**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| **IN RE:** | § | **Chapter 11** |
| | § | |
| **COBALT INTERNATIONAL ENERGY, INC., *et al.*[1]** | § | **CASE NO. 17-36709 (MI)** |
| | § | |
| | § | |
| **Debtors.** | § | **(Jointly Administered)** |

**WHITTON PETROLEUM SERVICES LIMITED'S OBJECTION TO THE FOURTH AMENDED JOINT CHAPTER 11 PLAN OF COBALT INTERNATIONAL ENERGY, INC. AND ITS DEBTOR AFFILIATES**
[Relates to Doc. No. 561]

Whitton Petroleum Services Limited ("Whitton") files this objection ("Objection") to confirmation of the Fourth Amended Joint Chapter 11 Plan (the "Plan") filed by Cobalt International Energy, Inc. and its affiliates (collectively, the "Debtors") and respectfully states as follows:

## SUMMARY OF OBJECTION

Whitton has asserted a $225 million claim against Cobalt International Energy, L.P. Whitton objects to the Plan because it contains numerous provisions that are prejudicial to creditors and will limit Whitton's recovery on its claim. In particular, Whitton objects on the grounds that: (i) the Plan releases and discharges the liability of non-debtor third parties without consideration or consent and the Debtors cannot receive a discharge being a liquidating corporate debtor; (ii) the Plan fails to incorporate language from the Disclosure Statement[2] that preserves

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Cobalt International Energy, Inc. (1169); Cobalt International Energy GP, LLC (7374); Cobalt International Energy, LP (2411); Cobalt GOM LLC (7188); Cobalt GOM # 1 LLC (7262); and Cobalt GOM # 2 LLC (7316). The Debtors' service address is: 920 Memorial City Way, Suite 100, Houston, Texas 77024. References herein to the "Debtors" refer, as applicable, to the Debtors and their non-debtor subsidiaries and affiliates.

[2] Defined terms used but not otherwise defined herein shall have the meanings provided to them in the Plan.

the right of any creditor or party in interest to object to the allowance of any Intercompany Claim or seek to recharacterize or equitably subordinate any Intercompany Claim; and (iii) there is not an adequate means for implementing the Plan given the substantial litigation claims held by the Debtors' estates.

## BACKGROUND

1. On December 14, 2017, (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court").

2. On March 8, 2018, the Debtors filed their Disclosure Statement for the Fourth Amended Joint Chapter 11 Plan of Cobalt International Energy, Inc. and its Debtor Affiliates (the "Disclosure Statement") [Doc. No. 562]. Among other things, the Disclosure Statement states that potential challenges to the $6+ billion in Intercompany Claims are not affected by the Plan and that all parties' rights to object or seek recharacterization are preserved.

3. On March 8, 2018, the Debtors filed their Fourth Amended Joint Chapter 11 Plan of Cobalt International Energy, Inc. and its Debtor Affiliates (the "Plan") [Doc. No. 561]. The Plan is a liquidation plan involving a sale of all or substantially all of the Debtors' assets and distribution of certain sale proceeds to creditors. Among other things, the Plan contains both direct releases of all claims and causes of action against the Officers, Directors, Control Parties and other Released Parties for no apparent consideration, and third party releases without the necessary consent from the Releasing Parties (together, the "Releases"). *See Fourth Amended Plan* § VIII. The Plan also fails to incorporate important language from the Disclosure Statement preserving all parties' rights to object to Intercompany Claims. In addition, to date, the

Debtors have not identified the Plan Administrator, have not provided details on how the post-confirmation estates will be managed, and have failed to provide a sufficiently detailed Wind-Down Budget.

4. On March 8, 2018, the Court signed its Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Proposed Joint Chapter 11 Plan, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief (the "Disclosure Statement Order") [Doc. No. 563].

## OBJECTIONS

### A. The Releases Fail to Comply with the Bankruptcy Code and are Improper

5. The Releases, exculpation provisions, discharge and injunction fail to comply with the Bankruptcy Code and are improper because (i) no consideration has been given for the blanket releases the Debtors are giving to non-debtor third parties, (ii) the Releases are effectively forced upon the Releasing Parties without their consent in violation of section 524(e), and (iii) Cobalt is a liquidating corporate Debtor, and pursuant to section 1143(d)(3), is not entitled to the discharge granted under the Plan.

