

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

GRITSTONE BIO, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-12305 (KBO)

(Jointly Administered)

Re: Docket Nos. 355, 364, & 387

Obj. Deadline: Feb. 6, 2025 at 5:00 p.m. (ET)<sup>2</sup>

Hearing Date: Feb. 12, 2025 at 9:30 a.m. (ET)

**THE UNITED STATES TRUSTEE’S OBJECTION TO AMENDED DEBTOR’S MOTION FOR AN ORDER (I) APPROVING THE DISCLOSURE STATEMENT; (II) SCHEDULING CONFIRMATION HEARING; (III) APPROVING FORM AND MANNER OF NOTICE OF CONFIRMATION HEARING; (IV) ESTABLISHING PROCEDURES FOR SOLICITATION AND TABULATION OF VOTES TO ACCEPT OR REJECT PLAN, INCLUDING (A) APPROVING FORM AND CONTENT OF SOLICITATION MATERIALS; (B) ESTABLISHING RECORD DATE AND APPROVING PROCEDURES FOR DISTRIBUTION OF SOLICITATION MATERIALS; (C) APPROVING FORMS OF BALLOTS; (D) ESTABLISHING VOTING DEADLINE FOR RECEIPT OF BALLOTS AND (E) APPROVING PROCEDURES FOR VOTE TABULATIONS; (V) APPROVING FORM AND MANNER OF NOTICE OF PLAN RELEASES; (VI) ESTABLISHING DEADLINE AND PROCEDURES FOR FILING OBJECTIONS TO CONFIRMATION OF PLAN; AND (VII) GRANTING RELATED RELIEF**

Andrew R. Vara, the United States Trustee for Region Three (the “U.S. Trustee”), through his undersigned counsel, hereby objects (the “Objection”) to: (i) approval of the *Disclosure Statement with Respect to Gritstone bio, Inc.’s Chapter 11 Plan of Reorganization* [D.I. 355] (the “Disclosure Statement”); and (ii) *Amended Debtor’s Motion for an Order (I) Approving the Disclosure Statement; (II) Scheduling Confirmation Hearing; (III) Approving Form and Manner of Notice of Confirmation Hearing; (IV) Establishing Procedures for Solicitation and Tabulation*

<sup>1</sup> The Debtor’s mailing address is 4698 Willow Road, Pleasanton, CA 94588, and the last four digits of the Debtor’s federal tax identification number are 9534.

<sup>2</sup> The objection deadline was extended by agreement of the parties.



*of Votes to Accept or Reject Plan, Including (A) Approving Form and Content of Solicitation Materials; (B) Establishing Record Date and Approving Procedures for Distribution of Solicitation Materials; (C) Approving Forms of Ballots; (D) Establishing Voting Deadline for Receipt of Ballots and (E) Approving Procedures for Vote Tabulations; (V) Approving Form and Manner of Notice of Plan Releases; (VI) Establishing Deadline and Procedures for Filing Objections to Confirmation of Plan; and (VII) Granting Related Relief*[D.I. 387] (the “Procedures Motion”),<sup>3</sup> and in support of this Objection respectfully states:

**PRELIMINARY STATEMENT**

1. The Court should deny approval of the Disclosure Statement for the following separate and independent reasons:

- (a) The Debtor’s proposed plan is unconfirmable and should not be solicited using procedures that facilitate the plan’s defects. The court must deny approval of a disclosure statement if the related proposed plan is not confirmable on its face. Here, the proposed plan is unconfirmable for at least the following reasons:
  - (i) the proposed plan imposes non-consensual third-party releases on holders of claims who vote to accept the plan, if they fail to check the opt-out box on the ballot, but deeming consent based solely on a vote to accept the plan without checking an opt out box is not consistent with applicable state law; and
  - (ii) The proposed plan includes an injunction to enforce the third-party release and exculpation that is not supported by any authority.

