O'MELVENY & MYERS LLP
Tancred V. Schiavoni (admitted *pro hac vice*)
1301 Avenue of the Americas, Suite 1700
New York, NY 10019
Telephone: (212) 326-2000
Facsimile: (212) 408-2419
Email: tschiavoni@omm.com

Alexandra J. Wolter (S.B. #317951)
400 South Hope Street, Suite 1900
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
Email: awolter@omm.com

Attorneys for Pacific Indemnity Company, Pacific Employers Insurance Company, Insurance Company of North America, and Westchester Fire Insurance Company

CLYDE & CO US LLP
Alexander Potente (S.B. #208240)
Jason J. Chorley (S.B. #263225)
150 California Street, 15th Floor
San Francisco, CA 94111 USA
Telephone: (415) 365-9800
Email: alex.potente@clydeco.us
jason.chorley@clydeco.us

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:

THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole,

Debtor

PACIFIC INSURERS' OBJECTION TO APPROVAL OF DISCLOSURE STATEMENTS AND SOLICITATION PROCEDURES [DKT. NO. 2753]

Case No. 23-40523 WJL

Chapter 11

Judge: Hon. William J. Lafferty

Hearing
Date: April 10, 2026
Time: 8:00 a.m. (Pacific Time)
Place: United States Bankruptcy Court
1300 Clay Street, Courtroom 200
Oakland, California 94612

TABLE OF CONTENTS

Page

The Pacific Insurers, as defined in the signature block, hereby file this objection (the "**Objection**") to this Court approving the *Disclosure Statement For The Official Committee of Unsecured Creditors' Plan of Reorganization, Dated March 27, 2026* [Dkt. No. 2753] (the "**Committee**" and "**Committee Disclosure Statement,**" respectively) and any related proposed solicitation procedures and proposed form of ballot. In support of this Objection, the Pacific Insurers respectfully state as follows:

PRELIMINARY STATEMENT

The Committee has not presented a motion to this Court seeking approval of the Committee Disclosure Statement, nor has the Committee proposed solicitation procedures or a form of ballot for its plan or a motion to approve them. The Committee Disclosure Statement includes only a generic reference to solicitation that provides no actual information about how votes will be solicited, what the form of ballot will look like, or whether parties even have the right to consent or not consent to the plan's releases and injunctions. *See* Committee Disclosure Statement, Art. I.B.

Yet, if the Committee Plan is confirmed, the Committee contends that "ALL HOLDERS OF CLAIMS AGAINST THE DEBTOR (INCLUDING, WITHOUT LIMITATION, THOSE HOLDERS OF CLAIMS WHO DO NOT SUBMIT BALLOTS TO ACCEPT OR REJECT THE COMMITTEE PLAN OR WHO ARE NOT ENTITLED TO VOTE ON THE COMMITTEE PLAN, EXCEPT AS OTHERWISE PROVIDED IN THE COMMITTEE PLAN) WILL BE BOUND BY THE TERMS OF THE COMMITTEE PLAN AND THE TRANSACTIONS DESCRIBED IN THE COMMITTEE PLAN," as stated in the "Important Information About This Disclosure Statement" section found on the first two pages of the Committee Disclosure Statement. Committee Disclosure Statement, at i-ii (emphasis in original).

The Committee seeks to bind all parties to a plan using a disclosure statement that does not provide the barest of information about how it is proposed that voting takes place and no opportunity for anyone to object to the form of ballots or solicitation procedures. Moreover, the provisions of the plan that are described as binding on all parties include the terms by which claims will be allowed, valued and handled which are contained in Plan Documents that have not been

filed and, hence, the Court has no way to assess the adequacy of disclosure.

The Supreme Court held in *Harrington v. Purdue Pharma L.P.* that bankruptcy courts cannot involuntarily alter relationships between non-debtors by imposing nonconsensual releases of, or injunctions barring, claims between them. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 09, 227 (2024). Parties cannot be deemed to consent simply because they voted in favor of a plan, did not vote at all or were precluded by the plan from voting. Non-debtor third-party releases that do not require the affirmative and unambiguous indication of consent by the impacted parties are legally impermissible.

Recently, the Chief Judge for the Bankruptcy Court for the Western District of New York held in a diocesan bankruptcy that opt-outs are insufficient to imply consent and therefore are nonconsensual and barred by the Supreme Court in *Purdue*. *In re The Diocese of Buffalo, N.Y.*, Case No. 20-10322 (CLB), ECF Doc. No. 4616, at 7-8 (Bankr. W.D.N.Y. Feb. 27, 2026) (applying principals of contract law to find consent cannot be implied from silence). This case directly applies here. The court in *Buffalo* correctly concluded that, because releases are a voluntary contract among affected parties, it is governed by state law rather than bankruptcy law. *Id.* at 5. Applying New York law, which, like California law, recognizes that silence does not constitute consent except in the most limited circumstances, the court determined that deeming silence to be acceptance is both ineffective as a matter of law and an improper use of the bankruptcy process. *Id.* at 5-6.

Here, the Committee Plan is structured around the novel, entirely unconfirmable artifice of what is termed a "differed discharge." *See* Committee Plan, Section 13.3. Since the "discharge" is deferred, the Committee Plan resorts to the use of a channeling injunction, insurance entity injunction and releases to impair contract claims against the insureds under the contracts of insurance for breach and reimbursement of costs incurred for uncovered claims. Separately, the insurance entity injunction is deployed to impair claims among non-settled insurers and settled insurers for allocation and contribution.

