Docket #0623 Date Filed: 11/04/2024

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' SECOND AMENDED COMBINED DISCLOSURE STATEMENT AND JOINT CHAPTER 11 PLAN OF REORGANIZATION

Mary Ida Townson, United States Trustee for Region 21, acting in furtherance of her responsibilities under 28 U.S.C. § 586, objects to confirmation of Debtors' plan as proposed in *Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* (Dkt. No. 481). Debtors' proposed plan improperly extracts non-consensual third-party releases from holders of claims or interests, unless the respective holders of claims or interests affirmatively act to avoid the third-party releases. Further, Debtors' proposed plan improperly imposes an injunction on all creditors to enforce the third-party releases, and improperly deems the proposed plan a settlement between Debtors, parties benefiting from the third-party releases, and Debtors' creditors.

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COURSE OF PROCEEDING

1.

On June 2 and June 3, 2024, LaVie Care Centers, LLC, and 281 related entities ("Debtors") filed petitions for relief under chapter 11 of the United States Bankruptcy Code. The cases are being jointly administered for procedural purposes only.[1]

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) The United States Trustee modified the composition of the committee on October 17, 2024, after one member resigned and another was determined by the court to be ineligible. (Dkt. No. 568)

3.

The United States Trustee commenced the section 341meetings of creditors on June 28, 2024, and concluded the meeting on August 12, 2024, after Debtors filed required schedules and statements.

4.

On July 23, 2024, Debtors filed the *Debtors' Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization.* (Dkt. No. 273) On September 17, 2024, Debtors filed *Debtors' Combined Disclosure Statement and Joint First Amended Chapter 11 Plan of Reorganization.* (Dkt. No. 438) On October 1, 2024, Debtors filed *Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization*

[1] 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.

(Dkt. No. 481) (the disclosure statement portion thereof, the "Second Amended Disclosure Statement," and the chapter 11 plan portion thereof, the "Second Amended Plan," including all exhibits and supplements).

5.

On September 20, 2024, the United States Trustee timely filed her *Objection to Debtors' Amended Disclosure Statement and Form of Ballots*. (Dkt. No. 445) (the "Disclosure Statement Objection") The United States Trustee hereby incorporates, by reference, all allegations and arguments in the Disclosure Statement Objection to this pleading.

6.

On October 1, 2024, the Court entered the *Order (I) Conditionally Approving Disclosure Statement, (II) Scheduling Combined Hearing for November 14, 2024, at 9:30 A.M. (Prevailing Eastern Time), (III) Establishing Procedures for Solicitation and Tabulation of Votes on Plan, (IV) Approving Certain Forms and Notices, and (V) Granting Related Relief*. (Dkt. No. 480) (the "Disclosure Statement Order") In the Disclosure Statement Order, the Court conditionally approved the use of the Second Amended Disclosure Statement for solicitation of votes for the Second Amended Plan, but specifically indicated that any objections to the adequacy of the information contained in the Second Amended Disclosure Statement would be reserved for consideration at the plan confirmation hearing. (Dkt. No. 480, Pg. 3) The Disclosure Statement Order set the deadline for filing an objection to confirmation of the Second Amended Plan for November 4, 2024, at 4:00 p.m., prevailing eastern time.

7.

This Objection to Debtors' Second Amended Disclosure Statement and Second Amended Plan is timely.

STANDING

8.

Pursuant to 28 U.S.C. § 586, the United States Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code. This duty is part of the United States Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the United States Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.),* 898 F.2d 498, 500 (6th Cir. 1990) (describing the United States Trustee as a "watchdog").

9.

Pursuant to 28 U.S.C. § 586(a)(3)(B), the United States Trustee has the duty to monitor plans and disclosure statements filed in chapter 11 cases and to comment on such plans and disclosure statements. The United States Trustee has standing to be heard regarding the sufficiency of the Second Amended Disclosure Statement and confirmation of the Second Amended Plan, pursuant to 11 U.S.C. § 307.

ARGUMENT

I. Debtors' Second Amended Plan Should Not Be Confirmed Because It Imposes Improper Non-Consensual Third-Party Releases.

10.

Debtors' Second Amended Plan should not be approved in its present form, because it improperly extracts non-consensual third-party releases from holders of claims or interests who (1) vote to accept the Plan; (2) vote to reject the Plan, unless they also check an opt-out box on the ballot; (3) are entitled to vote and do not cast a ballot, including those who may not have received the solicitation materials, unless they also check an opt-out box on the ballot; (4) 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; or (5) have an unclassified claim, but do not object to the third-party releases.

11.