2. Accordingly, and for the reasons set forth in more detail herein, the U.S. Trustee respectfully requests that the Court enter an order or orders: (a) denying approval of the Disclosure Statement; and (b) denying approval of the Procedures Motion.

---

<sup>3</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Disclosure Statement and the Procedures Motion, as applicable.

### **JURISDICTION AND STANDING**

3. This Court has jurisdiction to hear and determine the Procedures Motion, approval of the Disclosure Statement 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 Procedures Motion and approval of the Disclosure Statement 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 October 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. On October 29, 2024, the U.S. Trustee appointed an official committee of unsecured creditors (the "Committee").

8. The Debtor filed its Disclosure Statement on January 16, 2025. [D.I. 355]. The Debtor filed its Liquidation Analysis on February 7, 2025. [D.I. 413].

**B. The Procedures Motion**

9. On January 16, 2025, the Debtor filed its initial Procedures Motion. The Debtor amended the initial Procedures Motion with a filing on January 29, 2025, which addressed issues with the Solicitation materials using forms that did not match the contents of the Disclosure Statement or Plan, and that were inconsistent with *Harrington v. Purdue Pharma L.P.*, 603 U.S. \_\_\_, 144 S. Ct. 2071, 2082-88 (2024). In the Procedures Motion, the Debtor requests approval of the Disclosure Statement and approval of procedures for the solicitation and tabulation of votes on the Plan.

10. The Solicitation Procedures generally provide that the Debtors will send holders of claims in Classes 1, 3, 4, 5 and 6 a ballot that gives the option to “opt out” to the Plan’s Third Party Releases, and provides that if you vote to accept the Plan, and do not also affirmatively opt out on the ballot, you will be deemed to have consented to the releases contained in the Plan. Procedures Mot. Ex. D1 through D5.

11. Creditors in classes who are fully impaired or unimpaired will receive a non-voting status form, which provides “the Third Party Release does not apply to Holders of Claims or Interests in Non-Voting Classes.”. *Id.*, Ex. C1 & C2.

**C. Specific Provisions of the Debtor’s Proposed Plan**

12. On January 16, 2025, the Debtors filed the *Gritstone bio, Inc.’s Chapter 11 Plan of Reorganization* (the “Plan”). [D.I. 354]. The Plan includes the following provisions relevant to this Objection.

**Third-Party Release Provisions**

13. Article IX.C of the Plan provides as follows (the “Releases by Holders of Claims”):

***Releases by Holders of Claims***

As of the Effective Date, for good and valuable consideration, ***unless such Holder elects on its ballot to opt out of the release provided herein, each Holder of a Claim that is eligible to vote to accept or reject the Plan that has affirmatively voted to accept the Plan,*** shall be deemed to have unconditionally released and discharged the Released Parties from any and all claims, obligations, rights, suits, damages, causes of action, remedies and liabilities whatsoever, including any claims or causes of action that have been or could be asserted by or on behalf of the Debtor or the Estate or that are derivative or duplicative of any such claims or causes of action, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, that such Holder of a Claim could have been legally entitled to assert in its own right (whether individually or collectively), based in whole or in part upon any act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date, in any way relating or pertaining to (i) the purchase or sale, or the rescission of a purchase or sale, of any security of the Debtor, (ii) the Debtor or the operation or conduct of the business of the Debtor, (iii) the Chapter 11 Case and/or (iv) the negotiation, formulation and preparation of the Plan, or any related agreements, instruments or other documents; provided that these releases will have no effect on the liability of any Released Party arising from any act, omission, transaction, agreement, event or other occurrence, constituting fraud, criminal conduct, gross negligence or willful misconduct. The releases set forth in this paragraph shall be binding upon and shall inure to the benefit of the Reorganized Debtor and the Liquidating Trustee and any other successor to the Debtor or the Estate. ***Each ballot will have a place for a party to opt out of the release provided herein.*** Nothing in the foregoing or elsewhere in the Plan constitutes a waiver or release of any right to receive distributions from the Reorganized Debtor or the Liquidating Trust, as applicable, or of any portion of a Claim supporting such right.