Any proposal to use master ballot solicitation or balloting controlled by plaintiff firms should also be rejected. Such solicitation procedures are riddled with problems, including (i) the lack of disclosure directly to Claimants, with solicitation packets going to the law firms instead,

(ii) impermissible self-certification by law firms that they are authorized to vote on behalf of their clients without necessary disclosures required by Bankruptcy Rule 2019 and evidence of such authority, and (iii) allows a small handful of law firms to control the Claimants' class vote as more than half of the Abuse Claims were filed by just four law firms.

This Court should deny approval of the Committee Disclosure Statement based on these substantive deficiencies alone. As discussed herein, the Court should (i) reject any proposed opt-out procedure for non-debtor third-party releases and instead (ii) require the Debtor and/or Committee to obtain affirmative consent to the releases and injunctions through an opt-in procedure by which the right to sue is relinquished only through express and unambiguous consent.

STATEMENT OF FACTS

On March 27, 2026, the Committee filed the Committee Disclosure Statement [Dkt. No. 2753] and Plan of Reorganization [Dkt. No. 2752] (the "**Committee Plan**"), but did not file a motion seeking approval of any proposed solicitation, voting, and tabulation procedures, nor did the Committee file any proposed form of ballot. The Committee Disclosure Statement does not contain any description of a claimant's need to express their consent or non-consent to such releases and injunctions in the balloting process.

The Committee Plan includes injunctions that impair the rights to pursue the claims against any Settling Insurers. *See* Committee Plan, Section 8.8.1. ("Each Insurance Settlement Agreement is effective and binding upon all Persons who have notice, and any of the foregoing Persons' successors and assigns, upon the entry of a Final Order approving the Insurance Settlement Agreement" and "[a]ll payments by each Settling Insurer to the Survivors' Trust, and all releases contained in an Insurance Settlement Agreement, shall occur and/or be effective according to the terms of each such agreement"). Any releases will become effective with only notice and without soliciting consent to such releases from the claimants. The same is true with regard to the channeling injunction, releases and insurance entity injunction that are imposed to impair claims for reimbursement against insured and other contract claims in the event of rulings of no coverage.

Since there is no proposed form of ballot or proposed solicitation procedures, it cannot be known whether the Committee will seek to utilize master ballots at the time of filing this Objection.

Just four of the plaintiffs' law firms representing claimants in this case filed over 50% of the Abuse Claims. Each of those four firms would only be required to submit one master ballot on behalf of all of their clients comprising more than half of the total abuse claims in this bankruptcy case.

Various Insurers filed proofs of claim with respect to policies in place during the bankruptcy including, Westchester Surplus Lines Insurance Company, and Executive Risk Indemnity Inc. addressing insurance premiums (including audit premiums), deductibles, funded deductibles, expenses, taxes, assessments and surcharges.

ARGUMENT

I. OPTING-IN TO RELEASES IS THE ONLY TRUE MANIFESTATION OF CONSENT

To the extent the Committee seeks to allow opt-out releases and injunctions it is asking this Court to do what controlling law forbids: treat silence as consent to a releases. That position is contrary to this Court's prior rulings, the Supreme Court's decision in *Purdue*, and applicable state law as further discussed below. Opt-out releases are inherently nonconsensual and cannot survive scrutiny under any of those authorities.

The Ninth Circuit has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors. *In re PG&E Corp. & Pac. Gas & Elec. Co.*, No. AP 25-03027-DM, 2025 WL 2690234, at *5 (Bankr. N.D. Cal. Sept. 19, 2025) ("[i]n the Ninth Circuit, third party releases have been prohibited for decades); *see also In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995) (collecting cases); *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 (9th Cir. 2002). Those decisions reflect the Ninth Circuit's consistently strict approach to non-debtor releases. Moreover, as this Court explained in *PG&E*, *Lowenschuss,* it condemns situations where consent is deemed "simply by voting in favor of the plan or by not voting at all." *In re PG & E Corp.*, 617 B.R. 671, 683 (Bankr. N.D. Cal. 2020).

In *PG&E*, this Court already held that a non-debtor release is consensual, and thus permissible, only when non-debtor parties affirmatively opt in to a release of their claims. Under the plan at issue in that case, creditors only became a "Releasing Party" only if it was "solicited

and voluntarily indicate[d] on a duly completed Ballot [that it] opt[ed] into granting such releases." *Id.* at 683.

This Court was clear that the releases at issue were permissible only because they were consensual, requiring each affected claimant to affirmatively opt in, because § 524(e) prohibits only nonconsensual third-party releases. *Id.* at 683 ("[a]s releases in Section 10.9(b) are consensual and require an affirmative opt-in by the affected creditor, the court determines that such releases do not violate section 524(e), which prohibits only nonconsensual third-party releases.").

In further support of its conclusion, this Court cited *Station Casinos* which provided that "[a] release of non-debtor third parties *voluntarily and knowingly* given by a creditor or equity holder in connection with a chapter 11 plan does not implicate the concerns regarding third party releases discussed by the Ninth Circuit Court of Appeals in *Lowenschuss*."). *Id.* at 684 (citing *In re Station Casinos, Inc.*, No. 09-52477, 2011 WL 6813607 (Bankr. D. Nev. June 08, 2011) (emphasis added).

Similarly, the Bankruptcy Court for the Eastern District of California in *Hotel Mt. Lassen* established that "[a]ny third-party release in connection with a plan or reorganization, at a minimum, must be fully disclosed and *purely voluntary* on the part of the releasing parties and cannot unfairly discriminate against others. In the Ninth Circuit and other jurisdictions that prohibit compelled third-party releases, any third-party release associated with a plan of reorganization draws its vitality from its status as a *voluntary contractual agreement* between the releasing and the released parties, rather than by virtue of the court's order confirming the plan." *In re Hotel Mt. Lassen, Inc.*, 207 B.R. 935, 941 (Bankr. E.D. Cal. 1997) (emphasis added).

