Docket #0055 Date Filed: 1/30/2026

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
Medley LLC,	:	Case No. 21-10526 (KBO)
Debtor.	:	
MEDLEY LLC LIQUIDATING TRUST,	:	
Plaintiff,	:	Adv. Pro. 23-50121-KBO
-against-	:	
EVERSHEDS SUTHERLAND (US) LLP,	:	
Defendant.	:	

REPLY BRIEF OF DEFENDANT EVERSHEDS SUTHERLAND (US) LLP IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED UPON RELEASE

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Defendant Eversheds Sutherland (US) LLP (**"Eversheds"**) submits this Reply Brief in further support of its Motion for summary judgment dismissing the claims asserted by Plaintiff, the Medley LLC Liquidating Trust (the **"Trust"**) as released.

INTRODUCTION

Once established, the Trust engaged in a tri-partite effort to resolve claims involving alleged wrongful conduct by the Debtor's management that the SEC was investigating, including conduct of the Taubes[1], Management, and others. The Trust sought to maximize creditor recoveries. The SEC sought injunctive relief and penalties relating to the alleged wrongful conduct. And the Debtor's management sought a global resolution of the claims.

On March 23, 2022, the Trust—represented by its Trustee and a phalanx of lawyers—entered the Settlement Agreement that became the effort's centerpiece. The Settlement Agreement included a **"Release"** of "all" **"Taube Released Parties"** from "any and all Released Claims," whether "known or unknown," including "all" avoidance claims. The Release was entered alongside the Forbearance Agreement and the side Eversheds Letter, both of which were required conditions to the Settlement Agreement and its Release. Under them, Eversheds agreed to "waive" immediate collection of administrative expenses to enable the Trust to maximize creditor distributions and to pay its own counsel.

The Release is unambiguous and, as such, must be adjudged by singular reference to its terms; extrinsic evidence and uncommunicated intent when entered are irrelevant. The Release makes clear that Eversheds, as one of "all" "legal advisors" and "attorneys" for Management and others, is a Taube Released Party. The Release also makes clear that as a Taube Released Party, Eversheds is released from "any and all Released Claims," whether "known or unknown,"

[1] Undefined capitalized terms herein have the meanings ascribed in Eversheds' Motion for summary judgement.

including "all" avoidance claims. The Trust's claims were released, and no measure of false *ad hominem* accusing Eversheds of a "lack of candor" or of an effort to "misinform" the Court, and nothing in the Trust's "everything-but-the-kitchen-sink" defenses to the Release, saves the day.

ARGUMENT

I. THE CLAIMS AGAINST EVERSHEDS FALL WITHIN THE RELEASE

In *Wells v. Shearson Lehman/Am. Exp., Inc.*[2]—the seminal decision the Trust ignores—New York's highest court declared the framework for determining the scope of a release as applied to non-signatory parties. The court declared:

> courts must look to the language of a release—the words used by the parties—to determine their intent, resorting to extrinsic evidence only when the court concludes as a matter of law that the contract is ambiguous.[3]

Asserting a party's "[u]ncommunicated subjective intent" was different cannot create ambiguity. Indeed, nowhere is this strict standard more relevant than where, as here, "[t]he release in issue is a handmade document—not a standard form—that was independently negotiated as part of a complex commercial transaction in which plaintiff was represented by counsel."[4]

New York's highest court also set the standard for determining contract ambiguity. The "ultimate inquiry" is "an objective one: is the language 'written so imperfectly that it is susceptible to more than one reasonable interpretation?'"[5] The word "all" is not "susceptible to more than one reasonable interpretation"; "all" is unambiguous—it means "all."[6] "[A]ny and all" also constitutes "clear language."[7] The Release, the scope of which is based in these terms, is unambiguous.

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[2] 526 N.E.2d 8 (N.Y. 1988).

[3] *Id*. at 12; *see Smith v. City of New York*, 2025 WL 3671272, at *2 (N.Y. Dec. 18, 2025) (same).

[4] *Id*. at 15.

[5] *MAK Tech. Holdings Inc. v. Anyvision Interactive Techs. Ltd*., 249 N.E.3d 1194, 1196 (N.Y. 2024) (quoting *Brad H. v. City of New York*, 951 N.E.2d 743, 746 (N.Y. 2011)).

[6] *Matter of DeVera*, 117 N.E.3d 757, 764 (N.Y. 2018).

[7] *Smith*, 2025 WL 3671272, at *2.

A. Eversheds is a "Taube Released Party": "All" Means "All"

The Trust contends the Release applies only to (i) attorneys that continued to represent Management and others on the date of the Settlement Agreement, and (ii) Eversheds had ceased representing Management. The Trust's argument is contrary to the uncontested facts and the law.

