HEARING DATE: December 10, 2024
HEARING TIME: 10:00 am

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 15
Unigel Participações S.A. *et al.*,	:	Case No. 24-11982 (MG)
Debtors in Foreign Proceeding.	:	(Jointly Administered)

LIMITED OBJECTION OF THE UNITED STATES TRUSTEE TO MOTION FOR RECOGNITION OF FOREIGN MAIN PROCEEDINGS AND REQUEST FOR CERTAIN RELATED RELIEF UNDER CHAPTER 15 OF THE BANKRUPTCY CODE

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**TO THE HONORABLE MARTIN GLENN,
CHIEF UNITED STATES BANKRUPTCY JUDGE**:

William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), hereby respectfully files his limited objection to the Motion for Recognition of Foreign Main Proceedings and Request for Certain Related Relief under Chapter 15 of the Bankruptcy Code (the "Recognition Motion"). ECF No. 5. In support of his objection, the United States Trustee respectfully alleges as follows:

PRELIMINARY STATEMENT[1]

Chapter 15 of the Bankruptcy Code provides for recognition of and cooperation with other countries' bankruptcy schemes. Its primary purpose is to grant comity to foreign court orders as long as they do not conflict with United States public policy. The United States Trustee objects to the proposed Recognition Order because it seeks relief above and beyond the relief that was granted by the Brazilian Court. Further, even if the relief had been granted by the Brazilian Court, to the extent that applicable United States law authorizes exculpation beyond 11 U.S.C. 1125(e), such relief is inconsistent with United States caselaw. Specifically, the proposed Recognition Order contains a broad exculpation provision that if granted would exculpate from liability parties that are not estate fiduciaries and for actions not yet taken. Further, the provision fails to carve out claims for legal malpractice and, for the "Participating Creditors," fails to carve out liability for gross negligence, fraud, bad faith, or willful misconduct.

Chapter 15 does not authorize inclusion of this exculpation provision in the Recognition Order. First, this broad exculpation is not contained in the Brazilian Court Order.[2] Chapter 15 is

1 Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Recognition Motion.
2 In fact, in approving the EJ Plans, the Brazilian Court sustained objections to nonconsensual third-party releases in those plans. Recognition Motion at ⁋ 84. The Brazilian Court ruled that releases of non-debtors (including dismissal

meant to recognize foreign insolvency proceedings – not to embellish upon them. Second, even if the Brazilian Court Order had set forth these broad exculpation provisions, neither section 1521 nor section 1507 of the Bankruptcy Code provides the Court with authority to authorize the exculpation requested. Finally, the Court should decline to include the requested exculpation provision in the Recognition Order under section 1506 because the requested exculpation exceeds the scope of exculpation available in United States bankruptcy cases and thus is 'manifestly contrary to the public policy of the United States' as reflected in current law. For these reasons, as more fully explained below, the United States Trustee respectfully requests the Court deny the aforementioned relief sought in the Recognition Motion.[3]

BACKGROUND

General Background

1. On November 15, 2024 (the "Petition Date"), Andre Luis da Costa Gaia, the foreign representative (the "Foreign Representative") of the Debtors, filed a voluntary petition under Chapter 15 of the Bankruptcy Code for Recognition of Foreign Proceeding in each of the Debtors cases. ECF No. 1.

2. The Debtors produce a diverse portfolio of petrochemicals for the global market. Recognition Motion at ⁋ 1.

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of lawsuits against non-debtors) must be consented to and, therefore, such relief was only granted by Covered Creditors who are signatories to the EJ Plans. *Id*. Thus, the court ruled Sections 11.1, 11.3, 15.10, and 15.11 of the EJ Plans – to the extent they provide releases of third parties – are only enforceable against such Covered Creditors. *Id*.

3 In *In re Avanti Communications,* this Court recognized a UK Scheme that bound non-voting impaired creditors to third party releases. *In re Avanti Commc's Grp.,* PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018). Not only was *Avanti Communications* decided prior to the Supreme Court's decision in *Harrington v. Purdue Pharma, L.P.*, 603 U.S. ___, 144 S. Ct. 2071 (2024) (holding non-consensual third-party releases are not permitted), but the releases in *Avanti Communications* were part of the foreign scheme. Here the Debtors seek relief beyond what was obtained in the Brazilian proceeding for which they seek recognition.

