IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FISKER INC., *et al.*,[1]	Case No. 24-11390 (TMH)
Debtors.	(Jointly Administered)
	Re: Docket Nos. 587, 588 & 623
	Hearing Date: Oct. 9, 2024 at 10:00 a.m. (ET)
	UST Obj. Deadline: Oct. 4, 2024 at 6:00 p.m. (ET)[2]

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF THE FIRST AMENDED COMBINED DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF LIQUIDATION OF FISKER INC. AND ITS DEBTOR AFFILIATES

Andrew R. Vara, the United States Trustee for Region Three (the "U.S. Trustee"), through his undersigned counsel, hereby objects (this "Objection") to the *First Amended Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Fisker Inc. and Its Debtor Affiliates* [D.I. 588] (the "Combined Plan"),[3] and in support of this Objection respectfully states:

PRELIMINARY STATEMENT

1. The Court should deny confirmation of the Combined Plan for the following separate and independent reasons:

(a) The Combined Plan's third-party release provisions are contrary to United States Supreme Court precedent and applicable state law. The Combined Plan extracts non-consensual third-party releases from holders

[1] The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors' corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

[2] The Debtors agreed to extend the U.S. Trustee's Objection deadline from October 4, 2024 at 4:00 p.m. to October 4, 2024 at 6:00 p.m.

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Combined Plan.

of claims or interests that fail to check an opt-out box on a ballot or opt-out form—including even those who are not entitled to vote on the Combined Plan and parties who will receive no notice under the Combined Plan.

(b) **The Combined Plan's exculpation provision is overly broad.** To the extent that exculpation is permissible beyond the provisions of Bankruptcy Code section 1125(e), the proposed plan's exculpation provision violates controlling Third Circuit case law by attempting to shield non-fiduciaries of the Debtors' estates. The exculpation provision also attempts to prospectively exculpate the two plan trustees, who will not exist until after the Combined Plan's effective date.

(c) **The Combined Plan's injunction grants the liquidating Debtors a discharge.** Together, the third-party release and plan injunction provisions violate section 1141(d)(3) of the Bankruptcy Code.

(d) **The Combined Plan proposes a reimbursement structure for certain vehicle owners that violates the statutory priority scheme for plan distributions and provides disparate treatment to members of the same class.** Both the Code and applicable case law require that members of the same class receive equal treatment.

2. Accordingly, and for the additional reasons set forth herein, the U.S. Trustee respectfully requests that the Court deny final approval of the disclosure statement and deny confirmation of the Combined Plan.

JURISDICTION AND STANDING

3. This Court has jurisdiction to hear and determine final approval of the disclosure statement, confirmation of the Combined Plan and this Objection pursuant to: (i) 28 U.S.C. § 1334; (ii) applicable order(s) of the United States District Court of the District of Delaware issued pursuant to 28 U.S.C. § 157(a); and (iii) 28 U.S.C. § 157(b)(2).

4. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of chapter 11 cases filed in this judicial district. The duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the Courts. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

5. The U.S. Trustee has standing to be heard on the Combined Plan and this Objection pursuant to 11 U.S.C. § 307. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest).

BACKGROUND

A. The Chapter 11 Cases

6. On June 17 and 19, 2024, the above-captioned debtors and debtors in possession (collectively, the "Debtors") each filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, (the "Bankruptcy Code," or "Code"), in the United States Bankruptcy Court for the District of Delaware (this "Court"), thereby commencing the above-captioned chapter 11 cases (the "Chapter 11 Cases").

7. The Debtors continue to manage and operate their business as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

8. On July 2, 2024, pursuant to section 1102(a)(1) of the Bankruptcy Code, the U.S. Trustee appointed an official committee of unsecured creditors in the Chapter 11 Cases (the "Committee"). D.I. 106.

9. As of the date hereof, no trustee or examiner has been requested in the Chapter 11 Cases.

B. The Settlement Term Sheet

10. A total of six interim orders have been entered authorizing the Debtors to use the cash collateral of prepetition secured creditor CVI Investments, Inc. ("CVI") in accordance with such orders and the Court-approved budgets attached thereto. D.I. 59, 98, 184, 260, 361 and 481.

11. The Sixth Interim Cash Collateral Order was entered on August 23, 2024. Attached thereto is a form of term sheet [D.I. 481-1] (the "Term Sheet") documenting the terms of a proposed settlement between the Debtors, CVI, the Committee and Committee member Magna International, Inc. ("Magna") in its individual capacity.

12. The Term Sheet generally provided for, among other things, the negotiation and filing of a proposed chapter 11 plan, disclosure statement, and confirmation order on the timeline set forth therein.

C. The Plan Documents and Related Procedural History

13. On August 30, 2024, the Debtors filed their (a) *Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Fisker Inc. and Its Debtor Affiliates* [D.I. 498] (the "Original Combined Plan"), and (b) *Motion of Debtors for Entry of an Order (I) Approving (A) the Disclosure Statement on an Interim Basis, (B) the Solicitation and Tabulation Procedures, and (C) the Forms of Ballots, Solicitation Package, and Notices, (II) Establishing Certain Dates and Deadlines in Connection with the Solicitation and Confirmation of the Plan, (III) Scheduling a Joint Hearing for Final Approval of the Disclosure Statement and Confirmation of the Plan, and (IV) Granting Related Relief* [D.I. 499] (the "Procedures Motion").

14. On September 6, 2024, the U.S. Trustee timely objected to interim approval of the disclosure statement component of the Original Combined Plan and to the Procedures Motion. D.I. 514.

15. On September 9, 2024, at approximately 12:56 p.m. (ET), the Debtors filed their *Notice of Revised Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Fisker Inc. and Its Debtor Affiliates* [D.I. 526] (the "First Revised Combined Plan"). The First Revised

Combined Plan is approximately 115 pages long and included extensive revisions, including the introduction of the "Owner Reimbursement Claims" concept discussed herein. *Id.*

16. One hour later, at approximately 2:00 p.m. on September 9, 2024, the Court held a hearing on interim approval of the disclosure statement and the proposed solicitation procedures. The Court overruled the U.S. Trustee's objection without prejudice and authorized the Debtors to solicit ballots.

17. On September 10, 2024, the Debtors filed a further revised version of the Revised Combined Plan [D.I. 541] (the "Second Revised Combined Plan"). A black-lined version of the Second Revised Combined Plan was also filed on that date. D.I. 542.

18. Later on September 10, 2024, the Court entered an order approving the Debtors' proposed solicitation procedures and approving the Disclosure Statement on an interim basis [D.I. 545] (the "Solicitation Order").

19. On September 23, 2024, the Debtors filed their *Notice of Filing of Plan Supplement to Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Fisker Inc. and Its Debtor Affiliates* [D.I. 587] (the "Plan Supplement"). While the Plan Supplement included the Liquidating Trust Agreement, the proposed Liquidating Trustee and their fee structure were not identified.

20. On September 24, 2024, Debtors filed a further revised combined disclosure statement and plan (*i.e.*, the currently operative Combined Plan), along with a black-lined copy thereof, which they now ask the Court to approve. D.I. 588.

21. On October 3, 2024, four days before the voting deadline, the Debtors filed a Second Plan Supplement that included a completed Liquidating Trust Agreement, identifying Matthew Dundon as the Liquidating Trustee along with his compensation. D.I. 623.

D. The Solicitation Procedures

22. The Solicitation Order approves ballots for use in soliciting votes from Class 3 (Secured Notes Claims) and Class 4 (General Unsecured Claims). D.I. 545-1, Ex. 3-A and Ex. 3-B. The ballots include a box to check for creditors in those classes to "opt out" of providing the Combined Plan's third-party release (discussed below). *Id*. For unsecured creditors, the opt-out box is buried on page 7 of the ballot, which is titled "BALLOT FOR VOTING TO ACCEPT OR REJECT THE CHAPTER 11 PLAN OF LIQUIDATION OF FISKER INC. AND ITS DEBTOR AFFILIATES FOR HOLDERS OF CLASS 4 CLAIMS." D.I. 545-1 at 26, 32.

23. The Solicitation Order also provides that non-voting parties in Class 1 (Other Priority Claims; deemed to accept), Class 2 (Other Secured Claims; deemed to accept), Class 5 (Intercompany Claims; deemed to reject), Class 6 (Equity Interests; deemed to reject) and Class 7 (Intercompany Interests; deemed to reject) will receive: (a) the *Non-Voting Combined Notice*, which identifies the deadline for submission of the approved *Optional Opt-Out Form* (the "Opt-Out Form"); and (b) the Opt-Out Form. *Id.* at Ex. 4. The Solicitation Order does not direct service of the Non-Voting Combined Notice or Opt-Out Form upon non-voting parties' "Related Parties" (defined herein).

