IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

IN RE:	)	
	)	Chapter 11
HOPEMAN BROTHERS, INC.	)	Case No. 24-32428-KLP
	)	
Debtor.	)	

MEMORANDUM IN SUPPORT OF OBJECTION OF THE UNITED STATES TRUSTEE TO JOINT MOTION OF THE DEBTOR AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF AN ORDER (I) SCHEDULING A COMBINED HEARING TO APPROVE THE DISCLOSURE STATEMENT AND CONFIRM THE PLAN; (II) CONDITIONALLY APPROVING THE DISCLOSURE SATEMENT; (III) ESTABLISHING OBJECTION DEADLINES; (IV) APPROVING THE FORM AND MANNER OF NOTICE; (V) APPROVING THE SOLICITATION AND TABULATION PROCEDURES; AND (VI) GRANTING RELATED RELIEF (DOCKET NO. 691)

COMES NOW Matthew W. Cheney, Acting United States Trustee for Region 4, by counsel, and states as follows in support of his Objection to the Joint Motion of the Debtor and Official Committee of Unsecured Creditors for Entry of an Order (I) Scheduling a Combined Hearing to Approve the Disclosure Statement and Confirm the Plan; (III) Conditionally Approving the Disclosure Statement; (III) Establishing Objection Deadlines; (IV) Approving the Form and Manner of Notice; (V) Approving the Solicitation and Tabulations Procedures; and (VI) Granting Related Relief (Docket No. 691) (the "Disclosure Statement and Plan Procedures Motion").

SUMMARY

The Bankruptcy Code does not authorize non-consensual releases of the liability of third parties nor permanent injunctions on actions against non-debtors. *See Harrington v. Purdue*

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Pharma L.P., 603 U.S. 204, 227 (2024).[1] Before the Court is the Disclosure Statement and Plan Procedures Motion (Docket No. 691), not the Disclosure Statement or the Plan.[2] But the Debtor's Disclosure Statement and Plan Procedures Motion seeks approval of Ballots and Notices of Non-Voting Status that would deem consent to a third-party release by a vote in favor of the Plan or deemed acceptance of a Plan, and would force those who reject the Plan or do not vote on the Plan to opt out of the Plan. The Disclosure Statement and Plan Procedures Motion also would force third-party releases on those not entitled to vote without any ability to opt out, despite language in the Plan suggesting that they can.[3] It appears the only way they could avoid them is to object to the Plan, although the proposed notices are unclear on this point, and there may be no way for them to avoid the releases.

As Judge Novak held in *Patterson v. Mahwah Bergen Retail Grp., Inc.,* 636 B.R. 641, 684-85 (E.D. Va. 2022), contract law does not support deeming consent based upon a failure to opt out. Nor does it support deeming consent to a third-party release based on a vote for the plan, a separate agreement governing claims against the debtor. The Court should require the

[1] The only exception is the Code's limited authorization of injunctions in asbestos cases under 11 U.S.C. § 524(g). *Id.* at 222 (explaining that "the code does authorize courts to enjoin claims against third parties without their consent, but does so in only one context," asbestos-related bankruptcies). The United States Trustee is objecting to the use of third-party releases against non-asbestos creditors and parties in interest and to asbestos claimants for non-asbestos related injuries. The Plan's section 524(g) injunction, Article X, Section 10.3, is not at issue in the United States Trustee's Objection.

[2] The United States Trustee reserves his rights to object to the Disclosure Statement and Plan in due course.

[3] The definition of "Releasing Party" in Article I, Section 1.97 of the Plan states, in part, "(c) all holders of Claims and Interests that . . . are deemed to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable form indicating that they opt not to grant the releases provided in the Plan . . . ." However, the Notice of Non-Voting Status, *see* Docket No. 691, Exhibit 3, does not provide any box to check or other way to opt out of the third-party releases.

Debtor to amend the Plan, Disclosure Statement, the Ballots and Notice of Non-Voting Status to obtain affirmative, voluntary, and knowing consent for the third-party releases.

ARGUMENT

I. Introduction

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. *See* 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.

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 bankruptcy court is not using the forcible authority of the Bankruptcy Code or the bankruptcy court to extinguish the property right.

