

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re: : Chapter 11  
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ENRON CORP., et al., : Case No. 01-16034 (AJG)  
:   
: Jointly Administered  
Reorganized Debtors. :  
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ORDER, PURSUANT TO 11 U.S.C. §§ 105(a), 502(c), AND 1142,  
ESTIMATING CLAIM NOS. 15229-35 FOR  
PURPOSES OF ESTABLISHING RESERVES

Upon consideration of (a) the Reorganized Debtors' Fourth Omnibus Motion for Order, pursuant to 11 U.S.C. §§ 105(a), 502(c) and 1142, Estimating Certain Contingent or Unliquidated Claims for Purposes of Establishing Reserves, dated September 23, 2005 (the "Motion"), (b) the Objection to the Motion of Claimant Oscar's Photo Lab ("OPL"), on Behalf of Itself and All Similarly Situated California Business and Residential Ratepayers (the "OPL Objection"), (c) the Reorganized Debtors' Reply to the Objection (the "Reply"), (d) OPL's Response to the Reply, on Behalf of Itself and All Similarly Situated California Business and Residential Ratepayers, and(e) the argument of counsel at the hearing held to consider the Motion and the OPL Objection on December 8, 2005 (the "Hearing"); and the Reorganized Debtors and OPL having agreed that the Motion may be

decided on the parties' written submissions; and it appearing that, while the Disallowance Order (as defined in the Reply) has been appealed by OPL, no stay pending such appeal has been obtained; and it appearing that the relief requested in the Motion is in the best interests of the Reorganized Debtors and their creditors; and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and for the reasons stated in the Court's opinion attached hereto as Exhibit A; and after due deliberation and sufficient cause appearing therefore, it is

**ORDERED** that, the OPL Objection is hereby overruled, and the Motion is hereby granted with respect to Claim Nos. 15229-35; and it is further

**ORDERED** that, pursuant to sections 105(a), 502(c), and 1142 of the Bankruptcy Code, each of Claim Nos. 15229-35 filed by Oscar's Photo Lab (the "Affected Claims") shall be estimated, for the purposes of establishing unsecured Reserve Claim Amounts (as such term is defined in the Motion), at \$0; and it is further

**ORDERED** that, pursuant to Sections 21.2 and 21.3(a) of the Plan, the Reserve Claim Amounts shall constitute and represent the maximum amount in which each

Affected Claim may ultimately become an allowed Claim, subject solely to OPL's right to seek reconsideration of any of the Affected Claims pursuant to section 502(j) of the Bankruptcy Code; and it is further

**ORDERED** that, the claims agent appointed in these cases is authorized and directed to make appropriate entries in the claims register to reflect the terms of this Order.

Dated: New York, New York  
January 17, 2006

s/ Arthur J. Gonzalez  
HONORABLE ARTHUR J. GONZALEZ  
UNITED STATES BANKRUPTCY JUDGE

# EXHIBIT A

## Exhibit A

The Reorganized Debtors filed the Fourth Omnibus Motion for Order, pursuant to 11 U.S.C. §§ 105(a), 502(c), and 1142, Estimating Certain Contingent or Unliquidated Claims for Purposes of Establishing Reserves, dated September 23, 2005 (the “Estimation Motion”). In the Estimation Motion, the Reorganized Debtors sought, among other things, to estimate certain claims<sup>1</sup> filed by Oscar Photo Lab (“Oscar”) at a value of zero for the purpose of establishing an amount to maintain as a reserve for any amount for which the Debtors are ultimately found liable to Oscar.

Pursuant to § 1142 of the title 11 of the United States Code (the “Bankruptcy Code”), the Reorganized Debtors are directed to “carry out the plan.” 11 U.S.C. § 1142(a). Section 1142 of the Bankruptcy Code also authorizes the court to “direct the debtor and any other necessary party . . . to perform any . . . act . . . that is necessary for the consummation of the plan.” 11 U.S.C. § 1142(b). In the instant cases, the Court entered an Order (the “Confirmation Order”) on July 15, 2004, confirming the Debtors’ Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the “Plan”). The Plan became effective on November 17, 2004. Section 32.1 of the Plan provides for periodic distributions of estate assets to holders of Unsecured Allowed Claims. In ¶ 60 of the Confirmation Order, the Court retained jurisdiction of these confirmed cases for various purposes including, among other things, “to enter such orders as may be necessary or appropriate to implement or consummate the

