IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
WEST MARINE, INC., *et al*.,[1]	)	Case No. 26-10794 (KBO)
	)	
Debtors.	)	Jointly Administered
	)	
	)	**Re: D.I. 56**
	)	**UST Obj. Deadline: June 9, 2026, at 4:00 p.m.**
	)	**Hearing Date: June 18, 2026, at 1:00 p.m.**

OBJECTION OF THE UNITED STATES TRUSTEE TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) CONDITIONALLY APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT, (II) APPROVING THE SOLICITATION AND VOTING PROCEDURES WITH RESPECT TO CONFIRMATION OF THE DEBTORS' JOINT CHAPTER 11 PLAN, (III) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, (IV) SCHEDULING A COMBINED HEARING AND SETTING RELATED DATES AND DEADLINES, AND (V) GRANTING RELATED RELIEF

In support of his objection (the "Objection") to the *Debtors' Motion for Entry of an Order (I) Conditionally Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Voting Procedures with Respect to Confirmation of the Debtors' Joint Chapter 11 Plan, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling a Combined Hearing and Setting Related Dates and Deadlines, and (V) Granting Related Relief* [D.I. 56] (the "Motion"), Andrew R. Vara, the United States Trustee for Regions 3 and 9 ("U.S. Trustee"), by and through his undersigned counsel, states:

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: West Marine, Inc. (5502); Marine One Holdco, LLC (2231); Marine One Parent, Inc. (0402); Rising Tide Holdings Inc. (2628); Rising Tide Parent Inc. (6153); Seascapes, Inc. (3739); W Marine Management Company, Inc. (4151); and West Marine Products, Inc. (4523). For purposes of these chapter 11 cases, the Debtors' service address is West Marine Headquarters, 1 East Broward Blvd., Suite 200, Fort Lauderdale, FL 33301.

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PRELIMINARY STATEMENT

1. The Court should deny the Motion because the Debtors' plan[2] includes opt-out third-party releases. The U.S. Trustee respectfully submits that such releases are non-consensual and are prohibited under *Harrington v. Purdue Pharma L.P.* ("*Purdue*"), 603 U.S. 204, 209, 227 (2024).

2. In addition, certain parties are granting releases without the opportunity to opt out. "Releasing Parties" includes "each current and former Affiliate of each Entity" listed in subsections (a) through (l) of the definition of Releasing Parties. These current and former affiliates likely are not creditors themselves and likely will not be receiving notice of the releases contained in the Plan. There is no process for these parties to opt out of giving releases.

3. The Court should decide this issue now, before ballots and notices are sent to creditors.

JURISDICTION AND STANDING

4. This Court has jurisdiction to hear and determine the Motion and this Objection pursuant to: (i) 28 U.S.C. § 1334; (ii) applicable orders of the United States District Court of the District of Delaware issued pursuant to 28 U.S.C. § 157(a); and (iii) 28 U.S.C. § 157(b)(2).

5. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of chapter 11 cases filed in this judicial district. This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the Courts. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.*), 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog"). Under 28 U.S.C. §

[2] The *Joint Plan of Reorganization of West Marine, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [D.I. 46] (the "Plan").

586(a)(3)(B) the U.S. Trustee has the duty to monitor and comment on plans and disclosure statements filed in chapter 11 cases.

6. The U.S. Trustee has standing to be heard concerning the Motion and this Objection pursuant to 11 U.S.C. § 307. *See U.S. Tr. v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under section 307, which goes beyond mere pecuniary interest).

BACKGROUND

7. On May17, 2026, the above-captioned debtors (the "Debtors") filed chapter 11 petitions in this Court.

8. On May 29, 2026, the U.S. Trustee appointed an official creditors' committee. [D.I. 103].

9. The Debtors filed the Plan on May 18, 2026, along with the Disclosure Statement for the Plan [D.I. 47]. The Motion, seeking interim approval of the Disclosure Statement and approval of solicitation procedures, was filed on May 19.

