IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§ CASE NO. 24-90627-11
	§ HOUSTON, TEXAS
THE CONTAINER STORE GROUP,	§ FRIDAY,
INC., ET AL,	§ JANUARY 24, 2025
DEBTORS.	§ 12:59 P.M. TO 2:02 P.M.

CONFIRMATION HEARING

BEFORE THE HONORABLE ALFREDO R. PEREZ
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:	SEE NEXT PAGE
COURTROOM DEPUTY:	AKEITA HOUSE
COURT RECORDER:	AKEITA HOUSE

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(Please also see Electronic Appearances.)

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WITNESSES:	Direct	Cross	Redirect	Recross
(None called)				

EXHIBITS:	Admitted
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HOUSTON, TEXAS; FRIDAY, JANUARY 24, 2025; 12:59 P.M.

THE COURT: All right. Good afternoon. It is Friday, January 24th. We're here for the 1:00 o'clock Docket, the confirmation hearing in Case Number 24-90627, The Container Store.

MS. HARPER: Good afternoon, Your Honor. Ashley Harper, Tad Davidson, and Philip Guffy from Hunton Andrews Kurth on behalf of the Debtors.

And from the Latham & Watkins team, Hugh Murtagh, Jonathan Weichselbaum, Amy Quartarolo. And on GoToMeeting, Ted Dillman.

THE COURT: Thank you.

MR. NGUYEN: Good afternoon, Your Honor. Ha Nguyen, for the United States Trustee.

THE COURT: Thank you.

MR. PERSONS: Good afternoon, Your Honor. Charles Persons of Paul Hastings for the Ad Hoc Group of Lenders and DIP Lenders.

THE COURT: All right. Anyone wish to make an appearance on the phone?

(No verbal response)

THE COURT: Any appearances on the phone?

(No verbal response)

MS. SCHRAGE: Hello, Your Honor. Patricia Schrage for the Securities and Exchange Commission.

THE COURT: Good afternoon, Ms. Schrage.

All right. Who's going to take the lead?

MR. MURTAGH: That's me. Good afternoon, Your Honor. Hugh Murtagh from Latham & Watkins on behalf of the Debtors.

It is my privilege to appear this morning on behalf of the Debtors for confirmation of the plan and a pleasure to be in front of Your Honor for the first time. Thank you to you and your staff for accommodating us today and over the course of the last five or six weeks.

I would also like to take a minute at the outset to thank the company's many creditors, stakeholders, their counsel and advisor, some of whom are here today, and the U.S. Trustee for working with us over the past several weeks to resolve the vast majority of the comments and objections that were raised on the plan and other issues along the way.

As of today, Your Honor, there are two outstanding objections to the plan, one from the Office of the United States Trustee and one from the SEC, both relating to the third-party releases, and we'll come to those.

As we'll discuss in some detail, we're very pleased to be seeking confirmation of the prepackaged Chapter 11 cases that substantially de-leverage the Debtors' balance sheet and that received unanimous support from all voting closes -- or the sole voting class in these cases.

As I just said, Your Honor, we have unanimous support from the sole voting class. We've resolved every objection, other than the UST and the SEC, with regard to the third-party releases.

And we have a plan to confirm that substantially de-levers the company by reducing its total funded debt by approximately $88 million, through equitization of a significant portion of the pre-petition term loan claims, while still paying all unsecured creditors in full in the ordinary course. All vendors will be paid or otherwise satisfied in full and over 3,800 jobs will be preserved. And all of that is a testament to the hard work of the stakeholders and the professionals in this case and we think to the fairness of the plan. So we're very encouraged and happy to be here, Your Honor.

If I could also make a few introductions:

First, as Ms. Harper said, I'm joined by Ms. Quartarolo and Mr. Weichselbaum from Latham.

We're joined in the courthouse by Mr. Chad Coben, who is the Debtors' chief restructuring order -- Chief Restructuring Officer. And he has submitted a declaration in support of confirmation, which is at Docket 162.

Mr. Adam Dunayer is also here, managing director in the financial restructuring group at Houlihan Lokey, the Debtors' financial advisor. He submitted a declaration in

support of confirmation, which can be found at Docket 163.

And finally, importantly, we're joined virtually by Darlene Calderon, who is a Director of Corporate Restructuring at the Debtors' claims and noticing agent Verita. She submitted a declaration in support of confirmation, which can be found at Docket 164.

Notably, Your Honor, Ms. Calderon also has prepared and just recently, within the last hour, submitted a supplemental declaration in support of confirmation, which I believe is at Docket 179. Your Honor, that brief declaration sets forth some factual matters or additional detail on the noticing and that -- and opt-outs that were received. And I expect Your Honor has not had an opportunity to review it yet, but I'd be happy to pass it up if it would be helpful.

THE COURT: I can find it.

MR. MURTAGH: Okay. Let me make sure that I have a copy in front of me, Your Honor. I don't know how I lost that on the way to the podium, but I've got another one now.

(Laughter)

MR. MURTAGH: Okay.

THE COURT: Give me a minute.

MR. MURTAGH: Those are the declarants or the potential witnesses in support to offer evidence.

Your Honor, if it's acceptable to you, I would propose to start by introducing the declarations, subject to

cross-examination, if there's no objections; and then briefly turning to adequacy of the Disclosure Statement, which is technically a matter before Your Honor today; and then to turn to the plan, and very briefly, Your Honor, really, with everything, except to the expected argument over the third-party releases.

THE COURT: Okay. So what -- the supplemental declaration at 179, let me jut review it.

MR. MURTAGH: Yes, Your Honor.