Plan, Art. X.C (emphasis added).

14. The Plan provides the following definition for the term “Released Party”:

“*Released Party*” or “*Released Parties*” means, subject to any exclusions expressly set forth in the Plan and other than the Excluded Parties, the Debtor, the Estate, the Committee, each of the DIP Lenders, the DIP Agent, each of the Prepetition Lenders, each of the Prepetition Agent and each of their respective successors and current and former control persons, trustees or beneficiaries, direct or indirect shareholders or members, officers, directors, employees, affiliates, principals and agents (and each of their respective attorneys, consultants, financial advisors, investment bankers, accountants, and other retained professionals), in each case solely in their capacities as such.

*Id.* at Art. I.B, Item 94.

15. The Plan also includes an injunction in support of the Third-Party Release and the Plan Exculpation (the “Plan Injunction”):

Except as otherwise expressly provided for herein or for obligations issued or required to be paid pursuant to the Plan or the Confirmation Order, all Persons and Entities that have held, hold, or may hold claims, interests, obligations, suits, judgments, damages, demands, debts, rights, remedies, actions, or causes of actions that have been released or exculpated under the Plan or Confirmation Order are permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, any of the Released Parties or the Exculpated Parties (collectively, the “Enjoined Matters”): (1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any Enjoined Matters; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against the Released Parties and the Exculpated Parties on account of or in connection with or with respect to any Enjoined Matters; (3) creating, perfecting, or enforcing any Lien or encumbrance of any kind against the Released Parties and the Exculpated Parties on account of or in connection with or with respect to Enjoined Matters; (4) asserting any right of setoff, subrogation or recoupment of any kind against any obligation due from the Released Parties and the Exculpated Parties or their property on account of or in connection with or with respect to any Enjoined Matters unless such Holder has Filed a motion requesting the right to perform such setoff on or before the Confirmation Date or has Filed a Proof of Claim or proof of Equity Interest indicating that such Holder asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any Enjoined Matters. Notwithstanding anything to the contrary in the foregoing, the injunction set forth above does not enjoin the enforcement of any obligations arising on or after the Effective Date of any Person or Entity under the Plan (including the Debtor’s obligations pursuant to the Plan of the Confirmation Order).

The Vested Causes of Actions constitute assets of the Debtor’s Estate, and from and after the Effective Date, the terms of this Plan and any Confirmation Order, constitute Liquidation Trust Assets to be prosecuted, settled, dismissed, or otherwise resolved in accordance with the provisions of this Plan and the Liquidating Trust Agreement and any other Person is stayed and enjoined from proceeding with such Vested Causes of Actions pursuant to the provisions of Section 362 of the Bankruptcy Code

*Id.* at Art. X.C.

**OBJECTION**

**I. THE DISCLOSURE STATEMENT LACKS ADEQUATE INFORMATION REGARDING THE THIRD-PARTY RELEASE PROVISIONS.**

16. 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).

17. 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).

18. 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).

19. 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 Adelpia Commc’ns Corp.*, 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006) (citing *Century Glove*, 860 F.2d at 100).

20. 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).

21. Applied here, the Disclosure Statement does not provide sufficient disclosures appropriate to the circumstances of these Chapter 11 Cases. In particular, the Debtor has failed to attach exhibits relating to what creditors would receive in a hypothetical chapter 7 case, and to provide its financial projections. Further, the Debtor fails to disclose the nature and value of the claims the voting parties are releasing. Relatedly the Disclosure Statement does not contain information as to what (if anything) the Debtor is receiving as consideration for its release under the Plan.

22. The Disclosure Statement simply repeats the language of the plan provision relating to the third-party release, which is long, dense, difficult to understand, and does not identify specific claims that will be released. The operative sentence setting forth the scope of the release runs for more than ten lines and includes numerous technical terms. Moreover, the Released Parties include unidentified categories of people no creditor will have the information to identify, “each of their respective successors and current and former control persons, trustees or beneficiaries, direct or indirect shareholders or members, officers, directors, employees, affiliates, principals and agents (and each of their respective attorneys, consultants, financial advisors, investment bankers, accountants, and other retained professionals).” Plan, Art. I.B, Item 94.

