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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	:	Chapter 11
	:	Case No. 23-14853(JKS)
Cyxtera Technologies, Inc., *et al*.,	:	The Honorable John K. Sherwood
Debtors.[1]	:	Hearing Date: November 16, 2023 at 2:00 p.m.

OBJECTION OF THE UNITED STATES TRUSTEE TO THE SECOND AMENDED JOINT PLAN OF REORGANIZATION OF CYXTERA TECHNOLOGIES, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

The United States Trustee ("U.S. Trustee") by and through counsel, in furtherance of his duties and responsibilities under 28 U.S.C. § 586(a)(3) and (5), hereby submits this objection ("Objection") to confirmation of the *Second Amended Joint Plan of Reorganization of Cyxtera Technologies Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* ("Second Amended Plan") (Dkt. 551)[2], and respectfully states as follows:

[1] A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' Claims and Noticing Agent at https://www.kccllc.net/cyxtera.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Second Amended Plan.

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PRELIMINARY STATEMENT

1. The U.S. Trustee objects to several of the provisions in the Second Amended Plan. The Second Amended Plan provides overbroad exculpation provisions, overbroad release provisions, impermissible third-party release provisions as they are not consensual, and improper injunction provisions.

JURISDICTION

2. This Court has jurisdiction to hear the above-referenced Objection.

3. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code ("Bankruptcy Code"). This duty is part of the U.S. Trustee's overarching responsibility to enforce the 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) (the U.S. Trustee has "public interest standing" under section 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 U.S. Trustee as a "watchdog").

4. Pursuant to 28 U.S.C. § 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.

5. Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to be heard regarding the above-referenced Objection.

BACKGROUND

6. On June 4, 2023 ("Petition Date"), Cyxtera Technologies, Inc., *et al*., ("Debtors") ("Cyxtera") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* Dkt. 1.

7. On June 6, 2023, this Court entered an Order directing that these cases be jointly administered. Dkt. 71.

8. The Debtors continue to operate their business(es) as debtors in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

9. No trustee or examiner has been appointed in these chapter 11 cases.

10. On June 28, 2023 the Office of the United States Trustee filed a Notice of Appointment of Official Committee of Unsecured Creditors (the "Committee"). *See* Dkt. 133.

11. On August 7, 2023, the Debtors filed the filed their *Joint Plan of Reorganization of Cyxtera Technologies, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan") and related Disclosure Statement. Dkts. 372 and 407.

12. On September 13, 2023, Debtors filed their *Amended Joint Plan of Reorganization of Cyxtera Technologies, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Amended Plan") and related Disclosure Statement. Dkts. 501 and 502.

13. On September 24, 2023, Debtors filed their *Second Amended Joint Plan of Reorganization of Cyxtera Technologies, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Second Amended Plan") and related Disclosure Statement. Dkts. 551 and 552.

14. On September 26, 2023, the Court entered an *Order Approving (I) the Adequacy of the Disclosure Statement, (II) the Solicitation Procedures, (III) the Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates with Respect Thereto*. Dkt. 563.

15. Should the plan toggle to an asset sale, the Second Amended Plan provides for the appointment of a Plan Administrator to manage the Post-Effective Date Debtors pursuant to a Plan Supplement. *See* Dkt. 551 at Article IV.D.

16. The Second Amended Plan includes Release, Exculpation, and Injunction provisions. *See id*. at Article VIII. The releases include Debtor releases and third-party releases. *See id*.

OBJECTION

I. Confirmation of the Plan

17. A chapter 11 plan cannot be confirmed unless the Court finds the plan complies with the provisions of 11 U.S.C. § 1129(a). *See Matter of Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 220-21 (Bankr. D.N.J. 2000). Even where there are no objections to a plan, a court must find that the debtor fulfilled the requirements of section 1129(a). *In re Friese*, 103 B.R. 90, 91 (Bankr. S.D.N.Y. 1989). A plan proponent bears the burden of proof with respect to each and every element of section 1129(a). *See In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 599 (Bankr. D. Del. 2001).

18. "Release and exculpation clauses have also been found to be subject to review pursuant to section 1129(a)(1)." *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 133 (Bankr. D.N.J. 2010), *citing In re Whispering Pines Estates, Inc.*, 370 B.R. 452, 459 (1st Cir. BAP 2007). Accordingly, complying with section 1129(a) requires that a plan not include improper release or exculpation language.

19. There are numerous ways in which the Release and Exculpation provisions set forth in the Second Amended Plan are contrary to applicable case law, including the standards set forth in *In re Wash. Mut., Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), *In re Tribune Company*, 464 B.R. 126 (Bankr. D. Del. 2011) *and In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000).

