UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CHAPTER 11
	:	
WELLMADE FLOOR COVERINGS INTERNATIONAL, INC., et al.,[1]	:	CASE NO. 25-58764 - SMS
	:	
	:	
DEBTORS.	:	

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF DEBTORS' CHAPTER 11 PLAN

Guy A. Van Baalen, Acting United States Trustee for Region 21, in furtherance of his responsibilities under 28 U.S.C. § 586, objects to confirmation of *Debtors' Chapter 11 Plan*. Dkt. No. 385. 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.

I. Course of Proceedings

1. Debtors' commenced these proceedings by filing voluntary petitions under chapter 11 of the Bankruptcy Code on August 4, 2025.

2. On August 14, 2025, the United States Trustee appointed a committee of creditors holding unsecured claims pursuant to 11 U.S.C. § 1102. Dkt. No. 59.

3. The United States Trustee concluded the meetings of creditors in Debtors' cases on September 22, 2026.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Wellmade Industries MFR. N.A LLC (1058) and Wellmade Floor Coverings International, Inc. (8425).

4. On June 1, 2026, Debtors filed *Debtors' Chapter 11 Plan* (the "Plan"), Dkt. No. 385, and *Disclosure Statement for Debtors' Chapter 11 Plan*. Dkt. No. 386.

5. On July 14, 2026, the United States Trustee timely filed his *Objection to Debtors' Disclosure Statement and Form of Ballots*. Dkt. No. 443 (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 July 22, 2026, the Court entered the *Order (A) Conditionally Approving the Disclosure Statement on an Interim Basis, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, (C) Approving the Form of Ballot and Solicitation Materials, (D) Establishing Voting Record Date, (E) Fixing the Date, Time, and Place for the Hearing on Confirmation of the Plan and the Deadline for Filing Objections Thereto, and (F) Approving Related Notice Procedures and Deadlines* (the "Disclosure Statement Order"). Dkt. No. 463. In the Disclosure Statement Order, the Court conditionally approved the use of the Disclosure Statement for solicitation of votes for the Plan but specifically indicated that any objections to the adequacy of the information contained in the Disclosure Statement would be reserved for consideration at the plan confirmation hearing. Dkt. No. 463, Pg. 4-5. The Disclosure Statement Order set the deadline for filing an objection to confirmation of the Plan for August 20, 2026, at 4:00 p.m., prevailing eastern time. Dkt. No. 463, pg. 4.

7. This Objection to the Plan and Disclosure Statement is timely.

II. 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.

10. The United States Trustee has standing to be heard regarding the sufficiency of the Disclosure Statement and confirmation of the Plan, pursuant to 11 U.S.C. § 307.

III. Argument

a. Debtors' Plan should not be confirmed because it imposes improper non-consensual third-party releases

11. Debtors' 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 (a) vote to accept the Plan, (b) 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, (c) are entitled to vote and do not cast a ballot, including those who may not have received the solicitation materials, (d) vote to reject the Plan, unless they also check an opt-out box on the ballot, (e) have an unclassified claim, but do not object to the third-party releases, and (f) all other holders of claims and interests to the maximum extent permitted by law.

12. Article IX, Section D of the Plan provides for third-party releases (the "Third-Party Releases"):

Notwithstanding anything contained in the Plan to the contrary, as of the Effective Date, and to the fullest extent allowed by applicable law, each Releasing Party is deemed to have forever released, waived, and discharged each of the Released Parties from all Claims and Causes of Action, whether known or unknown, including any derivative claims asserted or assertable on behalf of the Debtors or their respective Estates, that such Entity would have been legally entitled to assert (whether individually or collectively) based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership, or operation thereof), any securities issued by the Debtors and the ownership thereof, the Debtors' in- or out-of-court restructuring efforts, any Avoidance Actions (but excluding Avoidance Actions brought as counterclaims or defenses to Claims asserted against the Debtors), any intercompany transaction, the DIP Loan Documents, Prepetition Loan Documents, the Cases, the formulation, preparation, dissemination, negotiation, or filing of the Disclosure Statement, the Plan, the Plan Supplement, solicitation of votes on the Plan, the prepetition negotiation and settlement of Claims, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of debt and/or securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, except for Claims related to any act or omission that is determined in a Final Order by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, knowing violation of law or gross negligence, but in all respects such Released Parties shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan (the "Third-Party Release"); provided, however, the Third-Party Release does not release any post-Effective Date obligations of any party or Entity under the Plan, or any document, instrument, or agreement (including the Plan Documents and other documents, instruments, and agreements set forth in the Plan Supplement) executed to implement the Plan.