23. In summary, the Disclosure Statement fails to provide adequate information as to t who will receive third-party releases, what claims are being released, the value of such claims, and the consideration the voting parties are receiving in exchange for the releases. Because the Disclosure Statement fails to provide adequate information as to numerous, significant issues, the Court should not approve the Disclosure Statement as currently drafted.

**II. THE COURT MUST DENY APPROVAL OF THE DISCLOSURE STATEMENT BECAUSE THE PLAN IS UNCONFIRMABLE.**

24. If the proposed plan is patently unconfirmable on its face, the bankruptcy court must deny the application to approve the disclosure statement. *See generally In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007) (*citing In re Beyond.com Corp.*, 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003) (collecting cases); *In re 266 Washington Assocs.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y.), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992); *In re Filex, Inc.*, 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990)).

25. Moreover, the Court should not approve solicitation procedures that facilitate the Plan's defects, and it would be a waste of estate resources for the Debtors to solicit votes on a Plan that is patently unconfirmable.

26. Here, the Court must deny approval of the Disclosure Statement because the Plan is patently unconfirmable on two separate and independent bases. *First*, the Plan is unconfirmable because it would impose non-consensual Third-Party Releases on all holders of claims who vote in favor of the Plan if they do not also check the "opt out" box on the ballot. *Second*, the Plan includes an injunction against released claims that is not authorized under the Bankruptcy Code nor supported by the traditional factors parties must meet to receive an injunction.

**A. The Plan is Not Confirmable Because Merely Voting for a Plan and Failing to Opt Out Does Not Provide the Required Affirmative Consent to a Third-Party Release**

27. The Supreme Court has definitively held that 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). The Supreme Court in *Purdue* did not address whether consensual non-debtor releases can be included in a chapter 11 plan and confirmation order.

28. The foundation of a consensual release is an agreement between the parties. Whether non-debtor parties have reached an agreement—including an agreement to release one’s claims against another (*i.e.*, not to sue)—is governed by state law. The only exception is if there is federal law that preempts applicable state contract law in some specific context. *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)).

29. No such exception applies here. The Bankruptcy Code does not define a “consensual release.” It contains no provision that addresses how to determine whether one non-debtor has agreed to extinguish its direct claims against another non-debtor. And no Code provision authorizes courts, as part of an order confirming a chapter 11 plan or otherwise, to “deem” a non-debtor to have consented to an agreement to release claims against other non-debtors where such consent would not otherwise be found to exist as a matter of state law. Nor does 11 U.S.C. § 105(a) itself confer any power to override state law. Rather, section 105(a) “serves only to carry out authorities expressly conferred elsewhere in the code.” *Purdue*, 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). Accordingly, any authority to include third-party releases in a plan must derive from some other source of law. Thus, the Bankruptcy Code does not change the state-law definition of consent as applicable to claims among non-debtor parties.<sup>4</sup>

---

<sup>4</sup> 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)

30. As courts have recognized, because the Bankruptcy Code does not govern relationships between claim holders and non-debtor third-parties, state-law contract principles serve as controlling authority when considering whether a release is consensual. *See, e.g., 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 Smallhold, Inc.*, 665 B.R. 704, 720 (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.”); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 506, 507 (Bankr. D.N.J. 1997) (explaining that a third-party release “is no different from any other settlement or contract” and thus “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.*, 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024) (quoting *Purdue Pharma*

---

(“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.”). That is because “the 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.” *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) (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.”).

*L.P.*, 144 S. Ct. at 2086). Accordingly, “any such consensual agreement would be governed by state law.” *Id.*

31. Here, the Debtor does not meet the state-law burden of establishing that all Holders of Claim voting on the Plan will affirmatively agree to release their property rights in a manner sufficient to demonstrate consent under state law, specifically as to those parties who are deemed to consent to the release by virtue of their vote to accept the Plan if they do not also opt out.

