Docket #1793 Date Filed: 11/04/2024

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | |
|---|---|
| In re:<br><br>TEHUM CARE SERVICES, INC.,[1]<br><br>Debtor. | Chapter 11<br><br>Case No. 23-90086 (CML)<br><br>Related Dkt. Nos. 1741, 1774, 1781, 1782 & 1785 |

**TORT CLAIMANTS' COMMITTEE'S OMNIBUS REPLY IN SUPPORT OF THE JOINT MOTION OF THE TORT CLAIMANTS' COMMITTEE, OFFICIAL COMMITTEE OF UNSECURED CREDITORS, AND DEBTOR FOR ENTRY OF ORDER (I) APPROVING DISCLOSURE STATEMENT AND FORM AND MANNER OF NOTICE OF HEARING THEREON, (II) ESTABLISHING SOLICITATION PROCEDURES, (III) APPROVING FORM AND MANNER OF NOTICE TO CLAIM HOLDERS (IV) APPROVING FORM OF BALLOTS, (V) APPROVING FORM, MANNER, AND SCOPE OF CONFIRMATION NOTICES, (VI) ESTABLISHING CERTAIN DEADLINES IN CONNECTION WITH APPROVAL OF DISCLOSURE STATEMENT AND CONFIRMATION OF PLAN, AND (VII) GRANTING RELATED RELIEF**

The Official Committee of Tort Claimants, the estate fiduciary for tort claimants (the "TCC"), submits this omnibus reply (the "Reply") to the objections received to the *Joint Motion of the Tort Claimants' Committee, Official Committee of Unsecured Creditors, and Debtor for Entry of an Order (I) Approving Disclosure Statement and Form and Manner of Notice of Hearing Thereon, (II) Establishing Solicitation Procedures, (III) Approving Form and Manner of Notice to Claim Holders (IV) Approving Form of Ballots, (V) Approving Form, Manner, and Scope of Confirmation Notices, (VI) Establishing Certain Deadlines in Connection with Approval of Disclosure Statement and Confirmation of Plan, and (VII) Granting Related Relief* (Dkt.

[1] The last four digits of the Debtor's federal tax identification number is 8853. The Debtor's service address is: 205 Powell Place, Suite 104, Brentwood, Tennessee 37027.

2390086241104000000000026

No. 1741) (the "Disclosure Statement Motion"). In support of this Reply and in further support of the Disclosure Statement Motion, the TCC respectfully states as follows.

## PRELIMINARY STATEMENT

1. The Plan, Disclosure Statement, the many Trust Documents, and record are today sufficiently developed to enable the Court to address and overrule the objections to the Disclosure Statement and permit solicitation to commence. The question before the Court is whether the Disclosure Statement allows a "hypothetical investor of the relevant class" to cast an informed vote on the Plan. 11 U.S.C. § 1125(a)(1). The TCC respectfully submits that it does.

2. The Disclosure Statement contains a plain-English summary and description of the reams of information, litigation, and negotiation history that led to the Plan and settlements it contains. Critically, for the TCC, the Disclosure Statement provides a plain-English summary to tort victims, some of whom may still be incarcerated, of how the Plan would impact them depending on the individualized choices they make. Tort victims have three fundamental choices that are clearly and succinctly described in the Disclosure Statement:

- They can choose to participate in the settlements reached by the TCC, through the PI/WD Trust that will be established for their sole benefit. The Disclosure Statement explains that participation in the PI/WD Trust means that such tort claimants will release YesCare and the other Released Parties, regardless of the claimants' recovery from the PI/WD Trust. Claimants who make this election can seek additional recoveries from governmental units, which are not being released.

- They can choose to pursue a potential insurance recovery, with the ability to return to the PI/WD Trust under certain circumstances should those recovery efforts fail. Under this option, claimants can seek to recover damages that exceeds the claim values available under the PI/WD Trust Distribution Procedures.

- They can choose to forego participation in the settlement and pursue third parties such as YesCare Corp. and CHS TX, Inc. for recovery, including on theories of successor liability.

3. Each of these choices is clearly explained, along with their attendant benefits and burdens. The TCC has endeavored to put forward a Plan that provides each individual tort claimant with meaningful choice and the dignity of controlling their own outcomes and justice.

4. The Disclosure Statement explains the quantum of the settlements benefiting tort victims. It explains the process by which a tort victim's claim will be assessed in the proposed PI/WD Trust,[2] and the projected amounts that they could expect to recover based on their injuries. The Disclosure Statement explains the allocation of assets between groups of unsecured and priority creditors. The Disclosure Statement includes a description of the work that each estate fiduciary conducted over the course of the case as well the reasons why each estate fiduciary believes this Plan maximizes value for all stakeholders, including all tort claimants.

5. The TCC has successfully negotiated amendments to the Disclosure Statement (included in the redline submitted in connection with the hearing) to resolve certain objections received, including by certain of the Debtor's insurers. The objections to the Disclosure Statement that remain are cast as either: (1) objections with respect to the adequacy of disclosures provided in the Disclosure Statement; and (2) objections to confirmation of the Plan.

6. The TCC is in receipt of the objections by: (i) Mr. Anant Tripati, a tort claimant Dkt. No. 1774) (the "Tripati Objection"), (ii) the United States Trustee (Dkt. No. 1781) (the "UST Objection"); (iii) Coverys Specialty Insurance Company (Dkt. No. 1782) (the "Coverys Objection"); and (iv) the Idaho Parties (Dkt. No. 1785) (the "Idaho Parties' Objection") and responds to each, in turn below. None of these objections are a barrier toward solicitation and each should be overruled.

2 Capitalized terms that are used but not defined herein have the meaning ascribed to them in the Disclosure Statement.

## REPLY

### A. Mr. Anant Tripati's Objection Should Be Overruled

7. Mr. Tripati argues that "20 wrongful death claims will utterly deplete the PI/WD Trust" and that the Plan is not "fair and equitable" as a result. Tripati Objection at 32. This is inaccurate. Twenty wrongful death claims will not deplete the PI/WD Trust. Each claimant whose claim is channeled to the PI/WD Trust will receive a pro rata recovery.

8. There is a difference between the allowed value of a PI/WD Claim and the amount that a claimant will receive on account of an allowed claim. The PI/WD Trust will not have adequate funding to pay claims in full. As set forth in Schedule 3 to the Disclosure Statement, the TCC projects that the payment percentage will be between 23.7% and 64.9%. The holder of a wrongful death claims valued at $1.2 million may recover between $284,400 and $778,800 on account of such claim from the PI/WD Trust.

9. One of the TCC's objectives in redoing the settlement was to replace contingent assets with hard assets. Under the new settlement, the PI/WD Trust will receive $25 million in cash. It is likely that claimants who elect to proceed to the PI/WD will receive at least 23.7% of the allowed value of their claims. In addition, claimants will remain free to pursue recoveries from governmental units. But the Plan Documents do not allow for a handful of wrongful claims to utterly deplete the PI/WD Trust as Mr. Tripati suggests. The payment percentage for all claimants is the same.

