IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
PES Holdings LLC, et al.,[1]	)	Case No. 18-10122 (KG)
	)	(Jointly Administered)
Debtors.	)	

GROWTH ENERGY'S MEMORANDUM IN OPPOSITION TO UNITED STATES' MOTION TO APPROVE EPA RVO CONSENT DECREE AND IN RESPONSE TO DEBTORS' OPPOSITION TO GROWTH ENERGY'S INTERVENION BRIEF

Proposed Intervenor Growth Energy submits this memorandum in opposition to the United States' Motion to Approve EPA's proposed Consent Decree and Environmental Settlement Agreement (the "Consent Decree" or "Decree") [Docket No. 347], (the "United States' Motion") and in response to the Debtors' Opposition to Growth Energy's Intervention Brief[2] [Docket No. 346] ("Debtors' Opposition"), and hereby objects to entry of the Consent Decree.

The United States, on behalf of EPA, is asking this Court to approve the Consent Decree not from the perspective of whether the settlement it reflects is good for the Debtors—it clearly is and the Court has already approved it from that perspective. Rather the perspective to be considered by the Court here is the public interest in compliance with the environmental laws. Although the Court may give EPA's decision to settle a measure of deference, the Court still must be satisfied that the proposed Consent Decree is fair, reasonable and in the public interest. The terrible, one-sided settlement that EPA negotiated here is not even close to meeting that

[1] The Debtors in this Chapter 11 proceeding are PES Holdings, LLC; North Yard Financing, LLC; North Yard GP, LLC; North Yard Logistics, L.P.; PES Administrative Services, LLC; PES Logistics GP, LLC; PES Logistics Partners. L.P.; PESRM Holdings, LLC; and Philadelphia Energy Solutions Refining and Marketing LLC.
[2] On March 26, 2018, Growth Energy filed the Intervention Brief [Docket No 330]. Capitalized terms used but not otherwise defined herein have the meaning ascribed to such terms in the Intervention Brief or the Consent Decree, as applicable.

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standard. It accepts almost total non-compliance with the Renewable Fuel Standard requirements with which the Debtors defaulted on March 31, 2018; it gives a complete pass to viable non-debtors who have direct liability for that compliance; and it fails to assure compliance going forward.

The Court should tell EPA that it needs to do better. And the Court should do so—even though approval of the Consent Decree is the last obstacle that stands in front of the completion of what will be perceived by many as a successful reorganization—because the Decree runs roughshod over critically important provisions of the Clean Air Act and the principle that bankruptcy is not a device for circumvention of laws to protect public health and the environment. A better settlement by EPA would affirm, not ignore, that principle and would allow for the refineries here to continue to operate <u>and</u> at the same time give more than lip service to assuring compliance with environmental laws. The Court should not approve a settlement that would be without precedent in the misuse of the bankruptcy process.

I. INTRODUCTION

1. The Debtors and their parent companies and joint venture partners are directly liable under the Clean Air Act to retire 467 million RINs due on March 31, 2018, representing 467 million gallons of renewable fuel to be blended in gasoline and diesel fuel. United States' Mot. ¶ 9. They estimate that the cost of compliance with this obligation is $350 million. *Id*. at ¶ 10. The United States explains that its proposed Decree requires the Debtors to use most of their 210 million RINs to keep up with their RIN obligations they have been incurring through refinery production in the first quarter of 2018 (estimated at 97 million RINs); to help them meet their projected RIN obligations for the rest of 2018 (64.6 million RINs); and allows them to sell the rest for $2.5 million. Consent Decree ¶¶ 3, 5, and 7. That leaves just 41 million RINs that

the United States is accepting to satisfy the past due obligation of 467 million RINs, forgiving 426 million RINs or 91.2 percent of the requirement.

2. Each of the forgiven 426 million RINs represents a gallon of renewable fuel that Congress mandated in the Renewable Fuels Standard ("RFS") program that refiners buy and use in gasoline and diesel instead of petroleum to reduce greenhouse gases to address climate change, and to support American investment and jobs producing these fuels here in the United States in place of foreign oil. To qualify as renewable fuels, the Clean Air Act generally requires a life-cycle greenhouse gas reduction of 20-60 percent compared to petroleum fuels. 42 U.S.C. § 7545(o)(2)(A)(i), (1)(D), (1)(B)(i), and (1)(E). Waiving nearly all of this refinery's massive obligation not only hurts Growth Energy members who have invested to produce these renewable fuels, but will add approximately one million tons of greenhouse gases to the atmosphere,[3] undermining the only statute Congress has passed with the specific intent to redress climate change. Perhaps unsurprisingly, the United States does not mention the words "climate change" anywhere in its motion, even in describing the purposes of the RFS program. *See* United States Mot. ¶ 19.

3. The United States justifies this bad deal almost entirely on the grounds that the Debtors in this case cannot afford to do more to comply with the law while remaining viable in emerging from bankruptcy. *Id.* at ¶¶ 26-28. The government contends that the Decree furthers the goals of the Clean Air Act "[b]y obtaining the maximum amount of pre-effective date RFS compliance realistically possible without threatening the viability of the company and a risk of

[3] In 2010, EPA estimated that the 36 billion gallons of renewable fuel (comprised of the four different types under the statute) required to be used in the transportation fuel supply annually by 2022 under the amended RFS Program would result in an annualized carbon dioxide emission reduction of 138.4 million metric tons. *See* 75 Fed. Reg. 14,670, 14,746, 14,843 (Mar. 26, 2010). Applying EPA's analysis, the Debtors' avoided compliance of about 0.4 billion RINs would cause an increase of at least 1.0 million metric tons of carbon dioxide emissions, assuming all of those RINs correspond to conventional ethanol.

liquidation." *Id.* at ¶ 53. The United States further suggests the importance of the refinery as 28 percent of East Coast refining capacity and employing 1,100 individuals, and argues that the Decree "avoid[s] the risk of liquidation of Debtors by taking into account PESRM's limited financial ability-to-comply." *Id.* at ¶¶ 3 and 6. In fact, even assuming that the Debtors have a limited ability to pay acknowledging the legitimate concerns for the refinery's employees, the settlement is defective.

4. Growth Energy is agnostic about whether the Debtors could do more to comply. Rather, Growth Energy objects that the proposed Consent Decree requires nothing at all from Debtors' parent companies and joint venture partners, The Carlyle Group L.P. ("Carlyle") and Sunoco, Inc. ("Sunoco"), and instead releases Carlyle and Sunoco from ***all*** liability.[4] This flat out contradicts the RFS regulations, which explicitly provide that "[a]ny parent corporation is liable for any violation… committed by any of its subsidiaries" and "[e]ach partner to a joint venture is jointly and severally liable for any violation. . . committed by the joint venture operation." 40 C.F.R. § 80.1461(c) and (d). EPA explained during the RFS rulemaking that this parent liability, common across its fuels regulations, is designed to ensure compliance in precisely this situation, where the operating subsidiary may lack the resources to comply. *See* EPA, 420-R-07-66, Renewable Fuel Standard Program: Summary and Analysis of Comments 11–19 (April 2007). Nevertheless, the United States simply asserts that, although it "believes it would prevail" in holding Carlyle and Sunoco liable, the Debtors disagree and there is litigation risk. United States' Mot. ¶ 49.

[4] The Consent Decree is in full satisfaction of all civil claims, obligations, liabilities and causes of action pursuant to the CAA and the RFS Regulations with respect to Pre-Effective Date RVOs by the United States on behalf of the EPA against the "Covered Persons" (as defined on page 5 of the Consent Decree). As so defined, Covered Persons appears to include Carlyle and Sunoco.

5. But that litigation risk, which is being utilized to justify a 91.2 percent discounting of the RIN obligation and asking nothing of Carlyle and Sunoco, is vanishingly small, as highlighted by the Debtors' own efforts to present the argument in opposing Growth Energy's intervention. The Debtors argue that the regulations imposing liability on "any parent corporation" and "each partner to a joint venture" is limited to the direct parent holding company, which of course lacks assets, and excludes "grandparents" and "great-grandparents." Debtors' Opposition ¶ 41. The Debtors' interpretation not only contradicts the language of the rules but is unreasonable, subverting EPA's purpose to guarantee compliance by enabling any intermediate holding company easily to circumvent the purpose of this parent liability provision. Indeed, in hearings before this Court, the Debtors in moments of candor refer to Carlyle and Sunoco simply as "parents," and in securities filings both Sunoco and Carlyle call themselves joint venture partners with regard to the refinery. *See* Tr. of Hr'g on Combined Disclosure Statement Approval and Plan Confirmation at 19:22–24 (Mar. 26, 2018) ("We've got sixty-five million in equity and seventy-five million in a loan coming from *parents and parent affiliates.*"); *see also* Energy Transfer Partners, L.P. Form 10-K For the fiscal year ended Dec. 31, 2017, SEC File Number 1-31219 at 21; Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 18; and Sunoco Logistics Partners L.P. Form 10-K For the fiscal year ended Dec. 31, 2012, SEC file number 1-312219 at 45; *see also* The Carlyle Group, "The Carlyle Group and Sunoco Agree to Form Philadelphia Refinery Joint Venture."[5]

6. The government also suggests that Carlyle and Sunoco could be entitled to a non-debtor release under bankruptcy law on account of contributions to the reorganization process, and maintain that there is a risk the Debtors would be liquidated absent this settlement. United

[5] https://www.carlyle.com/media-room/news-release-archive/carlyle-group-and-sunoco-agree-form-philadelphia-refinery-joint.

States Mot. ¶¶ 49 and 74-75. That risk, too, does not justify the massive non-compliance. Whatever the limits might be on when, if ever, non-consensual releases can be given to non-debtors, surely they could not be given in situations like this, where the non-debtors have the same obligations as the Debtors and are paying nothing to satisfy those obligations.

7. It is true that Philadelphia Energy Solutions LLC ("PES") and/or Carlyle[6] has supposedly committed $65 million in exchange for 25 percent equity in the Reorganized Debtor, and Sunoco (or an affiliate) is lending $75 million. But these funds, for which PES/Carlyle and Sunoco obtain value, hardly justify releasing them from more than ninety percent of the $350 million that the Debtors say achieving full compliance would cost.

8. Moreover, the Plan reflects Carlyle's and Sunoco's conclusion that the refinery is worth more as a going concern than in liquidation. That conclusion does not depend on whether Carlyle and Sunoco get a complete release from their legal obligation to ensure compliance with the 467 million RIN obligation that was due on March 31.

9. Surely it is no "compromise" in these circumstances for the United States to accept 41 out of 467 million RINs that is the maximum they say the Debtors can afford and require *zero* RINs from Carlyle and Sunoco. This deal frustrates the goals of the RFS by denying the public the benefits of 419 million of gallons of renewable fuels in the transportation fuel supply.

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[6] The Plan defines the $65 million as "Parent Cash Contribution" and that it is "payable by the Parent to the Debtors on the Effective Date," Plan at Art. 1.A 124, but the Debtors have implied the contribution may be from Carlyle or an affiliate. *See e.g.,* Debtor's Memorandum of Law in Support of Plan (the "Debtors' Confirmation Brief") [Docket No. 290], at ¶ 51 ("Among other things, the Parent Parties made a $65 million cash contribution and agreed to the terms of the Restructuring Support Agreement"); *see also* Tr. of Hr'g on Combined Disclosure Statement Approval and Plan Confirmation at 19:22-24 (March 26, 2018) ("We've got sixty-five million in equity and seventy-five million in a loan coming from *parents and parent affiliates.*") (emphasis added); *see also* Philadelphia Energy Solutions Press Release (Jan. 22, 2018) http://omnimgt.com/CMSVol2/pub_47219/654463_PressRelease.pdf ("a $65 million equity investment from existing equity holders, led by The Carlyle Group along with management and other partners").

10. The Acting Assistant Attorney General for the Environmental and Natural Resources Division recently emphasized in a memo to his top management that the key goals of civil environmental enforcement are to "require… compliance," "remove economic benefits obtained through noncompliance," and "remedy harm to public health or the environment" caused by noncompliance. *See* Memorandum from Jeffrey H. Wood, Acting Assistant Attorney General, to ENRD Section Chiefs and Deputy Section Chiefs ("Wood Mem."), at 5-6 (Mar. 12, 2018).[7] This settlement would impede rather than advance those goals. By any common-sense application of the standards for judicial approval of a consent decree—to ensure that it is fair, reasonable, adequate, and consistent with the governing statute—this Court should deny the United States' Motion for entry of the Consent Decree.

II. BACKRGOUND

A. The Debtors

11. Debtor Philadelphia Energy Solutions Refining and Marketing LLC ("PESRM") owns the Point Breeze and Girard Point refineries (the "Refining Complex") in Philadelphia, Pennsylvania. PES wholly owns all of the Debtor entities, including PESRM. *See* Corporate Organizational Chart, Disclosure Statement at Exhibit F. Carlyle PES, LLC holds a sixty-five percent interest in PES. *Id*. Carlyle PES is part of The Carlyle Group, L.P.[8] PES Equity Holdings, LLC, a wholly-owned subsidiary of Energy Transfer Partners, L.P.,[9] owns thirty-two percent of PES, and senior management owns the remaining two percent. *Id*.

[7] https://www.justice.gov/enrd/page/file/1043731/download.
[8] Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 259.
[9] Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 16.

B. The RFS Program

12. The RFS Program is codified in the Clean Air Act and requires that transportation fuel sold in the United States contains a certain minimum volume of renewable fuels. Congress first enacted the RFS Program as part of the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501, 119 Stat. 594, 1067-1076 (2005), and subsequently expanded the program under the Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, § 1 *et seq.*, 121 Stat. 1492 (2007). Congress intended the RFS Program to reduce greenhouse gas emissions and thereby address the risks of climate change, encourage the development of the renewable fuels sector, and reduce the country's dependence on imported oil. *See* S. Rep. No. 110-65, at 2-3 (2007).

13. The statute requires EPA to promulgate regulations to ensure that gasoline sold in the United States, on an annual average basis, contains the volumes of renewable fuel specified in the statute.[10] EPA has the authority to reduce by "waiver" the required annual statutory volumes if it finds that imposing those volumes would "severely harm the economy or environment" or if "there is an inadequate domestic supply," which criteria EPA considers during an annual rulemaking process. 42 U.S.C. § 7545(o)(7)(A). The required volumes of renewable fuel set by EPA during these rulemakings are called the Final Volume Requirements.[11] The Final Volume Requirements are the volumes of renewable fuel that must be blended into the transportation fuel supply in any given year. EPA then translates these Final

[10] EPA first adopted RFS regulations in 2007, 72 Fed. Reg. 23,900 (May 1, 2007), and updated those regulations in 2010 following the EISA amendments to the RFS Program. 75 Fed. Reg. 14,670 (Mar. 26, 2010).

[11] The Clean Air Act authorizes EPA to reduce or "waive" the Final Volume Requirements below the volumes specified in the statute only in limited circumstances, including where (i) implementation of the statutory volumes would "severely harm the economy or environment" or (ii) there is "an inadequate domestic supply" of renewable fuel. 42 U.S.C. § 7545(o)(7)(A). There is also a separate waiver provision that may be triggered where the projected production volume of cellulosic biofuel – a type of advanced renewable fuel – is less than the volume specified in the statute for that specific type of fuel. *Id.* § 7545(o)(7)(D). When EPA applies these waivers it does so as part of its annual rulemaking process, and EPA did apply the "cellulosic waiver" in setting the Final Volume Requirements for 2017 and 2018. 81 Fed. Reg. 89,746 (Dec. 12, 2016); 82 Fed. Reg. 58,486 (Dec. 12, 2017).

Volume Requirements into Final Percentage Standards, which percentages apply to individual "obligated parties" to determine their own Renewable Volume Obligation ("RVO") for a given year. "Chupka Decl." ¶¶ 3-4.[12]

14. Under the regulations, refiners are "obligated parties" who must demonstrate that they have satisfied their RVOs for the prior year by March 31 of the following year. 40 C.F.R. §§ 80.1406(a)(1) and (b), 80.1427, and 80.1451(a)(1). The currency used by obligated parties to satisfy their RVOs are credits called Renewable Identification Numbers ("RINs"). A RIN is created and assigned to each gallon of renewable fuel when it is produced and is valid for up to twelve months from its date of generation. 40 C.F.R. § 80.1426, 42 U.S.C. § 7545(o)(5)(C).

