiders receive under the Plan on their unsecured claims is less favorable than that of the other

unsecured creditors so the alleged beneficiaries of the Mutual Releases are not receiving any disproportionate benefit. Whether Gibraltar's demand that the Mutual Releases be included in the Amended Plans of the three related Debtors was advisable or not, Gibraltar demanded such, and confirmation of the Amended Plans of the three related Debtors is at risk if the Mutual Releases are not made part of the Confirmed Plan. The appointment of a Chapter 11 Trustee in Alan Kahn's case may have caused him to stop trying to reorganize in his case, or assist with the reorganizations in the cases of the two related Debtors, and may have resulted in Alan Kahn's Trustee using his managerial powers to liquidate the Debtor. Finally there is overwhelming support for the Amended Plan by the potentially affected parties and substantial payment to them.

V

The Debtor and the United States Trustee agree the Amended Exculpation Provision should be further amended to read as follows:

Releases.

Except for willful or intentional acts, or acts of gross negligence and/or fraud, on the Effective Date, the Debtor will release unconditionally, and hereby is deemed to release unconditionally (I) each of the Debtor's employees, consultants, attorneys, accountants, financial counsels, directors, shareholders, employees, consultants and attorneys, from any and all claims, obligations, suits, judgments, damages, rights, causes of action and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising

in law, equity or otherwise, based on whole or in part upon any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to "Debtor" or the Plan.

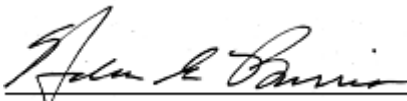
Conclusion

Based on the evidence presented at the Confirmation Hearing as supplemented by the Findings of Fact above, the Court finds the Mutual Releases in the Debtor's Amended Plan of Reorganization and the Exculpation Provision as amended and stated above are hereby approved.

**FILED BY THE COURT
09/15/2014**



Entered: 09/15/2014


US Bankruptcy Judge
District of South Carolina