Here, there is no existing release agreement between non-debtors. The Disclosure Statement and Plan Procedures Motion will ultimately lead to the Debtor's request for 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.

Three inconsistent tests have been suggested for determining whether a third-party release included in a bankruptcy court order is consensual: (1) it is only consensual when there is valid consent under applicable state contract law[4]; (2) parties who do not opt out can be deemed to have consented because class-action settlements are binding on those who do not opt out[5]; and (3) parties can be deemed to have consented the same way that a litigant may forfeit rights by failing to timely respond in litigation.[6]

The first test is the correct one. State law governs whether non-debtors have agreed to release each other. *See infra* Part II. Nothing in the Bankruptcy Code allows parties to disregard state law when debtors seek to impose third-party releases in their plans. Under Virginia law, as in other states, silence is not acceptance of an offer other than in limited circumstances inapplicable here.

Debtor here seeks by the Ballots to deem those who: (1) vote to accept the plan (even if they expressly opt out of the releases); (2)vote to reject the Plan but fail to check an opt out box; (3) fail to return a Ballot for any reason, and; (4) are not entitled to vote on the Plan to have released claims against all current and former directors, officers, or employees of Hopeman, or any past or present Affiliate of Hopeman, except Wayne Manufacturing Corporation, related to

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[4] *See, e.g.*, *In re Smallhold, Inc.*, 665 B.R. 704, 720 (Bankr. D. Del. 2024); *Emerge Energy Services, LP,* No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019); *In re Digital Impact, Inc.*, 223 B.R. 1, 14-15 (Bankr. N.D. Okla. 1998); *In re Arrowmill Dev. Corp.,* 211 B.R. 497, 507 (Bankr. D.N.J. 1997).

[5] *See, e.g.*, *In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 n.120 (Bankr. S.D. Tex. 2024). This test has been rejected in this District. *See Patterson*, 636 B.R. at 686-87 (section of the opinion titled "Class Action Law Does Not Support Finding Consent by Failing to Opt Out.").

[6] *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 Smallhold, Inc.*, 665 B.R. at 716; *In re LATAM Airlines Grp. SA*, 2022 WL 2206829, at *46 (Bankr. S.D.N.Y. June 18, 2022); *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022).

any claim prior to the Effective Date.. Debtor also seeks by the Notices of Non-Voting Status to deem those who are not entitled to vote—whether they are deemed to accept or reject the Plan—to have released such claims. Despite language in the Plan suggesting that they can opt out, *see* Plan, Article 1, Section 1.97, Docket No. 689, the Non-Voting Status Notice does not include an opt out box, *see* Docket No. 691, Exhibit 3, and it appears these parties must object to avoid the releases. As set forth below, none of these claimants have agreed to the third-party release under state law.

II. State Contract Law Applies

"[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.").

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.

Since 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.

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). 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.

Accordingly, state-law contract principles govern whether a third-party release is consensual. *See, e.g.*, *Patterson,* 636 B.R. at 684-85 (citing to contract law of the Commonwealth of Virginia in the discussion of 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.*[7]

III. Under Virginia Law, Silence Is Not Acceptance

The Debtor bears the burden to prove that their plan is confirmable. *See In re American Cap. Equip., LLC*, 688 F.3d 145, 155 (3d Cir. 2012); *In re Mohammad*, 596 B.R. 34, 39 (Bankr. E.D. Va. 2019) (Plan proponent must demonstrative by "at least a preponderance of the evidence" that the plan can be confirmed.). If the proposed Ballots and Notice of Non-Voting Status are sent to the creditors and parties in interest and the Plan and Disclosure Statement are not modified, the Debtor will not be able to meet this burden at confirmation because it cannot establish that the third-party release is consensual under Virginia law.

Under Virginia law, like in other states, an agreement to release claims—like any other contract—requires a manifestation of assent to that agreement.[8] *See, e.g.*, RESTATEMENT

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[7] 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)).