Notwithstanding anything to the contrary in the foregoing, any Holder of a Claim or Interest who did not (i) return an opt-out election form or (ii) file an objection to the Third-Party Release, that believes that its individual circumstances related to its ability to return a Ballot or opt-out election form opting out of the Third-Party Release or to object to the Third-Party Release are such that it should not be deemed to have consented to such Third-Party Release as a result of such failure, may seek relief from the Bankruptcy Court to exercise its rights and claims free of the Third-Party Release by rebutting the presumption that its failure to return an opt-out election form opting out of the Third-Party Release or to object to the Third-Party Release should be deemed to represent its consent to the Third-Party Release. Any party seeking such relief must, in any pleading regarding this provision filed with the Bankruptcy Court: (i) identify the claim(s) or types of claims the party wishes to pursue and (ii) identify the parties or the types of parties against such claims will be asserted.

> 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 the 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, without limitation, the Released Parties' contributions to facilitating the restructuring 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 respective 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 released pursuant to the Third-Party Release.

Plan, Dkt. No. 385, pg. 35-36.

13. The Plan provides 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; (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.

Plan, Art. I, Sec. A, Dkt. No. 385, pg. 13.

14. The Plan provides the definition of "Released Parties":

> "Released Parties" means, each of the following, solely in its capacity as such: (a) the Debtors; (b) the Creditors Committee and each of its members (solely in their respective capacities as such); (c) the Individual Defendants; (d) the Staffing Agencies; (e) the CRO; and (f) the Debtors' Professionals retained in these Cases.

Plan, Art. I, Sec. A, Dkt. No. 385, pg. 13.

i. Non-consensual third-party releases cannot be included in a chapter 11 plan.

15. The Supreme Court held in *Harrington v. Purdue Pharma L.P.* that bankruptcy courts cannot involuntarily alter relationships between non-debtors by imposing nonconsensual releases of, or injunctions barring, claims between them. 603 U.S. 204, 209, 227 (2024). The Court did not prohibit chapter 11 plans from memorializing consensual third-party releases, and it did not "express a view on what qualifies as a consensual release." *Id.* at 226.

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

17. The United States Trustee contends that the first test is the correct one. A consensual third-party release is a separate agreement between non-debtors governed by non-bankruptcy law. As the Supreme Court recognized in *Purdue*, a release is a type of settlement agreement. *Purdue*, 603 U.S. at 223 (explaining that what the Sacklers sought was not a traditional release because settlements are, by definition, consensual). A bankruptcy court can acknowledge the parties' agreement to a third-party release, but the authority for a consensual release is the agreement itself,

---

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

[3] *See, e.g., In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 n.120 (Bankr. S.D. Tex. 2024)

[4] *See, e.g., In re LaVie Care Centers, LLC, et. al.*, 2024 Bankr. LEXIS 2900, 2024 WL 4988600 (N.D.GA. Bank. 2024)(Baisier, J);.*In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 WL 2655592, at *5-*6 (Bankr. D. Del. Mar. 27, 2023), abrogated by *Smallhold, Inc.*, 665 B.R. at 716; *In re LATAM Airlines Grp. SA*, 2022 WL 2206829, at *46 (Bankr. S.D.N.Y. June 18, 2022); *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022).

not the Bankruptcy Code. If a claim has been extinguished by virtue of the agreement of the parties, then the court is not using the forcible authority of the Bankruptcy Code or the bankruptcy court to extinguish the property right.

18. Here, with the exception the claimants in Class 3 of the Plan, there is no existing release agreement between non-debtors. Debtors instead seek a confirmation order that would use the power of the court to impose the Third-Party Releases on claimants without their affirmative and voluntary consent. Such a confirmation order would impermissibly alter the relations between non-debtors because a valid release does not exist under non-bankruptcy law

ii. State law governs whether parties consent to a release.

