

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

PROSOMNUS INC., et al.,

Debtors.¹

Chapter 11

Case No. 24-10972 (JTD)

(Jointly Administered)

Hearing Date: July 30, 2024 at 10:00 a.m. (ET)

Objection Deadline: July 23, 2024 at 12:00 p.m.

RE: D.I. No. 192

**UNITED STATES TRUSTEE’S OBJECTION TO CONFIRMATION OF DEBTORS’
AMENDED JOINT PLAN OF REORGANIZATION**

Andrew R. Vara, the United States Trustee for Region 3 (“U.S. Trustee”), through his counsel, files this objection (the “Objection”) to Confirmation of *Debtors’ Amended Joint Plan of Reorganization* (“Plan”) filed at [D.I. 192], and in support of his Objection, states:

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number are: ProSomnus, Inc. (8216), ProSomnus Holdings, Inc. (3855), and ProSomnus Sleep Technologies, Inc. (0766). The location of the Debtors’ principal place of business and the Debtors’ mailing address is 5675 Gibraltar Dr., Pleasanton, California 94588.

PRELIMINARY STATEMENT

1. The Debtors' Plan is unconfirmable because it contains non-consensual releases of non-debtors. The Plan strips numerous non-debtor parties of their direct claims against other non-debtors, through a third-party release provision, without their affirmative consent. The parties that are deemed by their silence to consent to give such releases include creditors in voting classes who do not return a ballot or opt-out form, including those creditors who never receive the solicitation package, or did not receive it timely. In addition, a "related parties" clause (defined below) expands the universe of those whose direct claims against non-debtors will be extinguished to at least 46 categories of persons and entities that are related in some fashion to each party deemed to give a release. The related parties include, by way of example, all current and former employees of all creditors and all current and former employees of all *affiliates* of all creditors. Such parties also include those who may fall under such broad and vaguely defined categories as "agents," "consultants," "representatives" and "other professionals" of Releasing Parties.²

2. The releases to be imposed on the related parties are not limited to claims they could assert derivatively through the Releasing Party to which they relate. Nor are they limited to claims that the party to whom they relate could release on their behalf under principal and agency concepts. Rather, the broad release language also covers direct claims held by the Related Releasing Parties against each Released Party, if such claims relate in any way, in whole or in part, to the Debtors.

3. It does not appear that the Debtors will obtain affirmative consent from any of the Related Parties to waive their direct claims against non-debtors. There is not even a mechanism by which Related Parties may opt out of giving such releases. Moreover, the majority of the

² Capitalized terms not otherwise defined herein shall have the definition set forth in the Plan.

Related Parties will not have received notice of the Plan or notice of the third-party releases to be imposed on them, because they are not themselves creditors or equity holders of the Debtors. There is no basis for the approval of such non-consensual third-party releases under the Bankruptcy Code.

4. For these reasons, and others set forth below, the U.S. Trustee respectfully submits that the Plan should not be confirmed in its current form.³

JURISDICTION, VENUE AND STANDING

1. Under (i) 28 U.S.C. § 1334; (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a); and (iii) 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and determine Plan confirmation and this Objection.

2. 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 the U.S. Trustee 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”).

3. 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

³ The U.S. Trustee’s counsel has provided additional comments to Debtors’ counsel to the Plan, other than those addressed in this Objection. To the extent such comments are not resolved, the U.S. Trustee reserves the right to supplement this Objection, or to assert additional objections at the hearing.

statements.

4. The U.S. Trustee has standing to be heard on Plan confirmation pursuant to 11 U.S.C. § 307.

BACKGROUND

5. On May 7, 2024, the above-captioned cases were commenced by the filing of voluntary petitions in this Court.

6. The U.S. Trustee has not appointed an official committee of unsecured creditors [D.I. 207].

7. On May 24, 2024, the Debtors filed the Disclosure Statement Motion [D.I. 88], which sought approval of (i) the Disclosure Statement [D.I. 87] and (ii) certain procedures concerning the solicitation of votes on the Plan of Reorganization [D.I. 88]. On June 26, 2024, the Court approved the Disclosure Statement and solicitation procedures. [D.I. 195]. The Court set the voting deadline for July 19, 2024, and the confirmation objection deadline as July 22, 2025. On June 26, 2024, the Debtors filed the Plan. [D.I. 192].