Article X, Section D, Part 2 of Debtors' Second 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.

Second Amended Disclosure Statement and Second Amended Plan, Art. X, Sec. D, Pt. 2.

(Dkt. No. 481, Pgs, 100-101).

12.

Article II, Sec. A, Pt. 1.243. of the Second 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.

Second Amended Disclosure Statement and Second Amended Plan, Art. II, Sec. A, Pt. 1.243. (Dkt. No. 481, Pg. 34).

13.

Article II, Sec. A, Pt. 1.244. of the Second 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.

Second Amended Disclosure Statement and Second Amended Plan, Art. II, Sec. A, Pt. 1.224. (Dkt. No. 481, Pg. 34).

A. Non-Consensual Third-Party Releases Cannot Be Included in a Chapter 11 Plan.

14.

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.

15.

Because the Second Amended Plan forces the Third-Party Releases on creditors without their affirmative consent, the releases are non-consensual and cannot be approved under *Purdue Pharma*. Neither a vote to accept the Plan while being silent as to the Third-

Party Releases, nor the mere failure by a creditor to opt out of a Third-Party Release, constitutes affirmative consent under governing contract law.

B. State Law Governs Whether Parties Consent to a Release.

16.

Whether parties have reached an agreement—including an agreement not to sue—is governed by state law. *See In re Smallhold, Inc.* 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024). 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)).

17.

No federal law applies to the question of whether the non-debtor 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 Bankruptcy Code.

18.

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.").

19.

Because "[c]ourts generally apply contract principles in deciding whether a creditor [or equity holder] consents to a third-party release, [when-] 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 Smallhold, Inc., 2024 WL 4296938, at *11 (requiring "some sort of affirmative expression of consent that would be sufficient as a matter of contract law"); *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third-party release."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 506 (Bankr. D.N.J. 1997) (holding that a third-party release "is no different from any other settlement or contract"); *id*. at 507 (holding that "the validity of the release … hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order") (internal quotation marks omitted) (alterations in original). As one court recently held, because "nothing in the bankruptcy code contemplates (much less authorizes it) … any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent." *In re Tonawanda Coke Corp*., 2024 WL 4024385, at *2 (Bankr. W.D.N.Y. Aug. 27, 2024) (quoting *Purdue*, 144 S. Ct. at 2086). Accordingly, "any such consensual agreement would be governed by state law." *Id.*

20.

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 Second Amended Disclosure Statement and Second Amended Plan.

C. Under State Law, Silence Does Not Manifest Consent.

21.

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).

22.

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).

23.

"[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)

24.

Accordingly, "[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)).

25.

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)).

26.

Applicable state contract law cannot be disregarded on a default theory, applied by some courts, that creditors who remain silent forfeit their rights against non-debtors because they received notice of the non-debtor release, just as they would forfeit their right to object to a plan if they failed timely to do so. *See, e.g., In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), *abrogated by In re Smallhold, Inc.*, 2024 WL 4296938, at *8-*11. As explained in the *Smallhold* opinion, the Supreme Court's *Purdue Pharma* decision undermined the fundamental premise of 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. *In re Smallhold, Inc.*, 2024 WL 4296938, at *1-*2; *see also id*. at *10 ("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."). Under the default theory, because pre-*Purdue Pharma* a chapter 11 plan could permissibly include nonconsensual, non-debtor releases, non-debtor releases were no different from any other plan provision to which creditors had to object or risk forfeiture of their rights. *See id*. at *10. A failure to opt out under the default theory is not truly consent, but rather "an administrative shortcut to relieve those creditors of the burden of having to file a formal plan objection." *See id*. at *2; *see also id*. at *9 ("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.").

27.

But entering relief against a party who defaulted by not responding is, "[u]nder established principles" permissible "only after satisfying themselves that the relief the plaintiff seeks is relief that is at least potentially available to the plaintiff in 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. [After *Purdue Pharma*], that is no longer the case in the context of a third-party release."). After *Purdue Pharma*, however, it is now clear that imposition of a non-debtor release is not available relief

through a debtor's chapter 11 plan. *See id*. at *2 ("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."); *see also id*. at *10.

28.

The *Smallhold* court provided an illustration that makes obvious why notice-plus-failure-to-opt-out is not consent:

> Consider, for example, a plan of reorganization that provided that each creditor who failed to check an "opt out" box on a ballot was required to make a $100 contribution to the college education fund for the children of the CEO of the debtor. Just as in the case of Party A's letter to Party B, no court would find that in these circumstances, a creditor that never returned a ballot could properly be subject to a legally enforceable obligation to make the $100 contribution.

