UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 24-55507-PMB
	)	
LAVIE CARE CENTERS, LLC, *et. al.,*	)	JOINTLY ADMINISTERED
	)	
DEBTORS.	)	CHAPTER 11

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' AMENDED DISCLOSURE STATEMENT AND FORM OF BALLOTS

Mary Ida Townson, United States Trustee for Region 21, acting in furtherance of her responsibilities under 28 U.S.C. § 586, objects to the approval of the disclosure statement contained in *Debtors' Combined Disclosure Statement and Joint First Amended Chapter 11 Plan of Reorganization* (Dkt. No. 438). The disclosure statement does not provide creditors with adequate information to make an informed judgment about the Debtors' proposed plan, and, in conjunction with Debtors' plan, improperly requires creditors to take affirmative action to avoid third-party releases. Further, the United States Trustee objects to the form of ballots contained in *Debtors' Motion for Entry of Order (I) Approving Disclosure Statement, (II) Scheduling Confirmation Hearing, (III) Establishing Procedures for Solicitation and Tabulation of Votes on Plan, (IV) Approving Certain Forms and Notices, and (V) Granting Related Relief* (Dkt. No. 316), as the proposed ballots do not adequately explicate the process and effect of the third-party release provisions.

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FACTUAL AND PROCEDURAL BACKGROUND

1.

The above-captioned action is the lead case for 282 entities (hereinafter the "Debtors"), whose bankruptcy cases are being jointly administered for procedural purposes only.[1] The voluntary petitions initiating these bankruptcy cases were filed on June 2, 2024 and June 3, 2024.

2.

On June 13, 2024, the United States Trustee appointed a Committee of Creditors Holding Unsecured Claims pursuant to 11 U.S.C. § 1102(a). (Dkt. No. 112).

3.

The initial Meetings of Creditors pursuant to 11 U.S.C. § 341(a) for Debtors was initially held on June 28, 2024, but was continued to August 12, 2024, for production of additional documentation and information. The Meetings of Creditors for Debtors was concluded on August 12, 2024.

4.

On July 23, 2024, Debtors filed the *Debtors' Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization.* (Dkt. No. 273) (the "Original Combined Disclosure Statement and Plan"). On September 17, 2024, Debtors filed the *Debtors' Combined Disclosure Statement and Joint First Amended Chapter 11 Plan of Reorganization.* (Dkt. No. 438) (the disclosure statement portion thereof, the "Amended

[1] A complete list of the debtors is not provided herein. A complete list of the debtors and the last four digits of their federal tax identification numbers are included in the *Order (I) Authorizing Joint Administration of Related Chapter 11 Cases and (II) Granting Related Relief* (Dkt. No. 20) and is incorporated by reference.

Disclosure Statement", and the chapter 11 plan portion thereof, the "Amended Plan", including all exhibits and supplements).

5.

On August 7, 2024, Debtors filed a *Motion for Entry of Order (I) Approving Disclosure Statement, (II) Scheduling Confirmation Hearing, (III) Establishing Procedures for Solicitation and Tabulation of Votes on Plan, (IV) Approving Certain Forms and Notices, and (V) Granting Related Relief.* (Dkt. No. 316) (the "Plan and Solicitation Procedure Motion"). Within the Plan and Solicitation Procedure Motion, Debtors included, among other things, a proposed schedule for providing supplements to the Original Combined Disclosure Statement and Plan and a proposed form of ballot for each class of claims.

6.

The deadline to object to Debtors' Original Combined Plan and Disclosure Statement was September 4, 2024 at 4:00 P.M., prevailing Eastern Time. (Dkt. No. 317). However, in anticipation of the Amended Disclosure Statement and Amended Plan, counsel for Debtors and counsel for the United States Trustee conferred and agreed that the deadline for the United States Trustee to object to Debtors' Amended Disclosure Statement was extended to September 20, 2024 at 4:00 P.M., prevailing Eastern Time.

7.

Accordingly, this Objection to Debtors' Amended Disclosure Statement and Plan and Solicitation Procedure Motion is timely.

GENERAL CITATION OF AUTHORITY

8.

Pursuant to Section 1125(b) of the Bankruptcy Code:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.
> 11 U.S.C. § 1125(b).

9.