(Pause in proceedings)

THE COURT: Okay.

MR. MURTAGH: So, Your Honor, that brings a total of four declaration. I'll step through them.

The first declaration we would propose to submit is the declaration of Chad Coben in support of confirmation, and that's at Docket Number 162.

THE COURT: All right. Does anyone object to the admission of the declaration of Mr. Coben? It is in the Debtors' witness and exhibit list, Docket Number 171-20.

(No verbal response)

THE COURT: All right. No objections. It will be admitted.

(Debtors' Exhibit ECF 171-20 received in evidence)

THE COURT: And we'll reserve cross-examination until all of them are considered.

MR. MURTAGH: Understood.

The second is the declaration of Adam Dunayer in support confirmation. As I said, Mr. Dunayer is here in the courtroom. It's Docket Number 163.

THE COURT: All right. Does anyone oppose the admission of the declaration of Mr. Adam Dunayer as his direct testimony found at Docket 171-21?

(No verbal response)

THE COURT: All right. Hearing no objections, it's admitted.

(Debtors' Exhibit ECF 171-21 received in evidence)

THE COURT: And we'll reserve on cross-examination.

MR. MURTAGH: The third, Your Honor, is the first declaration of Ms. Calderon, regarding solicitation of votes and tabulation of ballots cast on the prepackaged joint plan, and that's Docket Number 164.

THE COURT: All right. Does anyone object to the admission as direct evidence, the declaration of mister -- of Ms. Darlene Calderon at Docket Number 171-19?

(No verbal response)

THE COURT: All right. Hearing none, we will admit that.

(Debtors' Exhibit ECF 171-19 received in evidence)

MR. MURTAGH: Your Honor, I believe that that Docket number is -- for the original declaration, is 164.

THE COURT: Yeah, it's 164. But on the witness and exhibit --

MR. MURTAGH: Witness --

THE COURT: -- list --

MR. MURTAGH: I'm sorry.

THE COURT: -- it's 171-19.

MR. MURTAGH: Understood.

And the final, Your Honor, is the one we were just talking about, it's the supplemental declaration of Ms. Calderon, it's Docket 179. It -- as I said -- and Your Honor had, I know, only a moment to review it, but it was intended to provide additional detail that the Office of the United States Trustee had asked for. And I -- my understanding is that, with the submission of this declaration, the office is happy with the completeness of the factual record and will not be seeking to cross-examine. But obviously, the Office of the U.S. Trustee can speak for itself on that point. It's Docket Number 179.

THE COURT: All right. Does anyone object to the declaration of miss -- the supplemental declaration of Ms. Darlene Calderon found at Docket Number 179?

(No verbal response)

THE COURT: All right. That will be admitted.

(Debtors' Exhibit ECF 179 received in evidence)

THE COURT: All right. Does anyone wish to

cross-examine Ms. Calderon, Mr. Coben, or Mr. Dunayer?

(No verbal response)

THE COURT: Okay. Hearing none, I will allow that testimony in.

Go ahead.

MR. MURTAGH: Thank you, Your Honor.

Let me touch very briefly on adequacy of the Disclosure Statement.

Your Honor, as you know, there was one voting class here. Everybody in that class voted in favor of the plan. We have not received any objections, concerns, comments, or otherwise on the Disclosure Statement or the adequacy thereof.

And unless Your Honor has questions about the Disclosure Statement at this point, we would ask the Court to approve the Disclosure Statement on a final basis.

THE COURT: All right. Does anyone wish to be heard with respect to the approval of the Disclosure Statement on a final basis?

(No verbal response)

THE COURT: All right. Hearing none.

I have reviewed the Disclosure Statement in connection with both preparation for this hearing, as well as at the time that I entered the initial order. And based on my reading and based on the record in the case and the fact that there have been no objections filed, I find that the

Disclosure Statement has adequate information, so it is approved.

MR. MURTAGH: Thank you, Your Honor.

Then turning to the main event, the plan.

Your Honor, six weeks ago, on December 21st, we really began this brief journey with a transition services agreement that was executed by holders over 90 percent of the outstanding principal amount of term loans and the consenting stockholder, which is LGP in this case.

On the same day, we began solicitation of the term loan holders on the plan.

On the 22nd, we filed our petitions.

And of course, on the 23rd, we were before Your Honor for the first-day hearing.

Since that time, things have gone remarkably smoothly up to today, and I -- hopefully, today will be no different.

As Your Honor knows, we had no objections to the final orders or the relief on a final basis on a couple of motions that were left open on an interim basis, and those final orders were entered on January 16th.

Pursuant to the solicitation procedures order, the voting opt-out deadline and the plan and Disclosure Statement objection deadline were set for the 21st of this month.

As I noted at the outset, we received only two

objections, two -- sorry -- two formal objections that are unresolved from the UST and the SEC. We did receive a filed objection from one landlord whose concerns we have been able to resolve by modifications to the proposed order.

And that brings us to today, Your Honor.

As Your Honor is well aware, I'm sure, the plan classes the claimants to eight classes, seven of which are non-voting classes.

Class 1, which is other secured claims; Class 2, which is ABL claims; and Class 4, which is general unsecured claims, are unimpaired and are not voting.

Class 3, the pre-petition loan claims, is the voting class. They voted unanimously in favor.

Classes 5, subordinated claims, and Class 8, equity interests, are not recovering and are deemed to reject the plan.

And Classes 6 and 7 are intercompany claims and intercompany interests, respectively, which are either deemed to accept or reject, as applicable.

Just to highlight a few key aspects of the plan and the transactions contemplated thereunder:

As I noted at the outset, the plan and the related transaction documents de-lever the company by about $88 million by equitizing a substantial portion of the term loans.