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<sup>1</sup>The claims were filed against the following debtor entities: Enron Corp. (Claim No. 15232), Enron Energy Marketing Corp. (Claim No. 15229), Enron Power Marketing, Inc. (Claim No. 15230), Enron North America Corp. (Claim No. 15231), Enron Energy Services, Inc. (Claim No. 15233), Enron Energy Services, LLC (Claim No. 15234), and Enron Energy Services North America, Inc. (Claim No. 15235).

provisions of the Plan,” [¶ 60(b)]; “to ensure that distributions to holders of Allowed Claims and Allowed Equity Interests are accomplished as provided in the Plan.” [¶ 60(d)]; and “to allow, disallow, determine, liquidate, classify, estimate or establish the priority of or secured or unsecured status of any Claim.” [¶ 60(e)].

Section 21.3 of the Plan provides that an amount must be reserved and held in escrow (the “Disputed Claims Reserve”) for the benefit of holders of Disputed Claims until such time as the Disputed Claims “have been compromised and settled or determined by Final Order.” The section further provides that the amount to be held in the Disputed Claims Reserve for each holder of a Disputed Claim shall equal “the Pro Rata Share of distributions which would have been made to the holder of such Disputed Claim if it were an Allowed Claim in an amount equal to the lesser of (i) the Disputed Claim Amount, (ii) the amount in which the Disputed Claim shall be estimated by the Bankruptcy Court pursuant to section 502 of the Bankruptcy Code for purposes of allowance, which amount, unless otherwise ordered by the Bankruptcy Court, shall constitute and represent the maximum amount in which such Claim may ultimately become an Allowed Claim or (iii) such other amount as may be agreed upon by the holder of such Disputed Claim and the Reorganized Debtors.”

Pursuant to 11 U.S.C. § 502(c), a bankruptcy court has the power to estimate “any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.” 11 U.S.C. § 502(c). Section 21.2 of the Plan authorizes the Court to estimate claims pursuant to § 502(c) and further provides that “the estimated amount shall constitute either the allowed amount of such Claim or a maximum limitation on such Claim.”

Prior to filing the Estimation Motion, the Reorganized Debtors had filed objections to the claims

filed by Oscar, which motion Oscar opposed. In addition, Oscar had filed a motion to Amend its proofs of claim to seek additional relief. On August 5, 2005, the Court issued the Opinion Sustaining Debtors' Objection To Proofs of Claim No. 15229-35 Filed By Oscar's Photo Lab And Motion To Amend Certain Proofs of Claim Filed By Oscar's Photo Lab. An order consistent with the Court's Opinion was entered on August 26, 2005. In its ruling, the Court determined that there could be no liability, as a matter of law, to Oscar on the claims filed by Oscar because of preemption by the Federal Power Act and because the claims are precluded by the filed rate doctrine. Moreover, the Court ruled that the proposed amended claims were not timely filed as they did not relate back to the date of the filing of the proofs of claim.

The Reorganized Debtors maintain that the relief that they seek in the Estimation Motion is necessary to allow them to comply with the Plan provisions relating to the periodic distributions to the holders of allowed claims. The Reorganized Debtors contend that they are currently maintaining a reserve for these claims that has no correlation to any assessment of an actual amount for which they may ultimately be deemed liable. The Reorganized Debtors further argue that maintaining such a high reserve works a hardship on holders of general unsecured claims who expect that they will be provided with a meaningful distribution at the next scheduled distribution in April 2006.

