

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	§	Chapter 11
	§	
VERTEX ENERGY, INC., <i>et al.</i> , ¹	§	Case No. 24-90507 (CML)
	§	
Debtors.	§	(Jointly Administered)
	§	
	§	

**PENTHOL LLC AND PENTHOL C.V.’S OBJECTION TO
THE JOINT CHAPTER 11 PLAN OF VERTEX
ENERGY, INC. AND ITS DEBTOR AFFILIATES**

TO THE HONORABLE BANKRUPTCY JUDGE:

Penthol LLC (“Penthol LLC”) and Penthol C.V. (“Penthol C.V.” and together with Penthol LLC, the “Penthol Parties”) file this objection (the “Objection”) to the Debtors’ *First Amended Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates* [Dkt. No. 425-1] (as may be further amended or supplemented, the “Plan”). In support of the Objection, the Penthol Parties respectfully state as follows:

PRELIMINARY STATEMENT²

1. Over the preceding four (4) years, the Penthol Parties and Vertex Operating, LLC (“Vertex” and together with its debtor-affiliates, the “Debtors”) have been engaged in litigation related to alleged breaches of a Sales Representative and Marketing Agreement (“SRMA”) between Penthol LLC and Vertex dated June 5, 2016, pursuant to which Vertex

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://www.veritaglobal.net/vertex>. The location of Debtor Vertex Energy, Inc.’s corporate headquarters and the Debtors’ service address in these chapter 11 cases is 1331 Gemini Street Suite 250, Houston, Texas 77058

² Capitalized terms used in this section but not otherwise defined shall have the means ascribed below.



acted as Penthol LLC's independent sales representative in North America. In October and November of 2023, Penthol LLC and Vertex took part in a five-day bench trial to resolve their disputes and, in March of 2024, the District Court for the Southern District of Texas entered a Judgment ordering that Penthol LLC take nothing and awarding \$1.396 million in favor of Vertex (which was later reduced by \$242,586 due to a calculation error). Vertex appealed this ruling, but Penthol LLC did not. Vertex's appeal remains pending.

2. Notwithstanding the pending litigation between the parties, the Plan purports to impermissibly impair the Penthol Parties' defenses in connection with any claims Vertex has against them. Accordingly, the Penthol Parties object to the Plan and request that any order confirming the Plan include language preserving the Penthol Parties' defensive rights in connection with their disputes with Vertex. Notably, the Penthol Parties are not seeking to preserve any claims for an affirmative recovery, but merely seek to preserve their defenses in connection with the affirmative claims asserted by Vertex against the Penthol Parties, which remain subject to pending proceedings.

BACKGROUND

A. The Parties' Pending Disputes

3. Penthol LLC is a distributor of high-quality petrochemicals and petroleum-based products. Since 2016, Penthol LLC has distributed in North America a Group III base oil (the "Product") manufactured by the Abu Dhabi National Oil Company.

4. In June 2016, Penthol LLC and Vertex entered into the SRMA through which Vertex became Penthol LLC's independent sales representative in North America for the Product.

5. On October 13, 2020, Vertex sued Penthol LLC in Harris County, Texas, asserting a breach of contract claim arising out the SRMA, instituting a case styled *Vertex Energy Operating, LLC v. Penthol LLC*, Cause No. 2020-65269, in the 61st District Court of Harris County, Texas (“State Action”). Through the State Action, Vertex sought injunctive relief as well as actual, consequential and exemplary damages and attorneys’ fees.

6. On February 8, 2021, Penthol LLC sued Vertex in federal court, instituting the case styled, *Penthol LLC v. Vertex Energy Operating LLC*, Civil Action No. 4:21-cv-416, in the United States District Court for the Southern District of Texas (“Federal Action”), asserting claims for (i) violation of the Sherman Act, (ii) breach of contract, (iii) business disparagement, and (iv) misappropriation of trade secrets. By its claims, Penthol LLC sought declaratory and injunctive relief, as well as actual, treble, consequential, and exemplary damages and attorneys’ fees and costs.

