Docket #0594 Date Filed: 07/28/2025

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN RE:	)	CASE NO. 25-10356-PMB
	)	
AFH AIR PROS, LLC, *et. al.,*	)	JOINTLY ADMINISTERED
	)	
DEBTORS.	)	CHAPTER 11

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' SECOND AMENDED CHAPTER 11 PLAN OF LIQUIDATION OF AFH AIR PROS, LLC AND ITS DEBTOR AFFILIATES

Mary Ida Townson, United States Trustee for Region 21, acting in furtherance of her responsibilities under 28 U.S.C. § 586, objects to confirmation of Debtors' plan as proposed in Debtors' *Second Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (Dkt. No. 478). Debtors' proposed plan improperly extracts non-consensual third-party releases from holders of claims or interests, unless the respective holders of claims or interests affirmatively act to avoid the third-party releases. Further, Debtors' proposed plan improperly imposes an injunction on all creditors to enforce the third-party releases, and improperly deems the proposed plan a settlement between Debtors, parties benefiting from the third-party releases, and Debtors' creditors.

I. COURSE OF PROCEEDING

1.

The above-captioned action is the lead case for 20 entities (hereinafter the "Debtors"), whose bankruptcy cases are being jointly administered for procedural purposes

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only.[1] The voluntary petitions initiating these bankruptcy cases were filed on March 16, 2025.

2.

On March 31, 2025, the United States Trustee appointed a Committee of Creditors Holding Unsecured Claims pursuant to 11 U.S.C. § 1102(a). (Dkt. No. 111).

3.

The Meetings of Creditors pursuant to 11 U.S.C. § 341(a) for Debtors was held and concluded on April 22, 2025.

4.

On May 30, 2025, Debtors filed the *Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (Dkt No. 431) and the *Disclosure Statement for the Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and Its Debtor Affiliates* (Dkt. No. 432). On June 13, 2025, Debtors filed the *Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (Dkt. No. 448) and *Amended Disclosure Statement for the Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and Its Debtor Affiliates* (Dkt. No. 449) On June 18, 2025, Debtors filed the *Second Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (Dkt. No. 461) and *Second Amended Disclosure Statement for the Chapter 11 Plan of Liquidation of AFH Air*

[1] The last four digits of AFH Air Pros, LLC's tax identification number are 1228. Due to the large number of debtor entities in these chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained o the website of the claims and noticing agent at https://www.veritaglobal.net/airpros. The mailing address for the debtor entities for purposes of these chapter 11 cases is: 150 S. Pine Island Road, Suite 200, Plantation, Florida 33324.

Pros, LLC and Its Debtor Affiliates (Dkt. No. 462). On June 24, 2025, Debtors filed another document entitled *Second Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (Dkt. No. 478) (the "Plan", including all exhibits and supplements) and *Second Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (Dkt. No. 479) (the "Disclosure Statement", including all exhibits and supplements).

5.

On June 13, 2025, the United States Trustee timely filed her *Objection to Debtors' Disclosure Statement and Form of Ballots.* (Dkt. No. 451) (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 June 24, 2025, the Court entered the *Order (A) 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 Final Approval of the Disclosure Statement and Confirmation of the Plan and the Deadline for Filing Objections Thereto, and (F) Approving Related Notice Procedures and Deadlines*. (Dkt. No. 477) (the "Disclosure Statement Order") 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. 477, Pg. 5) The Disclosure Statement Order set the deadline for filing an objection to confirmation of the Plan for July 28, 2025, at 4:00 p.m., prevailing eastern time.

7.

This Objection to Debtors' Disclosure Statement and Plan 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. 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.

10.

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.

11.

Article X, Section D of Debtors' 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 Chapter 11 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 a Ballot or 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 a Ballot or 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 this Plan, and, further, shall constitute the Bankruptcy Court's finding that the Third-Party Release is: (a) consensual;

> (b) essential to the confirmation of the Plan; (c) given in exchange for the good and valuable consideration provided by the Released Parties, including the Released Parties' contributions to facilitating the Plan Transaction and implementing the Plan; (d) a good faith settlement and compromise of the Claims released by the Third-Party Release; (e) in the best interests of the Debtors and their Estates; (f) fair, equitable, and reasonable; (g) given and made after due notice and opportunity for hearing; and (h) a bar to any of the Releasing Parties asserting any claim or Cause of Action of any kind whatsoever released pursuant to the Third-Party Release.

