Office of the United States Trustee
1100 Commerce Street, Room 976
Dallas, Texas 75242
(214) 767-8967
Meredyth A. Kippes
for the United States Trustee
meredyth.kippes@usdoj.gov

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Case No. 25-80121-mvl11**
	§	
HIGHER GROUND EDUCATION, INC., et al.,	§	**(Jointly Administered)**
	§	
	§	**Chapter 11**
***Debtors-in-Possession*.**	§	

UNITED STATES TRUSTEE'S OBJECTION TO (A) DEBTOR'S MOTION FOR ENTRY OF AN ORDER (I) CONDITIONALLY APPROVING THE DISCLOSURE STATEMENT (II) SCHEDULING A COMBINED DISCLOSURE STATEMENT APPROVAL AND PLAN CONFIRMATION HEARING; (III) ESTABLISHING A PLAN AND DISCLOSURE STATEMENT OBJECTION DEADLINE AND RELATED PROCEDURES; (IV) APPROVING THE SOLICITATION AND NOTICE PROCEDURES; AND (V) GRANTING RELATED RELIED AND (B) CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT FOR THE JOINT PLAN OF REORGANIATION OF HIGHER GROUND EDUCATION, INC. AND ITS AFFILIATED DEBTORS
(related to docket entry nos. 97 and 98)

TO THE HONORABLE MICHELLE V. LARSON,
UNITED STATES BANKRUPTCY JUDGE:

Lisa L. Lambert, the United States Trustee for Region 6 (the "United States Trustee"), files this objection (the "Objection") to (A) Debtors' Motion for Entry of an Order (I) Conditionally Approving the Disclosure Statement (II) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing; (III) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures; (IV) Approving the Solicitation and Notice Procedures; and (V) Granting Related Relief (the "Solicitation Motion," Docket Entry No. 98) and (B) Conditional

Approval of the Disclosure Statement for the Joint Plan of Higher Ground Education, Inc., and its Affiliated Debtors (the "Disclosure Statement," Docket Entry No. 97).

SUMMARY

The United States Trustee objects to the Solicitation Motion and conditional approval of the Disclosure Statement because (i) conditional approval of a disclosure statement is not appropriate under the facts of this case and (ii) the Joint Plan of Higher Ground Education, Inc., and its Affiliated Debtors (the "Plan," Docket Entry No. 94) contains impermissible third-party releases, exculpations, and injunctions that render the Plan patently unconfirmable.

Because the Court approves the ballot and "non-voting notices" when approving the disclosure statement, and because here, the ballot and "non-voting notices" will facilitate certain of the Plan's flaws, parties in interest should have an opportunity to object to the ballot, the "non-voting notices" and Disclosure Statement in advance of a confirmation hearing on a Plan with such impermissible provisions.

Further, approval of the Disclosure Statement, conditionally or otherwise, is inappropriate because the Disclosure Statement does not contain adequate information as required by 11 U.S.C. § 1125(a)(1).

Specifically, with regard to the Plan, the United States Trustee objects to the following:

a. The Plan violates the United States Bankruptcy Code by imposing nonconsensual third-party releases on:

   i. claim holders in voting classes that do not return ballots with an "opt-out" election checked; and

   ii. non-voting claim holders who do not return an "opt-out" form.

Through this process, the Plan imposes non-debtor releases without the releasing parties' affirmative, voluntary, and knowing consent under state law. The releases are thus nonconsensual and cannot be approved under recent Supreme Court precedent.

b. The Plan should specify that the Plan does not release claims of governmental entities exercising their police and regulatory authority.

FACTUAL ALLEGATIONS

Commencement of the Case

1. June 17 and 18, 2025, the Debtors filed voluntary petitions in Chapter 11 before this Court (the "Petition Dates").

2. On June 20, 2025, the Court heard "first day hearings" in this case.

3. The Debtors filed the Plan on June 26, 2025.

4. The Debtors also filed the Debtors' Motion for Entry of an Order (I) Authorizing and Approving Assumption of the Restructuring Support Agreement, (II) and Granting Related Relief (the "RSA Motion," Docket Entry No. 93), which was negotiated and entered into by certain parties prepetition in order to fix Plan terms and bind certain parties' voting rights in connection with confirmation of the Plan.[1]

5. Parties to the Restructuring Support Agreement (the "RSA") are as follows (collectively the "RSA Parties"):

a. the Debtors;

b. 2HR Learning, Inc. ("2HR"), as proposed plan sponsor;

c. YYYYY, LLC ("Five Y"), as senior DIP financing lender;

d. Guidepost Global Education, Inc. ("GG"), as junior DIP financing lender;

[1] The United States Trustee intends to file a separate objection to the RSA Motion.

e. Learn Capital Venture Partners IV, L.P. ("Learn");

f. Cosmic Education America Limited ("Cosmic");

g. Venn Growth GP Limited LP ("Venn");

h. Venture Lending & Leasing IX, Inc. ("Venture");

i. WTI Fund X, Inc., ("WTI");

j. Yu Capital LLC ("Yu Capital");

k. YuATI LLC ("YuATI");

l. YuFICB LLC ("YuFICB");

m. YuHGE A LLC ("YuHGE A");

n. NTRC Equity Partners LP ("NTRC");

o. Ramandeep Girn ("Mr. Girn"); and

p. Rebecca Girn ("Mrs. Girn").

6. Mr. Girn is the Debtors' co-founder and former CEO. Mrs. Girn is the Debtors' co-founder and former CFO. *See* Disclosure Statement, Article II, page 2.

7. The Plan collectively defines Mr. and Mrs. Girn as "Girn." *See* Plan, Article I, section 1.1.15, p. 8.

8. The Debtors filed the Solicitation Motion and the Disclosure Statement on June 27, 2025.

9. Under the Court's General Order 2023-01, Procedures for Complex Cases in the Northern District of Texas (the "Complex Procedures"), the Debtors set the deadline to object to the Solicitation Motion on July 11, 2025, which is fourteen days after service of the Solicitation Motion and less than a month into these cases. The Federal Independence Day holiday also fell within the Solicitation Motion objection period.

10. The Official Unsecured Creditors Committee (the "UCC") was appointed by the United States Trustee on July 8, 2025.

11. Since that time, the Debtors and the UCC have engaged in negotiations and mediation concerning, among other things, the Plan.