19. "[T]he basic federal rule in bankruptcy is that state law governs the substance of claims." *Travelers Cas. & Sur. Co. of America v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450- 451 (2007); accord *Butner v. United States*, 440 U.S. 48 (1979). Thus, courts apply state law when the question is whether a debtor has entered a valid settlement agreement. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) ("Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law."); *De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)*, 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009) ("Where the United States is not a party, it is well established that settlement agreements in pending bankruptcy cases are considered contract matters governed by state law.").

20. The rule is no different for third-party releases. They are separate agreements between non-debtors governed by state law. Unlike a bankruptcy discharge, which "is an involuntary release by operation of law," "[i]n the case of voluntary releases, the nondebtor is released from a debt, not by virtue of 11 U.S.C. § 1141(b), but because the creditor agrees to do so." *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 503, 507 (Bankr. D.N.J. 1997). *See also Continental*

Airlines Corp. v. Air Line Pilots Assn., Int'l (In re Continental Airlines Corp.), 907 F.2d 1500, 1508 (5th Cir. 1990) (holding that for settlement provisions "unrelated to substantive provisions of the Bankruptcy Code," "the settlement itself is the source of the bankruptcy court's authority"). Thus, "the Bankruptcy Code has not altered the contractual obligations of third parties, the parties themselves have so agreed." *Arrowmill*, 211 B.R. at 507.

21. Because the Bankruptcy Code does not authorize the imposition of an involuntary release, *Purdue*, 603 U.S. at 209, 227, the release must be consensual under nonbankruptcy law. There is no Bankruptcy Code provision that preempts otherwise applicable state contract law governing releases between non-debtors. *See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (plurality) ("For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law must govern because there can be no other law.'") (quoting *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). Section 105(a), for example, "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue*, 603 U.S. at 216 n.2 (quotation marks omitted). But the Code does not confer any authority to impose a release of claims between non-debtors that would not be valid under state law. The Bankruptcy Code does not define a "consensual release." *See* 11 U.S.C. § 101. "There is no rule that specifies an 'opt out' mechanism or a 'deemed consent' mechanism" for third-party releases in chapter 11 plans. *In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). And no Code provision authorizes bankruptcy courts to deem a non-debtor to have consented to release claims against other non-debtors where such consent would not exist as a matter of state law.

22. Some courts have held that federal rather than state law applies to determine whether a third-party release is consensual. But because there is no applicable Code provision, whether a non-debtor has consented to release another non-debtor is not, as one court concluded, a "matter of federal bankruptcy law." *In re Spirit Airlines, Inc.*, No. 24-11988, 2025 WL 737068, at *18, *22 (Bankr. S.D.N.Y Mar. 7, 2025); see also *In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 (Bankr. S.D. Tex. 2024) (relying on caselaw in the district rather than any provision of the Bankruptcy Code). Absent express authority in the Code, federal courts cannot simply make up their own rules for when parties have given up property rights by releasing claims. 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). Indeed, nearly a hundred years ago, the Supreme Court rejected the notion that federal courts can displace state law as "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Erie*, 304 U.S. at 79; accord *Rodriquez v. FDIC*, 589 U.S. 132, 133 (2020) (holding state law applies to determine allocation of federal tax refund resulting from consolidated tax return). Courts thus may not invent their own rule for when parties may be "deemed" to have given up property rights by releasing claims.

23. Accordingly, state-law contract principles govern whether a third-party release is consensual. *See, e.g., Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 684- 85 (E.D. Va. 2022) (describing bankruptcy courts in the District of New Jersey as "look[ing] to the principles of contract law rather than the bankruptcy court's confirmation authority to conclude that the validity of the releases requires affirmative consent"); *In re Smallhold, Inc.*, 665 B.R. 704, 720 (Bankr. D. Del. 2024) (recognizing that "some sort of affirmative expression of consent that

would be sufficient as a matter of contract law" is required); *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third-party release."); *Arrowmill*, 211 B.R. at 506, 507 (explaining that a third-party release "is no different from any other settlement or contract" and thus "the validity of the release . . . hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order") (internal quotation marks omitted) (alterations in original). Because "'nothing in the bankruptcy code contemplates (much less authorizes it)' . . . any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent." *In re Tonawanda Coke Corp.*, 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024) (quoting Purdue, 603 U.S. at 223). And "any such consensual agreement would be governed by state law." *Id.*

