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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole, Debtor.	Bankruptcy Case No. 23-40523 WJL Chapter 11 Date: December 18, 2024 Time: 10:30 a.m. Place: 1300 Clay Street, Ctrm 220 Oakland, CA [In Person or via Zoom]

OBJECTION AND RESERVATION OF RIGHTS OF THE UNITED STATES TRUSTEE TO APPROVAL OF (I) DEBTOR'S DISCLOSURE STATEMENT AND (II) MOTION TO APPROVE SOLICITATION, NOTICE, AND BALLOTING PROCEDURES

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Tracy Hope Davis, United States Trustee for Region 17 (the "**UST**"), by and through her undersigned counsel, hereby files this objection (the "**Objection**") and reservation of rights with respect to (i) the Debtor's disclosure statement (ECF No. 1445) (the "**Disclosure Statement**") for the plan of reorganization filed on November 8, 2024 (ECF No. 1444) (the "**Plan**"), and (ii) the Debtor's motion for an order approving solicitation, notice, and balloting procedures for the Disclosure Statement and Plan (ECF No. 1453) (the "**Solicitation Procedures Motion**"). In support of her Objection, the UST respectfully represents as follows:

I. INTRODUCTION

1. The UST objects to approval of the Disclosure Statement because the Plan is unconfirmable for at least two reasons.

2. *First*, the Plan contains non-consensual provisions for a third-party release and a channeling injunction, contrary to *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024). Although the Debtor describes the release and channeling injunction as consensual, the release and injunction would be binding on any Abuse Claimant[1] who does not timely make an opt-out election. Thus, Abuse Claimants who do not execute the Opt-Out Release Form will be deemed to consent to the release and injunction, *even if* (i) they do not submit a ballot for the Plan, or (ii) they vote to reject the Plan. A creditors' silence is not consent to a release. Hence, as set forth in greater detail below, in the absence of Abuse Claimants' affirmative assent, the release and channeling injunction are not consensual.

3. *Second*, as set forth in greater detail below, the Plan proposes to eliminate the obligation of the Survivors' Trust to pay quarterly fees, contrary to 28 U.S.C. § 1930(a)(6).

4. The Debtor should not expend limited estate resources soliciting a Plan that is

[1] Capitalized terms not otherwise defined herein, shall have the meanings ascribed to them in the Plan.

unconfirmable, and the Court should not approve solicitation procedures that would facilitate such an unconfirmable Plan. Accordingly, the Court should not approve the Disclosure Statement.

5. Moreover, apart from issues with the Plan's confirmability, the Disclosure Statement fails to provide adequate information in several important respects. Notably, the Disclosure Statement does not:

a. adequately address the factual and legal bases for extending the benefit of the Debtor's discharge to parish Churches.

b. disclose the identity of all parties who would benefit from the Third-Party Release.

c. disclose the identity or affiliations of the Survivors' Trustee or include the forms of the Survivors' Trust Agreement and the Survivors' Trust Distribution Plan. This information is highly relevant to Abuse Claimants' consideration of the procedures for receiving distributions from the Survivors' Trust.

d. address the filing of post-confirmation quarterly reports by the Debtor and the Survivors' Trust.

6. The UST reserves all her rights, including to object to confirmation of the Plan regarding these and other issues, and to object to any subsequently filed amended plan or disclosure statement filed prior to the hearing.

II. STATEMENT OF FACTS

A. General Case Background

7. On May 8, 2023, the Debtor commenced this case under Chapter 11 of the Bankruptcy Code. *See* ECF No. 1. The Debtor is currently a debtor in possession under Sections 1107 and 1108 of the Bankruptcy Code.

8. On May 23, 2023, the UST appointed the official committee of unsecured creditors (the "**Committee**"). *See* ECF No. 58.

9. According to the first day declaration of Charles Moore (ECF No. 19) (the "**First Day Declaration**"), the Debtor was established "in 1962 from the eastern territory of the

Archdiocese of San Francisco. The territory of the diocese spans roughly 1,467 square miles and encompasses two counties, Alameda and Contra Costa." *See* First Day Declaration, ¶ 13. There are 82 parish churches within the diocese. *Id.*, ¶ 22. The parish churches are not separately incorporated under California law. *Id.*, ¶ 19.

10. According to the First Day Declaration, as of May 4, 2023, there were "approximately 332 separate, active lawsuits or mediation demands pending against the Debtor filed by plaintiffs alleging sexual abuse by clergy or others associated with the Debtor." *See* First Day Declaration, ¶ 84.