Taken together, these principles and applicable state law (as further discussed below), foreclose any inference of consent to a non-debtor release from silence, inaction, or other passive conduct. Neither voting in favor of a plan containing a release provision nor failing to submit a ballot constitutes the requisite assent. Rather, consent must be affirmatively, clearly, and objectively manifested, and, as this Court correctly recognized in PG&E, only an opt-in mechanism can ensure that level of consent. *Id.*

II. STATE CONTRACT LAW GOVERNS WHETHER CREDITORS CONSENT TO A NON-DEBTOR RELEASE

The Supreme Court held in *Harrington v. Purdue Pharma L.P.* that bankruptcy courts cannot involuntarily alter relationships between non-debtors by imposing nonconsensual releases of, or injunctions barring, claims between them. *Harrington v. Purdue Pharma L.P.* 603 U.S. 204, 209, 227 (2024).

A consensual third-party release is a separate agreement between non-debtors governed by non-bankruptcy law. As the Supreme Court recognized in *Purdue*, a release is a type of settlement agreement. *Purdue*, 603 U.S. at 223 (explaining that what the Sacklers sought was not "a traditional release" because "'settlements are, by definition, consensual'").

After *Purdue*, a non-consensual third-party release is no longer "an ordinary plan provision that can properly be entered by 'default' in the absence of an objection." *In re Smallhold, Inc.*, 665 B.R. 704, 709 (Bankr. D. Del. 2024); *see also id.* at 719 ("After [*Purdue*], regardless of what facts the debtor may establish at the confirmation hearing, the third-party release is no longer a potentially permissible plan provision."). Because *Purdue* makes the existence of actual consent an essential predicate to the *lawful* presence of a third-party release, the mere *presence* of such a release cannot by itself establish its lawfulness—affirmative signal of consent is required. *Id.* at 709, 720.

Thus, not objecting to the Plan or appealing is not the same as consenting to third-party releases. "[R]eleases cannot be described as 'consensual' on the ground that the creditor's failure to assert an objection effectively allowed the release to be imposed by virtue of the creditor's default"; contract law and *Purdue* require affirmative manifestation. *Smallhold*, 665 B.R. at 720 (holding that after *Purdue*, "in the absence of some sort of affirmative expression of consent that would be sufficient as a matter of contract law, the creditor's silence in the face of a plan and form of ballot can no longer be sufficient").

Three inconsistent tests have been suggested for determining whether a third-party release included in a bankruptcy court order or confirmed plan is consensual: (1) it is only consensual

when there is valid consent under applicable state contract law[1]; (2) parties who do not opt out can be deemed to have consented because class-action settlements are binding on those who do not opt-out[2]; and (3) parties can be deemed to have consented the same way that a litigant may forfeit rights by failing to timely respond in litigation.[3]

The first test is the correct one. State law governs whether non-debtors have agreed to release each other. Nothing in the Bankruptcy Code allows parties to disregard state law when a plan proponent seek to impose third-party releases in a plan.

The "'basic federal rule in bankruptcy is that state law governs the substance of claims.'" *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas/ & Elec. Co.*, 549 U.S. 443, 450 (2007); *accord Butner v. United States*, 440 U.S. 48, 55-57 (1979). This is because "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000).

Courts thus apply state law when the question is, for example, whether a debtor has entered a valid settlement agreement. *See e.g., In re Rains*, 428 F.3d 893, 901 (9th Cir. 2005) (applying California state law to determine the validity of a settlement agreement) (citing *Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir.1995) (holding that the validity of settlements in bankruptcy cases is best resolved by reference to state contracts law)); *American Prairie Constr. Co. v. Hoich*, 594 F.3d 1015, 1023 (8th Cir. 2010) ("We apply South Dakota law to determine whether a settlement agreement was formed."); *PRLP 2011 Holdings LLC v. Manuel Mediavilla, Inc. (In re Manuel Mediavilla, Inc.)*, 568 B.R. 551, 567-68 (B.A.P. 1st Cir. 2017) (per curiam) (observing that "the Bankruptcy Code does not provide explicit rules for the interpretation or construction of agreements").

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[1] *See, e.g., In re Smallhold, Inc.*, 665 B.R. 704, 720 (Bankr. D. Del. 2024); *Emerge Energy Services, LP*, No. 19¬11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019); *In re Digital Impact, Inc.*, 223 B.R. 1, 14-15 (Bankr. N.D. Okla. 1998); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (Bankr. D.N.J. 1997).

[2] *See, e.g., In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 n.120 (Bankr. S.D. Tex. 2024).

[3] *See, e.g., In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 WL 2655592, at *5-*6 (Bankr. D. Del. Mar. 27, 2023), *abrogated by Smallhold, Inc., 665 B.R. at 716; In re LATAM Airlines Grp. SA*, No. 20-11254, 2022 WL 2206829, at *46 (Bankr. S.D.N.Y. June 18, 2022); *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022).

The Bankruptcy Code is generally concerned with the relationship between a debtor and its creditors, *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-14 (1938) ("The subject of bankruptcies is nothing less than the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief."), not the relationships among *non*-debtors. Given that applicable state law generally governs the relationship between debtors and creditors, applicable state law—and not federal bankruptcy law—must govern property and contractual rights between non-debtors.

The rule is no different for third-party releases. No Bankruptcy Code provision governs claims between non-debtors. Nor does the Bankruptcy Code define "consent," a "non-debtor release," or a "third party release." *See generally* 11 U.S.C. § 101. Because there is no federal statute that preempts state law governing when and whether non-debtors have released each other, state law applies, and bankruptcy courts may not create their own federal rule of decision. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In *Erie*, the Supreme Court held that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Id*. at 78. "[O]nly limited areas exist in which federal judges may appropriately craft the rule of decision," such as "admiralty disputes and certain controversies between States." *Rodriguez v. FDIC*, 589 U.S. 132, 136 (2020); *see also Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (plurality) ("For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law must govern because there can be no other law.'").