3. On December 11, 2023, the Debtors commenced an administered pre-insolvency Mediation in Brazil before the Câmara Especial de Resolução de Conflitos em Reestruturação de Empresas – CamCMR. *Id*. at ⁋ 61.

4. Through the Mediation the Debtors reached agreement with a sufficient threshold of creditors to implement a transaction pursuant to Brazilian extrajudicial reorganization proceedings. *Id*. at ⁋ 62.

5. On February 20, 2024, the Debtors presented two consensual extrajudicial reorganization (recuperação extrajudicial) plans with the Brazilian Bankruptcy Court (the "Original EJ Plans"). *Id*. The Original EJ Plans were subsequently amended (as modified, the "EJ Plans") reflecting additional terms agreed with creditors. *Id*. at ⁋ 66. The EJ Plans substantially deleverage the Debtors' balance sheets and provide for new capital investments. *Id*. at ⁋ 67.

6. On November 11, 2024, the Brazilian Bankruptcy Court entered an order approving the EJ Plans. *Id*. at ⁋ 82. In approving the EJ Plans, the Brazilian Court sustained objections to nonconsensual third-party releases in those plans. *Id*. at ⁋ 84. The Brazilian Court ruled that releases of non-debtors (including dismissal of lawsuits against non-debtors) must be consented to and, therefore, such relief was only granted by Covered Creditors who are signatories to the EJ Plans. *Id*. Thus, the court ruled Sections 11.1, 11.3, 15.10, and 15.11 of the EJ Plans – to the extent they provide releases of third parties – are only enforceable against such Covered Creditors. *Id*.

The Recognition Motion

7. On November 18, 2024, the Foreign Representative filed the Recognition Motion.

8. The Recognition Motion requests, among other things, that this Court (i) recognize, grant comity to, and give full force and effect in the United States to the Foreign Proceedings, the

EJ Plans, and the Brazilian Orders4 and (ii) give full force and effect in the United States to the restructuring of the Debtors' obligations pursuant to the terms of the EJ Plans, including with respect to the 2026 Notes. *Id*. at ⁋ 126.

9. The Recognition Motion also asks this Court to authorize and direct the Directed Parties[5] to take any and all lawful actions necessary or appropriate to give effect to and implement the EJ Plans and the Brazilian Orders and consummate the transactions contemplated thereunder, including, but not limited to, making distributions of cash, New Money Notes, Restructured Notes, Participating Notes and Holdco Depositary Receipts to parties as contemplated under the EJ Plans or the Brazilian Orders, and effectuating the cancellation and discharge of the 2026 Notes and related documentation. *Id*.

10. The Recognition Motion also seeks to exculpate the Debtors, the Foreign Representative, the Directed Parties, the Participating Creditors[6] and each of their respective current and former officers, directors, managers, predecessors, successors, assigns, principals,

4 The term "Brazilian Orders" is defined in the Recognition Motion as follows: "the decision from the Brazilian Bankruptcy Court commencing the foreign proceedings (the "Brazilian Commencement Order"), and the Plan Approval Order (as defined herein and, together with the Brazilian Commencement Order, the "Brazilian Orders"). *Id*. at ⁋ 6.

5 The term "Directed Parties" is defined in the Recognition Motion as follows: "The Bank of New York Mellon, as trustee for the 2026 Notes and, when issued, the New Money Notes, the New Restructured Notes, and the Participating Notes (each as defined herein) ('BNY'), The Depository Trust Company ('DTC'), including Cede and Co., as nominee of DTC, Unigel Netherlands Holding Corporation B.V. ('HoldCo'), and the Stichting Administratiekantoor Unigel Creditors (the 'STAK'), as holder of all class B shares of HoldCo for which depositary receipts will be issued ('HoldCo Depositary Receipts') (the STAK, collectively with BNY, DTC, and HoldCo, the 'Directed Parties')." *Id*. at ⁋ 6.