Oscar opposes the relief sought in the Estimation Motion arguing that because the underlying substantive issues concerning their "disputed claims" are currently on appeal from this Court's ruling disallowing their claims, estimating their claims at zero would undermine their appellate rights despite the fact that they maintain that the Plan guarantees those rights. Oscar further argues that estimating its claims at a value of zero is inconsistent with the requirement, pursuant to section 1123(a)(4) of the

Bankruptcy Code, that each claim of a particular class receive the same treatment. Oscar also contends that because this Court has already issued a ruling dismissing its claims, the Court is deprived of jurisdiction to estimate those claims as any such ruling will impact a matter on appeal because a zero reserve would have the effect of allowing this Court “to resolve the Appeal in the Debtors’ favor.” Finally, Oscar argues that, even if this Court does have jurisdiction to estimate the claims, if the Court were to estimate the claims at a value of zero and if no amount were set aside for the claims, then, in the event Oscar were successful on appeal, the Debtors would be forced to expend large amounts of money and spend years on litigation to recover from other creditors distributions made to them in order to pay Oscar for its distributive share on any amount it is ultimately awarded.

As previously noted, section 502(c) requires that if the fixing or liquidation of a contingent or unliquidated claim would unduly delay the administration of a case, such claim “shall be estimated for purpose of allowance.” 11 U.S.C. § 502(c). While the clearly stated purpose of allowing for such estimation is “to avoid undue delay in the administration of bankruptcy proceedings,” *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 957 (2d Cir. 1993), the section is designed for two purposes:

- 1) to avoid the need to await the resolution of outside lawsuits to determine issues of liability or amount owed by means of anticipating and estimating the likely outcome of these actions, and
- 2) to promote a fair distribution to creditors through a realistic assessment of uncertain claims.

*O’Neill v. Continental Airlines, Inc. (In re Continental Airlines)*, 981 F.2d 1450, 1461 (5<sup>th</sup> Cir. 1993).

Thus, the estimation of claims promotes the purpose of setting the amount of claims that are to receive distributive shares. *In re Thomson McKinnon Securities, Inc.*, 143 B.R. 612, 619 (Bankr.

S.D.N.Y. 1992). In meeting this need, a bankruptcy court is free to use the best method available to it under the circumstances to value the claim. *Addison v. Lanston (In re Brints Cotton Mktg., Inc.)*, 737 F.2d 1338, 1341 (5<sup>th</sup> Cir. 1984). The standard utilized by an appellate court in reviewing a bankruptcy court's method of estimating a contingent or unliquidated claim is that of abuse of discretion. *Id.*

In estimating claims, a court must apply “the legal rules which govern the ultimate value of the claim,” which ordinarily requires the application of state law. *Brints*, 737 F.2d at 1341. While state law ordinarily determines whether a claim is valid and the obligations that remain, nevertheless, a bankruptcy court may, when authorized by the Code, “determine how and what claims are allowable for bankruptcy purposes, in order to accomplish the statutory purpose of advancing a ratable distribution of assets among the creditors.” *Id.* Indeed, to advance the purpose of a ratable distribution amongst creditors and to prevent creditors from being “disadvantaged *vis-a-vis* one another” claimants have been precluded from availing themselves of certain rights they ordinarily would have had under state law, including the right to select the date on which a payment is due them and the right to receive post-petition interest. *Brints*, 737 F.2d at 1341-1342.

Courts utilize various procedures to estimate the value of a claim. In *Brints*, the bankruptcy court conducted a trial. *Brints* 737 at 1341. In *Thomson McKinnon*, the bankruptcy court estimated a claim after conducting a hearing at which each side provided a live witness, in addition to reviewing relevant deposition testimony of witnesses who had been deposed during the course of several years in previous litigations concerning the subject matter of the claim. *Thomas McKinnon*, 143 B.R. at 619. In another case, the bankruptcy court used a non-binding arbitral decision as the basis for estimating a

claim. *Maxwell v. Seaman Furniture Co. (In re Seaman Furniture Co.)*, 160 B.R. 40, 42 (S.D.N.Y. 1993). Notwithstanding the fact that the arbitration was non-binding on the parties, the appellate court concluded that the bankruptcy court acted within its discretion in using the arbitration award as a basis to estimate the claim. *Id.* at 42.

In *JP Morgan Chase Bank v. U.S. Nat'l Bank Ass'n. (In re Oakwood Homes Corp.)*, 329 B.R. 19, 22 (D. Del. 2005), the debtor's plan included a process similar to that in the instant case. The debtor's plan in *Oakwood* provided for three options for setting a reserve including the amount of the asserted claim, an amount agreed to by the parties, or an amount "as may otherwise be determined by order of the Bankruptcy Court." The bankruptcy court had previously disallowed the claim, which ruling was on appeal. *Id.* at 21. In estimating the claim at zero, the bankruptcy court considered the facts of the case, including the likelihood of success on the appeal. The district court affirmed the estimation concluding that because the bankruptcy court was authorized to set the reserve amount, it had "complete discretion to set that amount." *Id.* at 22.