10. The Plan defines "Releasing Parties" in Article I.A.128 to mean:

> (a) each Debtor; (b) each Reorganized Debtor; (c) each Wind-Down Debtor and the Plan Administrator; (d) the Agents; (e) each Consenting Term Loan Lender and Consenting FILO Lender; (f) each ABL Lender; (g) the Consenting Equity Holders; (h) all Holders of Claims that vote to accept this Plan and are provided with the opportunity to opt out of the releases in this Plan and do not affirmatively opt out of the releases provided for in this Plan; (i) all Holders of Claims who are presumed to accept this Plan and are provided with the opportunity to opt out of the releases in this Plan and do not affirmatively opt out of the releases provided for in this Plan; (j) all Holders of Claims who abstain from voting on this Plan and are provided with the opportunity to opt out of the releases in this Plan and do not affirmatively opt out of the releases provided for in this Plan; (k) all Holders of Claims or Interests who vote to reject this Plan and do not affirmatively opt out of the releases provided for in this Plan; (l) all Holders of Claims or Interests who are deemed to reject this Plan and that elect to opt in to the releases contained in this Plan; (m) each current and former Affiliate of each Entity in clause (a) through the preceding clause (l); and (n) each Related Party of each Entity in clause (a) through the

> preceding clause (m) for which such Entity is legally entitled to bind such Related Party to the releases contained in this Plan under applicable law; provided, that, in each case, an Entity in clause (h) through clause (n) shall not be a Releasing Party if it: (x) was provided with an opportunity to (i) opt out of the releases in this Plan by returning an "opt out" form and affirmatively opts out; or (ii) opt into the releases in this Plan by returning an "opt in" form and does not affirmatively opt in; or (y) timely objects to the releases contained in this Plan and such objection is not resolved before the Confirmation Order is entered.

11. Released Parties are defined in Article I.A.127 of the Plan to mean:

> (a) each Debtor; (b) each Reorganized Debtor; (c) each Wind-Down Debtor and the Plan Administrator; (d) the Agents; (e) each Consenting Term Loan Lender and Consenting FILO Lender; (f) each ABL Lender; (g) each Releasing Party; (h) the Consenting Equity Holders; (i) each current and former Affiliate of each Entity in clause (a) through the preceding clause (h); and (j) each Related Party of each Entity in clauses (a) through the preceding clause (i); provided, however, that, in each case, an Entity shall not be a Released Party if it: (x) was provided with an opportunity to (i) opt out of the releases in this Plan by returning an "opt out" form and affirmatively opts out; or (ii) opt into the releases in this Plan by returning an "opt in" form and does not affirmatively opt in; or (y) timely objects to the releases contained in this Plan and such objection is not resolved before the Confirmation Order is entered.

12. The Debtors have indicated to the U.S. Trustee that they will be amending the Plan to provide that only creditors who actually vote on the plan – either to accept or to reject – will be bound by the release unless they "opt out" or object. Such amended plan has not been filed to date. Even if the Plan is amended consistent with the Debtors' statements, the U.S. Trustee objects to the proposed amendment for the reasons set forth below.

OBJECTION[3]

13. The Court should deny the Motion. Third-party releases based on a failure to opt out are not consensual. In addition, the Plan includes releases deemed granted by parties who do

[3] The U.S. Trustee has provided additional comments to the Motion. The parties have agreed to various changes to the proposed form of order and its attachments but those changes have not been reduced to writing. The U.S. Trustee reserves these objections to the extent that the parties are unable to agree on final documentation.

not have the right to opt out and, potentially, will not even receive notice of the releases. Any third-party releases in this Plan should be removed or changed so that consent is measured by whether parties opt in to same.

I. The Plan is Not Confirmable Because It Proposes Nonconsensual Third-Party Releases That Are Not Authorized Under the Bankruptcy Code.

14. The Court should deny the Motion because the Plan contains nonconsensual third-party releases.

15. "Releasing Parties" includes all current and former Affiliates of certain Releasing Parties. Neither the Plan, the order approving the Motion, or any of the proposed notices provide these parties with the right to opt out of the releases. To the extent they are not creditors in their own right, they will not receive notice of the releases. These are classic non-consensual releases expressly prohibited by the Supreme Court's decision in *Purdue*. *See Purdue*, 603 U.S. at 227 (2024).

16. The Plan also includes within the definition of Releasing Parties any Holder of a Claim that votes to accept or votes to reject the Plan and who does not affirmatively opt out of the releases. In addition, the Plan as currently on file includes in the definition of Releasing Parties all creditors who are unimpaired and presumed to accept the Plan, who are provided the opportunity to opt out, and who do not affirmatively opt out of the releases. Plan, Art. I.A.128. These, too, constitute nonconsensual releases and the Court should decline approval.

17. The United States Supreme Court held in *Purdue* that bankruptcy courts cannot involuntarily alter relationships between non-debtors by imposing nonconsensual releases of, or injunctions barring, claims between them. 603 U.S. at 209. 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. 26.