[8] The Court may apply Virginia law because the Plan provides it applies, *see* Article XIII, Section 13.1 of the Plan, and no party has suggested that any other state's law applies. *See, e.g., Wood v. Mid-Valley Inc.*, 942 F.2d 425, 426 (7th Cir. 1991) ("The operative rule is that when neither party raises a conflict of law issue in a diversity case, the federal court simply applies the law of the state in which the federal court sits."). Thus, the statement of one bankruptcy court that there is "no answer" to the choice of law question, *In re LaVie Care Cntrs., LLC*, No. 24-55507, 2024 WL 4988600, at *14 (Bankr. N.D. Ga. Dec. 5, 2024), is not true. Even if a choice of law had to be made, if such a choice is made difficult by the breadth of the third-party release that may be a reason not to approve the plan, but it is not an excuse to avoid the court's obligation to make a choice of law if there is an actual conflict of laws. *See Phillips Petroleum*

(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."); *See Melo v. Zumper, Inc.*, 439 F. Supp. 3d 683, 696 (E.D. Va. 2020) (Judge Novak) ("Further, mutuality of assent . . . is an essential element of all contracts." (quotations and citations omitted) (alteration in original); *Phillips v. Mazyck*, 273 Va. 630, (Va. 2007) ("It is elementary that mutuality of assent - the meeting of the minds of the parties - is an essential element of all contracts. Until the parties have a distinct intention common to both and without doubt or difference, there is a lack of mutual assent and, therefore, no contract.") (citations omitted)

Thus, "[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). This is the law in Virginia. "Limited exceptions to this rule exist, such as previous dealings or when an offeror gives the offeree reason to believe that silence or inaction will manifest assent, and the offeree remains silent or inactive with the intent to accept the offer." *Patterson*, 636 B.R. at 686 (citing RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(b)). But, "[i]n the absence of circumstances from which an acceptance may be implied [such as the course of prior dealings between the parties], an acceptance will not be presumed from a mere failure to decline a proposal." *Boone v. Standard Accident Ins. Co.*, 192 Va. 672, 680 (Va. 1951).

But absent such limited 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." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a. And "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain

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Co. v. Shutts, 472 U.S. 797, 821 (1985); *Cf. Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 669 (E.D. Va. 2022).

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).

IV. Merely Voting for a Plan Does Not Provide the Required Affirmative Consent.

Under the Ballots and Non-Voting Status Notices to be sent to the parties in interest under the Disclosure Statement and Plan Procedures Motion, the third-party releases would bind all parties who vote to accept the Plan, even if they also opt-out of granting the releases. Because the Plan would impose non-debtor releases on these parties based on their silence, the releases are not consensual under Virginia law and thus cannot be approved under *Purdue*.

Debtor equates a vote for the Plan, which is governed by the Bankruptcy Code's provisions for adjusting relations between a debtor and its creditors, with acceptance of proposed third-party releases, which are contracts governed by state law dealing with relations between non-debtor parties. Those are distinct legal constructs involving distinct parties: A plan disposes of a creditor's claims against the debtor, while a third-party release disposes of a non-debtor's right to sue other non-debtors. There is nothing in the Code that authorizes treating a vote to accept a chapter 11 plan as consent to a third-party release. "[A] creditor should not expect that [its] rights [against non-debtors] are even subject to being given away through the debtor's bankruptcy." *Smallhold*, 665 B.R. at 721.

Debtor's conflation of voting for the Plan with acceptance of the third-party release violates black-letter contract law, which requires a manifestation of intent to be bound by the third-party release. *See supra* Part III. Voting to accept a plan does not manifest that intent. A chapter 11 plan allocates how the bankruptcy estate will pay claims and interests against the debtor. *See* 11 U.S.C. § 1123. If the plan is confirmed, only claims and interests against the debtor are discharged. 11 U.S.C. § 524(e). And it is "[b]ecause discharge affects a creditor's rights, [that] the Code generally requires a debtor to vie for the creditor's vote first." *Keystone*

