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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	:	Chapter 11
	:	Case No. 25-23630 (MBK)
United Site Services, Inc., et al.,[1]	:	The Honorable Michael B. Kaplan
Debtors.	:	Hearing Date: February 10, 2026, at 10:00 a.m.

UNITED STATES TRUSTEE'S OBJECTION TO THE AMENDED JOINT PREPACKAGED PLAN OF REORGANIZATION OF UNITED SITE SERVICES, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

Andrew R. Vara, the United States Trustee for Regions Three and Nine (the "U.S. Trustee"), through his undersigned counsel, hereby objects to the *Amended Joint Prepackaged*

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: United Site Services, Inc. (3387); Johnny on the Spot, LLC (1604); Northeast Sanitation, Inc. (3569); PECF USS Intermediate Holding II Corporation (5368); PECF USS Intermediate Holding III Corporation (9019); Portable Holding Corporation (2044); Portable Intermediate Holding Corporation (2150); Portable Intermediate Holding II Corporation (2253); Russell Reid Waste Hauling and Disposal Service Co., Inc. (5208); United Site National Services Company (4933); United Site Services Northeast, Inc. (3022); United Site Services of California, Inc. (8969); United Site Services of Colorado, Inc. (5717); United Site Services of Florida, LLC (1631); United Site Services of Louisiana, Inc. (0960); United Site Services of Maryland, Inc. (1689); United Site Services of Mississippi, LLC (7131); United Site Services of Nevada, Inc. (8145); United Site Services of Texas, Inc. (3850); USS Ultimate Holdings, Inc. (8857); Vortex Holdco, LLC (6868); and Vortex Opco, LLC (6864). The Debtors' service address is 118 Flanders Road, Suite 1000, Westborough, MA 01581.

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Plan of Reorganization of United Site Services, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code [Dkt. 234] (the "Plan"),[2] and respectfully states as follows:

PRELIMINARY STATEMENT

1. In contravention of United States Supreme Court precedent and applicable state law, the Plan extracts non-consensual third-party releases and, to the extent that exculpation is permissible beyond the provisions of Bankruptcy Code section 1125(e), the proposed Plan's exculpation provision violates controlling Third Circuit case law by attempting to shield non-fiduciaries of the Debtors' estates and impermissibly insulates prepetition activity from liability.

2. In addition, the Plan contains (i) overbroad Debtor releases and injunctions, (ii) a gatekeeping role for the Court, (iii) language that improperly suggests that the Plan itself is a settlement agreement, (iv) language that the releases, Debtor and third-party, are approved pursuant to Fed. R. Bankr. P. 9019, and (v) improperly seeks the waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 3020(e).

3. The U.S. Trustee further objects to several miscellaneous provisions of the Plan including (i) Article III of the Plan that contains the phrase "satisfaction, settlement, release and discharge of, and in exchange for such Claim" (Art. III.B, III.B.2.b., III.B.c.3, III.B.4.c, III.B.5.c, III.B.6.c, III.B.7.c, III.B.8.b, and III.B.9.b, pages 125-129 of 177); (ii) Article III.E of the Plan concerning votes and deemed acceptances, and (iii) Article XII.L of the Plan that allows cases to be deemed closed on and after the Effective Date except for one case remaining open.[3]

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan (including exhibits), as applicable.

[3] The Debtors and the U.S. Trustee continue to discuss certain of these objections and hope to resolve some of these objections prior to the confirmation hearing including but not limited to (i) the phrase "satisfaction, settlement, release and discharge of, and in exchange for such Claim", (ii) language that improperly suggests that the Plan itself is a settlement agreement, (iii) language that the releases, Debtor and third-party, are approved pursuant to Fed. R. Bankr. P. 9019, (iv) the waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 3020(e), (v) votes and deemed acceptances, and (vi) cases to be deemed closed on and after the Effective Date except for one case remaining open.

4. Accordingly, and for the reasons set forth in more detail herein, the U.S. Trustee respectfully requests that the Court enter an order denying confirmation of the Plan.[4]

JURISDICTION AND STANDING

5. This Court has jurisdiction to hear and determine confirmation of the Plan and this Objection pursuant to: **(i)** 28 U.S.C. § 1334; **(ii)** applicable orders of the United States District Court of the District of New Jersey issued pursuant to 28 U.S.C. § 157(a); and **(iii)** 28 U.S.C. § 157(b)(2).

6. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of chapter 11 cases filed in this judicial district. This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the Courts. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog"). Under 28 U.S.C. § 586(a)(3)(B) the U.S. Trustee has the duty to monitor and comment on plans and disclosure statements filed in chapter 11 cases.

7. The U.S. Trustee has standing to be heard concerning confirmation of the Plan and this Objection pursuant to 11 U.S.C. § 307. *See U.S. Tr. v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under section 307, which goes beyond mere pecuniary interest).

BACKGROUND

A. The Chapter 11 Cases

8. On December 29, 2025 (the "Petition Date"), United Site Services, Inc.; Johnny on the Spot, LLC; Northeast Sanitation, Inc.; PECF USS Intermediate Holding II Corporation; PECF

[4] The Debtors agreed to extend the deadline for the U.S. Trustee to object to confirmation of the Plan to 4:00 p.m. on February 2, 2026.

USS Intermediate Holding III Corporation; Portable Holding Corporation; Portable Intermediate Holding Corporation; Portable Intermediate Holding II Corporation; Russell Reid Waste Hauling and Disposal Service Co., Inc.; United Site National Services Company; United Site Services Northeast, Inc.; United Site Services of California, Inc.; United Site Services of Colorado, Inc.; United Site Services of Florida, LLC; United Site Services of Louisiana, Inc.; United Site Services of Maryland, Inc.; United Site Services of Mississippi, LLC; United Site Services of Nevada, Inc.; United Site Services of Texas, Inc.; USS Ultimate Holdings, Inc.; Vortex Holdco, LLC; and Vortex Opco, LLC (the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").

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

10. As of the date hereof, no statutory committee, trustee, or examiner has been requested or appointed.

B. The Debtors and their Businesses

11. The Debtors are the largest provider of portable sanitation systems and related "site services," with more than 3,000 employees and more than 70,000 customers. *See* Dkt. 17 at Section II.A.1.a, page 22 of 504. Construction sites make up over 70% of the Debtors' revenue. *See id.*

12. Despite entering into a 2024 Recapitalization with several pre-petition lenders that provided new capital to the Debtors, the Debtors continued to face liquidity challenges exacerbated by the decline of construction activity. *See id.* at Section II.C.2 and 3, page 32-33 of 504.

C. The Plan.

13. On December 29, 2025, the Debtors filed the *Joint Prepackaged Plan of Reorganization of United Site Services, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Original Plan"). *See* Dkt. 16.

14. Also, on December 29, 2025, the Debtors filed the *Motion for Entry of an Order (i) Scheduling a Combined Hearing to Approve the Disclosure Statement and Confirm the Plan; (ii) Establishing Objection Deadlines; (iii) Approving Solicitation Procedures; (iv) Approving the Form and Manner of Ballots and Notices; (v) Directing that a Meeting of Creditors Not be Convened; (vi) Conditionally Waiving the Requirement To File Schedules of Assets and Liabilities and Statements of Financial Affairs; (vii) Approving Procedures for Assumption and Rejection of Executory Contracts and Unexpired Leases; (viii) Granting Approval of Rights Offering Procedures; and (ix) Granting Related Relief* (the "Scheduling Motion"). *See* Dkt. 18.

15. On December 29, 2025, CastleKnight Master Fund LP ("CastleKnight") filed an Objection to First Day Relief. *See* Dkt. 57. CastleKnight objected to the motion concerning DIP financing, alleging that there was a lien priority dispute and requesting adequate protection, and arguing that the scheduling timeline was unworkable. *See id.*

16. On December 30, 2025, after a hearing at which the U.S. Trustee and CastleKnight orally objected to the Scheduling Motion, the Court entered an Order (i) Scheduling a Combined Hearing to Approve the Disclosure Statement and Confirm the Plan; (ii) Establishing Objection Deadlines; (iii) Approving Solicitation Procedures; (iv) Approving the Form and Manner of Ballots and Notices; (v) Directing that a Meeting of Creditors Not be Convened; (vi) Conditionally Waiving the Requirement To File Schedules of Assets and Liabilities and Statements of Financial Affairs; (vii) Approving Procedures for Assumption and Rejection of Executory Contracts and

Unexpired Leases; (viii) Granting Approval of Rights Offering Procedures; and (ix) Granting Related Relief, and scheduled a confirmation hearing for February 10, 2026. *See* Dkt. 79.

17. On January 23, 2026, the Debtors filed a Notice of Filing of Plan Supplement. *See* Dkt. 217.

18. On January 26, 2026, after participating in Court-ordered mediation, the Debtors, the Ad Hoc Group, and CastleKnight executed a Settlement Agreement (the "Settlement Agreement") resolving CastleKnight's objections to the first day relief and Original Plan and modifying the treatment of its claims thereunder. *See* Dkt. 233 at Annex I, pages 271-283 of 396.

19. On January 28, 2026, the Debtors filed a Notice of Filing of Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing (B) Grant Senior Secured Priming Liens and Superpriority Administrative Expense Claims and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Modifying the Automatic Stay; and (IV) Granting Related Relief. *See* Dkt. 233. This Notice attached a copy of the Settlement Agreement as Annex I. *See id.* at Annex I, pages 271-283 of 396.

20. On January 28, 2026, the Debtors filed the *Amended Joint Prepackaged Plan of Reorganization of United Site Services, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code*. *See* Dkt. 234 (the "Plan").

21. On February 1, 2026, the Debtors filed a Notice of Filing of Amended Plan Supplement. *See* Dkt. 250.

D. Specific Provisions of the Plan

22. The Plan includes the following provisions relevant to this Objection.

i. Third-Party Release Provision

23. Article VIII.E of the Plan broadly provides that the Releasing Parties[5] shall release each of the Released Parties[6] "from any and all Claims, obligations, rights, suits, damages, Causes of Action, remedies and liabilities whatsoever (including any derivative claims, including those asserted or assertable on behalf of any Releasing Party), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, direct or derivative, suspected or unsuspected, secured or unsecured, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any applicable international,

[5] The Plan defines "Releasing Parties" as follows:

> "Releasing Parties" means, collectively and in each case in their capacity as such: (i) the Debtors, (ii) the Reorganized Debtors, (iii) the Consenting Stakeholders, (iv) each of the First-Out Notes Trustee, the First-Out/Second-Out Agent, the ABL Agent, and the Intercompany Credit Agreement Agent, (v) the DIP Agent and the DIP Lenders, (vi) the Exit Term Loan Parties, (vii) the Exit ABL Facility Parties and Exit RCF Facility Parties, (viii) the ERO Backstop Parties, (ix) the Sponsor, (x) CastleKnight; (xi) each Related Party of each of the foregoing Persons in clauses (i) through (x), (xii) the Holders of Claims or Interests who vote to accept the Plan and who do not affirmatively opt out of the Third-Party Release, (xiii) the Holders of Claims or Interests that are deemed to accept the Plan and who do not affirmatively opt out of the Third-Party Release, (xiv) the Holders of Claims or Interests who abstain from voting on the Plan and who do not affirmatively opt out of the Third-Party Release, (xv) the Holders of Claims or Interests who are deemed to reject the Plan and who do not affirmatively opt out of the Third-Party Release, and (xvi) the Holders of Claims or Interests who vote to reject the Plan and who do not affirmatively opt out of the Third-Party Release.