Certain Disclosure Statement, Balloting, Notice and Plan Terms

Classification of Claims and Interests

12. Article II of the Plan sets forth the following classes of claims.

Class	Claims and Interests	Status	Voting Rights
Class 1:	Bridge CN-3 Secured Lender Claim	Impaired	Entitled to Vote
Class 2:	WTI Secured Lender Claim	Impaired	Entitled to Vote
Class 3	CN Note Claims	Impaired	Entitled to Vote
Class 4:	Other Secured Claims	Unimpaired	Deemed to Accept; Not Entitled to Vote
Class 5:	Non-Tax Priority Claims	Unimpaired	Deemed to Accept; Not Entitled to Vote
Class 6:	General Unsecured Claims	Impaired	Entitled to Vote
Class 7:	Intercompany Claims	Impaired	Deemed to Reject; Not Entitled to Vote
Class 8:	Equity	Impaired	Deemed to Reject; Not Entitled to Vote
Class 9:	Subsidiary Equity Interests	Unimpaired	Deemed to Accept; Not Entitled to Vote

Release, Exculpation and Injunction

13. The Plan defines Released Parties in Article I, Section 1.1.102 as follows:

1.1.102 "Released Parties" means each of, and in each case in their capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) 2HR Learning, Inc., including without limitation in its capacities as Plan Sponsor; (d) YYYYY, LLC, including without limitation in its capacity as Senior DIP Lender; (e) Guidepost Global, including without limitation in its capacity as Junior DIP Lender; (f) Learn Capital, LLC; (g) Yu Capital; (h) WTI; (i) Girn; (j) Venn; (k) the Releasing Parties; (l) all Holders of Claims or Interests who do not affirmatively opt out of the releases provided by this Plan; (m) each current and former Affiliates of each Entity in clause (a) through the following clause (l); and each Related Party of each Entity in clause (a) through (l); provided that, in each case, an Entity shall not be a Released Party if it: (x) elects to opt out of the releases contained in Article 10.3 hereof or (y) timely objects to the releases contained in Article 10.3 hereof and such objection is not resolved before Confirmation.

14. Article I, section 1.1.103 of the Plan defines Releasing Parties as follows:

1.1.103 "Releasing Parties" means each of, and in each case in their capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) 2HR Learning, Inc., including without limitation in its capacities as Plan Sponsor; (d) YYYYY, LLC, including without limitation in its capacity as Senior DIP Lender; (e) Guidepost Global including without limitation in its capacity as Junior DIP Lender; (f) Learn Capital, LLC; (g) Yu Capital; (h) WTI; (i) Girn; (j) Venn; (k) all Holders of Claims or Interests that vote to accept or reject this Plan and who do not affirmatively opt out of the releases by timely completing and submitting the Opt-Out Form before the Voting Deadline; (l) all Holders of Claims or Interests that are deemed to accept or reject this Plan and who do not affirmatively opt out of the releases by timely completing and submitting the Opt-Out Form before the Voting Deadline; (m) all Holders of Claims or Interests who abstain from voting on this Plan and who do not affirmatively opt out of the releases by timely completing and submitting the Opt-Out Form before the Voting Deadline; (n) current and former Affiliates of each entity in clause (a) through the following clause (m) for which such Entity is legally entitled to bind such Affiliates to the releases contained in this Plan under applicable Law or that have otherwise received proper notice of this Plan; and (o) each Related Party of each Entity in clause (a) through this clause (m) for which such Entity is legally entitled to bind such Related Party to the releases contained in this Plan under applicable Law or that have otherwise received proper notice of this Plan; *provided that*, in each case, an Entity shall not be a Releasing Party if it: (x) elects to opt out of the releases contained in Article 10.3 hereof or (y) timely objects to the releases contained in Article 10.3 hereof and such objection is not resolved before Confirmation. Notwithstanding the foregoing, and for the avoidance of doubt, no party shall be a Releasing Party to the extent that such party did not receive proper notice and service of the Opt-Out Form.

15. Beyond the named parties, the Plan defines the "Releasing Parties" as including "(k) all Holders of Claims or Interests that vote to accept or reject this Plan and who do not affirmatively opt out of the releases by timely completing and submitting the Opt-Out Form before the Voting Deadline; (l) all Holders of Claims or Interests that are deemed to accept or reject this Plan and who do not affirmatively opt out of the releases by timely completing and submitting the Opt-Out Form before the Voting Deadline; (m) all Holders of Claims or Interests who abstain from voting on this Plan and who do not affirmatively opt out of the releases by timely completing and submitting the Opt-Out Form before the Voting Deadline; (n) current and former Affiliates of each entity in clause (a) through the following clause (m) for which such Entity is legally entitled to bind such Affiliates to the releases contained in this Plan under applicable Law or that have otherwise received proper notice of this Plan; and (o) each Related Party of each Entity in clause (a) through this clause (m) for which such Entity is legally entitled to bind such Related Party to the releases contained in this Plan under applicable Law or that have otherwise received proper notice of this Plan."

16. The Definition of Releasing Party goes on to provide that an "Entity shall not be a Releasing Party if it: (x) elects to opt out of the releases contained in Article 10.3 hereof or (y) timely objects to the releases contained in Article 10.3 hereof and such objection is not resolved before Confirmation. Notwithstanding the foregoing, and for the avoidance of doubt, no party shall be a Releasing Party to the extent that such party did not receive proper notice and service of the Opt-Out Form."

17. Based upon on the United States Trustee's reading of this provision, despite the language to the effect that all Holders of Claims or Interests that vote to accept or reject the Plan and do not opt out are Releasing Parties, the later provision that an entity shall not be a Releasing

Party if it files a confirmation objection to the Third-Party Release would also apply to those creditors. That provision must be clarified before the Plan can be solicited.

18. Further, the definition of Releasing Party should also be clarified to set forth plainly whether students, former students, parents of students or former students, and/or legal guardians of students or former students are proposed to be Releasing Parties and for what claims the Debtors seek to have students, parents of students, and/or legal guardians of students grant the Third Party Release.

19. Section 10.3 of the Plan, Releases by Releasing Parties (the "Third Party Release") is broad including direct and derivative claims, including derivative claims assertable on behalf of the Debtors, the Reorganized Debtors, and their Estates (thus, potentially hamstringing the UCC's ability to obtain derivative standing to pursue estate causes of action).

20. Third Party Release further purports not to extend to, among other things "any Cause of Action identified in the Schedule of Retained Causes of Action." No Schedule of Retained Causes of Action is attached to either the Plan as filed or the Disclosure Statement as filed such that no party in interest can know at this stage of the proceedings—when they must actually vote on the Plan—what causes of action may appear on the Schedule of Retained Causes of Action. This information may be critical to certain creditors' votes.