15. Obligated parties comply with their RVOs by obtaining and "retiring" sufficient numbers of RINs, either by purchasing renewable fuel (to which a certain number of RINs are assigned) and blending it into their products, or by purchasing only the RINs from other market participants. 42 U.S.C. § 7545(o)(5)(B), 40 C.F.R. §§ 80.1427(a)(1), 80.1428. RINs have a market value that is determined by the interplay between RIN demand (obligated parties who purchase RINs) and RIN supply (parties such as Growth Energy members that produce and sell renewable fuel or that blend renewable fuel and sell RINs). Chupka Decl. ¶ 8. A refiner that is unable to generate or purchase sufficient credits to meet its RVO for any given year may carry forward a deficit into the next year, but the obligated party must in the subsequent year demonstrate compliance for both the first and the second years and may not carry a deficit into a third year. 42 U.S.C. § 7545(o)(5)(D), 40 C.F.R. § 80.1427(b). In a case where a deficit is carried forward, the compliance obligation applies for the two-year averaging period, or 730 days. *Id*.

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[12] The Declaration of Marc W. Chupka in Supp. of Growth Energy's Brief in Supp. of Intervention with Respect to the Approval of the Consent Decree is attached as Exhibit A to Growth Energy's Intervention Brief.

16. Failure of a refiner to retire sufficient RINs to meet its RVO by the March 31 date violates the regulations and the Clean Air Act. 40 C.F.R. §§ 80.1427, 80.1451(a)(1), and 80.1640(c)(1). The Clean Air Act provides that any violation of the RVO requirements that apply for "a multiday averaging period shall constitute a separate day of violation for each and every day in the averaging period." 42 U.S.C. § 7545(d)(1); *see also* 40 C.F.R. § 80.1463(b) (person that fails to meet RVO during a compliance period is subject to a separate day of violation for each day in compliance period). Accordingly, failure to retire RINs by the March 31 date after carrying forward a RIN deficit constitutes 730 violations.

17. A refiner who violates the RFS regulations is subject to injunctive relief "to restrain violations." 42 U.S.C. § 7545(d)(2). In other words, a court can order a refiner to demonstrate compliance with its RIN obligations. A violator is also subject to civil penalties of up to $46,192 for every day of each violation as well as "the amount of economic benefit or savings resulting from the violation." 42 U.S.C. § 7545(d)(1); 40 C.F.R. § 80.1463(a); *see also* Civil Monetary Penalty Inflation Rule, 83 Fed. Reg. 1,190, 1,193 (Jan. 10, 2018).

18. In addition to the refiner, "[a]ny parent corporation is liable for any violation… that is committed by any of its subsidiaries" and "[e]ach partner to a joint venture is jointly and severally liable for any violation…committed by the joint venture operation." 40 C.F.R. § 80.1461(c) and (d). In other words, parent companies and joint venture partners are directly liable for RIN obligations under the RFS Program. EPA explained in promulgating these liability provisions that "the ability to hold a parent corporation liable for violations caused by a subsidiary company is necessary in order to ensure that the goals of the RFS program are met in the event that relief cannot be obtained by the subsidiary company." EPA, 420-R-07-006,

Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Summary and Analysis of Comments at 11-19 (Apr. 2007).

C. The Proposed Consent Decree

19. On March 12, 2018, the United Stated lodged the proposed Consent Decree in this Court ("Notice of Lodging") [Docket No. 244]. The lodging of the Decree began a public comment period that ended on March 26, 2018. The Decree provides that "[t]he United States reserves the right to withdraw or withhold its consent prior to approval of the Settlement Agreement by the Bankruptcy Court if the public comments regarding the Settlement Agreement disclose facts or considerations that indicate that this Settlement Agreement is inappropriate, improper, or inadequate." Decree at ¶ 35.

20. The Consent Decree, if entered, would require Debtors and their solvent affiliates to comply with only a very small fraction—less than ten percent—of their RVO due March 31, 2018. According to the Debtors' Disclosure Statement, PESRM, the Debtor, who owns the Refining Complex, had accumulated RVOs equivalent to 467 million gallons and held 210 million RINs as of December 31, 2017. Disclosure Statement, Notes to the Liquidation Analysis, n.7 (Docket No. 10); United States' Mot. ¶ 9. PESRM also stated that it had approximately $350 million in outstanding RFS compliance obligations that would require the purchase and retirement of RINs by March 31, 2018, indicating that the company had experienced a shortfall in meeting its RVOs from 2016 and 2017. Disclosure Statement at 17; United States' Mot. ¶ 10. Further, the Refining Complex is still operating with a refining capacity of 335,000 barrels of crude oil per day, and will thus generate RVOs in 2018 that must be satisfied by March 31, 2019, or if carried over for one year then due March 31, 2020. United States' Mot. ¶ 6.

21. The Consent Decree addresses PESRM's RVO liability for 2016 and 2017, and for January 1 through March 31, 2018 (together, the "Pre-Effective Date RVO"). The total Pre-Effective Date RVO exceeds 560 million RINs, including (i) the portion of 2016 RVO that it carried over from the 2016 compliance period to 2017 and its RVO for the 2017 compliance period (collectively 467 million RINs) and (ii) the *pro rata* RVO based on PESRM's gasoline and diesel fuel production from January 1, 2018 through the first quarter of 2018, Decree at 3, which Mr. Chupka has estimated to be approximately 97 million RINs. Chupka Decl. ¶ 16. The latter 97 million RINs would not normally be due to be retired until March 31, 2019 at the earliest. The Decree provides for PESRM to retire 138 million of its 210 million RINs to satisfy the entire Pre-Effective Date RVO of more than 560 million RINs, including the estimated 97 million RIN RVO for the first quarter of 2018 and 64.6 million RINs applied as a credit for the remainder of 2018 with $2.5 million of RINs to be sold for cash, leaving just 41 million RINs accepted to satisfy the 467 million RIN obligation that was due on March 31, 2018. Consent Decree ¶¶ 3, 5, and 7; Chupka Decl. ¶ 12.

D. Comments of Growth Energy and Others

22. On March 22, 2018, Growth Energy submitted public comments on the Consent Decree.[13] Growth Energy submitted the Comments because its members rely on the integrity of the RFS Program to sell renewable fuel and receive revenue based on the market value of RINs. As explained in the Comments,

> [T]he Proposed Settlement would have significant business impacts, extending well beyond these settling parties, to renewable fuels manufacturers and oil refiners who comply with the Renewable Fuels Standard program . . . and broad policy implications for the RFS Program, other EPA fuels regulations, and compliance with environmental law by financially distressed companies.

[13] Growth Energy's comments (the "Comments") are attached as Exhibit B to its Intervention Brief, and are reattached here for the Court's convenience as Exhibit A.

Comments at 1. The Comments urged that the proposed Consent Decree would "give a free pass to non-debtor entities who are clearly liable for the RVO obligations." Comments at 2. The Comments emphasized that this release is "without asking anything of them in return, disregarding the plain liability of those entities to guarantee compliance" and pointed out that, a financial analysis would surely show that the parent companies and joint venture partners could readily make good on their liability to guarantee full compliance with the RIN obligations. *Id*. at 13. For these reasons, among others, Growth Energy urged the United States to withdraw from the proposed Decree.

23. At least eighteen other key stakeholders filed similar comments opposing the Consent Decree. These include other stakeholders in the renewable energy sector (like the Advanced Biofuels Association, the Biotechnology Innovation Organization, National Corn Gowers Association, the Coalition for Renewable Natural Gas, and the Renewable Fuels Association), the petroleum sector (the American Petroleum Institute), other independent refiners (PBF and Kolmar) and environmental organizations (the Clean Air Council, PennEnvironment, and Moms Clean Air Force). Growth Energy urges the Court carefully to consider these comments as collectively they make a compelling demonstration about how deficient the EPA settlement is under the principles that should guide such settlements.

E. The United States' Motion to Enter the Consent Decree

24. On March 30, 2018, four days after the end of the public comment, the United States responded to the comments on the Consent Decree and moved this Court to enter the Decree. In its motion, the government explains that it would have objected to the Debtors' original proposed prepackaged Plan, which contained no provision for compliance with the pre-petition obligation of 467 million RINs due on March 31, 2018, because it did not "properly harmonize bankruptcy and environmental law." United States' Mot. ¶ 2. The government

maintains, however, that the Decree is fair and reasonable, and consistent with the requirements of environmental and bankruptcy law. In support of its conclusion, the United States makes three main points.

25. First, the United States contends that the Consent Decree is justified because it would avoid a risk of liquidation of the Debtors "by taking into account PESRM's limited financial ability-to-comply with its pre-effective date RFS obligations." *Id.* at ¶ 3. For that proposition, the government "relies on the United States' experts' careful review of financial information provided by Debtors about their financial circumstances," and in particular on the declaration it attached to its motion of an accountant, Robert L. Harris. *See e.g. id* at ¶¶ 3, 28, 36, and 38. Mr. Harris's declaration, *see id.* at Exhibit A, is just three pages, is conclusory and devoid of any specific financial information or analysis. The United States further explained that the Decree provides for the Debtors' full compliance during their time in bankruptcy, *id.* at ¶ 44. Of course, that the Debtors must comply with the law during bankruptcy is something not even the Debtors have disputed, and by allowing the limited RINs in the debtors-in-possession to be used for such post-petition compliance, it means that even fewer of the Debtors' RINs would be available to comply with the obligation to retire 467 million RINs by March 31 to satisfy the pre-petition RVO.

26. Second, the United States contends that the Decree is reasonable because it accounts for the litigation risk that the Debtors might prevail in selling PESRM's assets free and clear of any RFS obligations. *Id*. at ¶ 47. The government asserts that it has a strong position that RIN obligations are not dischargeable claims within the definition of the Bankruptcy Code, because the RIN retirement obligation is not a claim that gives rise to a right to payment to the government but rather are a compliance obligation that can be enforced equitably. *Id*. (citing

cases). The government identifies the Debtors' disagreement and plan for an asset sale as creating legal risk. *Id*. Likewise, the government explains that it has a strong argument that the Debtors' original plan to sell the assets could be contested as "a sham sale in which shareholders and other credits or insiders retain interests in the purchaser cannot be free and clear of nondischargeable liabilities." *Id*. at ¶ 48. But the government notes again that the Debtors disagree, and liquidation would result in "even less compliance with pre-effective date RFS obligations." *Id*.

27. Finally, the United States asserts that it "believes it would prevail in its argument that Debtors' parents and joint venturers are liable for the RINs obligations under 40 C.F.R. § 80.416(c), (d)," but observes yet again that the Debtors disagree and that the "Debtors would contend they are entitled to a non-debtor release under bankruptcy law on account of contributions to the reorganization process." Id. at ¶ 49. In addressing comments on this subject, the government suggests it would have litigation risk based on the Debtors' contention that EPA has been clearer in other regulations about extending parent liability to indirect parents; their contention that PESRM itself is not "part of a joint venture"; and their argument that the parent liability should not be interpreted broadly when the Clean Air Act does not provide for parent liability. *Id*. at ¶ 73. Under these circumstances, the government concludes that it "would risk that Debtors would be liquidated without RFS compliance and that these other parties would be found not to be liable." *Id*. at ¶ 49.

28. The government offers no explanation for how seeking to hold the Debtors' parents and joint venturers liable would risk liquidation of PESRM without RFS compliance. In responding to comments on the proposed Decree, the government indicates that the Debtors were not willing to settle without a release of the parents and joint venturers' liability, leading to a risk

of liquidation, and that these non-Debtor contributions created a risk of a non-consensual third-party release by the Bankruptcy Court. *Id*. at ¶ 75.

III. ARGUMENT

A. Legal Standard for Judicial Approval of Consent Decree

29. A consent decree must be fair, adequate, reasonable, and consistent with the governing statute. *See United States v. Se. Penn. Transp. Auth. ("SEPTA")*, 235 F.3d 817, 823 (3d Cir. 2000) (adopting the standards set forth in *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990)). District courts have discretion either to accept, or to reject, a proposed consent decree. *See Cannons Eng'g Corp.*, 899 F.2d at 84. Although the court is "not to substitute its judgment for that of the parties to the decree [it must] assure itself that the terms of the decree are fair and adequate, and are not unlawful, unreasonable, or against public policy." *United States v. Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982), *aff'd*, 749 F.2d 968 (2d Cir. 1984).

30. "The proponents of a consent decree have the burden of producing evidence which enables the court to determine independently whether the proposed consent decree is fair, reasonable and consistent with the goals of [the statute]." *United States v. Pesses*, No. CIV. A. 90-654, 1994 WL 741277, at *5 (W.D. Pa. Nov. 7, 1994). In *Pesses*, the district court denied entry of a consent decree where the parties at fault were to be absolved of their obligation to come into full compliance with the environmental statute. *Id*. at *12. The court explained that the requirement of substantive fairness "introduces into the equation, concepts of corrective justice and accountability: a party should bear the cost of harm for which it is legally responsible." *Id*. at *6 (*citing Cannons Eng'g Corp.*, 899 F.2d at 87 (1st Cir. 1990)); *see also United States v. Wyeth Holdings LLC*, No. 15-7153, 2015 WL 7862724, at *2 (D.N.J. Dec. 3, 2015) (same).

31. Moreover, the reasonableness requirement takes into account the relative strength of the parties' litigating positions: "If the government's case is strong and solid, it should typically be expected to drive a harder bargain." *Cannons Eng'g Corp.*, 899 F.2d at 90; *see also F.T.C. v. Circa Direct LLC*, No. CIV. 11-2172 RMB/AMD, 2012 WL 2178705, at *4 (D.N.J. June 13, 2012) (same); *United States v. Rohm & Hass Co.*, 721 F. Supp. 666, 680-81 (D.N.J. 1989); *United States v. Hooker Chem. & Plastic Corp.*, 607 F. Supp. 1052, 1057 (W.D.N.Y.), *aff'd*, 776 F.2d 410 (2d Cir. 1985).

B. The Consent Decree Fails the Standards for Judicial Approval

32. The terms of this Consent Decree do not meet the standards for approval because the United States has no justification for reaching a "compromise" that releases the parent and joint venture companies, Carlyle and Sunoco, without requiring them to contribute anything at all toward compliance with their obligation to retire 467 million RINs by March 31, 2018, of which the obligation to retire 426 million RINs would completely vanish. This omission is inconsistent with the Clean Air Act and contrary to the public interest due to the environmental impact and frustration of Congress's goals in the RFS program. It is unreasonable because the government's liability case is so strong. And it is unfair to both suppliers of renewable fuels such as Growth Energy members and refinery competitors.

1. The Consent Decree Is Inconsistent with the Clean Air Act

33. The Decree would result in enormous and permanent uncorrected noncompliance with the Clean Air Act. In seeking confirmation of the Plan, the Debtors' counsel himself described the outstanding RIN obligations of PESRM as "massive." Tr. of Hr'g on Combined Disclosure Statement Approval and Plan Confirmation at 14:16 (Mar. 26, 2018). Dismissing the obligation to retire 426 million of those RINs and the corresponding 426 million gallons of mandated renewable fuel—virtually the entire obligation—is likewise massive.

34. The substantive terms of the proposed settlement should be "faithful to the objectives of the governing statute" and consistent with the public interest. *Cannons Eng'g Corp.*, 899 F.2d at 84. The adequacy and reasonableness of the settlement should take into account the "decree's likely efficaciousness as a vehicle for cleansing the environment." *Id*. at 89-90; *see also Rohm & Haas Co.*, 721 F. Supp. at 680 (the court's "core concern" must be whether the decree furthers the public interest as expressed in the environmental statute).

35. The Clean Air Act's goal is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). Congress added the RFS program to the Clean Air Act as the only federal statutory program aimed specifically at climate change, requiring use of renewable fuels to displace petroleum and thereby reduce greenhouse gas emissions from the transportation sector. *See* S. Rep. No. 110-65, at 2-3 (2007). Subsequent EPA analyses have corroborated the environmental benefits of the program. *See, e.g.,*75 Fed. Reg. at 14,764–14,799 (analyzing effects on greenhouse gas emissions).

36. Mandating specified volumes of four categories of biofuels, the statute requires conventional biofuel (corn starch ethanol), to achieve a 20 percent reduction in lifecycle greenhouse gases, advanced biofuel biomass-based diesel to achieve a 50 percent reduction, and cellulosic biofuel to achieve a 60 percent reduction. 42 U.S.C. § 7545(o)(1) and (2)(A)(i).[14]

37. In its rulemaking to implement the program, EPA estimated the overall annualized average carbon dioxide emissions reductions due to the mandated use of renewable fuel to be between 136 to 140 million metrics tons of carbon dioxide emissions. 75 Fed. Reg. at

[14] Although conventional biofuel facilities built before December 19, 2007 are grandfathered from the 20 percent requirement, those that are expanded since that time must comply. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,785 (Mar. 26, 2010).