Gas Gathering, L.L.C. v. Ad Hoc Comm. (In re Ultra Petroleum Corp.), 943 F.3d 758, 763 (5th Cir. 2019). The right to vote on a plan depends solely on how the plan treats claims and interests against the debtor. *See* 11 U.S.C. §§ 1124, 1126, 502, 501, 101(10); *Ultra Petroleum Corp.*, 943 F.3d at 763; 7 *Collier on Bankruptcy* ¶ 1126.02 (16th 2025). Claims and interests that are not impaired by the plan are deemed accept it. *See* 11 U.S.C. §§ 1124, 1126; *Ultra Petroleum Corp.*, 943 F.3d at 763. Because the purpose of a chapter 11 plan is to determine how claims and interests *against the debtor* will be treated, voting to accept a chapter 11 plan does not manifest an intent to be bound by the third-party release. *See In re Congoleum Corp.*, 362 B.R. 167, 194 (Bankr. D.N.J. 2007); *Arrowmill*, 211 B.R. at 507; *In re Digital Impact, Inc*., 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998).

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." *Arrowmill*, 211 B.R. at 507 (quotation marks omitted); *accord Congoleum Corp.*, 362 B.R. at 194 ("[A] consensual release cannot be based solely on a vote in favor of a plan."); *Digital Impact, Inc*., 223 B.R. at 14. Rather, a creditor must "unambiguously manifest[] assent to the release of the nondebtor from liability on its debt." *Arrowmill*, 211 B.R. at 507. 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).

In addition to the lack of consent under state law, imposing a third-party release on everyone who votes to accept the plan may discourage creditors from voting. This would distort the voting process, which is intended to provide a valuable signal about the extent of creditor

support, within each voting class, for the plan's treatment of creditors' allowed claims against the debtor. *Smallhold,* 665 B.R. 716.

V. Failing to Check an Opt Out Box Does Not Provide the Required Affirmative Consent.

Under the Disclosure Statement and Plan Procedures Motion, someone who gets a Ballot or the Non-Voting Status Notice and fails to do anything would be deemed to grant the third-party release. In other words, the Disclosure Statement and Plan Procedures Motion purports 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. Under black-letter law, silence is not acceptance of the offer to release non-debtors. Moreover, the District Court in the Eastern District of Virginia has already expressly held that such a procedure cannot be approved. *See 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.").

The proposed Ballots state that creditors who do not return the Ballot by the deadline are deemed to have consented to the third-party releases. *See* Docket No. 691, Exhibit 2A and Exhibit 2B. But third-party releases cannot be imposed on those who do not vote and do not opt out. *See Patterson*, 696 B.R. at 685 ("First, contrary to Debtors' statement that 'actual principles of contract law have long provided that the manifestation of assent may be made wholly by failure to act' (Appellee Br. at 65), black letter contract law dictates otherwise."). *See also Smallhold,* 665 B.R. at 709; *SunEdison*, 576 B.R. at 458–61; *Chassix*, 533 B.R. at 81–82; *In re Washington Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011). There is no basis to infer consent by those who do not vote and are taking no action with respect to the Plan. "[A]ny

attempt to claim that contract law supports a finding of consent to third-party releases based on inaction rings hollow." *Patterson*, 696 B.R. at 686.

Even where there are conspicuous warnings that a party will be bound if they remain silent, that is not sufficient to recast a party's silence as consent to a third-party 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.

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. Here, the Disclosure Statement with the Plan attached runs 219 pages. *See* Docket No. 691. That does not include a number of the exhibits to the Plan that are not yet available. It is entirely possible that a creditor receiving the Disclosure Statement, Plan and related solicitation materials would look at the stack of convoluted legal documents, throw up their hands in despair and take no action. *SunEdison*, 576 B.R. at 461.

This is especially true for those whose votes are not solicited at all (here priority claims, secured claims, and equity holders) who are instead sent the Notice of Non-Voting Status informing them they cannot vote, which informs them of the terms of the third-party releases, but never explicitly tells them how to avoid the third-party releases. Despite the language of the Plan, these parties do not receive a form with an opt-out box but apparently must object to avoid having the releases imposed on them.[9]

"Charging all inactive creditors with full knowledge of the scope and implications of the proposed third-party releases, and implying a 'consent' to the third-party releases based on the creditors' inaction, is simply not realistic or fair and would stretch the meaning of 'consent' beyond the breaking point." *Chassix*, 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*, 665 B.R. at 721; *see also id.* at 719-20 (discussing *Chassix*). "A party's receipt of a notice imposing an artificial opt-out requirement, the recipient's *possible* understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as consent. *Emerge Energy Services, LP*, 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.* Simply put, an "opt