10. Mr. Tripati also asserts that the "Debtor has no assets to liquidate" and that if the "Estate Party Settlement is rejected that the Debtor would convert their Chapter 11 to Chapter 7, liquidation bankruptcy." *Id.* at 32. Mr. Tripati also offers a litany of reasons as to why he believes that this case was filed in bad faith and should be dismissed.

11. The TCC does not dispute the fact that the "Divisional Merger" left the debtor with no operating assets and that this transaction can likely be avoided as a fraudulent transfer. The TCC also does not dispute the fact that if the Estate Party Settlement is rejected, then this case will likely be dismissed or converted to chapter 7.

12. But the Plan, as devised by the TCC, is a better outcome for tort claimants than dismissal or conversion. As a threshold matter, the Plan was constructed based on consent. No tort claimant is being forced to settle. Tort claimants are free to elect the treatment that they want.

13. Tort claimants are free to "opt out" and seek recovery from YesCare, Corp. and CHS TX, Inc. The doctrine of successor liability, available to those claimants who do choose to "opt out," offers a better remedy than fraudulent transfer law.

14. A claimant who "opts out" and prevails under the doctrine of successor liability will be entitled to seek recovery of the full amount of his or her claim from the successor. The recovery would not be limited to the value of property that was transferred under the Divisional Merger. CHS TX, Inc. or YesCare, Corp. could be required to pay the claim in full regardless of the value of Corizon's operating assets on the date of the Divisional Merger.

15. To be clear, the TCC is not proposing and would never propose a Plan that prevents tort victims from having access to the civil justice system. Rather, the TCC fought for a Plan that preserves such access because it is critical to funds being paid to claimants.

16. The TCC's understanding is that a substantial number of claimants are willing to settle and prefer the settlement trust option. If this is true, the overwhelming majority of claimants will vote to accept the Plan and will not "opt out." If this occurs, the TCC will respect this decision.

17. The proposed Plan leaves it to the ***tort claimants*** to decide if they want to participate in the Estate Party Settlement. This is not a decision that will be made ***by the TCC***. The TCC has

not "committed legal malpractice," as Mr. Tripati contends, but is putting the question to the tort claimants ***themselves*** as to how they want this case and their individual claims to be resolved.

18. The Plan, as designed, makes it possible for a large portion of the tort claimants to enter into what is effectively a voluntary settlement. If Mr. Tripati believes that the settlement is not fair and that he is better off in the civil justice system, then he can elect to "opt-out". Mr. Tripati has the right to elect to "opt-out" and may also vote to accept the Plan. The "Opt Out" is the lynchpin of the Plan.

19. The "Opt Out" is also what makes it possible for the Plan to deliver payments to tort claimants and other claimants in the near term. A critical lesson learned in other bankruptcy cases involving tort claims is that pursuing non-consensual third-party releases can harm tort claimants and, at the same time, benefit the parties seeking the releases.

20. For example, the debtor in *Purdue* spent over four years attempting to confirm a plan that included *non-consensual* third-party releases—*i.e.*, releases that would have deprived tort claimants of their right to seek recovery from various non-debtor parties, including the Sackler family, in the civil justice system. During this time, no tort claimants were paid and the Sacklers retained all the monies that they were ostensibly offering to settle in bankruptcy.

21. As this Court knows, Purdue's plan was rejected by the U.S. Supreme Court. *See Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071, 2088, 219 L. Ed. 2d 721 (2024). The pursuit of non-consensual releases, and the Bankruptcy Court's willingness to support that pursuit (which was likely done with the best of intentions), delayed payments to tort victims and arguably enriched the parties who were alleged to have caused harm. Making settlement payments contingent upon denying ***all*** claimants access to the civil justice system was not beneficial for anyone other than the tortfeasor.

22. The proposed Plan does not fall into this trap. No settlement funds are contingent upon the entry of a final order barring all claimants from having access to the civil justice system. This aspect of the Plan ensures that Mr. Tripati can "opt out" if he so chooses, and it ensures that claimants who do not "opt out" can be paid in the near term. But for the "opt out," Mr. Tripati's criticisms might hold water. But the plan that Mr. Tripati criticizes is not the Plan that the TCC has proposed. The TCC submits that the Plan is fair and in the best interest of claimants.

**B. The United States Trustee's Objection Should Be Overruled; the Consensual Releases in the Plan Are Legal and Appropriate**

23. The U.S. Trustee argues that the Plan does not go far enough and that the consensual releases under the Plan are improper. The U.S. Trustee objects to the consensual release based on its overly expansive reading of United States Supreme Court opinion in *Purdue*, which held that the Bankruptcy Code does not permit non-consensual third-party releases in chapter 11 plans other than (and maybe not even there) under 11 U.S.C. § 524(g). *See Purdue*, 144 S. Ct. 2071.

24. The U.S. Supreme Court limited its decision to the question before it—non-consensual releases of non-debtors:

> As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.[3]

[3] *Purdue Pharma*, 144 S.Ct. at 2087-88.

25. The U.S. Trustee ignores this express limitation and seeks to expand *Purdue* beyond its own language (which was already the law in the Fifth Circuit). There is no basis to go beyond *Purdue* or Fifth Circuit precedent here.

26. This Court recently addressed this objection, correctly holding that *Purdue* "did not change the law in this Circuit[,]" and that chapter 11 plans, such as this Plan, which provide for consensual releases through a clearly disclosed "opt-out" mechanism, do "not include non-consensual third-party releases like the ones addressed in *Purdue*[;]" indeed they contain "consensual ones." *See* Memorandum Decision on Plan Confirmation, *In re Robertshaw US Holding Corp.*, Case No. 24-90052 (Bankr. S.D. Tex. Aug. 16, 2024) (Dkt. No. 959).

27. Third-party releases are permitted in the Fifth Circuit when the release is consensual.[4] The Fifth Circuit has not expressly defined what constitutes a "consensual" third-party release. Bankruptcy Courts in this Circuit generally analyze whether third-party releases are consensual by focusing on the facts, circumstances, and process in each specific case.

28. Courts look to whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look it over [and] the disclosure is adequate so that they can actually understand[] what they're being asked to do and the options that they're being given."[5]

4 *Cole v. Nabors Corporate Servs., Inc. (In re CJ Holding Co.)*, 597 B.R. 608-09 (S.D. Tex. 2019) ("The Fifth Circuit does not preclude bankruptcy courts from approving a 'consensual non-debtor release.'").