Relevant Plan Provisions

8. The third-party releases in the Plan (the “Third-Party Releases”) provide as follows, in relevant part:

Section 8.04 Releases by the Releasing Parties.

Effective as of the Effective Date, to the fullest extent permissible under applicable Law, each Releasing Party, in each case on behalf of itself and its respective successors, assigns, and representatives, and any and all other entities who may purport to assert any Claim, Cause of Action, directly or derivatively, by, through, for, or because of a Releasing Party, is deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged each Debtor, Reorganized Debtor, and each other Released Party from any and all Claims (other than Reinstated Claims), interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, whether liquidated or unliquidated, fixed or contingent, known or unknown, foreseen or unforeseen, existing or hereafter arising, in Law, equity, contract, tort, or otherwise, whether arising under federal or state statutory or common

law, or any other applicable international, foreign, or domestic Law, rule, statute, regulation, treaty, right, duty, requirement, or otherwise, including any derivative claims, asserted or assertable on behalf of any of the Debtors, the Reorganized Debtors, the Estates or their Affiliates, heirs, executors, administrators, successors, assigns, managers, accountants, attorneys, representatives, consultants, agents, and any other Persons claiming under or through them would have been legally entitled to assert (whether individually or collectively), based on or relating to (including the formulation, preparation, dissemination, negotiation, entry into, or filing of, as applicable), or in any manner arising from, in whole or in part, the Debtors (including the management, ownership or operation thereof) or their Estates or the Non-Debtor Subsidiaries, the purchase, sale, or rescission of the purchase or sale of any Security of the Debtors or Non-Debtor Subsidiaries, the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor or Non-Debtor Subsidiaries and any Released Party, the Debtors' in- or out-of-court restructuring efforts, the decision to file the Chapter 11 Cases, any intercompany transactions, the Chapter 11 Cases, the negotiation, formulation, preparation, or consummation of the Restructuring Support Agreement, the Restructuring Transactions, the Plan (including the Plan Supplement), the solicitation of votes on the Plan, the Disclosure Statement, the New Organizational Documents, the pursuit of Confirmation and Consummation, the DIP Facility, the DIP Facility Documents, the New Money Common Equity Investment Documents, the New Note Documents, the administration and implementation of the Plan, including the issuance or distribution of Securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other act, omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date. Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not release (a) any post-Effective Date obligations of any party or Entity under the Plan or the Confirmation Order, any Restructuring Transaction, or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan, including the assumption of the indemnification provisions as set forth in the Plan; (b) any Cause of Action included on the Schedule of Retained Causes of Action; (c) the rights of any Holder of an Allowed Claim to receive distributions under the Plan; or (d) the liability of any Released Party that otherwise would result from any act or omission to the extent that act or omission subsequently is determined in a Final Order to have constituted fraud, gross negligence or willful misconduct.

Plan at § 8.04.

9. The Releasing Parties are defined under the Plan as follows:

“Releasing Parties” means, collectively, and in each case in its capacity as such: (a) each Debtor; (b) each Reorganized Debtor; (c) each Non-Debtor Subsidiary; (d) the Sponsoring Noteholders; (e) each DIP Lender; (f) the Prepetition Agents; (g) the DIP Agent; (h) each Holder of Senior Notes Claims; (i) each Holder of Subordinated Notes Claims who is party to or has otherwise signed the Restructuring Support Agreement; (j) all Holders of Claims or Interests that (i) vote to accept the Plan or are deemed to accept the Plan and (ii) who do not affirmatively opt out of the releases provided by

the Plan; (k) all Holders of Claims who abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan; (l) all Holders of Claims who vote to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan; and (m) each Related Party of each Entity in clause (a) through (l).

Plan at § 1.1.