Id. at *2 (footnote omitted). Cases that impose a non-debtor release based merely on the failure to opt out fail to provide a limiting principle to distinguish the third-party release from the hypothetical college education fund plan; after *Purdue Pharma*, there is none. *Id*. Thus, "ordinary contract principles" must apply to determine whether there is consent to a non-debtor release. *Id*. at *3.

29.

In an oral ruling prior to the *Purdue Pharma* decision, Judge Jeffrey W. Cavender in the Northern District of Georgia confirmed a proposed plan with third-party releases, that allowed creditors to avoid the releases by exercising a right to opt-out of the release on a ballot for the plan. *In re Envistacom, LLC*, No. 23-52696-JWC (Bankr. N.D. Ga., November 8, 2023). In his oral ruling, Judge Cavender specifically cited *Arsenal*, and its

default theory, as the primary rationale for his decision. *Id.* However, as the *Smallhold* Court correctly held, *Purdue Pharma* undermined the fundamental premise of default theory — that a bankruptcy proceeding legally could lead to the destruction of creditors' rights against non-debtors. *In re Smallhold, Inc.*, 2024 WL 4296938, at *1-*2, *10, *abrogating In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592.

30.

Under ordinary contract principles, an affirmative agreement — something more than the failure to opt out — is required to support a consensual third-party release. *See In re Smallhold, Inc.*, 2024 WL 4296938, at *3 ("[A] creditor cannot be deemed to consent to a third-party release without some affirmative expression of the creditor's consent."); *see also id*. at *8; *In re Tonawanda Coke Corp.,* 2024 WL 4024385, at *2; *Patterson*, 636 B.R. at 686. Failing to "opt out" of an offer is not a manifestation of consent unless one of the exceptions to the rule that silence is not consent applies, such as conduct by the offeree that manifests an intention that silence means acceptance or taking the offered benefits. For example, the *Patterson* court, in applying black-letter contract principles to opt-out releases in a chapter 11 plan, found that contract law does not support consent by failure to opt-out. *Patterson*, 636 B.R. at 686. "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." *Id.* at 688.

D. Debtors' Second Amended Plan Cannot Be Approved Because It Assumes Creditor Silence or Failure to "Opt-Out" Equates to Consent.

31.

Debtors' Second Amended Plan should not be approved in its present form, because it improperly extracts non-consensual third-party releases from holders of claims or interests that (1) vote to accept the Plan; (2) vote to reject the Plan, unless they also check an opt-out box on the ballot; (3) are entitled to vote and do not cast a ballot, including those who may not have received the solicitation materials, unless they also check an opt-out box on the ballot; (4) 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; or (5) have an unclassified claim, but do not object to the third-party releases.

32.

First, Debtors' Second Amended Plan improperly extracts the Third-Party Releases from creditors who vote to accept the Second Amended Plan. Because the Second Amended Plan forces third-party releases on these parties without their affirmative consent, the releases are non-consensual and cannot be approved under *Purdue Pharma.*

33.

The Second Amended Plan's conflation of voting for the Plan with acceptance of the Third-Party Releases is inconsistent with basic, state-law contract principles. Voting for a plan does not reflect the unambiguous assent necessary to find consent to a release. *See, e.g., In re Congoleum Corp.*, 362 B.R. 167, 194 (Bankr. D.N.J. 2007) ("[A] consensual

release cannot be based solely on a vote in favor of a plan."); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (holding that, because consensual releases are premised on the party's agreement to the release, "it is not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan").

34.

Voting for the Second Amended Plan 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). 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.* Because impaired creditors have a federal right under the Bankruptcy Code to vote on a chapter 11 plan, 11 U.S.C. § 1126(a), merely exercising that right does not manifest consent to release claims against non-debtors. 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*. *See Arrowmill*, 211 B.R. at 507; *Congoleum Corp.*, 362 B.R. at 194; *In re Digital Impact, Inc*., 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998). Further, creditors have no state law duty to respond to an offer to release nondebtors such that their silence can be understood as consent, nor have they any prior course of dealing with the released nondebtors that would impose such a duty. *See, e.g., Norcia*, 845 F.3d at 1285-86. Nor do creditors have any affirmative obligation to act on a plan, either to vote or to opt out. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan); *SunEdison, Inc.*, 576 B.R. at 460–61 (holding creditors have no duty to speak regarding a plan that would

allow a court to infer consent from silence). A claimant's vote in favor of a plan while remaining silent regarding a non-debtor release thus is does not manifest an intention to agree to a non-debtor release.

35.