21. Moreover, the definition of "Schedule of Retained Causes of Action" in Article I, Section 1.1.112 of the Plan excludes "Claims or Causes of Action against any Released Party or any Exculpated Party that is released pursuant to Article 10 of the Plan." Accordingly, the provision in the description of the Third Party Release in Article X, Section 10.3, of the Plan and the definition of Retained Causes of Action appear to contradict one another and should be clarified.

22. The Plan also provides for broad exculpation and injunction provisions enforcing the proposed Debtor Release and Third Party Release, including protection of Exculpated and Released Parties from any claims relating to the RSA, which was entered into by the RSA parties prepetition.

Ballots and Notices in Connection with Solicitation

23. The following classes are described as impaired in the Plan and Disclosure Statement and are, thus, entitled receive ballots and to vote to accept or reject the Plan under the proposed solicitation procedures (the "Voting Creditors"):

a. Class 1, Bridge CN-3 Secured Lender Claim;

b. Class 2, WTI Secured Lender Claim;

c. Class 3, CN Note Claims; and

d. Class 6, General Unsecured Claims ("GUC").

24. The Debtors propose to send the full solicitation package to the Voting Creditors.

25. The following classes are described as unimpaired and are thus deemed to accept the Plan:

a. Class 4, Other Secured Claims;

b. Class 5, Non-Tax Priority Claims; and

c. Class 9, Subsidiary Equity Interests.

26. The following classes are described as impaired and are thus deemed to reject the Plan:

a. Class 7, Intercompany Claims; and

b. Class 8, Equity.

27. Together, the unimpaired classes that are deemed to accept the Plan and the impaired classes who are deemed to reject the Plan shall be referred to herein as the "Non-Voting Creditors."

28. The Debtors propose to send all of the Non-Voting Creditors, except for Class 7, Intercompany Claims, the Notice of Non-Voting Status Package, which is proposed to contain a Notice of Non-Voting Status, which includes an opt-out form and the combined notice of the Disclosure Statement and Plan.

29. The Debtors also propose to publish notice of the Plan, Disclosure Statement, objection deadline, opt-out deadline, and other information relating to these cases in the Wall Street Journal, New York time or a similar national publication (the "Publication Notice"). The Publication Notice is also proposed to be on the Debtors' claims agent's website.

30. To the extent the Debtors have received returned mail from a creditor and have not received a forwarding address, the Debtors seek a waiver from the Court of the requirement to solicit the Plan to those parties whose addresses the Debtors know are bad and for which the Debtors have no forwarding address.

Ballots and Non-Voting Status Notices

31. The proposed form of ballot provides separate checkboxes on page 6 for the creditor to (a) vote for or against the Plan and (b) opt out of the Third-Party Release. The checkboxes are followed by creditor's certifications on pages 6 and 7, with a signature box for the ballot located on page 8. *See* Solicitation Motion, Exhibit 4. The Plan, Article I, Section 1.1.103, provides that Voting Creditors are deemed to consent to the Third Party Release unless they opt out of it on the ballot, even if they choose to abstain from voting. The proposed form of ballot does not contain

the Third-Party Release language or definitions but instead refers the recipients to Section 10.3 of the Plan.

32. As described above, the Plan further provides that Nonvoting Creditors are deemed to consent to the release if they do not return the opt out form with the opt out box checked, even though they are not entitled to vote on the Plan. The Notice of Non-Voting Status is contemplated to provide information on how to obtain the Debtors' full solicitation package but does not include any of the documents themselves. *See* Solicitation Motion, Exhibit 5.

33. The second page of the Notice of Non-Voting Status informs the recipient that they are not entitled to vote on the Plan. Thus, a recipient of the Notice of Non-Voting Status may see on page 2 that they are not entitled to vote on the Plan and go no further.

34. The Notice of Non-Voting Status does not alert the recipients to the existence of and the opportunity to opt out of the Third Party Release until page 3 of the Notice of Non-Voting Status.

35. It is not until the fifth page of the Notice of Non-Voting Status that a Nonvoting Creditor will see the Release Opt-Out Form. Pages 8 and 9 of the Notice of Non-Voting Status describes the opt out of the Third Party Release as "optional." Page 8 also contains a checkbox for a Nonvoting Creditor to use to opt out of the Third-Party Release. Certifications for the Nonvoting Creditor returning an opt out form are on pages 8 and 9 of the Notice of Non-Voting Status. A signature block for the Nonvoting Creditor appears on page 9 of the Notice of Non-Voting Status.

Adequacy of Information

36. The Disclosure Statement is inadequate in several additional respects.

37. At the bottom of page 4 of the Disclosure Statement the Debtors include a disclaimer that "prospective recoveries set forth herein are subject to change," thus hedging all information relating to creditor recoveries under the Plan.

38. The Disclosure Statement contains no estimate of professional fees and, indeed, was filed before any employment application had been filed, apart from the Debtors' claims agent's application, which was heard at the first day hearings.

39. The Disclosure Statement attaches no financial projections or liquidation analysis, but instead drops a footnote saying that the financial projections and liquidation analysis will be filed on or before the deadline to file a plan supplement. The proposed deadline to file a plan supplement is August 22, 2025, three days before the proposed August 25, 2025 voting deadline and deadline to object to final approval of the Disclosure Statement and confirmation of the Plan. *See* Disclosure Statement, pp. 56-57. Accordingly, the Debtors propose to solicit acceptance or rejection of the Plan without financial projections or a liquidation analysis.

40. Although the Debtors seek approval of a Third-Party Release, the Disclosure Statement provides no specific information regarding the Debtors' analysis or investigation of the causes of action, including Debtors' claims or non-debtor third party claims against the Released Parties.

Governing Law

41. Article I, Section 1.2.4 of the Plan defines the governing law for the Plan as the laws of the State of Texas.

Reservation of Rights

42. The United States Trustee reserves the right to raise any and all applicable Plan objections in connection with confirmation of the Plan or any amended plan, whether or not such objections are articulated in this Objection.

OBJECTIONS

I. The facts of this case do not support conditional approval of the Disclosure Statement.

43. Although the hearing on the Solicitation Motion and conditional approval of the Disclosure Statement has been moved multiple times from July 21, 2025, the initial scheduling of the objection deadline in accordance with the Complex Procedures was July 11, 2025, less than one month after the Petition Dates. This tight timeline highlights the inappropriateness of even conditional approval of a disclosure statement on such shortened notice. The July 11, 2025 deadline was prejudicial to the UCC, which had only just been appointed three days before, and to all other parties in interest given that the objection deadline was less than one month after the Petition Dates. Further the original objection period included an intervening Federal holiday, further exacerbating the time crunch. Parties in interest should not be required to scramble to formulate a conditional disclosure statement objection under such time constraints. Moreover, as the UCC and other parties expressed concern over these tight deadlines, the Debtors correspondingly moved their deadlines significantly. It is unclear what benefit, if any, still exists for pursuing conditional approval of a disclosure statement when the Debtors have already pushed the hearing on conditional approval past their projected confirmation objection deadline of August 25, 2025. Simply, the procedural history and facts of this case demonstrate full notice is warranted to ensure the transparency of the process.