1. The Release Applies to "All" "Legal Advisors" and "Attorneys"

Eversheds attorneys were "legal advisors" and "attorneys" for, among others, Management for the SEC Investigation settled as a Settlement Agreement condition.[8] Or in the words of *Wells*, Eversheds lawyers were "not remote strangers to the parties or events at issue" and were thus far from "unknown third parties" at the time the Trustee and his lawyers negotiated the Release.[9]

To the contrary, Eversheds' role as SEC enforcement counsel was essential to settling with the SEC and finalizing the Settlement Agreement. The Trustee and his counsel were well-aware of Eversheds' role when negotiating the "handmade" Release."[10] Despite their knowledge, they chose not to limit the scope of released attorneys to those that continued to represent Management on the date of the Settlement Agreement as the Trustee now urges[11], or to carve out claims against Eversheds as they had with others.[12] Again, in the words of New York's highest court, if the Trust "intended to reserve" claims against Eversheds, it "should have added words of reservation or in the alternative" deleted the word "all" as a modifier to "legal advisors" and "attorneys."[13]

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[8] For instance, Eversheds was not among "all" attorneys that represented "former spouses" or "former trusts." (Trust Op. ¶43.) Rather, Eversheds was among "all" the "legal advisors" and "attorneys" that represented "Medley," among others. Christakos Decl., Ex. 1, **"Settlement Agreement"** §6.1.

[9] 526 N.E.2d at 15.

[10] *Wells*, 526 N.E.2d at 12.

[11] Trust Op. ¶43.

[12] Settlement Agreement §6.1 (preserving claims against "direct or indirect subsidiaries" and "Preserved Claims"). *See Coby Group, LLC v. Kriss*, 881 N.Y.S.2d 101, 102 (N.Y. App. Div. 1st Dep't 2009) (release "clear and unambiguous" where it "does not limit the word 'attorneys' and does not exclude the claims that plaintiff asserts herein").

[13] *In re Schaefer*, 221 N.E.2d 538, 540 (N.Y. 1966).

The Trustee's new assertion that he "never intended to release Eversheds for anything" is irrelevant.[14] As a sophisticated attorney in his own right, the Trustee apparently did not manifest his lack of intent in real time and never revised the Release to meet his purported "intent." The Release language instead remains unambiguous and, it bears repeating, any "[u]ncommunicated subjective intent" alone cannot create an issue of fact where otherwise there is none.[15]

The Trust next insists the "standard" reason for including "attorneys" as release beneficiaries is to prevent the releasor from "circumventing the release by suing a released party's representative for the same conduct covered by the release."[16] Where, as here, however, the Settlement Agreement declares a "desire to finally and conclusively settle and compromise any and all Released Claims"[17], courts view the reason for including "attorneys" as "beneficiaries" unambiguous: the "desire for finality provides motive, but the language of the Settlement and Release Agreement also speaks for itself."[18] Indeed, including "attorneys" in a release for a "full satisfaction" of released claims recognizes that "to the extent that a claim is later asserted against counsel, the attorney might attempt to obtain further reimbursement from the settling client."[19] The Release avoids that result; it prevents a judgment against Eversheds that would entitle it to seek "reimbursement" from other Taube Released Parties for the services it had provided.

2. <u>Eversheds Remained Management's "Legal Advisors" and "Attorneys"</u>

In any event, Eversheds continued to represent Management on the Settlement Agreement date. The Trust, however, contends that because SEC enforcement had been postponed to enable

[14] Saccullo Decl. ¶7.

[15] *Wells*, 526 N.E.2d at 15.

[16] Trust Op. ¶39.

[17] Settlement Agreement at 2.

[18] *In re Rama Grp. of Companies, Inc.*, 496 B.R. 307, 312 (Bankr. W.D.N.Y. 2013).

[19] *Id.*

a separate law firm to attempt to negotiate a global settlement with the SEC and the Trust, Management had terminated Eversheds' representation as SEC counsel.[20] As "evidence," the Trust points to a lull in Eversheds' communications, legal work and billing. But any such lull was to be expected during efforts to settle being conducted by separate counsel.

Indeed, missing from the Trust's "evidence" is a document or declaration that Management terminated Eversheds' continuing representation.[21] The only communication submitted is a February 2022 email declaring Eversheds' representation *of the Debtor* at an end upon the SEC staff determining not to "recommend that the SEC take any enforcement action against Medley, LLC [*the Debtor*]"; the SEC offered no similar communication concerning *Management* and thus there is no related correspondence concluding Eversheds' representation of *Management*.[22]

In fact, real time communications establish the opposite. Eversheds' work was put on hold during negotiations and "other than the ongoing reduced costs for maintaining [Eversheds'] database, we are just waiting for word from the SEC for all our clients and not billing for any of the time we are spending on the insurance issues."[23] Moreover, as Eversheds' lead SEC attorney explained, by the time SEC negotiations commenced, (i) Management had submitted lengthy presentations to the SEC, (ii) Eversheds had met with the SEC in October 2021 and was awaiting an enforcement decision, (iii) given its multi-year role, Eversheds had extensive and continuing "institutional knowledge" and "expertise" relating to the investigation and witnesses should enforcement action continue, and thus (iv) Eversheds was "still representing Medley Management

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[20] *Id*.