See Dkt. 234 at Art. I.A, page 18-19 of 177. The Settlement Agreement expands the definition of Releasing Parties to include CastleKnight and its Related Parties. *See* Settlement Agreement, Dkt. 233, paragraph 14 on page 281 of 396.

[6] The Plan defines "Released Parties" as follows:

> "Released Parties" means collectively and in each case in their capacity as such: (i) the Debtors, (ii) the Reorganized Debtors, (iii) the Consenting Stakeholders, (iv) each of the First-Out Notes Trustee, the First-Out/Second-Out Agent, the ABL Agent, and the Intercompany Credit Agreement Agent, (v) the DIP Agent and the DIP Lenders, (vi) the Exit Term Loan Parties, (vii) the Exit RCF Facility Parties, (viii) the Exit ABL Facility Parties, (ix) the ERO Backstop Parties, (x) the Sponsor, (xi) CastleKnight, and (xii) each Related Party of each of the foregoing Persons in clauses (i) through (xi).

See Dkt. 234 at Art. I.A, page 27 of 177. The Settlement Agreement expands the definition of Released Parties to include CastleKnight and its Related Parties. *See* Settlement Agreement, Dkt. 233, paragraph 14 on page 281 of 396.

foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise."[7]

See Dkt. 234 at Art. VIII.E, pages 72-74 of 177.

[7] The Plan provides for a Third-Party Release as follows:

> Notwithstanding anything contained in the Plan or the Confirmation Order to the contrary, pursuant to Bankruptcy Code section 1123(b), in exchange for good and valuable consideration, the receipt and adequacy of which is hereby confirmed, on and after the Effective Date, each Releasing Party (in each case on behalf of itself and its respective Related Parties who may purport to assert any Claims, obligations, rights, suits, damages, Causes of Action, remedies or liabilities) hereby conclusively, absolutely, unconditionally, irrevocably, and forever releases and discharges each and all of the Released Parties from any and all Claims, obligations, rights, suits, damages, Causes of Action, remedies and liabilities whatsoever (including any derivative claims, including those asserted or assertable on behalf of any Releasing Party), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, direct or derivative, suspected or unsuspected, secured or unsecured, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise, that each Releasing Party and/or its Related Parties or any other Entities claiming under or through them would have been legally entitled to assert in his/her or its own right (whether individually or collectively) or on behalf of any Entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Estates, or the Reorganized Debtors (in each case, including the capital structure, management, direct or indirect ownership or operation thereof), the purchase, sale, or rescission of any security of any Debtor, or Reorganized Debtor, the subject matter of, or the transactions or events giving rise to, any Claim or Interest affected by the Restructuring or the Chapter 11 Cases, the business or contractual arrangements or interactions between any Debtor, or Reorganized Debtor and any other Person, the Restructuring Transactions, the Restructuring Support Agreement, the CastleKnight Settlement, any Definitive Documents, the 2024 Transactions, the 2024 Transactions Documents, the DIP Facility the DIP Orders, the DIP Facility Documents, the Disclosure Statement, the Plan Supplement, the Exit Term Loan Facility, the Exit RCF Facility, the Exit Term Loan Facility Documents, the Exit RCF Facility Documents, the Equity Rights Offering, the ERO Backstop Agreement, the ERO Documents, the Exit ABL Facility, the Exit ABL Facility Documents, the Management Incentive Plan, the Plan, the Plan Supplement, the negotiation, formulation, preparation, or implementation thereof, the solicitation of consent or support with respect to the Restructuring or the Plan, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, in all cases, based upon any act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date (the "Third-Party Release", and together with the Debtor Release, the "Releases"). Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not (i) release any Causes of Action identified in the Schedule of Retained Causes of Action, (ii) release any post-Effective Date obligations of any party or Entity under the Plan, the Confirmation Order, any Definitive Document, any Restructuring Transaction, or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan, including the Exit Term Loan Facility Documents, the Exit RCF Facility Documents, ERO Documents, Exit ABL Facility Documents, or any Claim or obligation arising under the Plan, and any rights that remain in effect from and after the Effective Date to enforce the Definitive Documents and the obligations contemplated by the Restructuring Transactions, (iii) affect the rights of any Holder of Allowed Claims to receive distributions under the Plan, (iv) release any claims or Causes of Action against any non-Released Parties, (v) release Claims or Causes of Action arising out of or relating to any act or omission of a Released Party that constitutes actual fraud or willful misconduct, each solely to the extent as determined by a Final

24. The Released Partes include each Related Party[8] of each Person or Entity listed in clauses (i) through (xi) of the definition of "Released Parties." *See* Dkt. 234 at Art. I.A, page 27 of 177. Holders of Claims in Classes 1, 2, 3, 4, 5, 8, and 12 and Holders of Intercompany Claims and Interests in Classes 9, 10, and 11 are either unimpaired or are insiders or Affiliates of the Debtor or impaired but deemed to reject; as a result, they are either presumed to have accepted the

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> Order of a court of competent jurisdiction, or (vi) release any lender under either the First-Out/Second-Out Credit Agreement or ABL Facility Credit Agreement of any indemnification or contribution claims held by the prepetition First-Out/Second-Out Agent or the ABL Agent.
>
> Entry of the Confirmation Order shall constitute the Court's approval, pursuant to Bankruptcy Rule 9019, of the Third-Party Release, which includes by reference each of the related provisions and definitions contained in the Plan, and, further, shall constitute the Court's finding that the Third-Party Release is: (i) consensual; (ii) essential to the Confirmation; (iii) given in exchange for the good and valuable consideration provided by the Released Parties, including the Released Parties' contributions to facilitating the restructuring and implementing the Plan; (iv) a good faith settlement and compromise of the claims or Causes of Action released by the Third-Party Release; (v) in the best interests of the Debtors and their Estates; (vi) fair, equitable, and reasonable; (vii) given and made after due notice and opportunity for hearing; and (viii) a bar to any of the Releasing Parties asserting any claim or Cause of Action released pursuant to the Third-Party Release.

See Dkt. 234 at Art. VIII.E, pages 72-74 of 177.

[8] The Plan defines "Related Parties" as follows:

> "Related Parties" means, collectively, with respect to any Entity, in each case solely in its capacity as such with respect to such Entity, such Entity's current and former directors, managers, officers, shareholders, investment committee members, special committee members, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, participants, successors, assigns (whether by operation of law or otherwise), subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, fiduciaries, Case 25-23630-MBK Doc 234 Filed 01/28/26 Entered 01/28/26 23:00:48 Desc Main Document Page 26 of 177 18 employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, other representatives, restructuring advisors, and other professionals and advisors, and any such person's or Entity's respective predecessors, successors, assigns, heirs, executors, estates, and nominees; *provided*, *however*, for the avoidance of doubt, any Affiliates of any Revolving Credit Lender, or any funds or accounts managed by BlackRock Financial Management, Inc., BlackRock Advisors, LLC, BlackRock Fund Advisors, BlackRock Capital Investment Advisors, LLC or their Related Parties (collectively, the "***BlackRock Creditors***"), that are signatories to the Restructuring Support Agreement (which, for purposes of this proviso, shall include any separate trading desk, fund, account, branch unit and/or business group of a Revolving Credit Lender or a BlackRock Creditor) shall not be deemed to be a Related Party of such Revolving Credit Lender or such BlackRock Creditor or a Revolving Credit Lender or a BlackRock Creditor itself, unless such Affiliate has itself submitted a Ballot or specifically authorized a third party to submit a Ballot on its behalf.

See Dkt. 234 at Art. I.A.180, page 26-27 of 177.

Plan or deemed to have rejected it, and so are not entitled to vote on the Plan. *See* Dkt. 234, Art. III.B, page 37-42 of 177. Instead, pursuant to the Solicitation and Voting Procedures, the holders of claims in these classes received a Notice of Non-Voting Status and Opt-Out Form. *See* Dkt. 18 at Exhibits F and G, pages 145-177 of 212.

25. The Notice of Non-Voting Status and Opt-Out Forms specifies that a recipient who fails to timely and properly submit a Release Opt-Out Election Form to the Balloting Agent by the Opt-Out Deadline with the opt-out box checked will be deemed to have consented to the Article VIII.E third-party releases. *See id.* The Notice of Non-Voting Status further provides that members of these classes may also opt out of the third-party release by objecting to the Plan by the objection deadline. *See id.* at Exhibits F and G, pages 147 and 164 of 212.

26. Holders of Claims in Classes 6a, 6b, and 7 are impaired and entitled to vote under the Plan. *See* Dkt. 234 at Art. III.B.6, III.B.7 and III.B.8, pages 40-41 of 177. The ballots provided to the voting classes included an opt-out election. *See* Dkt. 18 at Exhibits B-1 and B-2, pages 50, 63, 71, and 84 of 212. The opt-out election provides that a claimant will be deemed to provide the releases contained in Article VIII.E of the Plan unless the box is checked and the ballot submitted to the Balloting Agent prior to the Voting Deadline. *See id.*

ii. Debtor Release Provision

27. Article VIII.D of the Plan broadly provides that each Released Party is deemed released on and after the Effective Date by each Debtor, Estate, and Reorganized Debtor (in each case on behalf of, themselves and their respective Related Parties)**.** The Claims being released include "any and all Claims, obligations, rights, suits, damages, Causes of Action, remedies and liabilities whatsoever (including any Avoidance Actions and any derivative claims, including those asserted or assertable on behalf of any Debtor, Estate, or Reorganized Debtor), whether liquidated

or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, direct or derivative, suspected or unsuspected, secured or unsecured, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise."[9] *See* Dkt. 234 at Art. VIII.D, pages 71-72 of 177.