24. The Solicitation Order further provides that "Nominees" of beneficial holders in Class 6 (Equity Interests) will receive: (a) the *Beneficial Holder Non-Voting Combined Hearing Notice*, which identifies the deadline for submission of the Opt-Out Form; (b) the Opt-Out Form; and (c) the *Master Opt-Out Form*. *Id.* at Ex. 5 and Ex. 6. Such Nominees are instructed to "immediately distribute the Beneficial Holder Opt-Out Forms" to the beneficial holders in Class 6 (Equity Interests) whom they represent. *Id.* at Ex. 6, p. 2. Nominees must then collect the opt-out elections of such beneficial holders, complete the Master Opt-Out form by aggregating and

certifying the beneficial holders' opt-out elections, and timely return the Master Opt-Out Form to the Solicitation Agent. *Id.*

E. Specific Provisions of the Combined Plan[4]

25. The Combined Plan includes the following provisions relevant to this Objection.

i. Third-Party Release Provisions

26. Article XII.B of the Combined Plan provides as follows (the "Third-Party Release[s]"):

> Except as otherwise provided in the Plan, as of the Effective Date and to the fullest extent authorized by applicable law, for good and valuable consideration, including the obligations of the Debtors under this Plan and the contributions of the Released Parties and the Other Directors and Officers to facilitate and implement this Plan, each (a) Releasing Party and (b) Other Director and Officer, conclusively, absolutely, unconditionally, generally, individually, collectively, irrevocably, and forever releases and discharges the (y) Released Parties and (z) Other Directors and Officers ***from any and all Causes of Action whatsoever***, including any derivative claims, asserted or assertable on behalf of the Debtors or their Estates, as applicable, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, contingent or noncontingent, in law, equity, contract, tort or otherwise, ***that such Releasing Party would have been legally entitled to assert in its own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Equity Interest in, a Debtor, the Estates, or other Entity***, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Debtors' in and out-of-court restructuring efforts, the Chapter 11 Cases, the Global Settlement, the Cash Collateral Orders, the Plan Documents, the 2025 Notes Documents, the 2026 Notes, the Bridge Note Documents, or any other instrument, contract, or document related to the foregoing, the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is treated in this Plan, the business or contractual arrangements between any Debtor and any Released Party, the restructuring of Claims and Equity Interests before or during the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, pursuit, performance, administration, implementation, or consummation of the Chapter 11 Cases (including any payments, distributions or transfers in connection therewith), the Global Settlement, the Cash Collateral Orders, the Plan Documents, the 2025 Notes Documents, the 2026 Notes, the Bridge Note

[4] Upon information and belief, further revisions will be made to the Combined Plan and filed with the Court prior to the Confirmation Hearing scheduled for October 9, 2024. The U.S. Trustee reserves all rights to raise additional objections and arguments with respect to the provisions set forth in any further revised plan.

> Documents, ***or any other instrument, contract, or document related to the foregoing***.
>
> For the avoidance of doubt and notwithstanding anything to the contrary in this Plan, the Confirmation Order, or any prior order of the Bankruptcy Court, the releases set forth in this Article XII.B do NOT release (a) Claims or Causes of Action of the Debtors against (i) the D&Os (other than the Other Directors and Officers), (ii) all professionals, advisors, and attorneys advising the Debtors prior to the Petition Date other than those specifically identified in (e) through (h) of the definition of "Released Party" in Article I.A.141 of this Plan and Other Directors and Officers, (iii) any entity that directly or indirectly owned, held, or controlled any equity in the Debtors prior to the Petition Date (other than those specifically identified in clauses (c) through (p) the definition of "Released Party" in Article I.A.141 of this Plan), (iv) the Fisker Parties, (v) the Debtors' current or former direct or indirect non-Debtor subsidiaries, and (vi) the Debtors' current or former non-Debtor Affiliates (other than the Other Directors and Officers, the Transaction Committee Chairman, and the CRO); and (b) (i) any Released Party from any Causes of Action arising from or related to any act or omission by such Released Party that is determined in a Final Order to have constituted intentional fraud, willful misconduct, or gross negligence; (ii) any obligations of any party or Entity under the Plan or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan; (iii) any rights or obligations under the Fleet Sales Agreement and Fleet Sale Order; or (iv) any Causes of Action against any Entity that is not a Released Party, (v) any Released Party that is a Class Action Defendant, solely with respect to the Class Action Claims asserted in the Class Action, (v) any Released Party from any Causes of Action asserted by (1) the Fisker Parties, (2) any D&O that is not an Other Director and Officer, (3) the Debtors' current or former direct or indirect non-Debtor subsidiaries, and/or (4) the Debtors' current or former non-Debtor Affiliates (other than the Other Directors and Officers, the Transaction Committee Chairman, and the CRO).

D.I. 588, Art. XII.B (emphasis added).

27. The Combined Plan provides the following definition for the term "Released Party":

> "*Released Party*" means each of the following, each solely in their capacity as such: (a) each Debtor; (b) [reserved]; (c) the Liquidating Trustee; (d) the IP/Austria Assets Trustee; (e) Davis Polk, as counsel to the Debtors; (f) Morris Nichols, as counsel to the Debtors, (g) Huron Consulting Services, LLC, as financial advisor and consultant to the Debtors; (h) Kurtzman Carson Consultants, LLC dba Verita Global, as administrative advisor to the Debtors; (i) the Transaction Committee Chairman; (j) the CRO; (k) the Committee and each of its members; (l) the Secured Noteholder; (m) Heights Capital Management, Inc.; (n) the 2025 Notes Trustee and the 2026 Notes Indenture Trustee; (o) Magna; (p) ***each Related Party of each***

> ***Entity in clauses (c) through (o) above***; *provided*, that, for the avoidance of doubt and notwithstanding anything to the contrary herein, (i) the D&Os, including the Other Directors and Officers (for the avoidance of doubt, notwithstanding that the Other Directors and Officers are not and shall not be deemed hereunder to be a Released Party, the Other Directors and Officers shall be released in accordance with Article XII.B of this Plan); (ii) all other professionals, advisors, and attorneys advising the Debtors prior to the Petition Date other than those specifically identified in clauses (e) through (h) of this definition of "Released Party", (iii) any entity that directly or indirectly owned, held, or controlled any equity in the Debtors prior to the Petition Date (other than those specifically identified in clauses (c) through (p) this definition of "Released Party"), (iv) the Fisker Parties, (v) the Debtors' current or former direct or indirect non-Debtor subsidiaries, and (vi) the Debtors' current or former non-Debtor Affiliates (other than the Transaction Committee Chairman, the CRO, and the Other Directors and Officers), in each case, are not and shall not be deemed hereunder to be a Released Party.

Id. at Art. I.A, Item 141 (emphasis added).

28. The Combined Plan provides the following definition for the term "Releasing Party":

> "*Releasing Party*" means (a) all holders of Claims or Equity Interests ***who are sent a Ballot or Non-Voting Opt-Out Form and do not timely elect to opt-out of the releases provided by the Plan in accordance with the Solicitation Procedures***; (b) ***each Related Party of each Entity in clause (a) above***; and (c) each Released Party (other than the Debtors); provided that, for the avoidance of doubt and notwithstanding anything to the contrary herein, (i) the D&Os (other than the Other Directors and Officers); (ii) all other professionals, advisors, and attorneys advising the Debtors prior to the Petition Date other than those specifically identified in clauses (e) through (h) of the definition of "Released Party" in Article I.A.141 of this Plan, (iii) the Fisker Parties, (iv) the Debtors' current or former direct or indirect non-Debtor subsidiaries, and (v) the Debtors' current or former non-Debtor Affiliates (other than the Transaction Committee Chairman, the CRO, and the Other Directors and Officers), in each case, are not and shall not be deemed hereunder to be a Releasing Party.

Id. at Art. I.A, Item 142 (emphasis added).

29. The Combined Plan provides the following definition for the term "Related Party":

> "*Related Party*" means, each solely in its capacity as such, with respect to any Entity, such Entity's current and former Affiliates, and such Entity's and its current and former Affiliates' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds,

> assignors, participants, successors, assigns, majority-owned subsidiaries, direct or indirect partners, limited partners, general partners, members, principals, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals and advisors.

Id. at Art. I.A, Item 140.

30. The Combined Plan includes an injunction in support of the Third-Party Release that provides (the "Plan Injunction");

> Except as otherwise provided in the Plan or the Confirmation Order, as of the Confirmation Date, but subject to the occurrence of the Effective Date, ***all Entities who have held, hold or may hold Causes of Action, Claims or Equity Interests in the Debtors or the Estates that have been released or are subject to exculpation are, with respect to any such Causes of Action, Claims or Equity Interests, permanently enjoined, from and after the Effective Date, from***: (i) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) ***against or affecting the Debtors, the Estates or any of their Assets***, the Liquidating Trust, the IP/Austria Assets Trust, ***the Released Parties, the Exculpated Parties***, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to any of the foregoing Entities or any property of any such transferee or successor; (ii) enforcing, levying, attaching (including any pre-judgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order ***against the Debtors, the Estates or any of their Assets***, the Liquidating Trust, the IP/Austria Assets Trust, ***the Released Parties, the Exculpated Parties*** or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Entities, or any property of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against ***the Debtors, the Estates or any of their Assets***, the Liquidating Trust, the IP/Austria Assets Trust, ***the Released Parties, the Exculpated Parties***, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Entities, or any property of any such transferee or successor; (iv) commencing or continuing in any manner or in any place, any suit, action or other proceeding on account of or respecting any Claim, demand, liability, obligation, debt, right, Cause of Action, interest or remedy released or to be released pursuant to the Plan or the Confirmation Order, including the releases and exculpations provided under Article XII.A, Article XII.B and 0 of the Plan; (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of this Plan to the fullest extent permitted by applicable law; and (vi) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of this Plan; *provided, however*, that nothing contained herein shall preclude such persons from exercising their rights pursuant

> to and consistent with the terms of this Plan. ***Each holder of an Allowed Claim or Allowed Equity Interest shall be deemed to have specifically consented to the injunctions set forth herein***. For the avoidance of doubt, the foregoing provisions of this Section shall not operate to waive or release the rights of the Debtors or other parties in interest to enforce the Plan and the contracts, instruments, releases and other agreements or documents delivered under or in connection with the Plan and Plan Supplement or assumed pursuant to the Plan or assumed pursuant to Final Order of the Bankruptcy Court.