Oscar acknowledges that if the Court had conducted an estimation proceeding at which it estimated the Disputed Claims at a value of zero prior to disallowing the claims, the Reorganized Debtors would then not have to reserve for its claims. Oscar, however, contends that because the Reorganized Debtors chose first to object to the claims and, as a consequence of the Court's disallowance of those claims, Oscar has appealed, the Plan protects its appellate rights by requiring that the Reorganized Debtors maintain a reserve until entry of a Final Order concerning that appeal. Oscar argues that the Plan sets up a process whereby the Reorganized Debtors can either seek to have the Court estimate the claim or choose to object to the claim. If the latter option is selected and the claim is

disallowed, then the Plan functions to protect a claimant's appellate rights by allowing a Court, in its sole discretion, to require a reserve for the Disputed Claim that is on appeal. Oscar infers from the inclusion of this section that a claimant has no obligation to seek a stay pending appeal because the Plan does not specifically provide for it. Oscar also argues that the fact that the disallowance is on appeal divests this Court of jurisdiction on any issues related to that matter.

Pursuant to the terms of the Plan, this Court retained jurisdiction for various purposes including, inter alia, to enter any necessary or appropriate orders for the purpose of implementing or consummating the Plan, to ensure that distributions provided for under the Plan are accomplished, and “to allow, disallow, determine, liquidate, classify, estimate or establish the priority of or secured or unsecured status of any Claim.” While it is true that, because Oscar has appealed this Court's ruling concerning the disallowance of its claim, this Court is divested of jurisdiction concerning the substantive issue of whether the claims were properly disallowed based upon the preemption doctrine and the filed-rate doctrine, this Court, nevertheless retains jurisdiction to administer the case. As part of that process, this Court may estimate any contingent or unliquidated claim where awaiting the fixing or liquidation of such claim would unduly delay the administration of the case.

More importantly, the terms of the Plan contemplate that an estimation proceeding may occur subsequent to any disallowance of such claim. This interpretation derives from the interplay of section 1.87 and 21.3 of the Plan. Pursuant to section 1.87 of the Plan, the term “Disputed Claim Amount” is defined to include, inter alia, valuing a disallowed claim at zero. This valuation applies regardless of whether the disallowance is on appeal.

Section 21.3 requires that a reserve be maintained for Disputed Claims until such time as such

claims are “compromised and settled or determined by Final Order” in an amount equal to the lesser of three options, one of which is the previously defined term “Disputed Claim Amount.” Therefore, the drafters of the Plan contemplated that the reserve for a Disputed Claim that was previously disallowed would be zero even during the pendency of an appeal. Section 1.87, however, further provides that if a Disputed Claim has been disallowed but the order of disallowance for such claim has not yet become a Final Order, the Bankruptcy Court may, nevertheless, require a reserve for such claim to the extent that the Bankruptcy Court, “in its sole and absolute discretion” determines that “such reserve is necessary to protect the rights of such holder under all of the facts and circumstances relating to the order of disallowance and the appeal of such holder from such order.” Thus, this proviso is an indication that it was contemplated that the Bankruptcy Court might be called upon to address the degree to which a reserve might be appropriate for a previously disallowed Disputed Claim in lieu of valuing the reserve at zero. Further, this section makes clear that the pendency of an appeal is one of the factors that the Court considers in assessing the amount of any reserve. If the pendency of an appeal, itself, precluded any reserve other than the amount alleged in the proof of claim by a claimant, the section would be superfluous as the Court would not have to consider the facts and circumstances of the disallowance order and the appeal. Neither would the Court have discretion to determine the reserve. Further, the mechanism for the Court to address the appropriate amount to reserve must be an estimation hearing. Moreover, section 1.87 of the Plan is permissive, not mandatory, as it provides that a bankruptcy court “may” reserve in an amount other than zero for a disallowed claim where the order disallowing the claim has not yet become final. In addition, the section does not mandate that a court-ordered reserve be for the full amount of the filed claim. Rather, a court has absolute discretion to determine the extent to