A. The Exculpation Clause Is Impermissibly Broad

20. The Second Amended Plan defines "**Exculpated Party**" as follows:

> collectively: (a) the Debtors; (b) the Post-Effective Date Debtors, (c) the Committee and the members of the Committee; (d) the Plan Administrator (as applicable); and (e) with respect to each of the foregoing Entities in clauses (a) through (d), each of the Related Parties of such Entity.

See Dkt. 551 at Article I.A., ¶ 71.

21. The Second Amended Plan defines "**Related Party**" as follows:

> current and former directors, managers, officers, committee members, members of any Governing Body, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors and any such Person's or Entity's respective heirs, executors, estates, and nominees.

See id. at ¶ 143.

22. The section of the Second Amended Plan entitled "**Exculpation**" provides, in part, that:

> no Exculpated Party will have or incur, and each Exculpated Party will be released and exculpated from, any Claim or Cause of Action arising prior to the Effective Date in connection with or arising out of the administration of the Chapter 11 Cases, the negotiation and pursuit of the RSA, the Restructuring Transactions, the First Lien Credit Documents, the Bridge Facility Documents, the New Organizational Documents, the DIP Documents, the DIP Orders, the Disclosure Statement, the Plan Supplement, the Purchase Agreement (if applicable), the Plan and related agreements, instruments, and other documents, the New Takeback Facility Documents, the Receivables Program Documents, and all other Definitive Documents, the solicitation of votes for, or Confirmation of, the Plan, the funding of the Plan, the occurrence of the Effective Date, the administration of the Plan or the property to be distributed under the Plan, the issuance of securities under or in connection with the Plan, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Post-Effective Date Debtors, if applicable, in connection with the Plan and the Restructuring Transactions, or the transactions in furtherance of any of the

> foregoing, other than Claims or Causes of Action in each case arising out of or related to any act or omission of an Exculpated Party that is a criminal act or constitutes actual fraud, willful misconduct, or gross negligence as determined by a Final Order, but in all respects such Persons will be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan.

See id. at Article VIII.E.

23. The Second Amended Plan's definition of Exculpated Parties is inconsistent with controlling case law because it is not limited to estate fiduciaries. In *In re PWS Holding Corp*., the Third Circuit considered whether an official committee of unsecured creditors could be exculpated and held that section 1103(c) implies both a fiduciary duty and a limited grant of immunity to members of the unsecured creditors' committee. *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000). As stated by the Court in *Washington Mutual*, an "exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceedings: estate professionals, the Committees and their members, and the Debtors' directors and officers." *In re Wash. Mut., Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) (emphasis added). The Court in *In re Tribune Company*, 464 B.R. 126 (Bankr. D. Del. 2011), agreed with the holding in *Washington Mutual* relating to exculpated parties, and held that the exculpation clause in Tribune, "must exclude non-fiduciaries." *Id*. at 189, *quoting Wash. Mut.*, 422 B.R. at 350-51; *accord*, *Indianapolis Downs*, 486 B.R. 286 (Bankr. D. Del. 2013); *see also In re Diocese of Camden, New Jersey*, 653 B.R. 309, 359 (Bankr. D.N.J. 2023) ("the estate itself cannot be granted immunity, nor can consultative bodies that do not qualify as 'fiduciaries' under the Bankruptcy Code.").

24. Contrary to these limits of exculpation, the Second Amended Plan includes as "Exculpated Parties" – and within that definition "Related Parties" – numerous entities that are not fiduciaries of the estate. The Exculpated Parties must be limited to estate fiduciaries. Additionally, the definition of Exculpated Parties includes "Plan Administrator (as applicable)," a person that

does not exist during the time period addressed by the Exculpation. The Exculpation applies to claims or causes of action "arising prior to the Effective Date," and the Plan Administrator does not exist until the Effective Date. As such, the Second Amended Plan cannot be confirmed unless its definition of Exculpated Parties is limited to: **(i)** the Debtors; **(ii)** the directors and officers of the Debtors who served during any portion of the cases prior to the Effective Date; **(iii)** the Committee; **(iv)** the members of Committee, in their capacity as such; and **(v)** the professionals retained in these cases by the Debtors and the Committee. *See Wash. Mut.*, 442 B.R. at 350-51 (an "exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers.").

B. The Release Clauses Are Impermissible under Applicable Law

25. The Second Amended Plan defines "**Released Party**" as follows:

> (a) each Debtor; (b) each Post-Effective Date Debtor; (c) each Consenting Stakeholder; (d) each Releasing Party; (e) each Agent; (f) each DIP Lender; (g) in the event of a Sale Transaction, the Purchaser; (h) the Committee and each member of the Committee; (i) each current and former Affiliate of each Entity in clause (a) through the following clause (j); (j) each Related Party of each Entity in clause (a) through this clause (j); provided that in each case, an Entity shall not be a Released Party if it: (x) elects to opt out of the releases described in Article VIII.D of the Plan; or (y) timely objects to the releases contained in Article VIII.D of the Plan and such objection is not resolved before Confirmation.