The phrase "adequate information" is defined by the Bankruptcy Code in this context to mean "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records…that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a).

10.

Case law has produced a list of factors which may be relevant for evaluating the adequacy of a disclosure statement, which includes:

(1) the events which led to the filing of a bankruptcy petition;
(2) a description of the available assets and their value;
(3) the anticipated future of the company;
(4) the source of information stated in the disclosure statement;
(5) a disclaimer;
(6) the present condition of the debtor while in Chapter 11;
(7) the scheduled claims;
(8) the estimated return to creditors under a Chapter 7 liquidation;

> (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information;
> (10) the future management of the debtor;
> (11) the Chapter 11 plan or a summary thereof;
> (12) the estimated administrative expenses, including attorneys' and accountants' fees;
> (13) the collectability of accounts receivable;
> (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan;
> (15) information relevant to the risks posed to creditors under the plan;
> (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;
> (17) litigation likely to arise in a non-bankruptcy context;
> (18) tax attributes of the debtor; and
> (19) the relationship of the debtor with affiliates.

In re Metrocraft Pub. Serv's, Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984); *accord. In re Howell*, No. 09-91538, 2011 WL 1332176, at *1 (Bankr. N.D. Ga. Jan. 21, 2011).

ARGUMENT

11.

The Debtors' Amended Disclosure Statement is deficient, as it does not provide creditors with adequate information to make an informed judgment about the Debtors' Amended Plan. In addition, Debtors' Amended Disclosure Statement, in conjunction with Debtors' Amended Plan, improperly imposes nonconsensual non-debtor releases on creditors who fail to take affirmative action to avoid them. Finally, Debtors' proposed ballot forms fail to adequately explicate the process and effect of the third-party release provisions.

I. Debtors' Amended Disclosure Statement Is Deficient, as It Does Not Provide Creditors with Adequate Information to Make an Informed Judgment Regarding Debtors' Amended Plan.

12.

Debtors' Amended Disclosure Statement gives insufficient information to creditors to make an informed judgment regarding Debtors' Amended Plan as to the following topics:

A. Debtors' Amended Disclosure Statement Fails to Provide Sufficient Financial Information for Debtors.

13.

Debtors' Amended Disclosure Statement lacks an adequate discussion of Debtors' current and future income and expenses.

14.

In the Amended Disclosure Statement, Debtors provide a detailed background as to the financial difficulties that caused Debtors to seek bankruptcy protection. However, the Amended Disclosure Statement includes no explanation of Debtors' operations since filing the case. Further, the Amended Disclosure Statement includes no financial projections for future performance of the operating Debtors. Debtors reference an "Exhibit B" to the Amended Disclosure Statement and Amended Plan, which purportedly includes "Financial Projections", but then indicates that this information is "To Come". (Dkt. No. 438, Pg. 125). [2]

[2] The United States Trustee reserves the right to amend this Objection upon presentation of additional or amended information from Debtors.

15.

Without this detailed information, creditors have inadequate information to make an informed judgement about the plan.

B. Debtors' Amended Disclosure Statement Fails to Provide Sufficient Information for Creditors to Determine Whether Creditors Will Receive More Through the Amended Plan Than Through a Liquidation.

16.

A disclosure statement must contain a detailed liquidation analysis, including an explanation of any assumptions made in the preparation of such analysis so creditors can make an informed decision about alternatives to a debtor's plan.

17.

Debtors' Amended Disclosure Statement lacks a liquidation analysis of sufficient detail to satisfy the "best interest of creditors" test under §1129(a)(7) of the Bankruptcy Code. *See In re Smith*, 357 B.R. 60, 67 (Bankr. M.D.N.C. 2006) ("In order to show that a payment under a plan is equal to the value that the creditor would receive if the debtor were liquidated, there must be a liquidation analysis of some type that is based on evidence and not mere assumptions or assertions.").

18.

An application of the best interest of creditors test involves a comparison between the proposed chapter 11 plan and what creditors would receive in a chapter 7 liquidation. If the plan fails the §1129(a)(7) test, then creditors are better off with a chapter 7 liquidation. Here, creditors are essentially being asked to accept general statements

without any comparative analysis demonstrating that a chapter 7 trustee would distribute cash proceeds less efficiently than a chapter 11 estate. Debtors reference an "Exhibit A" to the Amended Disclosure Statement and Plan, which purportedly includes a "Liquidation Analysis", but then indicates that this information is "To Come". (Dkt. No. 438, Pg. 124).[3]

19.