14,798.[15] Applying EPA's analysis to the 426 million gallons of renewable fuels that the proposed settlement excuses from mandatory use would result in excess greenhouse gas emissions in the range of one million tons. This is equivalent to taking 200,000 cars off the road for a year.[16]

38. In addition, Congress intended the RFS program to reduce reliance on foreign oil, and to stimulate production of renewable fuels by companies such as Growth Energy's members using domestic resources and labor. *See* S. Rep. No. 110-65, at 2 and 9 (2007). The 426 million RINs that would go unfulfilled under the proposed Decree require a year of production at five to ten ethanol plants employing hundreds of workers. Declaration of John Fuher ("Fuher Decl.") ¶ 6, attached hereto as Exhibit B. And this disregards the impact on upstream agricultural production to generate the raw materials for these plants to produce that much renewable fuel. Indeed, President Obama has explained:

> Combined with improved energy efficiency, *biofuels are the primary near-term option for insulating consumers against future oil price shocks and for lowering the transportation sector's carbon footprint.* The direct consumer benefit has been well documented and producing and using more biofuels today means an immediate reduction in oil imports in addition to an immediate increase in domestic employment. . .

See Letter from President Barack Obama to Governor John Hoeven, North Dakota, and Governor Chet Culver, Iowa (May 27, 2009).

39. Strangely, the United States in its Motion for entry submits that the RFS Program "is not a program designed to protect public health and safety from specific hazards posed by actions of a debtor or property as are many other requirements of environmental law." United States' Mot. ¶ 44 n. 6. The government asserts that bankruptcy law must give way to statutes

[15] EPA analyzed the overall greenhouse gas emissions impacts of increased volumes of renewable at the levels required by the statute and estimated a net present value reduction in greenhouse gas emissions of 4.15 billion tons over 30 years, which works out to an annual reduction of approximately 138 million metric tons. 75 Fed. Reg. at 14,798.

[16] *See* https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator.

designed to protect against such health and environmental threats and can never be used as a safe haven from compliance with environmental laws protecting against hazardous to public health and safety. *Id*. (*citing Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 507 (1986)). The government contends that the RFS program does not fall within this category. This is incorrect.[17]

40. EPA has made a final regulatory determination that greenhouse gases from motor vehicles endanger public health and welfare. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009) ("The Administrator finds that elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations."). An environmental regulation such as the RFS that affords regulated entities greater flexibility using market based mechanisms—allowing refiners to blend renewable fuels themselves or buy RIN credits from others—is equally critical to addressing this threat. In other words, default on the requirement to retire 426 million RINs corresponds to 426 million gallons of renewable fuel that are not required to be used. In any case, there is no basis to distinguish for bankruptcy purposes environmental laws based on the imminence of threats to public health. Rather, the relevant distinction is whether EPA is seeking equitable relief to require compliance with the environmental statute versus seeking payment of money. *See, e.g., In re Torwico Elecs., Inc.*, 8 F.3d 146, 151 n. 7 (3d Cir. 1993) ("[A] statutory obligation attached to hazardous waste (i.e. to make sure it does no damage) [] survives bankruptcy.").

[17] As the legislative history makes clear, public health was one of the primary drivers of the RFS Program: "Expanding the use of ethanol will also protect our environment by reducing auto emissions, which will mean cleaner air and improved public health." Cong. Rec. 13 May 2003 S6045.

2. The Consent Decree is Unreasonable

41. The Decree is unreasonable because it releases parent corporations and joint venture partners Carlyle and Sunoco without requiring them to contribute anything toward compliance with the pre-petition obligation to retire the 426 million RINs that the United States claims Debtors cannot afford. Although the government claims this is justified based on "litigation risk," there is no such realistic risk, and in any case requiring nothing at all from Carlyle and Sunoco is not a reasonable compromise.

42. The RFS Program regulations, just like virtually all of U.S. EPA's fuels regulations as well as various other environmental laws, in order to assure that public health and the environment will be protected precisely in the situation where the subsidiary does not have the ability to comply, impose liability on parent companies for violations committed by subsidiaries, and on joint venture partners for violations committed by the joint venture operation. 40 C.F.R. § 80.1461(c) and (d). Carlyle and Sunoco, as parent corporations and joint venture partners, are sophisticated companies participating in the energy sector that presumably understood the regulatory regime when they made their investment decisions, there is no evidence they are unable to ensure compliance, and they have no grounds to be released from this liability. Yet the Decree unreasonably releases them without any commitment from them to comply, setting a terrible precedent not only for the RFS Program but for enforcement of similar requirements in all of EPA's fuels regulations and other environmental programs. Allowing a failing operating company to seek bankruptcy protection and then, as is the case here, bring its parent companies along for the ride in obtaining a shield against liability undermines the regulatory purpose of imposing liability on the parent companies to back-stop the obligation.

a. The Regulations Make Carlyle and Sunoco Liable as Parent Corporations and Joint Venture Partners

43. The liability provisions of EPA's RFS regulations are clear:

> (c) Parent corporation liability. ***Any parent corporation*** is liable for any violation of this subpart that is committed by any of its subsidiaries.
>
> (d) Joint venture liability. ***Each partner to a joint venture*** is jointly and severally liable for any violation of this subpart that is committed by the joint venture operation.

40 C.F.R. § 80.1461(c) and (d) (emphasis added).

EPA explained in the RFS rulemaking, in response to comments, that the "the ability to hold a parent corporation liable for violations caused by a subsidiary company is necessary in order to ensure that the goals of the RFS program are met in the event that relief cannot be obtained by the subsidiary company." EPA, 420-R-07-66, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Summary and Analysis of Comments at 11-19 (Apr. 2007). Furthermore, EPA justified this approach as "consistent with the gasoline sulfur program, the Highway and Nonroad Diesel sulfur programs, and other fuels programs." *Id*.

44. In fact, EPA has adopted a similar parent and joint venture partner liability regime in virtually all of its regulations implementing requirements for transportation fuels under Section 211 the Clean Air Act, 42 U.S.C. § 7545.[18] In a program like the RFS, where a refiner is not required to use or acquire renewable fuels on an ongoing basis but instead can defer such action for more than two calendar years and then purchase RIN credits to demonstrate compliance, there can be a significant risk of default. The regulations adopt a form of financial assurance requiring parent companies and joint venture partners to stand behind the compliance

[18] *See* 40 C.F.R. Subpart D and § 80.87(b)(3) and (4) (reformulated gasoline requirements), 40 C.F.R. Subpart H and § 80.395(a)(11) and (12) (gasoline sulfur requirements), 40 C.F.R. Subpart I and § 80.612(5) and (6) (diesel sulfur requirements), 40 C.F.R. Subpart J and § 80.1015(a)(3) (gasoline toxics requirements), 40 C.F.R. Subpart L and § 80.1360(a)(3) and (4) (gasoline benzene requirements), 40 C.F.R. Subpart O and § 80.1662(a)(12) and (13) (additional gasoline sulfur requirements).

obligation of the operating subsidiary. The situation presented here, where the Debtors claim they do not have the financial resources to comply but have parent corporations and joint venture partner entities with substantial resources, is exactly the type of situation that EPA intended its liability regime to address.

45. Considering the weakness of Debtors' counterargument presented in opposition to Growth Energy's Intervention Brief confirms that there is no serious question that all parent companies, including indirect parent corporations like Carlyle and Sunoco, are subject to this liability. *See* Debtors' Opposition ¶¶ 39-48. First, limiting this liability to a direct parent holding company with no assets would make a mockery of EPA's purposes in imposing such liability. As the Debtors themselves assert, "PESRM's parents are Holdings and PESRM GP, and it is undisputed that neither has sufficient assets to satisfy PESRM's RIN Liabilities." *Id.* at ¶ 40. Where EPA seeks to impose liability on parent corporations to assure compliance, it is simply not reasonable to conclude that EPA intended do so in manner that could be so easily circumvented by interposing an intermediate direct parent holding company with little or no assets. Adopting Debtors' interpretation would effectively render the parent liability provision a nullity. Similarly, Debtors' contention that liable joint venture partners must directly own the refinery assets and be responsible for compliance, *id*. at ¶ 46-47, suffers the same defect: Joint venture partners could simply operate as here through a subsidiary entity.

46. The Debtors' textual arguments are likewise unavailing. They contend that "the plain unambiguous language of the RFS Regulations provides that ***only*** parents—not grandparents, great-grandparents, or entities even further up the organizational tree—are liable for an Obligated Part[y's] RIN obligations." *Id.* at ¶ 41. But even the Debtors' counsel refers to these indirect parent entities as "parents." *See* Tr. of Hr'g on Combined Disclosure Statement

Approval and Plan Confirmation Hearing at 19:2224 (March 26, 2018) ("We've got sixty-five million in equity and seventy-five million in a loan coming from *parents and parent affiliates.*") (emphasis added). The Debtors offer examples from far afield involving hazardous waste rules and reporting regulations that seek to encompass all U.S. entities in a corporate family under the highest level U.S. parent company. Debtors' Opposition ¶ 42. Among those examples, Debtors include the Toxic Substances Control Act, which defines "parent company" to mean "a company that owns or controls another company" where "own[] or control" includes "the power to control the management and policies of that company." 40 C.F.R. § 704.3; *see also* Reporting and Recordkeeping Requirements; Small Manufacturer Exemption Standards; Final Rule, 49 Fed. Reg. 45,425, 45,426 (Nov. 16, 1984) (explaining TSCA parent definition to include a company that "has the power to control the management and policies of the other company").[19] By the Debtors' own example, Carlyle qualifies as a parent company, as four managing directors at Carlyle (Rodney Cohen, David Albert, David Marchick and David Stonehill) control the board of PES, serving with two executive members and one member from Sunoco.[20] These are the same members as serve on the boards of PES Holdings, LLC[21] and PESRM[22] (except that Joseph Colella, from Sunoco, appears not to be on the board of PES).[23]

47. Meanwhile, the Debtors ignore EPA's explanations in the Agency's parallel fuels rulemakings. There, EPA explained that the Agency defines "parent company" broadly as "any

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[19] This approach is also consistent with other EPA definitions and general corporate law. *see also Weinstein Enters, Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005) ("[i]n the context of imposing fiduciary responsibilities, it is well established in the corporate jurisprudence of Delaware that control exists when a stockholder owns, directly or indirectly, more than half of a corporation's voting power.") (citations omitted).

[20] Information on the board composition is from the PES website (see http://pes-companies.com/sitemap/).

[21] Information on the board composition is from PES Holdings bankruptcy petition, the petition is available on the website of the Debtors' claim agent at www.omnimgt.com/sblite/philadelphiaenergy/.

[22] Information on the board composition is from PESRM bankruptcy petition, the petition is available on the website of the Debtors' claim agent at www.omnimgt.com/sblite/philadelphiaenergy/.

[23] Upon information and belief, Roberts Owens was Senior Vice President of Marketing at Sunoco, Inc. from 2001 to 2012 and was President and CEO from 2012 until his retirement in 2017; he now serves as a Consultant to the company. Information on Robert Owens is obtained from S&P Capital IQ and www.bloomberg.com.

company (or companies) with controlling ownership interest, and a subsidiary of a company as any company in which the refiner or its parent(s) has a controlling ownership interest." Control of Hazardous Air Pollutants from Mobile Sources; Final Rule, 72 Fed. Reg. 8,428, 8,490 (Feb. 26, 2007) (the "Benzene Rule"). More explicitly, in the preamble to the proposed Benzene Rule, EPA recognized that "[i]n many cases, there are likely to be multiple layers of parent companies, with the ultimate parent being the one for which no one else has controlling interest." Control of Hazardous Air Pollutants from Mobile Sources; Proposed Rulemaking, 71 Fed. Reg. 15,804, 15,878 (Mar. 29, 2006) (the "Benzene Proposal"). EPA clarified that in such cases, "all parent companies, and all subsidiaries of all parent companies, [will] be taken into consideration when evaluating compliance." *Id*.

48. Oddly, the Debtors assert that the RFS Regulations "do not reference 'direct or higher-tier parents,' 'the highest level United States company' ***or any other modifier***, and thus obviously do not intend to include them." Debtors' Objection ¶ 44 (emphasis added). But of course the RFS regulations *do* include a modifier: The regulations impose liability on "***any*** parent company," signaling EPA's intention not to limit liability to the single, direct parent. As the Supreme Court has observed: "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' Webster's Third New International Dictionary 97 (1976)." *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (where "Congress d[oes] not add any language limiting the breadth of that word," the courts should give the term "any" its ordinary broad meaning); *see also Massachusetts v. EPA*, 549 U.S. 497, 529 (2007) (Congress's repeated use of the term "any" "underscores" its intent to define "air pollutant" broadly.).[24]

[24] Debtors also argue that "[t]here is no statutory basis for parent corporation or joint venture liability under the Clean Air Act's renewable fuels program at 42 U.S.C. § 7545(o) or generally in the fuels section at 42 U.S.C. § 7545," and contend therefore that the parent can only be liable where it controls the operations of the subsidiary or the corporate veil is pierced under traditional corporate law principles. Debtors' Opp. at ¶ 37 n.6. This argument is

49. Finally, the Debtors' protestation that Carlyle and Sunoco are not joint venture partners proves too much. Debtors' Opposition ¶ 46. Debtors argue that the RFS regulations impose liability on each partner to a joint venture for violations "committed by the joint venture operation," and apparently that the only refiner obligated under the RFS and that could commit violations is PESRM. *Id.* at ¶ 47. But the companies themselves contradict this. The most recent annual report filed with the SEC by Energy Transfer Partners, L.P., Sunoco's parent company, states explicitly that Carlyle and Sunoco are joint venture partners and even describes Carlyle as owning the refinery:

> Our wholly-owned subsidiary, Sunoco, Inc., owns an approximate 33% non-operating interest in PES, ***a refining joint venture with The Carlyle Group, L.P.,*** **which owns a refinery in Philadelphia**.

Energy Transfer Partners, L.P. Form 10-K For the fiscal year ended Dec. 31, 2017, SEC File Number 1-31219 at 21 (emphasis added). Other securities filings, too, contain the same admissions. *See* Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 18 (withdrawn on Sept. 13, 2016 due to decision not to pursue public offering) ("PES LLC is a ***joint venture originally formed among Carlyle, PES Equity (as successor-in-interest to Sunoco)*** and members of our management to own and operate the Philadelphia refining complex and the North Yard terminal.") (emphasis added); Sunoco Logistics Partners L.P. Form 10-K For the fiscal year ended Dec. 31, 2012, SEC file number 1-312219 at 45 ("In September 2012, Sunoco contributed the refining assets of its Philadelphia refinery to Philadelphia Energy Solutions ("PES"), ***a joint venture between The***

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untimely. The RFS regulations specifically impose parent and joint venture liability, and any argument this is contrary to the statute had to be raised in a petition for review of the rule in the U.S. Court of Appeals for the D.C. Circuit filed within sixty days of EPA's 2010 publication of the rule in the Federal Register. 42 U.S.C. § 7607(b)(1) and (2). Moreover, EPA has explained the statutory basis for parent liability in its fuels regulations as rooted in Sections 211 and 301 of the Clean Air Act, which "provides very broad authority for the Administrator to create necessary fuels regulations and appropriate means to enforce them. . . Parent corporation liability is derived from our presumptive liability scheme." EPA, 420-R-00-024, Control of Emissions of Hazardous Air Pollutants: Response to Comments at 103 (Dec. 20, 2000)

Carlyle Group and Sunoco, which enabled the Philadelphia refinery to continue operating.") (emphasis added).[25] The Debtors cannot now run from their own descriptions.

b. Bankruptcy Law Does Not Afford Carlyle and Sunoco Protection Against Liability

50. The United States asserts that it "believes it would prevail in its argument that the Debtors' parents and joint venturers are liable for the RINs Obligations under 40 C.F.R. §80.1461(c), (d), but cites litigation risk as its basis for consensually providing complete releases to those parties. United States' Mot. ¶¶ 49 and 75. Litigation risk is not a basis for providing consensual releases to the parents and joint venture partners, as neither the parent companies nor joint venture are required to do *anything* under the Consent Decree. The government could have agreed to the exact same settlement terms, without the complete releases to the parent companies and joint venture partners, and objected to the non-debtor third party releases in the Plan. There is no basis in bankruptcy law for a non-consensual release here. The government's only answer to why it provided the consensual release of the parent companies and joint venturers in the Consent Decree is that "it does not believe it could have reached a settlement with Debtors that did not also provide for a resolution of the liability of related entities who are in various ways supporting the reorganization," and that if there was protracted litigation the Debtors *might* have convinced the Court to grant a non-consensual release. *Id.* at ¶¶ 74-75 (emphasis added). That argument cannot hold up to scrutiny.

