MILBANK LLP
Dennis F. Dunne (admitted *pro hac vice*)
Samuel A. Khalil (admitted *pro hac vice*)
Matthew Brod (admitted *pro hac vice*)
Lauren C. Doyle (admitted *pro hac vice*)
Benjamin M. Schak (admitted *pro hac vice*)
55 Hudson Yards
New York, NY 10001
Telephone: 1 (212) 530-5000
DDunne@Milbank.com
SKhalil@Milbank.com
MBrod@Milbank.com
LDoyle@Milbank.com
BSchak@Milbank.com

Co-Counsel to the Debtors and Debtors in Possession

COLE SCHOTZ P.C.
Michael D. Sirota
Felice R. Yudkin
Daniel J. Harris
Court Plaza North, 25 Main Street
Hackensack, NJ 07601
Telephone: 1 (201) 489-3000
MSirota@coleschotz.com
FYudkin@coleschotz.com
DHarris@coleschotz.com

Co-Counsel to the Debtors and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re **UNITED SITE SERVICES, INC.** *et al.*,[1] Debtors.	Case No. 25-23630 (MBK) Chapter 11 (Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF AN ORDER (I) APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT AND (II) CONFIRMING THE SECOND AMENDED JOINT PREPACKAGED PLAN OF REORGANIZATION

[1] The last four digits of the tax identification number of United Site Services, Inc. are 3387. A complete list of the Debtors in these chapter 11 cases (the "**Chapter 11 Cases**"), with each one's tax identification number, principal office address and former names and trade names, is available on the website of the Debtors' noticing agent at www.veritaglobal.net/USS. The location of the principal place of business of United Site Services, Inc., and the Debtors' service address for these Chapter 11 Cases is 2487 W Navigator Drive, 3rd Floor, Meridian, ID 83642.

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The above-captioned debtors and debtors in possession (the "**Debtors**" or "**USS**") submit this memorandum of law in support of their request for entry of an order (i) approving the *Disclosure Statement for the Joint Prepackaged Plan of Reorganization of United Site Services, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 17] (as it may be amended, supplemented, or modified from time to time, the "**Disclosure Statement**") and (ii) confirming the *Joint Prepackaged Plan of Reorganization of United Site Services, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 16] (as it may be amended, modified, or supplemented from time to time, the "**Plan**").[1] In further support of the confirmation of the Plan, the Debtors rely upon the following declarations: (a) the *Declaration of Chris Kelly in Support of (I) Approval of the Disclosure Statement and (II) Confirmation of the Second Amended Joint Chapter 11 Plan of United Site Services, Inc. and Its Debtor Affiliates* (the "**Kelly Declaration**"), (b) the *Declaration of Avi Robbins in Support of an Order (I) Approving the Adequacy of the Disclosure Statement and the Prepetition Solicitation Procedures and (II) Confirming the Second Amended Joint Pre-Packaged Plan of Reorganization of United Site Services, Inc. and Its Debtor Affiliates* (the "**Robbins Declaration**") and (c) the *Declaration of James Lee Regarding the Solicitation and Tabulation of Votes on the Joint Prepackaged Plan of Reorganization of United Site Services, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 290] (the "**Voting Declaration**"), and respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Plan, which has been unanimously accepted by all classes of creditors entitled to vote thereon, and otherwise provides full satisfaction of all other third-party claims, implements a comprehensive financial restructuring that will reduce existing funded indebtedness by approximately $2.4 billion and raise up to $1.075 billion in new capital, including an Equity Rights

[1] Capitalized terms used and not otherwise defined herein have the meanings given to such terms in the Plan or the Scheduling Order (defined herein), as applicable.

Offering of up to $480 million fully backstopped by the Ad Hoc Group and certain other creditors, $300 million[2] of Exit Term Loan Facility funding provided by the Ad Hoc Group and certain other creditors, and approximately $295 million of additional asset-based and other revolving loans to satisfy the obligations under the Plan and to provide critical new liquidity to support the Reorganized Debtors. While the Plan will right-size USS's balance sheet for future success, it also ensures that USS's customers, vendors, and employees will remain unaffected by the Chapter 11 Cases by paying in full all General Unsecured Claims, allowing USS to emerge as a stronger company, with a sustainable capital structure that is better aligned with its operating prospects.

2. Prior to the Petition Date, USS and certain major creditors and other stakeholders (the "**Consenting Stakeholders**"), entered into an agreement (together with all exhibits, annexes, and schedules and as subsequently amended, the "**Restructuring Support Agreement**" or "**RSA**") on December 28, 2025, which set a road map for solicitation and confirmation of a prepackaged chapter 11 plan. Under the Restructuring Support Agreement, the Ad Hoc Group committed to support the Plan, provide and backstop a DIP Facility of $120 million, backstop the Equity Rights Offering, and provide the Exit Term Loan Facility.