Without this detailed information, creditors have inadequate information to make an informed judgement about the plan.

C. Debtors' Amended Disclosure Statement Fails to Adequately Explain the Rationale for, and Effect, of Substantive Consolidation or Alternative Remedies.

20.

In the Amended Disclosure Statement, Debtors indicate, for the first time, that Debtors intend to seek substantive consolidation of their 282 cases as part of the confirmation process. (Dkt. 438, Pgs, 61-65, 68-69). Alternatively, if the Court denies substantive consolidation, Debtors intend to seek permission for a consolidated distribution process for creditors for all Debtors to be paid by a single trust, funded by certain accounts receivable owed to Debtors and a contribution from a plan sponsor. (Dkt. No. 438, Pgs. 68-69).

[3] The United States Trustee reserves the right to amend this Objection upon presentation of additional or amended information from Debtors.

21.

Given Debtors' desire to seek substantive consolidation through the plan confirmation process, the Amended Disclosure Statement should provide creditors a full analysis of the legal issues involved with substantial consolidation, not merely a selected explanation of certain applicable factors.

22.

In addition, Debtors should provide creditors with a full analysis of the ramifications of the proposed alternative distribution scheme, should the Court determine substantial consolidation is not appropriate.

23.

Without this detailed information, creditors have inadequate information to make an informed judgement about the plan.

D. Debtors' Amended Disclosure Statement Fails to Provide Adequate Information Regarding the GUC Trust Agreement.

24.

Pursuant to Debtors' Amended Disclosure Statement, distributions to Debtors' general unsecured claims under the Amended Plan will be paid by the GUC Trust, not Debtors. (Dkt. No. 438, Pgs. 17, 27).

25.

Pursuant to Debtors' Amended Disclosure Statement, the GUC Trust will be established by the GUC Trust Agreement. (Dkt. No. 438, Pg. 28). The Amended Disclosure Statement indicates that the GUC Trust Agreement will conform with the Amended Plan

but provides no other details regarding the contents of the GUC Trust Agreement. Instead, the Amended Disclosure Statement indicates that a copy of the GUC Trust Agreement "shall be Filed with the Plan Supplement". (Dkt. No. 438, Pg. 28).

26.

Pursuant to Debtors' Amended Disclosure Statement, the Plan Supplement filing deadline is just seven days prior to the deadline for creditors to cast ballots, which is October 31, 2024. (Dkt. No. 438, Pgs. 28, 36). In addition, the Debtors' Amended Disclosure Statement is not clear as to whether Debtors' creditors will be served with a copy of the GUC Trust Agreement.

27.

As the GUC Trust Agreement is the sole mechanism through with distributions are made to general unsecured creditors in the Amended Plan, creditors have a critical interest in the specific terms of the GUC Trust Agreement. Creditors should have access to the GUC Trust Agreement prior to approval of the Amended Disclosure Statement. Without this detailed information, creditors have inadequate information to make an informed judgement about the plan.

II. Debtors' Amended Disclosure Statement, in Conjunction with Debtors' Plan, Improperly Requires Creditors to Take Affirmative Action to Avoid Third-Party Releases.

28.

The Debtors' Amended Disclosure Statement should not be approved in its present form, because it explicates and supports an Amended Plan that extracts non-consensual

third-party releases from holders of claims or interests that (a) vote to accept the Plan, unless they also check an opt-out box on the ballot, (b) vote to reject the Plan, unless they also check an opt-out box on the ballot, (c) are entitled to vote and do not cast a ballot, including those who may not have received the solicitation materials, (d) are presumed to accept or reject the plan, unless they opt out of the third-party releases by completing and returning an opt-out election form, despite these parties not being entitled to vote, and (e) have an unclassified claim, but do not object to the third-party releases.

29.