The District Court in the Southern District of New York and the Bankruptcy Court in the Western District of New York have both already held that the validity of a consensual non-debtor release is determined by applicable state law. In *In re GOL Linhas Aéreas Inteligentes S.A., et al.*, 675 B.R. 125, 131 (S.D.N.Y. 2025), the District Court, applying New York state law and Federal law, found "the general principles of contract law, as embodied in the Restatement of Contracts, establish that, outside of rare exceptions, consent cannot be implied from silence. Thus, the third-party releases here are nonconsensual under federal law as well." In *In re Tonawanda Coke*

Corporation, 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024), also a mass tort case, the Bankruptcy Court for the Western District of New York observed:

> Hence, any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent. Not authorized by any provision of the Bankruptcy Code, any such consensual agreement would be governed instead by state law.

Applying state law, the Southern District of New York concluded: "[w]e find that the mere ability to opt out of a release is insufficient to establish that consent." *Id.* at 223. Even more recently, Judge Bucki in the Western District of New York agreed with the analysis set forth in *In re GOL Linhas* to find that opt-outs are insufficient to imply consent when applying the principles of contract law and therefore are nonconsensual and barred by the Supreme Court in *Purdue*. *In re The Diocese of Buffalo, N.Y.*, Case No. 20-10322 (CLB), ECF Doc. No. 4616, at 7-8 (Bankr. W.D.N.Y. Feb. 27, 2026) (applying principles of contract law to find consent cannot be implied from silence). This case directly applies here because the facts are the same: the claimants there were subjected to the same arbitrary impositions at issue here by the debtor and the unsecured creditors committee, including an opt-out mechanism for third-party releases, with their silence deemed consent. *Id.* at 3.

The court in *Buffalo* correctly concluded that, because a third-party release is a voluntary contract among affected parties, it is governed by state law rather than bankruptcy law. *Id.* at 5. Applying New York law, which, like California law, recognizes that silence does not constitute consent except in limited circumstances, the court determined that deeming silence to be acceptance is both ineffective as a matter of law and an improper use of the bankruptcy process. *Id.* at 5-6.

Accordingly, in the absence of controlling federal authority, and because this Court is confronted with the same issues addressed in *Buffalo*, including whether third-party releases may be imposed through an opt-out mechanism, it should apply state law to determine whether deeming silence as consent through that mechanism can, as a matter of law, validly establish non-debtor parties' consent to non-debtor releases.

III. UNDER CALIFORNIA LAW, NOT OPTING OUT OF A THIRD-PARTY RELEASE IS NOT CONSENT TO IT

1. Under California Law, Silence is Not Consent

Under California law, the essential elements of a contract are: "(1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and, (4) A sufficient cause or consideration." Cal. Civ. Code, § 1550. The consent of the parties, or mutual assent is an essential element of any contract. *Marselian v. Wells Fargo & Co.*, 514 F. Supp. 3d 1166, 1173 (N.D. Cal. 2021) (quoting *Donovan v. RRL Corp.*, 26 Cal. 4th 261, 270, 109 Cal.Rptr.2d 807, 27 P.3d 702 (2001)).

Mutual consent is established objectively from the parties' outward words and conduct and not from their unexpressed intentions or private understandings. *Doe v. Roblox Corp.*, 602 F. Supp. 3d 1243, 1255 (N.D. Cal. 2022) (internal citations omitted). Thus, the true intent of a party is irrelevant if it is unexpressed. *United Com. Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992) (internal citations omitted).

For that reason, silence in the face of an offer does not constitute acceptance, except in limited circumstances. *S. California Acoustics Co. v. C. V. Holder, Inc.*, 71 Cal. 2d 719, 722, 456 P.2d 975, 978 (1969); *see also Norcia v. Samsung Telecommunications Am., LLC*, 845 F.3d 1279, 1284–85 (9th Cir. 2017) (describing exceptions to the general rule that silence or inaction does not constitute acceptance of an offer).

California courts also look to the Restatement (Second) of Contracts (1981) (the "Restatement"), which sets out blackletter principles of contract law that state courts across the country generally agree on. *See, e.g., In re W. Asbestos Co.*, 416 B.R. 670, 700 (N.D. Cal. 2009), *aff'd sub nom. Renfrew v. Hartford Acc. & Indem. Co.*, 406 F. App'x 227 (9th Cir. 2010) (citing Restatement § 69(1)(b); *In re Uber Techs., Inc.*, 734 F. Supp. 3d 934, 944 (N.D. Cal. 2024), *appeal dismissed and remanded sub nom. Doe LS 340 v. Uber Techs., Inc.*, No. 24-5063, 2025 WL 752485 (9th Cir. Mar. 10, 2025) (citing Restatement § 178(1)).

With respect to silence as a manifestation of consent, the Restatement recognizes there are limited circumstances when "silence" or "inaction" can demonstrate consent. Restatement §§ 19(1), 69(1). But those circumstances are "exceptional." Restatement § 69 cmt. a. Moreover,

these exceptions are really forms of estoppel preventing an offeree who engaged in wrongful or deceptive conduct from denying the formation of a contract. Those exceptions are not applicable here. Restatement § 69(1); *see also* Restatement § 69 cmt. c ("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."). And, as discussed below, California courts generally follow the same principles in determining when silence may constitute acceptance.