Debtors' Plan, Art. X, Sec. D. (Dkt. No. 478, Pgs, 51-52).

12.

Article I, Sec. A, Pt. 140. of the Plan provides the definition of "Releasing Party":

> "*Releasing Party*" means each of the following, solely in its capacity as such: (a) the Debtors; (b) the Estate; (c) the DIP Agent; (d) the DIP Lenders; (e) the Prepetition Agent; (f) the Prepetition Lenders; (g) the CPO; (h) with respect to each of the foregoing entities in clauses (a) through (g), such entity's respective current and former Affiliates, and each of such entity's, and such entity's current and former Affiliates', current and former equity holders (regardless of whether such interests are held directly or indirectly), subsidiaries, officers, directors, managers, principals, members, employees, agents, advisors, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such; (i) all Holders of Claims and Interests that vote to accept the Plan; (j) all Holders of Claims and Interests that are deemed to accept the Plan and do not opt out of the Third-Party Release; (k) all Holders of Claims and Interests in voting classes that abstain from voting on the Plan and do not opt out of the Third-Party Release; (l) all Holders of Claims and Interests that vote, or are deemed, to reject the Plan and do not opt out of the Third-Party Release; (m) each Holder of an unclassified Claim who does not object to the Third-Party Release; and (n) all other Holders of Claims and Interests to the maximum extent permitted by law.

Plan, Art. I, Sec. A, Pt. 140. (Dkt. No. 478, Pg. 19).

13.

Article I, Sec. A, Pt. 139. of the Plan provides a definition of "Released Parties" as follows:

> "*Released Party*" means each of the following, solely in its capacity as such: (a) the DIP Agent; (b) the DIP Lenders; (c) the Prepetition Agent; (d) the Prepetition Lenders; (e) the CPO; (f) the Released Debtor D&Os; and (g) the Debtors' Professionals retained in these Chapter 11 Cases; (i) with respect to the Entities in the foregoing clauses (a) through (g), each such Entity's current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers, control persons, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, participants, managed accounts or funds, fund advisors, predecessors, successors, assigns, subsidiaries, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, investment managers, and other professionals, each in their capacity as such; provided that any Holder of a Claim that opts out of the Third-Party Releases contained in the Plan and any Holder of a Claim or Interest that is not a Releasing Party shall not be a "Released Party". For the avoidance of doubt, the Non-Released Debtor D&Os shall not be Released Parties.

Plan, Art. I, Sec. A, Pt. 139. (Dkt. No. 478, Pg. 19).

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

14.

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.

15.

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]

16.

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, not the Bankruptcy Code. If a claim has been extinguished by virtue of the agreement of the parties, then the court is not

[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).

using the forcible authority of the Bankruptcy Code or the bankruptcy court to extinguish the property right.

17.

Here, 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.

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

18.

"[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.").

19.

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). *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 507.18.

20.

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 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.

21.

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.

22.

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*.

23.

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)).

24.

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), r*ev'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").

25.

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).

26.

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.

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

27.

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.

28.

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 (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)).

29.

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

[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 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)

"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.

30.

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 v. Solomon & Solomon P.C.*, 886 F. Supp. 2d 429, 433 n.3 (D. Del. 2012)

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

31.

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.

32.

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

33.

Debtors mistakenly equate a vote for the Plan, which is governed by the Bankruptcy Code's provisions for adjusting relations between a debtor and its creditors, with acceptance of proposed third-party releases, which are contracts governed by state law dealing with relations between non-debtor parties. Those are distinct legal constructs involving distinct parties: the Plan disposes of a creditor's claims against the debtor, while a third-party release disposes of a non-debtor's right to sue other non-debtors. There is nothing in the Code that authorizes treating a vote to accept a chapter 11 plan as consent to a third-party release. "[A] creditor should not expect that [its] rights [against non-debtors] are even subject to being given away through the debtor's bankruptcy." *Smallhold*, 665 B.R. at 721.