See Dkt. 551 at Article I.A., ¶ 144.

26. The Second Amended Plan defines "**Releasing Parties**" as follows:

> each of, and in each case in its capacity as such: (a) the Debtors; (b) the Post-Effective Date Debtors; (c) each DIP Lender; (d) each Agent; (e) each Consenting Stakeholder; (f) in the event of a Sale Transaction, the Purchaser; (g) the Committee and each member of the Committee; (h) all Holders of Claims that vote to accept the Plan; (i) all Holders of Claims who are deemed to accept the Plan but who do not affirmatively opt out of the releases provided for in the Plan by checking the box on the applicable

> notice of non-voting status indicating that they opt not to grant the releases provided for in the Plan; (j) all Holders of Claims who abstain from voting on the Plan and who do not affirmatively opt out of the releases provided for in the Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided for in the Plan; (k) all Holders of Claims or Interests who vote to reject the Plan or are deemed to reject the Plan and who do not affirmatively opt out of the releases provided for in the Plan by checking the box on the applicable ballot or notice of non-voting status indicating that they opt not to grant the releases provided for in the Plan; (l) each current and former Affiliate of each Entity in clause (a) through (k); and (m) each Related Party of each Entity in clause (a) through (l) for which such Entity is legally entitled to bind such Related Party to the releases contained in the Plan under applicable law; provided that, for the avoidance of doubt, an Entity in clause (i) through clause (k) shall not be a Releasing Party if it: (x) elects to opt out of the releases contained in Article VIII.D of the Plan; or (y) timely objects to the releases contained in Article VIII.D of the Plan and such objection is not resolved before Confirmation.

See id. at ¶ 145.

27. The Second Amended Plan defines "**Third-Party Release**" as follows:

> the release set forth in Article VIII.D of the Plan.

See id. at ¶ 166.

28. The section of the Second Amended Plan entitled "**Releases by the Debtors**" provides, in part, that:

> for good and valuable consideration . . . the Released Parties will be deemed conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged, by and on behalf of the Debtors, their Estates, and, if applicable, the Post-Effective Date Debtors and the Plan Administrator, in each case on behalf of itself and its respective successors, assigns, and representatives and any and all other Persons that may purport to assert any Cause of Action derivatively, by or through the foregoing Persons, from any and all claims and Causes of Action whatsoever (including any derivative claims asserted or assertable on behalf of the Debtors, their Estates, the Post-Effective Date Debtors, or the Plan Administrator), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise,

> that the Debtors, their Estates, the Post-Effective Date Debtors, if applicable, the Plan Administrator, if applicable, or their Affiliates, heirs, executors, administrators, successors, assigns, managers, accountants, attorneys, representatives, consultants, agents, and any other Persons claiming under or through them would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim or Interest or other Person, based on or relating to, or in any manner arising from, in whole or in part, the Debtors or the Estates, the Chapter 11 Cases, the Restructuring Transactions, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated under the Plan, the business or contractual arrangements or interactions between the Debtors and any Released Party, the restructuring of any Claim or Interest before or during the Chapter 11 Cases, the negotiation, formulation, preparation, or consummation of the RSA, the Restructuring Transactions, the First Lien Credit Documents, the Bridge Facility Documents, the New Organizational Documents, the DIP Documents, the DIP Orders, the Disclosure Statement, the Plan Supplement, the Purchase Agreement (if applicable), the Plan and related agreements, instruments, and other documents, the solicitation of votes with respect to the Plan, the New Takeback Facility Documents, the New Organizational Documents, the Receivables Program Documents, and all other Definitive Documents, in all cases based upon any act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date.

See id. at Article VIII.C.

29. The section entitled "**Releases by Holders of Claims and Interests**" provides, in part, that:

> the Released Parties will be deemed conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged, by the Releasing Parties, in each case on behalf of itself and its respective successors, assigns, and representatives and any and all other Persons that may purport to assert any Cause of Action derivatively, by or through the foregoing Persons, in each case solely to the extent of the Releasing Parties' authority to bind any of the foregoing, including pursuant to agreement or applicable non-bankruptcy law, from any and all claims and Causes of Action whatsoever (including any derivative claims, asserted or assertable on behalf of the Debtors or the Estates), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute,

> regulation, treaty, right, duty, requirement, or otherwise, that such Holders or their estates, Affiliates, heirs, executors, administrators, successors, assigns, managers, accountants, attorneys, representatives, consultants, agents, and any other Persons claiming under or through them would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim or Interest or other Person, based on or relating to, or in any manner arising from, in whole or in part, the Debtors or the Estates, the Chapter 11 Cases, the Restructuring Transactions, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated under the Plan, the business or contractual arrangements or interactions between the Debtors and any Released Party, the restructuring of any Claim or Interest before or during the Chapter 11 Cases, the negotiation, formulation, preparation, or consummation of the RSA, the Restructuring Transactions, the First Lien Credit Documents, the Bridge Facility Documents, the New Organizational Documents, the DIP Documents, the DIP Orders, the Disclosure Statement, the Plan Supplement, the Purchase Agreement (if applicable), the Plan and related agreements, instruments, and other documents, the solicitation of votes with respect to the Plan, the New Takeback Facility Documents, the New Organizational Documents, the Receivables Program Documents, and all other Definitive Documents, in all cases based upon any act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date.