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. Because the Second Amended Plan's distributions are not contingent on agreeing to the non-debtor release, one cannot infer consent from the acceptance of those distributions. *See Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1286 (9th Cir. 2017) (holding customer did not retain any benefits such that a failure to opt out of arbitration indicated consent when the warranty applied regardless of the failure to opt out). Further, acceptance of a "benefit" — distributions under the plan — that the offeror had no right to refuse the offeree does not manifest acceptance of the offer. *See Railroad Mgmt. Co., L.L.C. v. CFS La. Midstream Co*., 428 F.3d 214, 223 (5th Cir. 2005) ("In the absence of any evidence that Strong had the right to exclude CFS from the property in question or that CFS accepted any service or thing of value from Strong, no reasonable jury could conclude that CFS's failure to remove its pipeline upon Strong's demand constituted consent to a contract.").

36.

As explained in *Arrowmill*, a voluntary release arises only "because the *creditor agrees*" to it. 211 B.R. at 507 (emphasis in original). 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." *Id*. (quotation marks omitted); *accord Congoleum Corp.*, 362 B.R. at 194; *In re Digital Impact, Inc*., 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998). Rather, a creditor must "unambiguously manifest[] assent to the release of the nondebtor from liability on its debt." *Arrowmill*, 211 B.R. at 507. Merely voting for the Second Amended Plan does not reflect actual and knowing consent for a third-party release, particularly in the context of "an immensely complicated plan" where "it would be difficult for any layperson to comprehend all of its details." *In re Congoleum Corp.*, 362 B.R. at 194.

37.

In addition, as the *Smallhold* court recognized, if voting to accept a plan means a non-debtor release is imposed on the voter, that will discourage creditors from voting to accept the plan and may 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. *In re Smallhold, Inc.,* 2024 WL 4296938, at *7.

38.

Second, the Second Amended Plan also imposes the Third-Party Releases on those who vote to reject the plan, unless they also check an opt-out box on the returned ballot. 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). There no "mutual agreement" as to the Plan, much less the Third-Party Release, as the creditor has expressly stated its rejection of the Plan. As the court in

Chassix said, "a creditor who votes to reject a plan should also be presumed to have rejected the proposed third-party releases that are set forth in the plan. The additional 'opt out' requirement, in the context of this case, would have been little more than a Court-endorsed trap for the careless or inattentive creditor." *Id*.

39.

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. "[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." *Norcia*, 845 F.3d at 1285 (quotation marks omitted).

40.

While it had previously allowed an opt-out procedure in *In re Stein Mart*, 629 B.R. 516 (Bankr. M.D. Fla. 2021)(Funk, J), the Bankruptcy Court for the Middle District of Florida recently found that an opt-out procedure was no longer sufficient to show creditors affirmatively consented to the releases, *see In re Red Lobster Mgm't*, *LLC*, No. 24-02486 (GER)(Bankr. M.D. Fla.). In said case, on July 26, 2024, Judge Grace Robson made an oral ruling stating that she would not impose a duty to opt out, finding that there were many reasons that creditors might fail to return the proposed opt-out form, including

"carelessness, inattentiveness, a mistake."[2] 73 No. 18 Bankr. Ct. Dec. News 5. Judge Robson also reasoned that creditors should not be expected to take action based on vague information, especially if they are expecting a "de minimis or unknown" recovery. *Id.* The Debtors agreed to modify the Plan documents to instead require an opt-in procedure.

41.

The United States Trustee recognizes that the court in *Smallhold* found that the act of voting on a plan combined with a failure to opt out can constitute consent to a non-debtor release. *See Smallhold,* 2024 WL 4296938, at *14. The *Smallhold* decision, however, although stating it was applying "ordinary contract principles," 2024 WL 4296938, at *3, failed to faithfully apply those principles to the question of when silence can constitute consent. For the reasons discussed above, they do not.

42.

In *Smallhold*, the court reasoned that consent existed because the act of voting is an "affirmative step" taken after being told that failing to opt out would bind the voter to the nondebtor release. *Smallhold,* 2024 WL 4296938, at *14. But while voting is an "affirmative step" with respect to the debtor's plan, it is not a "*manifestation of intention* that silence may operate as acceptance" of an offer to release claims against non-debtors for the reasons discussed above. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) (emphasis added). That is particularly so for those who vote to reject the plan. Creditors have no affirmative obligation to act on a plan, either to vote or to opt out. *See,*

[2] Although the court did allow vote in favor of the plan to be deemed consent, the court did not provide any specific analysis supporting that decision, and did not specifically cite state law in reaching that conclusion.

e.g., 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan); *In re SunEdison, Inc.*, 576 B.R. at 460–61 (holding creditors have no duty to speak regarding a plan that would allow a court to infer consent from silence). Further, because impaired creditors have a federal right under the Bankruptcy Code to vote on a chapter 11 plan, 11 U.S.C. § 1126(a), merely exercising that right does not manifest consent to release claims against non-debtors. Thus, the act of voting on a plan without taking an additional step to opt out is still merely silence with respect to the nondebtor release.