II. The Court should also decline to conditionally approve the Disclosure Statement because the Plan is patently unconfirmable.

44. Even if the Court were inclined to allow conditional approval of the Disclosure Statement in these Cases, if there is a defect that renders a plan patently or inherently unconfirmable, the Court may consider and resolve that issue at the disclosure statement stage before requiring parties to proceed with solicitation of the plan and a contested confirmation hearing. *In re American Capital Equipment, LLC*, 688 F.3d 145, 153-54 (3d Cir. 2012). *See also, In re United States Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996).

45. The Court's equitable powers under 11 U.S.C. § 105 permit the Court to control its own docket and, therefore, to decline to approve a disclosure statement when the plan it supports may not be confirmable. *In re American Capital Equipment, LLC*, 688 F.3d at 154. A plan is patently unconfirmable when confirmation defects cannot be overcome by creditor voting and the confirmation defects relate to matters upon which the material facts are not in dispute or have been fully developed at the disclosure statement hearing. *Id*. at 154-55.

46. The Plan is patently unconfirmable because it contains impermissible release, exculpation, and injunction provisions. Conditional approval of the Disclosure Statement in support of a plan with such impermissible terms would mean that a patently unconfirmable Plan would be solicited. And here, the solicitation procedures for which the Debtors seek conditional approval will actually facilitate certain of the Plan's flaws, because they include the opt-out provisions that will not establish actual consent to the Third Party Release. Rather, the Court should require the Plan and Disclosure Statement be amended to remove and/or tailor the release, exculpation, and injunctions so that they comply with applicable law.

III. The Third Party Release

Nonconsensual plan releases of non-debtor third parties by non-debtor third parties are not authorized under the United States Bankruptcy Code.

47. The Supreme Court held in *Harrington v. Purdue Pharma L.P.* that bankruptcy courts cannot involuntarily alter relationships between non-debtors by imposing nonconsensual releases of, or injunctions barring, claims between them. 603 U.S. 204, 209, 227 (2024). The Court did not prohibit chapter 11 plans from memorializing consensual third-party releases, and it did not "express a view on what qualifies as a consensual release." *Id*. at 226. This has long been the conclusion held by the Fifth Circuit Court of Appeals. *See Bank of N.Y. Trust Co. v. Off'l Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009) (observing that prior Fifth Circuit authority "seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions") ("*Pacific Lumber*").

48. A consensual third-party release is a separate agreement between non-debtors governed by nonbankruptcy law. As the Supreme Court recognized in *Purdue*, a release is a type of settlement agreement. *Purdue*, 603 U.S. at 223 (explaining that what the Sacklers sought was not "a traditional release" because "settlements are, by definition, consensual") (cleaned up). A bankruptcy court can acknowledge the parties' agreement to a third-party release, but the authority for a consensual release is the agreement itself, not the Bankruptcy Code. If a claim has been extinguished by virtue of the agreement of the parties, then the court is not using the forcible authority of the Bankruptcy Code or the bankruptcy court to extinguish the property right.

49. Here, there is no existing release agreement between non-debtors. Debtors instead seek a confirmation order that would use the power of the court to impose a third-party release on claimants without their affirmative and voluntary consent. Such a confirmation order would

impermissibly alter the relations between non-debtors because a valid release does not exist under nonbankruptcy law.

State Contract Law Applies, Not Federal Law

50. "[T]he basic federal rule in bankruptcy is that state law governs the substance of claims." *Travelers Cas. & Sur. Co. of America v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) (cleaned up); *accord Butner v. United States*, 440 U.S. 48 (1979). Thus, courts apply state law when the question is whether a debtor has entered a valid settlement agreement. *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.").

51. The rule is no different for third-party releases. They are separate agreements between non-debtors governed by state law. Unlike a bankruptcy discharge, which "is an involuntary release by operation of law," "[i]n the case of voluntary releases, the nondebtor is released from a debt, not by virtue of 11 U.S.C. § 1141(b), but because the *creditor agrees to do so*." *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 503, 507 (Bankr. D.N.J. 1997) (emphasis in original). *See also Continental Airlines Corp. v. Air Line Pilots Assn., Int'l (In re Continental Airlines Corp.)*, 907 F.2d 1500, 1508 (5th Cir. 1990) (holding that for settlement provisions "unrelated to substantive provisions of the Bankruptcy Code," "the settlement itself is the source of the bankruptcy court's authority"). Thus, "the Bankruptcy Code has not altered the contractual obligations of third parties, the parties themselves have so agreed." *Arrowmill*, 211 B.R. at 507.

52. Because the Bankruptcy Code does not authorize the imposition of an involuntary release, *Purdue*, 603 U.S. at 209, 227, the release must be consensual under non-bankruptcy law. There is no Bankruptcy Code provision that preempts otherwise applicable state contract law governing releases between non-debtors. *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)); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). Section 105(a), for example, "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue*, 603 U.S. at 216 n.2 (quotation marks omitted). But the Code does not confer any authority to impose a release of claims between non-debtors that would not be valid under state law. The Bankruptcy Code does not define a "consensual release." *See* 11 U.S.C. § 101. "There is no rule that specifies an 'opt out' mechanism or a 'deemed consent' mechanism" for third-party releases in chapter 11 plans. *In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). And no Code provision authorizes bankruptcy courts to deem a non-debtor to have consented to release claims against other non-debtors where such consent would not exist as a matter of state law.

53. Some courts have held that federal rather than state law applies to determine whether a third-party release is consensual. But because there is no applicable Code provision, whether a non-debtor has consented to release another non-debtor is not, as one court concluded, a "matter of federal bankruptcy law." *In re Spirit Airlines, Inc.*, No. 24-11988, 2025 WL 737068, at *18, *22 (Bankr. S.D.N.Y Mar. 7, 2025); *see also In re Robertshaw US Holding Corp.*, 662

B.R. 300, 323 (Bankr. S.D. Tex. 2024) (relying on caselaw in the district rather than any provision of the Bankruptcy Code). Absent express authority in the Code, federal courts cannot simply make up their own rules for when parties have given up property rights by releasing claims. 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). Indeed, nearly a hundred years ago, the Supreme Court rejected the notion that federal courts can displace state law as "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Erie*, 304 U.S. at 79 (cleaned up); *accord Rodriquez v. FDIC*, 589 U.S. 132, 133 (2020) (holding state law applies to determine allocation of federal tax refund resulting from consolidated tax return). Courts thus may not invent their own rule for when parties may be "deemed" to have given up property rights by releasing claims.