51. *First*, litigation risk is a reason to discount or compromise liability, not to forgive certain parties entirely. *Second*, to the extent the government is right and there is litigation risk,

[25] *See also Value Creation*, Carlyle Partners, https://www.carlyle.com/media-room/corporate-videos/philadelphia-energy solutions-refinery-value-creation (last visited Feb. 25, 2018); archived version at https://web.archive.org/web/20170702053224/http://www.carlyle.com/media-room/corporate-videos/philadelphia-energy-solutions-refinery-value-creation (Brian P. MacDonald, CEO, Chairman and President, Sunoco, describing Carlyle as a partner in the PES project).

it is not a valid basis for the consensual releases being provided here. The government routinely negotiates carve-out language from third-party release provisions in bankruptcy plans. *See, e.g.*, Tr. of H'rg on First Day Motions at 44 (Jan. 23, 2018) (Counsel for the government, noting that the "discharge provisions in the plan are very way overbroad… Fortunately, we've been able to negotiate resolutions with Kirkland & Ellis in many, many other cases, and we're very hopeful we can do so here."). Moreover, in these Chapter 11 Cases, the United States, Civil Division Department of Justice, objected to the Plan [Docket No. 272] ("U.S. Objection") and provided in that Objection that "the United States opts out of and objects to the third party non-debtor limitation of liability, injunction and exculpation and release provisions" in the Plan. U.S. Objection, at 12-13 and 20. Ultimately, because of that Objection, the Debtors and the United States agreed on "Reservation of Rights in Favor of Governmental Units" language for the Confirmation Order that specifically provided, *inter alia*, that the third party release provisions were not binding on the government (but noting that such provision in the Confirmation Order did not modify the Consent Decree). Confirmation Order ¶ 94. In other words, EPA is the *only* governmental unit of the United States providing a third-party release.

52. Moreover, as discussed more in depth in the Comments and acknowledged by the United States itself, the United States cannot justify the release of the parent companies and joint venture partners in the Consent Decree on the grounds that Debtors sought in the Plan to provide non-debtor third-party release provisions. The Third Circuit provides ample precedent for the United States to have objected to the release and discharge provisions, including on the basis that the Bankruptcy Court lacks constitutional jurisdiction to approve third-party release provisions and that the provisions violate applicable law. United States' Motion ¶ 75 (noting that the

"United States does not agree that the Bankruptcy Court should have authorized (or had jurisdiction) to authorize a non-consensual release"); *see also* Comments at 28-29.

53. The government highlights in its Motion that the Court noted at the Confirmation Hearing that the releases in the Plan *might* even be authorized as non-consensual releases. United States' Mot. ¶ 75. This in an inappropriate argument for two reasons. First, in the Supplemental Order [Docket No. 266] that Growth Energy negotiated with the Debtors and the government, the parties and the Court ordered as follows: "Neither the Confirmation Order nor any other finding of facts or conclusions of law made in connection with the Confirmation Hearing or Confirmation Order shall have any preclusive or other effect on the Court's consideration of whether to grant EPA's request for the Court to approve EPA's entry into the EPA RVO Settlement Agreement." Supplemental Order ¶ 8. Thus, any finding, much less comments, the Court made at the Confirmation Hearing should have no effect on the Court's consideration of the pending United States' Motion. Second, that stipulation makes sense, because the Court made its comment without the benefit of any objection to the release provisions or litigation, and at the conclusion of the hearing in passing. Tr. of Hr'g on Combined Disclosure Statement Approval and Plan Confirmation Hearing at 41 (March 26, 2018). Because the government was consensually agreeing to the Court's jurisdiction and the release provisions, the government did not brief the Court or ask the Court to rule on either of those issues. There is no basis to assume that if issue had been contested, the Court (or another court, on a motion to withdraw the reference or on appeal) would have found that the releases could be granted over objection. Moreover, although Growth Energy acknowledged in its Comments that it is aware that certain courts in the Third Circuit have permitted nonconsensual non-debtor third-party releases, Growth Energy is not aware of any case that did so in the face of government objection

and a regulation—like the RFS regulation here—that specifically provides for direct non-debtor liability.

C. The Proposed Consent Decree is Unfair

54. Fairness is about "corrective justice and accountability: a party should bear the cost of harm for which it is legally responsible." *Pesses*, 1994 WL 741277, at *6 (citing *Cannons Eng'g Corp.*, 899 F.2d at 87). The proposed Consent Decree is unfair because it does not hold Carlyle and Sunoco accountable for the harm caused by failing to retire 467 million RINs as required by March 31, 2018. Far from reflecting these entities' "accountability" and making all liable parties "bear the cost of harm for which [they are] legally responsible," this proposed settlement rewards them to the detriment of competitors who have complied with the law and inflicts great harm on the renewable fuel industry that has relied on the integrity of the RFS Program in investing in the development and production of renewable fuels.

55. By letting Carlyle and Sunoco off the hook, the proposed Consent Decree provides an unfair advantage over others in the petroleum industry that have complied with the law. The American Petroleum Institute ("API") submitted comments objecting to the proposed settlement because it creates "an un-level playing field and penalizes obligated parties [like many of API's members] who have met their compliance requirements in good faith." *See* United States' Mot. Exhibit 13 [Docket No. 347-13]. "Providing relief for one individual company sets a dangerous precedent and creates a distortion in the marketplace and threatens the integrity of the RFS program." *Id.*

56. API's concerns about the unfairness of the proposed settlement to others in the industry are shared by Murphy USA, which owns and operates more than 1,400 retail fuel sites and convenience stores and seven refined-products terminals. Murphy objects to the proposed consent decree because relieving Debtors of so much of their obligation "is inequitable to the rest

of the market." *Id.* at Exhibit 12 [Docket No. 347-12]. Murphy goes on to explain that "[a]ll other obligated parties have either satisfied or are working to satisfy their 2016 and 2017 obligations . . . because that is what the law requires." *Id.* The proposed settlement, Murphy claims, amounts to selective regulation. *Id.* Instead, EPA should apply the RFS program "evenhandedly." *Id.*

57. The proposed Consent Decree is also unfair to the entire renewable fuel industry whose members rely on the integrity of the RFS Program. *See* Chupka Declaration ¶ 13. When Congress significantly expanded the RFS Program in 2007, it did so with the goal of encouraging the development of the renewable fuels sector through increasing demand for renewable fuels by the annual volume requirements and creating a credit program that incentivizes obligated parties to purchase and blend renewable fuel. *See* S. Rep. No. 110-65, at 2-3 (2007). The RFS Program has spurred the development of the United States renewable fuel industry: Since the inception of the RFS Program, POET—a Unites States company—has emerged as the world's largest producer ethanol and other biorefined products, producing 6.5 billion gallons of biofuels per year. Fuher Decl. ¶¶ 3, 6. POET and Growth Energy's other members rely on the integrity of the RFS Program and on a stable RIN market to continue to grow and invest in renewable fuels. *Id.* ¶¶ 6-7. For the government to release Carlyle and Sunoco from the massive obligation to purchase 426 million RINs in the form of renewable fuel or credits, would undermine the investments POET and others have made to achieve Congress's goals in establishing the Program.

58. To put the RIN market in jeopardy in this way runs contrary to the Department of Justice's stated policy to use enforcement to ensure the integrity and proper functioning of "market-based credit programs" such as the RFS Program. *See* Wood Mem. at 10.

59. Finally, the proposed Consent Decree is unfair because it fails to ensure that these refineries will comply with the RFS going forward. EPA appears to have acknowledged that the reorganized Debtors could not be relied on to acquire and retire RINs on the one to two year cycle allowed in the regulations, and instead the proposed Consent Decree require the retirement of RINs on a twice a year basis. But even that could allow the refinery to get over 200 million RINs in the hole and find itself back in the same position it claimed to be in when the bankruptcy was it filed. A fair settlement would certainly ensure that the massive noncompliance proposed now would not repeat itself, and require real time (at least monthly) accountability. The Consent Decree fails in this regard as well.

D. Growth Energy Has Standing to Intervene to Object to the Proposed Decree.

60. Growth Energy timely filed the Intervention Brief in accordance with the Court's Supplemental Order. As explained above, the proposed Consent Decree would relieve the Debtors of more than 90 percent of their present environmental obligation to retire 467 million RINs by March 31, 2018. The proposed Decree is not only unfair, inadequate, and inconsistent with the RFS Program as enacted as part of the Clean Air Act, but it is certain to cause immediate and material harm to Growth Energy and its members such as POET, the largest producer of renewable fuel in the United States. Growth Energy clearly has standing to intervene related to the United States' request that the Court approve the Consent Decree.

61. Notably, the United States does not contest Growth Energy's statutory right to intervene in an RFS enforcement action under section 304 of the Clean Air Act or Growth Energy's standing to do so. The Debtors alone oppose Growth Energy's intervention, both on standing grounds, and also, perplexingly, because they argue that the intervention right under the Clean Air Act does not apply to enforcement under the RFS Program. The Debtors' arguments are without merit.

1. Growth Energy Has Standing to Intervene

62. Growth Energy is a trade association of biofuel producers with its headquarters in Washington, D.C. As set forth in the Fuher Declaration, together, Growth Energy's members produce 6.5 billion gallons of biofuels per year, which accounts for 40% of the biofuels used in the United States annually. Fuher Declaration ¶ 3. One of Growth Energy's members, POET, LLC ("POET"), is one of the world's largest producers of ethanol and other biorefined products. *Id.* ¶¶ 1 and 6. POET operates 28 biorefiners in 7 states that generate about $6.5 billion in annual revenue and employ 1,800 people. *Id.* ¶ 6.

63. Growth Energy has standing to intervene because (i) its members, including POET, have standing to intervene in their own right, (ii) the interests at stake are germane to Growth Energy's purposes, and (iii) the relief requested does not require the participation of individual members in the lawsuit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 169 (2000); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977). The Debtors focus their opposition solely on the first requirement, arguing that Growth Energy has not shown that any of its members would have standing to intervene. Debtors' Opposition ¶ 28. As set forth above and in the Fuher Declaration, Growth Energy identifies POET as such as member.

64. Growth Energy's members have standing to intervene in these proceedings because they meet each requirement of the familiar "irreducible constitutional minimum of standing": (1) injury-in-fact; (2) traceability; and (3) redressability. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-61 (1992). The Debtors' opposition mischaracterizes the Chupka Declaration and impermissibly interject a merits analysis into the standing inquiry and should be rejected.

65. *First*, Growth Energy's members satisfy the injury-in-fact prong. Debtors incorrectly rely on the observation in the Chupka Declaration that approval of the Decree could

encourage others to seek relief from RIN compliance. Debtors Opp. ¶ 31. But this overlooks Chupka's primary point: As set forth in the Chupka Declaration, approval of the proposed Consent Decree would "cause financial harm to Growth Energy and its members," because forgiving the 426 million RIN obligation would cause "a reduction in the quantity of renewable fuel demanded under the RFS program and the market price of RINs." Chupka Decl. ¶ 22. This reduction in demand and in the market price of RINs would hurt Growth Energy's members—like POET—that produce renewable fuel, because the market price of renewable fuel would fall "commensurate" with the fall in RIN prices. *Id.*; *see also* Fuher Declaration ¶¶ 5-7. These averments far exceed the "identifiable trifle" of injury required for constitutional standing. *E.g.*, *Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3d Cir. 1990).

66. Further, the alleged injury—a reduction in the market price of the products Growth Energy's members produce—is concrete and imminent, *not* hypothetical or conjectural. Mr. Chupka does not state that the settlement "may" impact RIN prices: He states unequivocally that the proposed Consent Decree "would" lower RIN prices and that the reduction "would" be "material." Chupka Decl. ¶¶ 20, 22. In addition, the Fuher Declaration provides that:

> By producing biofuels, POET generates RINs and sells both its biofuels and its RINs on the market. If the Court approves the Proposed EPA RVO Consent Decree, it will eliminate the demand for over 400 million RINs. This will significantly reduce the demand for renewable fuel, thereby reducing the value of POET's products. It will also reduce the market value of RINs, thereby causing further harm to POET's financial interest.

Fuher Decl. ¶ 6. These averments that POET will be harmed if the proposed Consent Decree is approved are also sufficient to meet the injury-in-fact prong.

67. *Second*, Growth Energy's members meet the traceability prong, because the proposed Consent Decree, if entered, would be a *determinative* step that would lead to their

injury. *See Bennett v. Spear*, 520 U.S. 154, 170-71 (1997). The Chupka Declaration links the imminent harm—the reduction in RIN prices with a "commensurate" reduction in market prices —to the approval of the proposed Consent Decree. Chupka Decl. ¶ 22.

68. *Third*, Growth Energy's members also meet the last prong—redressability— because a favorable decision is likely to remedy the injury. *See Lujan*, 504 U.S. at 561. Were the Court to disapprove of the proposed Consent Decree the imminent harm to Growth Energy's members would be avoided. The Debtors argue that redressability is not met because, were the Court to reject the settlement Growth Energy would suffer even an worse injury than it would were the settlement to be approved because "PESRM would either proceed with a section 363(f) sale free and clear of any RIN obligations associated with pre-sale refinery operations . . . or would liquidate." Debtors' Opp. ¶¶ 33 and 35. But this simply contests the merits of Growth Energy's position that EPA to satisfy the standards for entry of the Decree must hold Carlyle and Sunoco responsible. The law in the Third Circuit is clear that a proposed intervenor does not need to show that its claim is likely to succeed to have standing. *See The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000). Indeed, if Debtors were right that the existence of lower settlement options could defeat standing, intervention to challenge entry of a consent decree would always fail. We are aware of no such cases.

69. Finally, the Debtors' suggestion that Growth Energy may not have standing because its members are not "the object of the government action or inaction they challenge," Debtors' Opposition ¶ 27 (internal quotation marks omitted), is wrong. Encouraging the development of the renewable fuels sector was one of Congress's stated goals when it significantly expanded the RFS Program in 2007. S. Rep. No. 110-65, at 2-3 (2007). Congress's goals cannot be achieved unless the United States enforces this law. The proposed Consent

Decree undermines that goal and the RFS Program, because it relieves an obligated party of almost all of its obligation and "would" cause a drop in the market price of renewable fuels. Growth Energy's members are at the very center of the proposed Consent Decree they seek to challenge.

2. Growth Energy Has an Unconditional Statutory Right to Intervene under the Clean Air Act

70. Debtors' arguments contesting Growth Energy's statutory right to intervene all fail. *First*, the Debtors argue that section 304 does not apply because there is no "violation" of the RFS requirements, because the government agreed to delay commencing any enforcement action against the Debtors until May 1, 2018. Debtors' Opposition ¶ 51. This is incorrect. The government's decision to *delay enforcement* action does not mean that the Debtors are in compliance with the law. The regulations establish Debtors' obligation to retire a sufficient number of RINs to meet their 2016 and 2017 obligations by March 31, 2018. Nothing in the Scheduling Order[26] altered the date for compliance. The government's decision to delay enforcement of those regulations in this particular case neither alters those obligations nor expunges Debtors' current noncompliance with them. Moreover, the plain language of the Scheduling Order makes this point abundantly clear—the stipulation does not say the deadline for compliance was being extended, but rather specifically that the government "*will forbear*" from "*commencing any enforcement action*." *See* Scheduling Order ¶ 2.

71. *Second*, the Debtors argue that even if they were "in violation" of the RFS requirements, there was only one violation – their failure to meet the March 31, 2018 deadline – and not repeat violations, as required to file a citizen suit under the Clean Air Act. Debtors' Opposition ¶ 52. This is beside the point: This case involves EPA enforcement, not a citizen

[26] Stipulation and Agreed Order Between the Debtors and the United States Relating to Confirmation Scheduling Order [Docket No. 125].

suit. The Clean Air Act is clear that "any person may intervene as a matter of right" in an EPA enforcement action, without any limitation to EPA enforcement of repeat violations. 42 U.S.C. § 7604(a)(1), (b)(1)(B).

72. In any event, even if it were relevant, Debtors' math is *way* off: The Debtors have a grand total of 730 individual violations based on their failure to meet the March 31, 2018 for their 2016 and 2017 RVOs. Section 211(d)(1) of the Clean Air Act provides that any violation of a regulation under the renewable fuel program (subsection (o)) "shall constitute a separate day of violation for each and every day in the averaging period." 42 U.S.C. § 7545(d)(1). The regulations, 40 C.F.R. § 80.1463, further make clear that any person liable "for failure to meet its RVOs . . . is subject to a separate day of violation for each day in the compliance period." In this case, where the Debtors have failed to meet their RVOs for a two-year compliance period starting January 1, 2016 and running through December 31, 2017, they are liable for 730 (365 x 2) days' worth of violations.

73. *Third*, the Debtors argue that they have not violated "an emission standard or limitation" by failing to comply with their RVOs. Debtors' Opposition ¶ 55. The Debtors must concede that violations of "a control or prohibition respecting a motor vehicle fuel or fuel additive" would support a claim for intervention under section 304, but they argue that the RVOs are not such a "control or prohibition," because that precise phrase does not appear under the Renewable Fuel Program in 42 U.S.C. § 7545(o). *Id.* This is wrong. The phrase "control or prohibition respecting a motor vehicle fuel or fuel additive" is undefined by the Act, but by any reasonable application of its ordinary meaning the RVOs would qualify. The RFS requirements at issue would require the Debtors either to purchase renewable fuel and blend into gasoline or diesel fuel, or to buy credits from others who have done the same. *See* 42 U.S.C. §

7545(o)(2)(A)(i) (requiring EPA to "promulgate regulations to ensure that gasoline sole or introduced into commerce . . . contains the applicable volume of renewable fuel . . ."). These requirements are both a control and a prohibition respecting motor vehicle fuel.