[9] For non-voting parties in interest, it is not clear even if a formal objection to the Plan would be sufficient to avoid the third-party releases. *See* Disclosure Statement and Plan Procedures Motion, Docket No. 691, Exhibit 3. However, under the proposed procedures, that is the only way for a non-voting party in interest to be heard on the third-party releases.

out mechanism is not sufficient to support the third-party releases . . . particularly with respect to parties who do not return a ballot (or are not entitled to vote in the first place)." *In re Washington Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011); *see also Chassix*, 533 B.R. at 81–82.

Debtor's proposed procedures also impose a third-party release on anyone who is provided a ballot and does not return it with both a vote against the Plan *and* the opt-out box checked. It should be obvious though, that those who vote to reject the Plan are not consenting to third-party releases by failing to mark an opt-out box. 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).

One bankruptcy court has found that, in at least some circumstances, a failure to opt out constitutes consent when a claimant votes—either to accept or reject a plan—but not if they do not vote. *See Smallhold,* 665 B.R. at 723. Notably, unlike in *Smallhold*, those who vote in favor here do not have the ability to opt out of the release. The *Smallhold* court incorrectly reasoned that because the act of voting on a debtor's plan is an "affirmative step" taken after notice of the third-party release, failing to opt out binds the voter to the release. *Id*. But while voting is 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). That is because "[t]he mere receipt of an

unsolicited offer does not impair the offeree's freedom of action or inaction," *id.*—in this case, the federal right to vote on a chapter 11 plan. 11 U.S.C. § 1126(a). Nor does it "impose on him any duty to speak," RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a, such as by checking an opt out box.[10] Thus, consent to release *third-party* claims (which are governed by *nonbankruptcy* law) cannot properly be inferred from a party's failure to check an opt-out box on a ballot to vote on the proposed treatment of claims against the *debtor* (governed by *bankruptcy* law).

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

Applicable state contract law cannot be disregarded on a procedural default theory, 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.[11] *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 Smallhold, Inc.*, 665 B.R. at 716; *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022); *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

[10] The *Spirit Airlines* court concluded that "creditors entitled to vote who returned a ballot but did not check the opt-out box on that ballot also clearly manifested their consent to the Third-Party Releases." *In re Spirit Airlines, Inc.*, No. 24-11988, 2025 WL 737068, at *21 (Bankr. S.D.N.Y Mar. 7, 2025). That is wrong because an unsolicited offer of a third-party release cannot impose a duty to speak or impair the freedom to vote on a plan. Further, the *Spirit* court erred in assuming that the failure to check an opt-out box on a ballot necessarily shows that a creditor "affirmatively chose" not to check the box. *Id*. at *21. "When 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). And a failure to check an opt-out box is equally consistent with inadvertence or lack of understanding.

[11] Although the court in *Spirit* disclaimed relying on a default theory, *Spirit Airlines,* 2025 WL 737068, at *17, it based its holding on the same rationale: that a party may be deemed to consent based on notice and a failure to respond, *id*. at *9-*10, *12-*13.

(S.D.N.Y. Mar. 24, 2010), *rev'd in part and aff'd in part*, 634 F.3d 79 (2d Cir. 2011). 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*, 665 B.R. at 708 (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").

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*.

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. Forfeiture principles thus do not show consent.

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.

Finally, under *Purdue*, imposition of a nonconsensual non-debtor release is not available relief through a debtor's chapter 11 plan. *See Purdue,* 603 U.S. at 215-227 & n.1; *see also Smallhold*, 2665 B.R. at 709 ("After *Purdue Pharma*, a third-party release is no longer an ordinary plan provision that can properly be entered by 'default' in the absence of an objection."). It is therefore "no longer appropriate to require creditors to object or else be subject to (or be deemed to 'consent' to) such a third-party release." *Smallhold*, 665 B.R. at 719.

