IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FISKER INC., *et al.*,[1]	Case No. 24-11390 (TMH)
Debtors.	(Jointly Administered)
	Re: Docket Nos. 498, 499
	Hearing Date: Sept. 9, 2024 at 2:00 p.m. (ET)
	Obj. Deadline: Sept. 6, 2024 at 4:00 p.m. (ET)

UNITED STATES TRUSTEE'S OMNIBUS OBJECTION TO (I) COMBINED DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF LIQUIDATION OF FISKER INC. AND ITS DEBTOR AFFILIATES, AND (II) MOTION OF DEBTORS FOR ENTRY OF AN ORDER, *INTER ALIA*, APPROVING SOLICITATION AND TABULATION PROCEDURES

Andrew R. Vara, the United States Trustee for Region Three (the "U.S. Trustee"), through his undersigned counsel, hereby objects (this "Objection") to: (i) interim approval of the disclosure statement (the "Disclosure Statement") incorporated in the *Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Fisker Inc. and Its Debtor Affiliates* [D.I. 498] (the "Combined Disclosure Statement and Plan"); and (ii) the *Motion of Debtors for Entry of an Order (I) Approving (A) the Disclosure Statement on an Interim Basis, (B) the Solicitation and Tabulation Procedures, and (C) the Forms of Ballots, Solicitation Package, and Notices, (II) Establishing Certain Dates and Deadlines in Connection with the Solicitation and Confirmation of the Plan, (III) Scheduling a Joint Hearing for Final Approval of the Disclosure Statement and Confirmation*

[1] The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors' corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

of the Plan, and (IV) Granting Related Relief [D.I. 499] (the "Procedures Motion"),[2] and in support of this Objection respectfully states:

PRELIMINARY STATEMENT

1. The Court should deny interim approval of the Disclosure Statement for the following separate and independent reasons:

(a) **The Disclosure Statement fails to provide adequate disclosures regarding the third-party release provisions of the Debtors' proposed plan.** The Disclosure Statement fails to provide adequate information as to who will be deemed to give third-party releases, who will receive such releases, what claims are being released, the value of such claims and the consideration received in exchange for the releases. The Debtors fall far short of meeting their burden under section 1125 of the Bankruptcy Code.

(b) **The Debtors' proposed plan is patently unconfirmable and should not be solicited using procedures that facilitate the plan's defects.** The court must deny interim approval of a disclosure statement if the related proposed plan is not confirmable on its face. Here, the proposed plan is unconfirmable for at least three reasons:

(i) in contravention of United States Supreme Court precedent and applicable state law, the proposed plan extracts non-consensual third-party releases from holders of claims or interests that fail to check an opt-out box on a ballot or opt-out form—including even those who are not entitled to vote on the Plan and parties who will receive no notice under the Plan;

(ii) to the extent that exculpation is permissible beyond the provisions of Bankruptcy Code section 1125(e), the proposed plan's exculpation provision violates controlling Third Circuit case law by attempting to shield non-fiduciaries of the Debtors' estates and conduct occurring after the plan's effective date; and

(iii) the plan's third-party release and injunction provisions grant the liquidating Debtors a discharge in violation of section 1141(d)(3) of the Bankruptcy Code.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Disclosure Statement and the Procedures Motion, as applicable.

2. In addition, the Court should deny the Procedures Motion because the Debtors cannot and will not provide adequate notice of the proposed plan's third-party release provisions to tens (and potentially hundreds) of thousands of entities who will be "deemed to consent" to such releases without notice and for no consideration.

3. Accordingly, and for the reasons set forth in more detail herein, the U.S. Trustee respectfully requests that the Court enter an order or orders: (a) denying interim approval of the Disclosure Statement; and (b) denying the Procedures Motion.

JURISDICTION AND STANDING

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

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

6. The U.S. Trustee has standing to be heard on the Procedures Motion, the Disclosure Statement and this Objection pursuant to 11 U.S.C. § 307. *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 U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest).

BACKGROUND

A. The Chapter 11 Cases

7. On June 17 and 19, 2024, the above-captioned debtors and debtors in possession (collectively, the "Debtors") each filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, (the "Bankruptcy Code," or "Code"), in the United States Bankruptcy Court for the District of Delaware (this "Court"), thereby commencing the above-captioned chapter 11 cases (the "Chapter 11 Cases").

8. The Debtors continue to manage and operate their business as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

9. On July 2, 2024, pursuant to section 1102(a)(1) of the Bankruptcy Code, the U.S. Trustee appointed an official committee of unsecured creditors in the Chapter 11 Cases (the "Committee"). D.I. 106.

10. As of the date hereof, no trustee or examiner has been requested in the Chapter 11 Cases.

B. The Interim Cash Collateral Orders and the Settlement Term Sheet

11. On June 21, 2024, the Debtors filed their *Motion of the Debtors for Entry of an Interim Order (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection, (III) Modifying the Automatic Stay, (IV) Scheduling a Further Hearing on the Motion, and (V) Granting Related Relief* [D.I. 38] (the "Cash Collateral Motion") seeking the entry of an interim order, among other things, authorizing them to use the cash collateral of their purported prepetition secured creditor, CVI Investments, Inc. ("CVI").

12. On June 24, 2024, the Court entered an order granting the Cash Collateral Motion on an interim basis. D.I. 59 (the "First Interim Cash Collateral Order"). The First Interim Cash

Collateral Order, among other things, authorized the Debtors to use CVI's cash collateral for a period of one week in accordance with a Court-approved budget. D.I. 59-1.

13. The Court subsequently entered five additional interim orders continuing the Debtors' authorization to use CVI's cash collateral in accordance with such orders and the Court-approved budgets attached thereto. D.I. 98, 184, 260, 361 and 481.

14. Most recently, on August 23, 2024, the Court entered its *Sixth Interim Order (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection, (III), Modifying the Automatic Stay, and (IV) Granting Related Relief* [D.I. 481] (the "Sixth Interim Cash Collateral Order").

15. Attached to the Sixth Interim Cash Collateral Order is a form of term sheet [D.I. 481-1] (the "Settlement Term Sheet") documenting the terms of a proposed settlement between the Debtors, CVI, the Committee and Committee member Magna International, Inc. ("Magna") in its individual capacity.

16. The Settlement Term Sheet generally provides for, among other things, the negotiation and filing of a proposed chapter 11 plan, disclosure statement, confirmation order and cash collateral order (a) in form mutually satisfactory to all settlement parties, and (b) on the timeline approved by the Court in the Sixth Interim Cash Collateral Order. Additionally, the agreement described in the Settlement Term Sheet is contingent on: (y) the settlement parties first reaching agreement on a restructuring plan in the currently pending insolvency proceedings of the Debtors' non-debtor affiliate, Fisker GmbH (Austria) (the "Austrian Plan"); and (z) the Austrian Plan becoming effective. D.I. 481-1, p. 14, Item 21.