First, silence may operate as acceptance "[w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation." Restatement § 69(1)(a); *see also Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal. App. 4th 1372, 1386-87, 25 Cal. Rptr. 2d 242, 251 (1993), *as modified on denial of reh'g* (Jan. 7, 1994) (holding that in light of the existing relationship between insureds and the insurance company, the insured's retention of a renewal certification was sufficient evidence of acceptance of renewal policy under California law); and Cal. Civ. Code, § 1589. This exception also clearly does not apply here.

Second, silence may operate as acceptance "[w]here the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer." Restatement § 69(1)(b). Because "[t]he tactic of attempting to create a contract. . . . on the theory that silence and inaction would constitute an acceptance, has been consistently rejected by the courts," *see Sorg v. Fred Weisz & Assocs.*, 14 Cal. App. 3d 78, 81, 91 Cal. Rptr. 918, 919 (Ct. App. 1970) (collecting cases), courts considering whether silence may constitute acceptance examine whether the offeree had a duty to speak, taking into account factors such as the length and intensity of the parties' negotiations and whether they had an established course of dealing throughout the bankruptcy case. *See e.g. In re W. Asbestos Co.*, 416 B.R. at 700. In any event, this exception also clearly does not apply because the Claimants are under no duty to "speak" or vote on the Plan.

Third, silence may operate as acceptance "[w]here because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept." Restatement § 69(1)(c); *see also S. California Acoustics Co.*, 71 Cal. 2d 719 at 722 (not applying

Restatement but noting that "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance.") (internal citations omitted). The Restatement's comments further clarify that section 69(1)(c) refers to an "[e]xplicit statement by the offeree, usage of trade, or a course of dealing" or "exercise of dominion." Restatement § 69 cmts. d and e. No such circumstances exist here. This exception likewise does not apply. There have been no ongoing or prior course of dealings at all that the Committee (or anyone) can point to that would make it reasonable for them to believe that any Abuse Claimant has a duty to provide notice that he or she does not intend to accept the Plan's offer of third-party releases.

Thus, under California law, where the recipient of an offer is under no duty to speak, silence, may not be translated into acceptance even when the offer purports to attach that effect to it. *Norcia*, 845 F.3d at 1284 (an offeree's silence does not constitute acceptance when "the person to whom [the offer] is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offeror cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance.") (citing *Leslie v. Brown Bros. Inc.*, 208 Cal. 606, 621, 283 P. 936 (1929) and 1 Witkin, Summary of California Law, Contracts § 193 (10th ed. 2005)).

Here, the Plan seeks to impose a third-party release in favor of each of the Released Parties unless he or she opts out of it. In other words, the Committee would ask this Court to deem consent to exist when an Abuse Claimant is merely silent—not checking a box labelled "OPT OUT" on a ballot (even if he or she rejects the Plan), as well as not responding at all.

But a party has ***no duty*** to vote on the Plan, or any plan, let alone respond to an opt-out concerning their rights against other non-debtors. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan). Even where there are conspicuous warnings that a party will be bound if they remain silent, that is not sufficient to recast a party's silence as consent to a third-party release. *See In re SunEdison, Inc.*, 576 B.R. 453, 460-61 (Bankr. S.D.N.Y. 2017) (rejecting the argument "that the warning in the Disclosure Statement and the ballots regarding the potential effect of silence gave rise to a duty to speak").

Bankruptcy courts have largely addressed these basic contract law principles, including that an agreement can be proven only by a party's action or other manifestation of consent—not inaction or "silence." *See In re Emerge Energy Servs. LP*, 2019 WL 7634308, at *18 (Bankr. D. Del. 2019) (holding that, unlike in the context of claims objections where creditors have a duty to respond, "basic contract principles" apply in the context of third-party releases, and that even a ballot with an opt-out form and notice of "the implications of a failure to opt-out, the Court cannot on the record before it find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release"). Consent cannot be imputed or "deemed" based on a party's silence or failure to object—rather, consent must be affirmatively shown to exist. *Patterson et al. v. Mahwah Bergen Ret. Grp., Inc*., 636 B.R. 641 at 686 (E.D. Va. 2022) (the "general rule of contracts" is that "silence cannot manifest consent"); *McGurn v. Bell Microproducts, Inc.,* 284 F.3d 86, 94 (1st Cir. 2002) (same).

Courts consistently require *sufficient and clear* notice about third-party releases for them to be binding upon voting and nonvoting creditors,[4] and, since Purdue, generally a mechanism for creditors to affirmatively express their consent. *See, e.g., In re Tonawanda Coke Corp.*, 662 B.R. 220 (Bankr. W.D.N.Y. 2024) (requiring that creditors affirmatively agree to the releases to be enforceable under New York contract law); *In re Robertshaw US Holding Corp.*, 662 B.R. at 323-24 (finding "opt-out" procedures sufficient to provide consent for releases, which included detailed description about the third-party releases and the opt-out).

Thus, not objecting to the Plan or objecting is not the same as consenting to third-party releases. "[R]eleases cannot be described as 'consensual' on the ground that the creditor's failure to assert an objection effectively allowed the release to be imposed by virtue of the creditor's default"; contract law and Purdue require affirmative manifestation. *In re Smallhold, Inc.*, 665 B.R.

[4] *See, e.g., In re BowFlex Inc.*, No. 24-12364 (ABA) (Bankr. D.N.J. Aug. 23, 2024), Dkt. 631 (Oral Decision) (A. Altenburg, Jr., J.) (finding opt-out mechanism appropriate to establish a consensual release of non-debtors, only if releasing parties receive "very clear and conspicuous notices that explained exactly what was going on[] in terms of the third-party releases that were in the plan"); *In re Lower Bucks Hospital*, 571 F. App'x 139, 144 (3d Cir. 2014) (rejecting third-party release because it was not properly disclosed to creditors).