7. On February 26, 2021, Penthol LLC filed its Second Amended Answer and Counterclaims in the State Action in which Penthol LLC asserted counterclaims for (i) breach of contract and (ii) tortious interference. Penthol LLC sought monetary relief over \$1,000,000.

8. On March 2, 2021, Vertex filed a motion to dismiss and a motion to stay the Federal Action. The District Court (i) denied the motion to stay; (ii) denied the motion to dismiss as to claims for breach of contract, business disparagement, and misappropriation of trade secrets; and (iii) granted the motion to dismiss as to Penthol LLC’s Sherman Act claim.

9. On June 2, 2022, the parties agreed to stay the State Action while proceedings moved forward in the Federal Action. As of the date hereof, the State Action remains stayed.

10. On June 3, 2022, Vertex moved for leave to amend its pleadings in the Federal Action to add its State Action claims and to join Penthol C.V. as a third-party defendant. On July 11, 2022, Penthol LLC filed a motion for leave to amend its pleadings in the Federal Action to add its State Action claims, as well as newly discovered claims for breaches of additional SRMA provisions, misappropriation of Penthol LLC's trade secrets, fraud, and negligent misrepresentation. On October 18, 2022, the Court granted (i) Vertex's motion to add its State Action claims, (ii) Vertex's motion to add Penthol C.V. as a third-party defendant, and (iii) Penthol LLC's motion for leave to amend its pleadings.

11. On September 1, 2022, Vertex filed a motion for summary judgment and Penthol LLC filed a motion for partial summary judgment in the Federal Action.

12. On January 20, 2023, Penthol C.V. filed a motion to dismiss in the Federal Action for lack of personal jurisdiction and failure to state a claim.

13. On May 26, 2023, the Court (i) granted in part and denied in part Penthol LLC's motion for summary judgment; (ii) granted in part and denied in part Vertex's motion for summary judgment; and (iii) granted Penthol C.V.'s motion to dismiss.

14. Beginning on October 30, 2023, Penthol LLC and Vertex conducted a five-day bench trial. The District Court for the Southern District of Texas issued its Findings of Fact and Conclusions of Law and Final Judgment (the "Judgment") on March 7, 2024, ordering that Penthol LLC take nothing and awarding Vertex \$1,396,713 in damages

(which was later reduced by \$242,586 to correct a calculation error) against Penthol LLC.

The Judgment ordered that each party must bear its own fees and costs. Penthol LLC paid and satisfied the Judgment, as corrected.

15. On July 26, 2024, Vertex appealed the Judgment in the Federal Action to the United States Court of Appeals for the Fifth Circuit, instituting a case styled, *Penthol LLC v. Vertex Energy Operating, LLC*, Case No. 24-20329 (5th Cir. 2024) (the “Appeal”). The Appeal remains pending.

B. The Debtor’s Plan

16. The Plan defines “Causes of Action” as

any Claims, Interests, damages, remedies, causes of action, demands, rights, actions, controversies, proceedings, agreements, suits, obligations, liabilities, accounts, defenses, offsets, powers, privileges, licenses, Liens, indemnities, guaranties, and franchises of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, secured or unsecured, assertable, directly or derivatively, matured or unmatured, suspected or unsuspected, whether arising before, on, or after the Petition Date, in contract, tort, law, equity, or otherwise. Causes of Action also include: (a) all rights of setoff, counterclaim, or recoupment and claims under contracts or for breaches of duties imposed by law or in equity; (b) the right to object to or otherwise contest Claims or Interests; (c) claims pursuant to section 362 or chapter 5 of the Bankruptcy Code; (d) such claims and defenses as fraud, mistake, duress, and usury, and any other defenses set forth in section 558 of the Bankruptcy Code; and (e) any avoidance actions arising under chapter 5 of the Bankruptcy Code or under similar local, state, federal, or foreign statutes and common law, including fraudulent transfer Laws.

Plan at Art. I(A)(34) (emphasis added).