43.

As explained by the Restatement, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction"—in this case, the freedom to vote on a chapter 11 plan— "or impose on him any duty to speak," such as by checking an opt out box or returning an opt out form. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). Voting on a plan while failing to opt out thus cannot be equated with affirmative conduct manifesting consent to the nondebtor release. Just like the hypothetical creditors in *Smallhold* could not be forced to contribute $100 to a college fund to benefit the debtor's CEO's children merely because they failed to return a ballot with an "opt out" box, *Smallhold*, 2024 WL 4296938, at *2, creditors who cast such a ballot should not be forced to make such a contribution merely because they failed to check that "opt out" box. State law affords no basis to conclude that consent to release *third-party* claims can properly be inferred from a mere failure to check an opt-out box on a ballot expressing the party's views about—and in this case rejecting—the proposed treatment of its claims against the *debtor*.

44.

Notably, the Ninth and Second Circuit cases *Smallhold* cited do not support its conclusion that the act of voting on a chapter 11 plan while remaining silent regarding the non-debtor release constitutes consent. *Smallhold,* 2024 WL 4296938, at *14 n.60 (citing *Berman v. Freedom Financial Network*, 30 F.4th 849, 856 (9th Cir. 2022); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017)). Those cases emphasize the importance of notice as a prerequisite to consent and explain the requirements for when someone can be deemed on "inquiry notice" of terms they did not read. *See Berman*, 30 F.4th at 856; *Meyer*, 868 F.3d at 75. But whether there is sufficient notice is a distinct question from whether there has been a manifestation of an intent to accept an offer. *See, e.g., Meyer*, 868 F.3d at 74 ("[A]n offeree, *regardless of apparent manifestation of his consent*, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.") (internal quotation marks omitted; emphasis added). While notice of a contractual term is certainly a necessary precondition to finding consent, notice is not alone sufficient. *See, e.g., id.*; *Norcia*, 845 F.3d at 1284; RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). There must also be a manifestation of consent. *See, e.g., Berman*, 30 F.4th at 85; *Norcia*, 845 F.3d at 1284; RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

45.

Third, the Second Amended 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. Those who abstain from voting cannot be said to be consenting to anything—they are taking no action with respect to the plan.

46.

For the reasons discussed above, no consent can be inferred from a creditor's silence. *See In re Red Lobster Mgm't, LLC*, No. 24-02486 (GER)(Bankr. M.D. Fla.) (rejecting opt out procedures for those who reject a plan and those who do not vote); *see also Smallhold,* 2024 WL 4296938, at *2 (rejecting opt out procedures for those who do not vote), abrogating *Arsenal Intermediate Holdings*, 2023 WL 2655592; *SunEdison*, 576 B.R. at 458–61; *Chassix Holdings*, 533 B.R. at 81–82 (rejecting opt out procedures for those who reject a plan and those who do not vote); *In re Wash. Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) (rejecting opt out procedures for those who reject a plan and those who do not vote). 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.

47.

"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.

48.

"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 inaction. *In re Emerge Energy Servs., LP*, No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019). In the absence of some sort of affirmative expression of consent that would be sufficient as a matter of contract law, the creditor's silence in the face of a plan and form of ballot after the Supreme Court's decision in *Purdue Pharma* is not sufficient to infer consent. *In re Smallhold, Inc.*, 2024 Bankr. LEXIS 2332, at *32.

49.

Fourth, the Third-Party Releases will also be imposed on unimpaired claimants or holders of interests who are not permitted to vote on the Second Amended 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, unless they check an opt-out box on the non-voting status notice form. For the same reasons discussed in *Chassix*, *Emerge*, *Red Lobster,* and *Smallhold,* 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.

50.

Fifth, the Third-Party Releases will be imposed on claimants with unclassified claims that do not file an objection to the Second Amended Plan. For the same reasons discussed in *Chassix*, *Emerge*, *Red Lobster* and *Smallhold*, 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, to avoid the Third-Party Releases, a claimant with an unclassified claim must object to the Second Amended Plan to avoid being stripped of their direct claims against non-debtors.