6 The term "Participating Creditors" is defined to include Covered Creditors [defined in sections 1.1.16 and 1.1.25 of the EJ Plans as creditors holding claims against the Debtor subject to extrajudicial recognition proceedings] that are signatories to the Backstop Agreement. *Id*. at ⁋87 at 35. Initially the Participating Creditors were not included in the exculpation provision of the Proposed Order annexed to the Recognition Motion. An amended Proposed Order inserting the Participating Creditors was filed on November 26, 2024. ECF No. 16.

members, employees, agents, attorneys, consultants, advisors, other professionals, and representatives, to the maximum extent permitted by law and to the extent not inconsistent with the EJ Plans and the Brazilian Orders, from any liability for any action or inaction taken in accordance with the Recognition Order, the EJ Plans, and the Brazilian Orders. There is an exception to this exculpation provision for the Debtors, the Foreign Representative, or the Directed Parties (or each of their respective officers, directors, managers, predecessors, successors, assigns, principals, members, employees, agents, attorneys, consultants, advisors, other professionals, and representatives)—*but not for the Participating Creditors* (or their respective officers, directors, managers, predecessors, successors, assigns, principals, members, employees, agents, attorneys, consultants, advisors, other professionals, and representatives)—for any liability arising from any action or inaction constituting gross negligence, fraud, bad faith, or willful misconduct, in each case as finally determined by this Court. *Id*. and Proposed Order at ¶ 11.

11. There is no approved provision in the EJ Plans or the Brazilian court orders that provides this broad exculpation. Rather, the exculpation is a new protection sought from this Court in the Recognition Motion.

OBJECTION

As an initial matter, the Court should not enter the Recognition Order as it relates to the broad exculpation provision because it is not contained in the Brazilian Court Order. Chapter 15 is meant to recognize foreign insolvency proceedings—not to embellish upon them, and there is no basis under Chapter 15 to enter relief in the United States that was not entered in the foreign jurisdiction. Moreover, as discussed further below, the Court should refuse to enter the Recognition Order as requested for two additional reasons. First, the Court should not enter the

Recognition Order because the exculpation clause is not relief that is authorized under sections 1507 and 1521. Second, the Court should still deny relief under section 1506 because the requested exculpation exceeds the scope of exculpation available in U.S. bankruptcy cases and thus is 'manifestly contrary to the public policy of the United States' as reflected in current law.

A. The Exculpation Request Does Not Qualify for Relief Under Sections 1507 and 1521

After recognition of a foreign insolvency proceeding, a bankruptcy court is empowered under section 1521 to "grant any appropriate relief" when necessary "to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors."[7]

Section 1521(a) provides:

> Upon recognition of a foreign proceeding, whether main or non-main, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
>
> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
>
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
>
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
>
> (6) extending relief granted under section 1519(a); and

7 11 U.S.C. § 1521(a); *In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1044 (5th Cir. 2012).

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

11 U.S.C. § 1521(a).

In addition, under section 1507(a), a bankruptcy court may provide "additional assistance,"[8] subject to certain factors imposed by section 1507(b) and "consistent with the principles of comity."[9]

"The relationship between [Section] 1507 and [Section] 1521 is not entirely clear." *In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 877 (Bankr. S.D.N.Y. 2021) (quoting *In re Toft,* 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011) (citing In re *Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333 (S.D.N.Y. 2008), *aff'g* 374 B.R. 122 (Bankr. S.D.N.Y. 2007)), *see also Avanti Communications*, 582 B.R. at 615-616 ("The interplay between the relief available under sections 1507 and 1521 is far from clear.").[10] "As the considerations for Sections 1521 and 1507 overlap, courts have debated which standard should apply in a given case." *PT Bakrie Telecom Tbk,* 628 B.R. at 877.

In *In re Vitro,* the Fifth Circuit adopted a three-step framework for analyzing requests for post-recognition relief under chapter 15. *See In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1054 n.23 (5th Cir. 2012); *but see In re Rede Energia S.A.*, 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014) (noting

8 11 U.S.C. § 1507(a); *In re Vitro,* 701 F.3d at 1044.