**i. Under State Law, Silence Is Not Acceptance**

32. The “general rule of contracts is that silence cannot manifest consent.” *Patterson*, 636 B.R. at 686; *see also, e.g., McGurn v. Bell Microproducts, Inc.*, 284 F.3d 86, 90 (1st Cir. 2002) (recognizing “general rule” that “silence in response to an offer . . . does not constitute acceptance of the offer”). Moreover, “[o]rdinarily[,] 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); *accord* 1 Corbin on Contracts § 3.19 (2018); 4 Williston on Contracts § 6:67 (4th ed.); *Reichert v. Rapid Investments, Inc.*, 56 F.4th 1220, 1227 (9th Cir. 2022) (“[T]he offeror cannot prescribe conditions so as to turn silence into acceptance.”). Instead, under state law, an agreement to release claims—like any other contract—generally requires a manifestation of assent to that agreement. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (“[T]he formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and a consideration.”). Consent cannot be imputed or “deemed” based on a party’s failure to object—rather, consent must be affirmatively shown to exist. *See, e.g., id.*; RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a.

33. There are only very limited exceptions to that principle. “[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).

34. But absent such extraordinary circumstances, "[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." *Id.* And "[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." *Id.* § 69, cmt. c; *see also Patterson*, 636 B.R. at 686 (explaining how contract law does not support deeming consent based upon a failure to opt out).

35. Delaware's common law, as a point of reference, is in accord.<sup>5</sup> *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)). Absent limited exceptions not triggered here, silence and inaction are not assent to an offer. *See Urban Green Techs., LLC v. Sustainable Strategies 2050 LLC*, No. N13C-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).

36. The Debtor proposes that the Third-Party Releases in the Plan, which benefit numerous non-debtors that are Released Parties, bind: all Holders of Claims and Interests who vote to accept the Plan and do not also opt out.

**ii. Voting to Accept a Plan Without Opting Out is Not Consent to Release Non-Debtors**

---

<sup>5</sup> While the Plan provides that its construction and enforcement is governed by the laws of the State of Delaware, debtors cannot choose the law to apply to contracts between non-debtors. Rather, ordinary choice of law principles govern which state's law applies to contracts between non-debtors, although a choice of law analysis may not be necessary absent any assertion that there is a difference in potentially applicable state laws governing what constitutes consent. *See Smallhold*, 665 B.R. at 722 n.57.

37. The Plan thus would extract non-consensual third-party releases from holders of claims who vote to accept the Plan if they fail to check the opt-in box on the Class 1, 3, 4, 5 and 6 ballots. Because the Plan would impose non-debtor releases on these parties without their affirmative consent as to those releases, the releases are not consensual under state law and thus cannot be approved under *Purdue*.

38. 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).

39. As an initial matter, merely voting to approve a plan is not an expression of consent to a non-debtor release. *See, e.g., In re Congoleum Corp.*, 362 B.R. 167, 194 (Bankr. D.N.J. 2007) (“[A] consensual release cannot be based solely on a vote in favor of a plan.”); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (reaching same conclusion). As explained in *Arrowmill*, a voluntary release arises only “because the *creditor agrees*” to it. 211 B.R. at 507 (emphasis in original). There is nothing in the Code that authorizes treating a vote to accept a chapter 11 plan as consent to a third-party release. Instead, the “validity of th[at] release” necessarily “hinges upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court’s confirmation order.” *Id.* (citation and alterations omitted). Because “a creditor’s approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings,” “it is not enough for a creditor . . . to simply vote ‘yes’ as to a plan” in order to destroy its rights under nonbankruptcy law. *Id.* (quotation marks omitted); *accord Congoleum Corp.*, 362 B.R. at 194; *In re Digital Impact, Inc.*, 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998). Rather, a creditor must “unambiguously manifest[] assent to the release of the nondebtor from liability on its debt.” *Arrowmill*, 211 B.R. at 507.