The exit financing includes 40 million of new money

through the term loan DIP and a roll of the exit financing with Eclipse Business Capital, which we believe will give the Debtors a solid footing as reorganized entities.

Again, happy to report and reiterate that all general unsecureds are unimpaired.

And Your Honor, virtually all, with very, very limited exceptions, all executory contracts and unexpired leases are being assumed.

Finally, really the only, I think, sticking point that's left, subject to hearing anybody else who may want to be heard, is the third-party releases, which is obviously an issue Your Honor is familiar with, and I will present an argument on that. And obviously, we'll hear from the trustee and the SEC.

But unless Your Honor has questions about other aspects of the plan that are, I don't believe in dispute, I would move past those and just focus on the releases.

THE COURT: Okay. Does anyone else wish to be heard on anything other than the issues raised by the U.S. Trustee and the SEC?

(No verbal response)

THE COURT: Let me -- just one question. The U.S. Trustee raised an issue regarding the fourteen-day stay. I believe Mr. Coben addressed that in his declaration. Is there any further testimony on that?

MR. MURTAGH: No, Your Honor, there's no further evidence to present on it. I'm happy to speak to it as an argument point, if you would like me to.

THE COURT: Yeah, that would be -- that would be fine.

MR. MURTAGH: I think, as made clear in Mr. Coben's declaration, the immediate effectiveness or near immediate effectiveness of the plan is absolutely critical as a business matter. I did not mention it, Your Honor, but the hope is to be fully effective on this plan, if not Monday, Monday or Tuesday of next week.

This is an important company, but a company that, Your Honor, is not that big, in terms of capital structure. And the fees that are associated with every incremental day in bankruptcy are actually meaningful to this company, quite meaningful to the company and the stakeholders and the creditors who are funding the exit.

We think it's, you know, absolutely routine here and in other districts to waive that stay period to allow plans to go effective, particularly given the -- a case like this and the degree of consensus that we have around it.

So, unless Your Honor has specific questions about it --

THE COURT: No, I don't have any questions.

MR. MURTAGH: Should I turn to the releases, Your

Honor?

THE COURT: It probably makes sense for the objector to go first, and then you can respond.

So I don't know, Mr. Nguyen, whether you or Ms. Schrage wants to go first.

MR. NGUYEN: I -- since I'm here, I volunteer to go first, but if Ms. Schrage wants to go first, I'm happy to cede the podium.

THE COURT: Come on up.

MR. NGUYEN: All right. Your Honor, Ha Nguyen for the United States Trustee.

Thank you for the opportunity to address the Court with our objection. I've done many of these objections in front of Judge Lopez, I think he's a little bit tired of me telling him why I think *Robertshaw* was wrongly decided. But this is my first time in front of you with this objection, so I look forward to our conversation on the third-party release, on this issue.

As Your Honor knows, and we filed a brief -- I know you heard from Ms. Hersh from our Dallas office this morning -- the Supreme Court in Purdue held that there is really no basis for non-consensual third-party releases. And the Supreme Court really left it up to Your Honor and Bankruptcy Courts like Judge Lopez and other judges around the country to determine what exactly is consent, and really leave it up to

this Court to resolve the consent issue.

As Your Honor knows, the United States Trustee takes the position that the opt-out mechanism used in this case renders the third-party releases in the plan non-consensual.

As the Court is aware, courts all around the country have been revisiting this issue since Purdue. Judge Lopez issued his decision in *Robertshaw*. Courts in the Northern District of Texas, particularly in Ebix and *Eiger*, Judge Everett has a decision out there. Judge Jernigan in *Eiger* had a decision. There are decisions in Florida in the Red Lobster cases. There's a decision in Delaware by Judge Goldblatt in the Smallhold case, where he went 180 from his Arsenal case, which Judge Lopez cites in his *Robertshaw* decision.

THE COURT: There was a decision today by Judge Stickles.

MR. NGUYEN: Yes, and that was the *Lumio*, one of the *Lumio* cases.

THE COURT: Right.

MR. NGUYEN: I think that was early. But -- and I've (indiscernible), so I think we're all really going, in terms of the forefront of everything that's been going on. It's coming really fast.

But Judge, in terms of all these views -- I know Your Honor expressed a view in Independent Driller Contractors [sic], and I believe it was a media --

THE COURT: Digital Media.

MR. NGUYEN: Digital Media. Thank you.

But Your Honor, I would urge you to adopt the views of Judge Everett in Ebix and Judge Goldblatt in Smallhold. And really, the reasoning is straightforward. You know, state contract laws should really apply when you're looking at consent.

And also, in examining the default forfeiture theory, when someone gets notice of something, what happens if they don't act. Under -- in Smallhold, Judge Goldblatt said you can't really default them because you can't find that remedy anywhere in the Bankruptcy Code. And he uses like a five-dollar donation to the CEO's college fund as like there's no way you can default somebody if you put that provision in there. But he thinks that third-party releases are very similar, in terms of the forfeiture theory.

One case that really stands out to me -- and I think we cite it our brief -- is -- and I'm going to butcher the name -- is Norcia. It's a case where -- and it's not a bankruptcy case; it's a Ninth Circuit case, where a consumer bought a Samsung phone from a Verizon store. The customer walked in there, signed a customer agreement with Verizon, took the Samsung phone home and, within the Samsung phone, there was a product warranty. And within that product warranty, it says, you know, if you don't write to us within

30 days or if you don't call this phone number within 30 days, you are consenting to arbitrate any claims that you may have with Samsung. I'm not entirely sure what happened with the phone, but the customer eventually sued Samsung. And Samsung said hey, you know, you need an arbiter, you can't sue us.