74. *Fourth*, the Debtors argue that Growth Energy is engaging in an impermissible attempt to sue the EPA for negligent or improper administration of the Act. Debtors' Opposition ¶¶ 57-58. This argument is simply untrue. Growth Energy's objection is not with how EPA has administered the RFS Program, but rather to EPA's request that this Court enter the proposed Consent Decree under applicable standards for judicial review of consent decrees that resolve crucial environmental enforcement actions and related issues. Seeking to intervene in the enforcement case, as the statute explicitly provides is as of right, is not the same thing as suing EPA for failure to administer the RFS Program, and the Debtors' argument to the contrary should be rejected out of hand.

IV. CONCLUSION

75. Growth Energy does not lightly object to the Proposed Decree. However, if Court review and approval of environmental consent decrees as fair, reasonable and in the public interest is to mean anything, the court must reject the proposed Consent Decree in this case.

Dated: April 2, 2018

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Exhibit A

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March 22, 2018

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Email: pubcomment-ees.enrd@usdoj.gov

RE: In re PES Holdings LLC., et. al., D.J. Ref. No. 90-5-2-1-10993/1

Dear Mr. Wood:

Please find enclosed the comments of Growth Energy on the Proposed Consent Decree and Environmental Settlement Agreement lodged by the Department of Justice with the United States Bankruptcy Court for the District of Delaware in In re PES Holdings LLC, et al., Civil Action No. 18-10122 (Bankr. D. Del.) on March 12, 2018.

Although the comment period does not expire until March 26, 2018, we are submitting these comments now to provide the Department of Justice the maximum amount of time to review. We reserve the right to submit additional or supplemental comments prior to the deadline.

Please not do not hesitate to contact us if you have any questions on these comments. Thank you for considering our comments.

Sincerely,

Emily Skor, CEO
Growth Energy

Enclosure

<u>COMMENTS OF GROWTH ENERGY ON THE PROPOSED CONSENT DECREE AND ENVIRONMENTAL SETTLEMENT AGREEMENT</u>

Growth Energy submits these comments on the Proposed Consent Decree and Environmental Settlement Agreement (the "Proposed Settlement")[1] because the Proposed Settlement would have significant business impacts, extending well beyond these settling parties, to renewable fuels manufacturers and oil refiners who comply with the Renewable Fuels Standard program ("RFS Program"), and broad policy implications for the RFS Program, other EPA fuels regulations, and compliance with environmental law by financially distressed companies. Taking into account all of these important interests, this deal is inappropriate, improper and inadequate, and the Department of Justice should withdraw from and withhold its consent to the Proposed Settlement. The Proposed Settlement is critically flawed in multiple respects, including:

First, it unjustifiably allows PESRM (and the other Debtors) to avoid their environmental obligations, accepting retirement of 138 million Renewable Identification Number ("RIN") credits for the 2016 and 2017 compliance periods and the first quarter of 2018 against a Renewable Volume Obligation ("RVO") of 467 million RINs plus the obligation PESRM incurs in the first quarter of 2018, likely totaling well over 500 million RINs. That is a discount of more than 70 percent.

Second, rather than taking the bare minimum step of requiring PESRM to apply all of what we understand are 210 million currently held RIN credits toward partial compliance with its 2016 and 2017 environmental obligations, the Proposed Settlement allows PESRM to use some of their currently held RINs as credits to their 2018 obligations tied to petroleum refined during the bankruptcy, and to carry an additional

[1] Unless stated otherwise, defined terms used but not otherwise defined in these comments are intended to have the meaning ascribed to them in the Proposed Settlement.

64.6 million RINs forward as further credit toward 2018 compliance. Thus, notwithstanding uncorrected noncompliance for 2016 and 2017, the Proposed Settlement gives PESRM a head start advantage for this year, ahead of competitors who have been complying with the law.

Third, and most importantly, the Proposed Settlement would resolve the RVO liability not only of the Debtors, who have asserted that they lack the financial wherewithal to meet their obligations*, but it would also give a free pass to non-debtor entities who are clearly liable for the RVO obligations*: the Debtors' parent companies and joint venture partners, including Philadelphia Energy Solutions LLC ("PES"), Carlyle PES, LLC, The Carlyle Group L.P. ("Carlyle") and Sunoco, Inc. None of these entities are Debtors in the bankruptcy proceedings. There is no allegation that any are in financial distress; quite to the contrary, Carlyle claims $195 billion in assets. *And each of them is directly liable for the RIN obligations*. The applicable EPA regulations explicitly impose direct liability on parent companies and joint venture partners in order to guarantee compliance in just this type of situation—where the subsidiary asserts it does not have the financial ability to comply. The Proposed Settlement would inexplicably release these non-debtor entities without requiring them to make good on this guarantee.

This Proposed Settlement fails and indeed impedes all of the Department of Justice's recently stated goals of civil environmental law enforcement: to require compliance; remove economic benefits obtained through noncompliance; remedy harm to public health or the environment; and punish and deter violations through civil penalties. This Proposed Settlement would encourage rather than discourage others to pursue similar schemes to avoid compliance with the RFS Program, with similarly structured

EPA fuels regulations, and with environmental laws generally. It would also establish a terrible precedent of allowing bankruptcy to be used to avoid environmental liabilities, even the liabilities of affiliated companies that do not themselves file for bankruptcy.

From all of these perspectives, this is a very bad settlement for the government, for competitors who comply with the law, for manufacturers who have invested in producing renewable fuels that deliver the benefits Congress intended, and for the public interest. Fortunately, just as the EPA renewable fuel regulations protect against subsidiary companies without the assets to comply, the Department of Justice public comment regulations provide an opportunity for the Department to change course before such a misguided settlement can become effective. Growth Energy urges the Department of Justice to avail itself of that opportunity here.

I. BACKGROUND

A. Growth Energy

Growth Energy is a trade association of biofuel producers with its headquarters in Washington, D.C. Growth Energy advocates for policies that protect the environment while increasing the United States' energy independence and creating jobs for U.S. workers.

Growth Energy's members rely on the RFS Program to sell renewable fuels and receive revenue based on the market value of RINs. That market value is substantially impacted by the obligation of refiners to meet their RIN obligations under the RFS Program. Relieving PESRM, the other Debtors, and the non-debtor parent companies and joint venture partners from this obligation would reduce the demand for RINs and renewable fuels, and thus adversely affect the businesses of Growth Energy member companies.

B. The Debtor and Non-Debtor Entities

PES Holdings, together with the other Debtors and non-debtor PES,[2] operate an enormous petroleum refining complex near Philadelphia encompassing the Point Breeze and Girard Point refineries. *See* Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of PES Holdings, LLC and Its Debtor Affiliates, Case No.18-10122, Doc. No. 10 (the "Disclosure Statement"), at 1.

According to the Debtors' filings,[3] PESRM directly owns the refining complex, and PES Holdings owns 99.99% of PESRM. *See* Corporate Organizational Chart (Ex. F to Disclosure Statement), a copy of which is attached hereto as Appendix A. In turn, non-debtor PES owns 100% of PES Holdings. *Id*. Non-debtor Carlyle PES, LLC owns 65.04% of PES, with non-debtor PES Equity Holdings LLC owning 32.52%. *Id*. As described in the companies' security filings, PES is a "joint venture" of The Carlyle Group, L.P. and Sunoco, Inc.[4] *See, e.g.*, Energy Transfer Partners, L.P. Form 10-K For the fiscal year ended Dec. 31, 2017, SEC File Number 1-31219 at 21 ("Our wholly-owned subsidiary, Sunoco, Inc., owns an approximate 33% non-operating interest in PES, a refining joint venture with The Carlyle Group, L.P., which owns a refinery in Philadelphia.").

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[2] PES refers to Philadelphia Energy Solutions LLC, a non-debtor defined as the "Parent" under the Plan. *See* Plan Art. I.A.120.

[3] The Plan and Disclosure Statement, along with the other documents filed in the Debtors' Chapter 11 bankruptcy cases (the "Chapter 11 Cases"), are all publically available on the Debtors' claims agent website, available at: www.omnimgt.com/sblite/philadelphiaenergy/.

[4] *See Value Creation,* Carlyle Partners, https://web.archive.org/web/20170702053224/http:/www.carlyle.com/media-room/corporate-videos/philadelphia-energy-solutions-refinery-value-creation (last visited March 22, 2018) (describing PES as a joint venture); *see also* Disclosure Statement, at 15 (providing that the Company was formed in 2012 as a holding company by affiliates of Carlyle and Sunoco).

C. The RFS Program

1. RFS Requirements

Congress enacted the RFS Program, codified at Section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o), to require transportation fuel sold in the United States to contain a certain minimum volume of renewable fuels. Congress originally enacted the Program in 2005, in the Energy Policy Act of 2005. Pub. L. No. 109-58, § 1501, 119 Stat. 594, 1067-1076 (2005). Congress amended and expanded the Program in the Energy Independence and Security Act of 2007 ("EISA"). Pub. L. No. 110-140, § 1 *et seq.*, 121 Stat. 1492 (2007). By requiring the use of renewable fuels, Congress sought to reduce greenhouse gas ("GHG") emissions, encourage the development of the renewable fuels sector, and reduce the country's reliance on imported oil. *See* S. Rep. No. 110-65, at 2-3 (2007). For a fuel to qualify as a renewable fuel under the RFS Program, the fuel generally must (among other requirements), achieve a reduction in lifecycle GHG emissions (from production through use in motor vehicles) as compared to petroleum fuel.

Congress directed EPA, in Section 211(o)(2) of the Act, to promulgate regulations to ensure that gasoline in the United States, on an annual average basis, contains specified volumes of renewable fuel. 42 U.S.C. § 7545(o)(2)(A)(i). The statute specifies that the regulations shall contain compliance provisions applicable to refineries, blenders, distributors and importers. 42 U.S.C. § 7545(o)(2)(A)(iii)(I). Congress further directed that EPA's regulations must provide for a credit program (without imposing any per-gallon obligation for the use of renewable fuel), such that those who blend gasoline with more than the required renewable fuel earn credits that they may use or sell. § 7545(o)(5). Credits are valid for up to twelve months from the date of generation, and those entities that are unable to generate or purchase sufficient credits to meet their obligations for any year may carry forward a deficit if they achieve compliance and offset the deficit in the following year. 42 U.S.C. § 7545(o)(5)(C) and (D).

EPA first adopted RFS regulations in 2007, and updated those regulations in 2010 following Congress's amendments to EISA. Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Final Rule, 72 Fed. Reg. 23,900 (May 1, 2007) (codified at 40 C.F.R. § 80.1100 *et seq*.), *amended by* 75 Fed. Reg. 14,670 (March 26, 2010) (codified at 40 C.F.R. § 80.1400 *et seq*.). Under the regulations, refiners are "obligated parties" who must demonstrate that they have satisfied their Renewable Volume Obligation ("RVO") for each annual compliance period, which RVO is calculated as a portion of the overall renewable fuels mandatory volumes apportioned based on the refiner's gasoline and diesel fuel production. 40 C.F.R. §§ 80.1406(a)(1), (b) and 80.1407. The regulations provide that producers of renewable fuels generate RINs to represent the volume of renewable fuels they produce. 40 C.F.R. § 80.1426. RINs are "assigned" to each gallon of renewable fuel when it is produced. *Id*. When the renewable fuel is blended into gasoline, refiners can use the RINs to demonstrate compliance with their RVO (called "retiring" the RINs), or can sell the RINs. 40 C.F.R. §§ 80.1427(a)(1), 80.1428.

The price of RINs is determined in market transactions between RIN sellers and buyers based on supply and demand.[5] The market value of RINs thus also affects the market value of renewable fuels that Growth Energy members manufacture. Refiners are required by March 31 of each year to demonstrate that they have complied with their

[5] *See, e.g.*, Chris Prentice, *Biofuel Credits Surge Ahead of EPA Deadline for 2017 Requirements: Traders*, Reuters (Mar. 20, 2017), https://www.reuters.com/article/us-usa-biofuels-credits/biofuels-credits-surge-ahead-of-epa-deadline-for-2017-requirements-traders-idUSKBN16R2EX.

RVO for the prior calendar year by retiring sufficient RINs. 40 C.F.R. §§ 80.1427 and 80.1451(a)(1). As provided in the statute, a refiner can carry a deficit from one year into the next year, as long as the refiner in the subsequent year complies for both the first and the second years (*i.e.*, does not carry any deficit into a third year). 40 C.F.R. § 80.1427(b).[6]

2. Enforcement of the RFS and Liability

The EPA regulations prohibit any person from failing to acquire sufficient RINs to meet that person's RVO and from failing to meet any requirement that applies to that person under the regulations, or from causing another person to commit a violation. 40 C.F.R. §1460(c)(1), (e), (f). Critically here, EPA's regulations also specify that, in addition to the person committing or causing another person to commit a violation, "any parent corporation is liable for any violation that is committed by any of its subsidiaries," and "each partner to a joint venture is jointly and severally liable for any violation committed by the joint venture operation." 40 C.F.R. § 1461(c) and (d).

Under the Clean Air Act, a person who violates the RFS regulations is subject to injunctive relief "to restrain violations. " 42 U.S.C. § 7545(d)(2). In other words, a court can order a refiner that fails to demonstrate compliance with its RIN obligations to do so. A violator is also subject to civil penalties of up to $46,192 for every day of each violation as well as "the amount of economic benefit or savings resulting from the violation." 42 U.S.C. § 7545(d)(1); 40 C.F.R. § 80.1463(a); *see also* 83 Fed. Reg. 1,190, at 1,193 (Jan. 10, 2018). [7]

[6] *See* EPA, Reporting Deadlines for Fuel Programs, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/reporting-deadlines-fuel-programs (last updated Mar. 27, 2017).

[7] Since the program's inception, EPA has pursued a number of enforcement actions against violators, including a $27 million civil penalty the agency assessed against Chemoil Corporation for its failure to

D. PES Bankruptcy and the Proposed Plan

On January 21, 2018, the Debtors filed the Chapter 11 Cases, and on January 22, 2018, the Debtors filed their Plan and Disclosure Statement. On March 12, 2018, the United States, on behalf of EPA, filed its Notice of Settlement in the Chapter 11 Cases ("Notice of Lodging"), attaching a copy of the Proposed Settlement. On March 16, 2018, the Debtors filed their First Amended Joint Prepackaged Chapter 11 Plan of Reorganization (the "Amended Plan") in the Chapter 11 Cases, which Amended Plan incorporated the Proposed Settlement.

In the bankruptcy filings, the Debtors complain of the oppressive effects of the RFS Program, describing it as "the primary driver behind the Debtors' decision to seek relief under the Bankruptcy Code, " Disclosure Statement, at 1, yet the Debtors' own Disclosure Statement highlights that other factors appear primarily responsible for PESRM's insolvency and that the RIN shortfalls have resulted from their own financial decisions.

The Debtors themselves acknowledge the problems that they encountered with changes in the oil markets and operating challenges, *see id*. at 26-28, and third party analysis has pinned PESRM's problems on factors that are unrelated to the RFS.[8] As explained in the Debtors' Disclosure Statement, PESRM had an RVO of 467 million RINs and held 210 million RINs as of December 31, 2017. Disclosure Statement, Notes

retire 72.7 million RINs. *See* EPA, Civil Enforcement of the Renewable Fuel Standard Program, https://www.epa.gov/enforcement/civil-enforcement-renewable-fuel-standard-program.

[8] *See* Letter to The Honorable Chuck Grassley from Philip K. Verleger Jr., available at https://www.pkverlegerllc.com/assets/documents/180208GrassleyLetter.pdf (Feb. 8, 2018) (explaining that the financial problems resulted from "1) PES' failed gamble regarding the availability of lower-cost US crude, 2) its refusal to invest in its facility, and 3) competitive pressures in the US East Coast market" and summarizing those findings); *see also* University of Pennsylvania, Kleinman Center for Energy Policy, blog post available at https://kleinmanenergy.upenn.edu/blog/2018/02/04/part-3-philadelphia-energy-solutions-investors-prioritized-stronger-investments (last visited Mar. 22, 2018) (Part 3: Philadelphia Energy Solutions Investors Prioritized Stronger Investments).

to the Liquidation Analysis, n.7. Despite the fact that this compliance issue must have been obvious long before the end of 2017, it has been reported that the Debtors undertook significant transactions in the period leading up to the Chapter 11 filing. First, Reuters reported that PESRM reportedly sold roughly 40 million RINs prior to filing for bankruptcy, apparently reducing its holdings to the 210 million RINs it held at the end of the year.[9] Moreover, PESRM reportedly sold large amounts of credits in 2016, leaving it with a negative balance of $111.4 million in that year, effectively raising cash by risking its ability to comply by the March 31, 2018 deadline to demonstrate compliance for its carry-over deficit from 2016 and for 2017. *Id.*

In addition, the Disclosure Statement explains that the Debtors executed a series of prepetition intercompany transactions, including those by which they made significant payments to non-debtor PES. Disclosure Statement, at 22. These payments (aggregating almost double the cost of the RIN obligation now at issue), included approximately $305 million from PESRM and $311 million from Debtor North Yard Logistics, L.P. ("NYL"). *Id*.