24. Even if federal law applied, however, it would not lead to a different result. That is because "federal contract law is largely indistinguishable from general contract principles under state common law." *Young v. BP Expl. & Prod., Inc. (In re Deepwater Horizon)*, 786 F.3d 344, 354 (5th Cir 2015); *see also Deville v. United States*, 202 F. App'x 761, 763 n.3 (5th Cir. 2006) ("The federal law that governs whether a contract exists 'uses the core principles of the common law of contracts that are in force in most states.' . . . These core principles can be derived from the Restatements.") (quoting *Smith v. United States*, 328 F.3d 760, 767 n.8 (5th Cir. 2003)).

25. Applicable state contract law cannot be disregarded on a procedural default theory, applied by some courts, under which creditors who remain silent are held to have forfeited their rights against non-debtors if they received notice of the non-debtor release but failed to object, just as they would forfeit their right to object to a debtor's plan if they failed timely to do so. *See, e.g., In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 WL 2655592, at *5-*6 (Bankr. D.

Del. Mar. 27, 2023), abrogated by *Smallhold, Inc.*, 665 B.R. at 716; *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022); *In re DBSD North America, Inc.*, 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009), aff'd on other grounds, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), rev'd in part and aff'd in part, 634 F.3d 79 (2d Cir. 2011); *In re LaVie Care Cntrs.*, LLC, No. 24-55507, 2024 WL 4988600, at *14 (Bankr. N.D.Ga. Dec. 5, 2024); *In re Envistacom LLC*, No. 23-52696-JWC (Bankr. N.D. Ga. Nov. 8, 2023); *In re Robertshaw US Holding Corp.*, No. 24-90052, 2024 WL 3897812, at *17 (Bankr. S.D. Tex. 2024) (citing *Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592, at *6-8)]. These courts reasoned that so long as the creditors received notice of a proposed non-debtor release and were informed of the consequences if they did not opt out or object to that release, there is no unfairness or deprivation of due process from binding them to the release. *Cf. Smallhold*, 665 B.R. at 708 (describing this reasoning as having treated a mere "failure to opt out" as "allow[ing] entry of the third-party release to be entered by default").

26. A fuller explanation of this theory was articulated prior to the Purdue ruling in *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022). The *Mallinckrodt* court stated that "the notion that an individual or entity is in some instances deemed to consent to something by their failure to act is one that is utilized throughout the judicial system." *Id.* "When a party to a lawsuit is served with a complaint or a motion, they need to file an answer or otherwise respond, or a judgment is automatically entered against them." *Id.* at 879. The court reasoned that "[t]here is no reason why this principle should not be applied in the same manner to properly noticed releases within a plan of reorganization." *Id.* Similarly, this Court in *LaVie* found that creditors who failed to respond to a solicitation package that provided an opportunity to opt-out of a third-party release was bound by those releases, subject to a procedural mechanism providing limited

opportunity for unresponsive creditors to later seek relief from the release. *In re LaVie Care Cntrs.*, LLC, 2024 WL 4988600, at *37-39 (Bankr. N.D. Ga. Dec. 5, 2024).

27. The United States Trustee respectfully disagrees with the default theory analysis. First, when a party in litigation is bound to a result based on a failure to timely respond, it is not because the defaulting party has consented to an adverse ruling. Rather, "failure to make timely assertion of [a] right before a tribunal having jurisdiction to determine it" results in forfeiture of the right. *United States v. Olano*, 507 U.S. 725, 731 (1993). Forfeiture, unlike waiver, is not an intentional relinquishment of a known right. *Id.* at 733. *Cf. Smallhold*, 665 B.R. at 718 ("In this context, the word 'consent' is used in a shorthand, and somewhat imprecise, way. It may be more accurate to say that the counterparty forfeits its objection on account of its default."). Forfeiture principles thus do not show consent. Second, there is no basis to hold that parties have forfeited claims against non-debtor third parties based on their silence in response to a debtor's chapter 11 plan. No one has submitted the released claims for adjudication by the bankruptcy court. *See Olano*, 507 U.S. at 731.

iii. Under State Law, silence does not manifest consent

28. Debtors bear the burden to prove that their plan is confirmable. *In re 431 W. Ponce De Leon, LLC*, 515 B.R. 660, 669 (Bankr. N.D.Ga. 2014); *In re American Cap. Equip., LLC*, 688 F.3d 145, 155 (3d Cir. 2012). Debtors have not met this burden because they have failed to establish that the third-party release is consensual under applicable state law.