See id., at Article VIII.D.

30. The Solicitation Packages sent to various claimants include opt-out forms or a ballot with a separate opt-out check box. *See* Dkt. 563-2. As set forth in the definition of "Releasing Parties" in the Second Amended Plan, a claimant that is entitled to vote but abstains from voting and does not affirmatively opt-out – in other words, does not return a ballot – will still be considered a Releasing Party. *See* Dkt. 551, ¶ 145(j). Additionally, a claimant that votes to reject or is deemed to reject *but* does not affirmatively check the box to opt-out of the releases, will also be considered a Releasing Party. *See id*., ¶ 145(k).

31. The ballots provide:

> You may choose to opt out of the Third-Party Release. If you opt out of the Third-Party Release, you will not receive a release.

See Dkt. 563-2, pp. 37 & 50 of 109.

i. Certain of the Debtor Releases Are Overly Broad

32. The Second Amended Plan provides for a release by the Debtors to the Released Parties. *See* Dkt. 551, Article VIII.C.

33. The Second Amended Plan does not establish that each of the proposed Released Parties are providing adequate consideration in exchange for receiving such releases. In addition, certain persons included in the Released Party definition do not appear to be entitled to such releases under applicable case law.

34. In *In re Zenith Elecs. Corp.*, the Court identified five factors that are relevant to determine whether a debtor's release of a non-debtor is appropriate:

> (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources;
>
> (2) a substantial contribution to the plan by the non-debtor;
>
> (3) the necessity of the release to the reorganization;
>
> (4) the overwhelming acceptance of the plan and release by creditors and interest holders; and
>
> (5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan.

See Zenith, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (*citing Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994). These factors are neither exclusive nor conjunctive requirements but provide guidance in the Court's determination of fairness. *See Master Mortgage*, 168 B.R. at 935 (finding there is no "rigid test" to be applied in every circumstance and that the five factors are neither exclusive, nor conjunctive).

35. The first *Zenith* factor requires an "identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will

deplete the assets of the estate." *See In re Spansion, Inc.*, 426 B.R. 114, n. 47 (Bankr. D. Del. 2010), *citing Zenith*, 241 B.R. at 110. An identity of interest exists when, among other things, the debtor has a duty to indemnify the non-debtor receiving the release. *See Wash. Mut.*, 442 B.R. at 347 (recognizing that indemnification may create an identity of interest thereby satisfying the first factor of *Zenith*). Here, it is unclear whether an identity of interest exists between the Debtors and each of the Released Parties.

36. The second *Zenith* factor involves whether the non-debtor party benefiting from the release made a substantial contribution of assets to the debtor's reorganization. *See In re Congoleum Corp*., 362 B.R. 167, 193 (Bankr. D.N.J. 2007). In considering releases, substantial contribution does not include contributions to the reorganization related to operational restructuring or negotiating for the financial restructuring. *See In re Genesis Health*, 266 B.R. at 606-7 ("the officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization."). Here, it does not appear that each of the Released Parties provided a substantial contribution of assets.

37. As to the third *Zenith* factor, no information is provided to support a contention that all the releases are necessary to a reorganization, or even an orderly liquidation.

38. The fourth *Zenith* factor concerning acceptance of the plan cannot be assessed at this time as the Debtors have not filed a certification of ballots. And the fifth *Zenith* factor is not satisfied as it does not appear that unsecured creditors will receive all or substantially all of their claims. Accordingly, these factors do not support the proposed Debtor Releases.

ii. The Opt-Out Clause Is Insufficient

39. The non-debtor Third-Party Releases cover those who do not affirmatively opt-out of the releases. *See* 551, ¶ 145(k). Accordingly, the U.S. Trustee submits that these do not constitute consensual third-party releases and are contrary to applicable case law, including the standards set forth in *Washington Mutual*.

40. In *Washington Mutual*, the Court held that "any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases." *Wash. Mut.*, 442 B.R. at 355. The Court clarified that merely having an opt out mechanism is not enough, holding that 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."). *Id*. (emphasis added). "*Failing to return a ballot is not a sufficient manifestation of consent to a third party release*." *Id*. (emphasis added), *citing In re Zenith Electronics Corp*., 241 B.R. at 111.