51.

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

II. Debtors' Second Amended Plan Should Not Be Confirmed Because It Includes an Improper Injunction Provision to Enforce Third-Party Releases.

52.

Debtors' Second Amended Plan should not be confirmed, because it includes an improper injunction provision to enforce the Third-Party Releases.

53.

Pursuant to the Second Amended Plan, 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." Second Amended Disclosure Statement and Second Amended Plan, Art. X, Sec. D, Pt. 2. (Dkt. No. 481, Pg, 101).

54.

Further, Article X, Section F of Debtors' Second Amended Plan includes the following provision:

> Except as otherwise expressly provided in the Plan, or for obligations issued or required to be paid pursuant to the Plan or the Confirmation Order, all Entities who have held, hold, or may hold claims or interests that have been released, discharged, or are subject to exculpation are permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Reorganized Debtors, the Exculpated Parties, or the Released Parties: (1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such claims or interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such claims or interests; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or the estates of such Entities on account of or in connection with or with respect to any such claims or interests; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such claims or interests unless such holder has Filed a motion requesting the right to perform such setoff on or before the Effective Date, and notwithstanding an indication of a claim or interest or otherwise that such holder asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such claims or interests released or settled pursuant to the Plan.
>
> No enjoined party may commence, continue, or otherwise pursue, join in, or otherwise support any other party commencing, continuing, or pursuing, a Claim or Cause of Action transferred to the Reorganized Debtors or the GUC Trust pursuant to the terms of the Plan, or a Claim or Cause of Action of any kind against the Debtors, the GUC Trustee, the Exculpated Parties, the Released Parties, or the Debtor Professionals that relates to or is reasonably likely to relate to any act or omission in connection with, relating to, or

> arising out of a Claim or Cause of Action, as applicable, subject to Article X.D and Article X.E hereof, or the Chapter 11 Cases, including, but not limited to, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the administration of the GUC Trust, or any transaction in furtherance of the foregoing, without the Bankruptcy Court (1) first determining after notice and a hearing, that such Claim or Cause of Action (i) represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, actual fraud, or gross negligence against a Protected Party, and (ii) was not otherwise released or transferred to the Reorganized Debtors or the GUC Trust under the terms hereof, and (2) specifically authorizing such enjoined party to bring such Claim or Cause of Action against any such Debtor, Reorganized Debtor, Exculpated Party, or Released Party, as applicable. At the hearing before the Bankruptcy Court to determine whether such Claim or Cause of Action represents a colorable Claim of any kind, the Bankruptcy Court may, or shall if any Debtor, Reorganized Debtor, Exculpated Party, or Released Party, or other party in interest requests by motion (oral motion being sufficient), direct that such Person or Entity seeking to commence or pursue such Claim or Cause of Action file a proposed complaint with the Bankruptcy Court embodying such Claim or Cause of Action, such complaint satisfying the applicable Federal Rules of Civil Procedure, including, but not limited to, Rule 8 and Rule 9 (as applicable), which the Bankruptcy Court shall assess before making a determination. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a Claim or Cause of Action is colorable and, only to the extent legally permissible and as provided for in Article XI of the Plan, shall have jurisdiction to adjudicate the underlying colorable Claim or Cause of Action.

Second Amended Disclosure Statement and Second Amended Plan, Art. X, Sec. F (Dkt. No. 481, Pgs, 102-103).

55.

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)).

56.

Even if non-debtor releases are consensual, there is no Bankruptcy Code provision that authorizes chapter 11 plans or confirmation orders to include injunctions to enforce them. Further, such an injunction is not warranted by the traditional factors that support injunctive relief. Parties seeking an injunction "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also 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 Debtors have made no attempt to show that any of these factors are met. Nor could they. If the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent irreparable harm to either the estates or the released parties.

57.

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.

58.

Debtors' Second Amended Plan should not be confirmed until the injunction provisions are narrowed to specifically exclude any reference to the Third-Party Releases.

III. Debtors' Second Amended Plan Should Not Be Confirmed Because It Is Impermissibly Deemed to Be a Settlement.

59.

Debtors' Second Amended Plan should not be confirmed because it improperly deems the Third-Party Releases a settlement.

60.

Article X, Section D, Part 2 of Debtors' Second Amended Plan includes the following provision:

> 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.

Second Amended Disclosure Statement and Second Amended Plan, Art. X, Sec. D, Pt. 2. (Dkt. No. 481, Pg, 101).

61.

Section 1123(b)(3)(A) of the Bankruptcy Code allows a plan proponent to "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A).

62.