Id. at Art. XII.D (emphasis added).

31. The Debtors provided the following explanation of the Third-Party Release mechanics in their Procedures Motion:

> [C]reditors that elect not to consent to the Third-Party Releases may opt out of the Third-Party Releases by either, (a) to the extent eligible to vote on the Combined DS and Plan, checking a box on a timely and properly submitted Ballot, (b) to the extent ineligible to vote on the Combined DS and Plan, checking a box on a timely and properly submitted Opt-Out Form, or (c) timely and properly filing an objection to the Third-Party Releases. ***If a creditor (w) timely and properly votes to accept or reject the Combined DS and Plan but does not check the opt-out box on the Ballot, (x) abstains from voting on the Combined DS and Plan and does not check the opt-out box on a timely and properly submitted Ballot, (y) fails to timely and properly submit an Opt-Out Form with the opt-out box checked, or (z) fails to timely and properly file an objection, such creditor would be deemed to have consented to the Third-Party Releases.***

D.I. 499, ¶ 24 (emphasis added).

32. Thus, the Combined Plan will require tens (if not hundreds) of thousands of creditors and equity interest holders to affirmatively opt out of the Third-Party Release, and "deems" them and their "Related Parties" — who have no mechanism to opt out — to have consented to the Third-Party Release.[5] Many of these prospective Releasing Parties are not known

[5] Attachment 1 to Schedule E/F, Part 2 of the *Schedules of Assets and Liabilities for Fisker Group Inc. Case No. 24-11377 (TMH)* [D.I. 436] (the "Fisker Group Schedules"), listing "Actual/Contingent Warranty and After Sales Creditors Who Have NONPRIORITY Unsecured Claims" (collectively, the "Warranty Creditors"), discloses 4,261 general unsecured creditors holding claims totaling $30,520,116.90. D.I. 436, p. 827 of 1596. Attachment 2 to Schedule E/F, Part 2 of the Fisker Group Schedules, listing "Reservation Fee Creditors Who Have NONPRIORITY Unsecured Claims" (the "Deposit Creditors"), discloses 29,941 general unsecured creditors holding claims totaling $7,112,300.00. *Id.* at p. 1596 of 1596. Likewise, the Debtors disclosed that, as of the Petition Date, **there were approximately 1,250,822,032 outstanding class A shares of common stock in Debtor Fisker Inc.** D.I. 6, ¶ 10.

to the Debtors or the Released Parties and likely have no notice or knowledge of these Chapter 11 Cases and the Combined Plan that purports to extinguish their rights. Moreover, the Debtors did not serve the Related Parties with Opt-Out Forms, the Combined Hearing Notice or the Combined Plan. Therefore, it appears that the only way for such Related Parties to avoid being "deemed to have consented" to the Third-Party Release is to discover these Chapter 11 Cases, the Combined Plan and its related deadlines, and then file an objection to the Third-Party Release. *See id.*

ii. Exculpation Provisions

33. Article XII.C of the Combined Plan provides as follows (the "Exculpation Provision"):

> No Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from any Claim, obligation, Cause of Action or liability for any Claim related to any act or omission occurring between the Petition Date and the Effective Date in connection with or arising out of, the administration of the Chapter 11 Cases, the entry into the Cash Collateral Orders, the entry into the Liquidating Trust Agreement, the entry into IP/Austria Assets Trust Agreement, the negotiation and pursuit of this Plan, or the solicitation of votes for, or confirmation of, this Plan, the funding of this Plan, the consummation of this Plan, or the administration of this Plan or the property to be distributed under this Plan, and the issuance of securities or beneficial interests under or in connection with this Plan or the transactions contemplated by the foregoing, except for willful misconduct, gross negligence, or intentional fraud as finally determined by a Final Order, but in all respects such Exculpated Party shall be entitled to reasonably rely upon the advice of counsel with respect to its duties and responsibilities pursuant to this Plan. The Exculpated Parties have participated in compliance with the applicable provisions of the Bankruptcy Code with regard to the solicitation and distribution of the securities pursuant to the Plan, and are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule or regulation governing the solicitation of acceptances or rejections of this Plan or such distributions made pursuant to this Plan. Notwithstanding anything to the contrary in the foregoing or any other provision of the Plan, the foregoing provisions of this exculpation provision shall not operate to waive or release the rights of the Debtors or other parties in interest to enforce the Plan and the contracts, instruments, releases and other agreements or documents delivered under or in connection with the Plan and Plan Supplement or assumed pursuant to the Plan or assumed pursuant to Final Order of the Bankruptcy Court.

D.I. 588, Art. XII.C.

34. The Combined Plan provides the following definition for the term "Exculpated Parties":

> "*Exculpated Parties*" means each of the following, to the extent permitted by applicable law, in their capacity as such: (a) each Debtor; (b) each Other Director and Officer; (c) ***the Liquidating Trustee***; (d) *the IP/Austria Assets Trustee*; (e) Davis Polk, as counsel to the Debtors; (f) Morris Nichols, as counsel to the Debtors; (g) Huron Consulting Services, LLC, as financial advisor and consultant to the Debtors; (h) Kurtzman Carson Consultants, LLC dba Verita Global, as administrative advisor to the Debtors; (i) the Transaction Committee Chairman; (j) the CRO; (k) the Committee and each of its members; (l) ***solely to the extent provided by section 1125(e) of the Bankruptcy Code, each Section 1125(e) Party***; and (m) ***each Related Party of each Entity in clauses (c) through (k)*** above; *provided*, that, for the avoidance of doubt and notwithstanding anything to the contrary herein, D&Os (other than the Other Directors and Officers), the Fisker Parties, the Debtors' current or former direct or indirect non-Debtor subsidiaries, and the Debtors' current or former non-Debtor Affiliates are not and shall not be deemed hereunder to be an Exculpated Party.

Id. at Art. I.A, Item 66.

35. The Combined Plan provides the following definition for the term "Section 1125(e) Parties:

> "*Section 1125(e) Parties*" means (a) the Secured Noteholder; (b) Heights Capital Management, Inc.; (c) the 2025 Notes Trustee and the 2026 Notes Indenture Trustee; (d) Magna; and (e) ***each Related party of each Entity in clauses (a) through (d) above***.

Id. at Art. I.A, Item 143 (emphasis added).

OBJECTION

I. THE COURT SHOULD DENY FINAL APPROVAL OF THE DISCLOSURE STATEMENT BECAUSE IT LACKS ADEQUATE INFORMATION.

A. Applicable Legal Standard

36. The disclosure statement requirement of Bankruptcy Code section 1125 is "crucial to the effective functioning of the federal bankruptcy system" and, consequently, "the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey*

Bank (In re Oneida Motor Freight, Inc.), 848 F.2d 414, 417-18 (3d Cir. 1988)). "Adequate information" under section 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with debtors over the plan. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94, 100 (3d Cir. 1988). Further, section 1129(a)(2) of the Bankruptcy Code conditions confirmation upon compliance with applicable Code provisions. The adequate disclosure requirement of section 1125 is one of those provisions. *See* 11 U.S.C. § 1129(a)(2); *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000).

37. The Bankruptcy Code defines "adequate information" as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, *that would enable such a hypothetical reasonable investor of the relevant class to make an informed judgment about the plan*[.]

See 11 U.S.C. § 1125(a)(1) (emphasis added); *see also Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994); *Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999).

38. To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. *See In re McLean Indus.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) ("substantial financial information with respect to the ramifications of any proposed plan will have to be provided to, and digested by, the creditors and other parties in interest in order to arrive at an informed decision concerning the acceptance or rejection of a proposed plan"). Although the adequacy of the disclosure is determined on a case-

by-case basis, the disclosure must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy Code] alternatives so that they can intelligently accept or reject the plan." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988).

39. Section 1125 of the Bankruptcy Code is geared towards more disclosure rather than less. *See In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990). The "adequate information" requirement merely establishes a floor, and not a ceiling for disclosure to voting creditors. *In re Adelphia Commc'ns Corp.*, 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006) (citing *Century Glove*, 860 F.2d at 100).