Article X, Section D, Part 2 of Debtors' Amended Disclosure Statement and Amended Plan provides for Third-Party Releases (the "Third-Party Releases"):

> Effective as of the Effective Date, in exchange for good and valuable consideration, including the obligations of the Debtors under the Plan and the contributions and services of the Released Parties in facilitating the expeditious reorganization of the Debtors and implementation of the restructuring contemplated by the Plan, pursuant to section 1123(b) of the Bankruptcy Code, in each case except for Claims arising under, or preserved by, the Plan, to the fullest extent permissible under applicable Law, each Releasing Party (other than the Debtors or the Reorganized Debtors), in each case on behalf of itself and its respective successors, assigns, and representatives, and any and all other entities who may purport to assert any Claim, Cause of Action, directly or derivatively, by, through, for, or because of a Releasing Party, is deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged each Debtor, Reorganized Debtor, and each other Released Party from any and all claims, interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, including any derivative claims, asserted or assertable on behalf of any of the Debtors, their Estates or their Affiliates, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to (including the formulation, preparation, dissemination, negotiation, entry into, or filing of, as applicable), or in any manner arising from, in whole or in part, the Debtors (including the management, ownership

or operation thereof), the purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the Debtors' in- or out-of-court restructuring efforts, the decision to file the Chapter 11 Cases, any intercompany transactions, the Chapter 11 Cases, the Plan (including the Plan Supplement), the Disclosure Statement, the DIP Facility, the DIP Documents, the Disclosure Statement, the DIP Facility, the DIP Documents, the ABL Credit Agreement, the Omega Term Loan Credit Agreement, the Omega Master Lease, the Omega Note Agreement, the ABL Exit Facility, the ABL Exit Facility Credit Agreement, the pursuit of Confirmation and Consummation, the administration and implementation of the Plan, including the issuance or distribution of Securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, but not, for the avoidance of doubt, any legal opinion effective as of the Effective Date requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan, or upon any other act, omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, other than claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct, fraud or gross negligence. Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not release any obligations arising on or after the Effective Date of any party or Entity under the Plan, the Plan Transaction or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan as set forth in the Plan.

Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the Third-Party Release, which includes by reference each of the related provisions and definitions contained in this Plan, and, further, shall constitute the Bankruptcy Court's finding that the Third-Party Release is: (a) consensual; (b) essential to the confirmation of the Plan; (c) given in exchange for the good and valuable consideration provided by the Released Parties, including the Released Parties' contributions to facilitating the Plan Transaction and implementing the Plan; (d) a good faith settlement and compromise of the Claims released by the Third-Party Release; (e) in the best interests of the Debtors and their Estates; (f) fair, equitable, and reasonable; (g) given and made after due notice and opportunity for hearing; and (h) a bar to any of the Releasing Parties asserting any claim or Cause of Action of any kind whatsoever released pursuant to the Third-Party Release.

Amended Disclosure Statement and Amended Plan, Art. X, Sec. D, Pt. 2. (Dkt. No. 438, Pgs, 94-95).

30.

Article II, Sec. A, Pt. 1.223. of the Amended Disclosure Statement and Amended Plan lists the definition of "Released Parties":

> "**Released Parties**" means, collectively, the following Entities, each in their capacity as such: (a) the Debtors and the Reorganized Debtors; (b) the UCC and each of its members (solely in their respective capacities as such); (c) Omega; (d) the ABL Secured Parties; (e) OHI DIP Lender, LLC; (f) TIX 33433 LLC; and (g) with respect to each of the foregoing Entities, each such Entity's current and former affiliates, subsidiaries, officers, directors, managers, principals, members, equity investors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such.

Amended Disclosure Statement and Amended Plan, Art. II, Sec. A, Pt. 1.223. (Dkt. No. 438, Pg. 34).

31.

Article II, Sec. A, Pt. 1.224. of the Amended Disclosure Statement and Amended Plan lists the definition of "Releasing Parties":

> "**Releasing Parties**" means the following Entities, each in their respective capacities as such: (a) each Holder of a Claim that (i) votes to accept the Plan or (ii) either (1) abstains from voting or (2) votes to reject the Plan and, in the case of either (1) or (2), does not opt out of the voluntary release by checking the opt-out box on the applicable Ballot, and returning it in accordance with the instructions set forth thereon, indicating that they are electing to opt out of granting the releases provided in the Plan; (b) each Holder of a Claim that is deemed to accept the Plan or is otherwise Unimpaired under the Plan and who does not opt out of the voluntary release by checking the opt out box on the applicable non-voting status notice form, and returning it in accordance with the instructions set forth thereon,

> indicating that they are not willing to grant the releases provided in the Plan; and (c) each Holder of a Claim that is deemed to reject the Plan or is otherwise Impaired under the Plan and who does not opt out of the voluntary release by checking the opt-out box on the applicable non-voting status notice form, and returning it in accordance with the instructions set forth thereon, indicating that they are not willing to grant the releases provided in the Plan; and (d) each Holder of an unclassified Claim who does not object to the Third-Party Release.