B. <u>The Plan</u>

11. The Plan classifies Abuse Claims (other than Unknown Abuse Claims) in Class 4 and Unknown Abuse Claims in Class 5. Once appointed, an Unknown Claims Representative will cast a single vote on behalf of all Class 5 Claims. *See* Disclosure Statement, at 10, 45 of 86.[2]

12. The Plan contemplates the creation of a Survivors' Trust to make distributions to Abuse Claimants. The Survivors' Trust will be funded with:

- $103 million in cash from the Debtor ($63 million paid on the Effective Date, with the remainder funded over 4 years).
- up to $14.25 million in cash from the Roman Catholic Welfare Corporation of Oakland ("**RCWC**") (contingent on the number of releases RCWC secures from holders of Class 4 and Class 5 claims; with $2 million paid on the Effective Date and the remainder funded over 4 years).
- the transfer of the Livermore Property (which the Debtor values at between $43 million and $81 million), through the Debtor's affiliate, Adventus.
- the proceeds of any Insurance Settlement Agreements. There were no Settling Insurers or Settling Insurance Agreement as of the filing of the Disclosure Statement.

[2] The Debtor has filed a motion for the appointment of an Unknown Claims Representative. *See* ECF No. 1503.

- the assignment of the Debtor's rights and interests in the Non-Settling Insurer Policies.
- contributions from Contributing Non-Debtor Catholic Entities (in addition to those of RCWC and Adventus). The amount of these contributions, if any, shall be set forth in the Plan Supplement.

See Disclosure Statement, at 10-11, 52, 56 of 86.

13. Upon its creation, the Survivors' Trust will "(1) assume liability for all Abuse Claims, including without limitation Unknown Abuse Claims, of the Debtor, Contributing Non-Debtor Catholic Entities, and any Settling Insurers; and (2) receive, hold, administer, liquidate, and distribute the Survivors' Trust Assets in accordance with the Plan and the Survivors' Trust Documents." *See* Disclosure Statement, at 49 of 86.

14. Abuse Claimants may elect to receive an Immediate Distribution of $50,000 from the Survivors' Trust. Upon receipt of the Immediate Distribution, the holder of an Abuse Claim "shall not be entitled to any further distributions from the Survivors' Trust and shall not be entitled to purs[u]e [an] Abuse Claim against the Non-Settling Insurers or any other party." *See* Disclosure Statement, at 53 of 86.

15. Abuse Claimants who do not choose to receive the Immediate Distribution may "elect one of two paths as to their Trust Claim: 1) acceptance of a distribution solely from the Survivors' Trust [(the "**Distribution Option**")], or 2) pursuit of litigation that could yield recovery from an insurer, if any [(the "**Litigation Option**")]." *See* Disclosure Statement, at 13–14 of 86.

16. Regardless of whether an Abuse Claimant chooses the Distribution Option or the Litigation Option, the Abuse Claimant's claim shall be "reviewed and scored by the Abuse Claims Reviewer in order to determine the distribution to each such Holder in accordance with the terms of the Survivors' Trust Documents." *See* Disclosure Statement, at 53 of 86.

C. Discharge, Releases and Injunctions under the Plan

17. The Plan contemplates that the Debtor will receive a discharge effective as of the Effective Date. The discharge would extend to claims against the "Churches," which the Plan defines as "the individual Catholic churches within the Diocese of Oakland, each of which is part of the corporation sole that is the Debtor, and each of which is listed on Schedule 1.1.27 attached hereto." *See* Plan, at 74 of 93 (§ 13.3) (discharge includes claims against the Debtor "including for the avoidance of doubt the Churches"); Plan, at 12 of 93 (§ 1.1.27) (definition of Churches).

18. The Plan also contemplates a release by "the Debtor, the Reorganized Debtor, and the Estate … of the *Released Parties and Settling Insurers* of and from any and all Causes of Action … based on or relating to, or in any manner arising from, in whole or in part, any act, omission, transaction, event, or other circumstance taking place or existing on or before the Effective Date … in connection with or related to the Debtor, the Reorganized Debtor, the Estate, their respective assets and properties, the Chapter 11 Case, the Plan Documents … or upon any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date related or relating to the foregoing." *See* Plan, at 76–77 of 94 (§ 13.8) (emphasis added).

19. The Plan also contemplates a release by the holders of Abuse Claims.[3] *See* Plan, at 77–78 of 94 (§ 13.9) (the "**Third-Party Release**"). The Third-Party Release would be binding on

[3] The Plan defines an "Abuse Claim" as "any Claim relating to, in whole or in part, directly or indirectly, an act of Abuse committed by any Person before the Effective Date for which the Debtor, a Non-Debtor Catholic Entity, or any of their respective agents, employees, or representatives is allegedly responsible. Except as otherwise provided herein, the term 'Abuse Claim' includes Unknown Abuse Claims and Trust Claims but not Abuse Related Contribution Claims." *See* Plan, at 9 of 93 (§ 1.1.2). An "Abuse Related Contribution Claim" is defined as "any Person's Claim against any other Person for contribution, indemnity, equitable indemnity, subrogation, or equitable subrogation, or reimbursement, or any other indirect or derivative recovery, arising because such Person has paid or defended against any Abuse Claim including but

all holders of Abuse Claims who do not affirmatively opt out of the Third-Party Release "by returning their Opt-Out Release Form after checking the appropriate box on the Opt-Out Release Form indicating they opt not to grant such Releases." *See* Plan, at 36 of 93 (§ 6.2).