The Ninth Circuit took it up, and one of the things they said was that customer agreement with the Verizon Store and the customer, that has nothing to do with Samsung, Samsung was just the provider of the phone, that was a contract, very similar to here, Debtor and their creditors. We're not talking about third parties. So the Ninth Circuit said that customer agreement, it's between two parties, you can't really bring in a third party like Samsung.

And then so Samsung said well, there was consent to arbitrate under this clear and conspicuous warning that we had on our product's label with the warranty. The Ninth Circuit said well, really, there's no federal law that we can look to, to determine whether there was consent there. So they looked at contract law under the State of California. And really, it comes back to whether failing to act, whether having silence when there is something that's warning you within a product label can you deem that as consent. And the Ninth Circuit really looked at that and said well, you know, silence can't be consent, it's basically contract law, there was no contract there. So, you know, those arbitration agreement did not --

didn't apply.

You know, this is entirely applicable to the contracts of a Chapter 11 case. You know, the nonDebtor released parties are really not signatories to this Chapter 11 plan. As you hear from the Debtor, this is really about the Class 3, it's really about a de-leveraging of the term notes.

And really, the Bankruptcy Code itself provides that a plan is specifically to deal with how a Debtor will pay its creditors. It's not really a vehicle for claims to be resolved by nonDebtor. That's really not the purpose of the Bankruptcy Code.

Judge, we have a lot more arguments and cites and law in the brief, so I won't belabor the point. But again, I would urge you to take a look at what Judge Everett said in Ebix, look at what Judge Goldblatt said in --

THE COURT: Smallhold.

MR. NGUYEN: -- Smallhold. Thank you.

And Judge, if those two judges do not convince you, I think there's a third way to look at this and -- well, a second way to look at this is -- well, the first way to look at it is the U.S. Trustee thinks opt-out is the -- never permissible, you can't procure consent.

But there's another way. And I would point you to what Judge Stickles did in *Lumio* and what Judge Jernigan did in *Eiger*. Although the results were different, I think Your

Honor can apply it to this case.

In *Lumio*, Judge Stickles looked at the facts of the case and said -- you know, she was very skeptical that silence would mean consent when the general unsecured creditors were not entitled to vote and they were not entitled to any recovery. So Judge Stickles, again, really examined the facts of the case and said she would not allow the opt-out in a case where these creditors are getting nothing and you're going to send this out and expect them to return it, or else they're going to be binded [sic] by the third-party release.

Judge Jernigan approved the use of the opt-out in *Eiger* Pharmaceutical. But one of the things that she said at the hearing was that, you know, Debtors shouldn't always come in here and assume that these opt-out, it's going to be approved.

So, really, it brings this view that, you know, it's not a never opt-out or an always opt-out, but maybe let's take a look at the facts of the case, and it really depends on, you know, the process and the type of creditors you have and the purpose of the plan.

Judge, I know you approved the opt-outs in the past, but I really don't think it binds your hands with this specific case. So, Judge, the opt-out in this case is not really effective. It's similar to like *Lumio*, and it shouldn't be used in this case.

First, Your Honor, I've asked for a declaration from Verita, and that's the supplemental declaration. And one of the things you notice on there is about 16,968 opt-outs were sent out. And this is where these opt-outs were sent out to a non-voting class. So you either have equity, that's getting wiped, or you get creditors that are unimpaired and they're riding through the bankruptcy.

Again, this is about de-leveraging the company as to Class 3. These other creditors are just going along with the bankruptcy case. They're not getting a recovery. They're not -- really not involved in the case, they're just --

THE COURT: Well --

MR. NGUYEN: -- riding through.

THE COURT: -- the creditors here are getting a hundred cents on the dollar.

MR. NGUYEN: That's true. But they're -- so they're really riding through, based on --

THE COURT: Yeah. So it's not like --

MR. NGUYEN: The unimpaired is the point, Your Honor. But the thing is the crux of the case is the de-leveraging of the Class 3. That's why -- primarily why they're here.

But in terms of just the vote records and the opt-out, 16,968 opt-outs were sent; 165 opt-outs were returned. I'm doing some quick lawyer math, that's a little bit under 1

percent, very close to 1 percent. I rounded up, I give them 1 percent.

The Debtors, in their brief, talked about the specific process as a way to determine whether releases are consensual. I believe they cite this -- the case from Energy & Exploration Partners and they quote. Quote:

"-- notice has gone out, parties have actually gotten it, they've had the opportunity to look at it, and the disclosure is adequate so that they can actually understand what they're being asked to do and the options that they're being given."

Here, it's a little bit difficult for me to apply it to the facts of this case when you get 99 percent of the opt-outs not returning. People who received the notice in the mail did not return the form. Are we really going to say that 99 percent of these holders of claims affirmatively consented to give releases to nonDebtor third parties, when, really, they're riding through and they're not part of this Class 3 and they're not entitled to vote? And even one class is getting entirely wiped out, the equity class. And you're saying hey, we're wiping out your entire equity, and by the way, you're also granting all these third-party releases to these people. I think that's inappropriate for a case like this, where you're really trying to de-leverage the company and make sure the Class 3 is restructured. So applying that

other view that Judge Jernigan and Judge Stickles, look to the facts of this case.

I just really -- I remember the days where -- and it hasn't been so long ago because I haven't been practicing that long. But you know, third-party releases was kind of a rare thing. You know? It brings certain claims. But now it's par the course. It would be mis -- malpractice for these attorneys not to ask for it in a case like this because every single case has a third-party release.