The Supreme Court's *Purdue* decision rejected a fundamental premise of the procedural default theory—that a bankruptcy proceeding legally could lead to the destruction of creditors' rights against non-debtors, so they had best pay attention lest they risk losing those rights. *Smallhold*, 665 B.R. at 708-09; *see also id*. at 708 ("The possibility that a plan might be confirmed that provided a nonconsensual release was sufficient to impose on the creditor the duty to speak up if it objected to what the debtor was proposing."). The courts that relied on this procedural-default theory had reasoned that non-debtor releases were no different from any other plan provision to which creditors had to object or risk forfeiture of their rights, because pre-*Purdue* a chapter 11 plan could permissibly include nonconsensual, non-debtor releases under certain circumstances. *Id*. at 717-18. As the *Smallhold* court explained, however, under the default theory, a plan's opt-out provision functions not as a method to secure consent, but rather serves as "an administrative shortcut to relieve those creditors of the burden of having to file a formal plan objection." *Id*. at 709; *see also id*. 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.").

But "[u]nder established principles," courts may enter relief against a party who procedurally defaults 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. *Id*. at *2; *see also id*. at *13 ("[T]he obligation of a party served with pleadings to appear and protect its rights is limited to those circumstances in which it would be appropriate for a court to enter a default judgment if a litigant failed to do so."); *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).

"[After *Purdue*], that is no longer the case in the context of a third-party release." *Smallhold*, 665 B.R. at 722. A third-party release is not "an ordinary plan provision that can properly be entered by 'default' in the absence of an objection." *Id*. "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.

Since *Purdue* establishes that a *non*consensual 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 that creditor's default." *Id*. at 709. And besides the now-discredited

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.[12] Rather, an "*affirmative expression of consent* that would be sufficient as a matter of contract law" is required. *Id*. at 720 (emphasis added).

VII. There Is Neither Jurisdiction Nor Any Legal Basis for the Injunction Barring Claims Against Non-Debtors.

This Court also may not approve the injunction enforcing the third-party release by barring claims against non-debtors. *See* Plan, Article X, Section 10.8, Docket No. 689. *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. *See id*. at 222 (citing 11 U.S.C. § 524(g)).[13]

Even if the third-party release was consensual, which it is not, 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

[12] 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*.").
[13] As stated above, the United States Trustee's Objection is not aimed at the Section 524(g) injunction. The Debtor's proposed injunction at Article, X, Section 10.8 goes beyond actions on asbestos claims and applies to all creditors and parties in interest.

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.

A bankruptcy court lacks jurisdiction to enter a permanent injunction barring claims between non-debtors. *See Patterson*, 696 B.R. at 675-76. *See also Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 755, 757 (5th Cir. 1995). While 28 U.S.C. § 1334(b) provides concurrent jurisdiction over civil proceedings "related to" a bankruptcy case, the claims between non-debtors that the Plan purports to enjoin do not "relate to" Debtor's chapter 11 case.

Here, the claims between non-debtors that the Plan purports to release and enjoin are not property of Debtor or the estate, will not impact the estate, and do not bear on the execution of Debtor's plan. There is no authority in the Bankruptcy Code for a bankruptcy court to issue an injunction barring claims between non-debtors. Debtor 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. *See also Patterson*, 636 B.R. at 671 ("Although § 105 permits a bankruptcy court to issue orders necessary or appropriate to carry out the provisions of the Bankruptcy Code, that section does not provide an independent source of federal subject matter jurisdiction.").[14]

[14] Should the injunction provision survive to confirmation, the United States Trustee states that

CONCLUSION

WHEREFORE, the United States Trustee requests that the Court grant his objection for the reasons set forth in his Objection and herein and that the Court award such other and further relief as may be just and proper.

Dated: May 9, 2025

Respectfully Submitted,

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the Debtor would be required to show the factors that support the "drastic and extraordinary remedy" of injunctive relief, including irreparable injury, lack of remedy at law, the balance of hardships and that the public interest would not be harmed. *See Wudi Industrial (Shanghai) Co., Ltd. v. Wong*, 70 F.4th 183, 190 (4th Cir. 2023).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via CM/ECF on this 9th day of May, 2025 on the Counsel for the Debtor, Counsel for the Unsecured Creditors Committee, and all parties receiving notice in the above-captioned case, constituting all necessary parties.

/s/ *Kathryn R. Montgomery*