20. The beneficiaries of the Third-Party Release are defined as the "Released Parties." *See* Plan, at 77–78 of 94 (§ 13.9). The definition includes the Debtor, the Churches, the Contributing Non-Debtor Catholic Entities, and a long list of the foregoing entities' related persons, who are listed only by category and are nowhere specifically identified in the Disclosure Statement or any other plan document. The definition excludes any person "accused of committing a physical act of Abuse." *See* Plan, at 20 of 93 (§ 1.1.92).

21. The Plan also contemplates a channeling injunction for the benefit of the Released Parties and the Settling Insurers. *See* Plan, at 78–79 of 93 (§ 13.12) (the "**Channeling Injunction**"). The Channeling Injunction channels Channeled Claims for abuse and related insurance coverage (including Abuse Related Contributions Claims) to the Survivors' Trust. *Id.* The Channeling Injunction does not apply to Abuse Claims for which the holder opted out of the Third-Party Release. *Id.*, at 12 of 93 (§ 1.1.25) ("Channeled Claim" excludes "Opt-Out Abuse Claims"); Plan, at 18 of 93 (§ 1.1.78).

22. The Plan includes an exculpation for Exculpated Parties. *See* Plan, at 75–76 (§ 13.6). The exculpation is not expressly limited to claims arising between the Petition Date and the Effective Date.[4] *Id.*

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not limited to a joint tortfeasor or the like, but excluding any claim by an Insurer for contribution or similar relief." *Id.*, at 9 of 93 (§ 1.1.6).

[4] The UST reserves all rights to object to this provision at confirmation.

23. The Plan would also permanently enjoin creditors from taking actions relating to released, discharged, or exculpated claims.[5] *See* Plan, at 74–76, 78 of 93 (§§ 13.4, 13.5, 13.7, 13.10).

D. Quarterly Fees and Reports under the Plan

24. The Plan provides for the payment statutory fees to the UST under 28 U.S.C. § 1930(a)(6) ("**Quarterly Fees**") as follows:

> 12.8.4.1. The Reorganized Debtor shall continue to pay all U.S. Trustee Fees accruing on or before the earlier of (i) the closing of the Chapter 11 Case, and (ii) December 31, 2026. Should the Chapter 11 Case remain open through January 1, 2027 or later, the Survivors' Trust shall pay all U.S. Trustee Fees accruing on or after that date until the Chapter 11 Case is closed. All U.S. Trustee Fees shall be paid at the rate in effect at the time such fees come due.
>
> 12.8.4.2. Solely for purposes of calculating U.S. Trustee Fees on account of the *amounts to be funded by the Debtor to the Survivors' Trust*, such amounts *shall be considered distributions* from the Debtor pursuant to 28 U.S.C. § 1930(a)(6) on the date of such distributions.
>
> 12.8.4.3. *Contributions by any party to the Survivors' Trust other than the Debtor*, including without limitation a Contributing Non-Debtor Catholic Entity or a Settling Insurer, *shall not be considered distributions* by or on behalf of the Debtor or Reorganized Debtor for purposes of calculating U.S. Trustee Fees.
>
> 12.8.4.4. *Distributions from the Survivors' Trust shall not be considered distributions* by or on behalf of the Debtor or Reorganized Debtor for purposes of calculating U.S. Trustee Fees.

See Plan, at 71–72 of 93 (§ 12.8.4) (emphases added); *see also* Plan, at 27 of 93 (§ 3.5).

25. The Plan does not address the filing of post-confirmation quarterly reports pursuant to 28 C.F.R. § 58.8.

[5] Even if a release is consensual—which it is not in this case—there is no authority for a court to enter an injunction to enforce it. The UST reserves all rights to object to this provision at confirmation.

E. The Solicitation Procedures Motion

26. The Solicitation Procedure Motion seeks approval of the Disclosure Statement, as well as the form and procedures for Abuse Claimants to opt out of the Third-Party Release. *See* Solicitation Procedures Motion, at 2 of 35.