[21] *See Beach TV Props., Inc. v. Solomon*, 306 F. Supp. 3d 70, 85 (D.D.C. 2018) ("representation ends when the parties agree that it has ended"); *JuxtaComm-Texas Software, LLC v. Axway*, Inc., No. 6:10CV11, 2010 WL 4920909, at *2 (E.D. Tex. Nov. 29, 2010) ("The general rule is that representation of a client ends when the purpose of that representation ends."). *See also* Morrison Decl., Ex. 1 at Tr. 36:11-37:13.

[22] Morrison Decl., Exs. 2, 3.

[23] Reply Declaration of Adam D. Cole, Esq., dated January 30, 2026 ("**Cole Repl. Decl**."), Ex. 3; *see* Morrison Decl., Ex. 1 at Tr. 35:13-36:19, 59:4-25.

until the completion of the settlement."[24] Like any potentially dispositive litigation submission, it should come as no surprise for there to have been a lull in Eversheds' legal work, invoices, and client communications while the SEC—not unlike any administrative agency, court and the like—considered the merits of the submissions and rendered an enforcement decision.

Retention of separate counsel to negotiate a global resolution made sense. As the Trust points out, a critical component of any global settlement was Eversheds' agreement to waive rights regarding its fees. The purpose for Eversheds' forbearance was "to permit the Liquidating Trust to receive the maximum benefit of the negotiated agreement" and "to maximize the distribution . . . by avoiding . . . the incumbent dissipation of assets and insurance proceeds that may otherwise be available for distribution to creditors."[25] Eversheds could not simultaneously protect its own interests and the interests of other parties in negotiating the forbearance agreements that were conditions precedent to any global settlement.[26] *But nothing precluded Eversheds from continuing to represent Management and others before the SEC should no global settlement be consummated*.

The Trust's next assertion—that it was "impossible for Eversheds to be counsel to the Taube Released Parties" because the SEC investigation was "resolved no later than February 1, 2022"[27]—is inconsistent with the undisputed facts, as demonstrated by its own evidence. The SEC staff decided not to recommend "any enforcement action *against Medley LLC* [the Debtor]" on February 1, 2022, but as the Trust's lead lawyer confirmed, SEC action against other targets had not been "resolved" and were subject of ongoing negotiations.[28] Rather, as the Trust's lead counsel

[24] Morrison Decl., Ex. 1 at Tr. 29:6-22-30:3, 39:22-40:16, 48:2-21, 59:4-61:8, 85:7-12.
[25] Christakos Decl., Ex. 2 at 1.
[26] Trust Op. ¶42; *see* Settlement Agreement §5.
[27] Trust Op. ¶41.
[28] Morrison Decl., Exs. 2, 3 (emphasis added).

confirmed less than one week before, Eversheds "of course, serves as counsel to Medley, its parent entity, Medley Management, Inc. ("MDLY"), and perhaps others."[29]

The Settlement Agreement itself confirms the investigation was not resolved; as of March 23, 2022, only a settlement "offer" had been delivered to the SEC. By its terms, the Settlement Agreement's "effectiveness" was "contingent upon the Taube Parties and the [SEC] *entering into* a settlement regarding the SEC's investigation . . . and *approval by the SEC*."[30] The SEC settlement would be "considered approved" only when the SEC filed "an Order Instituting Administrative and Cease-and-Desist Proceedings against the Taube Parties relating to the SEC Offer of Settlement." That condition was consistent with SEC regulations providing a settlement offer may be accepted or denied until "[f]inal acceptance" upon "issuance of findings and an order by the Commission."[31]

The SEC accepted on April 28, 2022, one month *after* the Settlement Agreement.[32] Until that time, the SEC could have rejected the offer and continued action against Management, with Eversheds defending as it had throughout the SEC investigation. Nothing the Trust offers indicates otherwise; indeed, the Trust obtained a Declaration from the separate attorney that negotiated the SEC settlement but nothing indicates he intended to represent any Taube Released Parties in a continued enforcement action rather than in settlement negotiations or that he had replaced Eversheds in doing so. Stated simply, Eversheds was Management's current, not "former" counsel.

In sum, Eversheds is a Taube Released Party as a matter of law based upon the unambiguous language of the Release and the uncontested facts.

[29] Cole Repl. Decl., Ex. 5.
[30] Settlement Agreement §2 (emphasis added); *see* Cole Repl. Decl., Ex. 4.
[31] 17 CFR § 201.240(c)(7).
[32] Cole Decl., Ex. C.