704, 720 (Bankr. D. Del. 2024) (holding that after *Purdue*, "in the absence of some sort of affirmative expression of consent that would be sufficient as a matter of contract law, the creditor's silence in the face of a plan and form of ballot can no longer be sufficient"). In *Smallhold*, Judge Goldblatt overruled the court's prior ruling in light of *Purdue* and held that "affirmative consent" is required to grant third-party releases. 665 B.R. at 716, 719 ("[I]t is no longer appropriate to require creditors to object or else be subject to (or be deemed to 'consent' to) such a third-party release."). And in *In re Diocese of Syracuse*, while allowing "opt-out" procedures, Judge Kinsella denied approval of a ballot form that did not place the opt-out option on the ballot itself and failed to include "sufficient, clear notice" of the opt-out process and consequences of not opting out or failing to return a ballot. 2024 WL 5456196, at *6.

Likewise, as the Supreme Court established in *Purdue*, simply voting for a plan is not sufficient to demonstrate affirmative consent to third-party releases and injunctions either. *See* 603 U.S. at 219–20 (emphasizing the need to obtain a party's consent, not just votes to a plan, before a party's claims are "bargained away" or otherwise "extinguished").

IV. THE SOLICITATION PROCEDURES IMPROPERLY DISENFRANCHISE HOLDERS OF ABUSE CLAIMS, AND GIVE UNDUE INFLUENCE OVER THE OUTCOME OF THE SOLICITATION

The Court should reject any proposed solicitation procedures that propose to permit law firms to use a master ballot process that will invite abuse and taint the solicitation process because will give undue control over the vote process to a small number of claimant law firms that have filed the majority of claims. A solicitation process is even more untenable if the ballots permit law firms to merely self-certify that they have authority to submit ballots on behalf of their clients, even though applicable law does not permit this shortcut and requires the submission of evidence of such authorization.

1. The Use of Master Ballots Will Taint the Voting Process

First, the Court should not permit the Committee to allow law firms to control the ballot solicitation method. Under this method, the voting agent would reach out to individual law firms—not individual claimants—and provide those law firms with the one solicitation package and ballot, and then submit a single master ballot on which the firm will present the votes of all its clients and certify that it has authority to vote on their behalf. If this approach were adopted, claimants would be voting on the plan without ever having seeing a copy of the Proposed Plan or Disclosure Statement. Leaving control of the vote in the hands of these law firms is particularly problematic here, where just four law firms filed the majority of Claims in a short period of time and effectively have control over the class.

The sheer volume of claims—with some firms purporting to represent dozens of Claimants—invites abuse because it is simply not plausible that those firms are going to have sufficient time to contact each of their clients individually, have a meaningful conversation with them about the Disclosure Statement, and record their vote on a master ballot. The far more likely outcome is that these firms will announce to their clients how the firm intends to vote on their behalf unless they choose to opt out. That approach would render the outcome of the vote a foregone conclusion and taint the entire voting process. The only way to ensure that individual Claimants have a meaningful opportunity to evaluate the Disclosure Statement and Proposed Plan is to permit them to vote individually unless they affirmatively choose to vote as part of a master ballot.[5]

2. Self-Certification Is Unlawful and Will Enable Manipulation of Voting

Second, allowing each law firm to self-certify that it has authority to vote on behalf of its clients only after submitting their votes—and without any prior review by the Debtor or the Court—will further taint the solicitation and voting process. Requiring only a conclusory certification of each firm's customary practices or its authority to vote on behalf of its clients invites abuse and

[5] Claimants likely did not intend to forego their right to receive a Solicitation Package when they authorized their law firm to receive communications on their behalf (assuming they provided such authority). Claimants must have a meaningful opportunity to consider the Disclosure Statement and Proposed Plan, and a master ballot solicitation method would deprive them of this chance.

would vitiate Bankruptcy Rule 2019's requirement that persons acting on behalf of multiple claimants file with the Court the instrument granting them the claimed authority.[6]

Bankruptcy Rule 2019(b) provides that a verified statement "*shall* be filed," thus imposing a mandatory requirement. *See Firebaugh Canal Co. v. U.S.*, 203 F.3d 568, 573-74 (9th Cir. 2000) ("[t]he term "shall" is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary"); *In re Palmdale Hills Property, LLC*, 457 B.R. 29, 46 (9th Cir. Bankr. App. Panel 2011) ("any entity seeking to represent more than one creditor in a chapter 11 case must file a verified statement setting forth the names and addresses of the creditors, the nature and amount of the claims, and the relevant facts and circumstances surrounding the employment of the agent" pursuant to Rule 2019(a)). Only one law firm representing multiple Abuse Claimants has filed a Rule 2019 statement in this Case.[7]

To comply with Bankruptcy Rule 2019, the Court should thus require that persons or law firms purporting to act on behalf of multiple claimants file *evidence* of their authority as a matter of course. Specifically, the Court should only permit representative voting if the lawyer claiming authority submits a power of attorney establishing that he or she has been specifically authorized to vote on the client's behalf on *this* particular Proposed Plan. *See, e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 245 n.66 (3d Cir. 2004) (explaining that "[w]here the voting process is managed almost entirely by proxy, it is reasonable to require a valid power of attorney for each ballot to ensure claimants are properly informed about the plan and that their votes are valid."). As the court explained in *In re Congoleum Corp.*:

> I want to emphasize, the power of attorney must be bankruptcy specific. If it merely refers to the personal injury case, it is not enough. Authority to take

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[6] The Court should not allow the law firms to rely on their retention agreements as certification of their authority to vote on behalf of their clients, since the agreements do not grant a proxy with respect to voting. Accordingly, even if the Court were to accept certifications of voting authority, these agreements cannot satisfy the requirement.