34.

Debtors' conflation of voting for the Plan with acceptance of the third-party release violates black-letter contract law, which requires a manifestation of intent to be bound by the third-party release. See *supra* subpart c. Voting to accept a plan does not manifest that intent. A chapter 11 plan allocates how the bankruptcy estate will pay claims and interests against a debtor. *See* 11 U.S.C. § 1123. If the plan is confirmed, only claims and interests against a debtor can be discharged. 11 U.S.C. § 524(e). And it is "[b]ecause discharge affects a creditor's rights, [that] the Code generally requires a debtor to vie for the creditor's vote first." *Keystone Gas Gathering, L.L.C. v. Ad Hoc Comm. (In re Ultra Petroleum Corp.)*, 943 F.3d 758, 763 (5th Cir. 2019). The right to vote on a plan depends solely on how the plan treats claims and interests against the debtor. *See* 11 U.S.C. §§ 1124, 1126, 502, 501, 101(10); *Ultra Petroleum Corp.*, 943 F.3d at 763; 7 Collier on Bankruptcy ¶ 1126.02 (16th 2025). Claims and interests that are not impaired by the plan are deemed accept it. *See* 11 U.S.C. §§ 1124, 1126; *Ultra Petroleum Corp.*, 943 F.3d at 763. Because the purpose of a chapter 11 plan is to determine how claims and interests *against the debtor* will be treated, voting to accept a chapter 11 plan does not manifest an intent to be bound by the third-party release. *See In re Congoleum Corp.*, 362 B.R. 167, 194 (Bankr. D.N.J. 2007); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (Bankr. D.N.J. 1997); *In re Digital Impact, Inc.*, 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998).

35.

Because "a creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings," "it is not enough for a

creditor . . . to simply vote 'yes' as to a plan." *Arrowmill*, 211 B.R. at 507 (quotation marks omitted); *accord Congoleum Corp.*, 362 B.R. at 194 ("[A] consensual release cannot be based solely on a vote in favor of a plan."); *Digital Impact, Inc.*, 223 B.R. at 14. Rather, a creditor must "unambiguously manifest[] assent to the release of the nondebtor from liability on its debt." *Arrowmill*, 211 B.R. at 507. The "validity of th[at] release" necessarily "hinges upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order." *Id.* (citation and alterations omitted).

36.

In addition to the lack of consent under state law, imposing a third-party release on everyone who votes to accept the plan may discourage creditors from voting. This would distort the voting process, which is intended to provide a valuable signal about the extent of creditor support, within each voting class, for the plan's treatment of creditors' allowed claims against the debtor. *Smallhold*, 665 B.R. 716.

37.

Further, for those who believe the plan is the best way to maximize the return of their money from the Debtors, requiring them to vote "no" on the Plan or to refrain from voting solely because of an objectionable non-debtor release—thus raising the possibility that the Plan may not be confirmed and they thus cannot receive the economic benefit under the Plan—would be penalizing them for exercising their right to vote in favor of the Plan. If an offeree is penalized unless an "offer" is accepted, that circumstance "preclud[es] an inference of assent." *Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1230-31 (9th Cir. 2022).

38.

Second, the Plan also imposes the Third-Party Releases on those who vote to reject the Plan, unless they also check an opt-out box on the returned ballot. Those who vote to reject the Plan are not consenting to the 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 Releases, the creditor has expressly stated its rejection of the Plan. As the court in *In re Chassix Holdings, Inc.*, 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).

39.

Some bankruptcy courts, including this Court in *LaVie,* have found that, in at least some circumstances, a failure to opt out constitutes consent when a claimant votes—either to accept or reject a plan. *See LaVie Care Cntrs., LLC*,, 2024 WL 4988600, at *35-36; *Smallhold*, 665 B.R. at 723. In those cases, the Court reasoned that, because the act of voting on a debtor's plan is an affirmative step taken after notice of the third-party release, failing to opt out binds the voter to the release. See *LaVie Care Cntrs., LLC*, 2024 WL 4988600, at *35-36; *Smallhold*, 665 B.R. at 723. But while voting is an "affirmative step" with respect to the debtor's plan, it is not a "*manifestation of intention* that silence may operate as acceptance" of a third-party release. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) (emphasis added). That is because "[t]he mere receipt of

