IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

In re HOSPITAL FOR SPECIAL SURGERY, LLC *Dba* ONECORE HEALTH, Debtor.	Chapter 11 Case No. 24-12862-JDL

DEBTOR'S REPLY TO OBJECTION OF THE UNITED STATES TRUSTEE TO DISCLOSURE STATEMENT FOR CHAPTER 11 PLAN OF REORGANIZATION OF HOSPITAL FOR SPECIAL SURGERY, LLC *dba* ONECORE HEALTH

The United States Trustee erroneously argues that the *Chapter 11 Plan of Reorganization of Hospital for Special Surgery, LLC dba OneCore Health* [Dkt No. 221-1] (the "Plan") (i) contains impermissible nonconsensual third-party releases and (ii) is not feasible; therefore, the Plan is facially unconfirmable and the *Disclosure Statement* [Dkt. 221] must be disapproved. Debtor replies to note that the Plan permits Releasing Parties[1] to opt-out and such opt-out mechanism not only is consensual, it has been the standard mechanism for obtaining consent to releases within chapter 11 plans in the Tenth Circuit and this Bankruptcy Court since at least 1990. *See In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 601-02 (10th Cir. 1990) (prohibiting nonconsensual third-party releases).[2] Moreover, unchastened by prior mathematical errors, the UST has once again publicly caused confusion and imposed costs on the Debtor and its estate by misstating the financial condition and capabilities of the Debtor; this time, in the context of the feasibility of the Debtor's Plan. Finally, the UST has demanded disclosure of a variety of

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.
[2] Opt-out releases are prevalent in chapter 11 plans confirmed by United States Bankruptcy Courts within the Tenth Circuit. The Tenth Circuit has not issued any opinion calling into question their consensual nature.

documents through the Disclosure Statement which are adequately described therein but traditionally not filed as exhibits thereto; rather, such documents – including the Litigation Trust Agreement and the term sheet for the Exit Credit Facility – conventionally are filed as exhibits to the Plan Supplement. For these and other reasons set forth herein, the Debtor respectfully requests that this Court overrule the UST's objection, conditionally approve the Disclosure Statement and grant such other and further relief as is necessary and in the interests of justice.

A. <u>The Plan's Third-Party Releases Are Consensual</u>.

The UST notes that the Supreme Court prohibits non-consensual third-party releases but concedes the fact that the Supreme Court has never held that consensual non-debtor releases may not be included in a chapter 11 plan. Objection, at 2. Since the UST does not have any controlling precedent supporting its position that the Plan is facially unconfirmable as a consequence of the scope and mechanisms of the Plan's releases, the UST fashions a few flawed arguments: (i) state law governs whether a Plan's release is consensual and (ii) opt-out releases are nonconsensual because the United States Bankruptcy Court for the District of New Jersey issued a few opinions to that effect in 1997 and 2007, respectively. The UST is wrong on both counts, as is amply demonstrated by this Court's own practice, as further set forth below. Indeed, given that this Court has always authorized consensual third-party releases through opt-out election forms, it is difficult to understand why the UST believes, in good faith, that it is appropriate to impose temporal burdens on the Court and the parties, and financial costs on the Debtor and, even more so, why it is appropriate to state in a public filing that Debtor's Plan is facially unconfirmable when all controlling case law holds to the contrary of the UST's position.

In *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), the Supreme Court stated:

> Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with

> a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. Nor do we have occasion today to express a view on what qualifies as a consensual release[.]

Id., 603 U.S. at 226 (emphasis orig.). Since *Purdue* left the question of what constitutes a consensual third-party release unanswered, this Court's historic practice remains correct, notwithstanding the UST's semi-cogent argument to the contrary. In other words, this Court has approved the use of an opt-out election form to enact third-party releases similar to those in the Debtor's Plan in *Epworth Villa II* and *White Star Petroleum Holdings, LLC* and the Supreme Court made it abundantly clear that *Purdue* in no way, shape or form calls into question this Court's decisional authorities. *See Order Confirming Third Amended Plan of Reorganization* [Dkt. No. 289], at 5, ¶ Q, *In re Epworth Villa*, Case No. 23-12607-SAH (Dec. 21, 2023); *Findings of Fact, Conclusions of Law and Order Confirming the Joint Chapter 11 Plan of Liquidation of White Star Petroleum Holdings, LLC et al.* [Dkt. No. 1152], at 13-14, ¶¶ 34-35, *In re White Star Petr. Hldgs., LLC*, Case No. 19-12521-JDL (Apr. 16, 2020).