41. While the Court in *In re Indianapolis Downs*, LLC, 486 B.R. 286 (Bankr. D. Del. 2013) reached a different conclusion regarding the need for affirmative consent to third party releases, the Court pointed out that, in that case, unlike the present, "the third party release provision does not apply to any party that is deemed to reject the Plan." *Id.* at 305.[3]

[3] During the confirmation hearing for RTW Retailwinds, Inc., this Court opined, "I am prepared to follow *Indianapolis Downs*, as to the releases that apply to the general unsecured class. And any member of that class that did not opt out will be bound by the releases." Transcript of Confirmation Hearing at 81:12-15, *RTW Retailwinds, Inc.*, No. 20-18445 (JKS), Dkt. 843. Judge Sherwood further ruled as to the investor class: "[W]hat the Debtors are asking me to do is to take *Indianapolis Downs* one step further. And rule that investors who are getting nothing under the plan should be deemed to have released the released parties under the plan, just because they didn't opt out. . . . I'm not going to go any further than *Indianapolis Downs* went. . . . I'm inclined to reject the releases by the investors across the board." Tr. at 81:17-18, 82:5-6, 83:3-4.

42. The Court in *Spansion* also reached a different conclusion than *Washington Mutual* and the other cases cited above with respect to affirmative consent, but only with respect to releases given by unimpaired classes who were "being paid in full." *In re Spansion*, 426 B.R. at 144. In fact, in *Spansion*, the Court held that non-consensual releases being deemed to be given by parties who were not receiving any distribution under the plan did not pass muster under applicable law, and therefore, "the proposed nonconsensual Third Party Release does not pass muster under Continental." *See id*. at 145, *citing Continental Airlines*, 203 F.3d 203.

43. In *Emerge Energy Services LP*, 2019 WL 7634308 (Bankr. D. Del. Dec. 5, 2019), the Court rejected the debtor's argument that inferred consent from "silence" should be approved as typical, customary, and routine. The Court held that failure to return a notice can be due to "carelessness, inattentiveness, or mistake" rather than constituting the manifestation of intent to agree to a third-party release. *Id.*

44. Here, claimants who do not return a ballot at all are treated as giving a release. Additionally, claimants who vote to reject the plan but decline to take the extra step of checking an opt-out box – a step that may appear to be superfluous to such parties because they have already rejected the plan in its entirety – are also treated as giving a release.

45. Accordingly, these Third-Party Releases should only be granted against those creditors who affirmatively voted in favor of the Second Amended Plan and that did not opt-out.

iii. Unidentified Parties Not Receiving Notice Are Deemed to Grant Releases

46. The third-party release provisions cause an unknown number of unnamed parties, who are *not getting notice* of the Second Amended Plan, to give releases. Each "current and former Affiliate" of each Entity giving a release is included as a Releasing Party, and thereby giving releases, without identification of or notice to any such "Affiliate." *See* Dkt. 551, ¶ 145(l).

Additionally, an unknown number of unnamed related parties are similarly granting releases, without any such "Related Party" being identified or being given notice. *See id.*, ¶ 145(m). Moreover, certain claimants in this case are giving releases without being served with the Solicitation Package.

47. The Solicitation Procedures are attached to the *Order Approving (I) The Adequacy of the Disclosure Statement, (II) The Solicitation Procedures, (III) The Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates with Respect Thereto*. Exhibit 2, Dkt. 563-2, pp. 22-32 of 109 (the "Solicitation Procedures"). They provide that:

> The Debtors will not distribute Solicitation Packages or other solicitation materials to: . . . (ii) any party to whom notice of the Debtor's Motion for Entry of an *Order Approving (I) The Adequacy of the Disclosure Statement, (II) The Solicitation Procedures, (III) The Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates with Respect Thereto* [Docket No. 408] was sent but was subsequently returned as undeliverable without a forwarding address by the Voting Record Date . . . .

Id., pg. 25 of 109.

48. Unidentified and unnoticed parties should be excluded from those parties giving releases pursuant to the Second Amended Plan.

iv. The Non-Debtor Third-Party Releases Are Not Fair and Necessary to the Reorganization

49. Non-consensual third-party releases may only be approved under "special circumstances" if the releases are fair, necessary to the reorganization, and the debtor presents facts sufficient to enable the Court to make those findings. *See In re Continental Airlines*, 203 F.3d at 214.

50. In *Continental Airlines*, the Third Circuit determined that fairness requires, among other things, a showing that sufficient consideration was given to creditors whose claims were to be released and that such consideration renders the plan feasible. 203 F.3d at 213-14. The Third

Circuit further noted that the success of the plan must be based on the releases, and that there is an identity of interest between the debtor and the non-debtor so that the debtor would likely bear the costs of the litigation against the non-debtor. *See id*. at 216.