But for this case, where you're actually just trying to de-leverage and just trying to have somewhat of a balance sheet restructure, I just don't think it's appropriate, especially when everyone is unimpaired and riding through and one class is getting extinguished, and that's the Class 5 equity.

Lastly, Judge, I just want to talk about the "related party" definition that we raised in our objection. I know the Debtor narrowed the definition to some agency or derivative claim based on the amended plan. But I really don't think that resolved the problem in our objection.

These related parties are still releasing something against a third party; whether it's agency or derivative claim, they're still releasing something. So, if you're releasing something, at a minimum, you need notice. The record is clear that the related parties were not provided

notice and they were not given the opt-out form and did not consent to the third-party releases.

So, if the Court disagrees with all I said about the opt-out, and you can deem consent under the opt-out, I would simply ask the Court to just strike the related parties because, simply, due process requires that these related parties who are giving a release, although it's a narrow release, they still have an opportunity to have notice and an opportunity to object, which didn't happen here for the related party.

So, Your Honor, for the reasons stated in our objection and the arguments presented here today, we ask that confirmation be denied unless the third-party release is revised with an opt-in or some sort of affirmative consent. Thank you, Your Honor.

THE COURT: Thank you.

All right. Ms. Schrage?

MS. SCHRAGE: Yes, Your Honor. Hi. Can you hear me okay?

THE COURT: I can hear you fine. Thank you so much.

MS. SCHRAGE: Okay. Great. Okay. So, Your Honor, Patricia Schrage for the Securities and Exchange Commission. This is also my first time before you, so I appreciate the opportunity to allow us to come into court, especially virtually. Appreciate that. Thank you, Your Honor.

THE COURT: You're welcome.

MS. SCHRAGE: So the --

THE COURT: Any time.

MS. SCHRAGE: The U.S. Trustee -- thank you. Thank you very much.

So the U.S. Trustee, they go through, you know, a lot of the points, and the SEC agrees with the points that the U.S. Trustee made today and in their papers.

And those points are -- particularly apply to the non-voting classes. Those are the ones that are deemed to reject the plan, the public shareholders, the subordinated claimants. And so, Your Honor, in the SEC's view, the Debtors' plan, as has been said in the objection and by the U.S. Trustee, contains, in our view, a non-consensual third-party release, which is prohibited under Purdue.

So, Your Honor, specifically, the release is non-consensual as it applies to those public shareholders and subordinated claimants because those classes are receiving no consideration, they're not voting on the plan, and they're deemed to reject the plan. There is simply no incentive for the shareholders and the subordinated claimants to grant the third-party release. And in these circumstances, their failure to return that opt-out form, is, in our view, insufficient evidence of consent of a third-party release.

It's the SEC's position that, in order to bind these

shareholders and the subordinated creditors to that release, that you need a showing of affirmative consent. Without the affirmative consent, respectfully, they (indiscernible) on whether there was consent.

Specifically in these case -- in this case, the facts show they need affirmative consent. The Container Store is a public company. And according to the Debtors' voting declaration, only a small handful of the shareholders responded.

In the most recent declaration that was filed, of over thirty eight -- of over 3,800 forms that were sent out, only 15 came back from the Class 8 equity holders. That is a very small amount. And of those 15, only 9 actually opted out. So there would be remaining 6. And apparently, those 6 didn't opt out. There were also 297 forms returned. So it's unclear, you know, what group those return forms came from.

But what that does tell us is that, you know, shareholders may not be getting the form. The shareholders rely on nominees to get the forms and have the forms sent to them.

And you know -- and the other thing is it doesn't tell us, you know, because there was that small number that were returned, but the ones that returned the forms and didn't check the box, there's also (indiscernible) it appears that they didn't know why they were even receiving the form. If

they did, they likely would have either not returned it or checked the box.

So, Your Honor, we're not sure how comprehensive the service was. We do know the nominees were served, that's clear from their papers. And the certificate of service does appear to show that forms were mailed to some of the beneficial holders. It doesn't appear and it's unlikely that they would have been to all. We do know those nominees were served.

And Your Honor, just also, you know, I understand that the U.S. Trustee did make the point about the opt-in versus the opt-out. But it is our view that the only way to truly know that these shareholders were served and if they consented was to include an opt-in mechanisms, versus an opt-out mechanism.

You know, Purdue did change the legal landscape in this regard, and it's cited in our objection. There were courts post-Purdue that are requiring a showing of affirmative consent to bind parties to the third-party releases. And that's particularly (indiscernible) with respect to the shareholders, who, in many cases, are deemed to -- are not getting any consideration and are deemed to reject the plan.

Your Honor, so the Bankruptcy Code does not authorize the nonDebtor third-party releases without the consent of the affected claimant and there is no federal law

regarding consent. As discussed in our objection and in the U.S. Trustee's brief, courts have (indiscernible) basic contract principles when considering whether a release is consensual. And under the basic contract law, a creditor's filing is generally not sufficient with regard to consent.

In addition, some of the cases, including the recent case from the district in *Robertshaw*, have referenced the use of the opt-outs in the class action support opt-outs in the Chapter 11 plan process. However, as we state in our objection, that opt-out mechanism in class actions is different from the mechanism used in the Chapter 11 plan process, and that is because, in a class action, there are additional projection -- protections which are not available here.

And Your Honor, you know, as the U.S. Trustee had stated earlier and went through quite a few of the cases, you know, the case law on this point is developing. And courts post-Purdue are reconsidering how to look at consent and how consent can be applied. So, you know, are aware that just, you know, a week or so ago, in IDC, in Independence -- well, I'll just call it "IDC" for now -- that Your Honor did approve that opt-out mechanism, and other cases in this district have, as well.