40. Once the "adequate disclosure" floor is satisfied, additional information can go into a disclosure statement if the information is accurate and its inclusion is not misleading. *See id.* The purpose of the disclosure statement is to give creditors enough information so that they can make an informed choice of whether to approve or reject the debtor's plan. *In re Duratech Indus.*, 241 B.R. 291, 298 (Bankr. E.D.N.Y.), *aff'd*, 241 B.R. 283 (E.D.N.Y. 1999). The disclosure statement must inform the average creditor what it is going to get and when, and what contingencies there are that might intervene. *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

41. With respect to the third-party release, none of the disclosure statements served and/or filed with the Court provided sufficient information that is both necessary and appropriate to the circumstances of these Chapter 11 Cases. Further, inadequate information had been disclosed to voting parties to the extent terms have changed with each reiteration of the Combined Plan.

B. The Disclosure Statement Lacks Adequate Information Regarding the Third-Party Release Provisions.

42. The disclosure statement fails to identify the tens (if not hundreds) of thousands of parties who will deemed to be giving Third-Party Releases without their consent. The definition of Releasing Parties includes, for each Releasing Party, at least thirty-six categories of Related Parties, some as broad and ill-defined as "agents," "consultants," "representatives," and "other professionals and advisors."

43. Nor does the disclosure statement identify all parties who will be the recipients of Third-Party Releases. That is because the definition of "Released Parties" *also* includes the same broad categories of Related Parties, such as all "agents," "advisors," "consultants" and "other professionals and advisors."

44. The disclosure statement is also unclear as to whether holders of administrative claims and priority tax claims are included among the Releasing Parties who are being forced to release non-debtors. The definition of "Releasing Party" includes "all holders of claims … who are sent a Ballot or Non-Voting Opt-Out Form[.]" The Procedures Motion is silent as to whether unclassified claims will receive the Non-Voting Combined Notice.

45. Moreover, the disclosure statement does not adequately disclose: (a) why the Debtors will be releasing the Released Parties; (b) the nature and value of the claims the Debtors are releasing; or (c) what (if anything) the Debtors are receiving as consideration for such releases.

46. In summary, the disclosure statement fails to provide adequate information as to who will be deemed to give third-party releases, who will receive such releases, what claims are being released, the value of such claims and the consideration received in exchange for the releases.

C. The Disclosure Statement Lacks Adequate Information Regarding the Revisions to the Original Combined Plan.

47. Several concepts appear in the Combined Plan that were either absent in the First Revised Combined Plan or evolved over time. Inadequate information was supplied to voting creditors on many of these topics. By way of example, while there are professional fee caps, the Combined Plan includes a charging lien in favor of the Committee's professionals to the extent they were owed money in excess of the applicable fee cap. D.I. 588, Art. V.C.1. The Combined Plan does not disclose that this would affect unsecured creditor recoveries. Further, it is never explained that to the extent recall costs for current vehicle owners exceed $750,000, the overage will also negatively affect unsecured creditor recoveries. Because the various disclosure statements fail to provide adequate information as to numerous, significant issues, the Court should not approve the disclosure statement on a final basis.

II. THE COMBINED PLAN IS NOT CONFIRMABLE.

48. The Combined Plan is unconfirmable for at least four separate and independent bases. *First*, the Combined Plan proposes non-consensual Third-Party Releases that are not authorized under the Bankruptcy Code. *Second*, to the extent that exculpation is permissible beyond what is expressly provided for in section 1125(e) of the Bankruptcy Code, the Exculpation Provisions exceed the limitations that courts in this Circuit have imposed on exculpation. *Third*, the Third-Party Release provisions and Plan Injunction grant the liquidating Debtors a discharge in violation of section 1141(d)(3) of the Bankruptcy Code. *Fourth*, the Combined Plan contradicts the statutory priority scheme for plan distributions, and the requirement that similarly situated creditors be treated equally may not be met here due to proposed reimbursement payments to current vehicle owners.

A. The Combined Plan is Not Confirmable Because It Proposes Non-Consensual Third-Party Releases.

49. Non-consensual third-party releases are not authorized under the Bankruptcy Code. *Harrington v. Purdue Pharma L.P.*, 603 U.S. __, 144 S. Ct. 2071, 2082-88 (2024).

50. Contract principles govern whether a release is consensual. *See Smallhold, Inc.*, No. 14-10267, 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024); *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017). That is because a third-party release is essentially a settlement between a non-debtor claimant and another non-debtor.

51. Whether parties have reached an agreement — including an agreement not to sue — is governed by state law. The only exception is if there is federal law that preempts applicable state contract law. *See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (plurality) ("For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law must govern because there can be no other law.'") (quoting *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)).

52. No federal law applies to the question of whether the non-debtor Releasing Parties have agreed to release the non-debtor Released Parties. The Bankruptcy Code does not apply to agreements between non-debtors. And no Code provision authorizes courts, as part of an order confirming a chapter 11 plan, to "deem" a non-debtor to have consented to an agreement to release claims against other non-debtors where consent would not exist under state law. Nor does 11 U.S.C. § 105(a) confer any power to override state law. Rather, section 105(a) "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue Pharma, L.P.*, 144 S. Ct. at 2082 n.2 (quotation marks omitted). Bankruptcy courts cannot "create substantive rights that are otherwise unavailable under applicable law," nor do they possess a "roving commission to do

equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (quotation omitted). Thus, the state-law definition of consent is not diluted or transformed by the Code.

53. Indeed, even as to a debtor, it is well settled that whether parties have entered a valid settlement agreement is governed by state law. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) ("Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law."); *De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)*, 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009) ("Where the United States is not a party, it is well established that settlement agreements in pending bankruptcy cases are considered contract matters governed by state law."). *See also Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) ("[T]he basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law.") (quotation marks omitted); *Butner v. United States*, 440 U.S. 48 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").

54. Because the Bankruptcy Code does not govern relationships between claim holders and non-debtor third-parties, state contract principles are the source of authority when considering whether a release is consensual. *See, e.g.*, *In re Smallhold, Inc.*, No. 24-10267, 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024) (requiring "some sort of affirmative expression of consent that would be sufficient as a matter of contract law"); *Patterson v. Mahwah Bergen Retail Grp., Inc.,* 636 B.R. 641, 684-85 (E.D. Va. 2022) (describing bankruptcy courts in the District of New Jersey as "look[ing] to the principles of contract law rather than the bankruptcy court's confirmation authority to conclude that the validity of the releases requires affirmative consent"); *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract

principles in deciding whether a creditor consents to a third-party release."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 506 (Bankr. D.N.J. 1997) (holding that a third-party release "is no different from any other settlement or contract"); *id*. at 507 (holding that "the validity of the release … hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order") (internal quotation marks omitted) (alterations in original). As one court recently held, because "nothing in the bankruptcy code contemplates (much less authorizes it)' … any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent." *In re Tonawanda Coke Corp*., ___ B.R. ___, No. BK 18-12156 CLB, 2024 WL 4024385, at *2 (Bankr. W.D.N.Y. Aug. 27, 2024) (quoting *Purdue*, 144 S. Ct. at 2086). Accordingly, "any such consensual agreement would be governed by state law." *Id.*

55. Here, the Debtors do not meet the state-law burden of establishing that the Releasing Parties will expressly consent to release their property rights nor to having that release memorialized in the Combined Plan.

56. The "general rule of contracts is that silence cannot manifest consent." *Patterson,* 636 B.R. at 686. "Acceptance by silence is exceptional. Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

57. "[T]he exceptional cases where silence is acceptance fall into two main classes: those where the offeree silently takes offered benefits, and those where one party relies on the other party's manifestation of intention that silence may operate as acceptance. Even in those cases the contract may be unenforceable under the Statute of Frauds." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

58. Thus, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). *See also Patterson*, 636 B.R. at 686 (discussing how contract law does not support consent by failure to opt out). Further, "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." RESTATEMENT (SECOND) OF CONTRACTS § 69, cmt. c (1981). *See also Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1227-28 (9th Cir. 2022) ("[E]ven though the offer states that silence will be taken as consent, silence on the part of the offeree cannot turn the offer into an agreement, as the offerer cannot prescribe conditions so as to turn silence into acceptance.") (quotation marks omitted).

59. Using Delaware common law as a point of reference, silence does not equal consent except under limited circumstances not applicable here. *See, e.g., Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 991 (Del. Super. Ct. 2000) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981)). Delaware follows the "mirror image" rule, requiring the acceptance to be identical to the offer. *See Urban Green Techs., LLC v. Sustainable Strategies 2050 LLC*, No. N136-12-115, 2017 WL 527565, at *3 (Del. Super. Ct. Feb. 8, 2017); *see also Patterson*, 636 B.R. at 686 (contract law does not support consent by failure to opt out).