3. The Plan, which is the product of several months of intense, arm's-length negotiations with key stakeholders across the capital structure, reflects the significant settlements and compromises agreed to by the Debtors' stakeholders across their capital structure. As a result, the Plan will provide significant value to USS's creditors that would not be obtained without the settlements and compromises embodied in the Plan. USS has determined that implementing the transactions contemplated by the RSA, including near-term confirmation of the Plan, represents the best outcome for all of its stakeholders. This outcome was made possible by the hard-fought negotiations among USS, the members of the Ad Hoc Group, the lenders under USS's asset-backed and revolving credit facilities, affiliates of Platinum Equity Advisors, LLC (USS's equity sponsor), and ultimately, CastleKnight Management LP ("**CastleKnight**"). USS has committed significant

[2] Pursuant to the CastleKnight Settlement, an additional $14 million of debt will be issued under the Exit Term Loan Facility.

resources to minimizing operational disruption while negotiating a consensual restructuring framework that allows for prompt emergence from chapter 11.

4. To implement the Restructuring Transactions, the Debtors launched solicitation of votes to accept or reject the Plan on December 28, 2025.

5. Despite the commencement of these cases with overwhelming support for the proposed restructuring, the Plan was initially opposed by one creditor, CastleKnight. On the Petition Date, CastleKnight filed a preliminary objection to certain of the requested first-day relief [Dkt. No. 57] (the "**CastleKnight Objection**"). At the first day hearing, the Court directed the Debtors, the Ad Hoc Group, and CastleKnight to participate in mediation with respect to the CastleKnight Objection and the Plan. The Court later appointed the Honorable Robert D. Drain (Ret.) to serve as mediator.

6. Following a full-day mediation on January 13, 2026, and further negotiations over the following days, the mediation parties agreed to a settlement and memorialized its terms in a settlement agreement on January 26, 2026 (the "**CastleKnight Settlement**"). Among other things, the CastleKnight Settlement provides for separate classification and negotiated treatment of the Second-Out Term Loans and the Amended Term Loans, a limited fee reimbursement, mutual releases, and certain governance rights for CastleKnight. USS then filed an amended proposed Final DIP Order [Dkt. No. 233] and Plan [Dkt. No. 234], each of which incorporated terms of the CastleKnight Settlement. Following the CastleKnight Settlement, creditors in each Voting Class unanimously voted to accept the Plan.

7. USS has also consensually resolved many formal and informal objections and comments from various parties in interest, and has filed further amended versions of the Plan and a proposed Confirmation Order that reflect these resolutions.

8. For these and other reasons set forth more fully in this memorandum and based on the evidence presented in the Kelly Declaration, the Robbins Declaration and the Voting Declaration, the Debtors respectfully request that the Court enter the Confirmation Order, approving the Disclosure Statement and confirming the Plan.

BACKGROUND

9. On December 29, 2025 (the "**Petition Date**"), each Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of New Jersey (the "**Court**"). The Debtors are authorized to operate their business as debtors in possession pursuant to section 1107(a) and 1108 of the Bankruptcy Code. No trustee or creditors' committee has been appointed in these Chapter 11 Cases.

10. Prior to the Petition Date, on December 28, 2025, the Debtors commenced solicitation of votes on the Plan (the "**Solicitation**") from the Holders of Claims in Class 6 (First Lien Secured Claims)[3] and Class 7 (Unsecured Funded Debt Claims) (collectively, the "**Voting Classes**") as of December 22, 2025 (the "**Voting Record Date**") by directing Kurtzman Carson Consultants, LLC dba Verita Global (the "**Voting Agent**" or "**Verita**") to distribute (i) solicitation packages (the "**Solicitation Packages**") to the members of the Voting Classes by mail and electronic mail, as applicable, and (ii) Notices of Non-Voting Status to the Holders of Claims in all other Classes (the "**Non-Voting Classes**"). *See* Certs. of Service [Dkt. Nos. 24, 178, 183]. The Solicitation Packages included copies of the Disclosure Statement and the exhibits thereto, including the Plan and ballots (the "**Ballots**") for casting votes on the Plan. *Id*. Notice of the Combined Hearing (as defined below) was published in the *New York Times* on January 2, 2026 (the "**Publication Notice**"). *See* Proof of Publication [Dkt. No. 142].

11. The Plan and Disclosure Statement were filed on the Petition Date. [Dkt. Nos. 16, 17]. On January 28 and February 6, 2026, the Debtors filed successive amendments to the Plan [Dkt. Nos. 234, 291] to reflect the CastleKnight Settlement and other agreements with various parties. On January 23, February 1, and February 3, 2026, the Debtors also filed plan supplements [Dkt. Nos. 217, 250, 269] (collectively, and together with any additional plan supplements, the "**Plan Supplement**").