You know, the SEC's view is that, on these facts, the Court can come to a different conclusion. And we do

request that the Court delete the release or amend the plan to carve out the shareholders and the subordinated claimants or require an opt-in. Thank you, Your Honor.

THE COURT: Thank you. All right.

MR. MURTAGH: For the record again, Your Honor, it's Hugh Murtagh from Latham & Watkins on behalf of the Debtors.

I'll address both objections with the same argument. I think they basically go to the same points, Your Honor.

So just taking a small step back, let's start with what we all agree on. Yes, Your Honor, Purdue holds that non-consensual third-party releases are not permitted under the Code. As Your Honor recently recognized in *Independence Contract Drilling*, that was already the law in the Fifth Circuit. So, in other words, nothing has changed here. Third-party releases were -- non-consensual third-party releases were and remain prohibited.

However, we all also agree that, long before Purdue and in a substantial number of cases after Purdue, courts in this district have approved opt-out third-party releases because a release obtained through a properly noticed and documented opt-out mechanism is a consensual release.

Taking only some of the post-Purdue cases, both Your Honor and Judge Lopez have held, both in public and private company cases, that a proper opt-out mechanism is a sufficient basis for a consensual third-party release. Those cases

included:

Independence Contract Drilling, which Your Honor confirmed on January 9th;

Vroom, Inc., another public company case that Judge Lopez confirmed on January 8th;

And also *Robertshaw*, Your Honor, which the objectors referenced, reported at 662 B.R. 300, in which Judge Lopez also approved opt-out releases and held, quote:

"There is nothing improper with an opt-out feature for consensual third-party releases in a Chapter 11 plan. And what constitutes consent, including opt-out features and deemed consent for not opting out, has long been settled in this District. Hundreds of Chapter 11 cases have been confirmed in this District with consensual third-party releases with an opt-out. And, again, Purdue did not change the law in this Circuit."

So, Your Honor, this is common ground. It's the well-established, unbroken precedent in this district, both before and after Purdue, that a properly accomplished opt-out released is consensual and permissible. And I'm aware that's not the practice in every district, or at least uniformly in certain other districts. And those decisions taking another tact are thoughtful, but Your Honor, we disagree with them and it's not been the practice in this court.

There is no basis to assume that the only way to

sufficiently manifest consent is on basic non-judicial contract principles. As this Court and I think Judge Lopez have referenced, there is federal court practice that deems consent based on a proper process, including, but not limited to class actions.

And what the process does here is not just bless silence. It blesses a decision. If it is done properly, an opt-out mechanism puts a decision in front of a creditor or stakeholder whether they want to grant the release or not. And that stakeholder is told in clear and conspicuous language how to do it. And the creditor's or interest holder's decision should be respected.

And there's no evidence in the record as to why anyone who received an opt-out form did not return it. And to speculate it's because they didn't understand it or because they wanted to opt out, but it was too burdensome, or anything else is purely speculation.

The only evidence we have, Your Honor, the uncontroverted evidence is the four declarations before Your Honor, and that includes robust evidence, which I'll come to, about the extent of the noticing and the process that was followed to put that decision in front of creditors and interest holders, so that they could make a decision.

This isn't a contract, it's not an adhesion contract, where you bought something you needed and you just

have to deal with what the contract says or there was a third party's contract buried inside a box. This is something that is put conspicuously and purposefully, in bold capital letters, in front of these creditors and interest holders, to give them an opportunity to make the decision. And we should respect the decision that is manifested by the process, whether they returned an opt-out or decided not to return it and not opt out. And I think, as Your Honor has made clear, that's the view in this district.

And the question becomes, then:

A, was the opt-out process reasonable and effective?

And B, are the releases narrowly tailored and core to the proceedings?

So let's turn to those facts because I agree with the objectors that the facts are important, and these are the important facts:

So, first, as to process, Your Honor, as set forth in the declarations of Ms. Calderon, the Debtors served solicitation packages with a release opt-out election on the only voting class on December 21st.

The Debtors served notices of non-voting status and release opt-out forms on all other classes on or before December 27th.

As is set forth in the declarations, sufficient forms were sent to nominees to forward to beneficial holders,

and the solicitation procedures order directed nominees to make such forwarding happen.

In all cases, the notice and opt-out materials conspicuously described the nature of the release, included all of the operative release language from the plan, and explained the consequences of not returning the completed opt-out form.

Creditors and interest holders were given until January 21st to make an election by mail, overnight courier, hand-delivery, or electronic submission via the case website.

As of today, Your Honor, including some forms that were received after the deadline and as the objectors noted, we received -- I believe, if you count -- if you compare it to the total number that went out, it may be around one percent, but several -- a couple hundred were returned, executed, and they were returned executed across classes, including other secured claims, ABL claims, general unsecured claims, and existing equity interests.

So, again, Your Honor, to return to what that evidence shows, is that the noticing that was supposed to happen happened. Creditors and interest holders who were supposed to get notices got them. There is no evidence to the contrary. And creditors and interest holders who wanted to opt out returned opt-out forms. That's the only evidence before this Court, is that the process works for people who

chose to opt out. They knew how to do it if they were in secured claims, ABL claims, unsecured claims, or even equity interests recover nothing, whether they were individuals or whether they were entities.

We cannot speculate as to why others made a decision not to opt out. But consistent with the practice in this district, the process afforded that opportunity, a decision was made not to opt out, and it should be respected. Anything else is just speculation about why a creditor or interests holder who didn't return form didn't return a form. It should be viewed as it is intended to be viewed, as it is explained to the creditor, who should be deemed to understand it, that not opting out means you're granting the release.