60. Applicable state contract law cannot be disregarded on a default theory, applied by some courts, that creditors who remain silent forfeit their rights against non-debtors because they received notice of the non-debtor release, just as they would forfeit their right to object to a plan if they failed timely to do so. *See, e.g., In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), *abrogated by In re Smallhold, Inc.*, 2024 WL 4296938, at *8-*11. As explained by this Court in *Smallhold*, the Supreme Court's *Purdue*

decision undermined the fundamental premise of such a theory — that a bankruptcy proceeding legally could lead to the destruction of creditors' rights against non-debtors, so they had best pay attention lest they risk losing those rights. *In re Smallhold, Inc.*, 2024 WL 4296938, at *1-*2; *see also id*. at *10 ("The possibility that a plan might be confirmed that provided a nonconsensual release was sufficient to impose on the creditor the duty to speak up if it objected to what the debtor was proposing."). Under the default theory, because pre-*Purdue* a chapter 11 plan (under certain circumstances, under certain circuit-level decisions) could permissibly include nonconsensual, non-debtor releases, non-debtor releases were no different from any other plan provision to which creditors had to object or risk forfeiture of their rights. *Id*. at *10. A failure to opt out under the default theory is not truly consent, but rather "an administrative shortcut to relieve those creditors of the burden of having to file a formal plan objection." *Id*. at *2; *see also id*. at *9 ("In this context, the word 'consent' is used in a shorthand, and somewhat imprecise, way. It may be more accurate to say that the counterparty forfeits its objection on account of its default.").

61. But entering relief against a party who defaulted by not responding is, "[u]nder established principles" permissible "only after satisfying themselves that the relief the plaintiff seeks is relief that is at least potentially available to the plaintiff in litigation." *Id*. at *2; *see also id*. at *13 ("[T]he obligation of a party served with pleadings to appear and protect its rights is limited to those circumstances in which it would be appropriate for a court to enter a default judgment if a litigant failed to do so. [After *Purdue*], that is no longer the case in the context of a third-party release."). After *Purdue*, however, it is now clear in all circuits that imposition of a non-debtor release is not available relief through a debtor's chapter 11 plan. *Id*. at *2 ("After *Purdue Pharma*, a third-party release is no longer an ordinary plan provision that can properly be entered by 'default' in the absence of an objection."); *see also id*. at *10. Thus, *Smallhold* held that

"it is no longer appropriate to require creditors to object or else be subject to (or be deemed to 'consent' to) such a third-party release." *Id*. at *10.

62. The *Smallhold* court provided an illustration that makes obvious why notice-plus-failure-to-opt-out is not consent:

> Consider, for example, a plan of reorganization that provided that each creditor who failed to check an "opt out" box on a ballot was required to make a $100 contribution to the college education fund for the children of the CEO of the debtor. Just as in the case of Party A's letter to Party B, no court would find that in these circumstances, a creditor that never returned a ballot could properly be subject to a legally enforceable obligation to make the $100 contribution.

Id. at *2 (footnote omitted). Cases that impose a non-debtor release based merely on the failure to opt out fail to "provide[] any limiting principle that would distinguish the third-party release from the college education fund plan. And after *Purdue Pharma*, there is none." *Id*. Thus, "ordinary contract principles" apply to determine whether there is consent to a non-debtor release. *Id*. at *3.

63. Just like it is legal error to define consent in a manner inconsistent with state law, it is error to presume it exists. As discussed above, consent arises when two sets of parties affirmatively assent to something. *See* 1 VOSS ON DELAWARE CONTRACT LAW § 2.05 (citing *Loveman v. The NuSmile, Inc.*, C.A. No. 08C-08-223 MJB, memo. op. at *7 (Del. Super. Ct. Mar. 31, 2009) (Brady, J.)). A party seeking to include non-debtor releases in a bankruptcy plan must show that they are consensual. To do so, state law requires that mutually agreeing third parties must come forward, state their consent affirmatively, and ask the court to memorialize their consent in a plan. Nothing in the Code authorizes bankruptcy courts to extinguish claims by inferring consent outside the bounds of state law.

64. The Debtors propose that the Third-Party Releases in the Combined Plan, which benefit numerous non-debtors that are Released Parties, bind: (a) all parties who vote to accept the Combined Plan, unless they check an opt-out box on the returned ballot; (b) those who vote to

reject the Combined Plan, unless they check an opt-out box on the returned ballot; (c) all creditors in voting classes who abstain from voting and do not check an opt-out box on a returned ballot; (d) claimants or holders of interests in non-voting classes who are deemed to accept the Combined Plan, unless they complete and return an opt-out election form; (e) claimants or holders of interests in non-voting classes who are deemed to reject the Combined Plan, unless they complete and return an opt-out election; and (f) unclassified claims.[6]

65. But an affirmative agreement — something more than the failure to opt out — is required to support a consensual third-party release. *See In re Smallhold, Inc.*, 2024 WL 4296938, at *3 ("[A] creditor cannot be deemed to consent to a third-party release without some affirmative expression of the creditor's consent."); *see also id*. at *8; *In re Tonawanda Coke Corp.,* 2024 WL 4024385, at *2; *Patterson*, 636 B.R. at 686. Failing to "opt out" of an offer is not a manifestation of consent unless one of the exceptions to the rule that silence is not consent applies, such as conduct by the offeree that manifests an intention that silence means acceptance or taking the offered benefits. For example, the *Patterson* court, in applying black-letter contract principles to opt-out releases in a chapter 11 plan, found that contract law does not support consent by failure to opt-out. *Patterson*, 636 B.R. at 686. "Whether the Court labels these 'nonconsensual' or based on 'implied consent' matters not, because in either case there is a lack of sufficient affirmation of consent."*Id.* at 688. Because the Combined Plan forces third-party releases on these parties without their affirmative consent, the releases are non-consensual and cannot be approved under *Purdue*.

[6] The Combined Plan defines "Releasing Party" to include "all holders of Claims or Equity Interests who are sent a Ballot or Non-Voting Opt-Out Form and do not timely elect to opt-out of the releases provided by the Plan in accordance with the Solicitation Procedures[.]" D.I. 588, Art. I.A, Item 142. The Procedures Motion is silent as to whether creditors holding unclassified claims received Non-Voting Opt-Out Forms.

66. The Ninth Circuit's decision in *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279 (9th Cir. 2017), cited with approval by the Third Circuit in *Noble v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-18 (3d Cir. 2017), illustrates the point. In *Norcia*, a consumer bought a Samsung phone from a Verizon Wireless store and signed the Verizon Wireless Customer Agreement. *Norcia*, 845 F.3d at 1282. Among the contents of the phone's box was a Samsung "Product Safety & Warranty Information" brochure that contained an arbitration provision, which "stated that purchasers could opt out of the arbitration agreement by providing notice to Samsung within 30 calendar days of purchase, either through email or by calling a toll-free telephone number." *Id*. It also stated that opting out would not affect the warranty coverage. *Id*. The customer did not take any steps to opt out. *Id*. When the customer later sued Samsung, Samsung argued that the arbitration provision applied. *Id*. at 1282-83.

67. As an initial matter, the *Norcia* court rejected the argument that the customer agreed to the arbitration provision by signing his contract with Verizon: "The Customer Agreement is an agreement between Verizon Wireless and its customer. Samsung is not a signatory." 845 F.3d at 1290. That is even more true in the context of a chapter 11 plan. Not only are the non-debtor Released Parties not signatories to it, a chapter 11 plan is a creature of the Bankruptcy Code specifically for determining how the debtor will pay its creditors, not for resolving claims between non-debtors. As the Ninth Circuit has explained, "[w]hen a bankruptcy court discharges the debtor, it does so by operation of the bankruptcy laws, not by consent of the creditors. … [T]he payment which effects a discharge is not consideration for any promise by the creditors, much less for one to release non-party obligators." *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020) (quotation marks omitted).

68. The Ninth Circuit in *Norcia* further held that the customer's failure to opt out did not constitute consent to arbitrate. Unsurprisingly — because there was no applicable federal law — the court applied the "general rule," applicable under California law, that "silence or inaction does not constitute acceptance of an offer." 845 F.3d at 1284 (quotation marks omitted); *accord Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 456 P.2d 975, 978 (Cal. 1969). The customer did not agree to arbitrate because he did not "sign the brochure or otherwise act in a manner that would show his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement." *Norcia*, 845 F.3d at 1285 (quotation marks omitted). This was true, even though the customer *did* take action to accept the offered contract from Verizon Wireless. "Samsung's offer to arbitrate all disputes with [the customer] cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, unless an exception to this general rule applies." *Id.* at 1286 (quotation marks and citation omitted).

69. The Ninth Circuit explained that exceptions to this rule exist when the offeree has a duty to respond or when the offeree retains the offered benefits but held neither exception applied. *Norcia*, 845 F.3d at 1284-85. There was no state law imposing a duty on the customer to act in response to the offer, the parties did not have a prior course of dealing that might impose such a duty, and the customer did not retain any benefits by failing to act given that the warranty applied whether or not he opted out of the arbitration provision. *Id*. at 1286.

70. Here, too, the debtors' creditors have not signed an agreement to release the non-debtor releasees. Nor may consent be inferred from their silence because they have no duty to respond to the offer of a non-debtor release and they have not retained any benefits offered in exchange for it.