[3] Following the CastleKnight Settlement, Class 6 was split into Classes 6a (Second-Out Claims) and 6b (Amended Term Loan Claims) as reflected in the amended Plan. No re-solicitation was necessary, since the information contained in the Ballots for the original Class 6 was sufficient for Verita to allocate votes into Classes 6a and 6b.

12. On the Petition Date, the Debtors also filed the *Debtors' 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**") [Dkt. No. 18]. On December 30, 2025, the Court entered an order [Dkt. No. 79] (the "**Scheduling Order**") approving, among other things, the Scheduling Motion and the solicitation procedures used by Verita (the "**Solicitation Procedures**").

13. On December 31, 2025, the Debtors filed, and, on January 2, 2026, served, the *Notice of (I) Commencement of Chapter 11 Bankruptcy Cases, (II) Hearing on the Adequacy of the Disclosure Statement and Confirmation of the Pre-Packaged Plan, and (III) Certain Objection Deadlines* (the "**Combined Notice**"). *See* Combined Notice [Dkt. No. 83]; Certificate of Service [Dkt. No. 183].

14. The deadline for voting on the Plan (the "**Voting Deadline**") was January 30, 2026, at 4:00 p.m. (prevailing Eastern Time), as was the deadline to file objections to confirmation of the Plan, unless extended by the Debtors. Many of the Holders of Claims in the Voting Classes are either parties to the RSA or substantial Holders of the Amended Term Loan Claims (Class 6b) and, as such, were familiar with the terms of the Plan and the Debtors' financial condition prior to the Solicitation.

15. The Voting Declaration reports the following voting results:

	Accept		Reject	
	Number (%)	**Amount (%)**	**Number (%)**	**Amount (%)**
Class 6a – Second-Out Claims	130 *(100%)*	$377,467,634.03 *(100%)*	0 *(0%)*	$0.00 *(0%)*
Class 6b – Amended Term Loan Claims	3 *(100%)*	$20,104,144.89 *(100%)*	0 *(0%)*	$0.00 *(0%)*
Class 7 – Unsecured Funded Debt Claims	158 *(100%)*	$1,769,131,306.83 *(100%)*	0 *(0%)*	$0.00 *(0%)*

16. The hearing to consider approval of the Disclosure Statement and confirmation of the Plan (the "**Combined Hearing**") is scheduled for February 25, 2026, at 11:30 a.m. (prevailing Eastern Time). Concurrently with the filing of this memorandum, the Debtors have submitted a proposed order confirming the Plan (the "**Confirmation Order**").

17. The Debtors received certain formal and informal responses to the Plan, including the objection of OMJ LLC [Dkt. No. 240] (the "**OMJ Initial Objection")** and its supplemental objection [Dkt. No. 316] (the "**OMJ Supplemental Objection**", together with the OMJ Initial Objection, the "**OMJ Objections**"), and the objection of the U.S. Trustee [Dkt. No. 257] (the "**UST Objection**" and, together with the OMJ Objection, the "**Objections**"). As of the date hereof, the Debtors have resolved all formal and informal objections except the OMJ Objections and the UST Objection through certain modifications of the Plan and the inclusion of agreed language in the proposed Confirmation Order. A further amended Plan (the "**Second Amended Plan**") was filed [Dkt. No. 291] reflecting those modifications. The Debtors' responses to the remaining Objections are set forth below.

18. The Plan enjoys universal support of USS's economic stakeholders, and satisfies all applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, and applicable non-bankruptcy law. Therefore, the Debtors respectfully request that the Court overrule the outstanding Objections and confirm the Plan.

I. THE COURT HAS JURISDICTION, AND NOTICE HAS BEEN PROPERLY GIVEN.

A. Jurisdiction.

19. The Court has jurisdiction over the Chapter 11 Cases pursuant to 28 U.S.C. § 1334. These Chapter 11 Cases have been referred to the Court pursuant to 28 U.S.C. § 157(a) by the *Standing Order of Reference to the Bankruptcy Court under Title 11* (D.N.J. amended June 6, 2025) (Bumb, C.J.). The matters dealt with in the Motion are core proceedings under 28 U.S.C. § 157(b). The Debtors consent to the Court's entry of a final order on these matters if it is determined that the Court cannot otherwise enter a final order or judgment consistent with Article III of the U.S. Constitution. Venue in the Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

B. Adequate Notice of Combined Hearing.

20. In accordance with Bankruptcy Rules 2002, 9006, 9007, and 9014, the Scheduling Order, the Combined Notice, and the Solicitation Procedures, adequate notice of (a) the time for filing objections to approval of the Disclosure Statement and confirmation of the Plan, (b) the transactions, settlements, and compromises contemplated by the Plan, and (c) the Combined Hearing was provided to all Holders of Claims and Interests and other parties entitled to receive such notice under the Bankruptcy Code and Bankruptcy Rules. The Debtors respectfully submit that no other or further notice is necessary or required.