27. Specifically, the Debtor proposes that if Abuse Claimants do not consent to the Third-Party Release, "they must affirmatively opt out and decline to consent by checking a prominently featured and clearly labeled box set forth on an Opt-Out Release Form …." *See* Solicitation Procedures Motion, at 27 of 35. Moreover, "Class 4 or Class 5 creditors who receive a Solicitation Package *and elect not to respond should be deemed to have consented to the release* of Contributing Non-Debtor Catholic Entities." *Id.*, at 32 of 35 (emphasis added).

28. The Opt-Out Release Form is not integrated into the ballots for Class 4 and Class 5, but rather is a separate, standalone document. *See* ECF Nos. 1453-3, 1453-4, and 1453-7.

III. OBJECTION

29. A debtor-in-possession may not solicit creditors to vote on a plan, unless, at the time of such solicitation, the debtor-in-possession provides creditors with a "written disclosure statement approved, after notice and a hearing, by the court as containing *adequate information*." *See* 11 U.S.C. § 1125(b) (emphasis added); *In re Kelley*, 199 B.R. 698, 703 (B.A.P. 9th Cir. 1996).

30. "Adequate information" is defined as information that is in sufficient detail to enable "a hypothetical investor" to make an informed judgment about the Plan. *See* 11 U.S.C. § 1125(a); *In re Comm. W. Fin. Corp.*, 761 F.2d 1329, 1331 n.1 (9th Cir. 1985).

31. Even if a disclosure statement provides adequate information, the disclosure statement should not be approved if the plan it describes is patently unconfirmable. *See, e.g.*, *In*

re Beyond.com Corp., 289 B.R. 138, 140 (Bank. N.D. Cal. 2003) ("Because the underlying plan is patently unconfirmable, the disclosure statement may not be approved.").

A. <u>The Disclosure Statement Should Not be Approved Because the Plan it Describes is Unconfirmable Since it Contains a Nonconsensual Release.</u>

32. In *Harrington v. Purdue Pharma L.P.*, the Supreme Court held that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." 144 S. Ct. 2071, 2088 (2024). The Supreme Court's holding is consistent with long-standing Ninth Circuit precedent. *See In re Lowenschuss*, 67 F.3d 1394, 1401–02 (9th Cir. 1995); *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 626 (9th Cir. 1989).

33. The *Purdue Pharma* Court stated that its holding should not be "construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan [ ]." 144 S. Ct. at 2087 (emphasis in original).

34. Here, the Debtor has described the Third-Party Release and the Channeling Injunction as consensual. *See* Disclosure Statement, at 17 of 86. But because the Plan proposes to deem "consent" from an Abuse Claimant's failure to opt out of the Third-Party Release—from those who vote to accept the Plan to those who explicitly reject the Plan and those who do not even vote on the Plan at all— the release lacks the affirmative assent that is the hallmark of consent. *See*, *e.g.*, *Patterson v. Mahwah Bergen Retail Grp., Inc.,* 636 B.R. 641, 684–85 (E.D. Va. 2022) ("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 Tonawanda Coke Corp*., 662 B.R. 220, 222–23 (Bankr. W.D.N.Y. 2024) ("Absent a writing expressly agreeing to a release of nondebtors, creditors have not given consent as required by the Supreme Court in *Harrington v. Purdue Pharma*.").

1. Under State Law, a Creditor's Silence is Not Consent to a Release.

35. As the *Purdue Pharma* Court observed, "nothing in the bankruptcy code contemplates (much less authorizes)" a third-party release. 144 S. Ct. at 2086. Thus, "any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent…. any such consensual agreement would be governed instead by state law." *See In re Tonawanda Coke Corp.*, 662 B.R. at 222; *see also Smallhold, Inc*., 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024) (recognizing that "some sort of affirmative expression of consent that would be sufficient as a matter of contract law" is required); *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.").

36. A bedrock principle of contract law is that "silence or inaction does not constitute acceptance of an offer." *See Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1284 (9th Cir. 2017) (applying California law to hold that customer was not bound by arbitration provision despite his failure to opt out of the arbitration agreement). "Acceptance by silence is exceptional. Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance." *See Restatement (Second) of Contracts* § 69 cmt. a (1981).

37. There are exceptions to this general rule, where (i) the offeree has a duty to respond to an offer and fails to act in the face of this duty, or (ii) the offeree silently retains the benefit offered. *See Norcia v. Samsung,* 845 F.3d at 1284–85. Neither exception applies here, for the reasons discussed below.

2. Opt-Outs Cannot Be Imposed Based on a Procedural Default Theory.

38. Applicable state contract law cannot be disregarded on a default theory, applied by some courts, that creditors who remain silent forfeit their rights against nondebtors because they received notice of the nondebtor 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 Interm. Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), *abrogated by In re Smallhold, Inc.*, 2024 WL 4296938, at *8–11.