18. A consensual third-party release is a separate agreement between non-debtors governed by nonbankruptcy 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") (cleaned up). A bankruptcy court can acknowledge the parties' agreement to a third-party release, but the authority for a consensual release is the agreement itself, 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.

19. Here, there is no existing release agreement. The Debtors seeks to impose third party releases on creditors by providing them the opportunity to opt out. If the creditor does not (i) affirmatively opt out or (ii) object to confirmation on grounds that it is not granting a release, the creditor is deemed to grant the Plan's third-party release. A confirmation order effectuating such releases would impermissibly alter the relations between non-debtors because a valid release does not exist under nonbankruptcy law.

20. State law governs whether non-debtors have agreed to release each other. See *infra* Part A. Nothing in the Bankruptcy Code allows parties to disregard state law when debtors seek to impose third-party releases in their plans. Under New York law (Plan, Art. I.D.), as in other states, silence is not acceptance of an offer other than in limited circumstances inapplicable here. The Debtor thus cannot deem creditors to have released their claims based on their failure to opt out or object. Those claimants have not agreed to the third-party release under state law.

A. State Contract Law Applies.

21. "[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) (cleaned up); *accord Butner v. United States*, 440 U.S. 48 (1979). Thus, courts apply state law when the question is whether a debtor has entered into 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.").

22. 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) (emphasis in original); *cf. 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.

23. 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 non-bankruptcy 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 Bankruptcy Code does not confer any authority to impose a release of claims between non-debtors that would not be valid under state law.

24. 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). No Bankruptcy 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.

25. 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 Bankruptcy 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.,* 668 B.R. 689, 716, 720-21 (Bankr. S.D.N.Y. 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 Bankruptcy 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 (cleaned up); *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.

26. Accordingly, state law contract principles govern whether a third-party release is consensual. *See, e.g., Patterson v. Mahwah Bergen Ret. Grp., Inc.,* 636 B.R. 641, 684-85 (E.D. Va. 2022) (describing bankruptcy court 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.*

27. 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) (cleaned up); *see 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)); *In re Gol Linhas Aereas Inteligentes S.A.,* 675 B.R. 125, 130 (S.D.N.Y. 2025) ("[I]t is not necessary to decide whether federal or state law controls. . . . Here, the same general principles of contract law apply under both federal and state law, so there is no conflict. Those principles indicate that the third-party releases at issue here are nonconsensual and, thus, barred by the Supreme Court in *Purdue*.") (*appeal pending sub nom. In re Gol Linhas Aereas Inteligentes S.A*., 26-49 (2d Cir.)).

B. Under State Law, Silence Is Not Acceptance.

28. The Debtors bear the burden to prove that the Plan is confirmable. *In re American Cap. Equip*., LLC, 688 F.3d 145, 155 (3d Cir. 2012). The Debtors have not met that burden because they have failed to establish that the third-party release is consensual under applicable state law.

29. Under New York law, an agreement to release claims—like any other contract—

requires a manifestation of assent to that agreement. *See*, *e.g.*, RESTATEMENT (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."); *In re Hertz Corp.,* 120 F.4th 1181, 1192 (3d Cir. 2024) ("Contract law does not bind parties to promises they did not make."); *See, e.g., Wu v. Uber Techs., Inc.,* 43 N.Y.3d 288, 299 (2024) (citing Restatement § 19); *Diarassouba v. Urban,* 892 N.Y.S.2d 410, 416-17 (App. Div., 2d Dep't 2009) *(* ("This Court has previously held that absent a duty to speak, one party's silence does not constitute acceptance.").

30. Thus, "[o]rdinarily[,] an offeror does not have power to cause the silence of the offeree to operate as acceptance." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981); *see Reichert v. Rapid Invs., Inc.,* 56 F.4th 1220, 1227 (9th Cir. 2022) ("[T]he offeror cannot prescribe conditions so as to turn silence into acceptance."); *In re Gol Linhas,* 675 B.R. at 131 ("the general principles of contract law, as embodied in the Restatement of Contracts, establish that, outside of rare exceptions, consent cannot be implied from silence."); *Jacques v. Solomon & Solomon P.C.,* 886 F. Supp. 2d 429, 433 n.3 (D. Del. 2012) ("Merely sending an unsolicited offer does not impose upon the party receiving it any duty to speak or deprive the party of its privilege of remaining silent without accepting."); *Elfar v. Wilmington Trust, N.A*., No. 20-0273, 2020 WL 7074609, at *2 n.3 (E.D. Cal. Dec. 3, 2020) ("The court is aware of no jurisdiction whose contract law construes silence as acceptance of an offer, as the general rule."), adopted by 2021 WL 1700778, at *1 (E.D. Cal. Feb. 11, 2021); 1 CORBIN ON CONTRACTS § 3.19 (2018); 4 Williston on Contracts § 6:67 (4th ed.).