II. APPROVAL OF THE DISCLOSURE STATEMENT.

A. The Disclosure Statement Satisfies the Requirements of the Bankruptcy Code and the Bankruptcy Rules.

21. To determine whether a prepetition solicitation of votes to accept or reject a plan should be approved, the Court must determine whether the solicitation complied with sections 1125 and 1126(b) of the Bankruptcy Code and Bankruptcy Rules 2002, 3017(d), 3018(b), and 3018(c).

22. Section 1125(g) of the Bankruptcy Code provides that:

> Notwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.

11 U.S.C. § 1125(g).

23. Section 1126(b) of the Bankruptcy Code provides that:

> [A] holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or (2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

11 U.S.C. § 1126(b).

24. Therefore, prepetition solicitations must either comply with applicable federal or state securities laws and regulations (including the registration and disclosure requirements thereof) or, if such laws and regulations do not apply, the solicited holders must receive "adequate information," as such term is defined in section 1125(a)(1) of the Bankruptcy Code.

B. The Debtors' Prepetition Solicitation Was Exempt from Registration and Disclosure Requirements Otherwise Applicable Under Nonbankruptcy Law.

25. The Solicitation was exempt from compliance with generally applicable federal and state securities laws and regulations. Specifically, Section 5 of the Securities Act of 1933 (as amended, the "**Securities Act**") creates certain registration requirements for transactions involving the issuance of securities such as those to be issued to Holders of Allowed Claims in the Voting Classes under the Plan. The Solicitation was exempt from registration under the Securities Act, under one or more of the exemptions from registration provided thereunder, including Section 4(a)(2) of the Securities Act and/or Regulation D thereunder, as well as Regulation S under

the Securities Act, state "Blue Sky" laws and/or any similar rules, regulations, or statutes. Section 4(a)(2) of the Securities Act creates an exemption from the registration requirements under Section 5 of the Securities Act for transactions by an issuer not involving a "public offering." 15 U.S.C. § 77d(a)(2). Regulation S is a safe harbor from the registration requirements under Section 5 of the Securities Act for offers and sales of securities in offshore transactions outside the United States.

26. Accordingly, the Solicitation complied with all applicable bankruptcy and nonbankruptcy laws, rules, and regulations.

C. The Disclosure Statement Contains Adequate Information.

27. The Debtors submit that the disclosure provided to each Holder of a Claim in the Voting Classes in connection with the Solicitation was "adequate" as defined in section 1125(a) of the Bankruptcy Code. 11 U.S.C. § 1126(b)(2). Pursuant to section 1125(b) of the Bankruptcy Code, a plan proponent must provide holders of impaired claims and equity interests with "adequate information" regarding a proposed chapter 11 plan. Section 1125(a)(1) of the Bankruptcy Code defines "adequate information" as:

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

11 U.S.C. § 1125(a)(1).

28. Accordingly, a disclosure statement must provide sufficient information to impaired creditors and equity holders entitled to vote on the plan to permit them to make an informed voting decision. *See, e.g.*, *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 100 (3d Cir. 1988) ("[Section] 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote."); *In re Phoenix Petroleum, Co*., 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001) ("[T]he general purpose of the disclosure statement is to provide 'adequate information' to

enable 'impaired' classes of creditors and interest holders to make an informed judgment about the proposed plan and determine whether to vote in favor of or against that plan."). The essential requirement of a disclosure statement is that it "clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Keisler*, No. 08-34321, 2009 WL 1851413, at *4 (Bankr. E.D. Tenn. June 29, 2009) (quoting *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991)).