In other words, while the Debtors attempt to pin their financial troubles on the RFS Program, they also acknowledge their own financial missteps and the fact that they transferred substantial amounts of cash to PES in the years leading up to the bankruptcy filing.

E. The Proposed Settlement

On March 12, 2018, the United States lodged in the Bankruptcy Court the

[9] *See* Jarrett Renshaw, *Struggling Philadelphia Refiner Sells Biofuel Credits, Raises Cash: Sources*, Reuters (Nov. 14, 2017), https://www.reuters.com/article/us-refineries-biofuels-philadelphia/struggling-philadelphia-refiner-sells-biofuel-credits-raises-cash-sources-idUSKBN1DE2UU.

Proposed Settlement with the Debtors to "resolve a dispute about the obligations and liabilities of PESRM and related parties under the Clean Air Act's Renewable Fuels Standard program." Notice of Lodging, at 1. The recitals explain that PESRM contends it is unable to comply with its "Pre-Effective Date" RVOs due to its financial circumstances, and that the United States has reviewed the Debtors' financial information and "determined that PESRM has limited ability to comply with its pre-Effective Date RVOs." *Id*. at 3 and 5. The recitals say nothing about the projected future ability of PESRM or the reorganized company to comply with RVO obligations it incurs Post-Effective Date through its continued operation, or about the ability of PESRM's parent companies and joint venture partners to satisfy pre- or post-bankruptcy RVO obligations, even though these entities appear to receive a release from liability under the settlement as "Covered Entities."

The Pre-Effective Date RVO for which PESRM claims an inability to comply includes (i) the portion of 2016 RVO that it carried over from the 2016 compliance period to 2017 and its RVO for the 2017 compliance period (collectively 467 million RINs), for which the rules require PESRM to demonstrate compliance by March 31, 2018, as well as (ii) the *pro rata* RVO based on PESRM's gasoline and diesel fuel production from January 1, 2018 through the first quarter of 2018. *Id*. at 3. We do not know the amount of that *pro rata* RVO and the United States should disclose it. Nevertheless, one can estimate, based on the 467 million RINs owed for 2017 and a portion of 2016, that the RVO through the first quarter of 2018 will likely be at least 60 million additional RINs, and possibly much more. Accordingly, the total RVO with which PESRM claims it does not have the financial ability to comply for the period is likely well over 500 million RINs.

Under the Proposed Settlement, PESRM would retire 138 million of its currently held RINs to satisfy all liability with respect to the RVOs for this Pre-Effective Date RVO (including 2016, 2017 and essentially the first quarter of 2018). In other words, the United States would be agreeing that 138 million RINs will satisfy PESRM's obligation of well over 500 million RINs. This amounts to almost 400 million RINs that will not be satisfied, and a discounting of the RIN obligations by over 70%.

Most of the 2018 Pre-Effective Date period was and is *after* the January 21, 2018 bankruptcy filing date, during which PESRM as a debtor-in-possession clearly is obligated to comply with applicable environmental requirements. *Cf.* 28 U.S.C. § 959(b) (debtors-in-possession are required operate their property in compliance with the laws);[10] *see also* 11 U.S.C. 503(b)(1)(D) (post-petition expenses for preserving the estate are administrative expenses). Since the post-petition RIN obligations had to be satisfied under any scenario, and assuming those came to 20 million RINs a month, the RINs effectively being retired for pre-petition refining activities are likely under 100 million—a discounting of close to 80%, if not more.

Moreover, the Proposed Settlement does not require PESRM to use all of what we understand are its currently held 210 million RINs to satisfy its Pre-Effective Date RVO. Rather, the Proposed Settlement provides that PESRM is to retire 64.6 million of these RINs as a credit to satisfy the RVO for the *post-Effective Date portion of 2018*—projected as April 1, 2018 through the end of the year—that the reorganized company will incur. And then the Proposed Settlement allows PESRM to sell what appears to be

[10] *See also In re Wengert Transp., Inc.*, 59 B.R. 226, 231 (Bankr. N.D. Iowa 1986) (section 959(b) requires that a debtor's "rehabilitation must be undertaken in full compliance with all… valid state and federal laws").

the remainder of PESRM's currently held RINs for $2.5 million.

In other words, rather than requiring PESRM to use its 210 million RINs to satisfy as much of its current RVO as possible, the Proposed Settlement will allow PESRM to allocate more than 30 percent of those RINs as a credit toward *future* compliance and to sell some of them for cash. This leads to the unfair result that PESRM, an entity that is facing a multi-hundred million RIN shortfall for prior years, would emerge from bankruptcy not on equivalent footing with its competitors, but with a compliance head start even though these other entities have been steadfastly generating or purchasing RINs the whole time. After allowing PESRM to avoid compliance and use a significant portion of its RINs for future compliance, the Proposed Settlement imposes no civil penalty for noncompliance.

The Proposed Settlement also provides a covenant not to sue "Covered Entities." This covenant not to sue is with respect to the Pre-Effective Date RVO as well as the portion of the 2018 Post-Effective Date RVO covered by the 64.6 million RINs from PESRM's current holdings that would be credited for that *future* portion of 2018. Covered Entities is defined to include, among others, Parent Parties, which we believe encompasses all of the parent companies and joint venture partners above PESRM. This release of parent companies and joint venture partners would be provided notwithstanding that the Proposed Settlement imposes no obligation on them whatsoever, and even though the RFS regulations specify that they are directly liable for the failure of PESRM to comply.

Consistent with the regulatory requirements in 28 C.F.R § 50.7, the Proposed Settlement provides for a public comment period before the settlement can become effective. Paragraph 35 of the Proposed Settlement provides: "The United States reserves the right to withdraw or withhold its consent prior to approval of the Settlement Agreement by the Bankruptcy Court if the public comments regarding the Settlement Agreement disclose facts or considerations that indicate that this Settlement Agreement is inappropriate, improper, or inadequate."

II. REASONS THE UNITED STATES SHOULD WITHDRAW

The Proposed Settlement is fundamentally flawed and is inappropriate, improper and inadequate. First, it is unreasonable to require PESRM to retire only 138 million of its RINs to satisfy its undisputed legal obligation, especially where it possesses 210 million RINs. It is also unfair to competitors. The Proposed Settlement allows PESRM to sell $2.5 million of its currently held RINs and apply its remaining 64.6 million as a credit toward the reorganized company's RVO for the rest of 2018. In so doing, this would allow PESRM not only to avoid any penalty for substantial noncompliance, but to turn that noncompliance into an advantage over the competition for 2018. At the very least, the United States should require PESRM to apply all of its RINs to satisfy its Pre-Effective Date RVO.

Even more critically, the Proposed Settlement unreasonably releases PESRM's parent companies and joint venture partners from any liability at all without asking anything of them in return, disregarding the plain liability of those entities to guarantee compliance. Even if EPA's financial analysis showed an inability of the Debtors to fund more RINs, surely that analysis, had it been done, would have concluded that the parent companies and joint venture partners could readily comply with the RIN obligations.

The Proposed Settlement would thus undermine the goals and purposes of the RFS Program and the liability regime common to all of EPA's fuel programs, encouraging rather than discouraging similar ploys to avoid compliance.

A. <u>The Proposed Settlement Inappropriately and Improperly Facilitates The Avoiding of Environmental Liabilities</u>

There can be no ambiguity that the Debtors filed for bankruptcy protection as an attempt to avoid their RIN obligations. The Debtors initial Plan filed in the Chapter 11 Cases—which has now been amended to incorporate the Proposed Settlement—was structured as an asset sale to sell the Debtors' assets free and clear of the RIN obligations, but also structured to provide the Debtors could switch to a reorganization if they reached an agreement with the United States on the RIN obligations. In addition, the Plan—both as initially filed and now as amended—proposes to pay General Unsecured Claims in full on "the date due in the ordinary course of business," while the Plan also specifically excludes "RIN Liability" from the definition of "Claim." Plan, Art.II. B.9 and Art. I.A.24. In other words, the terms of the Plan itself—as initially filed and amended—make clear the purpose of the bankruptcy filing was clearly to seek to evade the RIN obligations.

The Proposed Settlement would allow the Debtors (and the Covered Entities), in large part, to do just that, in direct conflicts with applicable law. The law in the Third Circuit is that environmental compliance obligations are not dischargeable claims but obligations that exist in and after bankruptcy. In *In re Torwico Electronics, Inc.,* 8 F.3d 146 (3d Cir. 1993), the court held that obligations imposed under New Jersey state law to clean up a property that the debtor had previously operated were not dischargeable, even though the cleanup would cost money.

That bankruptcy does not vitiate environmental compliance obligations is eminently logical. When Congress creates environmental compliance obligations, it is concerned with physically remediating negative environmental impacts. The RFS is no different than other environmental laws in this respect. When Congress passed the law, it ascertained that the RFS reduces pollution while creating other benefits such for important policy goals, such as energy security, *see* S. Rep. No. 110-65, at 2-3 (2007) (discussing emissions reductions goals of RFS program), and subsequent EPA analyses have corroborated the environmental benefits of the program. For example, EPA projected that the increased use of renewable fuels would have positive impacts on air quality, including by reducing emissions of carbon monoxide, particulate matter, benzene, and acrolein. *See* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program 75 Fed. Reg. 14,670, 14,802 (Mar. 26, 2010); *see also* 14,764–14,799 (analyzing effects on GHG emissions), 14,799–14,816 (analyzing effects on other tailpipe emissions), and 14,839–14,842 (analyzing benefits to national security).

Therefore, absent the Proposed Settlement, the Debtors and the Covered Entities would not have been able to evade their RFS obligations, and they should not be able to do so under the Proposed Settlement.

B. <u>The Settlement Obligations of PESRM Are Inadequate</u>

PESRM has acknowledged that its RVO for 2016 and 2017 is 467 million RINs. It is not reasonable for the United States to release PESRM, after it retires 138 million RINs, from a remaining RVO obligation for 2016 and 2017 of 329 million RINs, plus whatever additional RVO obligation PESRM will have incurred in 2018 through the April 1 projected Effective Date. The United States should disclose the amount of the RVO incurred to date in 2018 (and projected through the Effective Date), so that stakeholders might be apprised of the total shortfall in use of renewable fuels resulting from this release.

Based on information available to Growth Energy, the Proposed Settlement represents a release from more than seventy percent of the RVO obligation. PESRM held 210 million RINs as of December 31, 2017 and we understand continues to hold that amount. Rather than requiring PESRM to use the remaining 72 million RINs toward remedying its noncompliance to date, the Proposed Settlement allows PESRM to hold 64.6 million RINs for the benefit of the reorganized company's *future* compliance, and apparently to sell the rest for $2.5 million.

Jeffrey Wood, Acting Assistant Attorney General of the Environment and Natural Resources Division ("ENRD"), recently summarized the pertinent "goals" of civil enforcement cases as follows: "to require violators to come into compliance with the law and take measures to abate ongoing violations; . . . remove economic benefits obtained through noncompliance; remedy harm to public health or the environment; and punish and deter violations through civil penalties." Memorandum from Jeffrey H. Wood, Acting Assistant Attorney General, to ENRD Section Chiefs and Deputy Section Chiefs, at 5-6 (March 12, 2018).

The Proposed Settlement hinders rather than advances these goals. PESRM will not come into compliance; in fact, it will come nowhere near compliance. Nor does the Proposed Settlement remove economic benefits obtained through noncompliance let alone deter noncompliance through penalties. PESRM has itself asserted that compliance with its 2016-2017 RVO would cost it $350 million. By releasing PESRM from more than seventy percent of this RVO, it appears that PESRM will save more than seventy percent of $350 million, or more than $250 million. This is money that PESRM's competitors are paying to comply. This settlement does not ensure a level playing field; rather it tilts the field markedly in one direction. And the playing field is skewed even further by EPA's proposal to allow PERSM to carry forward the very RINs it should have used for past compliance to the Post-Effective Date time period, meaning that PESRM's law-abiding competitors need to move the ball further than PESRM to show compliance. This is unfair not only to competitors but to the renewable fuels producers who have made investments to supply the renewable fuels that PESRM would be relieved of the obligation to ensure are used.

Finally, the Proposed Settlement will result in harm to the public. The required use of renewable fuels reduces greenhouse gas emissions, reduces emissions of other tailpipe emissions such as carbon monoxide and harmful particulates, and benefits domestic agriculture as well as national energy security. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, at 14,670 (reducing GHG emissions), 14,800 (reducing other tailpipe emissions), 14,766 (benefitting domestic agriculture), and 14,839 (benefitting national energy security) (Mar. 26, 2010).

To be sure, the recitals to the Proposed Settlement state that the United States "has reviewed financial information submitted by Debtors and determined that PESRM has limited ability to comply with its pre-Effective Date RVOs, and PESRM asserts that in the absence of a settlement or ruling against the United States' objections to the Plan, the Debtors would face a risk of liquidation." Proposed Settlement, at 5. In other words, the United States appears to justify vitiating the primary goals of civil enforcement on the grounds that PESRM simply does not have the financial ability to pay. If this is true, the United States should provide detailed information supporting that contention so that stakeholders and the Court might be able to evaluate its validity.

Moreover, impacted stakeholders would be reasonable in their skepticism that the Proposed Settlement's allowance that PESRM can credit 64.6 million of its currently held RINs toward the *future* RVO of the reorganized company can be justified based on inability to pay. This would require some *future* projection that the reorganized company will not be able comply in 2018 by generating sufficient profit in operating the refinery assets in compliance with regulatory requirements as all other refiners are required to do. The Proposed Settlement references no determination by the United States regarding the ability of PESRM (or the other Debtors) to comply with the environmental laws going forward, such that a credit from its currently held RINs must be allocated toward future rather than past compliance obligations. If the United States has conducted such an analysis and come to that conclusion, it should say so and explain the basis for this allocation.

C. The Proposed Settlement Improperly Releases Parents and Joint Venture Partners

Even if PESRM in fact is unable to do more to meet its RVO, the United States has provided no justification to release the Covered Entities, including the parent companies and joint venture partners, from all liability. The RFS Program regulations, just like virtually all of U.S. EPA's fuels regulations, impose liability on parent companies for violations committed by subsidiaries, and on joint venture partners for violations committed by the joint venture operation, precisely to address the situation where the subsidiary does not have the ability to comply. The parents and joint venture partners here, such as Carlyle Group, L.P., are sophisticated companies participating in the energy sector that presumably understood the regulatory regime when they made their investment decisions, there is no evidence they are unable to ensure compliance, and they have no grounds to be released from this liability. Yet the Proposed Settlement unreasonably releases them without any commitment from them to comply, setting a terrible precedent not only for the RFS Program but for enforcement of similar requirements in all of EPA's fuels regulations.

The Proposed Settlement also undermines a range of environmental protection laws that impose liability on corporate parents as assurance that public health and the environment will be protected. These legal requirements extend liability beyond a single company in order to protect against the risk that the operating company will fail and the public and the environment will suffer the consequences. Allowing a failing operating company to seek bankruptcy protection and then, as is the case here, bring its parent companies along for the ride in obtaining a shield against liability undermines the regulatory purpose of imposing liability on the parent companies to back-stop the obligation, creating a loophole big enough for a massive oil refinery.

1. The Regulations Provide for Parent Company and Joint Venture Partner Liability

The liability provisions of EPA's RFS regulations are clear:

> (c) Parent corporation liability. ***Any parent corporation*** is liable for any violation of this subpart that is committed by any of its subsidiaries.
>
> (d) Joint venture liability. ***Each partner to a joint venture*** is jointly and severally liable for any violation of this subpart that is committed by the joint venture operation.

40 C.F.R. § 80.1461(c) and (d) (emphasis added).

EPA explained in the RFS rulemaking, in response to comments, that the "the ability to hold a parent corporation liable for violations caused by a subsidiary company is necessary in order to ensure that the goals of the RFS program are met in the event that relief cannot be obtained by the subsidiary company." EPA, 420-R-07-66 , Renewable Fuel Standard Program: Summary and Analysis of Comments 11–19 (April 2007). Furthermore, EPA justified this approach as "consistent with the gasoline sulfur program, the Highway and Nonroad Diesel sulfur programs, and other fuels programs." *Id*.