54. In *In re 4 West Holdings, Inc*., Judge Everett determined that because "there are no Federal Bankruptcy Rules or Federal Civil Rules that govern whether or not somebody can assent through silence to a deemed release" the Court must look to state law to determine whether opt out provisions are effective to confer consent to a third-party release. *See* Transcript of Proceedings before the Honorable Scott W. Everett held on October 18, 2022, on Motion to Enforce Confirmation Order and Releases and Injunctions Thereunder, Case No. 18-30777-SWE-11, United States Bankruptcy Court for the Northern District of Texas, Docket Entry No. 2086, p. 7 at ln. 1-6 (the "4 West Transcript"). Other courts have also found that state-law contract principles govern whether a third-party 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. 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."); *Arrowmill*, 211 B.R. at 506, 507 (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). 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*, 603 U.S. at 223). And "any such consensual agreement would be governed by state law." *Id.*

55. Even if federal law applied, however, it would not lead to a different result. That is because "federal contract law is largely indistinguishable from general contract principles under state common law." *Young v. BP Expl. & Prod., Inc. (In re Deepwater Horizon)*, 786 F.3d 344, 354 (5th Cir 2015) (cleaned up). *See also Deville v. United States*, 202 F. App'x 761, 763 n.3 (5th Cir. 2006) ("The federal law that governs whether a contract exists 'uses the core principles of the common law of contracts that are in force in most states.' . . . These core principles can be derived from the Restatements.") (quoting *Smith v. United States*, 328 F.3d 760, 767 n.8 (5th Cir. 2003)).

Under State Law, Silence Is Not Acceptance

56. Debtors bear the burden to prove that their plan is confirmable. *In re Briscoe Enterprises, Ltd., II*, 994 F.2d 1160, 1165 (5th Cir. 1993 (debtor has the burden of proof by

preponderance of the evidence to establish compliance with section 1129); *In re American Cap. Equip., LLC*, 688 F.3d 145, 155 (3d Cir. 2012). They have not met this burden because they have failed to establish that the third-party release is consensual under applicable state law. Under Texas law, like other states, an agreement to release claims—like any other contract—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."); *Texas Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.,* 52 S.W.3d 128, 131-33 (Tex. 2000) (quoting 2 Williston on Contracts § 6:49 (4th ed. 1991), *see also In re Hertz Corp.*, 120 F.4th 1181, 1192 (3d Cir. 2024) ("Contract law does not bind parties to promises they did not make."); *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1229 (Del. 2018) ("Under Delaware law, overt manifestation of assent . . . controls the formation of a contract.") (cleaned up).

57. There are only very limited exceptions to the "general rule of contracts . . . 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"). "[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. 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); *Jacques*, 886 F. Supp. 2d at 433 n.3.

Failing to opt out does not provide the required affirmative consent.

59. By the Third-Party Release described above, the Debtors purport to impose an otherwise non-existent duty to speak on claimants regarding the offer to release non-debtors, and their silence—the failure to opt out—is "deemed" consent. But under black-letter law that silence is not acceptance of the offer to release non-debtors. *See, e.g.*, *Patterson*, 636 B.R. at 688 ("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.").

60. A case from the Ninth Circuit illustrates the point. In *Norcia v. Samsung Telecom. Am., LLC*, 845 F.3d 1279, 1286 (9th Cir. 2017), cited with approval by the Third Circuit in *Noble v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-118 (3d Cir. 2017), and the Fifth Circuit in *Imperial Ind. Supply Co. v. Thomas*, 825 F. App'x 204, 207 (5th Cir. 2020), the court held that a failure to opt out did not constitute consent to an arbitration agreement. A consumer bought a Samsung phone and signed the Verizon Wireless Customer Agreement. *Norcia*, 845 F.3d at 1282. The phone came with a Samsung warranty brochure that contained an arbitration provision but gave purchasers the ability to opt out of it without affecting the warranty coverage. *Id*. The customer did not opt out. *Id*. When the customer later sued Samsung, Samsung argued that the arbitration provision applied. *Id*. at 1282-83.

61. The Ninth Circuit in *Norcia* held that the customer's failure to opt out did not constitute consent to arbitrate. The court applied the "general rule," applicable under California law, that "silence or inaction does not constitute acceptance of an offer." *Norcia*, 845 F.3d at 1284

(quotation marks omitted); *accord* See *Texas Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.*, 52 S.W.3d 128, 131-33 (Tex. 2000) (quoting 2 Williston on Contracts § 6:49 (4th ed. 1991)**.**. 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).

62. The Ninth Circuit held that none of the exceptions to this rule 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.

63. Here, too, Debtors' creditors have not signed an agreement to release the non-debtor releasees nor acted in any other manner to suggest that their silence manifests an intention to accept an offer to release the non-debtors.

Voting on a plan without opting out is not consent to release nondebtors.

64. Voting to accept 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). Voting to approve a plan plus a failure to opt out of a third-party release is nothing more than silence with

respect to the offer to release claims against non-debtors. The act of voting on a chapter 11 plan without opting out is not conduct that "manifest[s] [an] intention that silence may operate as acceptance" of a proposal that the creditor release claims against non-debtors. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a. 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.

65. 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. Not only is there no "mutual agreement" as to the plan, much less the third-party release, the creditor has expressly stated its rejection of the plan. As the court in *In re Chassix Holdings, Inc.*, reasoned: "[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.*" 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015) (emphasis added).

Not voting and not opting out is not consent to release nondebtors.

66. Even more obviously, the releases cannot be imposed on those who do not vote and do not opt out. *See Smallhold*, 2024 WL 4296938, at *2; *SunEdison*, 576 B.R. at 458–61; *Chassix Holdings*, 533 B.R. at 81–82; *In re Wash. Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011). This applies both to those creditors who simply abstain from voting and those creditors who are not entitled to vote on a plan. Those who abstain from voting cannot be said to be consenting to anything—they are taking no action with respect to the plan. The same is true for those who have no right to vote on a plan—whether an unimpaired creditor or an impaired creditor receiving nothing under a plan who is deemed to reject the plan. Creditors who do not vote on a plan do not

manifest consent to a non-debtor release by failing to return an opt out form. Even where there are conspicuous warnings in the ballots or an opt-out form that silence or inaction will constitute consent to a release, that is not sufficient to recast a party's silence as consent to the release. *SunEdison*, 576 B.R. at 458–61. Creditors have no legal duty to vote on a plan, much less to respond to an offer to release non-debtors included in a plan solicitation. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan); *SunEdison,* 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). Consent thus cannot be inferred from their silence because "[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). Nor can it "impose on him any duty to speak." *Id.* § 69 cmt. a.