And to shortcut the point, Your Honor, the Debtors followed substantially the same process followed in *Independence Contract Drilling* and *Vroom* and *Robertshaw* and other cases noted in our briefing, and we should see the same result here, Your Honor. This was a fair and effective opt-out process for consensual releases.

I -- I'll move on to tailoring, Your Honor, and pause briefly on injunction. But let me stop there in case Your Honor has questions on the core point.

THE COURT: Nope.

MR. MURTAGH: So, as to tailoring, Your Honor, just briefly. The third-party releases are narrowly tailored. The

releases themselves release only claims related to the Debtors and these cases, just as in all of the precedent cases we've been discussing.

As set forth in Mr. Coben's declaration, specifically at Paragraph 56, the third-party releases were a core consideration among the parties to the TSA, instrumental in development of the plan, and critical to gaining and growing support for the plan and the cases from released parties. Like most everything here, Your Honor, that evidence is also unchallenged. So the releases are necessary and appropriately tailored.

Finally, Your Honor, and as briefly covered in *Independence Contract Drilling*, the injunction follows the release. Injunctions are appropriate in connection with third-party releases under Fifth Circuit law. And again, Your Honor, the evidence supports that the injunction is a necessary complement to the releases, as set forth in Mr. Coben's declaration at Paragraphs 60 to 62.

And then the final point on the related party releases that the Office of the United States Trustee raised. Your Honor, the structure of the releases, as modified -- which is intended as a clarification -- is that related parties are only granting releases to the extent that the primary releasing party could be forced to grant the release on behalf of the related party through agency principles. So

the power to grant the release is vested in the releasing party, and the release is only effective to that extent as to the related party or, similarly, for a derivative claim that is, itself, released by the direct claimant's release. So there's nothing that is being taken from a related party that is not already fully vested in the hands of the releasing party.

THE COURT: Who received notice.

MR. MURTAGH: Correct, correct.

So, in sum, Your Honor, the third-party releases are consensual and should be approved together with their accompanying injunction.

That's all I have on the releases, Your Honor. I did have on or two housekeeping points. But before I come to that, let me pause and see if Your Honor has any questions.

THE COURT: No questions.

MR. MURTAGH: So, just in terms of housekeeping, Your Honor, for completeness of the record, in addition to the declarations already admitted into evidence as Docket Numbers 171-19, 171-20, 171-21, and 179, we also would offer into evidence the remaining items referenced on the witness and exhibit list, which are found at Docket Numbers 171-1 through 171-18.

THE COURT: All right. Does anyone have any objection to the exhibits found at Documents Number 171-1

through 171-18?

And they include Mr. Coben's original declaration for the Disclosure Statement, that's Exhibit Number 171-1.

171-2 is the Disclosure Statement.

171-3 are the financial projections.

171-4 is the liquidation analysis.

171-5 is the valuation analysis.

171-6 is the prepackaged joint plan.

171-7 is the certificate of service on the solicitation dated December 23rd, 2024.

171-8 is the order scheduling the combined hearing.

And then 171-9 through 171-15 are the various certificates of service and affidavits filed by the claims agent in connection with the service of the plan.

And 171-16 is the first amended prepackaged plan.

And 171-17 is the redlines of the prepackaged plan of the amended plan.

And 171-18 is notice of the filing of the first amended prepackaged plan.

Any objections?

(No verbal response)

THE COURT: All right. Hearing none, they'll be admitted.

(Debtors' Exhibits ECF 171-1 through 171-18 received in evidence)

MR. MURTAGH: Thank you, Your Honor.

That concludes the Debtors' presentation, and we'd respectfully request that the Court enter the order confirming the plan found at Docket Number 177.

THE COURT: All right.

MR. MURTAGH: Thank you again.

THE COURT: Mr. Nguyen?

MR. NGUYEN: Nothing further, Your Honor. Thank you.

THE COURT: Okay. Ms. Schrage?

MS. SCHRAGE: Nothing further, Your Honor. Thank you.

THE COURT: Okay.

(Pause in proceedings)

THE COURT: Okay. Before the Court today is the Debtors' hearing on confirmation of the first amended plan and related matters.

With respect to all of the issues found in 1129-1 -- and I will deal with the objection separately -- I find that the -- number one, that I have jurisdiction; that confirmation of the plan is a core matter; that, you know, the Court has an independent obligation to review the plan, which I have done. And I believe that, based on the uncontroverted evidence, the plan meets all of the requirements of 1129 of the Bankruptcy Code, in order to obtain confirmation. And that is based on,

not only the exhibits that were admitted, but also the declarations of Mr. Coben, Mr. Dunayer, and the voting declaration filed by Ms. Calderon.

So now let me turn to the objections raised by the U.S. Trustee and the SEC.

So I want to -- and I do think that the facts matter, and I do view every plan on the facts. There is no set rule with respect to how third-party releases will be treated. I think it is based on the facts and I do think that facts matter.

And based on the evidence before me, what I have is a situation of a -- if I look at the liquidation analysis, this company would be hopelessly insolvent, the secured creditor would receive pennies on the dollar. And but for the negotiation that was had by the company in this charge of its fiduciary obligations with its ad hoc group of creditors, we have now reached a plan where the unsecured creditors are getting a hundred cents on the dollar; the ABL was paid off, they got a hundred cents on the dollar.