29. Whether a disclosure statement contains adequate information "is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation." 11 U.S.C. § 1125(d). Instead, bankruptcy courts have broad discretion to determine the adequacy of the information contained in a disclosure statement. *See, e.g.*, *In re Lisanti Foods, Inc.*, 329 B.R. 491, 507 (D.N.J. 2005) ("Section 1125 affords the Bankruptcy Court substantial discretion in considering the adequacy of a disclosure statement." (citing *In re River Village Assoc.,* 181 B.R. 795, 804 (E.D. Pa. 1995))); *In re Phoenix Petrol. Co*., 278 B.R. at 393 (noting that the determination of what is adequate information is "largely within the discretion of the bankruptcy court" (quoting *Tex. Extrusion Corp. v. Lockheed Corp*. (*In re Tex. Extrusion Corp*.), 844 F.2d 1142, 1157 (5th Cir. 1988))). Congress granted bankruptcy courts such wide discretion in determining the adequacy of a disclosure statement to facilitate effective reorganizations of debtors in a broad range of businesses, taking into account the various circumstances of chapter 11 cases. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 408–409 (1977); *see also In re Copy Crafters Quickprint Inc*., 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988) (noting that the adequacy of a disclosure statement "is to be determined on a case-specific basis under a flexible standard that can promote the policy of Chapter 11 towards fair settlement through a negotiation process between informed interested parties"). Accordingly, the determination of whether a disclosure statement contains adequate information is made on a case-by-case basis, focusing on the unique facts and circumstances of each case. *See In re Congoleum Corp*., 636 B.R. 362, 383 (Bankr. D.N.J. 2022) ("What constitutes 'adequate information' is determined on a case-by-case basis, with the ultimate determination within the discretion of the bankruptcy court.") (internal quotations omitted); *In re Lisanti Foods, Inc*., 329 B.R. at 507 ("The information required will necessarily be governed by the circumstances

of the case."); *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 417 (3d Cir. 1988) ("From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case.").

30. In determining whether a disclosure statement contains adequate information, courts generally examine a list of factors, including, but not limited to, whether the disclosure statement contains the following types of information:

(a) the circumstances that gave rise to the filing of the bankruptcy petition;

(b) an explanation of the available assets and their value;

(c) the anticipated future of the debtor(s);

(d) the source of the information provided in the disclosure statement;

(e) the condition and performance of the debtor while in chapter 11;

(f) information regarding claims against the estate;

(g) a liquidation analysis setting forth the estimated return that creditors and equity holders would receive under chapter 7;

(h) the accounting and valuation methods used to produce the financial information in the disclosure statement;

(i) information regarding the future management of the debtor, including the amount of compensation to be paid to any insiders, directors, and/or officers of the debtor;

(j) a summary of the plan;

(k) any financial information, valuations, or *pro forma* projections that would be relevant to the determination of whether to accept or reject the plan;

(l) information relevant to the risks involved;

(m) the existence, likelihood, and possible success of non-bankruptcy litigation; and

(n) the tax and securities laws consequences of the effectiveness of the plan.

See, e.g., *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–171 (Bankr. S.D. Ohio 1988); *see also In re Oxford Homes, Inc.*, 204 B.R. 264, 269 n.17 (Bankr. D. Me. 1997) (using a similar list). This list is not meant to be comprehensive, and a debtor is not required to provide all the information

on the list. Rather, the bankruptcy court must decide what is appropriate in each case in light of the particular facts and circumstances. *See Ferretti*, 128 B.R. at 18–19 (adopting a similar list); *see also In re Phoenix Petrol. Co.*, 278 B.R. at 393 (making use of a similar list but cautioning that "no one list of categories will apply in every case").

31. The Disclosure Statement provides all of the relevant types of information identified in the above list, including:

(a) an overview of the Plan (Section I);

(b) a description of the Debtors' businesses and capital structure (Sections II.A & II.B);

(c) key events leading up to the commencement of these Chapter 11 Cases (Section II.C);

(d) financial projections (Exhibit C);

(e) a liquidation analysis (Exhibit D);

(f) a valuation analysis (Exhibit E);

(g) risk factors (Section IX);

(h) confirmation requirements (Section VI.B, C);

(i) description of alternatives to the Plan (Section X); and

(j) tax and securities laws consequences of the effectiveness of the Plan (Sections VIII and IX).

32. Based on the foregoing, the Debtors submit that the Disclosure Statement contains sufficient information for their creditors entitled to vote on the Plan to make informed judgments regarding whether to vote to accept or reject the Plan. Accordingly, the Debtors respectfully request that the Court approve the Disclosure Statement as containing adequate information in satisfaction of the requirements of section 1125 of the Bankruptcy Code.

D. The Disclosure Statement Provides Adequate Notice of the Release, Exculpation, and Injunction Provisions of the Plan.

33. Bankruptcy Rule 3016(c) provides that "[i]f the plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement must (1)

describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined; and (2) identify the entities that would be subject to the injunction." Fed. R. Bankr. P. 3016(c).

34. In compliance with this requirement, Article IV.G of the Disclosure Statement describes in detail the release provisions contained in the Plan (including consensual Third-Party Releases), identifying the entities providing such releases, the entities being released, and the Claims and Causes of Action to be released. Article IV.G of the Disclosure Statement describes the terms on which certain parties are to be exculpated for certain actions in connection with these Chapter 11 Cases, and Article IV.G describes the injunction implementing the release and exculpation provisions of the Plan. Each of the foregoing disclosures is set forth in conspicuous, bold print.