67. Further, "[w]hen the circumstances are equally consistent with either of two facts, neither fact may be inferred." *See In re Couture Hotel Corp.*, 554 B.R. 369, 383 n.80 (Bankr. N.D. Tex. 2016). Consent thus cannot be inferred here because 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. This is especially true for those whose votes are not solicited at all—but who are instead sent a notice informing them they cannot vote, along with a form to opt out that they must return to avoid being bound by the third-party release.[2]

68. "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

[2] Here, the plan and associated materials, including the disclosure statement, run to at least 319 pages. *See* Disclosure Statement, Docket No. 19.

the creditors' inaction, is simply not realistic or fair and would stretch the meaning of 'consent' beyond the breaking point." *Chassix Holdings*, 533 B.R. at 81. "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 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; *see also id.* at *10 (discussing *Chassix*). As the court in *Emerge Energy Services, LP*, similarly explained, "[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 implied consent through a party's silence or inaction. No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (emphasis in original). "[B]asic contract principles" require affirmative assent, not inferences drawn from inaction that in fact may reflect only "[c]arelessness, inattentiveness, or mistake." *Id.*

69. Thus, after the Supreme Court's decision in *Purdue*, one Court in the Northern District of Texas[3] addressed whether the failure to exercise an "opt-out" is effective to constitute consent to third party releases at confirmation and in the context of a motion to enforce a confirmation order.[4] In *In re Ebix, Inc.*, the Court denied the effectiveness of opt out third party releases for creditors who failed to return a ballot. In disallowing the inclusion of the third-party

[3] *Ebix* and its predecessor, *In re 4 West Holdings, Inc*., interpret the contract law of the State of Texas. The laws of the State of Texas, whose law of contract is similar to New York's, have long held that silence does not equal consent sufficient to support the existence of a contract, except under limited circumstances not applicable in this case. *See Texas Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.*, 52 S.W.3d 128, 132-33 (Tex. 2000).

[4] As Judge Everett noted in *Ebix* and *4 West Holdings, Inc*., there are conflicting cases concerning the effectiveness of opt-out releases. *See Ebix* Transcript, p. 9 at 19, *4 West* Transcript, p. 3 at ln. 17-19. Judge Everett further noted that while no other bankruptcy judge in the Northern District of Texas had written on the issue, the other four judges in the Northern District of Texas had approved opt-out release structures and that he, respectfully, was parting ways with his colleagues. *See 4 West* Transcript, p. 6 at ln. 14-16, *Ebix* Transcript, p. 5, ln. 8-11.

release in the proposed plan, the Court noted "[n]othing in the Bankruptcy Code or Bankruptcy Rules provides for such relief, and under Texas contract law, that the parties agree governs the third-party release under the Debtors' proposed plan, silence does not equal the consent of the affected claimants on this record." *See In re Ebix, Inc. et al*, Transcript of Ruling on Amended Chapter 11 Plan, before the Honorable Scott W. Everett held on August 2, 2024, Case No. 24-80004-SWE-11, United States Bankruptcy Court for the Northern District of Texas. (the "Ebix Transcript").

70. The *Ebix* ruling conforms to that Court's prior ruling on the permissibility and effectiveness of an opt out third-party release in *4 West Holdings*, where the court found that there had not been "a determination, either in the confirmation order or since, on whether, in fact, the opt-out releases are permitted by applicable law." *See 4 West* Transcript, pp. 5-6 at ln.19-2. *See* also *4 West* Transcript, p. 13 at ln. 22-23. Although in *Ebix* Judge Everett found those parties who returned a ballot—but failed to opt-out of the third-party release—consented to that release, the better view requires affirmative action to knowingly release third parties for the reasons discussed above.

71. In *Ebix*, the Court stated "[o]nce consent is viewed from a contractual perspective, though, it is exceedingly difficult to construe the failure to opt out of a third-party release as valid consent." *Ebix* Transcript, p. 15, ln. 18-20. The Court found that silence does not equal consent under Texas contract law and that none of the three exceptions to that principle—that assent to contract is supported by the parties' course of conduct, that assent to contract arises where the offeree accepts the benefit of the offer, and that assent to contract exists where the offeree misleads the offeror and that the offeree, by remaining silent, intends to accept the offer—apply to the opt

out provisions in *Ebix*. *See Ebix* Transcript p. 16-19, *See also 4 West* Transcript, pp. 18-19 at ln. 23 to 21.

72. Judge Everett also rejected the notion that failing to opt out from a third-party release is akin to a default under a complaint, failure to file a proof of claim timely, or failure to respond to a claim objection. "All of those examples involve specific Bankruptcy or Federal Civil Rules that permit affirmative relief to be taken against a party if they fail to act. Here, there are no comparable rules providing for the result of a determination of deemed assent or consent to a contractual release through silence." *See 4 West* Transcript, pp. 20-21 at ln. 23-14.

Opt-out provisions cannot be imposed based upon a procedural default theory.

73. Applicable state contract law cannot be disregarded on a procedural default theory, previously applied by some courts, under which creditors who remain silent are held to have forfeited their rights against non-debtors if they received notice of the non-debtor release but failed to object, just as they would forfeit their right to object to a debtor's plan if they failed timely to do so. *See, e.g., In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 WL 2655592, at *5-*6 (Bankr. D. Del. Mar. 27, 2023), *abrogated by In re Smallhold, Inc.*, No. 14-10267, 2024 WL 4296938, at *8-*11 (Sept. 25, 2024); *In re DBSD North America, Inc.*, 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009), *aff'd on other grounds*, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *rev'd in part and aff'd in part*, 634 F.3d 79 (2d Cir. 2011); See *Texas Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.*, 52 S.W.3d 128, 131-33 (Tex. 2000) (quoting 2 Williston on Contracts § 6:49 (4th ed. 1991); *In re Robertshaw US Holding Corp.*, No. 24-90052, 2024 WL 3897812, at *17 (Bankr. S.D. Tex. 2024) (citing *Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592, at *6-8)**]**. These courts 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").

74. A fuller explanation of this theory was articulated prior to the *Purdue* ruling in *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022). The *Mallinckrodt* court stated that "the notion that an individual or entity is in some instances deemed to consent to something by their failure to act is one that is utilized throughout the judicial system." *Id*. "When a party to a lawsuit is served with a complaint or a motion, they need to file an answer or otherwise respond, or a judgment is automatically entered against them." *Id*. at 879. The court reasoned that "[t]here is no reason why this principle should not be applied in the same manner to properly noticed releases within a plan of reorganization." *Id*.