Amended Disclosure Statement and Amended Plan, Art. II, Sec. A, Pt. 1.224. (Dkt. No. 438, Pg. 34).

32.

In *Harrington v. Purdue Pharma L.P.*, 603 U.S. ___, 144 S. Ct. 2071 (2024), the Supreme Court held that non-consensual third-party releases are not authorized under the United States Bankruptcy Code. As a result, nonconsensual third-party releases cannot be included in a proposed plan.

33.

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

34.

No federal law applies to the question of whether the nondebtor Releasing Parties have agreed to release the non-debtor Released Parties. The Bankruptcy Code does not apply to agreements between non-debtors. And no Code provision authorizes courts, as part of an order confirming a chapter 11 plan, to "deem" a non-debtor to have consented to an agreement to release claims against other non-debtors where consent would not exist under state law. Nor does 11 U.S.C. § 105(a) confer any power to override state law. Rather, section 105(a) "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue Pharma, L.P.*, 144 S. Ct. at 2082 n.2 (quotation marks omitted). Bankruptcy courts cannot "create substantive rights that are otherwise unavailable under applicable law," nor do they possess a "roving commission to do equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (quotation omitted). Thus, the state-law definition of consent is not diluted or transformed by the Code.

35.

Indeed, even as to a debtor, it is well settled that whether parties have entered a valid settlement agreement is governed by state law. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) ("Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law."); *De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)*, 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009) ("Where the United States is not a party, it is well established that settlement agreements in pending bankruptcy cases are considered contract matters governed by state law."). *See also Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 450-

451 (2007) ("[T]he basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law.") (quotation marks omitted); *Butner v. United States*, 440 U.S. 48 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").

36.

Thus, "[c]ourts generally apply contract principles in deciding whether a creditor [or equity holder] consents to a third-party release [so if] consent is in question, applicable state contract law provides the most appropriate standard to determine consent . . ." *In re Stein Mart, Inc.*, 629 B.R. 516, 523 (Bankr. M.D. Fla. 2021) (bracketing added); *see also In re SunEdison, Inc.,* 576 B.R. 453, 458 (S.D.N.Y. Bankr. 2017). Contract principles govern because a third-party release is essentially a settlement between a non-debtor claimant and another non-debtor. *See id.*

37.

Here, the Debtors cannot meet the state-law burden of establishing that the releasing parties expressly consent to release their property rights or to having that release memorialized in the Amended Disclosure Statement and Amended Plan.

38.

The "general rule of contracts is that silence cannot manifest consent." *Patterson v. Mahwah Bergen Ret. Grp., Inc.,* 636 B.R. 641, 686 (E.D. Va. 2022).

39.

As explained in the Restatement (Second) of Contracts: "Acceptance by silence is exceptional. Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

40.

"[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)

41.

Thus, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). *See also Patterson*, 636 B.R. at 686 (discussing how contract law does not support consent by failure to opt out). Further, "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." RESTATEMENT (SECOND) OF CONTRACTS § 69, cmt. c (1981). *See also Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1227-28 (9th Cir. 2022) ("[E]ven though the offer states that silence will be taken as consent, silence on the part of the offeree cannot turn the offer into an agreement, as the offerer cannot prescribe conditions so as to turn silence into acceptance." (quotation marks omitted); *Imperial Ind. Supply Co v. Thomas*, 825 F. App'x 204, 207 (5th Cir. Sept. 2,

2020) ("Tacit acquiescence between relative strangers ignores the basic tenets of contract law. . . . While there may be exceptions in cases involving parties with longstanding relationships, generally speaking, 'silence or inaction does not constitute acceptance of an offer.'") (quoting *Norcia v. Samsung Telecomms Am., LLC*, 845 F.3d 1279, 1284 (9th Cir. 2017)).