17. The timeline established in the Sixth Interim Cash Collateral Order and Settlement Term Sheet requires the Debtors to: (a) file an "Acceptable Plan" (as defined therein) and

disclosure statement on or before August 30, 2024; (b) obtain the entry of an order pursuant to Federal Rule of Bankruptcy Procedure 9019 approving and authorizing the Debtors to facilitate support for and consummation of the Austrian Plan on or before September 9, 2024; (c) distribute plan ballots and solicitation packages on or before September 16, 2024; (d) obtain the entry of an order confirming the plan and approving the disclosure statement on or before October 9, 2024; and (e) have the confirmed plan go effective on or before October 11, 2024. D.I. 481, ¶ 18; D.I. 481-1, p. 14, Item 21.

18. In connection with the above timeline, the Court also approved an eight-week "Settlement Budget" for the Debtors' use of CVI's cash collateral during the sixth interim period, which period concludes on the targeted effective date of October 11, 2024. D.I. 481-1.

C. Specific Provisions of the Debtors' Proposed Plan

19. On August 30, 2024, the Debtors filed the Combined Disclosure Statement and Plan, which incorporates their proposed chapter 11 plan of liquidation (the "Plan"). D.I. 498. The Plan includes the following provisions relevant to this Objection.

i. Third-Party Release Provisions

20. Article XII.B of the Plan provides as follows (the "Third-Party Release[s]"):

> Except as otherwise provided in the Plan, as of the Effective Date and to the fullest extent authorized by applicable law, for good and valuable consideration, including the obligations of the Debtors under this Plan and the contributions of the Released Parties to facilitate and implement this Plan, *e*ach Releasing Party conclusively, absolutely, unconditionally, generally, individually, collectively, irrevocably, and forever releases and discharges the Released Parties ***from any and all Causes of Action whatsoever,*** including any derivative claims, asserted or assertable on behalf of the Debtors or their Estates, as applicable, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, contingent or noncontingent, in law, equity, contract, tort or otherwise, ***that such Releasing Party would have been legally entitled to assert in its own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Equity Interest in, a Debtor, the Estates, or other Entity,*** based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the

> Debtors' in- and out-of-court restructuring efforts, the Chapter 11 Cases, the Global Settlement, the Cash Collateral Orders, the Plan Documents, the 2025 Notes Documents, the Bridge Note Documents, or any other instrument, contract, or document related to the foregoing, the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is treated in this Plan, the business or contractual arrangements between any Debtor and any Released Party, the restructuring of Claims and Equity Interests before or during the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, pursuit, performance, administration, implementation, or consummation of the Chapter 11 Cases (including, without limitation, any payments, distributions or transfers in connection therewith), the Global Settlement, the Cash Collateral Orders, the Plan Documents, the 2025 Notes Documents, the Bridge Note Documents, or any other instrument, contract, or document related to the foregoing, ***or any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date.***
>
> Notwithstanding anything to the contrary in the foregoing, the releases set forth in this Article XII.BArticle XII.B [*sic*] do not release: (a) any Released Party from any Causes of Action arising from or related to any act or omission by such Released Party that is determined in a Final Order to have constituted intentional fraud, willful misconduct, or gross negligence; (b) any post-Effective Date obligations of any party or Entity under the Plan or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan; (c) any rights or obligations under the Fleet Sales Agreement and Fleet Sale Order; (d) any Causes of Action against the Debtors' non-Debtor subsidiaries or Affiliates held by any Entity; (e) any Released Party that is Class Action Defendant, solely with respect to the Class Action Claims asserted in the Class Action; (f) any Released Party from any Causes of Action asserted by (i) the Fisker Parties, (ii) any D&O that is not an Other Officer and Director, and/or (iii) the Debtors' non-Debtor subsidiaries or Affiliates; or (g) any Causes of Action of the Debtors against the Other Directors and Officers, including any such Causes of Action that are transferred to and vest in the Liquidating Trust.

D.I. 498, Art. XII.B (emphasis added).

21. The Plan provides the following definition for the term "Released Party":

> "*Released Party*" means each of the following, in their capacity as such: (a) ***each Debtor***; (b) each Other Director and Officer (solely for purposes of Article XII.B of this Plan but not, for the avoidance of doubt, for purposes of Article XII.A of this Plan); (c) the Liquidating Trustee; (d) the IP/Austria Assets Trustee; (e) Davis Polk, as counsel to the Debtors; (f) Morris Nichols, as counsel to the Debtors, [*sic*] (g) Huron Consulting Services, LLC, as financial advisor and consultant to the Debtors; (h) Kurtzman Carson Consultants, LLC dba Verita Global, as administrative advisor to the Debtors; (i) the Transaction Committee Chairman; (j) the CRO; (k) the Committee and each of its members; (l) the Secured Noteholder; (m) each Prepetition Collateral Agent; (n) the 2025 Notes Trustee; (o) Magna; (p)

> ***each Related Party of each Entity in clauses (c) through (o) above***; *provided, that,* for the avoidance of doubt and notwithstanding anything to the contrary herein, the D&Os (other than the Other Directors and Officers, the Transaction Committee Chairman, and the CRO), the Fisker Parties, the Debtors' current or former direct or indirect non-Debtor subsidiaries, and the Debtors' current or former non-Debtor Affiliates are not and shall not be deemed hereunder to be a Released Party.

Id. at Art. I.A, Item 138 (emphasis added).

22. The Plan provides the following definition for the term "Releasing Party":

> "*Releasing Party*" means (a) all holders of Claims or Equity Interests **w*ho are sent a Ballot or Non-Voting Opt-Out Form and do not timely elect to opt-out of the releases provided by the Plan in accordance with the Solicitation Procedures****; (b) each Related Party of each Entity in clause (a) above***; and (c) each Released Party; *provided, that*, for the avoidance of doubt and notwithstanding anything to the contrary herein, the D&Os (other than the Other Directors and Officers, the Transaction Committee Chairman, and the CRO), the Fisker Parties, the Debtors' current or former direct or indirect non-Debtor subsidiaries, and the Debtors' current or former non-Debtor Affiliates are not and shall not be deemed hereunder to be a Releasing Party.

Id. at Art. I.A, Item 139 (emphasis added).

23. The Plan provides the following definition for the term "Related Party":

> "*Related Party*" means, each solely in its capacity as such, with respect to any Entity, such Entity's current and former Affiliates, and such Entity's and its current and former Affiliates' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, assignors, participants, successors, assigns, subsidiaries, affiliates, direct or indirect partners, limited partners, general partners, members, principals, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals and advisors.

Id. at Art. I.A, Item 137.