[9] The Plan provides for Debtor Releases as follows:

> Notwithstanding anything contained herein or the Confirmation Order to the contrary, pursuant to Bankruptcy Code section 1123(b), in exchange for good and valuable consideration, the receipt and adequacy of which is hereby confirmed, on and after the Effective Date, each Debtor, Estate, and Reorganized Debtor (in each case on behalf of themselves and their respective Related Parties who may purport to assert any Claims, obligations, rights, suits, damages, Causes of Action, remedies or liabilities) hereby conclusively, absolutely, unconditionally, irrevocably, and forever releases and discharges each and all of the Released Parties from any and all Claims, obligations, rights, suits, damages, Causes of Action, remedies and liabilities whatsoever (including any Avoidance Actions and any derivative claims, including those asserted or assertable on behalf of any Debtor, Estate, or Reorganized Debtor), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, direct or derivative, suspected or unsuspected, secured or unsecured, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise, that each Debtor, Estate, or Reorganized Debtor and/or its Related Parties or any other Entities claiming under or through them would have been legally entitled to assert in his/her or its own right (whether individually or collectively) or on behalf of any Entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Estates, or the Reorganized Debtors (in each case, including the capital structure, management, direct or indirect ownership or operation thereof), the purchase, sale, or rescission of any security of any Debtor, or Reorganized Debtor, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements or interactions between any Debtor, or Reorganized Debtor and any other Person, the Restructuring Transactions, the Restructuring Support Agreement, the CastleKnight Settlement, any Definitive Documents, the 2024 Transactions, the 2024 Transactions Documents, the DIP Facility, the DIP Orders, the DIP Facility Documents, the Disclosure Statement, the Exit Term Loan Facility, the Exit RCF Facility, the Exit Term Loan Facility Documents, the Exit RCF Facility Documents, the Equity Rights Offering, the ERO Backstop Agreement, the ERO Documents, the Exit ABL Facility, the Exit ABL Facility Documents, the Management Incentive Plan, the Plan, the Plan Supplement, the negotiation, formulation, preparation, or implementation thereof, the solicitation of consent or support with respect to the Restructuring or the Plan, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, in all cases, based upon any act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, other than any rights that remain in effect from and after the Effective Date to enforce the Definitive Documents and the obligations contemplated by the Restructuring Transactions (the "Debtor Release"). Notwithstanding anything to the contrary in the foregoing, the releases set forth

iii. Exculpation Provision

above do not (i) release any Causes of Action identified in the Schedule of Retained Causes of Action, (ii) release any post-Effective Date obligations of any party or Entity under the Plan, the Confirmation Order, any Definitive Document, any Restructuring Transaction, or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan, including the Exit Term Loan Facility Documents, the Exit RCF Facility Documents, the ERO Documents, the Exit ABL Facility Documents, or any Claim or obligation arising under the Plan and any rights that remain in effect from and after the Effective Date to enforce the Definitive Documents and the obligations contemplated by the Restructuring Transactions, (iii) affect the rights of Holders of Allowed Claims to receive distributions under the Plan, (iv) release any claims or Causes of Action against any non-Released Party, or (v) release Claims or Causes of Action arising out of or relating to any act or omission of a Released Party that constitutes actual fraud or willful misconduct, each solely to the extent as determined by a Final Order of a court of competent jurisdiction.

Entry of the Confirmation Order shall constitute the Court's approval, pursuant to Bankruptcy Rule 9019, of the Debtor Release, which includes by reference each of the related provisions and definitions contained in this Plan and, further, shall constitute the Court's finding that the Debtor Release is: (i) in exchange for the good and valuable consideration provided by the Released Parties; (ii) a good faith settlement and compromise of the Claims or Causes of Action released by the Debtor Release; (iii) in the best interests of the Debtors, the Estates, and all Holders of Claims and Interests; (iv) fair, equitable, and reasonable; (v) given and made after notice and opportunity for hearing; and (vi) a bar to any of the Debtors, the Reorganized Debtors, or the Estates asserting any Claim or Cause of Action released by the Debtor Release against any of the Released Parties.

See Dkt. 234 at Art. VIII.D, pages 71-72 of 177.

28. Article VIII.F of the Plan is an overbroad exculpation provision[10] for Exculpated Parties.[11] *See* Dkt. 234 at Art. VIII.F, page 74 of 177.

iv. Injunction and Gatekeeping Provision

[10] The Plan's exculpation provision states as follows:

> Except as otherwise provided in the Plan or Confirmation Order, to the fullest extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party will be released and exculpated from, any claim or Cause of Action based on any act or omission occurring on or after the Petition Date through the Effective Date in connection with or arising out of the administration of the Chapter 11 Cases, the negotiation and pursuit of the Restructuring Support Agreement, the CastleKnight Settlement, the Restructuring, the 2024 Transactions, the 2024 Transactions Documents, the DIP Facility, the DIP Orders, the DIP Facility Documents, the Disclosure Statement, the Exit Term Loan Facility, the Exit RCF Facility, the Exit Term Loan Facility Documents, the Exit RCF Facility Documents, the Equity Rights Offering, the ERO Backstop Agreement, the ERO Documents, the Exit ABL Facility, the Exit ABL Facility Documents, the Definitive Documents, the Plan Supplement, the Plan and related agreements, instruments, and other documents, or the solicitation of votes for, or confirmation of, the Plan, the funding of the Plan, the occurrence of the Effective Date, the administration of the Plan or the property to be distributed under the Plan, the issuance of securities under or in connection with the Plan, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Reorganized Debtors, or the transactions in furtherance of any of the foregoing, other than (a) Claims or Causes of Action arising out of or related to any act or omission of an Exculpated Party that is a criminal act or constitutes gross negligence, intentional fraud or willful misconduct as determined by a Final Order, but in all respects such Persons will be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities, (b) rights that remain in effect from and after the Effective Date to enforce the Definitive Documents and the CastleKnight Settlement, including the Restructuring Support Agreement, and the obligations contemplated thereunder, or (c) breach of such Exculpated Party's obligations under any Definitive Document. The Confirmation Order shall include a determination that the Exculpated Parties have acted in compliance with the applicable provisions of the Bankruptcy Code and have participated in good faith with regard to the solicitation of securities pursuant to the Plan and, therefore, are not liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan. This exculpation is in addition to, and not in limitation of, all other releases, indemnities, exculpations, and any other applicable law or rules protecting such Exculpated Parties from liability.

See Dkt. 234 at Art. VIII.F, page 74 of 177.

[11] The Plan defines "Exculpated Parties" as follows:

> "Exculpated Parties" means collectively and in each case n their capacity as such: (i) the Debtors, (ii) the Reorganized Debtors, (iii) with respect to each of the foregoing, their current and former directors, managers, officers, attorneys, financial advisors, consultants or other professionals or advisors that served in such capacity between the Petition Date and the Effective Date, and (iv) the Professionals retained by the Debtors in the Chapter 11 Cases.

See Dkt. 234 at Art. I.A.92, page 19 of 177.

29. Art. VIII.G of the Plan broadly provides a permanent injunction against "all Entities that have held, hold, or may hold claims or interests or Causes of Action or liabilities that have been released, discharged, or are subject to exculpation" from and after the Effective Date from taking certain enumerated actions against "the Debtors, the Reorganized Debtors, the Exculpated Parties, or the Released Parties."[12] *See* Dkt. 234 at Art. VIII.G, page 74-75 of 177. In addition,

[12] The Plan's injunction provision states as follows:

> Effective as of the Effective Date, pursuant to section 524(a) of the Bankruptcy Code, to the fullest extent permissible under applicable law, and except as otherwise expressly provided in the Plan or for obligations issued or required to be paid pursuant to the Plan or the Confirmation Order, all Entities that have held, hold, or may hold claims or interests or Causes of Action or liabilities that have been released, discharged, or are subject to exculpation hereunder are permanently enjoined and precluded, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Reorganized Debtors, the Exculpated Parties, or the Released Parties: (1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such claims or interests or Causes of Action or liabilities; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such claims or interests or Causes of Action or liabilities; (3) creating, perfecting, or enforcing any Lien or encumbrance of any kind against such Entities or the respective property or estates of such Entities on account of or in connection with or with respect to any such claims or interests or Causes of Action or liabilities; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such claims or interests or Causes of Action or liabilities unless such Entity has timely asserted such setoff, subrogation, or recoupment right in a document filed with the Court explicitly preserving such right; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such claims or interests or Causes of Action or liabilities released or settled pursuant to the Plan.
>
> By accepting distributions under the Plan, each Holder of an Allowed Claim or Interest extinguished, discharged, exculpated or released pursuant to the Plan shall be deemed to have affirmatively and specifically consented to be bound by the Plan, including, without limitation, the injunction set forth above.
>
> The injunction set forth above shall extend to any successors of the Debtors, the Reorganized Debtors, the Released Parties, the Exculpated Parties, and their respective property and interests in property. No Person or Entity (including any Person or Entity that has elected to opt out of the Third-Party Release) may commence or pursue a Claim or Cause of Action of any kind against the Debtors, the Reorganized Debtors, the Exculpated Parties, or the Released Parties that relates to or is reasonably likely to relate to any act or omission in connection with, relating to, or arising out of a Claim or Cause of Action subject to Section VIII hereof, without the Court (1) first determining, after notice and a hearing, that such Claim or Cause of Action (a) is not subject to the Releases and (b) represents a colorable Claim or Cause of Action, and (2) specifically authorizing such Person or Entity to bring such Claim or Cause of Action.

See Dkt. 234 at Art. VIII.G, page 74-75 of 177.

Article VIII.G of the Plan provides that "each Holder of an Allowed Claim or Interest extinguished, discharged, exculpated or released pursuant to the Plan shall be deemed to have affirmatively and specifically consented to be bound by the Plan, including, without limitation, the injunction set forth above." *See id.*

30. Further, Article VIII.G of the Plan includes a gatekeeping injunction that forces a non-debtor who wishes to pursue a claim or cause of action against another non-debtor to come to this Court—and only this Court—for a determination of whether such claim or cause of action can proceed. *See id.*

v. Rule 3020(e) Waiver

31. The Debtors seek a waiver of the 14-day stay under Fed R. Bankr. P. 3020(e).[13] *See* Dkt. 234 at Art. XII.A, at page 82 of 177.

vi. Provisions Providing that the Plan is a Settlement and Approval of the Releases Pursuant to Rule 9019

32. Article IV.A[14] provides that the Plan is a good faith compromise and settlement of all Claims, Interests, Causes of Action, and controversies resolved pursuant to the Plan. *See* Dkt. 234 at Art. IV.A, page 44 of 177.