39. These courts had reasoned that so long as the creditors received notice of a proposed non-debtor release and were informed of the consequences if they did not opt out or object to that release, there is no unfairness or deprivation of due process from binding them to the release. *Cf. Smallhold*, 2024 WL 4296938, at *1 (describing this reasoning as having treated a mere "failure to opt out" as "allow[ing] entry of the third-party release to be entered by default").

40. This is wrong. Forfeiture principles do not apply to consent, which requires an affirmative manifestation of assent, not a mere failure to object. As the court in *Smallhold* recently explained, "[u]nder established principles," courts may enter relief against a party who has procedurally defaulted by not responding "only after satisfying themselves that the relief the plaintiff seeks is relief that is at least potentially available to the plaintiff in litigation" that is actually contested.[6] *Smallhold, Inc.*, 2024 WL 4296938, 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.").

41. But a third-party release is not "an ordinary plan provision that can properly be entered by 'default' in the absence of an objection…. The *nonconsensual* third-party release is now *per se* unlawful. As such, it is not the kind of provision that would be imposed on a creditor on account of that creditor's default." *Smallhold, Inc.*, 2024 WL 4296938, at *2 (emphases in original). "It is reasonable to require creditors to pay attention to what the debtor is doing in

[6] As discussed further below, *infra* ¶¶ 51-52, although the UST agrees with much of the analysis in *Smallhold*, she disagrees with its conclusion that voting on a plan combined with a failure to opt out constitutes consent.

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 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." *Smallhold, Inc.*, 2024 WL 4296938, at *12.

3. An Abuse Claimant's Failure to Opt-Out of the Third-Party Release is Not Consent to the Third-Pary Release or the Channeling Injunction.

42. As noted, the Debtor proposes that any Abuse Claimants who, for whatever reason, do not respond to the solicitation package will be deemed to consent to the Third-Party Release. The Debtor also proposes that Abuse Claimants who vote on the Plan, whether to accept or reject, will be deemed to consent to the Third-Party Release unless they execute an Opt-Out Release Form. *See* Solicitation Procedures Motion, at 27, 32 of 35.

43. In either case, the Debtor is proposing that Abuse Claimants' silence should be treated as acceptance of a release of their claims against non-debtors. But neither exception to the rule that an offeror cannot cause silence to be consent applies here.

44. Abuse Claimants who do not execute the Opt-Out Release Form would not be silently retaining any offered benefits. Plan distributions to a particular Abuse Claimant do not appear to be directly related to whether the Abuse Claimant consents to the Third-Party Release (though it may affect the amount of RCWC's contribution). Because the only benefits received by the creditors are distributions from the debtor's chapter 11 plan, "[e]ssentially, creditors are being asked to give releases to third parties for no consideration." *Tonawanda Coke Corp.*, 662 B.R. at 222. Because creditors are entitled to whatever distributions the Plan allocates them regardless of whether they opt out of the non-debtor releases, consent to the non-debtor release cannot be inferred from mere acceptance of the benefits of the debtor's plan. *See Norcia*, 845 F.3d at 1286

(explaining that customer's failure to opt out did not imply his consent where warranty applied regardless, meaning that customer did not thereby obtain any additional benefit).

45. Nor do Abuse Claimants have a duty to vote on the Plan or execute the Opt-Out Form. *See* 11 U.S.C. § 1126(a) (creditors "may" vote to accept or reject a plan); *see also In re Long M. Arabians*, 103 B.R. 211, 215 (B.A.P. 9th Cir. 1989) (failure to vote "is not equivalent to acceptance of the plan."); *Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1227 (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.'"). 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. *See Norcia*, 845 F.3d at 1285–86. Further, because impaired creditors have a federal right under the Bankruptcy Code to vote on a chapter 11 plan, 11 U.S.C. § 1126(a), merely exercising that right without returning an opt out form does not manifest consent to release claims against non-debtors.

46. In short, failure to execute an Opt-Out Release Form does not "manifest [an] intention that silence may operate as acceptance" of an offer to release claims against non-debtors. *Restatement (Second) of Contracts* § 69 cmt. a.

47. The absence of any manifested consent is particularly obvious for those who vote to reject the plan or who do not vote at all.

48. It is implausible to suggest that a party returning a ballot rejecting the plan but neglecting to opt out of the third-party release is evidencing consent to the third-party release. When the creditor has expressly stated its rejection of the plan, there is not even any "mutual agreement" as to the plan, much less the third-party release. As the court in *Chassix Holdings*

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." In re Chassix Holdings, Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015) (emphasis added).

49. The *Chassix* Court's concern that an opt-out requirement for rejecting creditors is a trap for inattentive creditors is magnified here. As noted, the Opt-Out Release Form is a separate document from the Class 4 and Class 5 ballots. *See* ECF Nos. 1453-3, 1453-4, and 1453-7. Thus, Abuse Claimants may easily overlook the Opt-Out Form.