35. Accordingly, the Debtors respectfully submit that the Disclosure Statement complies with Bankruptcy Rule 3016(c).

E. The Debtors Complied with the Bankruptcy Code, the Bankruptcy Rules, and the Scheduling Order.

36. Prior to the Petition Date, the Debtors distributed the Solicitation Packages to Holders of Claims in the Voting Classes and solicited votes to accept or reject the Plan pursuant to sections 1125 and 1126 of the Bankruptcy Code. *See* 11 U.S.C. § 1125(g) (noting that debtors may commence solicitation prior to filing chapter 11 petitions); 11 U.S.C. §1126(b)(2) (noting that holders of claims or interests that accepted or rejected a plan before the commencement of a chapter 11 case are deemed to accept or reject the plan so long as the solicitation provided adequate information). As set forth in the Scheduling Motion, the Debtors complied with the requirements of Bankruptcy Rules 2002, 3017(d), 3018(b), and 3018(c) with respect to the prepetition solicitation of the Plan, the form of ballot used to solicit acceptances of the Plan, and notice of the deadline to object to the Plan and the Disclosure Statement ("**Objection Deadline**"). Accordingly, the Solicitation Procedures complied with the Bankruptcy Code and the Bankruptcy Rules.

37. The Court entered the Scheduling Order on December 30, 2025, establishing several key dates and deadlines, including the Voting Deadline, Opt-Out Deadline, Objection Deadline, and the deadlines to serve the Combined Notice and file the Plan Supplement. *See* Scheduling Order ¶ 2. The Scheduling Order also approved, among other things, the form and manner of the Combined Notice, the Publication Notice, the Cover Letter, the Third-Party Release Opt-Out Election Form, and the Ballots. In the Scheduling Order, the Court found that the notice provided by the Combined Notice, the Notice to Unimpaired Classes, the Notice to Rejecting Classes, and the Publication Notice, constituted good and sufficient notice of the matters set forth therein for all purposes and no other or further notice shall be necessary. *See* Scheduling Order ¶ 18. Thus, the Debtors have complied with the procedures approved by the Scheduling Order.

1. *The Debtors Complied with the Notice Requirements Set Forth in the Scheduling Order and the Bankruptcy Rules.*

38. The Debtors satisfied the notice requirements set forth in the Scheduling Order and Bankruptcy Rules 2002(b) and 3017.

39. ***First***, on December 28, 2025, the Debtors caused the Voting Agent to distribute the Solicitation Packages containing the Cover Letter, the Disclosure Statement, the Plan, and the applicable Ballots (each including the Third-Party Release Opt-Out Election Form) to Holders of Claims in the Voting Classes as of the Voting Record Date. *See* Certs. of Service [Dkt. Nos. 24, 178, 183].

40. ***Second***, on or before January 2, 2026, Verita caused to be served the Notices of Non-Voting Status and Opt-Out Form on the Non-Voting Classes. Furthermore, on January 2, 2026, Verita caused to be served the Combined Notice on the Debtors' full creditor matrix and on all other parties required to receive such notice pursuant to the Scheduling Order. A Certificate of Service evidencing Verita's service of the foregoing was filed with the Court on January 12, 2026. *See* Cert. of Service [Dkt. No. 183]; Voting Decl. ¶ 12.

41. ***Third***, on January 2, 2026, the Debtors caused the Publication Notice to be published in the *New York Times*. An affidavit evidencing such publication was filed with the Court on January 8, 2026. *See* Proof of Publication [Dkt. No. 142]; Voting Decl. ¶ 14.

42. ***Fourth***, the Combined Notice included instructions on how to obtain the Plan and the Disclosure Statement through the Debtors' restructuring website, or by contacting the Voting Agent.

2. *The Ballots Used to Solicit Holders of Claims Entitled to Vote on the Plan Complied with the Scheduling Order.*

43. The form of Ballots comply with the Bankruptcy Rules and were approved by the Court in the Scheduling Order. *See* Scheduling Order, ¶ 5. Ballots were distributed only to parties entitled to vote on the Plan. *See* Voting Decl. ¶ 7. Therefore, the Debtors submit that they complied with the Scheduling Order and satisfied the requirements of Bankruptcy Rules 3017(d) and 3018(c).

3. *The Debtors' Solicitation Period Complied with the Scheduling Order and Bankruptcy Rule 3018(b).*

44. The Debtors' solicitation period complied with the Scheduling Order and Bankruptcy Rule 3018(b). Further, the Voting Record Date and the Voting Deadline were approved by the Court in the Scheduling Order. *See* Scheduling Order ¶ 2.