5 Conf. Hr'g Tr. at 47, *In re Energy & Expl. Partners, Inc.*, No. 15-44931 (RFN) (Bankr. N.D. Tex. Apr. 21, 2016) [Docket No. 730] (approving third-party releases as consensual, over objection of the U.S. Trustee, in light of sufficient notice and opportunity to object); *see also In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (approving third-party releases as consensual over objections from parties in interest, including U.S. Trustee). *In re Ameriforge Grp., Inc.*, No. 17-32660 (DRJ) (Bankr. S.D. Tex. May 22, 2017) [Docket No. 142] (confirming chapter 11 plan over U.S. Trustee objection where certain impaired creditors were deemed to have consented to third-party release provisions unless they opted out); *In re Ultra Petroleum Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. Mar. 14, 2017) [Docket No. 1324] (same); Conf. Hr'g Tr. at 42, *In re Southcross Holdings, LP*, No. 16-20111 (MI) (Bankr. S.D. Tex. Apr. 11, 2016) [Docket No. 191] (finding that the debtors correctly characterized a release as consensual because debtors provided extensive notice of plan and confirmation hearing and no party specifically objected to plan's release provisions); *see also, e.g.*, Conf. Hr'g Tr. at 14, *In re Warren*

Bankruptcy courts outside of the Fifth Circuit mirror this approach and find that such releases are consensual and appropriate based on protection afforded by the opt-out process put in place.[6]

29. Here, the Solicitation Procedures allow for the ability of all claimants to object to and/or opt out of the third-party releases. The Solicitation Procedures, if approved here, would clearly and conspicuously provide all claimants with notice of the Consensual Claimant Release, including a description of how claimants can opt out. Incarcerated Claimants will receive paper copies of the entire Solicitation Package, and Holders of Claims that are not Incarcerated Claimants will receive part of the Solicitation Package on a USB flash drive.

30. Moreover, the Debtor will make this information available free of charge on the case website for this case maintained by Verita. The Plan Proponents will provide all claimants with clear directions for how to opt-out. The Solicitation Procedures provide that Verita will assist claimants with locating or receiving unique Ballot ID numbers to be utilized for submitting an opt-out through the Verita's website portal.

31. The TCC recognizes and shares the U.S. Trustee's concerns about the legibility and readability of disclosure materials given the claimant constituency here. For that reason, the TCC prepared its solicitation materials and the explanation of the settlement and opt out mechanisms under the Plan in plain-English and as conspicuously as possible.

---

*Res., Inc.*, No. 16-32760 (MI) (Bankr. S.D. Tex. Sept. 14, 2016) [Docket No. 352] ("If there are third-party releases that are negotiated between the Debtor and third parties as part of their deal, that doesn't seem to me to really run afoul of anything.").

6 *See* Conf. Hr'g Tr. at 14, *In re Invitae Corp. et al.*, No. 24-11362 (MBK) (Bankr. D.N.J. July 23, 2024) (overruling the Office of the U.S. Trustee's objections, predicated on *Purdue*, with respect to plan releases, the opt out mechanism, and gatekeeper provisions); *see also In re Conseco Inc.*, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) (finding a release provision binding unimpaired creditors who abstained from voting on the plan and did not otherwise opt out to be consensual); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 305 (Bankr. D. Del. 2013) (confirming a plan that provided that creditors were deemed to have consented to the plan's third party release provisions where: (a) the creditor voted to reject or accept the plan and failed to "opt-out"; (b) the creditor failed to return his/her ballot; or (c) the creditor's claims were unimpaired, and therefore, were not entitled to vote).

32. Further, the TCC insisted on a 90-day proposed solicitation period to provide opportunity for incarcerated claimants sufficient time to vote on the plan and make their opt-out choice. Again, this option is a touchstone of settlements contained in the Plan, and critical in the view of the TCC for an appropriate settlement here that does not constrain tort victims' ability to pursue their claims in the civil justice system if they are not interested in participating in the settlement.

33. The U.S. Trustee, however, argues that the "opt-out" feature of the release renders the release non-consensual and, therefore, runs afoul of *Purdue*. The U.S. Trustee asks this Court to adopt a state law based contractual-consent analysis which is contrary to decisions from this Court and its sister Courts that have held that a claimant who received notice of the debtor's chapter 11 filing and the proposed a plan, which included a third-party release, but failed to object to the plan, was deemed by the party's inaction to have consented to the third-party release. Such an interpretation of *Purdue* arguably contravenes Federal Rule of Civil Procedure 55 (made applicable to contested matters such as confirmation hearings by Federal Rule of Bankruptcy Procedure 9014).[7]

34. Further, as this Court recently found in *Robertshaw*, the U.S. Trustee's view on the matter is incorrect. There is nothing coercive about the releases in the Plan that have been conspicuously noticed and are, in fact, the cornerstone of the settlements in the Plan. The Ballots contained clear and plain-English language informing each creditor and tort victim that they may

---

7 *See In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592, at *6 ("Just as a party that fails to respond to a validly served summons can be defaulted, it is incumbent on a creditor that has an objection to a provision of a plan of reorganization to raise its objection before the bankruptcy court," and recognizing Fed. R. Civ. P. 55, made applicable by Fed. R. Bankr. P. 9014, expressly provides for entering default judgments against parties who fails to respond to pleadings seeking affirmative relief.); see also *In re Mallinckrodt PLC*, 639 B.R. 837, 879 (Bankr. D. Del. 2022) (explaining parties that fail to act in response to a judicial process are regularly bound by the result of that process, whether in the context of default judgments, bar dates, and or consent to the entry of final orders by bankruptcy courts).

vote for or against the Plan and still select the option not to give the releases. That unilateral choice, untethered to a Plan vote, is quintessentially non-coercive—a vote in favor of the Plan does **not** even equate to a release (which has in other instances alone been found to be consensual).[8]

35. There is no coercion where the choice facing creditors is participating in a settlement with near term proceeds *or* retaining their rights to pursue the full value of their claims against successor entities and even under theories that debtors have previously attempted to release under a plan (such as "successor liability"). The choice is plainly disclosed, and it may well be that creditors who do opt-out recover more than those who elect to settle. The TCC's goal here is for all tort claimants to receive an appropriate recovery. Since claimants who elect to litigate bear the risk that they will recover nothing, it is both fair and equitable that they enjoy the benefits of prevailing on the merits should they succeed.

### C. Coverys' Objection Should Be Overruled

#### 1. Coverys' and Other Insurers' Actual Disclosure Objections Have Been Resolved

36. For the past several weeks, the Plan Proponents have worked with Coverys and other insurers to revise Schedule 2 to the Disclosure Statement to include additional information as well as contentions made by insurers regarding their policies. This effort was appropriate, as it was aimed at providing more fulsome information to creditors to evaluate the Plan.

37. The TCC believes that the insurers' "adequacy of information" objections (their only actual Disclosure Statement objection) have been resolved by the revised and amended Disclosure Statement, which include the majority of Coverys' contentions related to its policy

8 *In re Arsenal Intermediate Holdings, LLC*, Case No. 23-10097, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023) (stating that voting in favor of a plan is an example of an affirmative express of consent).

provisions in order to resolve any objections. *See* Dkt. No. 1788-9.[9] Resolving the adequacy of information objection leaves only Coverys' Plan confirmation objections remaining.

38. Coverys' Plan objections (*e.g.*, that the Plan is unconfirmable) should be reserved for the confirmation hearing and are no impediment to solicitation of a Plan that is clear on its treatment of insurance policies as well as the preservation of insurers' rights. Nonetheless, the TCC is compelled to address the merits of Coverys' Plan objections, at least on an initial basis.