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[13] The Plan provides for the waiver of the 14-day stay as follows:

> "Subject to Section IX.A and notwithstanding Bankruptcy Rules 3020(e), 6004(h), or 7062 or otherwise, upon Consummation, the terms of the Plan shall be immediately effective and enforceable and deemed binding upon the Debtors, the Reorganized Debtors, and any and all Holders of Claims and Interests (irrespective of whether the Holders of such Claims or Interests have accepted or are deemed to have accepted the Plan), all Entities that are party, or subject, to the settlements, compromises, releases, discharges, and injunctions set forth in the Plan, each Entity acquiring property under the Plan, and any and all of the Debtors' counterparties to Executory Contracts, Unexpired Leases, and any other prepetition agreements."

See Dkt. 234 at Art. XII.A, at page 82 of 177.

[14] Article XIV.A of the Plan states as follows:

33. Articles VIII.D[15] and VIII.E[16] provide that the releases described in such Articles are approved pursuant to Rule 9019. *See* Dkt. 234 at Art. VIII.D, page 72 of 177 and Article VIII.E at pages 73-74 of 177.

vii. Other Provisions

> Pursuant to section 1123 of the Bankruptcy Code, and in consideration for the classification, distributions, releases, and other benefits provided under the Plan, on the Effective Date, the provisions of the Plan shall constitute an arms' length and good faith compromise and settlement of all Claims, Interests, Causes of Action, and controversies resolved pursuant to the Plan. All distributions made to Holders of Allowed Claims and Allowed Interests in any Class in accordance with the Plan are intended to be, and shall be, final and indefeasible and reflect the settlement and compromises set forth herein, including that the distributions and recoveries set forth in Article III hereof shall be limited to the treatment and recoveries described therein and in no way shall give effect to any Claims or rights to distribution or recoveries that may be asserted under the Intercompany Credit Agreement Documents by Vortex Opco, LLC.

See Dkt. 234 at Art. IV.A, page 44 of 177.

[15] The relevant part of Article VIII.D of the Plan provides as follows:

> Entry of the Confirmation Order shall constitute the Court's approval, pursuant to Bankruptcy Rule 9019, of the Debtor Release, which includes by reference each of the related provisions and definitions contained in this Plan, and further, shall constitute the Court's finding that the Debtor Release is: (i) in exchange for the good and valuable consideration provided by the Released Parties; (ii) a good faith settlement and compromise of the Claims or Causes of Action released by the Debtor Release; (iii) in the best interests of the Debtors, the Estates, and all Holders of Claims and Interests; (iv) fair, equitable, and reasonable; (v) given and made after notice and opportunity for hearing; and (vi) a bar to any of the Debtors, the Reorganized Debtors, or the Estates asserting any Claim or Cause of Action released by the Debtor Release against any of the Released Parties.

See Dkt. 234 at Art. VIII.D, page 72 of 177.

[16] The relevant part of Article VIII.E of the Plan provides as follows:

> Entry of the Confirmation Order shall constitute the Court's approval, pursuant to Bankruptcy Rule 9019, of the Third-Party Release, which includes by reference each of the related provisions and definitions contained in this Plan, and, further, shall constitute the Court's finding that the Third-Party Release is: (i) consensual; (ii) essential to the Confirmation; (iii) given in exchange for the good and valuable consideration provided by the Released Parties, including the Released Parties' contributions to facilitating the restructuring and implementing this Plan; (iv) a good faith settlement and compromise of the claims or Causes of Action released by the Third-Party Release; (v) in the best interests of the Debtors and their Estates; (vi) fair, equitable, and reasonable; (vii) given and made after due notice and opportunity for hearing; and (viii) a bar to any of the Releasing Parties asserting any claim or Cause of Action released pursuant to the Third-Party Release.

See Dkt. 234 at Art. VIII.E, pages 73-74 of 177.

34. Article III.B.1-8 of the Plan provides that for Classes 1 through 8,[17] in exchange for the proposed treatment in the Plan, Holders of an Allowed Claim in these classes will receive payment "in full and final satisfaction, settlement, release, and discharge of or in exchange for such Claim." *See* Dkt. 234 at Art. III.B.1-8, pages 37-41 of 177.

35. Article III.E of the Plan provides that a class will be deemed to accept the Plan if no votes are cast and the class contains claims or interests eligible to vote.[18] *See* Dkt. 234 at Article III.E, page 43 of 177.

36. Article XII.L of the Plan allows the cases to be deemed closed on and after the Effective Date except for one case remaining open.[19] *See* Dkt. 234 at Art. XII.L, pages 85-86 of 177.

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[17] The Plan generally provides the following template language for Classes 1 through 8 regarding their treatment:

> "Except to the extent that a Holder of an Allowed [Specific Class] Claim agrees to less favorable treatment, on the Effective Date (or as soon as reasonably practicable thereafter), **in full and final satisfaction, settlement, release, and discharge of, and in exchange for**, such Allowed [Specific Class] Claim . . ."

See Dkt. 234 at Art. III.B.1-8, pages 37-41 of 177.

[18] Article III.E of the Plan provides:

> If a Class contains Claims or Interests that are eligible to vote and no Holders of such Claims or Interests vote to accept or reject this Plan, the Holders of such Claims or Interests in such Class shall be deemed to have accepted this Plan.

See Dkt. 234 at Art. III.E, page 43 of 177.

[19] Article XII.L of the Plan provides:

> On and after the Effective Date, after the full administration of the Chapter 11 Cases, the Chapter 11 Cases shall be deemed closed except for one of the Chapter 11 Cases as determined by the Reorganized Debtors, and all contested matters and adversary proceedings relating to any of the Debtors (including Claim objections) shall be administered and heard in such Chapter 11 Case, irrespective of whether the contested matter or adversary proceeding was commenced against a Debtor whose Chapter 11 Case was closed. The Reorganized Debtors shall file with the Court all documents required by Bankruptcy Rule 3022 and any applicable order of the Court to close the Chapter 11 Cases. Upon the occurrence of the Effective Date, the Reorganized Debtors shall be permitted to change the name of the remaining Debtor and case caption of the remaining open Chapter 11 Case as desired, in the Reorganized Debtors' sole discretion. The Reorganized Debtors may at any time seek to close the remaining Chapter 11 Case in accordance with the Bankruptcy Code and the Bankruptcy Rules.

OBJECTION

I. Confirmation Standard

37. A chapter 11 plan cannot be confirmed unless this Court finds the plan complies with the provisions of 11 U.S.C. § 1129(a). *See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 220-21 (Bankr. D.N.J. 2000). A plan proponent bears the burden of proof with respect to each element of section 1129(a). *See In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 599 (Bankr. D. Del. 2001).

38. For the following reasons, the Plan cannot be confirmed in its present form.

II. The Plan is Not Confirmable Because it Proposes Non-Consensual Third-Party Releases That Are Not Authorized Under the Bankruptcy Code.

A. Introduction

39. 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. *See* 603 U.S. 204, 209, 227 (2024). The Court did not prohibit chapter 11 plans from memorializing consensual third-party releases, and it did not "express a view on what qualifies as a consensual release." *See id.* at 226.

40. A consensual third-party release is a separate agreement between non-debtors governed by nonbankruptcy law. As the Supreme Court recognized in *Purdue*, a release is a type of settlement agreement. *See Purdue*, 603 U.S. at 223 (explaining that what the Sacklers sought was not "a traditional release" because "settlements are, by definition, consensual") (cleaned up). A bankruptcy court can acknowledge the parties' agreement to a third-party release, but the authority for a consensual release is the agreement itself, not the Bankruptcy Code. If a claim has

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See Dkt. 234 at Art. XII.L, pages 85-86 of 177.

been extinguished by virtue of the agreement of the parties, then the court is not using the forcible authority of the Bankruptcy Code or the bankruptcy court to extinguish the property right.

41. Here, there is no existing release agreement between non-debtors. Debtors instead seek a confirmation order that would use the power of the court to impose a third-party release on claimants without their affirmative and voluntary consent. Such a confirmation order would impermissibly alter the relations between non-debtors because a valid release does not exist under nonbankruptcy law.

42. State law governs whether non-debtors have agreed to release each other. *See infra* Part B. Nothing in the Bankruptcy Code allows parties to disregard state law when debtors seek to impose third-party releases in their plans. Under New York law, which appears to be the law governing the Plan, as in other states, silence is not acceptance of an offer other than in limited circumstances inapplicable here. The Debtors thus cannot deem those who fail to opt out to have released claims because those claimants have not agreed to the third-party release under state law.

B. State Contract Law Applies

43. "[T]he basic federal rule in bankruptcy is that state law governs the substance of claims." *See Travelers Cas. & Sur. Co. of America v. Pac. Gas & Elec. Co*., 549 U.S. 443, 450-451 (2007) (cleaned up); *accord Butner v. United States*, 440 U.S. 48 (1979). Thus, courts apply state law when the question is whether a debtor has entered a valid settlement agreement. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) ("Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law."); *De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)*, 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009) ("Where the United States is not a party, it is well established that settlement agreements in pending bankruptcy cases are considered contract matters governed by state law.").

44. The rule is no different for third-party releases. They are separate agreements between non-debtors governed by state law. Unlike a bankruptcy discharge, which "is an involuntary release by operation of law," "[i]n the case of voluntary releases, the nondebtor is released from a debt, not by virtue of 11 U.S.C. § 1141(b), but because the *creditor agrees to do so*." *See In re Arrowmill Dev. Corp.*, 211 B.R. 497, 503, 507 (Bankr. D.N.J. 1997) (emphasis in original); *see also Continental Airlines Corp. v. Air Line Pilots Assn., Int'l (In re Continental Airlines Corp.)*, 907 F.2d 1500, 1508 (5th Cir. 1990) (holding that for settlement provisions "unrelated to substantive provisions of the Bankruptcy Code," "the settlement itself is the source of the bankruptcy court's authority"). Thus, "the Bankruptcy Code has not altered the contractual obligations of third parties, the parties themselves have so agreed." *See Arrowmill*, 211 B.R. at 507.

45. Because the Bankruptcy Code does not authorize the imposition of an involuntary release, *Purdue*, 603 U.S. at 209, 227, the release must be consensual under non-bankruptcy law. There is no Bankruptcy Code provision that preempts otherwise applicable state contract law governing releases between non-debtors. *See, e.g., 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.'") (quoting *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except 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."). Section 105(a), for example, "serves only to carry out authorities expressly conferred elsewhere in the code." *See Purdue*, 603 U.S. at 216 n.2 (quotation marks omitted). But the Code does not confer any authority to impose a release of claims between non-debtors that would not be

valid under state law. The Bankruptcy Code does not define a "consensual release." *See* 11 U.S.C. § 101. "There is no rule that specifies an 'opt out' mechanism or a 'deemed consent' mechanism" for third-party releases in chapter 11 plans. *See In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). And no Code provision authorizes bankruptcy courts to deem a non-debtor to have consented to release claims against other non-debtors where such consent would not exist as a matter of state law.