B. The Claims are "Released Claims": "Any and All" Means "Any and All"

The claims Released are also unambiguous. The Release applies to "*any and all Released Claims*" including "causes of action" whether "known or unknown . . . from conduct of *any* nature whatsoever, which the Liquidating Trust Releasing Parties may have or claim to have, against *any* of the Taube Released Parties."[33] "Released Claims" includes "*any Cause of Action* that the Liquidating Trust has against one or more of the Taube Released Parties that is not a Preserved Claim," specifically "including those arising under chapter 5 of the Bankruptcy Code and local, state and federal analogues."[34] And "Cause of Action" is also unambiguous; it includes:

- "*any* claims, . . . causes of action . . . liabilities, . . ., defenses, offsets . . . of *any* kind or character whatsoever";
- claims "whether known or unknown, foreseen or unforeseen, . . . suspected or unsuspected, in contract, tort, law, equity, or otherwise";
- and includes "claims pursuant to sections 544 through 550 . . . of the Bankruptcy Code."[35]

The claims against Eversheds fall squarely within the Release; in particular, they are "known or unknown" "claims pursuant to sections 544 through 550 . . . of the Bankruptcy Code."

The Trust's attempts to sow confusion in the Release's unambiguous terms fail. The Trust points to a "Whereas" recital purportedly stating the Settlement Agreement's "purpose" was "to resolve 'Causes of Action for damages on behalf of the Liquidating Trust against Medley, the Taubes, BTT and the Executives *in their capacity as directors, officers, stakeholders or otherwise* of the Debtor or [MDLY].'"[36] In fact, the recital merely states the Trust's "intent" to pursue such causes of action, and the following two recitals note that such causes of action are covered by

[33] Settlement Agreement §6.1 (emphasis added).
[34] *Id*. ¶J (emphasis added).
[35] Settlement Agreement, Schedule I (emphasis added).
[36] Trust Op. ¶44 (emphasis added).

insurance and are "Preserved Claims" unaffected by the Settlement Agreement.[37] Indeed, those "Preserved Claims" were expressly carved out from the Release to be resolved separately.[38]

The Release, by contrast, relates to "any and all Released Claims" that were *uninsured*, including claims "of *any* kind or character whatsoever."[39] *All* Taube Released Parties were released from "Released Claims" including "all" "legal advisors" and "attorneys." The Trustee's suggestion that the Release somehow applies only to "Wrongful Act" claims or to avoidance claims only against Management, the Taubes, the Brook Taube Trust and other officers—referred to by the Trust as "Taube Avoidance Actions"[40]—flies in the face of the unambiguous Release. Indeed, the Trust's suggestion is contrary to the law and would improperly render "meaningless" the list of released parties and the entire definition of "Causes of Action" in the Settlement Agreement.[41]

The Trust next contends certain avoidable transfers were "unknown" due to Eversheds' "concealment."[42] The Release, however, applies to "causes of action of whatever kind, nature or character" including "known or unknown, foreseen or unforeseen" claims.[43] The Trust's belief that a release of "wholly unknown" claims "does not make sense" is irrelevant since those are precisely the claims the Trust released and the settled law confirms it could do so.[44]

The Settlement Agreement goes even further in a provision entitled "Unknown Claims":

> The releases in Section 6 are executed with the *full knowledge and understanding* by the Parties that *there may be more serious consequences or damages that are now not known*. The Parties knowingly, voluntarily, and expressly *waive, to the fullest extent permitted by law, any and all rights they may have under any statute or any common law principle that would*

[37] Settlement Agreement ¶¶G-I & Schedule I.

[38] *Id*. ¶L & & §§4, 6.1 & n.1; Forbearance Agreement ¶¶D, E, 4, 5.

[39] *Id*. §6.1 & Schedule I.

[40] Trust Op. ¶¶13, 44.

[41] *See Dibrino v. Rockefeller Ctr. N., Inc*., 2025 WL 3670593, at *4 (N.Y. Dec. 18, 2025).

[42] Trust Op. ¶¶45-46.

[43] Settlement Agreement §6.1 & Schedule I.

[44] *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V*., 952 N.E.2d 995 (N.Y. 2011).

> *limit the effect of the releases in Section 6 based upon their knowledge at the time they execute this Agreement*.[45]

In other words, the Trust knowingly *waived* any purported knowledge defense to the Release's scope and knowingly *waived* "any common law principle"—such as fraudulent concealment of a released claim—that would limit the effectiveness of the Release.[46]

The Trust's attempt to attribute its purported lack of knowledge to "Eversheds' fraudulent concealment" also fails. The Trust's proposed defense that due to concealment, the full extent of claims was "unknown" was rejected by New York's highest court in *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*[47] In *Centro*, the releasors sought to avoid a release claiming that they were provided with "false information" that prevented them from "realiz[ing] the true value of the claims they were giving up." *Id*. at 1001. The court held that fraud was not a defense to a release that included "all manner of actions" including those "unknown at the time of contract" because the defendant was unable to establish the fraud elements, including "justifiable reliance," or to "identify a separate fraud from the subject of the release." *Id*. at 1000. The purported fraud instead related to concealment of the "true value" of claims that fell within the scope of the release.

