IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
KABBAGE, INC. d/b/a KSERVICING, *et al.*,	Case No. 22-10951 (CTG) (Jointly Administered)
Debtors.[1]	Re: D.I. No. 466 Hearing Date: March 13, 2023 at 10:00 a.m. ET. Objection Deadline: February 28, 2023 at 4:00 p.m. ET.

UNITED STATES TRUSTEE'S LIMITED OBJECTION TO AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION OF KABBAGE, INC. (D/B/A KSERVICING) AND ITS AFFILIATED DEBTORS

Andrew R. Vara, the United States Trustee for Region 3 ("U. S. Trustee"), through his counsel, files this limited objection (the "Objection") to the *Amended Joint Chapter 11 Plan of Liquidation of Kabbage, Inc. (D/B/A Kservicing) And Its Affiliated Debtors* ("Plan") filed at D.I. 466, and in support, states as follows:

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable are: Kabbage, Inc. d/b/a KServicing (3937); Kabbage Canada Holdings, LLC (N/A); Kabbage Asset Securitization LLC (N/A); Kabbage Asset Funding 2017-A LLC (4803); Kabbage Asset Funding 2019-A LLC (8973); and Kabbage Diameter, LLC (N/A). Kabbage is a trademark of American Express used under license; Kabbage, Inc. d/b/a KServicing is not affiliated with American Express. The Debtors' mailing and service address is 925B Peachtree Street NE, Suite 383, Atlanta, GA 30309.

PRELMINARY STATEMENT

1. The U.S. Trustee objects on a limited basis to confirmation of the Plan because certain aspects of the Plan's third-party release and the injunction provision amount to a discharge of a liquidating debtor contrary to section 1141(d)(3) of the Bankruptcy Code. For these reasons, the U.S. Trustee submits that the Plan should not be approved until the offending provisions are revised or stricken from the Plan.

JURISDICTION, VENUE, AND STANDING

2. This Court has jurisdiction over the above-captioned cases pursuant to 28 U.S.C. § 1334. This Court is authorized to hear and determine confirmation of the Plan pursuant to 28 U.S.C. § 157(a, b), and the amended standing order of reference issued by the United States District Court for the District of Delaware dated February 29, 2012. Venue of the cases is proper in this District pursuant to 28 U.S.C. § 1408(1).

3. Pursuant to 28 U.S.C. § 586, the U. S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U. S. Trustee as a "watchdog").

4. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in chapter 11 cases, and to comment on such plans and disclosure statements.

5. Pursuant to 11 U.S.C. § 307, the U. S. Trustee has standing to be heard with regard to this Objection.

RELEVANT FACTS

Procedural Background

6. On October 3, 2022, the above-captioned Debtors filed voluntary petitions seeking relief under chapter 11. *See* D.I. 1

7. The U.S. Trustee has not appointed a committee of unsecured creditors in these cases. *See* D.I. 156.

8. On October 31, 2022 the Debtors filed the DS Approval Motion seeking approval of the Amended Disclosure Statement filed at D.I. 396 and establishing certain solicitation procedures, deadlines, and approval of materials for solicitation of votes on the Amended Plan of Liquidation filed at D.I. 395. This Court subsequently approved the Amended Disclosure Statement after it ruled that creditors voting to accept the Plan had to be given an opportunity to opt-out of the Plan's third-party release at the solicitation stage. D.I. 470. The solicitation version of the Plan is filed at D.I. 466. Pursuant to the Plan, the Debtors are liquidating their assets, dissolving, and will no longer be engaged in business following confirmation of the Plan.

9. Under the Plan, creditors and claimants that did not opt out of the release, abstained from voting, or -- through no failure of their own -- did not return a ballot or file a confirmation objection, provide, through the third-party release, a release of the Debtors and the Liquidating Debtors of 'any and all claims, interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever (including any derivative claims asserted or that may be

asserted on behalf of any of the Debtors or their Estates), whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, based on or relating to, or in any manner arising from, in whole or in part, the Debtors[.]" Plan at Art. 10.6, *accord id*. Art. 1.101 (definition of Released Parties includes the Debtors and the Debtors' Released Related Parties), *accord id*. 1.104 (definition of Releasing Parties).