40. Because merely voting to approve a plan does not manifest consent to a non-debtor release, such a vote plus a failure to opt out is still nothing more than silence with respect to the offer to release claims against non-debtors. Voting to accept a plan but remaining silent about a non-debtor release by failing to check an opt-out box does not fit within any of the exceptions to the rule that silence is not acceptance of an offer.

41. Creditors who vote for a plan without opting out of a non-debtor release are not “silently tak[ing] offered benefits” from the released non-debtors, such that consent may be inferred. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). The only benefits received by the creditors are distributions from the debtor’s chapter 11 plan. Thus, “[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 v. Samsung Telecomm’s Am., LLC*, 845 F.3d 1279, 1286 (9th Cir. 2017) (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). Further, non-debtors have no right to prevent a debtor’s creditors from receiving distributions under the debtor’s chapter 11 plan, and thus acceptance of those distributions does not manifest acceptance of an offer to release non-debtors. *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.”).



42. Nor does voting to approve a chapter 11 plan while remaining silent about a non-debtor release “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. 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 does not manifest consent to release claims against non-debtors. 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*.

43. 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. *See Norcia*, 845 F.3d at 1285-86. Nor do creditors have any 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); *SunEdison, Inc.*, 576 B.R. at 460–61 (recognizing that creditors have no duty to speak regarding a plan that would allow a court to infer consent to third-party releases from silence). A claimant’s vote in favor of a plan while remaining silent regarding a non-debtor release thus does not fit within the exception to the general rule that consent cannot be inferred from silence.

44. The United States Trustee recognizes that the court in *Smallhold* found that, in at least some circumstances, the act of voting on a debtor’s plan (whether to accept or reject it) combined with a failure to exercise an opt-out option can constitute consent to a non-debtor release. *See Smallhold*, 665 B.R. at 723. The *Smallhold* decision, however, although stating it was applying “ordinary contract principles,” 665 B.R. at 710, 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 and that remains true even when that option is conspicuous or well-advertised.

45. In *Smallhold*, the court reasoned that consent to a non-debtor release could be understood to exist because the act of voting on a debtor's plan is an "affirmative step" taken after being told that failing to opt out would bind the voter to the non-debtor release. *Smallhold*, 665 B.R. at 723. But while voting is certainly an "affirmative step" with respect to the debtor's plan, it is not a "*manifestation of intention* that silence may operate as acceptance" of a third-party release. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) (emphasis added). The bankruptcy exists to resolve debtor's liabilities, not those of third parties. And because, as noted above, *supra* 37-43, creditors have no affirmative obligation to act even as to a debtor's plan, they certainly can have no duty to respond to an offer to release non-debtors of liabilities that exist outside the bankruptcy case entirely. 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 does not manifest consent to release claims against non-debtors. Thus, the act of voting on a plan without taking an additional step to opt out is still merely silence with respect to the non-debtor release.

46. As explained by the Restatement, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction"—in this case, the freedom to vote on a chapter 11 plan—"or impose on him any duty to speak," such as by checking an opt out box or returning an opt out form. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). Voting on a plan while failing to opt out thus cannot be equated with affirmative conduct manifesting consent to the non-debtor release. Just like the hypothetical creditors in *Smallhold* could not be

forced to contribute \$100 to a college fund to benefit the debtor's CEO's children merely because they failed to return a ballot with an "opt out" box, *Smallhold*, 665 B.R. at 710, creditors who cast such a ballot should not be forced to make such a contribution merely because they failed to check that "opt out" box. State law affords no basis to conclude that consent to release *third-party* claims (which are governed by *nonbankruptcy* law) can properly be inferred from a party's mere failure to check an opt-out box on a ballot expressing views about the proposed treatment of a creditor's claims against the *debtor* (governed by *bankruptcy* law). *See supra* 37-43. As a result, the "general proposition" that *Smallhold* recognized continues to apply: "creditors must *affirmatively express consent to the release* in order to be bound by it." 665 B.R. at 717 (emphasis added); *accord* at 719-20 ("[I]t 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.").