And the ad hoc group represented by Mr. Persons' client is the only impaired class, and they are receiving less than they would otherwise be entitled to. And, in essence, they are -- what they have done, that has allowed funding of the plan to do the things that are being -- the transactions that are contemplated by the plan, paying all unsecured

creditors in full, saving the jobs, and continuing the business as a going concern. So that's the way that I view the transaction that is being implemented by the plan, so I do think that facts matter.

This company was hopelessly insolvent. The equity here, if you use the strict priority rule, if you look at the liquidation analysis, most unsecured creditors would have received nothing. So, in essence, that's -- the facts do matter, and that's the way that I view the plan.

So I'm -- I thought very carefully about Mr. Nguyen's arguments and Ms. Schrage's arguments, and I'm -- and I would be -- if we were writing on a blank slate, I think that Mr. Nguyen's arguments would be fairly persuasive, but we're not writing on a blank slate.

Prior to Purdue, the Fifth Circuit did not have non-consensual third-party releases. We have been in a situation for years that -- since Pacific Lumber, where there have been no non-consensual third-party releases in the Fifth Circuit. So we have developed and refined a way to determine whether the releases that are included in the plan are consensual, and we've done that by the use of an opt-out mechanism that allows for notice to the parties, actual notice to the parties, and then allows them the opportunity to opt out. That has been refined in cases for a while.

So I don't think Purdue really changed anything in

the Fifth Circuit as it relates to non-consensual third-party releases because there weren't any. And the Supreme Court was clear in Purdue that -- when they said nothing that we have said should be construed to call into question consensual third-party releases offered in connection with bankruptcy organizations.

And having, number one, a mechanism that has been developed over the cases;

Number two, having effective service of that mechanism, I think the evidence is uncontroverted based on the declaration of Ms. Calderon, based on the numerous exhibits that were admitted showing service, that service was effective. You know, the nominees, who are the only people that the Debtor had, received it with instructions to forward them. So I believe that the process here worked. And giving the opportunity for the Debtors [sic] to opt out is consistent with having consensual third-party releases.

So I don't think that we're necessarily treading on new ground. I think the major goal and the major inquiry that the Court has to make is: Was this a process that was fair and that it was intended to get notice to people, so that they could make a decision?

And as Mr. Murtagh indicated, there was no evidence as to why people didn't return it. There was no evidence that, because some of the shareholders returned it without

having opted out, that they somehow misunderstood it, misread it, or I don't know what. There is simply no evidence

So, in -- kind of in summary, I agree that facts do matter. I think that, based on the facts in this case and the process that was run, that the releases are -- because of the opportunity for all the parties to have opted out, are consensual.

And furthermore, that the injunction is -- I don't believe that the injunction is an additional thing that needs to be added in order to make non-consensual releases consensual. I think the injunction is the way that you enforce the mechanism. It's more of a -- it's more a process than it is substance. So I don't think that the use of the injunction to support a consensual release is in any way prohibited by the case law, either by Purdue or in the Fifth Circuit.

I believe that the other arguments raised by the trustee, similarly, the gatekeeping function, again, Highland Capital permits the gatekeeping function with respect to the exculpated parties, which, in this case, is only the Debtor, as well as the parties that are released.

So, in addressing the scope -- and that I did look at very, very closely, the scope, and I agree with Mr. Murtagh. The only people -- the related parties that would be giving a release would be only parties for whom the people who

received notice would have been able to opt out. And the same thing is true for the people who are being provided the releases. So I think that, in terms of the scope of the releases and use of the "related party" definition, I think -- with the limitations that were included in the revised draft, I think those, again, are perfectly appropriate because it's you're only binding people who you could otherwise bind by the people who got notice.

With respect to the request to waive the fourteen-day period under 3020(e), I believe it's appropriate under the circumstances. This is not a -- you know, a mega case, in terms of billions of dollars. And I think that being able to save on the administrative burden in this case is significant, so I will go ahead and approve that.

So, for those reasons, the Court overrules the objections and I will confirm the plan.

So is it the order that was submitted at Docket Number 177?

MR. MURTAGH: That's correct, Your Honor.

(Pause in proceedings)

THE COURT: And since Ms. Shriro did not appear, I -- am I to believe that the changes in Paragraph 26 and 29 resolved her objections? I think you said that, but I just want to make sure.

MR. MURTAGH: That's correct, Your Honor. The

modifications for the landlord objection --

THE COURT: Paragraphs --

MR. MURTAGH: -- those changes --

THE COURT: -- 26 --

MR. MURTAGH: -- resolve the ---

THE COURT: -- and 29.

MR. MURTAGH: -- objection.

THE COURT: Okay.

(Pause in proceedings)

THE COURT: Okay. The confirmation order has been signed and sent to docketing.

MR. MURTAGH: Thank you, Your Honor.

THE COURT: Anything else we can do?

MR. MURTAGH: On behalf of the Debtors --

(Participants confer)

MR. MURTAGH: Oh, one thing.

UNIDENTIFIED: Just a very quick housekeeping item. We did have our retention applications on file. The objection deadline for that runs today, and then we'll be filing certificates of no objection for those probably earlier next week.

THE COURT: Okay. Thank you.

Anything else, anyone?

MR. MURTAGH: That's it, Your Honor.

THE COURT: All right. Thank you very much. You're

all excused.

(Proceedings concluded at 2:02 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability produced from the electronic sound recording of the proceedings in the above-entitled matter.

/S./ MARY D. HENRY

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JTT TRANSCRIPT #69558

DATE FILED: JANUARY 28, 2025

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

In Re:	The Container Store Group, Inc. and The Container Store, Inc. Debtor	Case No.: 24−90627 Chapter: 11

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