9 11 U.S.C. § 1507(b)

10 As noted above, in *Avanti Communications*, decided prior to the Supreme Court's decision in *Harrington v. Purdue Pharma, L.P.*, 603 U.S. ___, 144 S. Ct. 2071 (2024) (holding non-consensual third-party releases are not permitted), this Court recognized a UK Scheme that bound non-voting impaired creditors to third party releases. Here the Debtors seek relief beyond what was obtained in the Brazilian proceeding for which they seek recognition.

that it remains to be seen whether the "analysis crafted by the *Vitro* court [as to Sections 1521 and 1507] is embraced by other courts."). Under the *Vitro* court's framework, first, a court should consider whether the requested relief falls under sections 1521(a)(1)-(7) and (b). *Id.* at 1056. Second, if it does not, then a court should decide whether the requested relief is "appropriate relief" under section 1521(a). *Id.* The inquiry here focuses on whether such relief was previously available under section 304 or is currently provided for under United States law. *Id.* at 1056-57. Third, if the requested relief is not available under section 1521, then a court should consider whether the requested relief is available as "additional assistance" under section 1507. *Id.* at 1057.

Neither section 1521 nor 1507 provides the Court authority to authorize the Debtors' broad exculpation request.

1. The Court Should Not Enter an Order Enforcing the Exculpation Request Because Exculpation Is Not Available Relief Under Section 1521(a)(1)-(7) and (b)

None of the seven bases for relief enumerated in section 1521(a) apply here. The first five concern the debtor—its assets, affairs, rights, obligations, or liabilities—and do not authorize exculpation for the benefit of non-debtors. The sixth enumerated provision concerns an extension of relief upon the filing of a petition, which is inapplicable to the relief requested. The seventh enumerated provision concerns the relief available to a trustee, which does not include authority for the type of relief afforded by the exculpation request at issue in this chapter 15 case. Accordingly, the exculpation provision, as requested, is not relief that is available under sections 1521(a)(1)-(7). *See Vitro,* 701 F.3d at 1058-59.

Section 1521(b), which concerns "entrust[ing] the distribution of all or part of the debtor's assets located in the United States to the foreign representative . . . provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected," also does not apply.[11]

2. The Court Should Not Enter an Order Enforcing Exculpation Because Exculpation is Not "Appropriate Relief" Under Section 1521(a)

Because the requested exculpation is not available relief under sections 1521(a)(1)-(7) and (b), the inquiry turns to whether it is "appropriate relief" under section 1521(a). It is not. Section 1521(a) includes a bankruptcy court's "more general power to grant 'any appropriate relief.'" *Vitro*, 701 F. 3d at 1059. But the statute ties that general power to a specific precondition, that such relief must be "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors."[12]

In *PT Bakrie Telecom Tbk*, the Court (Hon. Judge Lane) observed that:

> Courts have found such "appropriate relief" under Section 1521(a) to be the same type of relief that was previously available under Chapter 15's predecessor, Section 304 of the Bankruptcy Code. *Vitro II*, 701 F.3d at 1054. But relief under Section 1521(a) may only be granted if the "interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a); *see also In re Intl. Banking Corp. B.S.C.*, 439 B.R. 614, 626–27 (Bankr. S.D.N.Y. 2010) (same). "[S]ufficient protection" embodies three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." *In re Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009) (quoting *In re Artimm, S.r.L.*, 335 B.R. 149, 160 (Bankr.C.D.Cal.2005)).

PT Bakrie Telecom Tbk, 628 B.R. at 876.

Under the *ejusdem generis* canon, "the catchall must be interpreted in light of its surrounding context and read to 'embrace only objects similar in nature' to the specific examples

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11 11 U.S.C. § 1521(b); *See Vitro,* 701 F.3d at 1059-60.

12 11 U.S.C. § 1521(a); *see PT Bakrie Telecom Tbk*, 628 B.R. at 876.

preceding it." *Purdue Pharma, L.P.,* 144 S. Ct. at 2082-83. Paired with its "context dependent" term "appropriate," *id.* at 2083, the exculpation relief sought by the Debtor is not similar in nature to the relief provided in section 1521(a). The relief provided in section 1521(a)-(7) protects the Debtor, Debtor's assets and creditors. However, the broad exculpation provision is designed to protect, among others, non-debtors. It is thus not authorized by section 1521(a)'s provision for "any appropriate relief."