4. *The Debtors' Vote Tabulation Procedures Complied with the Scheduling Order.*

45. As set forth in the Scheduling Motion, the Debtors used standard tabulation procedures in tabulating votes received from the Holders of Claims in the Voting Classes. The Voting Agent reviewed, determined the validity of, and tabulated all Ballots received in accordance with the Solicitation Procedures. *See* Voting Decl. ¶ 17. The Debtors submit that the Court should approve the tabulation of votes that reflects acceptance of the Plan by each of the Voting Classes, as the requisite majorities in amount and number of Claims voted in each such Class in compliance with section 1126(c) of the Bankruptcy Code.

F. Solicitation of the Plan Complied with the Bankruptcy Code and Was in Good Faith.

46. Section 1125(e) of the Bankruptcy Code provides that:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of [title 11] . . . is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan.

11 U.S.C. § 1125(e).

47. The Debtors, through Verita, have solicited votes on the Plan in good faith and in compliance with the Bankruptcy Code. The Debtors respectfully request that the Bankruptcy Court find that the Solicitation was conducted properly and grant the applicable parties the protections provided by section 1125(e) of the Bankruptcy Code.

G. The Supplemental Information Is Sufficient for Purposes of Section 1145.

48. Subject to certain qualifications (described in the Disclosure Statement), section 1145(a)(1) of the Bankruptcy Code exempts from the Securities Act and other securities registration laws and regulations, the offer, issuance or delivery, and distribution of securities that are issued under a plan of reorganization in exchange (or principally in exchange) for a claim against or interest in the debtor or a successor of the debtor under such plan. Such securities offerings are considered "public offerings," *see* 11 U.S.C. § 1145(c), meaning that recipients may resell these securities without either registering them or complying with a Securities Act safe harbor. *See* 8 Collier on Bankr. ¶ 1145.04 (citing 17 C.F.R. § 230.144 and several SEC no-action letters). When securities are issued under section 1145, there is no registration statement or prospectus investors could access for information about the issuer and its securities. Instead, investors must rely on the court-approved disclosure statement, along with any other disclosures of the issuer. During the first 40 days after the issuer's offering of securities under section 1145(a)(1)-(2) of the Bankruptcy Code, a stockbroker may transact in those securities so long as the stockbroker provides its counterparty with the issuer's approved disclosure statement, and "if the court orders, information supplementing such disclosure statement." 11 U.S.C. §

1145(a)(4). This requirement parallels and supplants the duty of a stockbroker under the Securities Act to provide a prospectus of an issuer that was not a reporting company prior to the filing of the registration statement.

49. Here, in response to informal comments from the Securities Exchange Commission (the "**SEC**"), the Debtors are contemporaneously filing supplemental information (the "**Supplemental Information**"), which includes, among other things, (a) additional risk factors, (b) historical financial information dating back to 2023, (c) additional detail regarding the Disclosure Statement's financial projections, and (d) summaries of the Exit ABL Facility, Exit RCF Facility, and Exit Term Loan Facility (collectively, the "**Exit Financing**"). The Debtors believe that this Supplemental Information, in conjunction with the ample information already set forth in the Disclosure Statement and its exhibits, provides more than sufficient information for investors with respect to reliance on section 1145 of the Bankruptcy Code. Accordingly, the Debtors request that the Court confirm the Plan's issuance of securities under section 1145 of the Bankruptcy Code and include a provision in the Confirmation Order that directs stockbrokers that transact in reliance on section 1145(a)(4) to provide counterparties with the Supplemental Information as "information supplementing such disclosure statement."

III. The Plan Satisfies the Applicable Requirements of Section 1129 of the Bankruptcy Code.

A. The Plan Complies with Section 1129(a)(1) of the Bankruptcy Code.

50. The Bankruptcy Code section 1129(a)(1) requires that a chapter 11 plan "compl[y] with the applicable provisions" of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) explains that this requirement refers primarily to sections 1122 and 1123(a) of the Bankruptcy Code, which govern, respectively, the classification of claims and interests and the contents of a chapter 11 plan. *See* S. Rep. No. 95-989, 95th Cong. 2nd Sess. at 126 (1978); H.R. Rep. No. 95-595, 95th Cong. 1st Sess. at 412 (1977); *see also In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008) ("As confirmed by legislative history, 11 U.S.C. § 1129(a)(1), which provides that the plan must 'compl[y] with the applicable provisions

of this title,' requires that a plan comply with 11 U.S.C. §§ 1122 and 1123."); *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 132 (Bankr. D.N.J. 2010) ("The legislative history reflects that 'the applicable provisions of chapter 11 [refers to] . . . section 1122 and 1123, governing classification and contents of plan.'"); *In re G-I Holdings Inc.*, 420 B.R. 216, 258 (Bankr. D.N.J. 2009) (reviewing a plan to determine whether it "complies with other applicable provisions of § 1129(a)(1), including §§ 1122 and 1123"); *In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986) (stating that "[o]bjections to confirmation raised under § 1129(a)(1) generally involve the failure of a plan to conform to the requirements of § 1122(a) or § 1123"), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636 (2d Cir. 1988). As demonstrated below, the Plan complies with the requirements of sections 1122 and 1123 of the Bankruptcy Code.