51. In *Genesis Health*, the Court evaluated whether a non-consensual release fit the "hallmarks" discussed in *Continental* by considering whether: (i) the nonconsensual release was necessary to the success of the reorganization; (ii) the releasees provided a critical financial contribution to the debtor's plan; (iii) the releasees' financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the release. In other words, to establish the necessity of such releases, the court declared that the debtors were required to demonstrate that the success of its reorganization was related to such non-consensual releases and the releasees provided a "critical financial contribution" that was necessary to render the plan feasible. *See In re Genesis Health*, 266 B.R. at 607.

52. Here, the Debtors have not established the necessity of the releases.

C. The Injunction Section

i. The Injunction Provisions Are Impermissible

53. The section of the Second Amended Plan entitled "**Injunction**" provides as follows:

> Except as otherwise expressly provided in the Plan or the Confirmation Order or for obligations issued or required to be paid pursuant to the Plan or the Confirmation Order, all Entities who have held, hold, or may hold Claims or Interests that have been released, discharged, or are subject to exculpation are permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Post-Effective Date Debtors, the Exculpated Parties, or the Released Parties: (i) 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, Causes of Action, or liabilities; (ii) 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, Causes of Action, or liabilities; (iii) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or the Estates of such Entities on account of or in connection with or with respect to any such Claims, Interests, Causes of Action, or liabilities; (iv) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims, Interests, Causes of Action, or liabilities unless such Holder has Filed a motion requesting the right to perform such setoff on or before the Effective Date, and notwithstanding an indication of a Claim or Interest or otherwise that such Holder asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (v) 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, Causes of Action, or liabilities released or settled pursuant to the Plan.
>
> No Person or Entity may commence or pursue a Claim or Cause of Action of any kind against the Debtors, the Post-Effective Date Debtors, the Exculpated Parties, or the Released Parties, as applicable, that relates to or is reasonably likely to relate to any act or omission in connection with, relating to, or arising out of a Claim or Cause of Action subject to Article VIII.C, Article VIII.D, or Article VIII.E hereof, without the Bankruptcy Court (i) first determining, after notice and a hearing, that such Claim or Cause of Action represents a colorable Claim of any kind, and (ii) specifically authorizing such Person or Entity to bring such Claim or Cause of Action against any such Debtor, Post-Effective Date Debtor, Exculpated Party, or Released Party.
>
> Upon entry of the Confirmation Order, all Holders of Claims and Interests and their respective current and former employees, agents, officers, directors, principals, and direct and indirect affiliates shall be enjoined from taking any actions to interfere with the implementation or Consummation of the Plan. Except as otherwise set forth in the Confirmation Order, each Holder of an Allowed Claim or Allowed Interest, as applicable, by accepting, or being eligible to accept, distributions under or Reinstatement of such Claim or Interest, as applicable, pursuant to the Plan, shall be deemed to have consented to the injunction provisions set forth in this Article VIII.F.

See id. at Article VIII.F.

54. Pursuant to section 524(a)(3), confirmation of a plan does not operate as an injunction. Only a discharge operates as an injunction. Instead, pursuant to section 362(c), the automatic stay remains in effect until such time as a discharge is granted or the case is closed. Additionally, pursuant to section 1141(a), the provisions of a confirmed plan bind all parties, including debtors and creditors, to the terms of the plan.

55. Because the Bankruptcy Code protects the Debtors by continuing the automatic stay until the earlier of entry of a discharge or the case is closed (11 U.S.C. § 362(c)), and by binding all parties to the terms of the Second Amended Plan (11 U.S.C. § 1141(a)), the U.S. Trustee submits that Article III.D be removed.

56. Finally, the Second Amended Plan anticipates either a sale or a restructuring. Dkt. 552, pg. 17 of 359. Section 1141(d)(3) does not grant a liquidating debtor a discharge. If the confirmation moves forward as, essentially, a sale on all or substantially all of the property of the estate, the Debtors cannot receive a discharge under section 1141(d)(3).

ii. The Gatekeeping Provision Is Impermissible

57. In addition, the Second Amended Plan provides that:

> No Person or Entity may commence or pursue a Claim or Cause of Action of any kind against the Debtors, the Post-Effective Date Debtors, the Exculpated Parties, or the Released Parties, as applicable, that relates to or is reasonably likely to relate to any act or omission in connection with, relating to, or arising out of a Claim or Cause of Action subject to Article VIII.C, Article VIII.D, or Article VIII.E hereof, without the Bankruptcy Court (i) first determining, after notice and a hearing, that such Claim or Cause of Action represents a colorable Claim of any kind, and (ii) specifically authorizing such Person or Entity to bring such Claim or Cause of Action against any such Debtor, Post-Effective Date Debtor, Exculpated Party, or Released Party.