50. Likewise, those who do not vote—whether or not they were eligible to vote—but do not return an opt out form are not manifesting consent to the non-debtor release. *See*, *e.g.*, *In re Smallhold, Inc.*, 2024 WL 4296938, at *11 ("[A] litigant who throws away a validly served legal pleading does so at that litigant's risk…. [A]fter *Purdue Pharma*, it no longer includes the risk that the creditor will release a cause of action it may have against a third party."); *SunEdison*, 576 B.R. at 458–61 (explaining 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); *In re Wash. Mutual, Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) ("[T]he Court concludes that the opt out mechanism is not sufficient to support the third party releases anyway, particularly with respect to parties who do not return a ballot …. Failing to return a ballot is not a sufficient manifestation of consent to a third party release.").

51. The UST recognizes that, although the *Smallhold* Court correctly held that a failure to opt out cannot be consent for nonvoting creditors regardless of why they did not vote, it also held that the act of voting on a plan combined with a failure to opt out can constitute consent to a

non-debtor release. *See Smallhold*, 2024 WL 4296938, at *14. The *Smallhold* decision, despite stating it was applying "ordinary contract principles," 2024 WL 4296938, at *3, failed to faithfully apply those principles to the question of when silence can constitute consent. For the reasons discussed above, contract principles do not support imputing consent for a third-party release based merely upon a creditor's neglect to exercise an opt-out option.

52. In *Smallhold*, the court reasoned that consent existed because the act of voting is an "affirmative step" taken after being told that failing to opt out would bind the voter to the nondebtor release. *Smallhold,* 2024 WL 4296938, at *14. But while voting is an "affirmative step" with respect to the debtor's plan, merely voting on a plan does not manifest consent to the non-debtor release for the reasons discussed above and particularly where the opt-out form is separate from the ballot. Thus, the act of voting on a plan without taking an additional step to opt out is still merely silence with respect to the nondebtor release.[7]

4. It is Premature to Permit an Unknown Abuse Claims Representative to Consent to Releases of Unknown Abuse Claims.

53. The Plan contemplates that an Unknown Abuse Claims Representative may consent to the Third-Party Release on behalf of the holders of Unknown Abuse Claims by failing

[7] The Ninth and Second Circuit cases cited in the *Smallhold* decision do not support the conclusion that the act of voting on a chapter 11 plan while remaining silent regarding a non-debtor release constitutes consent. *Smallhold,* 2024 WL 4296938, at *14 n.60 (*citing Berman v. Freedom Fin. Network*, 30 F.4th 849, 856 (9th Cir. 2022); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017)). Those cases emphasize the importance of notice as a prerequisite to consent and explain the requirements for when someone can be deemed on "inquiry notice" of terms they did not read. *See Berman*, 30 F.4th at 856; *Meyer*, 868 F.3d at 75. But whether there is sufficient notice is a distinct question from whether there has been a manifestation of an intent to accept an offer. *See, e.g., Meyer*, 868 F.3d at 74 ("[A]n offeree, *regardless of apparent manifestation of his consent*, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.") (internal quotation marks omitted; emphasis added). While notice of a contractual term is certainly a necessary precondition to finding consent, notice is not alone sufficient. There must also be a manifestation of consent.

to execute the Opt-Out Form. *See* Solicitation Procedures Motion, at 28 of 35. Although the *Smallhold* Court did not "foreclose the possibility … that a different outcome on the opt-out question might be appropriate in a case in which the plan process itself builds in the protections of Rule 23(b)(3), under which a named representative is authorized to act on behalf of a class ….", 2024 WL 4296938, at *3, the Court has not appointed an Unknown Claims Representative in this case. Nor has anyone attempted to follow the procedures for certifying a class action. *See* Fed. R. Bankr. P. 7023.

54. Thus, it is premature to consider whether an Unknown Claims Representative, if appointed, could consent to the Third-Party Release on behalf of holders of Unknown Abuse Claims. The UST reserves all her rights to object to this process once the parameters of the appointment become known.

B. <u>The Disclosure Statement Describes a Plan that is Unconfirmable Because it Limits the Statutory Obligations of the Survivors' Trust and the Debtor to Pay Quarterly Fees.</u>

55. The UST is authorized by law to collect Quarterly Fees in every chapter 11 case (except those cases in Subchapter V). *See* 28 U.S.C. § 1930(a)(6); *In re Sanders*, 2013 WL 1490971, at *10 (B.A.P. 9th Cir. Apr. 11, 2013) (*citing In re Celebrity Home Entm't, Inc.*, 210 F.3d 995, 998 (9th Cir. 2000)). The fee amount is calculated based on the amount of disbursements made by a debtor during each quarter that the case is pending. *See* 28 U.S.C. § 1930(a)(6).