71. *First*, merely voting for a plan without checking an opt-out box does not constitute the affirmative consent necessary to reflect acceptance of an offer to enter a contract to release claims against non-debtors. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). This Court correctly held in *Smallhold* that "ordinary contract principles" apply to determine whether there is consent to a non-debtor release. *In re Smallhold, Inc.*, 2024 WL 4296938, at *3. However, the U.S. Trustee respectfully submits that, in finding that voting on a plan without opting out constitutes "an affirmative step" necessary to infer consent (*id*. at *14), the Court erred by failing to consider whether any of the exceptions to the state-law rule that silence is not consent apply in this context. They do not. Delaware law affords no basis to conclude that consent to release *third-party* claims can properly be inferred from nothing more than a mere failure to check an opt-out box on a ballot expressing the party's views about the proposed treatment of its claims against the *debtor*.

72. While voting on a plan is an affirmative act, it is not an act that manifests consent to release non-debtors, and thus not a "*manifestation of intention* that silence may operate as acceptance" of an offer to release claims against non-debtors. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) (emphasis added). Creditors have no affirmative obligation to act on a plan, either to vote or to opt out. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan); *In re SunEdison, Inc.*, 576 B.R. at 460–61 (holding creditors have no duty to speak regarding a plan that would allow a court to infer consent from silence). And as in *Norcia*, creditors have no state law duty to respond to an offer to release non-debtors such that their silence can be understood as consent, nor have they any prior course of dealing with the released non-debtors that would impose such a duty. Rather, voting on a chapter 11 plan is governed by the Bankruptcy

Code, and a favorable vote reflects only approval of the plan's treatment of the voters' claims *against the debtor*.

73. Nor are those who vote for the plan but fail to opt out "silently tak[ing] offered benefits" (*id.*) from the released non-debtors such that consent may be inferred. The only benefits received are through distributions from the debtors' chapter 11 plan — there are no benefits provided from the released non-debtor to the releasing claimant. And because the plan's distributions are not contingent on agreeing to the non-debtor release, one cannot infer consent from the acceptance of those distributions. *See Norcia*, 845 F.3d at 1286 (holding customer did not retain any benefits when warranty applied regardless of failure to opt out). Further, acceptance of a "benefit" — distributions under the plan — that the offeror had no right to refuse the offeree does not manifest acceptance of the offer. *See Railroad Mgmt. Co., L.L.C. v. CFS La. Midstream Co*., 428 F.3d 214, 223 (5th Cir. 2005) ("In the absence of any evidence that Strong had the right to exclude CFS from the property in question or that CFS accepted any service or thing of value from Strong, no reasonable jury could conclude that CFS's failure to remove its pipeline upon Strong's demand constituted consent to a contract.").

74. Similarly, the *Patterson* court, in applying black-letter contract principles to opt-out releases in a chapter 11 plan, found that the failure to opt out of a third-party release does not constitute the requisite affirmative consent to bind the releasing party under contract law. *Patterson*, 636 B.R. at 686. "Whether the Court labels these 'nonconsensual' or based on 'implied consent' matters not, because in either case there is a lack of sufficient affirmation of consent." *Id*. at 688.

75. *Second*, the plan imposes non-debtor releases on those who vote to reject the Combined Plan, unless they check an opt-out box on the returned ballot. But it is even more

obvious that those who vote to reject a plan are not consenting merely through silence by failing to opt out of the nondebtor release. *See In re Chassix Holdings, Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015). Not only is there no "mutual agreement" as to the Combined Plan, much less the Third-Party Release, the creditor has actually expressly stated its rejection of the Combined Plan. As the court in *Chassix* said, "a creditor who votes to reject a plan should also be presumed to have rejected the proposed third-party releases that are set forth in the plan. ***The additional 'opt out' requirement, in the context of this case, would have been little more than a Court-endorsed trap for the careless or inattentive creditor.***" *Id.* (emphasis added).

76. Whether or not a creditor votes to accept or reject the Combined Plan, such creditors may not have understood the solicitation package, and may not have possessed the time or financial resources to engage counsel, never imagining that their rights against non-debtors could be extinguished through the bankruptcy of these Debtors. "[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *Norcia*, 845 F.3d at 1285 (quotation marks omitted).

77. *Third*, the Combined Plan provides that several classes of creditors who do not vote and do not opt out of the third-party releases shall also be stripped of their direct claims against non-debtors: (1) claimants who are eligible vote but do not vote; (2) unimpaired claimants or holders of interests who are not permitted to vote on the Combined Plan, but who receive a notice informing them that they will be bound unless they return the Non-Voting Opt-Out Form; and (3) *impaired* claimants or holders of interests deemed to reject the plan who are not permitted to vote

on the Combined Plan, but who receive a notice informing them that they will be bound unless they return the Non-Voting Opt-Out Form.[7]

78. For the reasons discussed above, no consent can be inferred from this silence. Further, such creditors: (a) may never have received the solicitation package, or received it late, due to mail errors or delays; or (b) received the solicitation package timely, completed same and returned it to the balloting agent but, through no fault of their own, the ballot never reached the balloting agent, or the ballot was received late.

79. There is no basis to infer consent by those who do not vote on the Combined Plan. Conspicuous warnings in the disclosure statement, on the plan ballots, or on an opt-out form that silence or inaction will constitute consent to a release are not sufficient to convert their silence into consent to the non-debtor release. *See SunEdison*, 576 B.R. at 458-61.[8] Just as creditors have no federal or state law duty to vote on a plan, they also have no obligation to read a plan. And creditors who do not intend to, or have no right to, vote in the first place are unlikely to do so. "Charging all inactive creditors with full knowledge of the scope and implications of the proposed third-party releases, and implying a 'consent' to the third-party releases based on the creditors' inaction, is simply not realistic or fair and would stretch the meaning of 'consent' beyond the breaking point." *In re Chassix*, 533 B.R. at 88. As this Court explained in *Smallhold*: "It is reasonable to require creditors to pay attention to what the debtor is doing in bankruptcy as it relates to the creditor's rights against the debtor. But as to the creditor's rights against third parties – which belong to the

[7] It is additionally unclear how releases by such claimants or interest holders could be supported by any consideration because, not only are they receiving no consideration from the released non-debtors, the relevant classes will not receive or retain any property under the Combined Plan. *See* 11 U.S.C. § 1126(g).

[8] Not all decisions from this District have required affirmative consent for third party releases. In *In re Indianapolis Downs, LLC*, 486 B.R. 286 (Bankr. D. Del. 2013), this Court reached a different conclusion than that of *Emerge* and the other cases cited above concerning the need for affirmative consent to third party releases.

creditor and not the bankruptcy estate – a creditor should not expect that those rights are even subject to being given away through the debtor's bankruptcy." 2024 WL 4296938, at *12.

80. As this Court noted in *Emerge*, "[a] party's receipt of a notice imposing an artificial opt-out requirement, the recipient's possible understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as consent through a party's silence or inaction. *In re Emerge Energy Servs., LP*, No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (Owens, J.).

81. The Debtors may try to distinguish these cases from *Emerge* based on the argument that *Emerge* dealt with creditors and shareholders who were receiving no distribution under the plan. However, the Court's decision in *Emerge* was not expressly limited to such a factual situation. To the contrary, the Court's recognition that failure to return a ballot or opt-out election form can be due to "carelessness, inattentiveness, or mistake," rather than constituting the manifestation of an intent to agree to a third-party release, would be applicable regardless of whether a creditor or interest holder was to receive a distribution under a plan.

82. Indeed, recipients of mailings regarding the Debtors' bankruptcy cases have no reason to expect that an offer to contract with non-debtors will be included in the plan solicitation or notices. As the Third Circuit has explained, there can be no presumption that someone has agreed to contractual provisions of which they are "on notice," unless "there is a reasonable basis to conclude that consumers will have understood the document contained a bilateral agreement." *See Noble*, 682 F. App'x at 117-118; *see also Norcia*, 845 F.3d at 1289 ("[N]o contract is formed when the writing does not appear to be a contract and the terms are not called to the attention of the recipient.") (quotation marks omitted).

83. Likewise, the court in *SunEdison* observed that parties who are solicited, but do not vote, may have failed to vote for reasons other than an intention to assent to the releases. *SunEdison*, 576 B.R. at 461. The *SunEdison* debtors argued that the warning in the disclosure statement and on the ballots regarding the potential effect of silence gave rise to a duty to speak, and the nonvoting creditors' failure to object to the plan or to reject the plan should be deemed their consent to the release. *Id*. at 460. The *SunEdison* court rejected this argument because the debtors failed to show that the nonvoting creditors' silence was misleading or that the nonvoting creditors' silence signified their intention to consent to the release (finding that silence could easily be attributable to other causes). *Id*.