Dkt. 551, Article VIII.F.

58. The effect of this language is to create a "gatekeeper" role for this Court. It forces a non-debtor who wishes to pursue a claim against another non-debtor to come to this Court – and

only this Court – for a determination of whether such claim is "colorable." The "gatekeeper" language specifies that this Court must make the "first determin[ation]," which effectively grants sole and exclusive jurisdiction to adjudicate the claim or cause of action. These procedures would apply even after these bankruptcy cases have been closed, thereby requiring the non-debtor seeking to pursue a claim against another non-debtor to first move to reopen the bankruptcy cases.

59. The proposed required procedure, which is akin to that to be followed under *Barton v. Barbour*, 104 U.S. 126 (1881), prior to suing a bankruptcy trustee, should not be permitted. The defense of "release" is an affirmative defense to a cause of action asserted in a court of law or other tribunal. Affirmative defenses cannot be adjudicated prior to the filing of the action to which such defense relates. Moreover, as to claims between non-debtors, there is no reason why the court in which the relevant action has been filed cannot make the determination as to whether the claim was released under the Plan.

60. A similar provision was rejected by Judge Owens in the Bankruptcy Court for the District of Delaware in *In re Gulf Coast Health Care, LLC*, et al, Case No. 21-11336 (JTD), where she noted "the plan says what it says, and other courts should be entitled to exercise their authority to interpret it." Further, "[i]mposing such a requirement could also impose an unnecessary administrative hurdle and cost the parties when these cases are closed." Transcript of Confirmation Hearing at 30:18-23, *Gulf Coast Health Care, LLC*, et al, No. 21-11336 (JTD), Dkt. 1236.

61. Such provision requiring non-consenting parties to request authorization to bring a claim or Cause of Action against a Released Party should be stricken from the Second Amended Plan.

D. The Plan Cannot Be Confirmed Because It Is Not a Settlement Subject to Approval under Bankruptcy Rule 9019

62. Article IV.A. of the Plan, entitled "General Settlement of Claims and Interests" provides:

> As discussed in detail in the Disclosure Statement and as otherwise provided herein, pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, distributions, releases, and other benefits provided under the Plan, upon the Effective Date, the provisions of the Plan shall constitute a good faith compromise and settlement of all Claims and Interests and controversies resolved pursuant to the Plan. The Plan shall be deemed a motion to approve the good faith compromise and settlement of all such Claims, Interests, and controversies pursuant to Bankruptcy Rule 9019, and the entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of such compromise and settlement under section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, as well as a finding by the Bankruptcy Court that such settlement and compromise is fair, equitable, reasonable, and in the best interests of the Debtors and their Estates. Subject to Article VI hereof, all distributions made to Holders of Allowed Claims and Allowed Interests (as applicable) in any Class are intended to be and shall be final.

See Dkt. 551 at Article IV.A.

63. Bankruptcy Rule 9019(a) confers discretion on the Bankruptcy Court to approve a compromise or settlement on motion after notice and a hearing. 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.'" *Wash. Mut.*, 442 B.R. at 328 (*quoting In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)).

64. 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).

65. While a plan may incorporate a settlement, a plan and a settlement are not one and the same. 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., Tribune*, 464 B.R. at 176 (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)).

66. The language in Article IV.A. suggests that the Second Amended Plan itself is a settlement agreement subject to approval under Bankruptcy Rule 9019. Sending a plan to impaired creditors for a vote is not the same thing as parties negotiating a settlement among themselves.

67. Further, Article IV.A. does not appear limited to the settlement of claims belonging to the Debtors or the estates and is therefore not permissible under section 1123(b)(3)(A). For a plan to incorporate a settlement of claims or causes of action of other parties, those parties must have expressly agreed to settle or compromise those items.

68. Similarly, Article VIII.D, Releases by Holders of Claims and Interests, impermissibly seeks to provide for the settlement of third-party claims (i.e., the releases):

> 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 herein, and, further, shall constitute the Bankruptcy Court's finding that the Third-Party Release is: (i) consensual; (ii) essential to the confirmation of the Plan; (iii) given in exchange for good and valuable consideration provided by the Released Parties; (iv) a good faith settlement and compromise of the Claims released by the Third-Party Release; (v) in the best interests of the Debtors and their Estates; (vi) fair, equitable, and reasonable; (vii) given and made after due notice and opportunity for hearing; and (viii) a bar to any of the Releasing Parties asserting any claim or Cause of Action released pursuant to the Third-Party Release.

See Dkt. 551 at Article VIII.D.

69. The various Releases described in Article VIII.D of the Second Amended Plan are not part of any agreement between the Debtors and all parties affected by the Second Amended Plan.