17. Article IX(A) states that the treatment provided under the Plan “shall be in complete satisfaction, discharge, and release . . . of . . . Causes of Action.” *Id.* at Art. IX(A).

18. Article IX(F) of the Plan enjoins all entities who “have held, hold or may hold Claims, Interests, or Causes of Action that have been released, discharged, or are subject to exculpation” from

(1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims, Interests, or Causes of Action . . . ; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims, Interests, or Causes of Action unless such Holder has Filed a motion requesting the right to perform such setoff on or before the Effective Date, and notwithstanding an indication of a Claim, Interest, or Causes of Action or otherwise that such Holder asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims, Interests, or Causes of Action released or settled pursuant to the Plan.

Plan at Art. IX(F).

OBJECTION

19. The terms of the Plan purport to impermissibly discharge the Penthol Parties’ defenses in connection with the pending State Action and Appeal (and, to the extent necessary, any renewed litigation in the Federal Action or State Action after the Appeal). *See, e.g.*, Plan at Art. I(A)(34); Plan at Art. IX(A), (F). However, the Plan cannot impair the Penthol Parties’ defenses in connection with any claims held by the Debtors.³ *See, e.g., In re Braum*, 179 B.R. 824, 827 (Bankr. E.D. Tex. 1995) (finding that if a defense is “neither a claim nor a debt, then it is also not dischargeable under the Code.”).

³ For the avoidance of doubt, the Penthol Parties are not seeking to preserve the right to commence any claims for an affirmative recovery against the Debtors for assertion after the confirmation of the Plan. The Penthol Parties are merely seeking to preserve any *defenses* they may have against affirmative claims asserted by the Debtors or their successors-in-interest.

20. Further, the law in the Fifth Circuit is clear that a creditors' *defensive* right to setoff cannot be discharged. *See, e.g., In re Luongo*, 259 F.3d 323, 334 (5th Cir. 2001) (holding that a creditors' assertion of setoff *defensively* did not violate a discharge injunction). "[This] interpretation also creates an equitable balance by preventing affirmative action to collect the discharged debt, while preserving the creditor's right to raise a discharged debt as a defense to a recovery action brought by the debtor." *Id.* at 333.

21. The Debtors cannot lawfully impair defenses to claims. Accordingly, the Penthol Parties request the inclusion of the following language in any order confirming the Plan:

Notwithstanding anything to the contrary contained in the Plan, the Plan Supplement or this Confirmation Order, any defenses (including defensive claims asserted for purposes of setoff that do not seek an affirmative recovery from the Debtors) held by Penthol LLC or Penthol C.V. in connection with (i) the cases styled (a) *Penthol LLC v. Vertex Energy Operating LLC*, Civil Action No. 4:21-cv-416, in the United States District Court for the Southern District of Texas, (b) *Vertex Energy Operating, LLC v. Penthol LLC*, Cause No. 2020-65269, in the 61st District Court of Harris County, Texas, or (c) *Penthol LLC v. Vertex Energy Operating, LLC*, Case No. 24-20329 (5th Cir. 2024) or (ii) Claims or Causes of Action held by the Debtors or Reorganized Debtors, and/or assigned to the GUC Trust, the GUC Trustee, and/or the Reorganized Debtors, including those relating to that certain Sales Representative and Marketing Agreement between Penthol LLC and Vertex Operating LLC, are fully preserved and shall not be prejudiced by the Plan, Plan Supplement or this Confirmation Order.

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PRAYER

WHEREFORE, Penthol respectfully requests that the confirmation of the Plan be denied unless language is included in any order confirming the Plan preserving Penthol's defenses in any disputes with the Debtors or their successors-in-interest relating to the SRMA.

DATED: December 17, 2024

Respectfully submitted,

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**ATTORNEYS FOR PENTHOL
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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2024, the foregoing was served on all parties entitled to service via the Court's Case Management/Electronic Case File System ("CM/ECF"), Electronic Filing System ("ECF").

/s/ Christopher A. Bailey

Christopher A. Bailey