10. The Plan defines the Released Parties as follows:

“*Released Parties*” means, collectively, and in each case in its capacity as such: (a) each Debtor; (b) each Reorganized Debtor; (c) each Non-Debtor Subsidiary; (d) the Sponsoring Noteholders; (e) each DIP Lender; (f) the Prepetition Agents; (g) the DIP Agent; (h) each Holder of Senior Notes Claims; (i) each Holder of Subordinated Notes Claims who is party to or has otherwise signed the Restructuring Support Agreement; (j) each current and former Affiliate of each Entity in the foregoing clauses (a) through (i); and (k) each Related Party of each Entity in clauses (a) through (i); *provided* that any Holder of a Claim or Interest that is an Excluded Party or that affirmatively opts out of the releases provided by the Plan by checking the appropriate box on the applicable ballot or Notice of Non-Voting Status indicating that they opt not to grant the releases provided in the Plan shall not be a “Released Party.”

Id.

11. The Plan defines the term “Related Party” as follows:

“*Related Party*” means, collectively, current and former directors, managers, officers, affiliated investment funds or investment vehicles, predecessors, participants, successors, assigns, subsidiaries, affiliates, managed accounts or funds, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents (including any disbursing agent), advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, heirs, executors, and assigns, and other professionals, in each case solely in their capacities as such, together with their respective past and present directors, officers, partners, members, employees, agents, attorneys, representatives, heirs, executors and assigns, in each case solely in their capacities as such.

Id.

ARGUMENT

12. In his *Objection To Debtors’ Motion For Entry of an Order (I) Approving Disclosure Statement and Form and Manner of Notice (II) Establishing Solicitation and Voting Procedures, (III) Scheduling Confirmation Hearing, (IV) Establishing Notice and Objection*

Procedures For Confirmation of Plan (“Disclosure Statement Objection”) [D.I. 164], the U.S. Trustee argued the reasons why the Third-Party Release as to Related Parties, unclassified creditors, and creditors in voting classes who do not return a ballot is non-consensual. Discl. Stmt. Obj., Sections II and III, D.I. 164, pp. 12-15. The U.S. Trustee incorporates by reference the forgoing portions of the Disclosure Statement Objection as if fully stated herein.

13. The Plan as solicited imposes non-consensual releases of non-debtors by non-debtors as to (1) the multitude of “Related Parties” who like have not received notice of this Plan and not had even an opportunity to opt out of the Third-Party-Release, (2) creditors in voting classes who do not vote on the Plan and do not opt out of the Third-Party Release, and (3) unclassified creditors. Nonconsensual releases by nondebtors of nondebtors are not authorized by the Bankruptcy Code. *See Harrington v. Purdue Pharma L.P.*, 23-124, 2024 WL 3187799, at *6 n.2 (U.S. June 27, 2024) (holding that “§ 105(a) alone cannot justify the imposition of nonconsensual third-party releases because it serves only to carry out authorities expressly conferred elsewhere in the code”) (internal quotation marks omitted); *id.* at *8 (“[P]recisely nothing in § 1123(b) suggests [claims against the Sacklers that belong to their victims] can be bargained away without the consent of those affected[.]”); *id.* (“[A] bankruptcy court’s powers are not limitless and do not endow it with the power to extinguish without their consent claims held by nondebtors . . . against other nondebtors[.]”); *id.* at *10 (holding that “nothing in the bankruptcy code contemplates (much less authorizes)” a nonconsensual release of direct claims held by creditors against nondebtor third parties).

CONCLUSION

14. For the reasons set forth above, the Plan should not be confirmed.

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. The U.S. Trustee also reserves all rights with respect to plan confirmation issues until the relevant objection deadline.

WHEREFORE, the U.S. Trustee requests that this Court enter an order (i) denying confirmation of the Plan and (ii) granting such other relief that the Court deems just and proper.

Dated: July 23, 2024
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 and 9

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CERTIFICATE OF SERVICE

I, Jonathan W. Lipshie, hereby attest that on July 23, 2024, 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:

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