10. The Plan also contains an injunction provision which states as follows ("Injunction"):

> (a) Upon entry of the Confirmation Order, all holders of Claims and Interests and other parties in interest, along with their respective present or former employees, agents, officers, directors, principals, and affiliates, shall be enjoined from taking any actions to interfere with the implementation or consummation of the Plan in relation to any Claim extinguished, **discharged**, or released pursuant to the Plan.
>
> (b) Except as expressly provided in the Plan, the Definitive Documents, the Confirmation Order, or a separate order of the Bankruptcy Court or as agreed to by the Debtors and a holder of a Claim against or Interest in the Debtors, **all Entities who have held, hold, or may hold Claims against or Interests in the Debtors (whether proof of such Claims or Interests has been filed or not and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan) and other parties in interest, along with their respective present or former employees, agents, officers, directors, principals, and affiliates are permanently enjoined, on and after the Effective Date, solely with respect to any Claims, Interests, and Causes of Action that will be or are treated by the Plan from** (i) commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtors, the Wind Down Estates, or the Wind Down Officer, as applicable, or the property of any of the Debtors, the Wind Down Estates, or the Wind Down Officer, as applicable; (ii) enforcing, levying, attaching (including, without limitation, any prejudgment attachment), collecting, or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree, or order against the Debtors, the Wind Down Estates, or the Wind Down Officer; or the property of any of the Debtors, or the Wind Down Estates, as applicable; (iii) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Debtors, the Wind Down Estates, or the property of any of the Debtors, the Wind Down Estates, or the Wind Down Officer, as applicable; (iv) asserting any right of setoff,

> directly or indirectly, against any obligation due from the Debtors, or the Wind Down Estates, as applicable, or against property or interests in property of any of the Debtors, or the Wind Down Estates, except as contemplated or Allowed by the Plan; and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan

Plan at Art. 10.6(a), (b) (emphasis added)

ARGUMENT

I. The Plan Violates Section 1141(d)(3) of the Bankruptcy Code.

11. Section 1141(d)(3) of the Bankruptcy Code provides:

> The confirmation of a plan does not discharge a debtor if—
>
> the plan provides for the liquidation of all or substantially all of the property of the estate;
>
> the debtor does not engage in business after consummation of the plan; and
>
> the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

11 U.S.C. §1141(d)(3)

12. The elements of section 1141(d)(3) are present here. First, the Plan provides that the Debtors' assets will be liquidated. *See* Plan Art. 5.4(h) (stating that Winddown Officer shall liquidate remaining assets). Second, the Debtors will not engage in business after consummation of the plan. *See id*. Third, the Debtors, as corporations, would not be eligible for a discharge if they were chapter 7 debtors pursuant to Section 727(a)(1) of the Code, which provides that the Court shall grant a debtor a discharge unless the debtor is not an individual. *See*, *e.g.*, *In re Flintkote Co.*, 486 B.R. 99, 129 n.80 (Bankr. D. Del. 2012) ("Section 1141(d)(3)(C) is always satisfied for corporate debtors, as they cannot receive discharges in chapter 7."). Therefore, the Debtors are not eligible for a discharge. *See* Plan Art. 10.3.

13. Here, there are two ways in which the Plan achieves a discharge of the Debtor. First, the Debtors are receiving a release by creditors and claimants through the third-party release. *See* Plan Art. 10.6(b). Second, the Injunction provides that holders of all claims ***treated under the Plan*** from taking the type of actions against the Debtors, personally, that the discharge injunction in section 524(a) of the Bankruptcy Code provides. As set forth in section 524(a) of the Code, the effect of a discharge "with respect to any debt discharged under section . . . 1141" includes "an ***injunction*** against the ***commencement or continuation of an action***, the employment of process, or an act, to ***collect***, recovery or ***offset*** any such debt as a personal liability of the debtor[.]" 11 U.S.C. § 524(a)(1) and (2) (emphasis added).

14. The Debtors should not be able to obtain relief expressly prohibited by section 1141(d)(3) of the Bankruptcy Code by including it in the Plan's Injunction provisions. Because the Plan violates section 1141(d)(3) of the Code, the Plan does not satisfy section 1129(a)(1) of the Code.

II. Reservation of Rights.

15. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, inter alia, complement, supplement, augment, alter and/or modify this Objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

CONCLUSION

16. For the reasons set forth above, conformation of the Plan should denied.

Dated: February 28, 2023
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE

By: /s/ *Rosa Sierra-Fox*

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CERTIFICATE OF SERVICE

I, Rosa Sierra-Fox, hereby attest that on February 28, 2023, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and upon the following parties by electronic mail:

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