In fact, EPA has adopted a similar parent and joint venture partner liability regime in virtually all of its regulations implementing requirements for transportation fuels under Section 211 the Clean Air Act. 42 U.S.C. § 7545.[11] In a program like the RFS, where a refiner is not required to use or acquire renewable fuels on an ongoing basis but instead can defer such action for more than two calendar years and then purchase RIN credits to demonstrate compliance, there can be is a significant risk of default. The regulations adopt a form of financial assurance requiring parent companies and joint venture partners to stand behind the compliance obligation of the operating subsidiary. The situation presented here, where the Debtors claim they do not have the financial resources to comply but have parent corporations and joint venture partner entities with substantial resources, is precisely the type of situation that EPA intended its liability regime to address.

There is no serious question that all parent companies, including the ultimate parent, are subject to this liability. Any argument that the liability is limited to direct

[11] *See* 40 C.F.R. Subpart D and § 80.87(b)(3) and (4) (reformulated gasoline requirements), 40 C.F.R. Subpart H and § 80.395(a)(11) and (12) (gasoline sulfur requirements), 40 C.F.R. Subpart I and § 80.612(5) and (6) (diesel sulfur requirements), 40 C.F.R. Subpart J and § 80.1015(a)(3) (gasoline toxics requirements), 40 C.F.R. Subpart L and § 80.1360(a)(3) and (4) (gasoline benzene requirements), 40 C.F.R. Subpart O and § 80.1662(a)(12) and (13) (additional gasoline sulfur requirements).

parents, but not those further up the corporate structure, is simply not tenable. Limiting this liability to a direct parent holding company with no assets would make a mockery of EPA's purposes in imposing such liability. In the context of rulemaking for EPA's programs, EPA explained that the Agency defines "parent company" broadly as "any company (or companies) with controlling ownership interest, and a subsidiary of a company as any company in which the refiner or its parent(s) has a controlling ownership interest." Control of Hazardous Air Pollutants from Mobile Sources; Final Rule, 72 Fed. Reg. 8,428, 8,490 (Feb. 26, 2007) (the "Benzene Rule"). The use of "any" in both the liability regulations ("any parent company"), and the preamble explanation ("any company (or companies)"), signals EPA's intention not to limit liability to the single, direct parent, which is of course easily circumvented with intermediate holding companies. More explicitly, in the preamble to the proposed benzene rule, EPA recognized that "[i]n many cases, there are likely to be multiple layers of parent companies, with the ultimate parent being the one for which no one else has controlling interest." Control of Hazardous Air Pollutants from Mobile Sources; Proposed Rulemaking, 71 Fed. Reg. 15,804, 15,878 (Mar. 29, 2006) (the "Benzene Proposal"). EPA clarified that in such cases, "all parent companies, and all subsidiaries of all parent companies, [will] be taken into consideration when evaluating compliance." *Id.*

This approach is also consistent with other EPA definitions and general corporate law. *See* 40 C.F.R. § 704.3 (EPA definition of "parent company" in regulations under the Toxic Substances Control Act (TSCA) to mean "a company that owns or controls another company); Reporting and Recordkeeping Requirements; Small Manufacturer Exemption Standards; Final Rule, 49 Fed. Reg. 45,425, 45,426 (Nov. 16, 1984) (explaining TSCA parent definition to include a company that "has the power to control the management and policies of the other company"); *see also Weinstein Enters, Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005) ("[i]n the context of imposing fiduciary responsibilities, it is well established in the corporate jurisprudence of Delaware that control exists when a stockholder owns, directly or indirectly, more than half of a corporation's voting power.") (citations omitted).

There is no basis to release the Covered Entities, and all of the parent companies and joint venture partners should remain liable. As explained in the Debtors' Disclosure Statement, Carlyle PES, LLC holds a sixty-five percent interest in PES. *See* Corporate Organizational Chart (Ex. F to Disclosure Statement), attached hereto as Appendix A. Carlyle PES is part of The Carlyle Group, L.P. *See* Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 259. PES Equity Holdings, LLC, a wholly-owned subsidiary of Energy Transfer Partners, L.P., *see* Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 16, owns thirty-two percent of PES, and senior management owns the remaining two percent. *See* Corporate Organizational Chart (Ex. F to Disclosure Statement), attached hereto as Appendix A. PES wholly owns all of the Debtor entities, including PESRM. Accordingly, none of these non-debtor entities should be released under the Proposed Settlement. Indeed, the following chart attached as Appendix B shows that, upon information and belief, four managing directors at The Carlyle Group (Rodney Cohen, David Albert, David Marchick and David Stonehill) control the board of PES, serving with two executive members and one member from Sunoco. These are the same members as serve on the boards of PES Holdings, LLC and

PESRM (except that Joseph Colella, from Sunoco, is not believed to be on the board of PES).

Finally, the companies themselves, including Energy Transfer Partners, L.P., have repeatedly characterized their relationship as joint venture partners with respect to this refinery operation. The most recent annual report filed with the SEC by Energy Transfer Partners, L.P. is explicit that Carlyle and Sunoco are joint venture partners and even describes Carlyle as owning the refinery:

> Our wholly-owned subsidiary, Sunoco, Inc., owns an approximate 33% non-operating interest in PES, ***a refining joint venture with The Carlyle Group, L.P.*, which owns a refinery in Philadelphia**.

Energy Transfer Partners, L.P. Form 10-K For the fiscal year ended Dec. 31, 2017, SEC File Number 1-31219 at 21 (emphasis added). *See also* Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 18 (emphasis added) (withdrawn on Sept. 13, 2016 due to decision not to pursue public offering) ("PES LLC is a ***joint venture originally formed among Carlyle, PES Equity (as successor-in-interest to Sunoco)*** and members of our management to own and operate the Philadelphia refining complex and the North Yard terminal.") (emphasis added); Sunoco Logistics Partners L.P. Form 10-K For the fiscal year ended Dec. 31, 2012, SEC file number 1-312219 at 45 ("In September 2012, Sunoco contributed the refining assets of its Philadelphia refinery to Philadelphia Energy Solutions ("PES"), ***a joint venture between The Carlyle Group and Sunoco***, which enabled the Philadelphia refinery to continue operating.") (emphasis added).[12]

[12] *See also Value Creation*, Carlyle Partners, https://web.archive.org/web/20170702053224/http://www.carlyle.com/media-room/corporate-videos/philadelphia-energy-solutions-refinery-value-creation (last visited March 22, 2018) (Brian P. MacDonald, CEO, Chairman and President, Sunoco, describing Carlyle as a partner in the PES project).

2. Non-Debtor Parent Entities and Joint Venture Partners Would Not Be Entitled to a Bankruptcy Release

The United States cannot justify the release of the parent companies and joint venture partners in the Proposed Settlement on the grounds that they might have gotten such a release anyway from the Bankruptcy Court. While the Debtors' Plan purports to provide for broad release and discharge provisions for non-debtor third parties, absent the Proposed Settlement, the non-debtor parent entities and joint venture partners would not be entitled to a release of their RFS liability. The government routinely negotiates carve-out language from third-party release provisions. *See, e.g.*, Transcript of Hearing on First Day Motions at 44, *In re PES Holdings, LLC*, No. 18-10122 (KG) (Bankr. D. Del. Jan. 23, 2018) (Counsel for the government, noting that the "discharge provisions in the plan are very way overbroad… Fortunately, we've been able to negotiate resolutions with Kirkland & Ellis in many, many other cases, and we're very hopeful we can do so here."); *see also* Objection by the United States, Civil Division Department of Justice, to the Debtors' Disclosure Statement and Plan, Docket No. 272, filed on Mar. 20, 2018 (the "United States Civil Division Objection"), at 12-13, and 20 (seeking carve-out language and providing that "the United States opts out of and objects to the third party non-debtor limitation of liability, injunction and exculpation and release provisions" in the Plan); *see also* United States Trustee's Objection to the Plan, Docket No. 261, filed on Mar. 19, 2018, at 7-9 (the "UST Objection") (objecting to the Plan's release provisions).

The recitals to the Proposed Settlement specify that, in the absence of the settlement, "the United States, on behalf of EPA, would have objected to the confirmation of the Plan, *inter alia*, based on the EPA's belief that the Plan failed to provide for compliance with the Debtors' Pre-Effective Date RVOs and failed to properly harmonize bankruptcy and environmental law." Proposed Settlement at 3. The Proposed Settlement does not resolve these concerns, and the United States should object to confirmation of the Plan under these circumstances, which objection the Court would be required to grant.

The mere fact that the Debtors sought in the proposed Plan to provide for non-debtor third-party release and discharge provisions does not provide grounds to release the Covered Entities. Case law in the Third Circuit provides ample precedent for the United States to have objected to the release and discharge provisions, including on the basis that the Bankruptcy Court lacks constitutional jurisdiction to approve third-party release provisions and that the provisions violate applicable law.

i. The Bankruptcy Court Lacks Constitutional Jurisdiction to Approve Non-Debtor Release Provisions

The Bankruptcy Court lacks constitutional authority to determine EPA's authority to enforce the RFS obligations against the non-debtor parent and joint venture entities. Article III of the Constitution limits the Bankruptcy Court's power as an Article I tribunal, at least absent consent (which here the United States should not provide), to enter judgment disposing of claims that are based on non-bankruptcy substantive law and not made against the debtor itself. *See Stern v. Marshall*, 564 U.S. 462, 503 (2011) (holding that the "Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim"); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015) ("[R]ecently in *Stern*, this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication."); *Executive Benefits Ins. Agency v.*

Arkison, 134 S. Ct. 2165, 2172 (2014) (same).

Stern's principles apply directly, and the United States could have objected to the release and discharge provisions—indeed, such objections were raised in the United States Civil Division Objection—so they are not a basis for the release of the Covered Entities in the Proposed Settlement. The obligations of the non-debtor parent and joint venture entities are based on congressionally mandated RIN obligations, do not "stem from the bankruptcy itself," and rather arise under non-bankruptcy federal law, specifically the Clean Air Act and EPA's RFS regulations. Accordingly, "the responsibility for deciding" these environmental obligations "rests with Article III judges in Article III courts," and that responsibility cannot be wrested from an Article III Court and given to a non-Article III tribunal by an Act of Congress. *Stern*, 564 U.S. at 484; s*ee also In re NEC Holdings Corp.*, No. 10–11890 PJW, 2011 WL 1740414, at *2 (Bankr. D. Del. May 4, 2011), *as amended* (May 18, 2011) (environmental claims did not qualify as "core" under 28 U.S.C. § 157(b)(2)(A)). It is therefore clear that, as in *Stern*, entry of a final order by the bankruptcy court that conclusively disposes of (by releasing without their consent), environmental claims to enforce obligations against non-debtor parties would constitute an improper exercise of the "judicial power of the United States" in violation of Article III.[13]

[13] In *Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC)*, 242 F.Supp.3d 322, 328 (D. Del. 2017), the District Court stated that "*Stern* made clear the limitation on a Bankruptcy Court's authority to enter a final order on a non-core claim for which the claimant has a constitutional right to adjudication by an Article III court." While on remand, the bankruptcy court in that case did hold it had constitutional authority to approve a nonconsensual third-party release, we believe that case is not determinative. *First,* the bankruptcy court decision is currently on appeal. *See* Civ. No. 17-1461-LPS (D. Del. 2017). *Second,* in that case, the court found that the objecting party waived its right to contest the court's constitutional adjudicatory authority, which, if EPA elects to object and not consent to the release of the Covered Entities in the Proposed Settlement or the court's constitutional adjudicatory authority, would be inapplicable here. *In re Millennium Lab Holdings II, LLC,* 575 B.R. 252, 288-95 (Bankr. D. Del. 2017).

The United States had no obligation to consent to the releases, and instead of entering into the Proposed Settlement, the United States should object to the third party release and discharge provisions in the Plan and seek to hold the parent corporations and joint venture partners liable for the RFS Program violations, which is precisely what the RFS regulations provide for and allow.

ii. <u>A Release Would Violate Applicable Law</u>

In addition, absent the United States' consent, any release of the non-debtor parent entities and joint venture partners would be impermissible and contravene applicable Third Circuit law and environmental regulations. Particularly here, where the environmental regulations provide explicitly for direct liability of the non-debtor parent and joint venture companies, there is no justification for a release. The enforcement of the distinct liability against the "Covered Entities" is entirely independent of the business rational for the bankruptcy reorganization. Whether they have such separate, clear and direct liability to ensure compliance with the Pre-Effective Date RVOs of PESRM by acquiring and retiring the requisite RINs has nothing to do with the rationale for reorganizing PESRM as an ongoing enterprise. A release of that liability is neither fair nor relevant, less alone necessary, for the success of the Plan.

Bankruptcy Courts in Delaware have previously held that they do not have the power to grant a non-debtor third-party release absent consent of the releasing party (either by contract or a mechanism of voting in favor of the plan). *See, e.g.*, *In re Abeinsa Holding, Inc.*, 562 B.R. 265, 285 (Bankr. D. Del. 2016) ("The third-party release in this Plan is designed to apply only to parties who affirmatively consent and, thus, is fair and equitable."); *In re Washington Mutual, Inc.*, 442 B.R. 314, 351-52 (Bankr. D.

Del. 2011) (finding non-debtor third-party releases impermissible absent affirmative agreement of the affected party); *In re Spansion Inc.*, 426 B.R. 114, 145 (Bankr. D. Del. 2010) ("Courts have determined that a third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan."); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) ("Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties."); *In re Exide Techs.*, 303 B.R. 48, 71-74 (Bankr. D. Del. 2003) (approving non-debtor third-party releases because they only bound creditors and equityholders who had accepted the terms of the plan); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (requiring debtors to modify a non-debtor third-party release to only bind creditors who voted in favor of the plan). *See also In re SunEdison, Inc.*, 576 B.R. 453, 464 (Bankr. S.D.N.Y. 2017) (requiring debtors to modify a release because non-voting creditors cannot be deemed to consent to a third-party release).

For example, in *Washington Mutual*, certain parties objected to confirmation of the debtors' proposed plan, arguing that non-debtor third-party releases could only be accomplished with the affirmative agreement of the affected party. 442 B.R. at 351. The bankruptcy court agreed, stating that the Third Circuit has recognized that third-party releases "are the exception, not the rule," and holding that it did "not have the power to grant a third party release of a non-debtor. Rather, any such release must be based on consent of the releasing party (by contract or the mechanism of voting in favor of the plan)." *Id.* at 351–352 (citations omitted).

A non-consensual third party release provision in a Plan is nothing more than an end-run around section 524 of the Bankruptcy Code. *See* 11 U.S. 524(e) ("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"). While certain courts in the Third Circuit have permitted nonconsensual non-debtor third-party releases if they meet the standard of fairness and necessity to the reorganization, and the court makes specific factual findings to support these conclusions, those cases are inapplicable here, where the RFS regulations specifically provide for non-debtor liability. Indeed, as provided for in the United States Civil Division Objection "[w]hile the Third Circuit stopped short of adopting a *per se* rule that a non-debtor release in a reorganization plan is not permissible (as other circuits have done), it held that, *at most*, such a provision could be valid in "extraordinary" cases." *See* United States Civil Division Objection, at 20 (internal citations omitted) (emphasis added).

Here, the environmental regulations specifically impose liability on parent corporations and partners to a joint venture for any violation committed by a subsidiary or the joint venture operation, *see* 40 C.F.R. § 1461(c) and (d), and there is no basis to release the parent corporations and joint ventures partner. Such a release was not essential to the reorganization and it was not essential to the survival of the refinery. All the release would do is give the Covered Entities a free pass they have no entitlement to, and in so doing run roughshod over just about every fundamental environmental enforcement principle the Department and ENRD had articulated. There is no basis for the EPA to provide the release of Covered Entities in the Proposed Settlement, and the United States, on behalf of the EPA, should object to the release of non-debtor entities.

D. The Proposed Settlement's Compliance Provisions are Inadequate

The Proposed Settlement is also deficient in protecting against non-compliance with the terms of the settlement itself. This is of particular concern in this situation, where PESRM has been operating for more than two years while incurring an RVO obligation that it now claims it cannot satisfy when due on March 31, 2018.

First, the specified stipulated penalties in Paragraph 18 of the Proposed Settlement are inadequate, falling short of the penalties that would apply pursuant to the Clean Air Act. Although the penalty for failure to comply with the RINs retirement requirements (after five days at $10,000 per day) is the inflation-adjusted amount specified in the Clean Air Act of $46,192, the statute specifies that this is in addition to "the amount of economic benefit or savings resulting from the violation." 42 U.S.C. § 7545(d)(1). Where the RVO obligation and thus the RINs retirement requirements could cost a hundred million dollars (or more), a daily penalty of $46,192 is 0.046 percent of the compliance cost, and the $10,000 per day stipulated penalty for the first five days is in the range of 0.01 percent of a that amount. It is essential that the stipulated penalty provision create a real deterrent to noncompliance. The stipulated penalty in the Proposed Settlement does not accomplish such deterrence, and should either be much higher or include the amount of economic benefit resulting from the violation.