29. Under Georgia law, like in other states, an agreement to release claims- like any other contract- requires a manifestation of assent to that agreement.[5] *See, e.g.*, RESTATEMENT

[5] In a previous case concerning a third-party release, the Court raised concerns regarding the choice of law question. *In re LaVie Care Cntrs.*, LLC, 2024 WL 4988600, at *14 (Bankr. N.D. Ga. Dec. 5, 2024). The United States Trustee contends that the Court may apply Georgia law because no party has suggested that any other state's law applies. *See, e.g., Wood v. Mid-Valley Inc.*, 942 F.2d 425, 426 (7th Cir. 1991) ("The operative rule is that when neither party raises

(SECOND) OF CONTRACTS § 17(1) ("[T]he formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and a consideration."); *Purvis v. Aveanna Healthcare, LLC*, 563 F. Supp. 3d 1360, 1379 (N.D. Ga. 2021) ("Mutual assent, or a meeting of the minds, 'is the first requirement of the law relative to contracts.' ") (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)).

30. There are only very limited exceptions to the "general rule of contracts . . . that silence cannot manifest consent." *Patterson*, 636 B.R. at 686; *see also, e.g., McGurn v. Bell Microproducts, Inc.*, 284 F.3d 86, 90 (1st Cir. 2002) (recognizing "general rule" that "silence in response to an offer . . . does not constitute acceptance of the offer"). "[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.

31. But absent such extraordinary circumstances, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." *Id.* And "[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." *Id.* § 69, cmt. c; see also *Patterson*, 636 B.R. at 686 (explaining how contract law does not support deeming consent

a conflict of law issue in a diversity case, the federal court simply applies the law of the state in which the federal court sits."). Nor has anyone suggested there would be a different outcome under the law of any other jurisdiction, so no choice of law is required. *See, e.g., In re Syntax-Brillian Corp.*, 573 F. App'x 154, 162 (3d Cir. 2014).

based upon a failure to opt out); *Jacques v. Solomon & Solomon P.C.,* 886 F. Supp. 2d 429, 433 n.3 (D. Del. 2012).

iv. Debtors' Plan cannot be approved because it assumes creditor silence or failure to "opt out" equates to consent.

32. Debtors' 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 (a) vote to accept the Plan, (b) 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, (c) are entitled to vote and do not cast a ballot, including those who may not have received the solicitation materials, (d) vote to reject the Plan, unless they also check an opt-out box on the ballot, (e) have an unclassified claim, but do not object to the third-party releases, and (f) all other holders of claims and interests to the maximum extent permitted by law.

33. *First*, only creditors in class 3 of the Plan are impaired by the Plan and entitled to vote. Those creditors agreed to settle their claims against the Debtors, and part of the settlement agreement includes release of the same parties contemplated by the Third Party Release in the Plan. As a result, even if the holders of class 3 claims opted out of the Third Party Release in the Plan, they would still be bound by the third-party release contained in their settlement agreement.

34. *Second*, the Plan provides that creditors in voting classes who do not vote and do not opt out of the Third-Party Releases shall also be stripped of their direct claims against nondebtors. Those who abstain from voting cannot be said to be consenting to anything—they are taking no action with respect to the plan. There is no basis to infer consent by those who do not vote and are taking no action with respect to the plan.

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

SunEdison, 576 B.R. at 458–61. Creditors have no legal duty to vote on a plan, much less to respond to an offer to release non-debtors included in a plan solicitation. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan); *SunEdison*, 576 B.R. at 460–61 (recognizing that creditors have no duty to speak regarding a plan that would allow a court to infer consent to third-party releases from silence). Consent thus cannot be inferred from their silence because "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. c (1981). Nor can it "impose on him any duty to speak." *Id.* § 69 cmt. a.