47. Notably, the Ninth and Second Circuit cases cited by *Smallhold* do not support its conclusion that the act of voting on a chapter 11 plan while remaining silent regarding the non-debtor release constitutes consent. *Smallhold*, 665 B.R. at 724 n.60 (citing *Berman v. Freedom Financial Network*, 30 F.4th 849, 856 (9th Cir. 2022); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017)). Those cases emphasize the importance of notice as one prerequisite to consent, recognizing that "an 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." *Meyer*, 868 F.3d at 74 (internal quotation marks omitted; emphasis added). Those cases thus concern 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 while notice of a contractual term is certainly a necessary precondition to finding consent, notice is not alone sufficient. *See, e.g., Meyer*, 868 F.3d at 74; *Norcia*, 845 F.3d at 1284;

RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). Whether there has been sufficient notice of an offer is a distinct question from whether there has been a manifestation of an intent to accept that offer, particularly where the offer—*i.e.*, the proposed third-party release—amounts to a side agreement governed by nonbankruptcy law and benefiting distinct parties. As explained above, for that side agreement to be valid, there must also be a manifestation of consent to that agreement. *See, e.g., Berman*, 30 F.4th at 85; *Norcia*, 845 F.3d at 1284; RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

**B. The Plan Cannot Be Confirmed Because There Is No Authority for the Injunction Against Bringing Claims Against Non-Debtors**

48. This Court also may not approve the injunction enforcing the Third-Party Release because *Purdue* stands for the proposition that non-consensual third-party releases and injunctions are generally not permitted by the Bankruptcy Code. *See Purdue Pharma L.P.*, 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 id.* at 2085 (citing 11 U.S.C. § 524(e)).

49. Even if releases between non-debtors 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. Parties seeking an injunction “must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also Purdue Pharma*, 144 S. Ct. at 2085 (noting that an injunction is an “extraordinary remedy”); *Weinberger*

*v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“An injunction should issue only where the intervention of a court of equity ‘is essential in order effectually to protect property rights against injuries otherwise irreparable.’”) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)); *Fechter v. HMW Indus., Inc.*, 879 F.2d 1111, 1119 (3d Cir. 1989) (“We have long followed the principle that equitable remedies are available once legal remedies are found to be inadequate.”) (citing *Weinberger*).

50. The Debtor has made no attempt to show that any of these factors are met. Nor could it. If the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent irreparable harm to either the estate 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.

51. Similarly, there is no statutory authority in the Bankruptcy Code that justifies an injunction to enforce an exculpation, and the Debtors have shown no need for an injunction to prevent “irreparable harm” to either the estates or the released parties.

### **RESERVATION OF RIGHTS**

52. The U.S. Trustee leaves the Debtor to its 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 approval of the Disclosure Statement; (ii) denying the Procedures Motion; and (iii) granting such other and further relief as the Court deems just and equitable.

Dated: February 10, 2025

Respectfully submitted,

**ANDREW R. VARA**  
**UNITED STATES TRUSTEE**  
**REGIONS 3 AND 9**

By: /s/ Timothy J. Fox

Timothy J. Fox, Jr. (DE Bar No. 6737)  
Trial Attorney  
United States Department of Justice  
Office of the United States Trustee  
J. Caleb Boggs Federal Building  
844 N. King Street, Room 2207, Lockbox 35  
Wilmington, DE 19801  
Telephone: (302) 573-6491  
Email: Timothy.Fox@usdoj.gov

**CERTIFICATE OF SERVICE**

I, Timothy J. Fox, Jr., hereby certify that on February 10, 2025, a copy of this Objection was caused to be served *via* electronic service on the parties registered with the Court's CM/ECF system with courtesy copies sent via email to other parties in interest.

Dated: February 10, 2025

/s/ Timothy J. Fox  
Timothy J. Fox, Jr.