24. The Plan includes an injunction in support of the Third-Party Release that provides (the "Plan Injunction");

> Except as otherwise provided in the Plan or the Confirmation Order, as of the Confirmation Date, but subject to the occurrence of the Effective Date, *all Entities who have held, hold or may hold Causes of Action, Claims or Equity Interests in the Debtors or the Estates that have been released or are subject to exculpation*

> *are, with respect to any such Causes of Action, Claims or Equity Interests, permanently enjoined, from and after the Effective Date, from*: (i) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) *against or affecting the Debtors, the Estates or any of their Assets*, the Liquidating Trust, the IP/Austria Assets Trust, or the Exculpated Parties, or direct or indirect successor in interest to any of the foregoing Entities or any property of any such transferee or successor; (ii) enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order against *the Debtors, the Estates or any of their Assets*, the Liquidating Trust, the IP/Austria Assets Trust, *the Released Parties,* the Exculpated Parties or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Entities, or any property of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against *the Debtors, the Estates or any of their Assets,* the Liquidating Trust, the IP/Austria Assets Trust, *the Released Parties,* the Exculpated Parties, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Entities; (iv) *commencing or continuing in any manner or in any place, any suit, action or other proceeding on account of or respecting any Claim, demand, liability, obligation, debt, right, Cause of Action, interest or remedy released or to be released pursuant to the Plan or the Confirmation Order, including, but not limited to, the releases and exculpations provided under Article XII.A, Article XII.B, Article XII.C, of the Plan*; (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of this Plan to the fullest extent permitted by applicable law; and (vi) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of this Plan; provided, however, that nothing contained herein shall preclude such persons from exercising their rights pursuant to and consistent with the terms of this Plan. *Each holder of an Allowed Claim or Allowed Equity Interest shall be deemed to have specifically consented to the injunctions set forth herein.* For the avoidance of doubt, the foregoing provisions of this Section shall not operate to waive or release the rights of the Debtors or other parties in interest to enforce the Plan and the contracts, instruments, releases and other agreements or documents delivered under or in connection with the Plan and Plan Supplement or assumed pursuant to the Plan or assumed pursuant to Final Order of the Bankruptcy Court.

Id. at Art. XII.D (emphasis added).

25. The Debtors provide the following explanation of the Third-Party Release mechanics in their Procedures Motion:

> [C]reditors that elect not to consent to the Third-Party Releases may opt out of the Third-Party Releases by either, (a) to the extent eligible to vote on the Combined

> DS and Plan, checking a box on a timely and properly submitted Ballot, (b) to the extent ineligible to vote on the Combined DS and Plan, checking a box on a timely and properly submitted Opt-Out Form, or (c) timely and properly filing an objection to the Third-Party Releases. ***If a creditor (w) timely and properly votes to accept or reject the Combined DS and Plan but does not check the opt-out box on the Ballot, (x) abstains from voting on the Combined DS and Plan and does not check the opt-out box on a timely and properly submitted Ballot, (y) fails to timely and properly submit an Opt-Out Form with the opt-out box checked, or (z) fails to timely and properly file an objection, such creditor would be deemed to have consented to the Third-Party Releases.***

D.I. 499, ¶ 24 (emphasis added).[3]

26. Thus, the Plan will require tens (if not hundreds) of thousands of creditors and equity interest holders to affirmatively opt out of the Third-Party Release, and "deems" them and their "Related Parties" — who have no mechanism to opt out — to have consented to the Third-Party Release.[4] Many of these prospective Releasing Parties may not even be known to the Debtors or the Released Parties and may not have any notice or knowledge of these Chapter 11 Cases and the Plan that purports to extinguish their rights. Moreover, the Debtors will not be serving the Related Parties with Opt-Out Forms, the Combined Hearing Notice or the Combined Disclosure Statement and Plan. Therefore, it appears that the only way for such Related Parties to avoid being "deemed to have consented" to the Third-Party Release is to discover these Chapter 11 Cases, the

[3] The bolded language of this provision only refers to "creditors." The U.S. Trustee presumes that these procedures also apply to equity interest holders, who are included in the Third-Party Release provisions and whom the Debtors propose to serve – in some cases through third-party intermediaries not subject to the Debtors' control or this Court's jurisdiction – with Opt-Out Forms.

[4] Attachment 1 to Schedule E/F, Part 2 of the *Schedules of Assets and Liabilities for Fisker Group Inc. Case No. 24-11377 (TMH)* [D.I. 436] (the "Fisker Group Schedules"), listing "Actual/Contingent Warranty and After Sales Creditors Who Have NONPRIORITY Unsecured Claims" (collectively, the "Warranty Creditors"), discloses 4,261 general unsecured creditors holding claims totaling $30,520,116.90. D.I. 436, p. 827 of 1596. Attachment 2 to Schedule E/F, Part 2 of the Fisker Group Schedules, listing "Reservation Fee Creditors Who Have NONPRIORITY Unsecured Claims" (the "Deposit Creditors"), discloses 29,941 general unsecured creditors holding claims totaling $7,112,300.00. *Id.* at p. 1596 of 1596. Likewise, the Debtors disclosed that, as of the Petition Date, **there were approximately 1,250,822,032 outstanding class A shares of common stock in Debtor Fisker Inc.** D.I. 6, ¶ 10.

Combined Disclosure Statement and Plan and its related deadlines, and then file an objection to the Third-Party Release. *See id.*

ii. Exculpation Provisions

27. Article XII.C of the Plan provides as follows (the "Exculpation Provision"):

> No Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from any Claim, obligation, Cause of Action or liability for any Claim related to any act or omission occurring between the Petition Date and the Effective Date in connection with or arising out of, the administration of the Chapter 11 Cases, the entry into the Cash Collateral Orders, entry into the Liquidating Trust Agreement, the IP/Austria Assets Trust Agreement, the negotiation and pursuit of this Plan, or the solicitation of votes for, or confirmation of, this Plan, the funding of this Plan, the consummation of this Plan, or the administration of this Plan or the property to be distributed under this Plan, and the issuance of securities or beneficial interests under or in connection with this Plan or the transactions contemplated by the foregoing, except for willful misconduct, gross negligence, or intentional fraud as finally determined by a Final Order, but in all respects such Exculpated Party shall be entitled to reasonably rely upon the advice of counsel with respect to its duties and responsibilities pursuant to this Plan. The Exculpated Parties have participated in compliance with the applicable provisions of the Bankruptcy Code with regard to the solicitation and distribution of the securities pursuant to the Plan, and are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule or regulation governing the solicitation of acceptances or rejections of this Plan or such distributions made pursuant to this Plan. Notwithstanding anything to the contrary in the foregoing or any other provision of the Plan, the foregoing provisions of this exculpation provision shall not operate to waive or release the rights of the Debtors or other parties in interest to enforce the Plan and the contracts, instruments, releases and other agreements or documents delivered under or in connection with the Plan and Plan Supplement or assumed pursuant to the Plan or assumed pursuant to Final Order of the Bankruptcy Court.

Id. at Art. XII.C.

28. The Plan provides the following definition for the term "Exculpated Parties":

> "*Exculpated Parties*" means each of the following, to the extent permitted by applicable law, in their capacity as such: (a) each Debtor; (b) each Other Director and Officer; (c) the Liquidating Trustee; (d) the IP/Austria Assets Trustee; (e) Davis Polk, as counsel to the Debtors; (f) Morris Nichols, as counsel to the Debtors; (g) Huron Consulting Services, LLC, as financial advisor and consultant to the Debtors; (h) Kurtzman Carson Consultants, LLC dba Verita Global, as administrative advisor to the Debtors; (i) the Transaction Committee Chairman; (j) the CRO; (k) the Committee and each of its members; (l) each holder of Secured

> Notes; (m) each Prepetition Collateral Agent; (n) the 2025 Notes Trustee; (o) Magna; and (p) each Related Party of each Entity in clauses (c) through (o) above; *provided*, that, for the avoidance of doubt and notwithstanding anything to the contrary herein, the Fisker Parties, the Debtors' current or former direct or indirect non-Debtor subsidiaries, and the Debtors' current or former non-Debtor Affiliates are not and shall not be deemed hereunder to be an Exculpated Party.