36. "Charging all inactive creditors with full knowledge of the scope and implications of the proposed third-party releases, and implying a 'consent' to the third-party releases based on the creditors' inaction, is simply not realistic or fair and would stretch the meaning of 'consent' beyond the breaking point." *Chassix*, 533 B.R. at 81. "It is reasonable to require creditors to pay attention to what the debtor is doing in bankruptcy as it relates to the creditor's rights against the debtor. But as to the creditor's rights against third parties— which belong to the creditor and not the bankruptcy estate—a creditor should not expect that those rights are even subject to being given away through the debtor's bankruptcy." *Smallhold*, 665 B.R. at 721; see also id. at 719-20 (discussing *Chassix*). "A party's receipt of a notice imposing an artificial opt-out requirement, the recipient's possible understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as consent. *Emerge Energy Services, LP*, No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (emphasis in original). "[B]asic contract principles" require affirmative assent, not inferences drawn from inaction that in fact may reflect only "[c]arelessness, inattentiveness, or mistake." *Id.*

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

38. *Third*, the Third-Party Releases will also be imposed on unimpaired claimants or holders of interests who are not permitted to vote on the Plan because they are deemed to accept the plan and impaired claimants or holders of interests who are not permitted to vote on the Plan because they are deemed to reject the Plan, unless they check an opt-out box on the non-voting status notice form. In other words, Debtors purport to impose an otherwise non-existent duty to speak on claimants regarding the offer to release non-debtors, and their silence—the failure to opt out—is "deemed" consent. But under blackletter law that silence is not acceptance of the offer to release non-debtors. *See, e.g., Patterson*, 636 B.R. at 688 ("Whether the Court labels these 'nonconsensual' or based on 'implied consent' matters not, because in either case there is a lack of sufficient affirmation of consent.").

39. A case from the Ninth Circuit illustrates the point. *In Norcia v. Samsung Telecom. Am., LLC*, 845 F.3d 1279, 1286 (9th Cir. 2017), cited with approval by the Third Circuit in *Noble v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-118 (3d Cir. 2017), and the Fifth Circuit in *Imperial Ind. Supply Co. v. Thomas*, 825 F. App'x 204, 207 (5th Cir. 2020), the court held that a failure to opt out did not constitute consent to an arbitration agreement. A consumer bought a Samsung phone and signed the Verizon Wireless Customer Agreement. *Norcia*, 845 F.3d at 1282. The phone came with a Samsung warranty brochure that contained an arbitration provision but gave purchasers the ability to opt out of it without affecting the warranty coverage. *Id.* The customer did not opt out. *Id.* When the customer later sued Samsung, Samsung argued that the arbitration provision applied. *Id.* at 1282-83.

40. The Ninth Circuit in *Norcia* held that the customer's failure to opt out did not constitute consent to arbitrate. The court applied the "general rule," applicable under California law, that "silence or inaction does not constitute acceptance of an offer." *Norcia*, 845 F.3d at 1284 (quotation marks omitted). The customer did not agree to arbitrate because he did not "sign the brochure or otherwise act in a manner that would show his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement." *Norcia*, 845 F.3d at 1285 (quotation marks omitted). This was true, even though the customer did take action to accept the contract offered by Verizon Wireless. "Samsung's offer to arbitrate all disputes with [the customer] cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, unless an exception to this general rule applies." *Id.* at 1286 (quotation marks and citation omitted).

41. *Fourth*, the Third-Party Releases will be imposed on claimants with unclassified claims that do not file an objection to the Plan, and any other undescribed holders of claims and interests "to the maximum extent permitted by law". For the same reasons discussed in *Chassix*, *Emerge*, 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 Plan to avoid being stripped of their direct claims against non-debtors.

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

b. Debtors' Plan should not be confirmed because it includes an improper injunction provision to enforce third-party releases.

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

44. Pursuant to the Plan, the Third-Party Release will be "a bar to any of the Releasing Parties asserting any Claim or Cause of Action released pursuant to the Third-Party Release." Plan, Art. IX, Sec. D, Dkt. No. 385, pg. 36.