an unsolicited offer does not impair the offeree's freedom of action or inaction," *id.*—in this case, the federal right to vote on a chapter 11 plan. 11 U.S.C. § 1126(a). Nor does it "impose on him any duty to speak," RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a, such as by checking an opt out box.[6] Thus, consent to release *third-party* claims (which are governed by *nonbankruptcy* law) cannot properly be inferred from a party's failure to check an opt-out box on a ballot to vote on the proposed treatment of claims against the *Debtors* (governed by *bankruptcy* law).

40.

Third, 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 non-debtors. Those who abstain from voting cannot be said to be consenting to anything—they are taking no action with respect to the plan. There is no basis to infer consent by those who do not vote and are taking no action with respect to the plan.

41.

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

[6] In a recent decision in the Southern District of New York, the Court concluded that "creditors entitled to vote who returned a ballot but did not check the opt-out box on that ballot also clearly manifested their consent to the Third-Party Releases." *In re Spirit Airlines, Inc.*, No. 24-11988, 2025 WL 737068, at *21 (Bankr. S.D.N.Y Mar. 7, 2025). The United States Trustee respectfully disagrees. An unsolicited offer of a third-party release cannot impose a duty to speak or impair the freedom to vote on a plan. Further, the *Spirit* court erred in assuming that the failure to check an opt-out box on a ballot necessarily shows that a creditor "affirmatively chose" not to check the box. *Id.* at *21. "When the circumstances are equally consistent with either of two facts, neither fact may be inferred." *See In re Couture Hotel Corp.*, 554 B.R. 369, 383 n.80 (Bankr. N.D. Tex. 2016). And a failure to check an opt-out box is equally consistent with inadvertence or lack of understanding.

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.

42.

Further, "[w]hen the circumstances are equally consistent with either of two facts, neither fact may be inferred." *See In re Couture Hotel Corp.*, 554 B.R. 369, 383 n.80 (Bankr. N.D. Tex. 2016). Consent thus cannot be inferred here because parties who are solicited but do not vote may have failed to vote for reasons other than an intention to assent to the releases.[7] *SunEdison*, 576 B.R. at 461.

43.

"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

[7] Here, the Plan and associated materials, including the Disclosure Statement, run to 131 pages.

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.*

44.

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.

45.

Fourth, 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 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.").

46.

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.

47.

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).

48.

Fifth, 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.

49.

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.

50.

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

51.

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 of any kind whatsoever released pursuant to the Third-Party Release." Plan, Art. X, Sec. D (Dkt. No. 478, Pg, 52).

52.

Further, Article X, Section F of Debtors' 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 Wind Down Debtors, the Plan Administrator, the Litigation Trust, the Litigation Trustee, 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. X, Sec. F (Dkt. No. 478, Pg. 53).

53.

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)).

54.

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.

55.

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.

56.

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.

57.

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

58.

Article X, Section D of 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. X, Sec. D (Dkt. No. 478, Pg, 52).

59.

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).

60.

Section 1123(b)(3) allows a debtor to settle claims it has against others; it does not allow a debtor to settle claims that creditors and interest holders may have against it, which

is what Art. X, Sec. D 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).

61.

Sections 1129 and 1141 govern resolution of claims against Debtors.

62.

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.

63.

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") (emphasis added). By its plain terms, Bankruptcy Rule 9019 does not authorize the imposition of non-consensual releases between non-debtors.

64.

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 nondebtor without the consent of affected claimants.").

65.

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) (emphasis added). Thus, under section 1123(b)(3)(A), a chapter 11 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.").

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.

Respectfully submitted this 28th day of July 2025.

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CERFICATE OF SERVICE

This is to certify that I have on this day electronically filed the foregoing *United States Trustee's Objection to Debtors' Second Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* using the Bankruptcy Court's Electronic Case Filing program, which sends a notice of this document and an accompanying link to this document to the following party who has appeared in this case under the Bankruptcy Court's Electronic Case Filing program:

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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.

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Dated: July 28, 2025.

s/ Jonathan S. Adams
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