Id. at Art. I.A, Item 68.

D. The Procedures Motion

29. On August 30, 2024, the Debtors filed their Procedures Motion.

30. In the Procedures Motion, the Debtors disclose that they believe they have "approximately 30,000 unsecured creditors," of which "approximately 29,000" are customers. D.I. 499, ¶ 16. The Debtors "did not collect mailing addresses for their customers." *Id.* Consequently, the Debtors served such "Customer Claimholders"[5] with the Bar Date Notice via email.[6]

31. The Debtors propose to send Solicitation Packages to holders of claims in Voting Classes, including Class 4 (General Unsecured Claims). *Id.* at ¶ 37. However, Voting Claimants receiving Solicitation Packages "shall not include any holders of claims listed on the Debtors [*sic*] Schedules and Statements as contingent, unliquidated, or disputed, unless such claimant files [*sic*] a proof of claim form in accordance with the Bar Date Order." *Id.* at ¶ 37 n.13.

32. The Debtors propose to serve Solicitation Packages via email, or, if an email address is not available, via first class mail "to the extent a valid physical mailing address is

[5] It is unclear to what extent "Customer Claimholders" includes the Warranty Creditors and/or Deposit Creditors.

[6] The Bar Date Order does not appear to authorize electronic service of the Bar Date Notice on creditors. *See* D.I. 458, ¶ 11. The Bar Date Order does appear to authorize electronic service of the Bar Date Notice on equity security holders. *See id.* However, the Court's *Final Order (I) Waiving the Requirement to File a List of Equity Security Holders and (II) Authorizing the Debtors to Redact Certain Personal Information* [D.I. 290] (the "Final PII Order") provides that the Debtors may serve registered equity security holders via email, "except for the service of," among other things, "notice establishing deadlines for the filings of proofs of claim and requests for allowance of administrative expenses." D.I. 290, ¶ 4.

known." D.I. 499, ¶ 38. But, as noted above, the Debtors did not collect customer addresses in the ordinary course of business. The Debtors seek authority not "to conduct any additional research for updated mailing addresses or email addresses based on undeliverable notices (including Ballots)[.]" D.I. 499-2, ¶ 20. It is unclear how many "undeliverable notices" the Debtors received when serving the Bar Date Notice.

33. Likewise, as to non-voting classes, the Debtors propose to serve Non-Voting Combined Notices on all Non-Voting Claimants "except beneficial equity interest holders" via email, or, if an email address is not available, via first class mail to the extent a valid physical mailing address is known by the Debtors. D.I. 499, ¶ 47. Such Non-Voting Claimants may opt out of the Third-Party Releases if they complete an Opt-Out Form and return same prior to a deadline. *Id.* at Ex. 4 and Ex. 5. These provisions apply to, among others, registered equity security holders in Class 6 (Equity Interests). However, the Final PII Order specifically excepts "notices of any plan or disclosure statement filed in the Chapter 11 Cases" from email service upon registered equity security holders. D.I. 290, ¶ 4.

34. The Debtors propose to serve "Beneficial Holder Non-Voting Combined Hearing Notices" on Beneficial Holders of equity security interests in Class 6 via Nominees. *Id.* at ¶ 73. The Nominees must deliver the notices to equity security holders with instructions for such holders to complete and return their opt-out forms "in sufficient time" for the Nominees "to timely submit a Master Opt-Out Form" on the holders' behalf. *Id.* Equity security holders who receive notice in this manner will be deemed to consent to the Third-Party Release if their Nominees fail to timely return the Master Opt-Out Form for any reason.

OMNIBUS OBJECTION

I. THE DISCLOSURE STATEMENT LACKS ADEQUATE INFORMATION REGARDING THE THIRD-PARTY RELEASE PROVISIONS.

35. The disclosure statement requirement of Bankruptcy Code section 1125 is "crucial to the effective functioning of the federal bankruptcy system" and, consequently, "the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.)*, 848 F.2d 414, 417-18 (3d Cir. 1988)). "Adequate information" under section 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with debtors over the plan. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94, 100 (3d Cir. 1988). Further, section 1129(a)(2) of the Bankruptcy Code conditions confirmation upon compliance with applicable Code provisions. The adequate disclosure requirement of section 1125 is one of those provisions. *See* 11 U.S.C. § 1129(a)(2); *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000).

36. The Bankruptcy Code defines "adequate information" as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, *that would enable such a hypothetical reasonable investor of the relevant class to make an informed judgment about the plan*[.]

See 11 U.S.C. § 1125(a)(1) (emphasis added); *see also Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994); *Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999).

37. To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. *See In re McLean Indus.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) ("substantial financial information with respect to the ramifications of any proposed plan will have to be provided to, and digested by, the creditors and other parties in interest in order to arrive at an informed decision concerning the acceptance or rejection of a proposed plan"). Although the adequacy of the disclosure is determined on a case-by-case basis, the disclosure must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy Code] alternatives so that they can intelligently accept or reject the plan." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988).

38. Section 1125 of the Bankruptcy Code is geared towards more disclosure rather than less. *See In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990). The "adequate information" requirement merely establishes a floor, and not a ceiling for disclosure to voting creditors. *In re Adelphia Commc'ns Corp.*, 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006) (citing *Century Glove*, 860 F.2d at 100).

39. Once the "adequate disclosure" floor is satisfied, additional information can go into a disclosure statement if the information is accurate and its inclusion is not misleading. *See id.* The purpose of the disclosure statement is to give creditors enough information so that they can make an informed choice of whether to approve or reject the debtor's plan. *In re Duratech Indus.*, 241 B.R. 291, 298 (Bankr. E.D.N.Y.), *aff'd*, 241 B.R. 283 (E.D.N.Y. 1999). The disclosure statement must inform the average creditor what it is going to get and when, and what contingencies there are that might intervene. *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

40. Applied here, the Disclosure Statement does not provide sufficient disclosures appropriate to the circumstances of these Chapter 11 Cases. The Disclosure Statement fails to identify the tens (if not hundreds) of thousands of parties who will deemed to be giving Third-Party Releases without their consent. The definition of Releasing Parties includes, for each Releasing Party, at least thirty-eight categories of Related Parties, some as broad and ill-defined as "agents," "consultants," "representatives," and "other professionals and advisors."

41. Nor does the Disclosure Statement identify all parties who will be the recipients of Third-Party Releases. That is because the definition of "Released Parties" *also* includes the same broad categories of Related Parties, such as all "agents," "advisors," "consultants" and "other professionals and advisors."