6. Bankruptcy Code Section 524(e) addresses the scope of a bankruptcy discharge and states, in relevant part, 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." 11 U.S.C. § 524(e). The Bankruptcy Code therefore contemplates that only a debtor that has submitted to the burdens of the bankruptcy process is entitled to a discharge.

7. The Fifth Circuit has rejected non-consensual non-debtor releases because they contravene Section 524(e). In numerous cases, the Fifth Circuit has made clear that Section 524(e)

discharges only the debtor, not co-liable third parties, and prohibits non-debtor releases. *See, e.g.*, *Feld v. Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995) ("Section 524(e) prohibits the discharge of debts of non-debtors"); *Hall v. Natl. Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997), citing *Matter of Edgeworth*, 993 F.2d 51, 53-54 (5th Cir. 1993) (Section 524(e) "specifies that the debt still exists and can be collected from any other entity that might be liable"); *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1061 (5th Cir. 2012) (the Fifth Circuit has "firmly pronounced its opposition to such releases").

8. The Debtors argue that the Release is a valid, consensual settlement of claims under Section 1123. However, the Release fails to meet the most basic requirements: (1) separate and valuable consideration from each Released Party; and (2) affirmative consent by each Releasing Party. *In re Bigler LP*, 442 B.R. 537, 543-5 (Bankr. S.D. Tex. 2010).

9. In order for a release to reflect a valid settlement, the estate must receive independent, valuable consideration in exchange for its agreement to the release. *Bigler*, 442 B.R. 537, 543-5 (recognizing that the released party was providing all of the funding under the plan, including payments to the unsecured creditors). Here, the Released Parties have not, and are not, proving any separate consideration in connection with the Release.

10. In addition, the Plan provides for releases and exculpation for non-debtor third parties, including the Debtors' former and current officers and directors. Although the Release in the Plan permits those who abstain from voting or who vote to reject the Plan to opt out of the Release, it appears to contain no such mechanism for those who vote to accept the Plan. Thus, the Release in the Plan is not voluntary. *See In re Bigler LP*, 442 B.R. 537, 543-544 (Bankr. S.D. Tex. 2010) ("releases must satisfy the requirements of a valid settlement of claims under the Code. It would require… consent and consideration… to be valid."). Deeming parties who

accept a plan to have consented to a release effectively nullifies the opt-out provision for those parties.

11. In addition, in light of the Releases and the exculpation clause, the Plan cannot be confirmed under the best-interests test set forth in Section 1129(a)(7) of the Bankruptcy Code. 11 U.S.C. §1129(a)(7). That provision requires that creditors under a plan must receive at least as much as they would in a liquidation of the debtor in a chapter 7 case. Section 1129(a)(7) thus establishes a "floor" with respect to the level of recovery to which creditors and interest holders are entitled. The court must consider not only monetary distributions to creditors but also the value of property that dissenting creditors would retain under a plan versus a Chapter 7 liquidation. *In re Quigley Co.*, 437 B.R. 102, 104-5 (Bankr. S.D.N.Y. 2010). Where claims are being released under a Chapter 11 plan but would be available for recovery in a Chapter 7 case, the released claims must be considered as part of the analysis under Section 1129(a)(7). *In re Wash. Mut., Inc.*, 442 B.R. 314, 359-60 (Bankr. Del. 2011). Here, creditors will fare worse under the Plan because causes of action are being released.

12. Lastly, Cobalt is a liquidating debtor, and corporate liquidating debtors are not entitled to a discharge under 1141(d)(3) of the Bankruptcy Code. Section 1141(d)(3) addresses the prohibition of a discharge in relation to confirmation of a plan, and states, in relevant part, "the confirmation of a plan does not discharge a debtor if—the plan provides for a liquidation of all or substantially all of the property of the estate." 11 U.S.C. §1141(d)(3). The Debtor's Plan contemplates a Chapter 11 liquidation. Thus, the Debtors are clearly prohibited from receiving a discharge, yet the Plan discharges claims and enjoins further action on discharged claims in violation of section 1141(d)(3).