56. The term "disbursements" in 28 U.S.C. § 1930(a)(6) is read broadly. *See, e.g., In re Genesis Health Ventures, Inc.*, 402 F.3d 416, 421 (3d Cir. 2005) (even "indirect payment of a debtor's expenses—i.e., payments made by an unrelated third party to secured creditors of the debtor—are disbursements"); *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1533–34 (9th Cir. 1994) ("a plain language reading of the statute shows that Congress clearly intended

'disbursements' to include all payments from the bankruptcy estate"); *In re Danny's Markets, Inc*., 266 F.3d 523, 526 (6th Cir. 2001) ("Congress contemplated that disbursements will encompass all payments to third parties directly attributable to the existence of the bankruptcy proceeding" regardless of "the technical source of the payments"); *In re Jamko, Inc*., 240 F.3d 1312, 1316 (11th Cir. 2001) (holding "disbursements" includes ordinary operating expenses during bankruptcy).

57. Several bankruptcy courts have found that proceeds of liquidating trusts are disbursements for Quarterly Fee purposes under 28 U.S.C. § 1930(a)(6). *See In re Hudson Oil Co.*, 210 B.R. 380, 383–84 (D. Kan. 1997) (rejecting argument that liquidating trust had no responsibility for quarterly fees because, among other reasons, the trust was subject to continuing bankruptcy court supervision); *see also In re Atna Resources, Inc.,* 576 B.R. 214, 219 (Bankr. D. Colo. 2017) (liquidating trustee responsible for quarterly fees even without plan provision addressing fees); *In re CSC Indust.*, *Inc.*, 226 B.R. 402, 405 (Bankr. N.D. Ohio 1998) (liquidating trust liable because it "essentially stepped into the shoes of the original debtor").

58. Here, the Plan provides that: (i) amounts funded by the Debtor to the Survivors' Trust "shall be considered distributions from the Debtor pursuant to 28 U.S.C. § 1930(a)(6) on the date of such distributions"; (ii) contributions from non-Debtor entities to the Survivors' Trust "shall not be considered distributions by or on behalf of the Debtor or Reorganized Debtor for purposes of calculating U.S. Trustee Fees"; and (iii) distributions from the Survivors' Trust "shall not be considered distributions by or on behalf of the Debtor or Reorganized Debtor for purposes of calculating U.S. Trustee Fees." *See* Plan, at 71–72 of 93 (§ 12.8.4).

59. The Plan limits the obligation to pay fees on applicable disbursements in violation of 28 U.S.C. § 1930(a)(6). Quarterly Fees also cannot be waived. *See, e.g., Cranberry Growers*

Cooperative v. Layng, 930 F.3d 844, 853 (7th Cir. 2019) (there is no basis for a waiver of quarterly fees). The UST objects to this Plan provision to ensure that fees mandated by Congress are properly paid on disbursements made. *See* 28 U.S.C. § 586(a)(3)(D). The UST is not seeking to "double-count" disbursements for Quarterly Fees purposes. Quarterly Fees would not be assessed on funds disbursed from the Debtor to the Survivors' Trust *and then again* when the same funds are disbursed by the Survivors' Trust.

60. Therefore, the Plan should be amended to expressly require both the Debtor and the Survivors' Trust to pay applicable Quarterly Fees to the UST in the amounts required, and as calculated, under 28 U.S.C. § 1930(a)(6) (or amounts that remain unpaid from the period prior to the Effective Date) until the earlier of (1) a final decree closing the Debtor's chapter 11 case or (2) conversion or dismissal of the Debtor's chapter 11 case.

C. <u>The Disclosure Statement Does Not Provide Adequate Information about the Legal or Factual Bases for the Discharge of the Churches.</u>

61. As noted, the Plan appears to contemplate that the Churches will benefit from the Debtor's discharge. *See* Plan, at 74 of 93 (§ 13.3).

62. According to the Disclosure Statement, the Churches are not separately incorporated, but each parish is a "separate public juridic person." *See* Disclosure Statement, at 25, 27 of 86. It does not appear that the Plan provides for the contribution of Church property to the Survivors' Trust. *See id.*, at 10–11, 27 of 86. Moreover, there appears to be a dispute between the Debtor and the Committee as to whether Church property belongs to the Debtor's estate. *See* ECF No. 1464 (Committee's Complaint for Declaratory Relief).

63. Considering the apparent dispute between the Debtor and Committee about the ownership of Church property, the Debtor should amend the Disclosure Statement to expressly address the bases for the Churches' apparent receipt of discharges under the Plan. *Cf. In re*

Lowenschuss, 67 F.3d at 1401 ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors.").