42. The Disclosure Statement is also unclear as to whether holders of administrative claims and priority tax claims are included among the Releasing Parties who are being forced to release non-debtors. The definition of "Releasing Party" includes "all holders of claims … who are sent a Ballot or Non-Voting Opt-Out Form[.]" The Procedures Motion is silent as to whether unclassified claims will receive the Non-Voting Combined Notice.

43. In addition, the Debtors fail to disclose that they are giving two sets of releases benefitting the same Released Parties. The Debtors are both a Released Party and a Releasing Party. Therefore, the Plan provides that the Debtors will release the Released Parties pursuant to both Article XII.A (Debtor Releases) and Article XII.B (Third-Party Release). The Debtors also fail to explain which of the two releases will control if there is a conflict.

44. Moreover, the Disclosure Statement does not adequately disclose: (a) why the Debtors will be releasing the Released Parties (whether under the Debtor release or the Third-Party

Release); (b) the nature and value of the claims the Debtors are releasing; or (c) what (if anything) the Debtors are receiving as consideration for such releases.

45. In summary, the Disclosure Statement fails to provide adequate information as to who will be deemed to give third-party releases, who will receive such releases, what claims are being released, the value of such claims and the consideration received in exchange for the releases. Because the Disclosure Statement fails to provide adequate information as to numerous, significant issues, the Court should not approve the Disclosure Statement on an interim basis.

II. THE COURT MUST DENY APPROVAL OF THE DISCLOSURE STATEMENT BECAUSE THE PLAN IS PATENTLY UNCONFIRMABLE.

46. If the proposed plan is patently unconfirmable on its face, the bankruptcy court must deny the application to approve the disclosure statement. *See generally In re Quigley Co.,* 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007) *(citing In re Beyond.com Corp*., 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003) (collecting cases); *In re 266 Washington Assocs*., 141 B.R. 275, 288 (Bankr. E.D.N.Y.) *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992); *In re Filex, Inc.*, 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990)).

47. Moreover, the Court should not approve solicitation procedures that facilitate the Plan's defects, and it would be a waste of estate resources for the Debtors to solicit votes on a Plan that is patently unconfirmable.

48. Here, the Court must deny approval of the Disclosure Statement because the Plan is patently unconfirmable on at least three separate and independent bases. *First*, the Plan is unconfirmable because it proposes non-consensual Third-Party Releases that are not authorized under the Bankruptcy Code. *Second*, to the extent that exculpation is permissible beyond what is expressly provided for in section 1125(e) of the Bankruptcy Code, the Exculpation Provisions in the Plan exceed the limitations that courts in this Circuit have imposed on parties entitled to receive

exculpation. *Third*, the Third-Party Release provisions and Plan Injunction grant the liquidating Debtors a discharge in violation of section 1141(d)(3) of the Bankruptcy Code.

A. The Plan is Not Confirmable Because It Proposes Non-Consensual Third-Party Releases That are Not Authorized Under the Bankruptcy Code.

49. In *Harrington v. Purdue Pharma L.P.*, 603 U.S. __, 144 S. Ct. 2071, 2082-88 (2024), the Supreme Court held that non-consensual third-party releases are not authorized under the Bankruptcy Code.

50. Contract principles govern whether a release is consensual. *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017). That is because a third-party release is essentially a settlement between a non-debtor claimant and another non-debtor. And no Code provision authorizes courts, as part of an order confirming a chapter 11 plan, to "deem" a non-debtor to have consented to an agreement to release claims against other non-debtors where consent would not exist under state law. Nor does 11 U.S.C. § 105(a) confer any power to override state law. Rather, section 105(a) "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue Pharma, L.P.*, 144 S. Ct. at 2082 n.2 (quotation marks omitted). 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). Thus, the state-law definition of consent is not diluted or transformed by the Code.

51. Here, the Debtors do not meet the state-law burden of establishing that the Releasing Parties will expressly consent to release their property rights nor to having that release memorialized in the Plan.

52. The "general rule of contracts is that silence cannot manifest consent." *Patterson v. Mahwah Bergen Ret. Grp., Inc.,* 636 B.R. 641, 686 (E.D. Va. 2022).

53. Using Delaware common law as a point of reference, silence does not equal consent except under limited circumstances not applicable here. *See, e.g., Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 991 (Del. Super. Ct. 2000) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981)).

54. As a general rule of contract construction:

> Acceptance by silence is exceptional. Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance. See Comment b to § 53. The usual requirement of notification is stated in § 54 on acceptance by performance and § 56 on acceptance by promise. The 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. The 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. See Chapter 5.

RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

55. Silence and inaction, however, will generally not be deemed assent to an offer because Delaware follows the "mirror image" rule, requiring the acceptance to be identical to the offer. *See Urban Green Techs., LLC v. Sustainable Strategies 2050 LLC*, No. N136-12-115, 2017 WL 527565, at *3 (Del. Super. Ct. Feb. 8, 2017); *see also Patterson*, 636 B.R. at 686 (contract law does not support consent by failure to opt out). "[E]ven though the offer states that silence will be taken as consent, silence on the part of the offeree cannot turn the offer into an agreement, as the offerer cannot prescribe conditions so as to turn silence into acceptance." *See Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1227-28 (9th Cir. 2022) (citations omitted; quoting RESTATEMENT (SECOND) OF CONTRACTS § 69, cmt. c (1981): "The mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting.").

56. Just like it is legal error to define consent in a manner inconsistent with state law, it is error to presume it exists. As discussed above, consent arises when two sets of parties affirmatively assent to something. *See* 1 VOSS ON DELAWARE CONTRACT LAW § 2.05 (citing *Loveman v. The NuSmile, Inc.*, C.A. No. 08C-08-223 MJB, memo. op. at *7 (Del. Super. Ct. Mar. 31, 2009) (Brady, J.)). A party seeking to include non-debtor releases in a bankruptcy plan must show that they are consensual. To do so, state law requires that mutually agreeing third parties must come forward, state their consent affirmatively, and ask the court to memorialize their consent in a plan. Nothing in the Code authorizes bankruptcy courts to extinguish claims by inferring consent outside the bounds of state law.

57. The Debtors propose that the Third-Party Releases in the Plan, which benefit numerous non-debtors that are Released Parties, bind: (a) all parties who vote to accept the Plan, unless they check an opt-out box on the returned ballot; (b) those who vote to reject the Plan, unless they check an opt-out box on the returned ballot; (c) all creditors in voting classes who abstain from voting and do not check an opt-out box on a returned ballot; (d) claimants or holders of interests in non-voting classes who are deemed to accept the plan, unless they complete and return an opt-out election form; (e) claimants or holders of interests in non-voting classes who are deemed to reject the plan, unless they complete and return an opt-out election; and (f) unclassified claims.[7] 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*.

[7] The Plan defines "Releasing Party" to include "all holders of Claims or Equity Interests who are sent a Ballot or Non-Voting Opt-Out Form and do not timely elect to opt-out of the releases provided by the Plan in accordance with the Solicitation Procedures[.]" D.I. 498, Art. I.A, Item 139. The Procedures Motion is silent as to whether creditors holding unclassified claims will be receiving Non-Voting Opt-Out Forms.