42.

Georgia common law, as a point of reference, is in accord. "Mutual assent, or a meeting of the minds, 'is the first requirement of the law relative to contracts.' " *Purvis v. Aveanna Healthcare, LLC*, 563 F. Supp. 3d 1360, 1379 (N.D. Ga. 2021) (citations omitted). Georgia law is clear: "silence, standing alone, does not demonstrate the 'mutual assent or meeting of the minds' required to create an enforceable contract . . . . [u]nder Georgia's objective theory of intent . . . ." *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800, 2022 WL 1122841, at *6 (N.D. Ga. Apr. 13, 2022) (*quoting Hart v. Hart*, 297 Ga. 709, 711–12 (2015)).

43.

The failure by a creditor to opt out of a third-party release does not constitute affirmative consent to same under governing contract law.

44.

First, merely voting for a plan without checking an opt-out box does not constitute the affirmative consent necessary to reflect acceptance of an offer to enter a contract to release claims against non-debtors. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). Voting on a chapter 11 plan is governed by the Bankruptcy Code, and a favorable

vote reflects only approval of the plan's treatment of the voters' claims *against the debtor*. Those voting on the chapter 11 plan have not "manifest[ed] [an] intention that silence may operate as acceptance" of an offer to release claims against non-debtors. *Id*. Nor are they "silently tak[ing] offered benefits" from the released non-debtors, *id*., such that consent may be inferred. The only benefits received are through distributions from the debtor's chapter 11 plan—there are no benefits provided from the released non-debtor to the releasing claimant. Further, because the plan's distributions are not contingent on agreeing to the non-debtor release, one cannot infer consent from the acceptance of those distributions.

45.

Second, the plan imposes non-debtor releases on those who vote to reject the Plan, unless they check an opt-out box on the returned ballot. But it is even more obvious that those who vote to reject a plan are not consenting merely through silence by failing to opt out of the nondebtor release. *See In re Chassix Holdings, Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015).

46.

Whether or not a creditor votes to accept or reject the plan, such creditors may not have understood the solicitation package, and may not have possessed the time or financial resources to engage counsel, never imagining that their rights against non-debtors could be extinguished through the bankruptcy of these Debtors.

47.

Third, the Plan provides that creditors in voting classes who do not vote and do not opt out of the third-party releases shall also be stripped of their direct claims against non-debtors. For the reasons discussed above, no consent can be inferred from this silence. Further, such creditors: (a) may never have received the solicitation package, or received it late, due to mail errors or delays; or (b) received the solicitation package timely, completed same and returned it to the balloting agent but, through no fault of their own, the ballot never reached the balloting agent, or the ballot was received late.

48.

"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 88. Moreover, the court in *SunEdison* observed that solicited parties may have failed to vote for reasons other than an intention to assent to the releases. *See SunEdison*, 576 B.R. at 461.[4]

49.

"A party's receipt of a notice imposing an artificial opt-out requirement, the recipient's possible understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as consent through a party's silence or

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

inaction. *In re Emerge Energy Servs., LP*, No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019).

50.

Fourth, the non-consensual Third-Party Releases will also be imposed on unimpaired claimants or holders of interests who are not permitted to vote on the plan because they are deemed to accept the plan *and* impaired claimants or holders of interests who are not permitted to vote on the plan because they are deemed to reject the plan, but who receive a notice informing them that, unless they check an opt-out box on the Non-Voting Opt-Out Form to opt out of giving third-party releases, they will be deemed to have consented to same. For the same reasons discussed in *Chassix* and *Emerge*, and under black-letter contract law discussed above, such "deemed consent" from silence does not constitute the affirmative consent required to support a consensual release. Moreover, this procedure is especially egregious as to those deemed to reject the plan because they will receive nothing under it, but will be forced to give a release without affirmative consent.

51.