84. *Fourth*, the non-consensual Third-Party Releases will apparently be imposed on holders of administrative claims and priority tax claims.[9] D.I. 588, Art. I.A, Item 142 (defining "Releasing Party" to include "all holders of Claims or Equity Interests who are sent a Ballot or Non-Voting Opt-Out Form and do not timely elect to opt-out of the releases provided by the Plan in accordance with the Solicitation Procedures[.]"). The claims to be released include direct claims that unimpaired parties hold against numerous non-debtors. The scope of the release of their direct claims against non-debtors is far broader than the claims upon which they will be paid. The release covers:

> any and all Causes of Action whatsoever, including any derivative claims, asserted or assertable on behalf of the Debtors or their Estates, as applicable, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, contingent or noncontingent, in law, equity, contract, tort or otherwise, that such Releasing Party would have been legally entitled to assert in its own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Equity Interest in, a Debtor, the Estates, or other Entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Debtors' in and out-of-court restructuring efforts, the Chapter 11 Cases, the Global Settlement, the Cash Collateral Orders, the Plan Documents, the 2025 Notes

[9] The Debtors' schedules disclose numerous priority tax claims. *See, e.g.*, D.I. 436, Schedule E/F, Part 1, Item 2.

> Documents, the 2026 Notes, the Bridge Note Documents, or any other instrument, contract, or document related to the foregoing, the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is treated in this Plan, the business or contractual arrangements between any Debtor and any Released Party, the restructuring of Claims and Equity Interests before or during the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, pursuit, performance, administration, implementation, or consummation of the Chapter 11 Cases (including any payments, distributions or transfers in connection therewith), the Global Settlement, the Cash Collateral Orders, the Plan Documents, the 2025 Notes Documents, the 2026 Notes, the Bridge Note Documents, or any other instrument, contract, or document related to the foregoing.

Id. at Art. XII.B (emphasis removed).

85. So, for example, a taxing authority whose priority claim against the Debtors is proposed to be paid in full under the Combined Plan (as required by the Code) could later be subject to an argument by a Released Party that it has no obligation to pay taxes in connection with revenue received from transactions with the Debtors because, under the Combined Plan, the taxing authority has been deemed to release the Released Party for all claims related in any manner to the Debtors.

86. In sum, there will be no affirmative consent to Third-Party Releases given by the numerous persons and entities on whom such releases will be imposed. Such releases are therefore non-consensual.

87. This Court also may not approve the injunction enforcing the "opt out" release by parties in interest against non-debtors because *Purdue* clearly stands for the proposition that non-consensual third-party releases and injunctions are not permitted by the Bankruptcy Code. *See Purdue Pharma*, 144 S.Ct. at 2088. As the *Purdue* court noted, the Bankruptcy Code allows courts to issue an injunction in support of a non-consensual, third-party release in exactly one context: asbestos-related bankruptcies, and these cases are not asbestos-related. *See Purdue Pharma*, 144 S. Ct. at 2085 (citing 11 U.S.C. § 524(e)). Even if non-debtor releases are consensual, there is no Code provision that authorizes chapter 11 plans or confirmation orders to include injunctions to

enforce them. Further, such an injunction is not warranted by the traditional factors that support injunctive relief because, if the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent "immediate and irreparable harm" to either the estates or the released parties. A consensual release may serve as an affirmative defense in any ensuing, post-effective date litigation between the third party releasees and releasors, but there is no reason for this Court to be involved with the post-effective date enforcement of those releases. Moreover, this injunction essentially precludes any party deemed to consent to this release from raising any issue with respect to the effectiveness or enforceability of the release (such as mistake or lack of capacity) under applicable non-bankruptcy law.

B. The Combined Plan is Not Confirmable Because It Proposes Exculpation Provisions That Exceed the Limitations of the Bankruptcy Code and Prior Case Law in This Circuit.

88. The Combined Plan is also unconfirmable for the separate and independent reason that it includes impermissible Exculpation Provisions. To the extent that exculpation is permissible beyond the provisions of Bankruptcy Code section 1125(e), this Circuit has only approved exculpations that are limited to estate fiduciaries (in such capacity) and cover the period between the petition date and the effective date.

89. In *In re PWS Holding Corp*., the Third Circuit considered whether an official committee of unsecured creditors could be exculpated and held that 11 U.S.C. § 1103(c) implies both a fiduciary duty and a limited grant of immunity to members of the unsecured creditors' committee. 228 F.3d at 246. Courts in this district have repeatedly interpreted *PWS* as requiring a party's exculpation to be based upon its status as an estate fiduciary. *See generally In re Indianapolis Downs, LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013); *In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del. 2011); *In re Washington Mut., Inc.*, 442 B.R. 314, 350-51 (Bankr. D.

Del. 2011); *In re PTL Holdings LLC*, No. 11-12676 (BLS), 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011).

90. Here, the Exculpation Provision is overbroad and inconsistent with controlling case law because it shields numerous parties that are not estate fiduciaries, including: each Holder of Secured Notes; each Other Director and Officer (which is not limited to directors and officers serving during the Chapter 11 Cases); each Section 1125(e) Party (which improperly reads specific parties, and their unidentified Related Parties, into section 1125(e) of the Code without providing any factual record in support of such relief); and the Related Parties of the Exculpated Parties.

91. Additionally, the Exculpation Provision shields both the Liquidating Trustee and the IP/Austria Assets Trustee, neither of whom will come into existence until after the effective date of the Combined Plan. In *In re Mallinckrodt PLC*, 639 B.R. 837 (Bank. D. Del. 2022), this Court held that exculpation "only extends to conduct that occurs between the Petition Date and the effective date," and ordered the debtors to strike contrary language from the exculpation provision. *Id.* at 883. The same analysis applies to the Combined Plan's prospective relief for the IP/Austria Assets Trustee and the Liquidating Trustee.

C. The Combined Plan is Not Confirmable Because It Provides a Discharge to the Liquidating Debtors.

92. The Combined Plan is also patently unconfirmable for the separate and independent reason that it will grant the Debtors a discharge in violation of section 1141(d)(3) of the Bankruptcy Code.

93. Section 1129(a)(1) of the Bankruptcy Code provides that the Court shall confirm a plan only if the plan "complies with the applicable provisions of" title 11. 11 U.S.C. § 1129(a)(1).

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

> The confirmation of a plan does not discharge a debtor if—

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

11 U.S.C. § 1141(d)(3).

95. The Combined Plan would grant the Debtors a discharge because they are included in the definition of "Released Party." D.I. 588, Art. I.A, Item 141 (defining "Released Party" to include, among others, "each Debtor"). Thus, the Debtors will receive the releases embodied in Article XII.B of the Combined Plan (quoted above in Section II.A). *Id.* at Art. XII.B ("[A]s of the Effective Date and to the fullest extent authorized by applicable law … each (a) Releasing Party … conclusively, absolutely, unconditionally, generally, individually, collectively, irrevocably, and forever releases and discharges the (y) Released Parties … from any and all Causes of Action whatsoever[.]") (emphasis removed). In addition, Article XII.D of the Combined Plan would establish an injunction to enforce this discharge as to the Debtors. *Id.* at Art. XII.D.[10]

96. However, the Debtors are not eligible for a discharge because the elements of section 1141(d)(3) are satisfied.

[10] Various other Combined Plan provisions also reference the Debtors receiving a discharge. D.I. 588, Art. V.A.1, Art. V.A.3, Art. V.D, Art. VI.B.1.b, Art. VI.B.2.b, Art. VI.B.3.c, Art. VI.B.4.b, Art. X.A, Art. XI.C, Art. XI.D; *but see* Art. XII.G ("Notwithstanding any other provision of this Plan, the Debtors shall not receive a discharge pursuant to section 1141(d)(3) of the Bankruptcy Code.").

97. *First*, the Combined Plan provides for the establishment of two trusts to liquidate the "Liquidating Trust Assets" [11] and the "IP/Austria Assets Trust Assets," [12] which assets include all or substantially all of the Debtors' property:

> This Combined DS and Plan contemplates the establishment of the Liquidating Trust and the IP/Austria Assets Trust to administer post-Effective Date responsibilities of the Debtors and wind-down the Debtors' business under the Plan, including: (1) the Debtor's [*sic*] Assets being vested with the Liquidating Trust Assets and IP/Austria Assets Trust Assets, respectively, (2) making distributions to holders of Allowed Claims in accordance with the terms of this Plan and the Liquidating Trust Agreement and IP/Austria Assets Trust Agreement, respectively, (3) resolving all Disputed Claims and effectuating the Claims reconciliation process pursuant to the procedures prescribed in this Combined DS and Plan, (4) prosecuting, settling, and resolving Causes of Action, (5) recovering, through enforcement, resolution, settlement, collection, or otherwise, assets on behalf of the Liquidating Trust or the IP/Austria Assets Trust, as applicable (which assets shall become part of the Liquidating Trust Assets or the IP/Austria Assets Trust, respectively), (6) winding down the affairs of the Debtors, if and to the extent necessary, including taking any steps to dissolve, liquidate, or take other similar action with respect to each Debtors [*sic*], including by terminating the corporate or organizational existence of each such Debtor, and (7) performing all actions and executing all agreements, instruments and other documents necessary to effectuate the purpose of the Liquidating Trust and IP/Austria Assets Trust.