### 2. Coverys Appears to Lack an Economic Interest in Plan Confirmation

39. Before turning to Coverys' Plan objections, it bears noting that Coverys is an ***excess insurer***. Its coverage obligations do not appear, to the TCC, to be triggered until at least $2 million in liability is accrued on a claim. However, not a single claim settled under the Plan's PI/WD Trust Distribution Procedures can be valued at or more than $2 million. Thus, it does not seem likely that any claim resolved under the PI/WD Trust Distribution Procedures will reach the Coverys coverage.

40. The TCC is hesitant to argue, given the Supreme Court's decision in *Truck Insurance Exchange v. Kaiser Gypsum Co*., 602 U.S. 268 (2024), that an insurer does not have standing to interpose objections at this stage of the case. But the reality of the situation here is that Coverys' broadside objection, which requires estate professionals to expend preciously limited resources to respond, is on behalf of an entity that has little or no financial stake in the manner in which the PI/WD Trust Distribution Procedures may operate.

---

9 For example, Coverys contends that creditors are not provided adequate information regarding a confidential settlement agreement entered between the Debtor and Coverys, its impact on recoveries under the Plan for a subset of claims allegedly released under the Coverys Policies, and the corresponding erosion of limits under the applicable policies. Coverys argues that four policies were eroded by payments made in connection with claims prepetition and the above-referenced confidential settlement. To resolve the objection, the Plan Proponents have agreed to add the positions of Coverys regarding the foregoing.

41. That Coverys may face litigation from opt-out claimants is no safe harbor for this glaring lack of real stake here. If this case were dismissed, Coverys could still face that exact same litigation and retain the exact same coverage defenses as it would under the Plan. If anything, Coverys appears to benefit from the Plan because all tort claims that are channeled to and paid by the Trust would not seem to pose any risk of reaching Coverys' coverage level.

**3. Coverys' Contentions Regarding the Requirement That All Chapter 11 Plans Must Be Insurance Neutral Is Incorrect**

42. Coverys' primary request to this Court is to require a form of "insurance neutrality" that is in fact **not** neutral and is instead intended to effectively discharge Coverys from all coverage obligations and liabilities as a consequence of the Debtor's bankruptcy filing and the transfer of insurance rights to the PI/WD Trust.

43. The Debtor's rights under its insurance policies are property of the debtor's estate. *See* 11 U.S.C. § 541(a) & (c). Such rights can be transferred under a chapter 11 plan to a post-confirmation trust without the insurers' consent. *See* 11 U.S.C. § 1123(a)(5)(B); *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 359 (3d Cir. 2012).

44. Thus, an insurer cannot point to this transfer post-confirmation as a basis to refuse to honor its coverage obligations, whatever those obligations may be. If this were not true, then insurers would receive the equivalent of a discharge of their coverage obligations any time an insured filed for bankruptcy and sought to confirm a plan that created a settlement trust that attempted to preserve insurance rights for the benefit of tort claimants.

45. Section 524(e) states that the "discharge of a debt" of the debtor "does not affect the liability of any other entity," including the debtor's insurers, for "such debt." 11 U.S.C. § 524(e). The Fifth Circuit has held that an insurer cannot avoid its obligation to indemnify based

on the insolvency or bankruptcy of its insureds.[10] The transfer of a debtor's insurance rights to a settlement trust under section 1123(a)(5)(B) is consistent with section 524(e) and Fifth Circuit case law since the trust is able to assert the debtor's coverage obligations post-confirmation.

46. Further, Coverys' policies state that it is obligated to pay its policyholder's liability whether it is resolved in the tort system or in the bankruptcy system.[11] Such a promise would be rendered illusory if it meant that Coverys could escape its obligations anytime one of its insured became insolvent and restructured in accordance with bankruptcy practice and law.

47. Coverys' contention that the Court cannot confirm any plan in this case unless it includes a "crystal-clear" statement that their rights are left unaltered is incorrect. *See* Coverys

---

10 *See Chapman v. Bituminous Ins. Co. (In re Coho Res., Inc.)*, 345 F.3d 338, 343 (5th Cir. 2003) (finding that it would be "fundamentally wrong" to "allow an insurer to escape coverage for injuries caused by its insured merely because the insured receives a bankruptcy discharge"); *Matter of Edgeworth*, 993 F.2d 51, 54 (5th Cir. 1993) ("[I]t makes no sense to allow an insurer to escape coverage for injuries caused by its insured merely because the insured receives a bankruptcy discharge"); *accord UNR Indus., Inc. v. Cont'l Cas. Co.*, 942 F.2d 1101, 1105 (7th Cir. 1991) (reversing district court's finding that the insured's covered loss was the amount the settlement trust actually pays to tort victims on the ground that it conferred a "windfall" on the debtor's insurers and was contrary to applicable law); *In re Jet Fla. Sys., Inc.*, 883 F.2d 970, 975 (11th Cir. 1989) ("The 'fresh-start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured."); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, No. 03-3408, 2012 WL 734176, at *3 (D. Md. Mar. 6, 2012) ("The Bankruptcy Code is not intended to enable insurers to evade their indemnity obligations. The notion that bankruptcy of the insured should not accrue to the benefit of the insurers is well-established."); *ARTRA 542(g) Asbestos Trust v. Fairmont Premier Ins. Co.*, No. 09-cv-458, 2011 WL 4684356, at *2 (N.D. Ill. Sep. 30, 2011) ("The court finds no support for Transport's assertion that the provisions prevent the trust from asserting that the policy language and Illinois law require Transport to indemnify it for any covered claims at the full amount of the claim rather than at the bankruptcy discount rate."); *Tucker v. Am. Int'l. Grp., Inc.*, 745 F. Supp. 2d 53, 65 (D. Conn. 2010) ("[C]ourts have 'reasoned that the insurance company should not be entitled to gain a benefit that was not intended or in any way computed within the rate charged for its policy.'").

11 *See* Coverys Objection, Exhibit B Section VIII(C) ("Bankruptcy or Insolvency of an Insured. Bankruptcy or insolvency of the INSURED or of the INSURED'S estate will not relieve US of OUR obligations under this POLICY.").