In *Vitro*, the Fifth Circuit so held. It acknowledged that "a non-consensual, non-debtor release through a bankruptcy proceeding, is generally not available under United States law." *Vitro,* 701 F.3d at 1059. It thus concluded, in discussing section 1521(a)'s grant of "any appropriate relief," that "[b]ecause our law prohibits the requested discharge, a request for such relief more properly falls under § 1507, which was included to address such circumstances." *Id*.

Moreover, the exculpation request does not fall within the category of "appropriate relief" because it is not necessary "to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors" under section 1521(a). The "interests of creditors" are not served by forcing exculpation provisions on them with respect to non-debtor entities. Additionally, the exculpation provision is not necessary to protect the Debtor's assets; instead, it is being used to protect non-debtors.

3. The Court Should Not Approve the Exculpation Provision Because the Record is Incomplete About Exculpation in Determining Whether the Principles of Comity Are Satisfied Under Section 1507(b)

Because relief is not available under section 1521, that leaves section 1507. But "relief under § 1507 'is in nature more extraordinary' than that provided under § 1521, as a result of which 'the test for granting that relief is more rigorous.'" *Vitro*, 701 F.3d at 1057. Under section

1507(a), a court "may provide additional assistance to a foreign representative under this title or under other laws of the United States."[13] In determining whether to grant additional assistance, section 1507(b) directs that "the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding includes.[14]

Providing the requested exculpation in the Recognition Order would not be consistent with the principles of comity.[15] Comity would only come into play if the Brazilian court orders provided the requested exculpation. But they do not. Indeed, at the time of filing this Limited Objection, it is unknown if exculpation sought in the Recognition Motion was requested or would even be permitted in Brazil.[16] The Recognition Motion does not directly address these questions. With no exculpation provided in the foreign proceeding for which recognition is sought, there is no basis to provide that extraordinary relief through the Recognition Order.

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13 11 U.S.C. § 1507(a).

14 11 U.S.C. § 1507(b).

15 The term "Comity" has been defined to mean "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed.95 (1895).

16 *See Supra* n. 2 and paragraph 6.

Even if consistent with comity, there is no evidence that providing this additional relief—not provided in the Brazilian proceedings—will "reasonably assure" that all of requirements of section 1507(b) are met. Indeed, in the absence of information about the basis and procedure underlying exculpation provisions in Brazil, the Court should deny relief because it cannot assess whether any of the considerations in section 1507(b) are impacted. For example, in *In re PT Bakrie Telecom Tbk,* the Court denied post-recognition relief under section 1521 and 1507 regarding enforcement of a third-party release of claims relating to certain senior notes because of the lack of record as to the basis for the release and as to the procedural fairness of the underlying process. *PT Bakrie Telecom Tbk,* 628 B.R. at 885. The Court found the record supplied by the Foreign Representative to be "problematic when viewed against the Supreme Court's guidance in *Hilton* on the need for a 'clear and formal record' in evaluating comity." *Id.*; quoting *Hilton v. Guyot,* 159 U.S. 113, 205-06, 16 S. Ct. 139, 40 L. Ed. 95 (1895); *see also* Leif M. Clark, *Chapter 15 Bankruptcy Strategies: Leading Bankruptcy Experts on Understanding the Filing Process and Achieving Successful Outcomes in Cross–Border Insolvency Cases—Advice for Handling Cross–Border Bankruptcy Cases Effectively* (Aspatore Sept. 2012), *available at* 2012 WL 3279175, at *10. Accordingly, as in *PT Bakrie Telecom Tbk,* the Court here should deny post- recognition relief of exculpation.

B. The Exculpation Request is Contrary to Public Policy

Even if section 1507 or 1521 authorized inclusion of the requested exculpation in the Recognition Order, the Court should still refuse to include that relief under section 1506 of the Bankruptcy Code, which provides that:

> Nothing in this chapter prevents the court from refusing to take an action governed by the chapter if the action would be manifestly contrary to the public policy of the United

States.[17]

The Second Circuit has held in interpreting section 1506 that "the key determination required by this Court is whether the procedures used . . . meet our fundamental standards of fairness." *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB,* 773 F.2d 452, 457 (2d Cir.1985).