45. Further, the Plan includes the following provision:

> Except as otherwise provided in the Plan or the Confirmation Order, all Entities who have held, hold, or may hold Claims, Interests, Causes of Action, or liabilities that: (a) are subject to compromise and settlement pursuant to the terms of the Plan; (b) have been released by the Debtors pursuant to the Plan; (c) are subject to exculpation pursuant to the Plan; or (d) are otherwise discharged, satisfied, stayed or terminated pursuant to the terms of the Plan, are permanently enjoined and precluded, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Plan Administrator, the Released Parties, or the Exculpated 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, Interests, or Causes of Action; (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, Interests, or Causes of Action; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or Estates of such Entities on account of or in connection with or with respect to any such Claims, Interests, or Causes of Action; (4) asserting any right of setoff (other than setoffs exercised prior to the Petition Date) or subrogation of any kind against any debt, liability, or obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any Claims, Causes of Action, or Interests; 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, Interests, or Causes of Action discharged, released, exculpated or settled pursuant to the Plan.
>
> Any Entity injured by any willful violation of such injunction may seek actual damages and, in appropriate circumstances, may seek punitive damages from the willful violator.

Plan, Art. IX, Sec. F, Dkt. No. 385, pg. 37.

46. 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)).

47. 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.

48. 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.

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

c. Debtors' Plan should not be confirmed because it is impermissibly deemed to be a settlement.

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

51. Debtors' 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 the 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, without limitation, the Released Parties' contributions to facilitating the restructuring 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 respective 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 released pursuant to the Third-Party Release.

Plan, Art. IX, Sec. D, Dkt. No. 385, pg. 36.

52. 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).

53. 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. IX, Sec. D of the 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).

54. Sections 1129 and 1141 govern resolution of claims against Debtors.

55. Bankruptcy Rule 9019(a) provides that, "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). "In making its evaluation, the court must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" *In re Washington Mut., Inc.*, 442 B.R. 314, 328 (Bankr. D. Del. 2011) (*quoting In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). The purpose of Bankruptcy Rule 9019 is thus not to determine the existence or validity of consent to a proposed settlement (which remains a question of state contract law), but instead to ensure that the proposed settlement is fair.

56. Nothing in Bankruptcy Rule 9019 permits bankruptcy courts to force non-debtors who have not consented to release their rights to sue other non-debtors under applicable state law. The Rule is limited to approvals of a debtor's "compromise or settlement." Fed. R. Bankr. P. 9019(a). But a debtor lacks standing to pursue its creditors' direct claims against third parties. *See Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 426-29 (1972). Moreover, a compromise or settlement is, by definition, consensual. See BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added) (defining a "settlement" as "an agreement ending a dispute or lawsuit," and defining an "agreement" as "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"). By its plain terms, Bankruptcy Rule 9019 does not authorize the imposition of non-consensual releases between non-debtors.

57. Nor could Bankruptcy Rule 9019 authorize the imposition of nonconsensual releases, even if, counterfactually, it purported to do so. Because 28 U.S.C. § 2075 commands that bankruptcy rules shall not abridge substantive rights, Bankruptcy Rule 9019 cannot authorize bankruptcy courts to approve something the Supreme Court held in Purdue no Bankruptcy Code provision permits. *Purdue*, 603 U.S. at 227 ("[T]he bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a non-debtor without the consent of affected claimants.").

58. Nor can such a "settlement" be included in a chapter 11 plan. A plan and a settlement are not one and the same thing. What may be permissible under a negotiated settlement agreement that is considered "fair, reasonable, and in the best interest of the estate" is different than what may be permissible under a plan, which is subject to the requirements of sections 1123 and 1129 of the Bankruptcy Code. *See, e.g., In re Tribune Co.*, 464 B.R. 126, 176 (Bankr. D. Del. 2011) (concluding at confirmation stage that a negotiated settlement could be approved because it was fair, reasonable and in the best interest of the debtors' estates and making an express finding that the settlement was properly part of the plan pursuant to section 1123(b)(3)(A)). Section 1123(b)(3)(A) of the Bankruptcy Code allows a plan proponent to propose "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). Thus, under section 1123(b)(3)(A), a chapter 11 plan may only provide for the settlement of claims or interests belonging to the debtor or the estate—not the settlement of claims held by third parties. *Purdue*, 603 U.S. at 219-20 ("[P]recisely nothing in § 1123(b) suggests those

claims can be bargained away without the consent of those affected, as if the claims were somehow Purdue's own property.").