Objection at p. 2. No court, bankruptcy or otherwise, has ever held that a chapter 11 plan must be "insurance neutral" or leave unaltered the rights of insurers.[12]

48. The opioid-related bankruptcies dealt with potentially billions of dollars of coverage, the benefit for which was or is to be transferred to post-confirmation trusts. There, insurers rose to bring the same objections that Coverys raises here, that their version of insurance neutrality was mandated. But the Courts in both *Purdue* and *Mallinckrodt* confirmed plans that subjected insurers to it and the related settlements reached therein.[13]

---

12 *See* Tr. of Judge Drain Bench Ruling 36:13-14, *In re Purdue Pharma L.P.*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 1, 2021) ("Purdue Ruling") ("There is no such concept or requirement that a plan be insurance neutral."); Eleventh Am. Joint Chapter 11 Plan of Reorganization at 89*, In re Purdue Pharma L.P.*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Aug. 31, 2021), ECF No. 3706 (vacated on other grounds) ("5.10 *Insurance Neutrality*. Nothing in the Plan, the Plan Documents or the Confirmation Order shall alter, supplement, change, decrease or modify the terms (including conditions, limitations and/or exclusions) of the Purdue Insurance Policies, including the MDT Insurance Policies; *provided* that, notwithstanding anything in the foregoing to the contrary, the enforceability and applicability of the terms (including conditions, limitations and/or exclusions) of the Purdue Insurance Policies, including the MDT Insurance Policies, and thus the rights or obligations of any of the Insurance Companies, the Debtors and the applicable post-Effective Date Entities, including the Master Disbursement Trust, arising out of or under any Purdue Insurance Policy, including any MDT Insurance Policy, whether before or after the Effective Date, are subject to the Bankruptcy Code and applicable law (including any actions or obligations of the Debtors thereunder), the terms of the Plan and the Plan Documents, the Confirmation Order (including the findings contained therein or issued in conjunction therewith, including but not limited to any findings pursuant to Sections 5.2 and 5.6(i) of the Plan) and, to the extent the Insurance Companies have or had adequate notice from any source, any other ruling made or order entered by the Bankruptcy Court whether prior to or after the Confirmation Date. For the avoidance of doubt, nothing contained in the Plan, the Plan Documents or the Confirmation Order shall operate to require any Insurance Company to pay under any Purdue Insurance Policy the liability of any Person that was not an insured prior to the Petition Date.")

13 *See In re Mallinckrodt PLC*, No. 20-12522 (JTD); Fourth Amended Joint Plan of Reorganization of Mallinckrodt PLC and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code at 98, *In re Mallinckrodt PLC*, No. 20-12522 (JTD) (Bankr. D. Del. Jan. 6, 2022), ECF No. 6066 ("Nothing in the Plan, the Plan Supplement, or the Confirmation Order shall alter, supplement, change, decrease or modify the terms (including conditions, limitations and/or exclusions) of the Opioid Insurance Policies; provided that, notwithstanding anything in the foregoing to the contrary, the enforceability and applicability of the terms (including conditions, limitations and/or exclusions) of the Opioid Insurance Policies and thus the rights or obligations of any Insurer, the Debtors, and the applicable post-Effective Date Entities, including the Opioid MDT II, arising out of or under any Opioid Insurance Policy, whether before or after the Effective Date, are subject to the Bankruptcy Code and applicable law (including any actions or obligations of the Debtors thereunder), the terms of the Plan, the Plan Supplement, the Confirmation Order (including the findings contained therein or issued in conjunction

49. The Delaware District Court reached the same conclusion in *In re Boy Scouts of America and Delaware BSA, LLC*, 650 B.R. 87, 189 (D. Del. 2023) ("***Insurance neutrality is not required by the Bankruptcy Code***") (emphasis in original).

50. The clearest example of how insurance rights can be altered is that, consistent with section 1123(a)(5)(B), a debtor's rights under its insurance policies can be transferred to a settlement trust. Such a transfer of rights clearly alters an insurer's obligations since the settlement trust stands in the shoes of the debtor post-confirmation. Yet, this is an alteration that is expressly permitted by the Bankruptcy Code and applicable law.

51. If Coverys were correct that the Code does not permit any alteration of insurers rights and obligations, then the PI/WD Trust could not function as a successor to the Debtor for the purpose of pursuing coverage. Even Coverys acknowledges that the PI/WD Trust can assert coverage rights as a successor to the Debtor, which shows that Coverys' absolutist position that a chapter 11 plan can never alter insurance rights is incorrect.

52. Here, the Plan Proponents did not want to waste time and expense addressing objections to plan confirmation lodged by insurers. To this end, the Plan contains an express reservation of rights and defenses. Article IX.L of the Plan provides:

> Nothing in the Plan, the Plan Documents, the Confirmation Order, any finding of fact and/or conclusion of law with respect to the Confirmation of the Plan, any order or opinion entered on appeal from the Confirmation Order, or any valuation of Claims (either individually or in the aggregate) in the Chapter 11 Case shall, with respect to any Insurance Company (including a PI/WD Insurance Company or a GUC Insurance Company): (i) constitute any adjudication, judgment, trial, hearing on the merits, finding, conclusion, other determination establishing the coverage obligation of any such Insurance Company for any Claim; or (ii) limit the right of any such Insurance Company to assert any Insurer Coverage

therewith) and, to the extent the Insurers have or had adequate notice from any source, any other ruling made or order entered by the Bankruptcy Court.")

> Defense[14]; provided, however, that with, respect to (i) and (ii), (y) the transfer of rights to the PI/WD Trust pursuant to the PI/WD Insurance Assignment and the transfer of rights to the GUC Trust pursuant to the GUC Insurance Assignment shall be valid and enforceable, and (z) the discharge or release of the Debtor or any Released Party from any Claims or Causes of Action under the Plan shall not affect the liability of any such Insurance Company. The establishment of any claim in litigation against the PI/WD Trust in its capacity as the Debtor's representative shall be deemed the establishment of a claim against the Debtor for the purpose of triggering any available Insurance Policy.

53. Thus, the Plan (as proposed) states that ***all defenses at law or in equity*** that any insurance company, including Coverys, may have under applicable law to provide insurance coverage is reserved. Plan at §§ IX.L & I.A.118. The only two "carve outs" to this general statement are that the transfer of the Debtor's rights under section 1123(a)(5)(B) is valid and that the drafting, proposing, confirmation, or consummation of the Plan and/or the discharge or release of the Debtor from liability does not eliminate or reduce the insurers' coverage obligations. *Id.*

54. Both "carve outs" are consistent with the Bankruptcy Code and Fifth Circuit law, as discussed above. Neither "carve out" impermissibly pares back Coverys' rights. Rather, both are a clarification that Coverys cannot use the fact of the bankruptcy and the assignment of insurance rights as a ***new*** coverage defense—that if not clarified, may allow insurers to effectively argue that all their coverage obligations have been obliterated and discharged *ab initio*. Again,

---

14 "*Insurance Coverage Defense*" means all defenses at law or in equity that any Insurance Company may have under applicable law to provide insurance coverage to or for PI/WD Claims, Indirect PI/WD Claims, GUC Claims or Indirect GUC Claims, except for (a) any defense that the PI/WD Insurance Assignment or the GUC Insurance Assignment is invalid or unenforceable or otherwise breaches the terms of such coverage; and (b) any defense that the drafting, proposing, confirmation, or consummation of the Plan and/or the discharge or release of the Debtor from liability for any Claims pursuant to the Plan; in any of the foregoing (a) through (b), operates to, or otherwise results in, the elimination of or the reduction in any obligation such Insurance Company may have under rights assigned to the PI/WD Trust or the GUC Trust, including in providing coverage for liabilities assumed by the PI/WD Trust or the GUC Trust that were or are liabilities of the Debtor. *See* Plan at § I.A.118.