75. This is wrong. First, when a party in litigation is bound to a result based on a failure to timely respond, it is not because the defaulting party has *consented* to an adverse ruling. Rather, "failure to make timely assertion of [a] right before a tribunal having jurisdiction to determine it" results in *forfeiture* of the right. *United States v. Olano*, 507 U.S. 725, 731 (1993). Forfeiture, unlike waiver, is not an intentional relinquishment of a known right. *Id*. at 733. *Cf*. *Smallhold*, 665 B.R. at 718 ("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."). Forfeiture principles thus do not show consent.

76. Second, there is no basis to hold that parties have forfeited claims against non-debtor third parties based on their silence in response to a debtor's chapter 11 plan. No one has submitted the released claims for adjudication by the bankruptcy court. *See Olano*, 507 U.S. at 731.

77. And "[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 contested litigation.[5] *Smallhold*, 665 B.R. at 709; *see also id*. at 722 ("[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."); *see also Thomson v. Wooster*, 114 U.S. 104, 113 (1885) (holding a decree *pro confesso* may only be entered if it "is proper to be decreed"); *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1245 (11th Cir. 2015) ("Entry of default judgment is only warranted when there is a sufficient basis in the pleadings for the judgment entered.") (cleaned up).

78. But a third-party release is not "an ordinary plan provision that can properly be entered by 'default' in the absence of an objection." *Smallhold*, 665 B.R. at 709. "It is unlike the listed cure amount where one can properly impose on a creditor the duty to object, and in the absence of such an objection bind the creditor to the judgment." *Id*. That is because, unlike for a creditor's claims against the debtor, the Bankruptcy Code affords no affirmative authority to order a release of claims against third parties. Because imposition of a nonconsensual non-debtor release is not relief available through a debtor's chapter 11 plan, it is not "appropriate to require creditors to object or else be subject to (or be deemed to 'consent' to) such a third-party release." *Id*. at 719-20.

79. Because a nonconsensual third-party release is "*per se* unlawful," it follows that a third-party release "is not the kind of provision that would be imposed on a creditor on account of

[5] As discussed further below, although the United States Trustee 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.

that creditor's default." *Id*. at 709. And besides the flawed default theory, there is "no other justification for treating the failure to 'opt-out' as 'consent' to the release [that] can withstand analytic scrutiny." *Id*. Because a chapter 11 plan cannot permissibly impose non-debtor releases without the affirmative consent of the releasing parties, a release cannot be imposed based on their mere failure to respond regarding the non-debtor release.[6] Rather, an "*affirmative expression of consent* that would be sufficient as a matter of contract law" is required. *Id*. at 720 (emphasis added).

80. Further, In *In re 4 West Holdings, Inc*., Judge Everett determined that because "there are no Federal Bankruptcy Rules or Federal Civil Rules that govern whether or not somebody can assent through silence to a deemed release" the Court must look to state law to determine whether opt out provisions are effective to confer consent to a third-party release. *See* Transcript of Proceedings before the Honorable Scott W. Everett held on October 18, 2022, on Motion to Enforce Confirmation Order and Releases and Injunctions Thereunder, Case No. 18-30777-SWE-11, United States Bankruptcy Court for the Northern District of Texas, Docket Entry No. 2086, p. 7 at ln. 1-6 (the "4 West Transcript").

The Solicitation Motion seeks approval of a solicitation process that will provide insufficient notice of the nondebtor release for there to be consent.

81. Finally, there is no acceptance of an offer when there is insufficient notice of the alleged contractual terms. *See Norcia*, 845 F.3d at 1285 ("[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.") (quotation marks omitted).

[6] For those reasons, the *Smallhold* court expressly disapproved of its prior decision in *Arsenal*, which had relied on the procedural default theory. *See id.* at 716 ("On the central question presented, the Court concludes that its decision in *Arsenal* does not survive *Purdue Pharma*.").

82. Furthermore, failure to return an opt-out form is not consent because—whether they are asked to vote or not—claimants have no reason to expect that an offer to contract with non-debtors will be included in the plan solicitation. 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 v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-118 (3d Cir. 2017). *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. Importantly in this case, those receiving Notices of Non-Voting Status do not receive the full solicitation package under the Solicitation Motion. While information concerning how to obtain a copy of the Disclosure Statement, the Plan, and other Plan documents is contemplated to be provided on the Notice of Non-Voting Status, it is undisputed that those parties would not be provided sufficient notice in the form of the underlying documents which would have more fully disclosed the parameters of the Plan provisions and releases from which they were expected to "opt out." Any party receiving a Notice of Non-Voting Status would have to take affirmative action to obtain those documents in order to review and understand fully what was being asked of them. Accordingly, the parties who received the Notice of Non-Voting Status may not fully comprehend the extent of the third-party release due to a lack of notice. The Court in *4 West Holdings, Inc.* similarly expressed concern about lack of notice. *See 4 West* Transcript, p. 16 at ln. 2-7 (noting that there was no evidence that the debtors in that case gave notice to the creditor of the bankruptcy filing, the plan and the ballot).

84. The ballots are also insufficient because they do not contain the full Plan language relating to the Third-Party Release, but rather, rely on ballot recipients to search for the release language and relevant definitions in the Plan with reference only to the Plan, Section 10.3, which is the text of the Third Party Release.

85. Accordingly, the Court should strike the Third-Party Release provisions from the Disclosure Statement and the Plan.

The Plan is patently unconfirmable because there is no authority for the injunction against bringing claims against non-debtors.

86. The Plan is also patently unconfirmable because it includes an injunction enforcing the Third Party Release. *Purdue* held that non-consensual third-party releases and injunctions are generally not permitted by the Bankruptcy Code. *See Purdue*, 603 U.S. at 227. 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 222 (citing 11 U.S.C. § 524(g)).

87. Even if the third-party release was consensual, that would not mean that the court has authority to impose an injunction. An injunction is critically different from a consensual non-debtor release. The legal effect of a consensual release is based on the parties' agreement. *See Continental Airlines Corp. v. Air Line Pilots Assn., Int'l (In re Continental Airlines Corp.)*, 907 F.2d 1500, 1508 (5th Cir. 1990) (holding that for settlement provisions "unrelated to substantive provisions of the Bankruptcy Code," "the settlement itself is the source of the bankruptcy court's authority"). The non-debtor parties themselves are altering their relations; the court is not using its judicial power to effect that change. An injunction, by contrast, relies on the court's power to enter orders binding on parties. The court must therefore have both constitutional and statutory authority to enter an injunction. And, once such jurisdiction and authority are established, the

court still must determine that an injunction is warranted. But jurisdiction, authority, and a showing that injunctive relief is warranted are all absent here.