46. Some courts have held that federal rather than state law applies to determine whether a third-party release is consensual.[20] But because there is no applicable Code provision, whether a non-debtor has consented to release another non-debtor is not, as one court concluded, a "matter of federal bankruptcy law." *See In re Spirit Airlines, Inc.*, 666 B.R. 689, 716 (Bankr. S.D.N.Y 2025); *see also In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 (Bankr. S.D. Tex. 2024) (relying on caselaw in the district rather than any provision of the Bankruptcy Code). Absent express authority in the Code, federal courts cannot simply make up their own rules for when parties have given up property rights by releasing claims. Bankruptcy courts cannot "create substantive rights that are otherwise unavailable under applicable law," nor do they possess a "roving commission to do equity." *See In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (quotation omitted). Indeed, nearly a hundred years ago, the Supreme Court rejected the notion that federal courts can displace state law as "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *See Erie*, 304 U.S. at 79 (cleaned up); *accord Rodriquez v. FDIC*, 589 U.S. 132, 133 (2020) (holding state law applies to determine allocation of federal tax

[20] One court recently found that the releases are not consensual under either State or Federal law, and therefore it is not necessary to decide whether federal or state law controls. *See In re Gol Linhas Aereas Inteligentes S.A.*, __ B.R. __, 2025 WL 3456675, *5 (S.D.N.Y. Dec. 1, 2025).

refund resulting from consolidated tax return). Courts thus may not invent their own rule for when parties may be "deemed" to have given up property rights by releasing claims.

47. Accordingly, state-law contract principles govern whether a third-party release is consensual. *See, e.g.*, *Patterson v. Mahwah Bergen Retail Grp., Inc.,* 636 B.R. 641, 684-85 (E.D. Va. 2022) (describing bankruptcy courts in the District of New Jersey as "look[ing] to the principles of contract law rather than the bankruptcy court's confirmation authority to conclude that the validity of the releases requires affirmative consent"); *In re Smallhold, Inc.*, 665 B.R. 704, 720 (Bankr. D. Del. 2024) (recognizing that "some sort of affirmative expression of consent that would be sufficient as a matter of contract law" is required); *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third-party release."); *Arrowmill*, 211 B.R. at 506, 507 (explaining that a third-party release "is no different from any other settlement or contract" and thus "the validity of the release . . . hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order") (internal quotation marks omitted) (alterations in original). Because "'nothing in the bankruptcy code contemplates (much less authorizes it)' . . . any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent." *See In re Tonawanda Coke Corp*., 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024) (quoting *Purdue*, 603 U.S. at 223). And "any such consensual agreement would be governed by state law." *See id.*

48. Even if federal law applied, however, it would not lead to a different result. That is because "federal contract law is largely indistinguishable from general contract principles under state common law." *See Young v. BP Expl. & Prod., Inc. (In re Deepwater Horizon)*, 786 F.3d 344, 354 (5th Cir 2015) (cleaned up). *See also Deville v. United States*, 202 F. App'x 761, 763

n.3 (5th Cir. 2006) ("The federal law that governs whether a contract exists 'uses the core principles of the common law of contracts that are in force in most states.' . . . These core principles can be derived from the Restatements.") (quoting *Smith v. United States*, 328 F.3d 760, 767 n.8 (5th Cir. 2003)).

C. Under State Law, Silence is Not Acceptance

49. The Debtors bear the burden to prove that their Plan is confirmable. *See In re American Cap. Equip., LLC*, 688 F.3d 145, 155 (3d Cir. 2012). The Debtors have not met this burden because they have failed to establish that the third-party release is consensual under applicable state law, nor have they even contended that consent exists under state law.

50. Here, the Plan provides that the governing law is the State of New York. *See* Dkt. 234 at Art. I.D, page 32 of 177. Under New York law, like in other states, an agreement to release claims—like any other contract—requires a manifestation of assent to that agreement.[21] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 17(1) ("[T]he formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and a consideration."); *In re Hertz Corp.*, 120 F.4th 1181, 1192 (3d Cir. 2024) ("Contract law does not bind parties to promises they did not make"); *Mizuna, Ltd. v. Crossland Fed. Sav. Bank, 90 F.3d 650, 658 (2d Cir. 1996) ("A valid contract requires a manifestation of mutual assent to a bargained-for exchange")*; *Wu v. Uber Tech.*, 260 N.E.3d 1060, 1070 (N.Y. 2024); *see also In re Gol Linhas*, 2025 WL 3456675, at

[21] The Court may apply New York law because no party has suggested that any other state's law applies. *See, e.g., Wood v. Mid-Valley Inc.*, 942 F.2d 425, 426 (7th Cir. 1991) ("The operative rule is that when neither party raises a conflict of law issue in a diversity case, the federal court simply applies the law of the state in which the federal court sits."). Nor has anyone suggested there would be a different outcome under the law of any other jurisdiction, so no choice of law is required. *See, e.g., In re Syntax-Brillian Corp.*, 573 F. App'x 154, 162 (3d Cir. 2014). Thus, the statement of one bankruptcy court that there is "no answer" to the choice of law question, *In re LaVie Care Cntrs., LLC*, No. 24-55507, 2024 WL 4988600, at *14 (Bankr. N.D. Ga. Dec. 5, 2024), is not true. Even if a choice of law had to be made, if such a choice is made difficult by the breadth of the third-party release that may be a reason not to approve the plan, but it is not an excuse to flout the court's obligation to make a choice of law if there is an actual conflict of laws. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985); *Cf. Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 669 (E.D. Va. 2022).

*5 ("Looking to the Restatement (Second) of Contracts for guidance, the New York Court of Appeals has 'repeatedly' held that 'a binding contract requires an objective manifestation of mutual assent, through words or conduct, to the essential terms of the agreement.'") .

51. Thus, "[o]rdinarily[,] an offeror does not have power to cause the silence of the offeree to operate as acceptance."[22] *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981); *see also Reichert v. Rapid Investments, Inc.*, 56 F.4th 1220, 1227 (9th Cir. 2022) ("[T]he offeror cannot prescribe conditions so as to turn silence into acceptance."); *Jacques v. Solomon & Solomon P.C.*, 886 F. Supp. 2d 429, 433 n.3 (D. Del. 2012) ("Merely sending an unsolicited offer does not impose upon the party receiving it any duty to speak or deprive the party of its privilege of remaining silent without accepting."); *Elfar v. Wilmington Trust, N.A.*, No. 20-0273, 2020 WL 7074609, at *2 n.3 (E.D. Cal. Dec. 3, 2020) ("The court is aware of no jurisdiction whose contract law construes silence as acceptance of an offer, as the general rule."), *adopted by* 2020 WL 1700778, at *1 (E.D. Cal. Feb. 11, 2021); *accord* 1 Corbin on Contracts § 3.19 (2018); 4 Williston on Contracts § 6:67 (4th ed.).

52. There are only very limited exceptions to the "general rule of contracts . . . that silence cannot manifest consent." *See Patterson*, 636 B.R. at 686; *see also, e.g.*, *McGurn v. Bell Microproducts, Inc.*, 284 F.3d 86, 90 (1st Cir. 2002) (recognizing "general rule" that "silence in response to an offer . . . does not constitute acceptance of the offer"). "[T]he exceptional cases where silence is acceptance fall into two main classes: those where the offeree silently takes offered benefits, and those where one party relies on the other party's manifestation of intention that silence may operate as acceptance. Even in those cases the contract may be unenforceable under the Statute of Frauds." *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a.

[22] New York, like many states, follows the Restatement (Second) of Contracts § 69. *See, e.g., Wu*, 260 N.E.3d at 1069-70; *James v. Global Tel*Link Corp.*, 852 F.3d 262, 266 (3d. Cir. 2017).

53. But absent such extraordinary circumstances, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." *See id.* And "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." *See id.* § 69, cmt. c; *see also Patterson*, 636 B.R. at 686 (explaining how contract law does not support deeming consent based upon a failure to opt out); *Jacques*, 886 F. Supp. 2d at 433 n.3.

D. Failing to Opt Out Does Not Provide the Required Affirmative Consent

54. The Plan imposes a third-party release on anyone who is provided a ballot and does not return it with the opt-out box checked and anyone who is provided the Non-Voting Status Notice, which contains a Release Opt-Out Election Form, and does not return the Release Opt-Out Election Form. In other words, the Debtor purports to impose an otherwise non-existent duty to speak on claimants regarding the offer to release non-debtors, and their silence—the failure to opt out—is "deemed" consent. But under black-letter law, silence is not acceptance of the offer to release non-debtors. *See, e.g.*, *Gol Linhas,* 2025 WL 3456675, at * 5 (under federal law, consent cannot be conferred by silence absent rare exceptions not applicable to third-party releases in a plan); *Patterson*, 636 B.R. at 688 ("Whether the Court labels these 'nonconsensual' or based on 'implied consent' matters not, because in either case there is a lack of sufficient affirmation of consent.").

55. A case from the Ninth Circuit illustrates the point. In *Norcia v. Samsung Telecom. Am., LLC*, 845 F.3d 1279, 1286 (9th Cir. 2017), cited with approval by the Third Circuit in *Noble v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-118 (3d Cir. 2017), and the Fifth Circuit in *Imperial Ind. Supply Co. v. Thomas*, 825 F. App'x 204, 207 (5th Cir. 2020), the court held that a failure to opt out did not constitute consent to an arbitration agreement. A consumer bought a

Samsung phone and signed the Verizon Wireless Customer Agreement. *See Norcia*, 845 F.3d at 1282. The phone came with a Samsung warranty brochure that contained an arbitration provision but gave purchasers the ability to opt out of it without affecting the warranty coverage. *See id*. The customer did not opt out. *See id*. When the customer later sued Samsung, Samsung argued that the arbitration provision applied. *See id*. at 1282-83.