Section 1123(b)(3) allows a debtor to settle claims it has against others; it does not allow a debtor to settle claims that creditors and interest holders may have against it, which is what Art. X, Sec. D, Pt. 2 of the Second Amended Plan seeks to do. *See Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 496 (B.A.P. 9th Cir. 2003) ("The only reference in [section 1123(b)] to adjustments of claims is the authorization for a plan to provide for 'the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.'… It is significant that there is no parallel authorization regarding claims against the estate.") (quoting section 1123(b)(3)(A)) (internal citation omitted).

63.

Sections 1129 and 1141 govern resolution of claims against Debtors.

64.

A plan may incorporate one or more negotiated settlements, but a plan is not itself a settlement. Sending a plan to impaired creditors for a vote is not equivalent to parties negotiating a settlement among themselves. A "settlement" is "an agreement ending a dispute or lawsuit." BLACK'S LAW DICTIONARY (10th ed. 2014). An "agreement" is "a mutual understanding between two or more persons about their relative rights and duties

regarding past or future performances; a manifestation of mutual assent by two or more persons." *Id.*

65.

Approval of settlements is governed by Federal Rule of Bankruptcy Procedure 9019, which provides that, "[o]n motion by the trustee [or chapter 11 debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement." But, because a "settlement" requires an agreement between the settling parties, Rule 9019 governs only parties that have entered into an express settlement agreement; it is not a blanket provision allowing general "settlements" to be unilaterally imposed upon broad swaths of claimants that have no formal agreement with any party to "settle" their claims.

66.

The decision whether to approve a settlement under Rule 9019 is left to the sound discretion of the bankruptcy court, which "must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" *Washington Mut.*, 442 B.R. at 338 (quoting *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). In contrast, chapter 11 plans are subject to the requirements of Bankruptcy Code sections 1123 and 1129. What may be permissible under a negotiated settlement agreement that is considered "fair, reasonable, and in the best interest of the estate" outside of the plan context is different from what may be permissible under a plan.

67.

Here, Art. X, Sec. D, Pt. 2 of the Second Amended Plan purports to treat the Second Amended Plan itself as if it were a Rule 9019 "settlement." Further, it appears the provision

is not limited to settling claims belonging to the Debtor or the estate. Thus, Art. X, Sec. D, Pt. 2 exceeds the scope of what can be settled under section 1123(b)(3)(A). Unless Art. X, Sec. D, Pt. 2 is narrowed so that (i) it pertains only to claims the Debtors are settling against others and (ii) the Plan itself is not a settlement, the Plan does not comply with section 1123(b)(3)(A) and does not satisfy section 1129(a)(1).

WHEREFORE, the United States Trustee respectfully requests the Court sustain the United States Trustee's objection, deny approval of Debtors' Second Amended Disclosure Statement, deny confirmation of the Debtors' Second Amended Plan, and grant such further relief as the Court deems fair and equitable.

Respectfully submitted this 4th day of November 2024.

MARY IDA TOWNSON
UNITED STATES TRUSTEE
REGION 21

s/ Jonathan S. Adams
Jonathan S. Adams
Trial Attorney
Georgia Bar No. 979073
United States Department of Justice
Office of the United States Trustee
362 Richard Russell Building
75 Ted Turner Drive SW
Atlanta, Georgia, 30303
404-331-4438
Jonathan.S.Adams@usdoj.gov

CERFICATE OF SERVICE

This is to certify that I have on this day electronically filed the foregoing *United States Trustee's Objection to Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* 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:

- **Leighton Aiken** laiken@fbfk.law
- **Carl H. Anderson** canderson@hpylaw.com, ttran@hptylaw.com
- **John Anthony** janthony@anthonyandpartners.com
- **Margaret Barajas** jarotz@pa.gov
- **Bryan E. Bates** bbates@phrd.com
- **Matthew R. Brooks** matthew.brooks@troutman.com
- **Nathan M. Bull** nbull@mwe.com
- **Liza L Burton** lburton@goodwinlaw.com
- **Ashley Champion** achampion@polsinelli.com, ggodfrey@polsinelli.com
- **Joanna J. Cline** joanna.cline@troutman.com
- **Keisha O. Coleman** colemank@ballardspahr.com
- **Heather Allyn DeGrave** hdegrave@walterslevine.com, jduncan@walterslevine.com
- **Michael G. Farag** mfarag@gibsondunn.com
- **Kathleen G. Furr** kfurr@bakerdonelson.com, smeadows@bakerdonelson.com; ali.lowe@bakerdonelson.com
- **David E. Gordon** dgordon@polsinelli.com, ATLDocketing@polsinelli.com; rbanks@polsinelli.com
- **Jack Gabriel Haake** jhaake@mwe.com
- **Aaron L. Hammer** ahammer@ktslaw.com
- **Jennifer Snyder Heis** jheis@ulmer.com
- **Lydia M Hilton** lhilton@bfvlaw.com, mdorsett@bfvlaw.com
- **Michael F. Holbein** mholbein@sgrlaw.com
- **Vivieon K Jones** vivieon.jones@usdoj.gov, Jocelyn.Lennon@usdoj.gov
- **R. Jacob Jumbeck** jjumbeck@mwe.com
- **Benjamin R Keck** bkeck@kecklegal.com, 2411851420@filings.docketbird.com, 9222034420@filings.docketbird.com
- **Pamela P. Keenan** pkeenan@kirschlaw.com
- **Emily C. Keil** ekeil@mwe.com
- **Andrew S. Koelz** akoelz@huntonak.com