58. *First*, merely voting for a plan without checking an opt-out box does not constitute the affirmative consent necessary to reflect acceptance of an offer to enter a contract to release claims against non-debtors. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). Voting on a chapter 11 plan is governed by the Bankruptcy Code, and a favorable vote reflects only approval of the plan's treatment of the voters' claims *against the debtor*. Those voting on the chapter 11 plan have not "manifest[ed] [an] intention that silence may operate as acceptance" of an offer to release claims against non-debtors. *Id*. Nor are they "silently tak[ing] offered benefits" from the released non-debtors, *id*., such that consent may be inferred. The only benefits received are through distributions from the debtor's chapter 11 plan—there are no benefits provided from the released non-debtor to the releasing claimant. Further, because the plan's distributions are not contingent on agreeing to the non-debtor release, one cannot infer consent from the acceptance of those distributions.

59. Thus, in *In re Chassix Holdings, Inc.*, 533 B.R. 64 (Bankr. S.D.N.Y. 2015), the United States Bankruptcy Court for the Southern District of New York rejected the idea that the independent consent to a third-party release required under contract law should be inferred from a vote cast on a chapter 11 plan:

> If (as prior cases have held) a creditor who votes in favor of a plan have implicitly endorsed and 'consented' to third party releases that are contained in that plan, then by that same logic 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.***

Id. at 79 (emphasis added).

60. Similarly, the *Patterson* court, in applying black-letter contract principles to opt-out releases in a chapter 11 plan, found that the failure to opt out of a third-party release does not

constitute the requisite affirmative consent to bind the releasing party under contract law. *Patterson*, 636 B.R. at 686. "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." *Id*. at 688.

61. As this Court noted in *Emerge*, "[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 through a party's silence or inaction. *In re Emerge Energy Servs., LP*, No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (Owens, J.).

62. The Debtors may try to distinguish these cases from *Emerge* based on the argument that *Emerge* dealt with creditors and shareholders who were receiving no distribution under the plan. However, the Court's decision in *Emerge* was not expressly limited to such a factual situation. To the contrary, the Court's recognition that failure to return a ballot or opt-out election form can be due to "carelessness, inattentiveness, or mistake," rather than constituting the manifestation of an intent to agree to a third-party release, would be applicable regardless of whether a creditor or interest holder was to receive a distribution under a plan.

63. *Second*, the plan imposes non-debtor releases on those who vote to reject the Plan, unless they check an opt-out box on the returned ballot. But it is even more obvious that those who vote to reject a plan are not consenting merely through silence by failing to opt out of the nondebtor release. *See Chassix*, 533 B.R. at 79.

64. Whether or not a creditor votes to accept or reject the plan, such creditors may not have understood the solicitation package, and may not have possessed the time or financial

resources to engage counsel, never imagining that their rights against non-debtors could be extinguished through the bankruptcy of these Debtors.

65. *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. For the reasons discussed above, no consent can be inferred from this silence. Further, such creditors: (a) may never have received the solicitation package, or received it late, due to mail errors or delays; or (b) received the solicitation package timely, completed same and returned it to the balloting agent but, through no fault of their own, the ballot never reached the balloting agent, or the ballot was received late.

66. "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 88. Moreover, the court in *SunEdison* observed that solicited parties may have failed to vote for reasons other than an intention to assent to the releases. *See SunEdison*, 576 B.R. at 461.[8]

67. *Fourth*, the non-consensual Third-Party Releases will also be imposed on unimpaired claimants or holders of interests who are not permitted to vote on the plan, but who receive a notice informing them that, unless they check an opt-out box on the Non-Voting Opt-Out Form to opt out of giving third-party releases, they will be deemed to have consented to same. For the same reasons discussed in *Chassix* and *Emerge*, and under the Delaware law discussed

[8] Not all decisions from this District have required affirmative consent for third party releases. In *In re Indianapolis Downs, LLC*, 486 B.R. 286 (Bankr. D. Del. 2013), this Court reached a different conclusion than that of *Emerge* and the other cases cited above concerning the need for affirmative consent to third party releases.

above, such "deemed consent" from silence does not constitute the affirmative consent required to support a consensual release.

68. *Fifth*, the non-consensual Third-Party Releases will also be imposed on *impaired* claimants or holders of interests who are not permitted to vote on the plan, but who receive a notice informing them that, unless they check an opt-out box on the Non-Voting Opt-Out Form to opt out of giving third-party releases, they will be deemed to have consented to same. For the same reasons discussed above, it is even more obvious that parties who are deemed to reject the Plan are not consenting through silence to the third-party releases. Moreover, it is unclear how releases by such claimants or interest holders could be supported by any consideration because, not only are they receiving no consideration from the released non-debtors, the relevant classes will not receive or retain any property under the Plan. *See* 11 U.S.C. § 1126(g).

69. *Sixth*, the non-consensual Third-Party Releases will apparently be imposed on holders of administrative claims and priority tax claims.[9] D.I. 498, Art. I.A, Item 139 (defining "Releasing Party" to include "all holders of Claims or Equity Interests who are sent a Ballot or Non-Voting Opt-Out Form and do not timely elect to opt-out of the releases provided by the Plan in accordance with the Solicitation Procedures[.]"). The claims to be released include direct claims that unimpaired parties hold against numerous non-debtors. The scope of the release of their direct claims against non-debtors is far broader than the claims upon which they will be paid. The release covers:

> any and all Causes of Action whatsoever, including any derivative claims, asserted or assertable on behalf of the Debtors or their Estates, as applicable, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, contingent or noncontingent, in law, equity, contract, tort or otherwise, that such Releasing Party would have been legally entitled to assert in its own right (whether individually or collectively) or on behalf of the holder of any Claim

[9] The Debtors' schedules disclose numerous priority tax claims. *See, e.g.*, D.I. 436, Schedule E/F, Part 1, Item 2.

> against, or Equity Interest in, a Debtor, the Estates, or other Entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Debtors' in- and out-of-court restructuring efforts, the Chapter 11 Cases, the Global Settlement, the Cash Collateral Orders, the Plan Documents, the 2025 Notes Documents, the Bridge Note Documents, or any other instrument, contract, or document related to the foregoing, the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is treated in this Plan, the business or contractual arrangements between any Debtor and any Released Party, the restructuring of Claims and Equity Interests before or during the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, pursuit, performance, administration, implementation, or consummation of the Chapter 11 Cases (including, without limitation, any payments, distributions or transfers in connection therewith), the Global Settlement, the Cash Collateral Orders, the Plan Documents, the 2025 Notes Documents, the Bridge Note Documents, or any other instrument, contract, or document related to the foregoing, or any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date.

D.I. 498, Art. XII.B (emphasis removed).

70. So, for example, a taxing authority whose priority claim against the Debtors is proposed to be paid in full under the Plan (as required by the Code) could later be subject to an argument by a Released Party that it has no obligation to pay taxes in connection with revenue received from transactions with the Debtors because, under the Plan, the taxing authority has been deemed to release the Released Party for all claims related in any manner to the Debtors.