[7] *See* Verified Rule 2019 Disclosure by Michael G. Finnegan (Jeff Anderson & Associates, P.A.) on Behalf of Certain Personal Injury Creditors [Dkt. No. 1607].

action on a client's behalf in a personal injury case is not sufficient to give authority to vote on that client's behalf in the bankruptcy case.[8]

The need for evidence—and not a mere certification—is particularly acute because this Court is the sole arbiter of the legal sufficiency of an attorney's authority to submit a ballot on behalf of a client, and a record must exist from which the Court can make such a determination. Indeed, once counsel have filed the requisite powers of attorney under Bankruptcy Rule 2019, the Court should allow parties in interest to object, if appropriate, to any authorizations that may be insufficient. This process would ensure that claimants have specifically authorized their counsel to vote in a particular manner on the *specific* plan under consideration, and the Court can therefore be confident that the votes on the Proposed Plan reflect the interests and intentions of the actual claimants, rather than their counsel. *See, e.g., Baron & Budd, P.C. v. Unsecured Asbestos Claimants*, 321 B.R. 147, 165 (D. N.J. 2005) ("Regulation of professional responsibility with respect to creditors' or debtors' counsel, moreover, is squarely within the purview of the bankruptcy court regardless of whether third party, non-debtors are involved.").[9]

The Court therefore cannot permit the law firms to submit ballots on a master ballot.

V. THE COMMITTEE AND DEBTOR DISCLOSURE STATEMENTS DESCRIBE PLANS THAT CONTAIN PROPOSED FINDINGS AND CONCLUSIONS OF LAW THAT ARE NOT RELEVANT TO SECTION 1129 AND DO NOT SERVE A PROPER (OR ANY) BANKRUPTCY PURPOSE

Both the Committee Disclosure Statement and the Debtor Disclosure Statement describe plans that contain proposed findings of fact and conclusions of law that are not relevant to Section 1129 and do not serve a proper (or any) bankruptcy purpose. Specifically, Section 12.12 in both plans provides that (as follows, the "Plan Settlement Finding"): "the provisions of the Plan shall constitute a good faith compromise and settlement of all Claims and controversies resolved pursuant to the Plan . . . " and the "Bankruptcy Court's findings will constitute its determination

[8] July 26, 2004 Hr'g Tr. at 52–53, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D. N.J. July 26, 2004) [Dkt. No. 1090]; *see also* Dec. 30, 2004 Hr'g Tr. at 57, *In re Congoleum Corp.*, No. 03-51524 (Bankr. D.N.J. Dec. 30, 2004) [Dkt. No. 1861] (holding that a "certification in the master ballots doesn't really solve the problem" and therefore "a bankruptcy specific power-of-attorney is something that must be strictly complied with here").

[9] Likewise, if a claimant is deceased, the person submitting the ballot for such a claim should provide evidence that they are the duly appointed agent for the estate of the deceased claimant.

that such compromises and settlements are in the best interest of the Debtor, the Estate, Abuse Claimants (including Unknown Abuse Claims), Holders of other Claims, and other parties in interest, and are fair, equitable and within the range of reasonableness." While a plan can contain a settlement for court approval (such as the proposed CCCEB Settlement), the Plan itself is not a settlement. *See In re Boy Scouts of America*, 642 B.R. 504, 626 (Bankr. D. Del. 2022) ("*BSA*") ("But a Plan is not a settlement. It gets solicited. And if the vote fails, debtors can cram down treatment."). Thus, the Plan Settlement Finding should be stricken from both Plans. For these reasons and as more fully set forth below, the Court should sustain the Certain Insurers' Objection and deny approval of both Disclosure Statements.

VI. THE COMMITTEE PLAN IS MISSING ESSENTIAL DOCUMENTS AND PROVISIONS THAT PRECLUDE AN ASSESSMENT OF THE ADEQUACY OF DISCLOSURE.

The core of a plan of reorganization in a case where the main claims are tort claims are the provisions associated with the handling, allowance, and valuation of claims and the treatment of insurance regarding them. While these issues are raised in the Committee Plan, the substance of the terms are shifted to Plan documents have been withheld. The substance of those provisions cannot be understood without the withheld Plan documents making it impossible to assess the adequacy of disclosure.

The Trust Documents which include the Trust Distribution Plan and the Trust Agreement have yet to be disclosed. These documents describe how claims are to be handled, valued and allowed under the Committee Plan, making them essential to understanding the Committee Plan generally and are material to understanding the impact of the Committee Plan on insurers.

The Committee has also withheld the terms of the agreement each claimant will need to sign to receive a distribution from the Trust. Claimants are required to sign what is referred to as the RCWC Release to obtain funds contributed by RCWC, a non-debtor entity. But that document is also missing from the Committee Plan. Likewise, the Plan documents that identify the individuals responsible for reviewing claims under the Trust Distribution Plan. The identity of the "Survivors' Trustee," the members of the "Survivors' Trust Advisory Committee," and the "Abuse

Claims Reviewer" are in the withheld Plan documents. These individuals—and how they are to be selected—play a vital role in reviewing, allowing, and paying claims under the Trust Distribution Plan.

Without these terms, there is no basis to solicit a plan; nor is there a proper plan of reorganization or disclosure statement on file. The Court and parties in interest cannot meaningfully evaluate the adequacy of the disclosures made in connection with the Committee Plan without the allowance and valuation terms because the Plan sections labeled Survivors' Trust Distribution Plan are, in essence, illusory or a placeholder—as they provide no actual allowance or valuation procedures. And, accordingly, without information that is core to the Committee Plan, a hearing on the Disclosure Statement is a futile exercise.