As noted above, the Debtors are not merely asking this court to, among other things, enforce the EJ Plans and the Brazilian court orders. Rather, they also ask this Court to exculpate non-estate fiduciaries from future liability, something beyond what was approved abroad, and something that is not permitted in Chapter 11 cases filed in the United States.

First, the exculpation provision would not be permitted in the United States because, to the extent that applicable law in the United States authorizes exculpation beyond 11 U.S.C. 1125(e), the list of exculpated parties is overly broad. Courts in the United States generally hold that exculpation provisions are only permissible when limited to the actions of estate fiduciaries during the pendency of the case (*i.e.*, after the petition has been filed and prior to plan's effective date) and must be limited to exclude gross negligence and willful misconduct. *See, e.g.*, *Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 437 (5th Cir. 2022) (limiting exculpation to a debtor, a creditors' committee and its members, and trustees); *In re Pac. Lumber Co.*, 584 F.3d 229, 252–53 (5th Cir. 2009) (striking provisions exculpating non-debtors and their personnel from liability); *In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (approving exculpation for a creditors' committee and its professionals acting within the scope of their duties); *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 702 (E.D. Va. 2022) (among other things, limiting exculpation to actual estate fiduciaries and excluding pre-petition claims); *In re*

17 11 U.S.C. § 1506.

Washington Mutual, Inc., 442 B.R. 314, 350–51 (Bankr. D. Del. 2011) (limiting exculpation to estate fiduciaries and expressly excluding, among others, their current and former officers, directors, partners, and shareholders); *In re PTL Holdings LLC*, 2011 WL 5509031 (Bankr. D. Del. Nov. 10, 2011) (same).

Thus, an "exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers." *In re Washington Mut., Inc*., 442 B.R. 314, 350–51 (Bankr. D. Del. 2011). Exculpation provisions are based "to some extent . . . on the theory that court-supervised fiduciaries are entitled to qualified immunity for their actions." *In re Aegean Marine Petroleum Network, Inc*. 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019).

Here, the list of exculpated parties includes many persons who cannot be classified as fiduciaries to the estate. They include not only the Directed Parties and Participating Creditors, but also their respective current and former officers, directors, managers, predecessors, successors, assigns, principals, members, employees, agents, attorneys, consultants, advisors, other professionals, and representatives. "A conventional business relationship between parties dealing at arm's length does not give rise to fiduciary duties." *Roni LLC v. Arfa*, 74 A.D.3d 442, 444 (2010), *aff'd,* 18 N.Y.3d 846 (2011). In fact, the range of exculpated parties is so broad that it likely includes parties who performed no duties essential, necessary, or at all, related to the EJ Plans, the Brazilian Orders or the Proposed Order.

Second, the exculpation provision is not limited to acts or omissions during the case, but instead extends to future conduct without an end date. Exculpation clauses may not extend past the effective date of a plan to avoid exculpating actions that have not yet occurred and are yet unknown. *See In re Washington Mut., Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011) (exculpations cover "actions in the bankruptcy case") (citing *In re PWS Holding Corp*., 228 F.3d 224, 246 (3d Cir. 2000)). Exculpation clauses should not extend past the effective date of a plan, to avoid exculpating actions that have not yet occurred and are yet unknown. *See In re Mallinckrodt PLC*, 639 B.R. 837, 883 (Bank. D. Del. 2022) (exculpation "only extends to conduct that occurs between the Petition Date and the effective date").

Finally, an exculpation provision should carve out claims for legal malpractice, release of which is prohibited under section of the New York Rules of Professional Conduct, *i.e.*, N.Y. Comp. Codes R. & Res. Tit. 22 § 1200.8 Rule 1.8(h)(1). An exculpation provision should also, with respect to the Participating Creditors, carve out liability for gross negligence, fraud, bad faith, or willful misconduct.

Accordingly, the Court should not approve the request of the overbroad exculpation provision.

WHEREFORE, the United States Trustee respectfully requests that the Court sustain his Objection and grant such other relief as is just.

Dated: New York, New York
December 3, 2024

Respectfully submitted,

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UNITED STATES TRUSTEE, Region 2

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