70. Moreover, under section 1123(b)(3)(A), the Second Amended Plan may only provide for the settlement of claims or interests belonging to the Debtors or the estate-not the settlement of claims held by third parties.

71. Article IV.A purports to treat the distributive provisions of the Second Amended Plan as if they were a Rule 9019 "settlement." Here, the Debtors have not articulated any justification for the request for additional relief under Bankruptcy Rule 9019.

E. Statutory Fees

72. In the Second Amended Plan the provision for statutory fees provides:

> All fees payable pursuant to section 1930(a) of the Judicial Code, as determined by the Bankruptcy Court at a hearing pursuant to section 1128 of the Bankruptcy Code, shall be paid by each of the Post-Effective Date Debtors, (or funded by the Post-Effective Date Debtors and disbursed by the Disbursing Agent on behalf of each of the Post-Effective Date Debtors and the GUC Trustee) for each quarter (including any fraction thereof) until such Post-Effective Date Debtor's Chapter 11 Case is converted, dismissed, or closed, whichever occurs first.

Dkt. 551, Article XII.C.

73. The following section of the Second Amended Plan further provides:

> All monthly reports shall be filed, and all fees due and payable pursuant to section 1930(a) of Title 28 of the United States Code shall be paid by the Debtors or the Post-Effective Date Debtors, as applicable, (or funded by the Post-Effective Date Debtors and disbursed by the Disbursing Agent on behalf of each of the Post-Effective Date Debtors and the GUC Trustee) on the Effective Date, and following the Effective Date, the Post-Effective Date Debtors (or the Disbursing Agent on behalf of each of the Post-Effective Date Debtors) shall pay such fees as they are assessed and come due for each quarter (including any fraction thereof) and shall file quarterly reports in a form reasonably acceptable to the U.S. Trustee. Each Debtor shall remain obligated to pay such quarterly fees to the U.S. Trustee and to file quarterly reports until the earliest of that particular Debtor's case being

> closed, dismissed, or converted to a case under chapter 7 of the Bankruptcy Code.

Id., Article XII.D.

74. The provision should be revised to reflect that the Debtors, Post-Effective Date Debtors, and the GUC Trust are joint and severally liable for the payment of statutory fees.

75. The provision should be further revised to strike any qualifying language for the payment of the statutory fees. Quarterly fees are provided for under 28 U.S.C. § 1930(a)(6) and are not subject to negotiation or court order.

F. Closing the Chapter 11 Cases

76. The closing of certain of the Debtors' chapter 11 cases cannot be approved, as presented. The Second Amended Plan provides as follows:

> Upon the occurrence of the Effective Date, the Post-Effective Date Debtors shall be permitted to close all of the chapter 11 Cases except for one of the Chapter 11 Cases as determined by the Post-Effective Date Debtors, and all contested matters relating to each of the Debtors, including objections to Claims, shall be administered and heard in such Chapter 11 Case.

77. Bankruptcy Rule 3022 provides as follows: "After an estate is *fully administered* in a chapter 11 reorganization case, the court, on its own *motion* or on a motion of a party in interest, shall enter a final decree closing the case." (emphasis added). Fed. R. Bankr. P. 3022.

78. The Bankruptcy Code and Federal Rules of Bankruptcy Procedure do not define the term "fully administered." However, the Advisory Committee Note (1991) to Bankruptcy Rule 3022 states in relevant part that:

> Factors that the court should consider in determining whether the estate has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary

proceedings have been finally resolved.[4]

Fed. R. Bankr. P. 3022 advisory committee's note.

79. Additionally, this Court's Local Rule 3022-1(a) does not provide for the closing of a chapter 11 case upon the Effective Date, but rather provides that "the court will close a chapter 11 case 180 days after entry of the order confirming the plan." D.N.J. LBR 3022-1(a).

80. A debtor cannot be authorized to close its own case. An appropriate motion to close any of the Debtors' cases must be filed, with appropriate notice, seeking closure of a case, in accordance with applicable authority.

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[4] A court need not find in the affirmative on each of the six enumerated factors before determining that a case has been fully administered (or, conversely, should remain open), and the decision must be made on a case-by-case basis. *In re SLI Inc.*, 2005 WL 1668396, 2005 Bankr. LEXIS 1322, at * 5 (Bankr. D. Del. June 25, 2005).

II. Reservation of Rights

81. The U.S. Trustee leaves the Debtors to meet their burden and reserves all rights, remedies, and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection.

CONCLUSION

For the reasons set forth above, the U.S. Trustee respectfully requests that the Court deny confirmation of the Second Amended Plan and grant such other relief as the Court deems just and proper.

Respectfully submitted,
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UNITED STATES TRUSTEE
REGIONS 3 & 9

/s/ David Gerardi
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