### B. The Plan Fails to Incorporate Language Included in the Disclosure Statement Preserving All Parties' Rights to Object to Intercompany Claims

13. Whitton objects to confirmation of the Plan because the Plan fails to incorporate provisions preserving creditors' rights to object to, or seek to recharacterize or equitably subordinate, the Intercompany Claims. The Disclosure Statement provides that any challenges to Intercompany Claims are not affected by the Plan and that all parties' rights to object are preserved. The absence of this preservation of rights creates a material difference between the Disclosure Statement and the Plan which must be remedied.[3]

14. Accordingly, Whitton requests that the Plan include the following language:

> Any party in interest may object to the Intercompany Claims or their proposed treatment under the Plan. Nothing in this Plan prevents any creditor or party in interest from objecting to the allowance of any Intercompany Claim or seeking to recharacterize or equitably subordinate any Intercompany Claim.

15. The failure of the Debtors to incorporate this language into the Plan materially impacts creditors by allowing the contentions (however flawed) of a deemed allowance of a $6+ billion intercompany claim that should be treated as equity, not debt[4]. Creditors must be granted the right to object to, or seek to recharacterize or equitably subordinate, the Intercompany Claims—as the Disclosure Statement clearly and properly provides.

### C. The Plan Lacks Adequate Means for Implementation

16. Section 1123 of the Bankruptcy Code requires that a plan "provide adequate means for the plan's implementation." 11 U.S.C. §1123(a)(5). The Plan is missing important mechanisms for its successful implementation.

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[3] Whitton believes the preservation of rights in the Disclosure Statement remains effective. But the Plan or the Order should include the same language to eliminate any contrary view or challenge.

[4] On March 27, 2018, the Cobalt CFO admitted under oath many, if not all, of the debt as equity characterizations that support characterization of the Intercompany debt as equity.

17. No liquidating trust or advisory board or committee is created under the Plan, and the Unsecured Creditors' Committee is to be dissolved on the Effective Date. That leaves the estates with no adequate oversight or direction for post-confirmation tasks, which should involve prosecution of potentially substantial litigation including, among others, actions to challenge $6+ billion in Intercompany Claims and challenges to the secured status of nearly $1 billion in second lien debt.

18. An unnamed Plan Administrator is to be appointed, but no trust agreement or other document (except for open ended Plan language) appears to govern the Plan Administrator's rights and duties. The Plan gives the Plan Administrator very little supervision or limits on authority. Considering the substantial post-confirmation tasks, additional protection such as the post-confirmation continuance of the Unsecured Creditors' Committee is needed to ensure that assets are properly monetized and distributed.

19. Moreover, the Wind-Down Budget contains insufficient detail. Rather than set out direction and funds for the Plan Administration, the Wind-Down Budget only provides a brief summary of estimated costs for four quarterly periods totaling $8,099,170. Four quarters is not nearly enough time for the Plan Administrator to effectively prosecute claims and objections for the benefit of the estates.

## JOINDER

20. The Unsecured Creditors' Committee is in the process of filing an objection to the Plan. Whitton joins in the Unsecured Creditors' Committee's Objection to the Fourth Amended Joint Chapter 11 Plan of Cobalt International Energy, Inc. and Its Debtor Affiliates (the "Committee Objection") and incorporates herein by reference the arguments contained therein.

21. Whitton joins the Committee Objection and the arguments set forth therein to the extent that such arguments are relevant to and not inconsistent with Whitton's claim against the Debtor.

## RESERVATION OF RIGHTS

22. Whitton reserves the right to further amend, modify, or supplement this Objection and Joinder at any time, and also reserves all its rights, if any, as a creditor in these bankruptcy cases, including in connection with its proof of claim, any contract cure or objection processes, the sale process, and with respect to the Plan.

## CONCLUSION

WHEREFORE for the reasons set forth herein, Whitton respectfully requests that the Court sustain this Objection and deny confirmation of the Debtors' Plan.

Dated: March __, 2018.

Respectfully submitted,

**PORTER HEDGES LLP**

*/s/ John F. Higgins*

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**ATTORNEYS FOR WHITTON PETROLEUM SERVICES LIMITED**

**CERTIFICATE OF SERVICE**

This will certify that a true and correct copy of the foregoing document was served by electronic transmission to all registered ECF users appearing in the case on March 29, 2018.

/s/ John F. Higgins
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