which any such reserve is necessary to protect a claimant's rights "under all of the facts and circumstances relating to the order of disallowance and the appeal." Finally, section 1.87, which affords a court authority within its discretion to set a reserve for a disallowed claim at more than the zero amount set forth in the Plan, is not intended as a substitute for requesting a stay pending appeal. While section 1.87 may obviate the need for a holder of a disallowed claim that is on appeal to seek a stay pending appeal, it does not impede that appellant's right to seek such relief if it deems it necessary. If a stay pending appeal were granted staying the effectiveness of a disallowance order, then the parties would return to their position prior to the issuance of the disallowance order with whatever rights they have under bankruptcy law and the Plan, including any rights regarding estimation.

Moreover, section 21.2 of the Plan, regarding Estimation of Claims, provides that "the Bankruptcy Court will retain jurisdiction to consider any request to estimate any Claim at any time *"during litigation concerning any objection to any Claim, including, without limitation, during the pendency of any appeal relating to any such objection."* The term "Claim" is defined in section 1.47 of the Plan to include unliquidated and contingent claims. Section 21.2 further provides that the procedures set forth in the Plan for objections to claims, estimation of claims and the resolution of claims "are cumulative and not necessarily exclusive of one another."

Thus, because Oscar's Disputed Claim was disallowed by the Court, its Disputed Claim Amount as defined by section 1.87 of the Plan is valued at zero regardless of whether the order disallowing the claim has become a Final Order. In turn, section 21.3 of the Plan requires that until a Final Order is entered, the value necessary to reserve for Oscar's claim is zero. The only remaining element is an estimation hearing to allow the Court to determine "*in its sole and absolute discretion*"

whether a reserve greater than the zero value is necessary to protect Oscar's rights "under all of the facts and circumstances" relating to the order disallowing Oscar's claim and its appeal. Therefore, it is within this Court's discretion whether to require a reserve to protect Oscar's rights under the facts and circumstances, including the appeal.

Thus, the Court will turn to the facts and circumstances that it should consider in determining whether a reserve greater than zero is required to protect Oscar's rights. First, this Court has already conducted a hearing on the objection filed to Oscar's claims. The Court concluded that the Debtors did not have liability to Oscar on its claims based upon principles of preemption and the filed-rate doctrine. As a result, the Court disallowed Oscar's claims. Oscar has not provided anything further that would prompt the Court to reconsider its ruling or that shows that Oscar has a likelihood of success on appeal. As the Court may estimate a claim based upon the ruling of another court or a non-binding arbitral decision, it certainly may base its estimation on its own ruling and the claimant's likelihood of success on appeal.

Oscar argues that its appellate rights are undermined by not maintaining a reserve for its claims in the amount for which it filed its proofs of claim. Oscar contends that because this Court's disallowance order is on appeal, the Court is divested of jurisdiction to consider the Debtors' liability to Oscar. Oscar further maintains that a zero-reserve is tantamount to no protection for its claims and effectively decides the liability issue that is on appeal "in the Debtors' favor" as it leaves Oscar with no source for recovery if it is successful on appeal.

Oscar's appellate rights are not undermined by this Court exercising its jurisdiction over the administration of these cases. Oscar may continue with its appeal on the issue of liability and, if

successful on appeal, it may seek reconsideration of the disallowance of its claims pursuant to section 502(j) of the Bankruptcy Code. Further, section 502(j) provides that if a reconsidered claim is allowed, others who hold claims in the same class will not receive future distributions until the holder of a reconsidered-allowed claim receives such claims proportionate value to that received by other holders. In addition, as Oscar itself notes, if it is later determined that Oscar is entitled to an Allowed Claim and distributions are completed, it may be required that distributions be recovered from other creditors to allow for a distribution to be paid to Oscar on its Claims pursuant to the Plan.