31. There are only very limited exceptions to the "general rule of contracts . . . that silence cannot manifest consent." *Patterson*, 636 B.R. at 686; *see, 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.

32. 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 based upon a failure to opt out); *Jacques*, 886 F. Supp. 2d at 433 n.3.

C. Failing to Opt Out Does Not Provide the Required Affirmative Consent.

33. The Plan imposes a third-party release on unimpaired creditors who are served with a Notice of Non-Voting Status and fail to opt out or object, as well as creditors in voting classes who (i) fail to return their ballot, (ii) who vote and fail to opt out, or (iii) who do not object. 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 black-letter 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.").

34. 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.

35. 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 offered contract from 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).

36. The Ninth Circuit held that none of the exceptions to this rule applied. *Norcia*, 845 F.3d at 1284-85. There was no state law imposing a duty on the customer to act in response to the offer, the parties did not have a prior course of dealing that might impose such a duty, and

the customer did not retain any benefits by failing to act given that the warranty applied whether or not he opted out of the arbitration provision. *Id*. at 1286.

37. Here, too, Debtors' creditors have not signed an agreement to release the non-debtor releasees nor acted in any other manner to suggest that their silence manifests an intention to accept an offer to release the non-debtors.

D. Not Voting and Not Opting Out Do Not Constitute Consent.

38. Third-party releases cannot be imposed on those who do not vote and do not opt out. *See Smallhold*, 665 B.R. at 709, 716; *SunEdison*, 576 B.R. at 458–61; *Chassix*, 533 B.R. at 81–82; *In re Wash. Mut., Inc.,* 442 B.R. 314, 355 (Bankr. D. Del. 2011). Here, the Plan would impose third-party releases on (i) creditors who are unimpaired under the Plan and do not opt out or object; and (ii) creditors in voting classes who do not opt out or object. There is no basis to infer consent by those parties based on their inaction regarding the Plan.

39. 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. *See 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.

40. "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 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.*

41. 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 (or are not entitled to vote in the first place)." *In re Wash. Mut., Inc.,* 442 B.R. at 355; *see Chassix*, 533 B.R. at 81 82.

E. Voting To Reject and Not Opting Out Does Not Manifest Consent to a Third-Party Release.

42. People who vote to reject the Plan are not consenting to third-party releases by failing to mark an opt-out box. Not only is there no "mutual agreement" as to the Plan, much less the third-party release, but also the creditor has expressly stated its rejection of the Plan. As the court in *Chassix* reasoned: "[A] creditor who votes to reject a plan should also be presumed to have rejected the proposed third-party releases that are set forth in the plan. The additional 'opt

out' requirement, in the context of this case, would have been little more than a Court-endorsed trap for the careless or inattentive creditor." 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015) (emphasis added).

F. This Case Does Not Fit the Taking-Offered-Benefits Exception to the Rule that Silence Is Not Consent.

43. This case does not fit within the exception to the rule that silence is not consent based on the taking of offered benefits. Creditors who are deemed to accept the Plan are not "silently tak[ing] offered benefits" from the released non-debtors such that consent to release them may be inferred. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). Unimpaired classes of creditors are receiving nothing from the released non-debtors. Any plan distributions are paid from the bankruptcy estate, not by the released non-debtors. And "[w]hen a bankruptcy court discharges the debtor, it does so by operation of the bankruptcy laws, not by consent of the creditors . . . . [T]he payment which effects a discharge is not consideration for any promise by the creditors, much less for one to release non-party obligators." *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020) (quotation marks omitted). "Essentially, creditors are being asked to give releases to third parties for no consideration." *Tonawanda Coke Corp*., 662 B.R. at 222.