56. The Ninth Circuit in *Norcia* held that the customer's failure to opt out did not constitute consent to arbitrate. The court applied the "general rule," applicable under California law, that "silence or inaction does not constitute acceptance of an offer." *See Norcia*, 845 F.3d at 1284 (quotation marks omitted). *See also, Weichert Co. Realtors v. Ryan*, 128 N.J. at 436 ([s]ilence does not ordinarily manifest assent, but the relationships between the parties or other circumstances may justify the offeror's expecting a reply and, therefore, assuming that silence indicates assent to the proposal). The customer did not agree to arbitrate because he did not "sign the brochure or otherwise act in a manner that would show his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement." *See Norcia*, 845 F.3d at 1285 (quotation marks omitted). This was true, even though the customer *did* take action to accept the offered contract from Verizon Wireless. "Samsung's offer to arbitrate all disputes with [the customer] cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, unless an exception to this general rule applies." *See id*. at 1286 (quotation marks and citation omitted).

57. The Ninth Circuit held that none of the exceptions to this rule applied. *See Norcia*, 845 F.3d at 1284-85. There was no state law imposing a duty on the customer to act in response to the offer, the parties did not have a prior course of dealing that might impose such a duty, and

the customer did not retain any benefits by failing to act given that the warranty applied whether or not he opted out of the arbitration provision. *See id*. at 1286.

58. Here, too, Debtors' creditors have not signed an agreement to release the non-debtors nor acted in any other manner to suggest that their silence manifests an intention to accept an offer to release the non-debtors.

i. Not voting and not opting out is not consent to release non-debtors

59. Third-party releases cannot be imposed on those who do not vote and do not opt out. *See Smallhold,* 665 B.R. at 709; *SunEdison*, 576 B.R. at 458–61; *Chassix*, 533 B.R. at 81–82; *In re Washington Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011). 442 B.R. 314, 355 (Bankr. D. Del. 2011). This applies to both those creditors who simply abstain from voting and those creditors who are not entitled to vote on the Plan because they are deemed to accept or reject. There is no basis to infer consent by those who do not vote and are taking no action with respect to the Plan.

60. 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 SunEdison*, 576 B.R. at 458–61. Creditors have no legal duty to vote on a plan, much less to respond to an offer to release non-debtors included in a plan solicitation. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan); *Gol Linhas*, 2025 WL 3456675, at * 6 ("[I]t is undisputed that the creditors had no duty to respond to the opt-out opportunity and courts do not enter default judgment when parties have no duty to respond."); *SunEdison,* 576 B.R. at 460–61 (recognizing that creditors have no duty to speak regarding a plan that would allow a court to infer consent to third-party releases from silence). Consent thus cannot be inferred from their silence because "[t]he mere fact that an offeror states that silence will constitute acceptance does

not deprive the offeree of his privilege to remain silent without accepting." *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. c (1981). Nor can it "impose on him any duty to speak." *Id.* § 69 cmt. a.

61. Further, "[w]hen the circumstances are equally consistent with either of two facts, neither fact may be inferred." *See In re Couture Hotel Corp.*, 554 B.R. 369, 383 n.80 (Bankr. N.D. Tex. 2016). Consent thus cannot be inferred here because parties who are solicited but do not vote may have failed to vote for reasons other than an intention to assent to the releases. *See SunEdison*, 576 B.R. at 461. This is especially true for those whose votes are not solicited at all—but who are instead sent a notice informing them they cannot vote, along with a form to opt-out that they must return to avoid being bound by the third-party release.

62. "Charging all inactive creditors with full knowledge of the scope and implications of the proposed third-party releases, and implying a 'consent' to the third-party releases based on the creditors' inaction, is simply not realistic or fair and would stretch the meaning of 'consent' beyond the breaking point." *See Chassix*, 533 B.R. at 81. "It is reasonable to require creditors to pay attention to what the debtor is doing in bankruptcy as it relates to the creditor's rights against the debtor. But as to the creditor's rights against third parties—which belong to the creditor and not the bankruptcy estate—a creditor should not expect that those rights are even subject to being given away through the debtor's bankruptcy." *See Smallhold*, 665 B.R. at 721; *see also id.* at 719-20 (discussing *Chassix*). "A party's receipt of a notice imposing an artificial opt-out requirement, the recipient's *possible* understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as consent. *See Emerge Energy Services, LP*, No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (emphasis in original).

"[B]asic contract principles" require affirmative assent, not inferences drawn from inaction that in fact may reflect only "[c]arelessness, inattentiveness, or mistake." *See id.*

63. Simply put, an "opt out mechanism is not sufficient to support the third-party releases . . . particularly with respect to parties who do not return a ballot (or are not entitled to vote in the first place)." *See In re Washington Mut., Inc.*, 442 at 355; *see also Chassix*, 533 B.R. at 81–82.

ii. Voting on a plan plus a failure to opt out does not manifest consent to a non-debtor release

64. Voting to accept a plan without checking an opt-out box does not constitute the affirmative consent necessary to reflect acceptance of an offer to enter a contract to release claims against non-debtors. *See* Restatement (Second) of Contracts § 69 cmt. a (1981). Voting to approve a plan plus a failure to opt out of a third-party release is nothing more than silence with respect to the offer to release claims against non-debtors. The act of voting on a chapter 11 plan without opting out is not conduct that "manifest[s] [an] intention that silence may operate as acceptance" of a proposal that the creditor release claims against non-debtors. *See* Restatement (Second) of Contracts § 69 cmt. a. Impaired creditors have a federal right under the Bankruptcy Code to vote on a chapter 11 plan. *See* 11 U.S.C. § 1126(a). Merely exercising that right does not manifest consent to release claims against non-debtors.

65. Even more obviously, those who vote to reject the plan are not consenting to third-party releases by failing to mark an opt-out box. Not only is there no "mutual agreement" as to the plan, much less the third-party release, the creditor has expressly stated its rejection of the plan. As the court in *In re Chassix Holdings, Inc.*, reasoned: "[A] creditor who votes to reject a plan should also be presumed to have rejected the proposed third-party releases that are set forth in the plan. *The additional 'opt out' requirement, in the context of this case, would have been little more*

than a Court-endorsed trap for the careless or inattentive creditor." *See* 533 B.R. at 79 (emphasis added).

iii. Smallhold's conclusion that voting plus a failure to opt out equals consent to a non-debtor release is incorrect

66. One bankruptcy court has found that, in at least some circumstances, a failure to opt out constitutes consent when a claimant votes—either to accept or reject a plan—but not if they do not vote. *See Smallhold*, 665 B.R. at 723. The *Smallhold* court incorrectly reasoned that because the act of voting on a debtor's plan is an "affirmative step" taken after notice of the third-party release, failing to opt out binds the voter to the release. *See id.* But while voting is an "affirmative step" with respect to the debtor's plan, it is not a "manifestation of intention that silence may operate as acceptance" of a third-party release. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) (emphasis added). That is because "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction," id.—in this case, the federal right to vote on a chapter 11 plan. 11 U.S.C. § 1126(a). Nor does it "impose on him any duty to speak," RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a, such as by checking an opt out box.[23] Thus, consent to release third-party claims (which are governed by nonbankruptcy law) cannot properly be inferred from a party's failure to check an opt-out box on a ballot to vote on the proposed treatment of claims against the debtor (governed by bankruptcy law). *See supra*.

[23] The *Spirit* court concluded that "creditors entitled to vote who returned a ballot but did not check the opt-out box on that ballot also clearly manifested their consent to the Third-Party Releases." *See In re Spirit Airlines, Inc.*, No. 24-11988, 2025 WL 737068, at *21 (Bankr. S.D.N.Y Mar. 7, 2025). That is wrong because an unsolicited offer of a third-party release cannot impose a duty to speak or impair the freedom to vote on a plan. Further, the *Spirit* court erred in assuming that the failure to check an opt-out box on a ballot necessarily shows that a creditor "affirmatively chose" not to check the box. *See id.* at *21. " When the circumstances are equally consistent with either of two facts, neither fact may be inferred." *See In re Couture Hotel Corp.*, 554 B.R. 369, 383 n.80 (Bankr. N.D. Tex. 2016). And a failure to check an opt-out box is equally consistent with inadvertence or lack of understanding.

E. Opt Outs Cannot Be Imposed Based on a Procedural Default Theory

67. Applicable state contract law cannot be disregarded on a procedural default theory, applied by some courts, under which creditors who remain silent are held to have forfeited their rights against non-debtors if they received notice of the non-debtor release but failed to object, just as they would forfeit their right to object to a debtor's plan if they failed timely to do so.[24] *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 Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022); *In re DBSD North America, Inc.*, 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009), *aff'd on other grounds*, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *rev'd in part and aff'd in part*, 634 F.3d 79 (2d Cir. 2011). These courts reasoned that so long as the creditors received notice of a proposed non-debtor release and were informed of the consequences if they did not opt out or object to that release, there is no unfairness or deprivation of due process from binding them to the release. *Cf. Smallhold*, 665 B.R. at 708 (describing this reasoning as having treated a mere "failure to opt out" as "allow[ing] entry of the third-party release to be entered by default").

68. A fuller explanation of this theory was articulated prior to the *Purdue* ruling in *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022). The *Mallinckrodt* court stated that "the notion that an individual or entity is in some instances deemed to consent to something by their failure to act is one that is utilized throughout the judicial system." *See id*. "When a party to a lawsuit is served with a complaint or a motion, they need to file an answer or otherwise respond, or a judgment is automatically entered against them." *See id*. at 879. The court reasoned

[24] Although the court in *Spirit* disclaimed relying on a default theory, *Spirit Airlines,* 666 B.R. at 715, it based its holding on the same rationale: that a party may be deemed to consent based on notice and a failure to respond.

that "[t]here is no reason why this principle should not be applied in the same manner to properly noticed releases within a plan of reorganization." *See id*.

69. This is wrong. First, when a party in litigation is bound to a result based on a failure to timely respond, it is not because the defaulting party has *consented* to an adverse ruling. Rather, "failure to make timely assertion of [a] right before a tribunal having jurisdiction to determine it" results in *forfeiture* of the right. *See United States v. Olano*, 507 U.S. 725, 731 (1993). Forfeiture, unlike waiver, is not an intentional relinquishment of a known right. *See id*. at 733. *Cf. Smallhold*, 665 B.R. at 718 ("In this context, the word 'consent' is used in a shorthand, and somewhat imprecise, way. It may be more accurate to say that the counterparty forfeits its objection on account of its default."). Forfeiture principles thus do not show consent.

70. Second, there is no basis to hold that parties have forfeited claims against non-debtor third parties based on their silence in response to a debtor's chapter 11 plan. No one has submitted the released claims for adjudication by the bankruptcy court. *See Olano*, 507 U.S. at 731; *Gol Linhas*, 2025 WL 3456675, at * 6 (rejecting arguments that: (i) creditors who have consented to the bankruptcy court's jurisdiction also consent to the approval of releases; (ii) class action opt-out procedures applied to the third-party releases before it; and (iii) that consent may be imputed from the failure to opt out).