71. For all of these classes of creditors, conspicuous warnings in the Disclosure Statement, on the plan ballots, or on an opt-out form that silence or inaction will constitute consent to a release are not sufficient to convert their silence into consent to the non-debtor release. *See SunEdison*, 576 B.R. at 458-61. In *SunEdison*, the debtors argued that the warning in the disclosure statement and on the ballots regarding the potential effect of silence gave rise to a duty to speak, and the non-voting creditors' failure to object to the plan or to reject the plan should be deemed their consent to the release. *Id.* at 460. The court rejected this argument because the debtors failed to show that the nonvoting creditors' silence was misleading or that the nonvoting creditors' silence signified their intention to consent to the release (finding that silence could easily be

attributable to other causes). *Id.* The debtors did not contend that an ongoing course of conduct between themselves and the nonvoting creditors gave rise to a duty to speak. *Id.*

72. In sum, there will be no affirmative consent to Third-Party Releases given by the numerous persons and entities on whom such releases will be imposed. Such releases are therefore non-consensual.

73. This Court also may not approve the injunction enforcing the "opt out" release by parties in interest against non-debtors because *Purdue* clearly stands for the proposition that non-consensual third-party releases and injunctions are not permitted by the Bankruptcy Code. *See Purdue Pharma*, 144 S.Ct. at 2088. 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)). Even if non-debtor releases are consensual, there is no 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 because, if the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent "immediate and irreparable harm" to either the estates or the released parties. 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.

B. The Plan is Not Confirmable Because It Proposes Exculpation Provisions That Exceed the Limitations of the Bankruptcy Code and Prior Case Law in This Circuit.

74. The Plan is also patently unconfirmable for the separate and independent reason that it includes impermissible Exculpation Provisions. To the extent that exculpation is permissible beyond the provisions of Bankruptcy Code section 1125(e), this Circuit has only approved exculpations that are limited to estate fiduciaries.

75. In *In re PWS Holding Corp*., the Third Circuit considered whether an official committee of unsecured creditors could be exculpated and held that 11 U.S.C. § 1103(c) implies both a fiduciary duty and a limited grant of immunity to members of the unsecured creditors' committee. *See* 228 F.3d 224, 246 (3d Cir. 2000). Courts in this district have repeatedly interpreted *PWS* as requiring a party's exculpation to be based upon its status as an estate fiduciary. *See generally In re Indianapolis Downs, LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013); *In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del. 2011); *In re Washington Mutual, Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011); *In re PTL Holdings LLC*, No. 11-12676 (BLS), 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011).

76. Here, the Exculpation Provision is overbroad and inconsistent with controlling case law because it shields numerous parties that are not estate fiduciaries, including: each Holder of Secured Notes; each Prepetition Collateral Agent; the 2025 Notes Trustee; Magna; and the Related Parties of the Exculpated Parties.

77. Additionally, the Exculpation Provision shields both the Liquidating Trustee and the IP/Austria Assets Trustee, neither of whom will come into existence until after the effective date of the Plan. In *In re Mallinckrodt PLC*, 639 B.R. 837 (Bank. D. Del. 2022), this Court held that exculpation "only extends to conduct that occurs between the Petition Date and the effective date," and ordered the debtors to strike contrary language from the exculpation provision. *Id.* at

883. The same analysis applies to the Plan's prospective relief for the IP/Austria Assets Trustee and the Liquidating Trustee. D.I. 498, Art. VIII.A.2 and Art. VIII.B.2.

C. The Plan is Not Confirmable Because It Provides a Discharge to the Liquidating Debtors.

78. The Plan is also patently unconfirmable for the separate and independent reason that it will grant the Debtors a discharge in violation of section 1141(d)(3) of the Bankruptcy Code.

79. Section 1129(a)(1) of the Bankruptcy Code provides that the Court shall confirm a plan only if the plan "complies with the applicable provisions of" title 11. 11 U.S.C. § 1129(a)(1).

80. Section 1141(d)(3) of the Bankruptcy Code provides that:

> The confirmation of a plan does not discharge a debtor if—
>
> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
>
> (B) the debtor does not engage in business after consummation of the plan; and
>
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

11 U.S.C. § 1141(d)(3).

81. The Plan would grant the Debtors a discharge because they are included in the definition of "Released Party." D.I. 498, Art. I.A, Item 138 (defining "Released Party" to include, among others, "each Debtor"). Thus, the Debtors will receive the releases embodied in Article XII.B of the Plan (quoted above in Section II.A), including as to, among other things, "any … act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date." *Id.* at Art. XII.B ("[A]s of the Effective Date and to the fullest extent authorized by applicable law … each Releasing Party conclusively, absolutely, unconditionally, generally, individually, collectively, irrevocably, and forever releases and discharges the Released Parties

from any and all Causes of Action whatsoever[.]") (emphasis removed). In addition, Article XII.D of the Plan would establish an injunction to enforce this discharge as to the Debtors. *Id.* at Art. XII.D.[10]

82. However, the Debtors are not eligible for a discharge because the elements of section 1141(d)(3) are satisfied.

83. *First*, the Plan provides for the establishment of two trusts to liquidate the "Liquidating Trust Assets" [11] and the "IP/Austria Assets Trust Assets," [12] which assets include all or substantially all of the Debtors' property:

> This Combined DS and Plan contemplates the establishment of the Liquidating Trust and the IP/Austria Assets Trust to administer post-Effective Date responsibilities of the Debtors and wind-down the Debtors' business under the Plan, including, but not limited to, (1) the Debtor's Assets being vested with the Liquidating Trust Assets and IP/Austria [Assets] Trust Assets, respectively, (2) making distributions to holders of Allowed Claims in accordance with the terms of this Plan and the Liquidating Trust Agreement and IP/Austria [Assets] Trust Agreement, respectively, (3) resolving all Disputed Claims and effectuating the Claims reconciliation process pursuant to the procedures prescribed in this Combined DS and Plan, (4) prosecuting, settling, and resolving Causes of Action, (5) recovering, through enforcement, resolution, settlement, collection, or otherwise, assets on behalf of the Liquidating Trust or the IP/Austria [Assets] Trust, as applicable (which assets shall become part of the Liquidating Trust Assets or the IP/Austria [Assets] Trust, respectively), (6) winding down the affairs of the Debtors, if and to the extent necessary, including taking any steps to dissolve, liquidate, or take other similar action with respect to each Debtors [*sic*], including

[10] Various other Plan provisions also reference the Debtors receiving a discharge. D.I. 498, Art. V.A.1, Art. V.A.3, Art. V.D, Art. VI.B.1.b, Art. VI.B.2.b, Art. VI.B.3.c, Art. VI.B.4.b, Art. X.A, Art. XI.C, Art. XI.D; *but see* Art. XII.G ("Notwithstanding any other provision of this Plan, the Debtors shall not receive a discharge pursuant to section 1141(d)(3) of the Bankruptcy Code.").