Coverys' own policies contain an assurance that the insolvency or bankruptcy of the insured will not reduce Coverys' coverage obligations. *See* Coverys Objection at Ex. B, § VIII(C).

55. The language in Article IX.L of the Plan is designed to ensure that all parties' rights are appropriately preserved. But Coverys is unwilling to agree to this language.

56. It is the TCC's understanding that Coverys will not agree to Plan language that treats all parties fairly. Instead, Coverys wants to add language to the Plan that would effectively give it the right to ignore the Confirmation Order and the Plan entirely.

57. Under the guise of neutrality, Coverys seeks special treatment and an exception from applicable law. In Coverys' view, the Plan and the Confirmation Order cannot be binding on it—*i.e.*, Coverys must be free to argue in subsequent coverage litigation that the Debtor's rights were not transferred to the PI/WD Trust under the Plan and the Bankruptcy Code and, therefore, the establishment of any claim against the PI/WD Trust (standing in the Debtor's shoes) will not be deemed to be an establishment of any claim against the Debtor for the purpose of triggering coverage. Coverys' view of "insurance neutrality" is that anything that happens in a bankruptcy proceeding and any order entered by this Court is not binding on it.

58. But this is not how the Bankruptcy Code works. Section 1141(a) of the Bankruptcy Code provides that a confirmed plan is binding on parties whether they vote to accept the plan or not.[15] In fact, "a confirmed plan of reorganization is equivalent to a final judgment in civil

[15] *See* 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan."); *Matter of LaHaye*, 17 F.4th 513, 518 (5th Cir. 2021) ("Indeed, a confirmation order binds every entity that holds a claim or interest in the planned reorganization, regardless of whether they assert those interests before the bankruptcy court").

litigation" *Matter of Highland Capital Mgmt. LP*, 102 F.4th 286, 291 (5th Cir. 2024).[16] But insurance neutrality provisions do not entitle insurers to deny coverage because of transfers that are incidental to reorganization and permissible under the Code.[17]

59. Insurers like Coverys will only agree to stand down if they are granted a windfall. They demand a free release or discharge of their contractual obligations to provide coverage. Unless Plan Proponents agree to permit Coverys to unilaterally modify its contracts and agree to release Coverys of its coverage obligations, Coverys will object and attempt to hold up the Plan. But these are not demands that the TCC can agree to. Whatever rights the Debtor has to insurance coverage should be preserved and made available to the PI/WD Trust so that claimants do not lose access to coverage that would be available to them but for this bankruptcy case.

60. In sum, the Plan preserves the ability of all insurers to contest their coverage obligations post-confirmation. *See* Plan at § IX.L. If the facts of a particular claim asserted against the Debtor and/or the PI/WD Trust trigger an exclusion or other policy defense, the defense is preserved. This includes defenses such as an applicable duty to defend or cooperate—those are all preserved. If such defenses succeed, the insurer need not pay that claim. This is a preservation

---

16 *Accord In re Arctic Glacier Int'l, Inc.*, 901 F.3d 162, 166 (3d Cir. 2018) ("[a] plan's preclusive effect is a principle that anchors bankruptcy law: '[A] confirmation order is res judicata as to all issues decided or which could have been decided at the hearing on confirmation.'") (quoting *In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989)); *In re USN Commc'ns., Inc.*, 280 B.R. 573, 592 (Bankr. D. Del. 2002) ("a confirmed plan acts as a binding contract on all the parties thereto"); 8 Collier on Bankruptcy ¶ 1141.02 (16th ed. 2021) ("A confirmation order operates as a final judgment. The doctrine of *res judicata* bars all questions that could have been raised pertaining to the confirmed plan, including questions concerning the treatment of any creditor under the plan, the discharge of liabilities, or disposition of property.").

17 *See, e.g.*, *In re TK Holdings, Inc.*, Omnibus Hearing Tr. 62:10–16, *In re TK Holdings, Inc.*, No. 17-11375 (BLS) (Bankr. Del. Sept. 16, 2020) (rejecting insurers' argument in post-confirmation coverage litigation that plan's neutrality provision entitled insurer to re-litigate validity of insurance rights transfer post-confirmation and noting that such an outcome would render the bankruptcy proceedings "a fool's errand").

of the rights and defenses of Coverys and other insurers, which rights and defenses can then be litigated post-confirmation under applicable law.

**4. The Plan Is Not "Patently Unconfirmable"**

61. Coverys' remaining Plan objections do not withstand scrutiny and fail to identify a single plan provision that would render the Plan unconfirmable under settled law.[18]

62. **First**, Coverys asserts that Coverys' excess policies are executory contracts within the meaning of section 365 of the Bankruptcy Code. Coverys Objection at ¶ 23. But this assertion is incorrect; insurance policies are not executory contracts.[19] Coverys cannot point to any case where a Court has held that an excess insurance policy is an executory contract. The reason for this is obvious.

63. The Debtor paid policy premiums to its insurers and is entitled to the coverage it bargained should no coverage defenses apply. The PI/WD Trust will stand in the shoes of the Debtor. If Coverys believes that the Debtor or the PI/WD Trust breached any obligation under its policies, it is entitled to raise that defense in any coverage litigation.

---

[18] *See, e.g.*, *In re Brass Corp*., 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996) (holding that a bankruptcy court may disapprove a disclosure statement with adequate information if the proposed plan is inherently or patently unconfirmable, but that "such action is discretionary and must be used carefully so as not to convert the disclosure statement hearing into a confirmation hearing, and to insure that due process concerns are protected"); *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) ("[w]hen objections relating to confirmability of a plan of reorganization raise novel or unsettled issues of law, the Court will not look behind the disclosure statement to decide such issues at the hearing on the adequacy of the disclosure statement.").

[19] *Gulf Underwriters Ins. Co. v. Burris*, 674 F.3d 999, 1003-04 (8th Cir. 2012) ("But in any event, as Gulf and its attorneys must have known, *every court in the country* to consider a related issue has ruled 'that insurance policies for which the policy periods have expired and the premium has been paid are not executory contracts, despite continuing obligations on the part of the insured.'") (quoting *In re Vanderveer Estates Holding, LLC*, 328 B.R. 18, 26 (Bankr. E.D.N.Y. 2005) (other citations omitted)); *Federal-Mogul*, 684 F.3d at 363-64 (insurance policies are not executory contracts subject to section 365); *Beloit Liquidating Trust v. United Ins.. Co*., 287 B.R. 904, 906 (N.D. Ill. 2002) (same); *In re Int'l Fibercom, Inc.*, 311 B.R. 862, 865 (Bankr. D. Ariz. 2004) (same); *In re CVA Gen. Contractors, Inc.*, 267 B.R. 773, 778 (Bankr. W.D. Tex. 2001) (same); *Columbia Cas. Co. v. Federal Press Co*., 104 B.R. 56, 66 (Bankr. N.D. Ind. 1989) (same).