71. And under *Purdue*, imposition of a nonconsensual non-debtor release is not available relief through a debtor's chapter 11 plan. *See Purdue,* 603 U.S. at 215-227 & n.1; *see also Smallhold*, 2665 B.R. at 709 ("After *Purdue Pharma*, a third-party release is no longer an ordinary plan provision that can properly be entered by 'default' in the absence of an objection."). It is therefore "no longer appropriate to require creditors to object or else be subject to (or be deemed to 'consent' to) such a third-party release." *See Smallhold*, 665 B.R. at 719.

72. The Supreme Court's *Purdue* decision rejected a fundamental premise of the procedural default theory—that a bankruptcy proceeding legally could lead to the destruction of creditors' rights against non-debtors, so they had best pay attention lest they risk losing those rights. *See Smallhold*, 665 B.R. at 708-09; *see also id*. at 708 ("The possibility that a plan might be confirmed that provided a nonconsensual release was sufficient to impose on the creditor the duty to speak up if it objected to what the debtor was proposing."). The courts that relied on this procedural-default theory had reasoned that non-debtor releases were no different from any other plan provision to which creditors had to object or risk forfeiture of their rights, because pre-*Purdue* a chapter 11 plan could permissibly include nonconsensual, non-debtor releases under certain circumstances. *See id*. at 717-18. As the *Smallhold* court explained, however, under the default theory, a plan's opt-out provision functions not as a method to secure consent, but rather serves as "an administrative shortcut to relieve those creditors of the burden of having to file a formal plan objection." *See id*. at 709; *see also id*. at 718 ("In this context, the word 'consent' is used in a shorthand, and somewhat imprecise, way. It may be more accurate to say that the counterparty forfeits its objection on account of its default.").

73. But "[u]nder established principles," courts may enter relief against a party who procedurally defaults by not responding "only after satisfying themselves that the relief the plaintiff seeks is relief that is at least potentially available to the plaintiff" in contested litigation. *See id*. at *2; *see also id*. at *13 ("[T]he obligation of a party served with pleadings to appear and protect its rights is limited to those circumstances in which it would be appropriate for a court to enter a default judgment if a litigant failed to do so."); *see also Thomson v. Wooster*, 114 U.S. 104, 113 (1885) (holding a decree *pro confesso* may only be entered if it "is proper to be decreed"); *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1245 (11th Cir. 2015) ("Entry of default

judgment is only warranted when there is a sufficient basis in the pleadings for the judgment entered.") (cleaned up).

74. "[After *Purdue*], that is no longer the case in the context of a third-party release." *See Smallhold*, 665 B.R. at 722. A third-party release is not "an ordinary plan provision that can properly be entered by 'default' in the absence of an objection." *See id*. "It is unlike the listed cure amount where one can properly impose on a creditor the duty to object, and in the absence of such an objection bind the creditor to the judgment." *See id*. That is because, unlike for a creditor's claims against the debtor, the Bankruptcy Code affords no affirmative authority to order a release of claims against third parties. Because imposition of a nonconsensual non-debtor release is not relief available through a debtor's chapter 11 plan, it is not "appropriate to require creditors to object or else be subject to (or be deemed to 'consent' to) such a third-party release." *See id*. at 719-20.

75. Because *Purdue* establishes that a *non*consensual third-party release is "*per se* unlawful," it follows that a third-party release "is not the kind of provision that would be imposed on a creditor on account of that creditor's default." *See id*. at 709. And besides the now-discredited default theory, there is "no other justification for treating the failure to 'opt-out' as 'consent' to the release [that] can withstand analytic scrutiny." *See id*. Because a chapter 11 plan cannot permissibly impose non-debtor releases without the affirmative consent of the releasing parties, a release cannot be imposed based on their mere failure to respond regarding the non-debtor release.[25] Rather, an "*affirmative expression of consent* that would be sufficient as a matter of contract law" is required. *See id*. at 720 (emphasis added).

[25] For those reasons, the *Smallhold* court expressly disapproved of its prior decision in *Arsenal*, which had relied on the procedural default theory. *See id.* at 716 ("On the central question presented, the Court concludes that its decision in *Arsenal* does not survive *Purdue Pharma*.").

76. In sum, the failure to opt out does not constitute the affirmative consent necessary to reflect unqualified acceptance by holders of Claims or Interests to the third-party releases the Plan seeks to provide to the many so-called "Released Parties." As a result, the Debtor does not meet its state-law burden of establishing that the members of the Classes in the Plan have agreed to release their property rights and have that release memorialized in the Plan. *See Mizuna, Ltd. 90 F.3d at 658.*

77. Nothing in the Bankruptcy Code authorizes bankruptcy courts to extinguish claims by inferring consent outside the bounds of state law. It is especially egregious to do so here to parties that are not entitled to vote on the Plan. The Plan's third-party releases are therefore non-consensual, and so are prohibited by *Purdue*.

III. The Debtor Release in the Plan Is Overbroad

78. The Plan provides for a release by each Debtor, Estate, and Reorganized Debtor to the Released Parties, which includes Related Parties. *See* Dkt. 234 at Article VIII.D, pages 71-72 of 177.

79. The Plan does not establish that each of the proposed Released Parties are providing adequate consideration in exchange for receiving such releases. In addition, certain persons included in the definition of Released Parties do not appear to be entitled to such releases under applicable case law. Many individuals and entities are also included in the definitions of Released Parties and Related Parties that are unknown parties. *See* Dkt. 234 at Art. I.A.180 and 181, pages 26-27 of 177. Further, estate fiduciaries including but not limited to the Debtors' current and former directors, managers, principals, officers, shareholders, committee members, equity holders, accountants, investment bankers, attorneys, and financial advisors, are not only receiving an exculpation under the Plan but are also receiving a release from the Debtors.

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

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

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

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

82. The second *Zenith* factor involves whether the non-debtor party benefiting from the release made a substantial contribution of assets to the debtor's reorganization. *See In re*

Congoleum Corp., 362 B.R. 167, 193 (Bankr. D.N.J. 2007). In considering releases, substantial contribution does not include contributions to the reorganization related to operational restructuring or negotiating for the financial restructuring. *See In re Genesis Health*, 266 B.R. at 606-7 ("the officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization."). There is scant evidence that each of the Released Parties provided a substantial contribution of assets.

83. As to the third *Zenith* factor, no information is provided to support the contention that all of the releases are necessary to a reorganization.

84. The fourth *Zenith* factor concerning acceptance of the Plan appears to favor the Debtors as this is a straddle pre-pack case where, upon information and belief, the classes allowed to vote under the Plan have voted to accept the Plan.

85. The fifth *Zenith* factor may be satisfied as it appears that a large subset of unsecured creditors—trade creditors—will receive payment on all or substantially all of their claims. Further, CastleKnight will receive more favorable treatment under the Settlement Agreement, paying more of its claim than originally proposed.

86. Although the Debtors may satisfy the fourth and fifth *Zenith* factors, the other *Zenith* factors do not support the Debtor Releases.

87. Additionally, pursuant to the Plan, estate fiduciaries, who are included in the definition of Related Parties, will receive an exculpation (albeit an overbroad exculpation as argued below) for their actions or inactions. *See* Dkt. 234 at Art. VIII.F, page 70-71 of 83. The estate fiduciaries do not satisfy the *Zenith* factors and should only be granted an exculpation for

their actions or inactions between the Petition Date and the Effective Date, not a release from the Debtors.

IV. The Exculpation Provision in the Plan is Impermissibly Broad

88. The period covered by the Exculpation Provision is overbroad because it covers actions or inactions prior to the Petition Date in connection with the restructuring process. The Third Circuit and the Bankruptcy Court for the District of Delaware has confirmed that exculpation "only extends to conduct that occurs between the Petition Date and the effective date." *See In re Mallinckrodt PLC*, 639 B.R. 837, 883 (Bankr. D. Del. 2022) (sustaining U.S. Trustee's objection to temporal scope of exculpation provision and ordering debtors to strike contrary language from same); *see also In re PWS Holding Corporation*, 228 F.3d 224, 246 (3d Cir. 2000) (providing that exculpations cover actions by estate fiduciaries during the bankruptcy case); *In re Washington Mut., Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) (holding that exculpations cover "actions in the bankruptcy case").

89. Because exculpation may be provided only to estate fiduciaries, and no estate exists until a case has been commenced under the Code, the only actions or omissions that may be exculpated are those taken between the Petition Date and the Effective Date of the Plan. That standard does not change in a prepackaged chapter 11 case.

90. Applied here, the Plan provides that Exculpated Parties are released and exculpated from claims arising out of "*any*" acts or omissions relating to, among other things, administration of the Chapter 11 Cases, the negotiation and pursuit of the RSA, the Restructuring, the 2024 Transactions, the 2024 Transactions Documents, the DIP Facility, the DIP Orders, the DIP Facility Documents, the Disclosure Statement, the Exit Term Loan Facility, the Exit RCF Facility, the Exit Term Loan Facility Documents, the Exit RCF Facility Documents, the Equity Rights Offering, the

ERO Backstop Agreement, the ERO Documents, the Exit ABL Facility, the Exit ABL Facility Documents, the Definitive Documents, the Plan Supplement, the Plan, and the administration and implementation of the Plan, including distributions. *See* Dkt. 234, Art. VIII.F, page 74 of 177. This provision improperly covers acts and omissions occurring at any time related to the aforementioned categories. Because this is a prepackaged chapter 11 case, substantially all of the negotiations and work related to the RSA, the Plan, the Plan Documents and the filing of the Chapter 11 Case occurred prepetition. Indeed, the Debtors and lenders have been in negotiations regarding a restructuring process since 2024, one year prior to the Petition Date in this case. Likewise, the administration and implementation of the Plan will necessarily continue past the Effective Date. Therefore, the Exculpation Provision "exceeds the bounds of what the Code allows" because it improperly insulates the Exculpated Parties for acts and omissions both prepetition and post Effective Date.

91. In sum, the proposed exculpation insulates from liability acts and omissions that do not warrant this protection under case law in the Third Circuit. Accordingly, the Court should deny confirmation of the Plan.

V. The Injunction Provision in the Plan is Overbroad and Impermissible

92. This Court also may not approve the injunction enforcing the third-party release by barring claims against non-debtors. *Purdue* held that non-consensual third-party releases and injunctions are generally not permitted by the Bankruptcy Code. *See Purdue*, 603 U.S. at 227. As the *Purdue* court noted, the Bankruptcy Code allows courts to issue an injunction in support of a non-consensual, third-party release in exactly one context: asbestos-related bankruptcies, and these cases are not asbestos-related. *See id.* at 222 (citing 11 U.S.C. § 524(g)).