VII. THE DISCLOSURE STATEMENTS PROVIDE INADEQUATE DISCLOSURE AND ARE PATENTLY UNCONFIRMABLE

The Pacific Insurers incorporate by reference and join in the arguments advanced by the London Market Insurers in their Supplemental Objection to the Disclosure Statement of the Official Committee of Unsecured Creditors Plan of Reorganization [Dkt. No. 2797], the London Market Insurers Objection to the Disclosure Statement in Support of the Debtors Modified Fourth Amended Plan [Dkt. No. 2799], Certain Insurers Objections to (i) The Disclosure Statement for the Official Committee of Unsecured Creditors' Plan of Reorganization and (ii) The Disclosure Statement in Support of Debtors Modified Fouth Amended Plan of Reorganization [Dkt No. 2798], Section III (B) of the Objection of RCWC and RCC to the Committee Disclosure Statement [Dkt No. 2801], and Argument Sections A(1) and (2) and B [Dkt. No. 2796].

VIII. THE DISCLOSURE STATEMENT HEARING SHOULD BE CONTINUED UNTIL AMENDED DISCLOSURE STATEMENTS ARE FILED AND PARTIES ARE AFFORDED PROPER NOTICE.

Bankruptcy Rule 3017(a) requires at least 28 days' notice for a disclosure statement hearing after complete disclosure. This rule ensures that parties in interest have adequate time to review the terms of the Plan and assess its impact on their rights.

First and foremost, the Committee Plan, as discussed above, is missing vital information

making any proposed hearing date premature. Furthermore, the schedule simply disregarded Rule 3017(a)'s 28-day-notice requirement. Parties had approximately 11 days to review the disclosure statements and file objections or responses thereto. And the Disclosure Statement hearing is three days later. Per Rule 3017(d)'s Advisory Committee Notes, "Section 1125(c) of the Code requires that ***the entire approved disclosure statement*** be provided in connection with voting on a plan." An "entire disclosure statement" is yet to be filed—key documents are still missing. The Debtor and Committee need to provide parties with at least 28 days' notice before seeking approval of the Disclosure Statement.

Here, the filed disclosure statements lack material information that is required for approval. *In re Medley*, 58 B.R. 255, 256 (Bankr. E.D. Mo. 1986) (holding that a disclosure statement would not be approved where it was a "superficial outline" that did not provide creditors with material information); *see also In re Clamp-All Corp.*, 233 B.R. 198, 206 (Bankr. D. Mass. 1999) ("the hearing on approval of the disclosure statement gives interested parties the opportunity to challenge certain statements or information ***contained*** in the disclosure statement"). The Court cannot set a confirmation schedule and let the Committee move forward with the Committee Plan when it is woefully incomplete and ignoring the requirements under the Bankruptcy Code and Bankruptcy Rules.

"[A] proper disclosure statement must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

"The disclosure statement was intended by Congress to be the primary source of information upon which creditors and shareholders could rely in making an informed judgment about a plan of reorganization." *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170 (Bankr. S.D.

Ohio 1988).[10]

> The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of "adequate information."

In re Oneida Motor Freight, Inc., 848 F.2d at 417. Bankruptcy Courts may not approve disclosure statements that include inadequate or misleading information. *See, e.g.*, *In re Monroe Well Services, Inc.*, 80 B.R. 324, 330 (Bankr. E.D. Pa. 1987). Thus, vague and ambiguous statements in a disclosure statement must be excised or clarified before approval. *See, e.g.*, *In re Pettit*, 18 B.R. 6, 8 (Bankr. E.D. Ark. 1980).

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Insurers respectfully request that the Court (i) does not approve the Committee's proposed Disclosure Statement or any proposed solicitation procedures and form of ballot that includes "opt-out" releases or a master ballot solicitation process, (ii) decline to set the schedule proposed by the Debtor and the Committee; (iii) require the Committee to file a disclosure statement for the Committee Plan; (iv) direct the Debtor and the Committee to file the Plan documents in advance of any hearing on the Disclosure Statement or Plan; and (v) grant such other and further relief as the Court deems just and proper.

[10] The Insurers have standing to object as a "party in interest" under 11 U.S.C. § 1109(b), which means "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." *See In re Global Indus. Techs. ("GIT")*, 645 F.3d 201, 209-210 (3d Cir. 2011) (quoting *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992)). Insurers are parties in interest in this bankruptcy case and have a direct and material stake in how the abuse claims and contracts of insurance are treated under any plan of reorganization. *See Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 602 U.S. 268, 273 (2024) (finding insure.rs are parties in interest under Bankruptcy Code section 1109(b) and may "appear and be heard on *any issue*" in a Chapter 11 proceeding) (emphasis added); *In re Western Asbestos Co*., 313 B.R. 832, 843 (Bankr. N.D. Cal. 2003) (finding insurer standing on a broad range of issues, including discovery).

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By: */s/ Alexandra J. Wolter*

O'MELVENY & MYERS LLP
TANCRED V. SCHIAVONI (pro hac vice)
1301 Avenue of the Americas, Suite 1700
New York, NY 10019
Telephone: (212) 326-2000
Facsimile: (212) 408-2419
Email: tschiavoni@omm.com

ALEXANDRA J. WOLTER (S.B. #317951)
400 South Hope Street, Suite 1900
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
Email: awolter@omm.com

CLYDE & CO. US LLP
ALEXANDER E. POTENTE (S.B. #208240)
JASON J. CHORLEY (S.B. #263225)
150 California Street, 15th Floor
San Francisco, CA 94111
Telephone: (415) 365-9800
Facsimile: (415) 365-9801
Email: alex.potente@clydeco.us
jason.chorley@clydeco.us

Attorneys for
Pacific Indemnity Company,
Century Indemnity Company as successor to
CCC Insurance Company as successor to
Insurance Company of North America,
Pacific Employers Insurance Company, and
Westchester Fire Insurance Company