88. First, the bankruptcy court lacks jurisdiction to enter a permanent injunction barring claims between non-debtors. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 755, 757 (1995). While 28 U.S.C. § 1334(b) provides concurrent jurisdiction over civil proceedings "related to" a bankruptcy case, the enjoined claims between non-debtors do not "relate to" Debtors' chapter 11 case.

89. "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and in any way impacts upon the handling and administration of the bankrupt estate." *Zale*, 62 F.3d at 752. "For jurisdiction to attach, the anticipated outcome of the action must both (1) alter the rights, obligations, and choices of action of the debtor, and (2) have an effect on the administration of the estate." *Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1022 (5th Cir. 1999). Post-confirmation jurisdiction is more limited. "After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan." *Bank of Louisiana v. Craig's Stores of Texas, Inc. (In re Craig's Stores of Texas, Inc.*), 266 F.3d 388, 390 (5th Cir. 2001). "No longer is expansive bankruptcy court jurisdiction required to facilitate 'administration' of the debtor's estate, for there is no estate left to reorganize." *Id*. (cleaned up).

90. Here, the claims between non-debtors are not property of Debtors or the estate, will not impact the estate, and do not bear on the execution of Debtors' plan. "[T]he state law causes of action" barred by the injunction "do not bear on the interpretation or execution of the debtor's plan." *Craig's Stores*, 266 F.3d at 391. Nor would the post-confirmation pursuit of such claims

against non-debtors have any impact on Debtors' bankruptcy estate, which ceases to exist at confirmation. Accordingly, the bankruptcy court has no jurisdiction to enjoin those claims. *Craig's Stores*, 266 F.3d at 391; *Zale*, 62 F.3d at 756-57.

91. The bankruptcy court also lacks jurisdiction to enter injunctive relief because Debtors lack standing to seek it. A party seeking injunctive relief must have standing to do so. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Wells Fargo Bank, N.A. v. Stewart (In re Stewart)*, 647 F.3d 553, 557 (5th Cir. 2011). To have standing, the party seeking injunctive relief must show "that he has sustained or is immediately in danger of sustaining some direct injury" and "the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *Lyons*, 461 U.S. at 105; *see also Stewart*, 647 F.3d at 557. "Absent such a showing, there is no case or controversy regarding prospective relief, and thus no basis in Article III for the court's power to issue an injunction."[7] *Stewart*, 647 F.3d at 557; *accord Lyons*, 461 U.S. at 101-02. Accordingly, because the bankruptcy court lacks jurisdiction to enter injunctive relief barring the released claims, inclusion of the injunction provision in the Plan renders the Plan patently unconfirmable.

92. Second, there is no authority in the Bankruptcy Code for the injunction barring claims between non-debtors. Debtors cannot rely on section 105(a) for this authority because it "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue*, 603 U.S. at 216 n.2 (quotation marks omitted). But nothing in the Code authorizes the court to use its judicial power to bar claims between non-debtors. *Id*. at 227.

[7] Although the bankruptcy court is not an Article III court, "[a] party that lacks standing to support jurisdiction in an Article III court also lacks standing for that claim to be adjudicated by a bankruptcy court." *Stewart*, 647 F.3d at 557.

93. Further, such an injunction is not warranted by the traditional factors that support injunctive relief. A party 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 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 irremediable.'") (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)); *id*. (noting that an injunction is an "extraordinary remedy").

The Disclosure Statement and Plan should clarify that claims of governmental entities are not released.

94. The "police and regulatory power" exception to the automatic stay found at 11 U.S.C. § 362(b)(4) is designed to ensure that the stay "does not impede government's ability to protect public health and safety." *In re Wyly*, 526 B.R. 194, 198 (Bankr. N.D. Tex. 2015). Preserving governmental entities ability to protect public health and safety is particularly important in the context of a healthcare company.

95. The Disclosure Statement does not contain adequate information as to whether governmental police and regulatory powers are preserved. The Debtors should modify the Disclosure Statement and Plan to clarify that no party shall be released from any causes of action or proceedings brought by any governmental entity in accordance with its regulatory functions, including but not limited to criminal and environmental matters. The United States Trustee requests that the Debtors include the following language in the Plan:

> Nothing in the Confirmation Order or the Plan shall effect a release of any claim by the United States Government or any of its agencies

> or any state and local authority whatsoever, including without limitation any claim arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person, nor shall anything in the Confirmation Order or the Plan enjoin the United States or any state or local authority from bringing any claim, suit, action, or other proceedings against any party or person for any liability of such persons whatever, including without limitation any claim, suit or action arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against such persons, nor shall anything in the Confirmation Order or the Plan exculpate any party or person from any liability to the United States Government or any of its agencies or any state and local authority whatsoever, including any liabilities arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person.

Conclusion

Wherefore, the United States Trustee respectfully requests that the Court deny to conditionally approve the Disclosure Statement and grant to the United States Trustee such other and further relief as is just and proper.

DATED: August 25, 2025.

Respectfully submitted,

LISA L. LAMBERT
UNITED STATES TRUSTEE

/s/ Meredyth A. Kippes
Meredyth A. Kippes
Trial Attorney
Texas State Bar No. 24007882
Office of the United States Trustee
1100 Commerce Street, Room 976
Dallas, Texas 75242
(214) 767-1079
meredyth.kippes@usdoj.gov

Certificate of Service

The undersigned counsel certifies that copies of the foregoing document were served on August 25, 2025 via ECF to those parties requesting service via ECF in this case and to the parties listed below via electronic mail.

/s/ Meredyth A. Kippes
Meredyth A. Kippes

Holland N. O'Neil
FOLEY & LARDNER LLP
2021 McKinney Avenue, Suite 1600
Dallas, TX 75201
honeil@foley.com

Timothy C. Mohan
FOLEY & LARDNER LLP
1144 15th Street, Suite 2200
Denver, CO 80202
tmohan@foley.com

Nora J. McGuffey
Quynh-Nhu Truong
FOLEY & LARDNER LLP
1000 Louisiana Street, Suite 2000
Houston, TX 77002
nora.mcguffey@foley.com
qtruong@foley.com

Jason S. Brookner
Aaron M. Kaufman
Amber M. Carson
Emily F. Shanks
GRAY REED
1601 Elm Street, Suite 4600
Dallas, Texas 75201
jbrookner@grayreed.com
akaufman@grayreed.com
acarson@grayreed.com
eshanks@grayreed.com