Likewise, Courts outside the Tenth Circuit have considered whether, in the wake of *Purdue*, an opt-out election form supplies the consent necessary to support a third-party release within a chapter 11 plan. Prominent courts have concluded the answer is yes. For example, in *In re Spirit Airlines, Inc.*, the Bankruptcy Court for the Southern District of New York held that a third-party release is consensual in each of the following contexts: if a creditor (i) voted yes/no but did not check the opt-out box, (ii) abstained from voting and did not check the opt-out box and submitted their ballot, (iii) failed to submit a form with an opt-out box selected, or (iv) failed to file an objection. *Id.*, 24-11988 (SHL), 2025 WL 737068, at *6, *23 (Bankr. S.D.N.Y. Mar. 7, 2025). The *Spirit Airlines* Court applied federal bankruptcy law in its analysis[3] and relied on

[3] In contrast to the UST's grasping for state law straws.

numerous other cases in its Circuit decided pre-*Purdue*, as well as one case decided after, to support its conclusion. *Id.* at *10-12; *18 ("the question about whether a creditor has agreed to certain treatment is a matter of federal bankruptcy law, with an already existing and well-developed body of case law on consent in the context of a collective bankruptcy proceeding."). Finally, the *Spirit Airlines* Court pointed out that, contrary to the UST's position herein, *see* Objection at 5, "the Restatement of Contracts 'itself is not the law anywhere' and it does not provide a solution on the choice of law [even if] if state law governed here." *Id.* at *18.

Likewise, in *In re Robertshaw US Holding Corp.*, 662 B.R. 300 (Bankr. S.D. Tex. 2024), the Bankruptcy Court for the Southern District of Texas held that non-debtor releases were consensual where creditors were given an opportunity to opt out, regardless whether they were entitled to vote on the plan. *Id.*, 662 B.R. at 323 (noting that the non-voting creditors were given a notice of their non-voting status and offered a chance to opt out). The court held that *Purdue* "did not change the law in this Circuit" because the Fifth Circuit had already held that non-consensual third-party releases were impermissible. *Id.* at 322. **The Court noted that the UST seemed to "want[] to use the *Purdue* holding as an opportunity to advance its long-held position that consensual third-party releases in a plan should require an opt-in feature, rather than an opt-out," but the court overruled its objection and pointed out the following quote from Purdue: "Nothing in what we have said should be construed to call into question consensual third-party releases…Nor do we have occasion today to express a view on what qualifies as a consensual release.**" *Id.* (citing *Purdue*, 144 S. Ct. at 2087-88) (emphasis supplied). What we are seeing in this Court is part of a nationwide refusal by the UST to adhere to existing and controlling precedents standing in the way of its preferred policy outcome. Query whether the UST is endowed with policy-making authorities under the Bankruptcy Code.

Finally, although the UST cites *In re Smallhold, Inc.*, 665 B.R. 704 (Bankr. D. Del. 2024), *Objection* at 5, in support of its argument only opt-in releases are consensual, that is not the holding in *Smallwood.* The truth is that the Bankruptcy Court for the District of Delaware held that a vote, which is an affirmative step, when coupled with a conspicuous notice of opt-out mechanism "suffices as consent to third-party releases under general contract principles." *Id.*, 665 B.R. at 723.

B. The Plan Is Feasible.

The UST claims that Debtor's Plan is not feasible for the reason that a $1,539,122.19 shortfall exists between cash available to fund the Plan and Plan commitments. The UST is incorrect. This is not the first time the UST has misstated financial information pertaining to the Debtor in a public filing. The Debtor has invited the UST to pick up the phone to discuss financial issues anytime they arise, so clarification can be provided. Unfortunately, the UST is unwilling to avail itself of this option and prefers making erroneous public filings at the expense of the Debtor, its estate and their creditors. Suffice to say, the Debtor has sought to avoid confusion to the creditor body, but the UST seems intent on continuing to cause it.

The UST's calculations of feasibility fail to consider the Debtor's postpetition accounts receivable on the confirmation date which will be received in the ordinary course of the Debtor's business. Additionally, the administrative claims of $4,524,832 include an estimated $2,200,000 of ordinary course trade payables which are paid net 30 and, therefore, will be paid out of the postpetition accounts receivable which are received post-confirmation and paid in the ordinary course over the thirty (30) day period post-confirmation. After adjusting for this $2,200,000, the shortfall alleged by the UST actually constitutes a cash overage in the approximate amount of $660,887.81. The Debtor respectfully submits that such amount reflects a reasonable working capital cash balance for the future operations of the Debtor and the Reorganized Debtor.

C. The Disclosure Statement Provides Sufficient Information; Therefore, It Should Be Conditionally Approved.

The UST argues that, because the Disclosure Statement does not include as exhibits certain documents, it fails to provide adequate information. The UST is incorrect. The terms of such documents, e.g., the Exit Credit Facility, the Base Settlement, and the Litigation Trust Agreement, are adequately summarized. The governing documents necessary to effectuate the Plan will be included as exhibits to the Plan Supplement, as is conventional practice in this Bankruptcy Court and others throughout the nation.

Conclusion

The Debtor respectfully requests that this Court overrule the UST's objection, conditionally approve the Disclosure Statement and grant such other and further relief as is necessary and in the interests of justice.

Respectfully submitted,

ONECORE

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