

Revised Proposed Order Approving, Pursuant to Bankruptcy Rule 9019, Chapter 11 Trustee's Settlement with Assignee of HCHK Entities under New York Court Assignment Proceedings (the "Revised Proposed Order"). (ECF No. 2004). In support of their objection, the HCHK Creditors respectfully represent as follows:²

1. The Revised Proposed Order does not remedy the patent inequity and unreasonableness of the Trustee's original proposed order. Rather, the Revised Proposed Order continues to unfairly burden non-debtor third parties, without their consent and without providing them with any consideration. Moreover, the Trustee asks the Court to enter the Revised Proposed Order without making any demonstration that the Court has the authority to do so and without offering any support for the findings he asks the Court to make to support the proposed Release. Rule 9013 of the Federal Rules of Bankruptcy Procedure requires that the grounds for requesting such findings, including the findings that the Release is "in exchange for the good and valuable consideration among the parties" and is "fair, equitable, and reasonable," must be stated with "particularity." Fed. R. Bank. Proc. Rule 9013. The grounds for requesting the "Gatekeeper Function" must also be stated with particularity. *Id.* The Trustee has simply failed to do so and, accordingly, the Revised Proposed Order should not enter.

2. The Trustee's revisions from his original proposed order are all the more egregious in light of the Trustee's repeated representations in the Motion that the channeling injunction and exculpation originally proposed were "key terms" and "necessary elements" of the Settlement Agreement. (*See* Motion ¶¶ 21, 31). In the Revised Proposed Order, these "key terms" have been completely replaced without the Trustee offering any support for the new, crucial and manifestly unfair terms. Entering the Revised Proposed Order on this record would completely undermine the

² For the Court's convenience, capitalized terms undefined herein shall have the meaning ascribed to them in the Revised Proposed Order.

process of submitting the Settlement Agreement to the Court for approval and affording third parties, like the HCHK Creditors, an opportunity to object. While recognizing the original proposed order was flawed, as demonstrated by the objection filed by the HCHK Creditors (their “Original Objection,” ECF No. 40) and the objection filed by the United States Trustee (Main Case ECF No. 1976), the Revised Proposed Order does not remedy the unfairness to third parties.

3. More particularly, revisions to paragraph 2 of the Revised Proposed Order are ambiguous at best and arguably inconsistent with the subsequent terms of the Revised Proposed Order. For example, new language in paragraph 2 provides that “[a]ll objections to the Motion have been resolved ... or have been overruled, including all assertions of reservations of rights.” Yet, paragraph 8 provides that “[t]he entry of this Order and the occurrence of the Initial HCHK Funds Transfer shall be without prejudice to the rights of any party (other than the Assignee) to file pleadings and take positions in connection with the Adversary Proceeding ...” Thus, paragraph 2 is ambiguous at best and could be read to waive rights that are in fact reserved.

4. Turning to paragraph 13, the Trustee has not demonstrated that the Release is fair and appropriate nor offered anything to support the necessary findings articulated in the Revised Proposed Order. For example, the Trustee claims the Release is “in exchange for the good and valuable consideration among the parties,” notably without describing the consideration that the Trustee provided to the creditors whom the Assignee represents. Payment to the Assignee is not payment to those the Assignee is supposed to protect. Certainly, the HCHK Creditors have received nothing. Similarly, the Trustee offers nothing to demonstrate that the completely revised Release in paragraph 13 is “fair, equitable, and reasonable.” The Revised Proposed Order may be in the best interest of the Trustee, but it is certainly not fair to third parties.


5. Perhaps most significantly, the Trustee has offered nothing to support the proposition that the Court has authority to act as a gatekeeper as provided in paragraph 14 of the Revised Proposed Order. Such an order would place an undue burden on any creditor of the HCHK Entities. The HCHK Creditors, who are complete strangers to these proceedings, would face significant risk under the process proposed by paragraph 14. For example, if the HCHK Creditors were required to seek approval from this Court prior to initiating a claim against the Assignee, presumably statutes of limitations on the HCHK Creditors' claims would continue to run while this Court evaluated the claims. Why should the HCHK Creditors be forced to bear that risk? Again, they have received no consideration and they have not consented. The Trustee offers no legal authority to support his position that this Court even has the power to impose this requirement on the HCHK Creditors. For all its flaws, the original channeling injunction did not create the same prejudice arising from the new gatekeeping order. For this reason, among others, the Trustee should not be permitted to rely on his original Motion to support his request for the Revised Proposed Order.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in their Original Objection, the HCHK Creditors respectfully request that this Court reject the Revised Proposed Order and deny the Motion to Compromise.

Dated: July 14, 2023
Stamford, Connecticut

**INDEPENDENT HCHK CREDITORS
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