93. Even if the third-party release was consensual, that would not mean that the court has authority to impose an injunction. An injunction is critically different from a consensual non-

debtor release. The legal effect of a consensual release is based on the parties' agreement. *See Continental Airlines Corp. v. Air Line Pilots Assn., Int'l (In re Continental Airlines Corp.)*, 907 F.2d 1500, 1508 (5th Cir. 1990) (holding that for settlement provisions "unrelated to substantive provisions of the Bankruptcy Code," "the settlement itself is the source of the bankruptcy court's authority"). The non-debtor parties themselves are altering their relations; the court is not using its judicial power to effect that change. An injunction, by contrast, relies on the court's power to enter orders binding on parties. The court must therefore have both constitutional and statutory authority to enter an injunction. And, once such jurisdiction and authority are established, the court still must determine that an injunction is warranted.

94. Here, the Court should not grant the injunction.

VI. The Injunction Provision in the Plan Includes a Gatekeeping Provision

95. The Plan includes language that creates a "gatekeeper" role for this Court that forces a non-debtor who wishes to pursue a Claim or Cause of Action against another non-debtor to come to this Court—and only this Court—for a determination of whether such claim or cause of action can proceed. By specifying that this Court shall determine whether a claimant can proceed, the Plan's gatekeeping injunction effectively grants this Court exclusive jurisdiction to adjudicate the claim or cause of action between non-debtors. The gatekeeping injunction would apply even after the Debtors' bankruptcy cases have been closed, which would require a non-debtor seeking to pursue a claim against another non-debtor to first move to reopen the bankruptcy cases.

96. The procedure proposed by the gatekeeping injunction should not be permitted. The defense of "release" is an affirmative defense that cannot be adjudicated prior to the filing of the action to which it relates. *See*, *e.g.*, Fed. R. Civ. P. 8(c)(1), incorporated in Fed. R. Bankr. P.

7008. There is no reason why the court in which the relevant action has been filed cannot determine whether the non-debtor claim was released under the Plan.

97. A similar provision was rejected in *In re Gulf Coast Health Care, LLC*, where the court noted "the plan says what it says, and other courts should be entitled to exercise their authority to interpret it," and "[i]mposing such a requirement could also impose an unnecessary administrative hurdle and cost the parties when these cases are closed." *See Gulf Coast Health Care, LLC*, No. 21-11336 (KBO) (Bankr. D. Del.), D.I. 1236, Transcript of May 4, 2022, Confirmation Hearing at 30:18-23.

98. In light of the foregoing, the Gatekeeping provision in the injunction should be stricken from the Plan.

VII. The Court Should Not Waive the Rule 3020 Stay

99. The Debtor's request for a waiver of the 14-day stay under Fed R. Bankr. P. 3020(e) is inappropriate and should be denied.

100. Federal Rule of Bankruptcy Procedure 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." *See* Fed. R. Bankr. P. 3020(e). The Committee Notes explain that subsection (e) was "added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot." *See id.*

101. Plan proponents frequently include stay waiver provisions to invoke the doctrine of "equitable mootness" as a sword to evade appellate review. *See In re Chemtura Corp.*, No. 09–11233, 2010 WL 4607822, at *1 (Bankr. S.D.N.Y. Nov. 3, 2010). Courts, however, should be "wary of wholly denying any party at least an opportunity to seek a stay to avoid the mooting of

its appeal" in deciding whether to waive Rule 3020(e)'s 14-day stay. *See id.*; *see also In re Adelphia Comm. Corp.*, 368 B.R. 140, 282 (Bankr. S.D.N.Y. 2007) (denying request to waive automatic stay because "fairness to [objecting creditors] . . . requires that I not take an affirmative step that would foreclose all opportunities for judicial review").

102. "An orderly bankruptcy process depends on a concomitantly efficient appeals process," *see In re Syncora Guarantee Inc.*, 757 F.3d 511, 517 (6th Cir. 2014) (citations omitted), and a waiver of the 14-day stay undermines this goal by forcing parties to seek an emergency stay.

103. Debtors have presented no exigencies that would justify departing from the Rule's imposition of an automatic 14-day stay and impeding the ability to obtain appellate review. The Court should thus deny their request to waive Rule 3020(e)'s stay.

VIII. The Plan Cannot Be Confirmed Because the Plan is Not a Settlement Subject to Approval Under Bankruptcy Rule 9019

104. The Plan cannot be confirmed because it purports to be a "settlement" with parties that have no formal agreements with the Debtors or the non-debtors that are included in the third-party release and injunction. *See* Dkt. 324 at Art. IV.A, page 44 of 177.

105. Under 11 U.S.C. § 1123(b)(3)(A), a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." But section 1123(b)(3)(A) only allows a debtor to settle claims it has against others; it does not allow a debtor to settle claims that its creditors and equity security holders may have against it. *See Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 496 (B.A.P. 9th Cir. 2003) ("The only reference in [section 1123(b)] to adjustments of claims is the authorization for a plan to provide for 'the settlement or adjustment of any claim or interest *belonging* to the debtor or to the estate.' . . . It is significant that there is no parallel authorization regarding claims *against* the estate.") (emphasis in original) (quoting section 1123(b)(3)(A)) (internal citation omitted).

106. The resolution of claims against the Debtors is governed by Sections 1129 and 1141 of the Bankruptcy Code. While a plan may incorporate one or more negotiated settlements, a plan is not itself a settlement. Sending a plan to impaired creditors for a vote is not equivalent to parties negotiating a settlement among themselves. A "settlement" is "an agreement ending a dispute or lawsuit." BLACK'S LAW DICTIONARY (12th ed. 2024). An "agreement" is "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons." *See id.*

107. Approval of settlements is governed by Federal Rule of Bankruptcy Procedure 9019, which provides that, "[o]n motion by the trustee [or chapter 11 debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement." But, because a "settlement" requires an agreement between the settling parties, Rule 9019 governs only parties that have entered into an express settlement agreement; it is not a blanket provision allowing general "settlements" to be unilaterally imposed upon broad swaths of claimants that have no formal agreement with any party to "settle" their claims.

108. The decision whether to approve a settlement under Rule 9019 is left to the sound discretion of the bankruptcy court, which "must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" *See Washington Mut.*, 442 B.R. at 338 (quoting *In re Louise's, Inc*., 211 B.R. 798, 801 (D. Del. 1997)). In contrast, chapter 11 plans are subject to the requirements of Bankruptcy Code sections 1123 and 1129. *See In re Armstrong World Indus., Inc.*, 432 F.3d 507, 511 (3d Cir. 2005) ("Confirmation of a proposed Chapter 11 reorganization plan is governed by 11 U.S.C. § 1129."). What may be permissible under a negotiated settlement agreement that is considered "fair, reasonable, and in the best interest of the estate" outside of the plan context is different from what may be permissible under a plan.

109. Here, Article IV.A purports to treat the Plan itself as if it were a good faith compromise and settlement of all Claims, Interests, Causes of Action and controversies.

110. In addition, it appears Articles VIII.D and VIII.E are not limited to settling claims belonging to the Debtors or the bankruptcy estates. Instead, they seek to "settle" claims belonging to holders of Claims and Interests that have not entered into any agreement to "settle" any claims or controversies.

111. Further, pursuant to Article VIII.D and VIII.E of the Plan, the Debtors seek entry of the confirmation order to constitute the Court's approval of the releases, debtor and third-party, pursuant to Bankruptcy Rule 9019. Thus, Articles IV.A, VIII.D and VIII.E exceed the scope of what can be settled under Section 1123(b)(3)(A).

IX. The Overbroad Language in the Plan Concerning Satisfaction, Settlement, Release and Discharge Must be Removed

112. Pursuant to the Plan, the following parties are exchanging their claims in full and final satisfaction, settlement, release, and discharge of, and in exchange for such claims: a Holder of Allowed Priority Non-Tax Claim (Article III.B.1), a Holder of Allowed Other Secured Claim (Article III.B.2), a Holder of Allowed ABL Facility Claims (Article III.B.3), a Holder of Allowed First-Out Revolving Loan Claims (Article III.B.4), a Holder of Allowed First-Out Term Loans/Notes Claims (Article III.B.5), a Holder of Allowed Second-Out Claims (Article III.B.6a), A Holder of Allowed Amended Term Loan Claims (Article III.B.6b), a Holder of Allowed Unsecured Funded Debt Claims (Article III.B.7); and a Holder of Allowed General Unsecured Claims (Article III.B.8). *See* Dkt. 234, Art. III.B.1-.8, pages 34-37-41 of 177.

113. These provisions should be revised to remove "satisfaction, settlement, release and discharge." The various Holders of these Claims have not agreed to a compromise or to settle their claims. In addition, not all creditors have agreed to release their claims. Instead, the language in

these provisions should simply state that holders of claims are exchanging their claims in full and final satisfaction of such claims.

X. The Deemed Acceptance Language Must be Removed From the Plan

114. Article III.E of the Plan provides that a class will be deemed to accept the Plan if no votes are cast and the class contains claims or interests eligible to vote. *See* Dkt. 234 at Art. III.E, page 43 of 177.

115. The Debtors do not provide any basis under the Bankruptcy Code, Bankruptcy Rules or case law that supports this provision. As such, the provision should be removed from the Plan. However, here, such provision is not material as, upon information and belief, the classes consisting of claims or interests eligible to vote have voted to accept the Plan.

XI. Article XII.L of the Plan Allows the Cases to be Deemed Closed on and After the Effective Date Except for One Case Remaining Open

116. Pursuant to Article XII.L of the Plan, on and after the Effective Date, and after full administration of the chapter 11 cases, all but one of the cases shall be deemed closed without filing a motion pursuant to Rule 3022. *See* Dkt. 234 at Art. XII.L, pages 85-86 of 177.

117. The Debtors should be required to file a motion to close any of the chapter 11 cases and none should be deemed closed upon the Effective Date. The procedure in this District is to file a motion or for the Clerk to issue a Notice of Intention to Close Case. That procedure should not change here.

RESERVATION OF RIGHTS

118. The U.S. Trustee reserves all of his rights and objections regarding any and all future amendments to the Plan. The U.S. Trustee reserves the right to comment on and object to the proposed form of confirmation order. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, among other things,

complement, supplement, augment, alter or modify this Objection and reservation of rights, assert any objection, file any appropriate motion, or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that this Court sustain the Objection and either deny confirmation or require revisions to be made to the Plan and grant such other relief it deems just and proper.

Respectfully submitted,

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UNITED STATES TRUSTEE
REGIONS 3 & 9

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