The Trust seeks to avoid transfers to Eversheds under chapter 5 of the Bankruptcy Code. The purported "concealed" transfers are among the transfers the Trust seeks to avoid; they are not "separate" from the subject of the release.[48] The "concealed" avoidable transfers were claims that existed at the time of the Release and, even if "unknown," fall squarely within its scope. To the

[45] Settlement Agreement §7 (emphasis added).

[46] *See Jordan v. Mirra*, No. CV 14-1485-GAM, 2017 WL 4070646, at *9 (D. Del. Sept. 14, 2017) ("fraudulent procurement" of release defense rejected where "expressly barred by the terms of the Release"), *report and recommendation adopted*, 2017 WL 5749664 (D. Del. Nov. 28, 2017).

[47] 952 N.E.2d 995 (N.Y. 2011).

[48] Complaint ¶25.

extent the purported concealment prevented the Trust from "realiz[ing] the true value of the claims [it was] giving up," that is not a basis to avoid the release under *Centro.*

In any event, the Settlement Agreement and the Trustee's own admissions in his sworn testimony conclusively establish that any reliance upon Eversheds' purported concealment was unjustified also under the test confirmed in *Centro.* In *Centro*, the Court reiterated that:

> "'[I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.'"[49]

The Trustee concedes that prior to executing the Release, he possessed "the means available to him of knowing, by the exercise of ordinary intelligence," the pre-petition transfers made by the Debtor to Eversheds. Indeed, the Trustee concedes he engaged in an "investigation" that "included potential avoidance actions arising under chapter 5 of the Bankruptcy Code and local, state and federal law analogues" prior to March 2021.[50] The Trustee also executed a Settlement Agreement representing he was able to investigate and discover claims "including those arising under chapter 5 of the Bankruptcy Code and local, state and federal law analogues."[51]

The Trustee confirmed even more in his deposition. He described investigating pre-petition transfers "using the bank statements and other financial records of the company" obtained in late 2021 that "Counsel" "analyzed" and "[c]ertainly before March" avoidance claims were "flagged."[52] And "by early 2022" in "Q1," he "had sufficient information to determine" the

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[49] *Centro*, 952 N.E.2d at 1002 (quoting *DDJ Mgt., LLC v. Rhone Group L.L.C.*, 931 N.E.2d 87 (N.Y. 2010), quoting *Schumaker v. Mather*, 30 N.E. 755 (N.Y. 1892)).

[50] Saccullo Decl. ¶3.

[51] Settlement Agreement ¶¶J, 9.3.

[52] Cole Repl. Decl., Ex. 1 at Tr. 23:16-25:20; *see* Cole Repl. Decl., Ex. 2 at Tr. 51:7-17, 67:11-26.

preference amount upon which the purported concealment argument is based "was incorrect."[53] In short, given the Trustee's admitted access to the Debtor's records, including bank records, the fact of purported preferential transfers the Trustee now says were "concealed" were "not matters peculiarly within [Eversheds'] knowledge" and could have been discovered with minimal diligence.

For all these reasons, the Trustee released the claims asserted against Eversheds.

II. THE SETTLEMENT AGREEMENT CONFIRMS EVERSHEDS WAS RELEASED

The Trust urges reading the Settlement Agreement as a whole, an unremarkable request given "[a]mbiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement."[54] To be clear, however, where, as here, the Settlement Agreement "was negotiated between sophisticated, counseled business people negotiating at arm's length, courts should be especially reluctant to interpret an agreement as impliedly stating something which the parties' specifically did not include."[55] The Release applies to "all" "legal advisors" and "attorneys" and to "any and all Released Claims." The law precludes a "construction" to "'add or excise terms'" or to "distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."[56] The Trust improperly invites the Court to do just that.

A. The Release Unambiguously Applies to Third-Parties

The Trust contends only non-signatories identified by name as third-party beneficiaries may enforce the Release.[57] Where, as here, however, a releasee is identified by title or role, the

[53] Cole Repl. Decl., Ex 2 at Tr. 69:3-72:20.
[54] *Brad H. v. City of New York*, 951 N.E.2d 743, 746 (N.Y. 2011).
[55] *2138747 Ontario, Inc. v. Samsung C & T Corp*., 103 N.E.3d 774, 780 (N.Y. 2018) (internal quotations omitted).
[56] *Id*. (internal quotations omitted).
[57] Trust Op. ¶¶47-48.

release applies to the releasee and the releasee may enforce the release. Indeed, in *Wells* (the controlling decision the Trust again ignores), the court permitted non-signatory "financial advisors" to enforce a release of claims against a settling defendants' "agents . . . representatives . . . or against anyone else"; by including those terms, the financial advisors were "beneficiaries" of and permitted to enforce the release.[58] Applying *Wells*, non-signatory attorneys routinely enforce litigation releases, the scope of which include "agents and attorneys."[59] It is far from surprising, accordingly, that the Trust fails to reference a single case applying a purported "intent to benefit" rule to a release, much less a release that includes among its beneficiaries "agents" or "attorneys."[60]

That the Settlement Agreement refers to "Executives" as "third-party beneficiaries" of *all rights* under the agreement—including the right to continued insurance coverage and to settle Preserved Claims—does not serve to undermine Eversheds' beneficiary status under the Release. The Settlement Agreement does not refer to "Executives" as its "only" non-signatory beneficiaries. And the Trustee's attempt to lean on the *expresso unius* maxim cannot bear the weight because the maxim "should not be applied to defeat contractual intent that is otherwise manifest" from the face of the agreement or to render other terms in the contract meaningless.[61]

Here, the Release is unambiguous and under *Wells*, Eversheds is entitled to enforce the Release it as a beneficiary.