44. Nor can receiving distributions under a chapter 11 plan be treated as taking offered benefits in way that manifests consent to a third-party release.[4] Because creditors are legally entitled to receive distributions allocated to them under a chapter 11 plan, receiving those

[4] The bankruptcy court in *Spirit* reasoned that there was consent because the released third parties were providing value to the bankruptcy estate with the "understanding that the Third Party Releases are being requested in the form of an opt-out," and that value was then passed on to creditors through the chapter 11 plan. *In re Spirit Airlines, Inc*., No. 24-11988, 2025 WL 737068, at *19-*20 (Bankr. S.D.N.Y. Mar. 7, 2025). But the mere receipt of this second-hand benefit via a chapter 11 plan cannot reasonably be interpreted as manifesting consent to an offer to release non-debtors for the reasons stated below.

benefits while remaining silent about a third-party release is not a manifestation of consent to release non debtors. Critically, "[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 2 15 Case 25-12277-LSS Doc 282 Filed 03/20/26 Page 16 of 20 (SECOND) OF CONTRACTS § 69 cmt. c (1981). Rather, for the taking-benefits exception to apply, three things must be true, none of which are true here.

45. First, consent cannot be inferred from taking benefits unless the offeree could reject the offered benefits and thereby avoid accepting the offer. *See, e.g., id.* § 69(1)(a) (requiring a "reasonable opportunity to reject" benefit); *accord Reichert v. Rapid Invs., Inc*., 56 F.4th 1220, 1230 (9th Cir. 2022); *Register.com, Inc. v. Verio, Inc.,* 365 F.3d 393, 403 (2d Cir. 2004); 2 Richard A. Lord, WILLISTON ON CONTRACTS § 6:9 (4th ed. 1991). But claim holders do not have an opportunity to reject Plan distributions (if any) and thereby avoid being bound by the third-party release.[5] Even if a claim holder could decline their plan distribution, that person would still be deemed bound by the third-party release despite their silence.

46. Second, an offeree is not "retaining" benefits from the offeror when the offeree is entitled to those benefits regardless of whether the offeree rejects the offer. *See Norcia*, 845 F.3d at 1286. That is the case here, where a given creditor's plan distributions are not contingent on how they voted on the Plan. Put differently, accepting "benefits" to which an offeree is otherwise entitled cannot provide a basis for inferring consent because an offeree cannot be required to give up rights in order to reject the offer. *See Reichert*, 56 F.4th at 1230-31 (using card to access one's own cash did not support inference of consent). Thus, creditors cannot be required to give

[5] Nor could the plan make distributions contingent on acceptance of a third-party release because section 1123(a)(4) requires that a plan "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4).

up their rights to distributions under a chapter 11 plan in order to reject the third-party release.

47. The *Reichert* case is illustrative. There, the plaintiff had cash confiscated when he was jailed. *Id*. at 1224. Upon release, he was issued a debit card to access the confiscated cash. *Id*. He was given no alternative way to access his money. *Id*. The Ninth Circuit held that use of the debit card did not constitute an agreement to the card's Account Agreement, despite a clear statement on the card that "by using this card, you agree to the Account Agreement." *Id*. The court explained that the plaintiff's "decision to withdraw his own money cannot reasonably be understood to manifest assent to the contract." *Id*. at 1228.

48. Similarly, creditors are effectively accessing their own money when they accept distributions under a chapter 11 plan. Creditors had prepetition rights against the Debtors. The Bankruptcy Code permits debtors to impair those rights if Bankruptcy Code requirements are met, including through a confirmed chapter 11 plan. Once a chapter 11 plan is confirmed, creditors are entitled to recover whatever distributions the plan allocates to them. But the distributions they receive are no more than what they were entitled to prepetition, and often are much less. Merely receiving these distributions—to which claim and interest holders have a statutory right—cannot reasonably be understood as manifesting consent to release third-party non-debtors.

49. Third, to infer consent from a receipt of benefits, the offeror must have a right to preclude the offeree from receiving the benefits. *Reichert,* 56 F.4th at 1228 (holding accessing one's own funds does not constitute accepting benefits for purposes of this exception); *R.R. Mgmt. Co., L.L.C. v. CFS La. Midstream Co*., 428 F.3d 214, 223 (5th Cir. 2005) (holding "no reasonable jury could conclude" there was consent to a contract despite the offeror's statement it would view the offeree's failure to remove a pipeline from certain land as consent when there

was no evidence the offeror had "the right to exclude" the offeree from the property or that the offeree "accepted any service or thing of value from" the offeror). But the non-debtor releasees have no right to preclude the Debtors' creditors from receiving distributions under the Plan.

50. For the above reasons, the U.S. Trustee respectfully submits that the Plan's opt-out releases are nonconsensual and should be denied.

CONCLUSION

WHEREFORE, the U.S. Trustee respectfully requests that this Court issue an order denying the Motion and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

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REGIONS 3 AND 9

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Dated: June 9, 2026

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 9, 2026, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and upon the following parties via electronic mail:

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