64. There are no open obligations from the Debtor, or the successor-trust, that either must fulfill that would render the contract executory as to the Debtor. Rather, as it would exist under state law and absent a bankruptcy proceeding, actions or inactions by the insured would simply give rise to coverage defenses benefiting the insurer—the same conclusion that will be reached under the Plan. Circuit courts that have analyzed the issue reach this conclusion even if an underlying policy has a self-insured retention provision that is argued to obligate the insured to satisfy that requirement for coverage to attach. *See Gulf Underwriters*, 674 F.3d at 1003-04 ("These cases confirm that the paragraph in the SIR calling it an 'executory contract' was an attempt (likely futile) to improve Gulf's position in asserting claims for the pre-petition obligations of bankruptcy insureds.").[20]

65. Moreover, even if the Coverys policies were executory contracts that must be analyzed under section 365, Coverys has not and cannot point to any "default" that must be cured or for which adequate assurance is required. And adequate assurance under section 365(f) would require nothing more than what is given under the Plan; the PI/WD Trust's actions or inactions like the Debtor's outside of bankruptcy will give rise to or not give rise to coverage defenses under Coverys' policies. This makes sense, again, because of the nature of insurance policies, "defaults" or breaches can give rise to coverage defenses that state courts will analyze and determine whether they preclude coverage. For this reason, for decades, and without noticeable insurer objection, Courts have analyzed the transfer of rights under insurance policies as part of a plan outside of the scope of section 365 of the Bankruptcy Code.

20 *Accord Vanderveer Estates*, 328 B.R. at 25-26 (stating that an insurance policy was not an executory contract despite the debtor's duty to pay a deductible).; *In re Wisconsin Barge Line, Inc.*, 76 B.R. 695, 697 (Bankr. E.D. Mo. 1987) (holding that a contract was not executory despite the debtor's duties to pay retroactive premiums).

66. **Second**, Coverys asserts that even if the policies are not executory contracts (which is clearly correct), the Debtor cannot make a post-loss assignment of them. Coverys Objection at ¶ 25. But the Bankruptcy Code and Circuit level case law say otherwise. *See* 11 U.S.C. § 1123(a)(5)(B); *Federal-Mogul*, 684 F.3d at 359. Further, as a technical matter, the Plan does not purport to assign the policies themselves to the PI/WD Trust. Only the Debtor's rights are being assigned, which is consistent with section 1123(a)(5)(B) and well-established case law.

67. **Third**, Coverys asserts that even if the policies are not executory contracts (and they are not), the Debtor cannot make a post-loss assignment of them unless Coverys retains every defense to claims it would have had against the insureds prior to the assignments and may assert such defenses against the assignee. Coverys Objection at ¶ 25. The question the Court should consider next is: ***what rights does Coverys contend are being taken away from it***? Coverys' answers to this question are taken in turn:

68. ***First,*** Coverys argues that its rights and obligations are being modified because the Plan calls for the creation of a settlement trust that will be managed for the benefit of personal injury claimants. *See* Coverys Objection at ¶ 28. But Coverys offers no explanation to how this modifies its rights beyond the basic transfer of insurance rights permitted under section 1123(a)(5)(B). Without the PI/WD Trust, there is no mechanism to make payments to tort claimants who do not "opt out" and pursue their claims in the civil justice system.

69. ***Second***, Coverys argues that its rights and obligations are being modified because the PI/WD Trust will determine the Debtor's liability for each trust claim. *See* Coverys Objection at ¶¶ 24 & 29. But Coverys offers no explanation as to how this modifies its rights.

70. Should Coverys have a state law coverage defense to a claim settled without its consent, that remains viable. And, as a practical matter, the PI/WD Trust must liquidate the tort claims. Otherwise, it could not make any payments to tort claimants on account of such claims.

71. ***Third***, Coverys argues that its rights and obligations are being modified because the PI/WD Trust's determination of tort claims is final. *Id.* But Coverys offers no explanation as to how this modifies its rights either. This provision in the Plan impacts the rights and obligations of tort claimants, not Coverys. The Plan as proposed here could not provide for the distribution of $25 million in cash to tort claimants if this money is spent on litigation costs. Tort claimants who elect to go to the PI/WD Trust are effectively agreeing to binding arbitration. This aspect of the Plan is clearly disclosed and is something that tort claimants must consider in deciding whether to "opt out" or not. But these provisions do not impact Coverys in any respect.

72. ***Fourth***, Coverys argues that its rights and obligations are being modified because the PI/WD Trust may seek reimbursement from insurers for purportedly insured claims. *See* Coverys Objection at ¶ 30. But Coverys offers no explanation was to how this modifies its rights. If the claim is an insured claim, then the PI/WD Trust's pursuit of coverage would be consistent with the assignment of the estate's insurance rights to the PI/WD Trust under section 1123(a)(5)(B). Coverys' position cannot be that the PI/WD Trust can never seek coverage for any tort claim. This would be tantamount to arguing that the Plan must discharge Coverys from its coverage obligations, which is not the law in the Fifth Circuit. *See Chapman*, 345 F.3d at 343; *Edgeworth*, 993 F.2d at 54.

73. ***Fifth***, Coverys argues that its policies are being unilaterally re-written. *See* Coverys Objection at ¶ 31. But Coverys fails to offer any intelligible explanation as to how

this is so. Nothing in the Plan purports to rewrite any insurance policies. In the face of this fact, Coverys contends that the Plan seeks to eliminate the insured's duty to defend claims. *Id*. at ¶ 32.

74. This is a fascinating argument. Coverys contends that under the terms of its policies, it has no obligation to defend any suit. *Id*. Coverys then points out that the PI/WD Trust has no obligation to appear and defend any lawsuit commenced against it, which is consistent with the fact that the PI/WD Trust should not be required to spend its limited assets on litigation costs.

75. Coverys then makes a tremendous leap of logic and asserts that this "blanket refusal" to appear and defend any lawsuit is contrary to its policies ***and, indeed, re-writes them itself***! But this also ignores the Plan. Under Article IX.L of the Plan, if another party is required to defend a lawsuit as a condition to coverage under an insurance policy, and no such party does so, then Coverys is free to argue that a breach has occurred and that it has no obligation to indemnify as a result of that breach.

76. So then why is Coverys wasting the Plan Proponents' time and the estate's limited resources? What Coverys is attempting here, through its disguised confirmation objection, is a request that this Court to render an ***advisory opinion*** as to what Coverys' obligations might be if certain events take place in the future.

77. Coverys' concern is that a tort claimant ***could*** "opt out," parties that have an obligation to defend ***may not (or may)*** undertake the defense of the claim, and if the tort claimant prevails in the litigation, Coverys ***could*** be asked to pay some portion of the judgment. But the Plan as drafted leaves the resolution of these issues for a coverage court to decide in the future. Coverys' version of "insurance neutrality" appears to be that unless the Court puts its thumb on the scale in Coverys' favor today and rules about what Coverys' obligations may or may not be in the future, then the Plan cannot be confirmed. This makes no sense.

78. ***Sixth***, Coverys argues that the Plan seeks to modify the requirements for exhaustion of the underlying policies. *See* Coverys Objection at ¶¶ 14 & 34. In support of this argument, Coverys points to a section in the Plan addressing the treatment of Class 8: "The PI/WD Trust shall have no obligation to satisfy any Insurance Policy's deductible or self-insured retention per claim or in the aggregate." *Id.* at ¶ 14.