In this regard, Oscar argues that the Court should consider that if Oscar is successful on appeal, the Reorganized Debtors would incur great administrative expenses and costs in recovering distributions made to other creditors. As a result, Oscar argues that maintaining a reserve is a more prudent course. Oscar further argues that if it is not successful in the Appeal, then the funds set aside will still be available for distribution to other creditors and because the reserves are in interest bearing accounts, other creditors will not be harmed.

The Reorganized Debtors argue that since the Plan was confirmed in July 2004, there has been great effort directed at reconciling the thousands of claims that have been asserted against the Debtors. At the time of the first two distributions to creditors, however, the Reorganized Debtors maintain that they were very conservative in reserving for Disputed Claims at the expense of the distributions to holders of Allowed Claims. The Reorganized Debtors argue that the Court should consider the necessity of providing a meaningful distribution at the next distribution date of April 2006 to the holders of Allowed Claims.

The Court first notes that if the potential expenses and costs of recovering distributions from

other holders of Allowed Claims in the event of a successful appeal by a holder of a Disputed Claim were a justification for not estimating a claim, then no claim could be estimated as any potential recovery in large cases would entail a significant expenditure. Further, the issue of the potential costs and expenses required to recover from distributions made to other holders of Allowed Claims is an issue that is considered by this Court under the “all facts and circumstances” standard it applies. In balancing the equities of the risk of the potential costs to recover the money against the benefit of a meaningful distribution at this time, the equities favor the distribution to holders of Allowed Claims. In addition, the issue of the potential recovery costs would be addressed by a court considering an application for a stay pending appeal, when such court endeavors to balance the equities. In such case, as a condition to granting a stay pending appeal, a court might deem it necessary to require that the appellant post a bond to protect the interests of the other creditors for any delay in distribution. Here, Oscar has not sought a stay of the effectiveness of the disallowance order pending appeal from the District Court.

Moreover, it has been noted that because a deferral of a distribution affects the efficient administration of a case, the possibility of such deferral provides a justification for estimation of a claim. *See Mirant Corp., et al.*, Case No. 03-46590, Memorandum Order, p.6 (Bankr. N.D. Tex. 2004). Thus, a meaningful distribution to those creditors who hold Allowed Claim is certainly a factor that the Court must consider. In light of this Court’s disallowance of Oscar’s claims and the Court’s assessment of Oscar’s likelihood of success on appeal, at this juncture, a meaningful distribution to holders of Allowed Claims comports with the estimation goal of promoting a fair distribution to creditors through a realistic assessment of uncertain claims. In addition, a meaningful distribution to

holders of Allowed Claims to advance the efficient administration of these cases is even more compelling than in instances where a court has not directly addressed the substantive issues in a case.

Finally, the Court does not agree with Oscar's argument that reserving for its claim at a value of zero violates section 1123(a)(4) of the Bankruptcy Code requiring that a plan provide the same treatment for each claim of a particular class unless the claim holder agrees to a less favorable treatment of its claim. Oscar is not being deprived of the same treatment for its claims in relation to other claims in the same class. Oscar has its appellate rights, including the right to seek entry of an order staying the effectiveness of the disallowance order pending a resolution of the appeal, and if it is ultimately determined that its claim should be an Allowed Claim, future distributions under the Plan will be made calculated to preserve its right to receive any pro rata share of distributions to which it is entitled. In addition, absent a stay of the effectiveness of this Court's disallowance order, Oscar's claims have been disallowed and expunged. There is no discrimination in relation to Oscar's claims because the Reorganized Debtors are not maintaining a reserve for other disallowed and expunged claims. Moreover, an objection based upon section 1123(a)(4) is an objection to the confirmability of a plan. As referenced previously, the Plan was confirmed on July 15, 2004 and went effective on November 17, 2004. Oscar did not file an objection to the Plan-reserve provisions. Although certain appeals, one of which remains extant, were filed to the Confirmation Order, the Court is not aware that any of those appeals raised any issues with respect to the reserve provisions of the Plan. In any event, no stay of the effectiveness of any provision of the Plan has ever been granted. As a result, the Plan-reserve provisions are fully effective. As Oscar's objection here regarding section 1123(a)(4) is in essence a Plan objection to the release provision, it is barred.

Based upon the foregoing, Oscar's objection to the Estimation Motion is overruled and the relief sought by the Reorganized Debtors is granted.