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[58] 526 N.E.2d at 11, 14.

[59] *Coby*, 881 N.Y.S.2d at 102; *see Berkowitz v. Fischbein, Badillo, Wagner & Harding*, 777 N.Y.S.2d 99, 101 (N.Y. App. Div. 1st Dept. 2004); *Argyle Cap. Mgmt. Corp. v. Lowenthal, Landau, Fischer & Bring, P.C.*, 690 N.Y.S.2d 256, 257 (N.Y. App. Div. 1st Dept. 1999).

[60] *See, e.g., Dormitory Auth. v. Samson Constr. Co*., 94 N.E.3d 456, 460 (N.Y. 2018) (intent to benefit applies to construction contract where court "generally required express contractual language stating that the contracting parties intended to benefit a third party"); *Mendel v. Henry Phipps Plaza W., Inc*., 844 N.E.2d 748, 751 (N.Y. 2006) (intent to benefit inapplicable when agreement "explicitly negates any intent to permit its enforcement by third parties").

[61] *Thomas v. Price*, 631 F. Supp. 114, 122 (S.D.N.Y. 1986); *see Quadrant Structured Prods. Co. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014) (*expressio unius* maxim may apply where court finds "ambiguity"); *New York Univ. v. Factory Mut. Ins. Co*., No. 15 CIV. 8505 (NRB), 2018 WL 1737745, at *11 (S.D.N.Y. Mar. 27, 2018) ("consistent with the general principle that interpretive tools need not be deployed when the contract is unambiguous, *expressio unius* should not be applied to create ambiguity where none would otherwise exist").

B. The Release is Consistent with the Eversheds Letter and Forbearance Agreement

The Trust contends the Settlement Agreement provided a "reciprocal release" of Section 503 claims that would render "no need for the Eversheds Letter by which Eversheds reserved its rights to collect its Administrative Fee Claim."[62] Eversheds did not execute the Settlement Agreement and was therefore not a releasor of any claims, including its administrative claim.[63] That being said, Eversheds is not pursuing recovery of its administrative claim from the estate.[64]

More importantly, the Eversheds Letter is a traditional side letter used in connection with contracts all the time that, as the Trustee acknowledges, "went effective simultaneously" with the Settlement Agreement.[65] Consistent with the Settlement Agreement, the Eversheds Letter modified the Release *as to Eversheds only* to permit it—*but not other Taube Released Parties*—to seek payment of administrative expenses subject to substantial preconditions.[66] In particular, the Eversheds Letter *confirmed* Eversheds "waiver" of "any right" to immediate payment under the "Final Fee Order" approving its administrative claim. It then provided, however, that Eversheds could later seek a recovery *only after* the Trust received "sufficient funds" from insurers and other Taube Related Parties (i) to make "Distributions" and fund an escrow for certain general unsecured noteholders and other creditors under the Plan, and (ii) to establish a reserve to cover other estate professionals "entitled to *pari passu* treatment" to Eversheds' administrative claim, *including recovery by the Trustee's present counsel*.[67] Thus, the Eversheds Letter read in conjunction with

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[62] Trust Op. ¶¶49-50.

[63] *See Killian v. Metropolitan Life Ins*. Co., 166 N.E. 798 (N.Y. 1929).

[64] Morrison Decl., Ex. 7 at Tr. 42:8-14. *See also* Main Case D.I. No. 686.

[65] Trust Op. ¶51; Morrison Decl., Ex. 1 at Tr. 68:1-9, 75:14-20; *id*. Ex. 7 at Tr. 12:2:8, 39:22-41:13. Side letter agreements are ancillary agreements to clarify rights in a main agreement and are routinely used in settlements. *See, e.g., In re LATAM Airlines Grp. S.A.,* No. 20-11254 (JLG), 2022 WL 272167, at *5 (Bankr. S.D.N.Y. Jan. 28, 2022).

[66] *See, e.g., Clarendon Nat'l Ins. Co. v. Trustmark Ins. Co.,* No. 09 CIV. 9896 (BSJ), 2012 WL 13176199, at *4 (S.D.N.Y. Jan. 13, 2012) (settlement agreement "modified" by executed "side letters").