79. But whether or not that failure to pay a self-insured retention or deductible is grounds for denying a claim is a state law coverage issue, not determined by the Plan. The Plan preserves Coverys' coverage defenses, including any defense related to the failure to satisfy any deductible or retention. Preserving, but not making advisory rulings related to coverage defenses, does not render the Plan patently unconfirmable as evidenced by the fact that other Courts have overruled objections by insurers and confirmed plans with similar provisions.[21]

80. ***Seventh***, Coverys argues that its rights and obligations are being modified because the PI/WD Trust can settle claims without its consent. *See* Coverys Objection at ¶¶ 14, 37-38. But any insured can enter into a settlement outside of bankruptcy without the consent of its insurer.

81. Settlement in bankruptcy is no different. Covery's argument is that under its policies, if Coverys does not consent to the settlement, then coverage is lost (according to Coverys). But, again, under the Plan, whatever consequence follows from the PI/WD Trust's decision to settle a tort claim is what it is. If the decision to enter into a settlement without Coverys' consent means that "coverage is lost," then that is a potential consequence of that decision.

---

21 *See, e.g.*, *In re Boy Scouts of Am. & Delaware BSA, LLC*, 642 B.R. 504, 673–74 (Bankr. D. Del. 2022), supplemented, No. 20-10343 (LSS), 2022 WL 20541782 (Bankr. D. Del. Sept. 8, 2022), *aff'd,* 650 B.R. 87 (D. Del. 2023), *and aff'd*, 650 B.R. 87 (D. Del. 2023) (overruling objection to provision stating, "Nothing herein shall obligate any Non-Settling Insurance Company to advance any deductible or self-insured retention, unless otherwise required by applicable law" because "[w]hether an insurance company is required to 'drop down' is, in the first instance, a matter of state law").

82. Again, Coverys seeks an advisory opinion on future possibilities. Coverys' concern is that the PI/WD Trust ***could*** settle claims without its consent and then seek coverage. But the Plan as drafted leaves the resolution of these issues for a coverage court to decide in the future. Coverys' heavy-handed version of "insurance neutrality" should be rejected.

83. Nothing in the Disclosure Statement suggests that all allowed claims will be covered by insurance or that the coverage available will be easy to access. And none of Coverys' objections amount to reasons for this Plan not to be solicited; they are misplaced confirmation objections and coverage arguments that ignore the Plan itself. The TCC will be prepared to further address these issues at a future confirmation hearing. For all of these reasons, the Court should overrule the Coverys Objection and permit solicitation to commence.

**D. The Idaho Parties' Objection Should Be Overruled**

84. The State of Idaho and certain of its instrumentalities object to the Solicitation Procedures on the basis that they afford each creditor one vote estimated for voting purposes at $1.00. Idaho Parties Objection at ¶¶ 2-6.

85. But the Plan Proponents anticipated and addressed this very concern by establishing procedures and a timeline for creditors, like the Idaho Parties to file and prosecute Rule 3018 Motions, should they be concerned with the one dollar, one vote protocol. *See* Disclosure Statement Motion at ¶¶ 73-79; Solicitation Procedures (Dkt. No. 1741-1) at pp. 7-8.

86. Those motions must be filed and served by December 27, 2024, and the Plan Proponents are willing to meet and confer with any creditor ahead of that deadline to attempt to address their concerns. However, it bears noting the implicit concerns motivating Idaho Parties Objection are entirely misplaced.

87. The Plan and its classification scheme were thoughtfully structured so that no group of creditors, especially governmental co-defendants—legitimately or otherwise—feel like their vote can be swamped by non-similarly situated creditors.

88. This is unequivocally **not** a situation where the Plan puts all impaired creditors into a single class and then attempts to achieve class acceptance by weighing low-value (or no-value) claims the same as high-value claims so that holders of high-value claims are denied their rights. Just the opposite is true—the Plan utilizes multiple classes so that creditors are not mistreated in this manner. And the Solicitation Procedures afford ***all claimants*** the right and opportunity to demand a higher claim value for voting purposes.

89. To the extent the Idaho Parties' claims arise out of their status as co-defendants in underlying personal injury and wrongful death tort litigation, such claims are classified together, to vote together, separately from tort victims. Those classes, Class 9 and Class 10, will principally be constituted of similarly situated governmental entities and forcing an estimation process to establish relative voting entitlements among those class members, many who have the same partially liquidated and unliquidated claims status as the Idaho Parties, makes little practical sense.

90. To the extent their claims are based on breached commercial contracts, the Idaho Parties' vote(s) will be collected along with similarly situated commercial creditors with the same incentives and treatment as the Idaho Parties.

91. If any of the classes in which the Idaho Parties are entitled to vote, votes to reject the Plan, then the Plan Proponents have preserved their ability to seek to approve the Plan over those rejections under section 1129(b). *See* Disclosure Statement at Art. I, § F.

92. The broad-based one dollar one vote voting mechanic is appropriately used to efficiently solicit the Plan. However, to the extent the Idaho Parties or any other creditor wish to

establish a different claim amount for voting purposes, they are entitled to do so under the Solicitation Procedures. For these reasons, the Idaho Parties Objection should be overruled.

**CONCLUSION**

93. The Disclosure Statement contains adequate information sufficient to apprise creditors and other parties-in-interest of their varied choices under the Plan and the Plan's impact on their claims. Many of the objections raised as to adequacy of information have been addressed by incorporating edits to the Disclosure Statement and its schedules. The Solicitation Procedures are fair, reasonable, and will be effective in progressing this case toward a confirmation hearing. The objections that remain, of the U.S. Trustee, Mr. Tripati, and Coverys, are confirmation objections and the TCC believes it and the Plan Proponents will prevail at confirmation. The confirmation objections should not prohibit or delay solicitation and should be overruled.

Dated: November 4, 2024
New York, New York

/s/ *Eric R. Goodman*
David J. Molton, Esquire
Eric R. Goodman, Esquire
D. Cameron Moxley, Esquire
Gerard T. Cicero, Esquire
Susan Sieger-Grimm, Esquire
BROWN RUDNICK LLP
7 Times Square
New York, NY 10036
(212) 209-4800; (212) 209-4801 (f)
dmolton@brownrudnick.com
egoodman@brownrudnick.com
cmoxley@brownrudnick.com
gcicero@brownrudnick.com
ssieger-grimm@brownrudnick.com

Co-Lead Counsel to the Tort Claimants' Committee

Michael W. Zimmerman, Esquire
BERRY RIDDELL LLC
6750 E. Camelback Rd. Suite #100
Scottsdale, AZ 85251
(480) 385-2727
mz@berryriddell.com

Co-Lead Counsel to the Tort Claimants' Committee

**CERTIFICATE OF SERVICE**

I certify that on November 4, 2024, I caused a true and correct copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

*/s/ Eric R. Goodman*
Eric R. Goodman