Second, just as the RFS regulations themselves impose direct liability on parent companies and joint venture partners in order to assure and guarantee compliance, the Proposed Settlement should clearly specify that those entities in control of PESRM going forward are responsible for meeting the RIN requirements on a going forward basis. In a situation where the Debtors are avoiding these liabilities because they say they do not have the financial resources to comply, it is certainly reasonable and in the public interest for EPA to ensure that it does not again find itself in the same position in the future, with the reorganized company making the same plea.

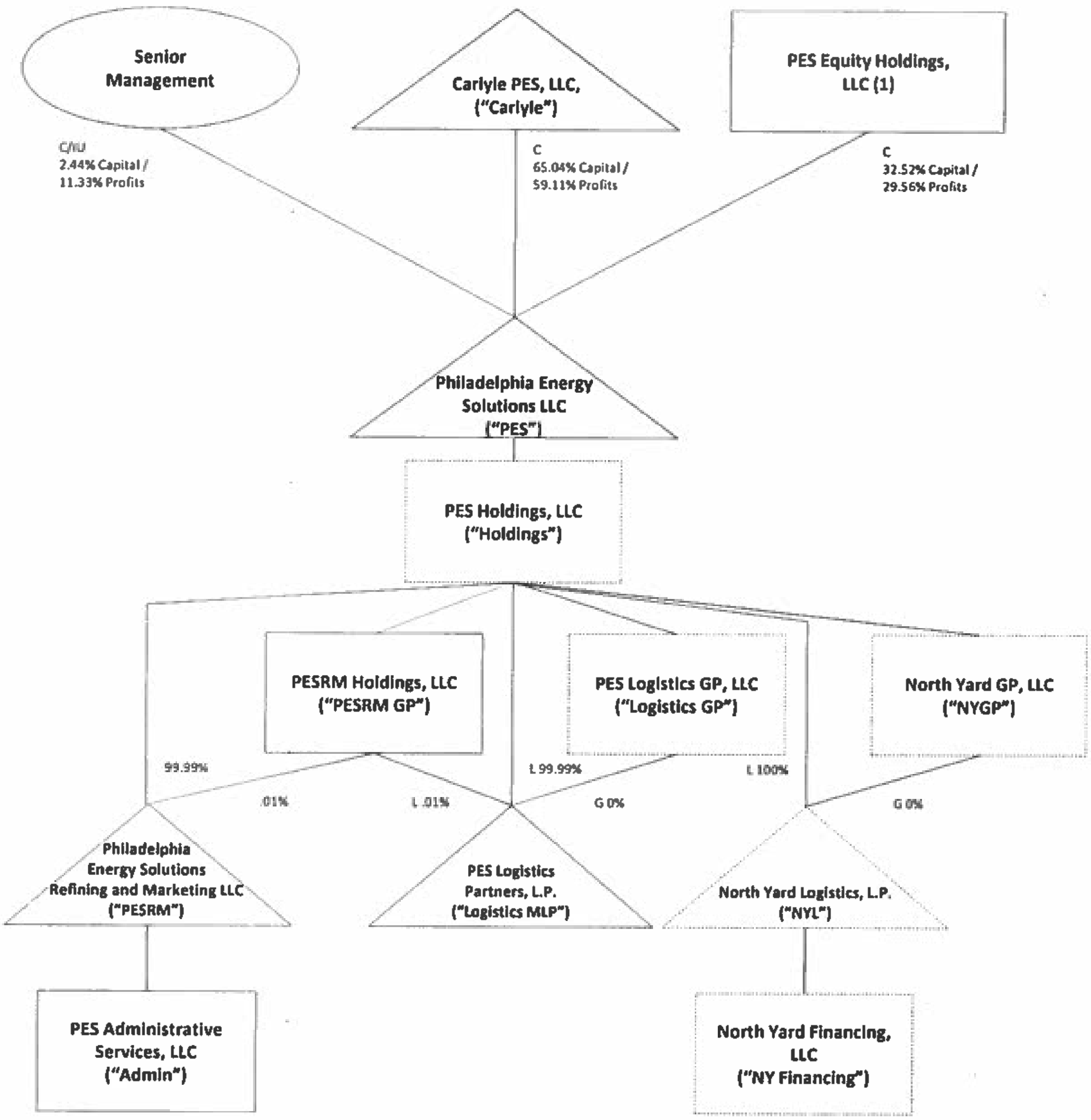
III. CONCLUSION

If the fundamental goal of environmental enforcement is to require compliance with the environmental laws, what possible justification could there be for the Department of Justice to enter into a settlement that allows massive non-compliance? The only justification offered so far is the Debtors' financial distress, and even that is not explained with any detail. However, even accepting that justification, it cannot conceivably apply to non-debtors, who are not in distress and not part of the bankruptcy process.

Nor can the Department point to the potential litigation risk that EPA would face in pursuing claims against non-debtors to justify a 70-80% reduction in the scope of compliance, when: (i) the applicable regulations clearly impose liability on parents and joint venture partners; (ii) multiple non-debtors entities, including Carlyle entities, fall within one or both of those categories; and (iii) as other components of the Department of Justice have argued in this very case, there would be no basis for non-debtors to obtain a non-consensual release from the Bankruptcy Court. Any litigation risk is small, and cannot justify such unprecedented levels of non-compliance.

The Proposed Settlement is inappropriate, improper and inadequate, and we urge the Department of Justice to withdraw from it and insist instead on full compliance.

APPENDIX A



= ownership
= disregarded entity for U.S. federal income tax purposes
= partnership of U.S. federal income tax purposes
= corporation for U.S. federal income tax purposes
= indebtedness
G = general partner
L = limited partner
C = common units
S = subordinated units
IDRs = incentive distribution rights
C = Common Units
IU = Incentive Units

(1) PES Equity Holdings, LLC is a subsidiary of Energy Transfer Partners, L.P.

APPENDIX B

Philadelphia Energy Solutions, LLC Board[1]	PES Holdings, LLC Board[2]	Philadelphia Energy Solutions Refining & Marketing LLC (PESRM) Board[3]
John B. McShane *Executive Vice President, General Counsel, Secretary*	John B. McShane *Executive Vice President, General Counsel, Secretary*	John B. McShane *Secretary*
Gregory Gatta *CEO*	Gregory Gatta *Manager*	Gregory Gatta *Manager*
Rodney Cohen *Manager*	Rodney Cohen *Manager*	Rodney Cohen *Manager*
David Albert *Manager*	David Albert *Manager*	David Albert *Manager*
David Marchick *Manager*	David Marchick *Manager*	David Marchick *Manager*
David Stonehill *Manager*	David Stonehill *Manager*	David Stonehill *Manager*
Robert W. Owens *Manager*	Robert W. Owens *Manager*	Robert W. Owens *Manager*
	Joseph Colella *Manager*	Joseph Colella *Manager*

[blue]	The Carlyle Group (see below)
[yellow]	Sunoco (see below)

[1] Information on the board composition is from the PES LLC website (*see* http://pes-companies.com/sitemap/).
[2] Information on the board composition is from PES Holdings bankruptcy petition, the petition is available on the website of the Debtors' claim agent at www.omnimgt.com/sblite/philadelphiaenergy/.
[3] Information on the board composition is from PESRM bankruptcy petition, the petition is available on the website of the Debtors' claim agent at www.omnimgt.com/sblite/philadelphiaenergy/

The Carlyle Group[4]	Sunoco, Inc.[5]	Sunoco Logistics Partners L.P.[6]
Rodney Cohen *Managing Director and Co-Head (Carlyle Growth Partners and Equity Opportunity Fund)*	Robert W. Owens *Former President & CEO, Consultant*	Joseph Colella *Senior Vice President of Business Development*
David Albert *Managing Director, Portfolio Manager and Co-Head (Energy Mezzanine Opportunities Fund)*		
David Marchick *Managing Director, Global Head of External Affairs, Management Committee Member*		
David Stonehill *Managing Director (Equity Opportunity Fund)*		

[4] Information on Carlyle individuals obtained from The Carlyle Group website (*see* https://www.carlyle.com/about-carlyle/team).

[5] Sunoco, Inc. is a subsidiary of Energy Transfer Partners, L.P. Upon information and belief, Roberts Owens was Senior Vice President of Marketing at Sunoco, Inc. from 2001 to 2012 and was President and CEO from 2012 until his retirement in 2017; he now serves as a Consultant to the company. Information on Robert Owens obtained from S&P Capital IQ and www.bloomberg.com.

[6] Sunoco Logistics Partners L.P. is a subsidiary of Energy Transfer Partners, L.P. Information on Joseph Colella obtained from http://analysis.petchem-update.com/supply-chain-logistics/sunoco-logistics-eyes-market-gains-northeast-pipeline-terminal-expansions and https://www.linkedin.com/in/joseph-colella-76ab3793/.

Exhibit B

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	**CHAPTER 11**
PES HOLDINGS, LLC, et al.,	)	Case No. 18-10122 (KG)
Debtors	)	Related Dkt. No. 37

DECLARATION OF JOHN FUHER IN SUPPORT OF GROWTH ENERGY'S MOTION TO INTERVENE AND IN OPPOSITION TO THE COURT'S APPROVAL OF THE PROPOSED CONSENT DECREE AND ENVIRONMENTAL SETTLEMENT AGREEMENT

I, John Fuher, declare under penalty of perjury and state as follows pursuant to 28 U.S.C. § 1746:

1. I am Vice President of Government Affairs for Growth Energy in Washington, D.C.

2. I submit this declaration in support of the Motion to Intervene filed by Growth Energy and Opposition to the Proposed Consent Decree and Environmental Settlement Agreement (the "Proposed Settlement").[1]

3. Growth Energy is a trade association of biofuel producers with its headquarters in Washington, D.C. Together, Growth Energy's members own and operate 89 ethanol plants. The members produce 6.5 billion gallons of biofuels per year, which accounts for approximately 40% of the biofuels used in the United States annually. Growth Energy advocates for the use of biofuels in transportation fuels, as biofuels displace petroleum fuel, reduce greenhouse gas

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Proposed Settlement.

emissions, promote U.S. energy security and independence, and promote rural and agricultural economies and jobs.

4. Growth Energy's primary purposes include advancing the interests of the biofuels industry nationwide and advocating for an RFS that is robustly crafted and strongly enforced to achieve the full benefits that come from renewable fuels. To that end, on March 26, 2018 Growth Energy filed a Motion to Intervene, pursuant to Section 304(b)(1)(B) of the Clean Air Act, to oppose any request by EPA for this Court to approve EPA's proposed RVO Consent Decree with the Debtors (the "Proposed EPA RVO Consent Decree").

5. Since Growth Energy's members are biofuel producers, their business depends on the demand for both biofuel and for the RINs generated through the production of biofuel. The market value of RINs is determined in transactions between RIN sellers and buyers based on supply and demand. The market value of RINs thus affects the market value of renewable fuels. The markets for both renewable fuels and RINs depend, in turn, on EPA's diligent enforcement of RFS Program obligations.

6. Growth Energy member POET, LLC ("POET") is the world's largest producers of ethanol and other biorefined products.[2] The POET network includes 28 biorefineries in 7 states[3] that employ a total of 1,800 people.[4] POET's biorefineries generate revenues of about $6 billion annually by producing 1.8 billion gallons of ethanol, 10 billion pounds of distiller's grain, 600 million pounds of corn oil, and other products. By producing biofuels, POET generates RINs and sells both its biofuels and its RINs on the market. I understand that, if the Court approves the

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[2] *See* https://poet.com/about (last visited Mar. 31, 2018).

[3] POET's biorefineries are located in Iowa, Indiana, Michigan, Minnesota, Missouri, Ohio and South Dakota, *see* https://poet.com/plants (last visited Mar. 31, 2018).

[4] *See* https://www.businesswire.com/news/home/20170525005598/en/POET-Founder-Chairman-CEO-Jeff-Broin-Receive (last visited Mar. 31, 2018).

Proposed EPA RVO Consent Decree, it will eliminate the demand for approximately 426 million RINs, corresponding to 426 million gallons of renewable fuel. To put this in context, production of that amount of renewable fuel requires the capacity for one year of five to ten POET biorefineries employing in total hundreds of people. The elimination of demand for 426 million RINs will significantly reduce the demand for renewable fuel that POET produces, thereby reduce the value of POET's renewable fuel product. It will also reduce the market value of RINs, thereby causing further harm to POET's financial interests.

7. Green Plains Inc. is also a member of Growth Energy. Green Plains is an ethanol producer based in Omaha, Nebraska with a production capacity of approximately 1.5 billion gallons of ethanol per year. Green Plains has 17 plants across the United States. Eliminating demand for more than 400 million RINs will significantly reduce the demand for renewable fuel that Green Plains produces at its 17 U.S. plants, thereby causing harm to Green Plain's financial interests.

8. The interests that Growth Energy seeks to protect in this action are manifestly germane to its organizational purposes. Growth Energy's website identifies three "core principles of engagement" that "guide [its] mission"—and one of these principles is "[d]efending the Renewable Fuels Standard and pursuing pro-biofuels policies."[5] Precluding a major petroleum refinery from avoiding its obligations under the RFS is clearly central to this core principle.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge, information and belief.

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[5] *See* https://growthenergy.org/about-us/ (last visited Mar. 31, 2018).

Executed on April 2, 2018.

John Fuher

CERTIFICATE OF SERVICE

I, William P. Bowden, hereby certify that, on April 2, 2018, I caused one copy of the foregoing to be served upon the parties below via Electronic Mail or in the manner indicated.

Steven N. Serajeddini Kirkland & Ellis LLP Kirkland & Ellis International LLP 300 North LaSalle Street Chicago, IL 60654 Email: steven.serajeddini@kirkland.com	Edward O. Sassower, P.C. Matthew C. Fagen Kirkland & Ellis LLP Kirkland & Ellis International LLP 601 Lexington Avenue New York, NY 10022 Email: edward.sassower@kirkland.com Email: matthew.fagen@kirkland.com
Laura Davis Jones Timothy P. Cairns Peter J. Keane Pachulski Stang Ziehl & Jones LLP 919 North Market Street, 17th Floor Wilmington, DE 19801 Email: ljones@pszjlaw.com Email: tcairns@pszjlaw.com Email: pkeane@pszjlaw.com	Keith A. Simon Paul F. Sheridan, Jr. Latham & Watkins LLP 885 Third Avenue New York, NY 10022 Email: keith.simon@lw.com Email: paul.sheridan@lw.com
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Damian S. Schaible Aryeh E. Falk Davis Polk & Wardwell LLP 450 Lexington Avenue New York, NY 10017 Email: damian.schaible@davispolk.com	Richard L. Schepacarter Office of the United States Trustee 844 N. King Street, Suite 2207 Lockbox 35 Wilmington, DE 19801 Email: richard.schepacarter@usdoj.gov

US Department Of Justice Environmental And Natural Resources Division Environmental Enforcement Section Alan S. Tenenbaum/Robert Darnell Po Box 7611, Ben Franklin Station Washington, DC 20044 Email: alan.tenenbaum@usdoj.gov Email: robert.darnell@usdoj.gov	US Attorney's Office District of Delaware Attn: Ellen Slights 1007 N. Orange Street, Suite 700 Wilmington, DE 19801 Email: ellen.slights@usdoj.gov
Morris, Nichols, Arsht & Tunnell LLP Attn: Robert Dehney/Andrew Remming 1201 N Market St #1800 Wilmington, DE 19801 Email: rdehney@mnat.com Email: aremming@mnat.com	**U.S. MAIL** PES Holdings, LLC Attn: John B. McShane 1735 Market Street Philadelphia, PA 19103
U.S. MAIL Susan Parker Bodine Assistant Administrator Office Of Enforcement And Compliance Assurance U.S. Environmental Protection Agency 1200 Pennsylvania Avenue, N.W. Washington, DC 20460	

/s/ William P. Bowden
William P. Bowden (#2553)

File an answer to a motion:

18-10122-KG PES Holdings, LLC

Type: bk	Chapter: 11 v	Office: 1 (Delaware)
Assets: y	Judge: KG	
Case Flag: CONFIRMED, MEGA, CLMSAGNT, LEAD, SealedDoc(s)		

U.S. Bankruptcy Court

District of Delaware

Notice of Electronic Filing

The following transaction was received from William Pierce Bowden entered on 4/2/2018 at 11:56 PM EDT and filed on 4/2/2018

Case Name: PES Holdings, LLC
Case Number: 18-10122-KG
Document Number: 359

Docket Text:
Response *//Growth Energy's Memorandum in Opposition to United States' Motion to Approve EPA RVO Consent Decree and in Response to Debtors' Opposition to Growth Energy's Intervention Brief* (related document(s)[346], [347]) Filed by Growth Energy (Attachments: # (1) Exhibit A # (2) Exhibit B # (3) Certificate of Service) (Bowden, William)