[11] "Liquidating Trust Assets" means the: (a) Non-IP Assets (subject to Article VIII.E.3 of the Plan); (b) the Preserved Estate Claims (subject to Article VIII.E.2 of the Plan); and (c) the Net Proceeds of IP/Austria Assets paid to the Liquidating Trust, and the Liquidating Trust's rights thereto, pursuant to Article VIII.E.1 of the Plan. D.I. 498, Art. 1.a, Item 104.

[12] "IP/Austria Assets Trust Assets" means: (a) the IP/Austria Assets (subject to Article VIII.E.1 of the Plan); (b) the Net Proceeds of Estate Claims paid to the IP/Austria Assets Trust and the IP/Austria Assets Trust's rights thereto, pursuant to Article VIII.E.2 of the Plan; and (c) the Net Proceeds of Non-IP Assets paid to the IP/Austria Assets Trust, and the IP/Austria Assets Trust's rights thereto, pursuant to Article VIII.E.3 of the Plan. *See* D.I. 498, Art. I.A, Item 93.

> by terminating the corporate or organizational existence of each such Debtor, and (7) performing all actions and executing all agreements, instruments and other documents necessary to effectuate the purpose of the Liquidating Trust and IP/Austria [Assets] Trust.

Id. at Art. IV.G; Art. VIII.A.1 (describing the purpose of the IP/Austria Assets Trust); Art. VIII.B.1. (describing the purpose of the Liquidating Trust).

84. *Second*, the Debtors will not engage in business after consummation of the Plan. *Id.* at Art. IV.G (providing that the Liquidating Trust and IP/Austria Assets Trust's responsibilities will include, among other things, "winding down the affairs of the Debtors, if and to the extent necessary, including taking any steps to dissolve, liquidate, or take other similar action with respect to each Debtors [*sic*], including by terminating the corporate or organizational existence of each such Debtor[.]"). The sections of the Plan addressing the IP/Austria Assets Trust and the Liquidating Trust expressly provide that such trusts "shall be established for the sole purpose of liquidating and distributing" the IP/Austria Assets Trust Assets and the Liquidating Trust Assets, respectively, "with no objective to continue or engage in the conduct of a trade or business except to the extent reasonably necessary to, and consistent with, the liquidating purpose" of such trusts. *Id.* at Art. VIII.A.1, Art. VIII.B.1. Fundamentally, this Plan is about monetizing assets – not engaging in business.

85. *Third*, the Debtors, as corporations, would not be eligible for a discharge pursuant to section 727(a)(1) of the Bankruptcy Code if they were chapter 7 debtors. That is because section 727(a)(1) provides that the Court shall grant a debtor a discharge unless the debtor is not an individual. *See, e.g.*, *In re Flintkote Co.*, 486 B.R. 99, 129 n.80 (Bankr. D. Del. 2012) ("Section 1141(d)(3)(C) is always satisfied for corporate debtors, as they cannot receive discharges in chapter 7.").

86. Accordingly, the Debtors are not eligible for a discharge pursuant to section 1141(d)(3) of the Bankruptcy Code. Because the Plan would grant the Debtors a discharge pursuant to Article XII.B and Article XII.D, among others, the Plan violates section 1141(d)(3), fails to satisfy section 1129(a)(1), and, consequently, is unconfirmable on its face.

III. The Solicitation Procedures Will Not Provide Notice to Numerous Entities That Their Claims Against Non-Debtors Will Be Released Under the Plan.

87. The Procedures Motion fails to provide that the Debtors will serve any part of the Solicitation Package, the Combined Hearing Notices, or any other document on the numerous Related Parties that would notify them that the Plan will strip them of their right to pursue their direct claims against a large number of non-debtor entities for no consideration. Moreover, it likely would be impossible for the Debtors to arrange to provide such notice to the tens (and potentially hundreds) of thousands of Related Parties, because the identity of many of such Related Parties — such as all "agents" of all Releasing Parties — are not, and cannot be, known by the Debtors.

88. In *Folger Adam Security, Inc. v. DeMatteis/MacGregor*, 209 F.3d 252 (3d Cir. 2000), the Third Circuit ruled that "[d]ue process requires 'notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 209 F.3d at 265 (citations omitted).

89. The Debtors' proposed solicitation procedures will not provide notice to the Related Parties that is "reasonably calculated, under all the circumstances, to apprize [them] of the pendency of the action and afford them an opportunity to present their objections" to having Third-Party Releases extracted from them. *Id.* In fact, most (if not all) of the Related Parties will receive no notice at all, because they are not themselves creditors or interest holders of the Debtors. Therefore, the Court must deny the Procedures Motion. *See Purdue Pharma*, 144 S. Ct. at 2086 ("nothing in the bankruptcy code contemplates (much less authorizes)" a non-consensual release

of direct claims held by creditors against non-debtor third parties); *In re Boy Scouts of America and Delaware BSA, LLC*, 642 B.R. 504, 678 (Bankr. D. Del. 2022) (stating that the Court was unable to find that the twenty-two categories of "Related Releasing Parties" received notice, and because Court had concluded that "a request for opt-out consent must be grounded in adequate notice, it was inconsistent to permit releases from persons who do not receive notice by virtue of creditor (or shareholder) status."); *see also Patterson*, 636 B.R. at 660 (noting that "[t]he Bankruptcy Court did not order that any notice or opt-out forms be sent to all of the Releasing Parties, including the current and former employees, consultants, accountants or attorneys of Debtors, their affiliates, lenders, creditors or interest holders.").

IV. Miscellaneous Objections to the Proposed Solicitation Procedures

90. The U.S. Trustee also objects to the following provisions of the Debtors' proposed solicitation procedures:

- Paragraph 12 of the proposed order granting the Procedures Motion provides that CVI "shall have the right to withdraw its vote with respect to any Secured Notes Claim in accordance with the terms of the Settlement Term Sheet and Article VI.H of the Plan." *See* D.I. 499-2, ¶ 12. This violates Federal Rule of Bankruptcy Procedure 3018(a), which provides that "[f]or cause shown, the court after notice and hearing may permit a creditor … to change or withdraw an acceptance or rejection."

- The "Voting Combined Hearing Notice," the "Non-Voting Combined Notice," and the "Beneficial Holder Non-Voting Combined Hearing Notice" include the Third-Party Release provisions and the Exculpation Provision but they all fail to define material terms including "Released Parties," "Releasing Parties," "Related Parties" and "Exculpated Parties." *See* D.I. 499-2, Ex. 2, Ex. 4 and Ex. 5.

RESERVATION OF RIGHTS

91. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, among other things, complement, supplement, augment, alter or modify this Objection and reservation of rights, assert any objection, file any appropriate

motion, or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that the Court enter an order or orders: (i) denying interim approval of the Disclosure Statement; (ii) denying the Procedures Motion; and (iii) granting such other and further relief as the Court deems just and equitable.

Dated: September 6, 2024

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

By: */s/ Malcolm M. Bates*

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CERTIFICATE OF SERVICE

I, Malcolm M. Bates, hereby certify that on September 6, 2024, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and courtesy copies were sent via email to parties in interest.

Dated: September 6, 2024

/s/ Malcolm M. Bates
Malcolm M. Bates