D. <u>The Disclosure Statement Does Not Provide Adequate Information about the Identity and Affiliations of the Survivors' Trustee.</u>

64. The proponent of a plan must disclose the identity and affiliations of "any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan." *See* 11 U.S.C. § 1129(a)(5)(A)(1); *In re Go-Go's Greek Grille, LLC*, 617 B.R. 394, 396 (Bankr. M.D. Fla. 2020). Section 1129(a)(5) contains a "blend of disclosure and substantive requirements." *See In re Beyond.com Corp.*, 289 B.R. at 144.

65. Here, neither the Plan nor the Disclosure Statement disclose the identity of the Survivors' Trustee. The Plan instead provides that "[o]n the Confirmation Date, the Bankruptcy Court shall appoint the Survivors' Trustee to serve in accordance with, and who shall have the functions and rights provided in, the Survivors' Trust Documents." *See* Plan, at 52 of 93 (§ 9.2).

66. The identity and affiliations of the Survivors' Trustee are highly relevant to Abuse Claimants' consideration of the Plan and should be disclosed in the Disclosure Statement. *See*, *e.g.*, *In re Affordable Med Scrubs, LLC*, 2016 WL 3693978, at *2 (Bankr. N.D. Ohio July 5, 2016) ("A hypothetical investor cannot make an informed judgment as to whether his interests would be better served by a liquidation conducted by a Chapter 7 trustee … rather than being conducted by the Liquidating Trustee … without information regarding the Liquidating Trustee's experience and credentials and his relationship with FirstMerit.").

67. The Debtor should similarly provide the forms of the Survivors' Trust Agreement and the Survivors' Trust Distribution Plan to Abuse Claimants with the Disclosure Statement. *See*

id. ("[p]roviding … a form of the Liquidating Trust Agreement in a plan supplement before a hearing on confirmation as contemplated in the Disclosure Statement is inadequate.").[8]

E. The Disclosure Statement Does Not Provide Adequate Information about the Identity of those Who Would Receive the Third-Party Release.

68. As described above, the Third-Party Release would benefit a host of unidentified categories of parties related to the Debtor, the Churches, and the Contributing Non-Debtor Catholic Entities. *See* Plan, at 20 of 94 (§ 1.1.92). It includes their "current and former directors, managers, officers, employees, equity holders (regardless of whether such interests are held directly or indirectly), interest holders, predecessors, successors, and assigns, subsidiaries, affiliates, managed accounts or funds, and each of their respective current and former equity holders, officers, directors, managers, principals, shareholders, members, management companies, fund advisors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals." There is no way for any Abuse Claimant using the four corners of the documents the Debtor will provide to them—nor even searching beyond them—to know the identity of all these parties and thus to consent to releasing them.

F. The Disclosure Statement Does Not Provide Adequate Information about the Filing of Post-Confirmation Quarterly Reports.

69. Bankruptcy Code Section 1106(a)(7), Fed. R. Bankr. P. 2015(a)(5), and 28 C.F.R. § 58.8 require a debtor to file with the Court and serve on the UST, quarterly financial reports to enable the Court and parties to monitor compliance with the plan of reorganization. In addition,

[8] The Debtor intends to provide these documents as part of the Plan Supplement. Because the Plan Supplement is due only 5 business days before the Voting Deadline (Plan, at 19 of 93 (§ 1.1.83)), Abuse Claimants may have insufficient time to assess the relevant information.

pursuant to 28 U.S.C. § 586(a)(3)(D), the UST is tasked to take any appropriate action to ensure that all reports and fees required by the debtor to be filed and paid are properly and timely filed.

70. Here, the Plan and Disclosure Statement do not address the filing of post-confirmation quarterly reports. Consistent with Section 1106(a)(7), Fed. R. Bankr. P. 2015(a)(5), and 28 C.F.R. § 58.8, the Plan should be amended to expressly require the Debtor and the Survivors' Trust be responsible to meet the requirements of 28 C.F.R. § 58.8 in all post confirmation reporting.

IV. RESERVATION OF RIGHTS

71. The UST reserves her right to make any and all confirmation objections in connection with any confirmation hearing, including additional objections to the permissibility of the Plan's releases, exculpations, and injunctions. The UST further reserves her right to supplement this Objection if the Debtor modifies or otherwise supplements the Disclosure Statement, the Plan, and/or the Solicitation Procedures Motion.

V. CONCLUSION

72. Based on the foregoing, the UST respectfully requests that the Court (i) sustain the Objection and (ii) disapprove the Disclosure Statement and the Solicitation Procedures Motion, unless modified to address the concerns set forth in this Objection.

Dated: December 10, 2024

Respectfully submitted,

TRACY HOPE DAVIS
UNITED STATES TRUSTEE

By:/s/ Jason Blumberg
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