[67] Christakos Decl., Ex. 2 ¶1.

the Settlement Agreement does not detract from the Release, but simply clarifies that a single Taube Released Party—Eversheds—may recover a limited claim only after a large recovery by unsecured creditors and the Trust's counsel. The Eversheds Letter is a typical side letter delivered simultaneously with and consistent with the Release, not evidence of some "newly offered interpretation" that "renders meaningless" the Settlement Agreement as the Trust bemoans.[68]

What would "render meaningless" unambiguous terms is the Trust's strained attempt to lean on the Eversheds Letter's and Forbearance Agreement's "recitals" to redefine the Release's scope and the "Taube Released Parties."[69] The recitals confirm the Trust had been (i) negotiating *uninsured* claims against "Seth Taube, Brook Taube and Medley Management, Inc." defined as the "Settling Defendants" and (ii) was "releasing Medley, the Medley D&Os, and certain other individuals and entities from the alleged Causes of Action that the Liquidating Trust has against one or more of the Insured Parties, except for the Preserved Claims." Both recitals were true as uninsured Causes of Action against "Settling Defendants" and "Insured Parties" were among the claims released.[70] But nothing in the recitals in the Eversheds Letter or Forbearance Agreement—neither of which recitals were made part of the Settlement Agreement—states that those were the *only* claims or parties being released under the Release.[71] As noted above, the Trustee's reformulation of the Release based on his "reading" of the recitals would render "superfluous" countless words, including "all," as applied to a long list of persons and entities, and "any and all" as applied to a long list of "Released Claims" and their corollary "Causes of Action."[72]

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[68] Trust Op. ¶52.

[69] Trust Op. ¶¶53-54.

[70] *See* Settlement Agreement § 6.1 & Schedule I.

[71] *See, e.g.*, *Doe v. UMG Recordings, Inc.*, No. 25 CIV. 2745 (NRB), 2025 WL 3268803, at *4 (S.D.N.Y. Nov. 24, 2025) (recital reference to a particular dispute did not restrict "plain language of the Agreement and Release which, by its terms, expressly applies to 'any and all' claims").

[72] *Dibrino v. Rockefeller Ctr. N., Inc.*, 2025 WL 3670593, at *4 (N.Y. Dec. 18, 2025).

C. The Trust Received Consideration

The Trust next argues Eversheds was not among "all" "legal advisors" and "attorneys" because "Eversheds contributed no value to the to the Liquidating Trust for the alleged release of avoidance action claims against Eversheds."[73] Even assuming the factual assertion true, a release is valid and enforceable even in absence of consideration under New York's General Obligations Law.[74] The Trustee fails to mention this controlling statute or the cases confirming its application.

In any event, the Trust received substantial consideration. As the Settlement Agreement and Eversheds Letter explain, the purposes of the settlement and Eversheds' participation was to (i) "finally and conclusively settle and compromise any and all Released Claims," and (ii) permit the Trust "to maximize the distribution to all creditors in this case by avoiding unnecessary litigation and the incumbent dissipation of assets and insurance proceeds that may otherwise be available for distribution to creditors."[75] The Trustee accomplished that goal by entering into the Settlement Agreement, with the Forbearance Agreement and Eversheds Letter representing Eversheds' material concessions required as conditions to the Settlement Agreement under which unsecured creditors ultimately received millions in insurance proceeds on a priority basis with Eversheds subordinating its superior rights to the same proceeds. The Trust clearly received consideration under the Settlement Agreement which the Trustee expressly "acknowledged."[76]

III. THE INSURANCE SETTLEMENTS CONFIRM EVERSHEDS WAS RELEASED

After the Settlement Agreement was entered, the Trust proceeded to settle the "Preserved Claims" by March 2023, referred to in the Trust's Opposition as the "Insurance Settlement

[73] Trust Op. ¶55.

[74] N.Y. GOL § 15-303 ("A written instrument which purports to be a total or partial release of all claims, debts, demands or obligations, or a total or partial release of any particular claim, debt, demand or obligation, . . . shall not be invalid because of the absence of consideration or of a seal.").

[75] Christakos Decl., Ex. 2 at 1.

[76] Settlement Agreement at 2.

Agreements."[77] The Trust contends a footnote in the Insurance Settlement Agreements "includ[ed] a carve-out for claims against attorneys, including Eversheds, because by March 2023 the Liquidating Trust's investigation had uncovered Eversheds misrepresentations and omissions, the Court had vacated the Final Fee Order, and the Liquidating Trust had commenced this action."[78] If anything, the Trust's assertion and the footnote each confirms the Release *included* "attorneys, including Eversheds," because otherwise there would be no need for the attempted clarification to enable the Trust to proceed with "this action" one year later.