Id. at Art. IV.H; Art. VIII.A.1 (describing the purpose of the IP/Austria Assets Trust); Art. VIII.B.1. (describing the purpose of the Liquidating Trust).

98. *Second*, the Debtors will not engage in business after consummation of the Combined Plan. *Id.* at Art. IV.H (providing that the Liquidating Trust and IP/Austria Assets Trust's responsibilities will include, among other things, "winding down the affairs of the Debtors, if and

[11] "Liquidating Trust Assets" means the: (a) Non-IP Assets (subject to Article VIII.E.3 of the Plan); (b) the Preserved Estate Claims (subject to Article VIII.E.2 of the Plan); and (c) the Net Proceeds of IP/Austria Assets paid to the Liquidating Trust, and the Liquidating Trust's rights thereto, pursuant to Article VIII.E.1 of the Plan. D.I. 588, Art. 1.a, Item 104.

[12] "IP/Austria Assets Trust Assets" means: (a) the IP/Austria Assets (subject to Article VIII.E.1 of the Plan); (b) the Net Proceeds of Estate Claims paid to the IP/Austria Assets Trust and the IP/Austria Assets Trust's rights thereto, pursuant to Article VIII.E.2 of the Plan; and (c) the Net Proceeds of Non-IP Assets paid to the IP/Austria Assets Trust, and the IP/Austria Assets Trust's rights thereto, pursuant to Article VIII.E.3 of the Plan. *See* D.I. 588, Art. I.A, Item 93.

to the extent necessary, including taking any steps to dissolve, liquidate, or take other similar action with respect to each Debtors [*sic*], including by terminating the corporate or organizational existence of each such Debtor[.]"). The sections of the Combined Plan addressing the IP/Austria Assets Trust and the Liquidating Trust expressly provide that such trusts "shall be established for the sole purpose of liquidating and distributing" the IP/Austria Assets Trust Assets and the Liquidating Trust Assets, respectively, "with no objective to continue or engage in the conduct of a trade or business except to the extent reasonably necessary to, and consistent with, the liquidating purpose" of such trusts. *Id.* at Art. VIII.A.1, Art. VIII.B.1. Fundamentally, the Combined Plan is about monetizing assets – not engaging in business.

99. *Third*, the Debtors, as corporations, would not be eligible for a discharge pursuant to section 727(a)(1) of the Bankruptcy Code if they were chapter 7 debtors. That is because section 727(a)(1) provides that the Court shall grant a debtor a discharge unless the debtor is not an individual. *See, e.g.*, *In re Flintkote Co.*, 486 B.R. 99, 129 n.80 (Bankr. D. Del. 2012) ("Section 1141(d)(3)(C) is always satisfied for corporate debtors, as they cannot receive discharges in chapter 7.").

100. Accordingly, the Debtors are not eligible for a discharge pursuant to section 1141(d)(3) of the Bankruptcy Code. Because the Combined Plan would grant the Debtors a discharge pursuant to Article XII.B and Article XII.D, among others, the Combined Plan violates section 1141(d)(3), fails to satisfy section 1129(a)(1), and, consequently, is unconfirmable.

D. The Combined Plan is Not Confirmable Because the Owner Reimbursement Claim Provisions Contradict the Code's Priority Scheme and Provide Different Treatment to Similarly Situated Creditors.

101. There are at least two problems with the Owner Reimbursement Claim provisions, either of which presents an independent basis upon which the Court should deny confirmation of the Combined Plan.

102. *First*, the Owner Reimbursement Claim provisions contradict the priority scheme for plan distributions under the Bankruptcy Code. The Combined Plan effectively seeks to divert Liquidating Trust proceeds to the Fisker Owners Association or its designee, presumably on behalf of the vehicle owners who are ostensibly entitled to such proceeds.

103. *Second*, the Owner Reimbursement Claim provisions single out a subset of general unsecured creditors for special treatment. But the Bankruptcy Code requires a plan to provide the same treatment for each claim or interest within a particular class. *See* 11 U.S.C. § 1123(a)(4). Section 1123(a)(4) "embodies the principle that all similarly situated creditors in bankruptcy are entitled to equal treatment." *Energy Future Holdings Corp. v. Delaware Trust Co.*, 2016 U.S. App. LEXIS 8179, at *14 (3d Cir. Mar. 23, 2015), *cert. denied* 137 S. Ct. 447, 196 L. Ed. 2d 336 (2016). While a chapter 11 plan may provide disparate treatment for claims or interests within a class if the holders of claims or interests agree to less favorable treatment, the proposed plan in such circumstances must explicitly provide that particular creditors or interest holders are being treated in this manner so as to put them on notice. *See, e.g.*, *In re AMR Corp.*, 562 B.R. 20, 33 (Bankr. S.D.N.Y. 2016) (citing *Forklift LP Corp. v. iS3C, Inc. (In re Forklift Corp.)*, 363 B.R. 388, 398 (Bankr. D. Del. 2007)). Applied here, the Combined Plan does not explicitly so provide. General unsecured creditors are required to piece together numerous plan provisions to figure out that they are receiving disparate treatment; there is no summary of the Owner Reimbursement Claims construct in Article VI of the Combined Plan, which describes the treatment of classes of claims and interests. Accordingly, the Combined Plan violates section 1123(a)(4) of the Bankruptcy Code, and the statutory exception thereto does not apply. This is also a basis to deny confirmation of the Combined Plan pursuant to section 1129(a)(1). 11 U.S.C. § 1129(a)(1) (requiring that plan "complies with the applicable provisions of" title 11).

III. The Solicitation Procedures Did Not Provide Notice to Numerous Entities That Their Claims Against Non-Debtors Will Be Released Under the Combined Plan.

104. The Debtors did not serve any part of the Solicitation Package, the Combined Hearing Notices, or any other document on the numerous Related Parties that would notify them that the Combined Plan will strip them of their right to pursue their direct claims against a large number of non-debtor entities for no consideration. Moreover, it likely would be impossible for the Debtors to arrange to provide such notice to the tens (and potentially hundreds) of thousands of Related Parties, because the identity of many of such Related Parties — such as all "agents" of all Releasing Parties — are not, and cannot be, known by the Debtors.

105. In *Folger Adam Security, Inc. v. DeMatteis/MacGregor*, 209 F.3d 252 (3d Cir. 2000), the Third Circuit ruled that "[d]ue process requires 'notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 209 F.3d at 265 (citations omitted).

106. The Debtors' solicitation procedures did not provide notice to the Related Parties that is "reasonably calculated, under all the circumstances, to apprize [them] of the pendency of the action and afford them an opportunity to present their objections" to having Third-Party Releases extracted from them. *Id.* In fact, most (if not all) of the Related Parties received no notice at all, because they are not themselves creditors or interest holders of the Debtors. Therefore, the Court should deny final approval of the disclosure statement and deny confirmation of the Combined Plan. *See Purdue Pharma*, 144 S. Ct. at 2086 ("nothing in the bankruptcy code contemplates (much less authorizes)" a non-consensual release of direct claims held by creditors against non-debtor third parties); *In re Boy Scouts of America and Delaware BSA, LLC*, 642 B.R. 504, 678 (Bankr. D. Del. 2022) (stating that the Court was unable to find that the twenty-two categories of "Related Releasing Parties" received notice, and because Court had concluded that

"a request for opt-out consent must be grounded in adequate notice, it was inconsistent to permit releases from persons who do not receive notice by virtue of creditor (or shareholder) status"); *see also Patterson*, 636 B.R. at 660 (noting that "[t]he Bankruptcy Court did not order that any notice or opt-out forms be sent to all of the Releasing Parties, including the current and former employees, consultants, accountants or attorneys of Debtors, their affiliates, lenders, creditors or interest holders").

IV. Miscellaneous Objections to the Combined Plan

107. The U.S. Trustee objects to any request to shorten the 14-day stay imposed by Federal Rule of Bankruptcy Procedure 3020(e), which provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." The Debtors have presented no exigencies which would justify impeding the U.S. Trustee's ability to obtain appellate review of this Court's ruling(s) and, by extension, provide good cause to shorten the Rule 3020(e) stay.

108. The U.S. Trustee has informally raised with the Debtors other objections to the Combined Plan, which the parties continue to discuss in good faith. The U.S. Trustee reserves all rights to raise additional objections at or before the confirmation hearing to the extent that the parties are not able to reach a consensual resolution.

RESERVATION OF RIGHTS

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

WHEREFORE, the U.S. Trustee respectfully requests that the Court enter an order or orders: (i) denying final approval of the disclosure statement; (ii) denying confirmation of the Combined Plan; and (iii) granting such other and further relief as the Court deems just and equitable.

Dated: October 4, 2024

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

By: */s/ Malcolm M. Bates*

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CERTIFICATE OF SERVICE

I, Malcolm M. Bates, hereby certify that on October 4, 2024, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and courtesy copies were sent via email to parties in interest.

Dated: October 4, 2024

/s/ Malcolm M. Bates
Malcolm M. Bates