Fifth, the non-consensual Third-Party Releases will be imposed on claimants with unclassified claims that do not file an objection to the Amended Plan. For the same reasons discussed in *Chassix* and *Emerge*, and under black-letter contract law discussed above, "deemed consent" from silence does not constitute the affirmative consent required to support a consensual release. Moreover, the claimants with unclassified claims will presumably not receive a ballot, and will not have an opportunity to opt-out of the Third-Party Releases. Instead, in order to avoid the Third-Party Releases, a claimant with an

unclassified claim must object to the Amended Plan to avoid being stripped of their direct claims against non-debtors.

52.

Accordingly, the Amended Disclosure Statement's and Amended Plan's Third-Party Releases must be stricken or amended to ensure consent from creditors, because silence is not affirmative consent.

53.

Moreover, Art. X, Sec. D, Part. 2 in (h) provides that the Third-Party Release will be "a bar to any of the Releasing Parties asserting any claim or Cause of Action of any kind whatsoever released pursuant to the Third-Party Release." This appears to be asking the Court to issue an injunction to enforce the Third-Party Release. But *Purdue* clearly stands for the proposition that non-consensual third-party releases and injunctions are not permitted by the Bankruptcy Code. *See Purdue Pharma*, 144 S.Ct. at 2088. As the *Purdue* court noted, the Bankruptcy Code allows courts to issue an injunction in support of a non-consensual, third-party release in exactly one context: asbestos-related bankruptcies, and these cases are not asbestos-related. *See Purdue Pharma*, 144 S. Ct. at 2085 (citing 11 U.S.C. § 524(e)). Even if non-debtor releases are consensual, there is no Code provision that authorizes chapter 11 plans or confirmation orders to include injunctions to enforce them. Further, such an injunction is not warranted by the traditional factors that support injunctive relief because, if the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent "immediate and irreparable harm" to either the estates or the released parties. A consensual release may serve as an affirmative defense

in any ensuing, post-effective date litigation between the third party releasees and releasors, but there is no reason for this Court to be involved with the post-effective date enforcement of those releases. Moreover, this injunction essentially precludes any party deemed to consent to this release from raising any issue with respect to the effectiveness or enforceability of the release (such as mistake or lack of capacity) under applicable non-bankruptcy law.

III. Debtors' Proposed Ballot Forms Fail to Concisely Explain the Effect of the Third-Party Releases, and the Effect of the "Opt-Out" Option.

54.

The Plan and Solicitation Procedure Motion includes proposed forms for ballots for specific classes of creditors under the Amended Plan. (Dkt. No. 316, Pgs. 43-92)

55.

The proposed ballots quote lengthy provisions from the Amended Disclosure Statement and Amended Plan regarding both Debtors Releases and Third-Party Releases. However, these provisions are both dense and difficult for a creditor, untrained in bankruptcy law, to understand.

56.

In addition, the proposed ballots place the denotation for an "opt-out" of the potential third-party release deep in the middle of each ballot, isolated from all other portions of the ballot a respective creditor may complete.[5]

[5] By raising the issue of clarity regarding the Debtors' proposed form of ballots, the United States Trustee does not waive her prior arguments against the inclusion of the Third-Party Releases in the Amended Disclosure Statement.

57.

The proposed ballots should be both convenient to navigate, and decipherable by the creditor body. Accordingly, the proposed ballots should be amended, to (1) include plain language regarding the effects and ramifications of the third-party releases in the Amended Plan; and (2) position any applicable denotation for the third-party releases with the other portions of the ballot a creditor may complete.

WHEREFORE, the United States Trustee respectfully requests that the Court sustain the United States Trustee's Objection, deny approval of the Debtors' Amended Disclosure Statement until Debtors address the issues in the Objection, and grant such further relief as the Court deems fair and equitable.

Respectfully submitted this 20th day of September, 2024.

MARY IDA TOWNSON
UNITED STATES TRUSTEE
REGION 21

s/ Jonathan S. Adams
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CERTIFICATE OF SERVICE

This is to certify that I have on this day electronically filed the foregoing *United States Trustee's Objection to Debtors' Amended Disclosure Statement and Form of Ballots* using the Bankruptcy Court's Electronic Case Filing program, which sends a notice of this document and an accompanying link to this document to the following party who has appeared in this case under the Bankruptcy Court's Electronic Case Filing program:

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I further certify that on this day, I caused a copy of this document to be served via United States First Class Mail, with adequate postage prepaid on the following parties at the address shown for each.

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Dated: September 20, 2024.

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