- **Deborah Kovsky-Apap** deborah.kovsky@troutman.com
- **Francis J. Lawall** francis.lawall@troutman.com, henrys@pepperlaw.com
- **Catherine T. Lee** clee@mwe.com
- **Mark D. Lefkow** mlefkow@csvl.law, mharris@csvl.law
- **Matthew W. Levin** mlevin@swlawfirm.com, fharris@swlawfirm.com; centralstation@swlawfirm.com; rwilliamson@swlawfirm.com; aray@swlawfirm.com; hkepner@swlawfirm.com
- **Ronald A. Levine** rlevine@levineblock.com, rlevine682@gmail.com
- **Elizabeth S. Lynch** blynch@chinnery.com
- **Emily Ballard Marshall** emily.marshall@us.dlapiper.com
- **Thomas T. McClendon** tmcclendon@joneswalden.com, jwdistribution@joneswalden.com; bdernus@joneswalden.com
- **Kevin J. McEleney** kmceleney@uks.com
- **Derek Meek** dmeek@burr.com, mgunnells@burr.com
- **Garrett A. Nail** gnail@pgnlaw.com, bharrison@pgnlaw.com
- **G. Frank Nason** fnason@lcenlaw.com, NasonFR86494@notify.bestcase.com; jkortman@lcenlaw.com
- **Erin M. Rose Quinn** equinn@quinnlegal.com
- **Shane Gibson Ramsey** shane.ramsey@nelsonmullins.com, jada.prendergast@nelsonmullins.com
- **Steven C. Reingold** steven.reingold@saul.com
- **John K. Rezac** jrezac@taylorenglish.com, twesley@taylorenglish.com
- **Thomas D. Richardson** TRichardson@Brinson-Askew.com, Tdr82454@gmail.com
- **Thomas Richelo** trichelo@richelolaw.com
- **Pierce Rigney** pierce.rigney@troutman.com
- **Elizabeth Barger Rose** Elizabeth@caiolarose.com, amber@caiolarose.com; tina@caiolarose.com
- **Paul M. Rosenblatt** prosenblatt@kilpatricktownsend.com, ecfnotices@ktslaw.com
- **Philip L. Rubin** prubin@lrglaw.com
- **Daniel M. Simon** dmsimon@mwe.com, dnorthrop@mwe.com; ekeil@mwe.com
- **Nicolas Stanojevich** nstanojevich@qcwdr.com, Jpalmer@qcwdr.com
- **Graham H. Stieglitz** gstiegli@burr.com
- **Bruce Z. Walker** bwalker@cpmtlaw.com, jpenston@cpmtlaw.com
- **Thomas R. Walker** thomas.walker@pierferd.com
- **Caryn E. Wang** cewang@polsinelli.com
- **Dante Wen** dwen@ktslaw.com
- **Jeffrey C. Wisler** jwisler@connollygallagher.com
- **Lisa Wolgast** lisa.wolgast@btlaw.com, talia.wagner@btlaw.com, marisa.howell@btlaw.com, LOFarrell@btlaw.com
- **Nicolette J. Zulli** njzulli@duanemorris.com

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.

LaVie Care Centers, LLC
1040 Crown Pointe Pkwy.
Suite 600
Atlanta, Georgia 30338

Dated: November 4, 2024.

s/ Jonathan S. Adams
Jonathan S. Adams
Trial Attorney
United States Department of Justice
Office of the United States Trustee
362 Richard Russell Building
75 Ted Turner Drive, SW
Atlanta, Georgia 30303
404-331-4438
Jonathan.S.Adams@usdoj.gov