In any event, because the Release is unambiguous, a later statement by some (but not all) Settlement Agreement parties does not cause an ambiguity, much less is even relevant. It constitutes inadmissible "extrinsic evidence" of a later realization that the Release included claims against Eversheds.[79] Indeed, the footnotes do not constitute amendments to the Release because (i) an amendment would require "a written instrument executed by all the Parties" to the Settlement Agreement, including Management which did not sign the Insurance Settlement Agreements[80], and (ii) the Trustee confirmed in his deposition that the footnotes were not meant to be and did not constitute an amendment of the Settlement Agreement that created an *ex post facto* "carve out." [81]

The Insurance Settlement Agreements only confirm Eversheds was released under the Settlement Agreement.

[77] Trustee Op. ¶¶57, 58.
[78] Saccullo Decl. ¶9.
[79] *Wells*, 526 N.E.2d 12.
[80] Settlement Agreement ¶12.
[81] Cole Repl. Decl., Ex. 1 at Tr.157:11-21.

IV. THE RELEASE IS ENFORCEABLE

Continuing its kitchen-sink approach, the Trust next declares the Release "unenforceable" due to Eversheds' (i) fraud, (ii) breach of contract and (iii) waiver. Each of these purported defenses to the Release is invalid as a matter of law.

A. The Trust's "Fraud" Defense Fails

The Trust repeats it was "not aware" of "any cause of action" against Eversheds, due to Eversheds' "fail[ure] to exercise proper diligence" and related "misrepresentation and fraudulent concealment," until the Trust "became aware of the pre-petition payments made to Eversheds."[82] It is true that Eversheds made a mistake in not identifying a 90-day, pre-petition transfer in its retention application, and misidentified the insurance source of certain payments, but alerted the Court as soon as it was made aware of the error.[83] Nevertheless, a failure to exercise diligence is not fraud, much less fraud sufficient to avoid the Release.

Moreover, as explained above, the Trust's fraud defense fails because (i) the Release, by its terms, was voluntarily executed with "full knowledge . . . that there may be more serious consequences or damages that are now not known" and a waiver of "any common law principle that would limit the effect of the releases,"[84] (ii) the purportedly concealed transfers were not "separate . . . from the subject of the release"[85], and (iii) the Trust is unable to establish "justifiable reliance" because it had "'the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation'" as of October 2021, but failed to "'make use of those means.'"[86]

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[82] Trustee Op. ¶60.
[83] Main Case D.I. No. 609.
[84] Settlement Agreement §7.
[85] *Centro*, 952 N.E.2d at 1001.
[86] *Id.* at 1002 (quoting *DDJ Mgt.*, 931 N.E.2d at 87).

B. The Trust's "Breach of Contract" Defense Fails

The Trustee next repeats that the Release and Eversheds Letter conflict and that Eversheds "breached" the Release by asserting claims the Eversheds Letter preserved.[87] As explained above, Eversheds did not execute the Settlement Agreement and did not agree to a release it could breach.[88] And the Eversheds Letter contemplated Eversheds seeking payment of administrative expenses subject to significant "waivers" and preconditions. Seeking the very expenses accorded under the Eversheds Letter is consistent with, not a breach of, the Settlement Agreement.

C. The Trustee's "Waiver" Defense Fails

The Trustee must not have considered Fed. R. Civ. P. 15 before arguing that Eversheds' Release defense was untimely asserted.[89] To be sure, the "Release" was not among Eversheds' defenses in its initial Answer due to an oversight.[90] But Rule 15(a)(2) provides that an answer may be amended "with the opposing party's written consent." And after consent, the assertion of a new defense "that arose out of the conduct, transaction or occurrence" to which the original answer related, "relates back to the date of the original pleading."[91]

On May 1, 2025, the Trust consented to Eversheds amending its answer to include an affirmative defense of "settlement and release."[92] The same day, Eversheds filed it Amended Answer in which it included its "Settlement and Release" affirmative defense that:

> All Counts in the Complaint are barred, in whole or part, by settlement and release. Among other things, the Plaintiff released all claims set forth in the Counts in the Complaint under a *Settlement Agreement and Release*, signed

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[87] Trust Op. ¶¶62-63.

[88] *See Killian*, 166 N.E. at 798.

[89] Trust Op. ¶¶65-68.

[90] Christakos Decl. ¶¶13-14; Morrison Decl., Ex. 7 at Tr. 25:14-26:11.

[91] *Id.* 15(c)(1)(B). *See also Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 553 (2010) ("Rule 15(c) makes clear, however, the speed with which a plaintiff moves to amend her complaint or files an amended complaint after obtaining leave to do so has no bearing on whether the amended complaint relates back.").

[92] D.I. No. 24.

> on March 23, 2022, and other agreements referred to and contemplated therein.[93]

As the Release is directed to the very "conduct, transaction or occurrence" at issue in this action, Eversheds' "Settlement and Release" defense relates back to its original answer under Rule 15(c)(1)(B). The Trustee's "waiver" defense to the Release, accordingly, fails as a matter of law.

CONCLUSION

For all the foregoing reasons, the Court should enter summary judgment dismissing the Complaint.

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Wilmington, Delaware

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[93] D.I. No. 25 at 13.