59. Furthermore, as this is a surplus case, Debtors have failed to demonstrate how the Third-Party releases are "essential to the confirmation of the Plan" because regardless of whether the Plan included releases, all classes of claims will accept or will be deemed to accept the Plan. The Debtors have also failed to identify any consideration given by the Released Parties in exchange for the Third-Party Releases.

60. Even if the Court were to find that it could approve the Third-Party Releases as an appropriate settlement, the Court could not find the alleged settlement as proposed is fair – the Released Parties are getting something for nothing.

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

GUY A. VAN BAALEN
ACTING UNITED STATES TRUSTEE
REGION 21

/s/ Lindsay P. S. Kolba
Lindsay P. S. Kolba
Georgia Bar No. 541621
United States Department of Justice
Office of the United States Trustee
362 Richard Russell Building
75 Ted Turner Drive, SW
Atlanta, Georgia 30303
(404) 331-4478
lindsay.p.kolba@usdoj.gov

CERTIFICATE OF SERVICE

This is to certify that I have on this day electronically filed the foregoing *United States Trustee's Objection to Confirmation of Debtors' Chapter 11 Plan* 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 parties who have appeared in this case under the Bankruptcy Court's Electronic Case Filing program.

Eric J. Breithaupt	EBreithaupt@joneswalden.com, jwdistribution@joneswalden.com, eterrell@joneswalden.com
Shawn M. Christianson	schristianson@buchalter.com, cmcintire@buchalter.com
Christopher K. Coleman	christopher.coleman@kslaw.com
Arthur A. Ebbs	Arthur.Ebbs@wbd-us.com, holly.hampton@wbd-us.com
John D. Elrod	elrodj@gtlaw.com, fieldss@gtlaw.com
Will B. Geer	wgeer@rlkglaw.com, dsideris@rlkglaw.com, willgeer@ecf.courtdrive.com, 2836@notices.nextchapterbk.com, 6717577420@filings.docketbird.com, lmassey@rlkglaw.com, cwilliams@rlkglaw.com, ecf_emails@rlkglaw.com
Aaron Michael Halegua	ah@aaronhalegua.com, 7457448420@filings.docketbird.com
Anna Mari Humnicky	ahumnicky@smallherrin.com, klemons@smallherrin.com, kweindorf@smallherrin.com
Sameer Kapoor	skapoor@phrd.com, elyttle@phrd.com
Benjamin S. Klehr	bklehr@smallherrin.com, klemons@smallherrin.com, kweindorf@smallherrin.com
Cia H. Mackle	cmackle@pszjlaw.com
Mark S. Marani	mmarani@cpmtlaw.com, jpenston@cpmtlaw.com, ddouglas@cpmtlaw.com
Gary W. Marsh	gary.marsh@troutman.com, wlbank@troutman.com
Allison Jane McGregor	allison.mcgregor@gtlaw.com, fieldss@gtlaw.com, allison--mcgregor-9094@ecf.pacerpro.com
Patrick James Reid	patrick@theworkersfirm.com
V. Severin Roberts	severin@theworkersfirm.com
Bradford J. Sandler	bsandler@pszjlaw.com
Gus H. Small	gsmall@smallherrin.com, klemons@smallherrin.com
A. Todd Sprinkle	toddsprinkle@parkerpoe.com, wandaclay@parkerpoe.com, courtneyvolz@parkerpoe.com
Charles H. Van Horn	cvanhorn@bfvlaw.com, notices@bfvlaw.com, cgross@bfvlaw.com, ksilverman@bfvlaw.com, dpark@bfvlaw.com
Bruce Z. Walker	bwalker@cpmtlaw.com, jpenston@cpmtlaw.com
Daniel Werner	dwerner@radfordscott.com, dwerner@ecf.courtdrive.com
Elaine Woo	ewoo@radfordscott.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.

Wellmade Floor Coverings International, Inc.
19150 SW 125th CT
Tualatin, OR 97062

Wellmade Industries MFR. N.A LLC
1 Wellmade Drive NE
Cartersville, GA 30321

/s/ Lindsay P. S. Kolba
Lindsay P. S. Kolba
Georgia Bar No. 541621
United States Department of Justice
Office of the United States Trustee
362 Richard Russell Building
75 Ted Turner Drive SW
Atlanta, Georgia 30303
(404) 331-4478
lindsay.p.kolba@usdoj.gov