1. *The Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code.*

51. Section 1122(a) of the Bankruptcy Code provides, in pertinent part, that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a); *see also In re Armstrong World Indus., Inc.*, 348 B.R. 136, 160 (D. Del. 2006) (holding that section 1122(a) of the Bankruptcy Code was satisfied where similar claims were classified together); *In re Rochem, Ltd.*, 58 B.R. 641, 642 (Bankr. D.N.J. 1985) ("Although Section 1122(a) of the Code requires that claims be substantially similar within a particular class, there is no requirement within Section 1122 or elsewhere in the Code that all substantially similar claims be included within a particular class."); *In re Aleris Int'l, Inc*., No. 09–10478 (BLS), 2010 WL 3492664, at *12 (Bankr. D. Del. May 13, 2010) (same and further noting that section 1122(a) is satisfied where a plan "does not propose a classification scheme to create an impaired consenting class or to manipulate class voting"). Thus, for the Plan to satisfy section 1122 of the Bankruptcy Code, Claims and Interests in each Class must be substantially similar to the other Claims and Interests, as applicable, in such Class.

52. In accordance with this requirement, Claims and Interests are placed in separate Classes based upon their legal nature and entitlements and taking into account their relative priority. *See* Second Amended Plan, Art. III.

53. Article III of the Plan provides for the following classification of Claims and Interests:

Class 1: Priority Non-Tax Claims

Class 2: Other Secured Claims

Class 3: ABL Facility Claims

Class 4: First-Out Revolving Loans Claims

Class 5: First-Out Term Loan/Notes Claims

Class 6a: Second-Out Claims

Class 6b: Amended Term Loan Claims

Class 7: Unsecured Funded Debt Claims

Class 8: General Unsecured Claims

Class 9: Intercompany Claims

Class 10: Intercompany Interests

Class 11: Existing Equity Interests

Class 12: Subordinated Claims

54. Each Class contains only substantially similar Claims or Interests, as applicable. To the extent that the Plan places similar Claims and Interests in different classes, there are valid business, legal, and/or factual reasons that justify such separate classification. Accordingly, the classification of Claims and Interests under the Plan satisfies the requirements of section 1122 of the Bankruptcy Code.

2. *The Plan Satisfies Section 1123(a) of the Bankruptcy Code.*

a. Designation of Classes of Claims and Interests (§ 1123(a)(1))

55. Section 1123(a)(1) of the Bankruptcy Code provides that a chapter 11 plan must "designate . . . classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests." 11 U.S.C. § 1123(a)(1). In compliance with this requirement, the Plan designates Classes of Claims (other than Claims that do not need to be classified, such as Administrative Claims, Priority Tax Claims, and DIP Claims) and Interests. *See* Plan, Art. III.

b. Specification of Unimpaired Classes (§ 1123(a)(2))

56. Section 1123(a)(2) of the Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(1). The Plan satisfies this requirement by identifying Class 1 (Priority Non-Tax Claims), Class 2 (Other Secured Claims), Class 3 (ABL Facility Claims), Class 4 (First-Out Revolving Loans Claims), Class 5 (First-Out Term Loan/Notes Claims), Class 8 (General Unsecured Claims), Class 9 (Intercompany Claims) (if reinstated), and Class 10 (Intercompany Interests) (if reinstated) as Unimpaired. *See* Plan, Art. III.B.

c. Treatment of Impaired Classes (§ 1123(a)(3))

57. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). The Plan meets this requirement by specifying the treatment of Claims and Interests in Class 6a (Second-Out Claims), Class 6b (Amended Term Loan Claims), Class 7 (Unsecured Funded Debt Claims), Class 9 (Intercompany Claims) (if not reinstated), and Class 10 (Intercompany Interests) (if not reinstated), Class 11 (Existing Equity Interests), and Class 12 (Subordinated Claims). *See* Plan, Art. III.B.

d. Equal Treatment Within Classes (§ 1123(a)(4))

58. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). The Plan satisfies this requirement because each Allowed Claim and Allowed Interest, as applicable, in the same Class will receive the same treatment as all other Allowed Claims and Allowed Interests, as applicable, in that Class, except to the extent any Holder has agreed to a different treatment. *See* Plan, Art. III.B.

e. Means for Implementation (§ 1123(a)(5))

59. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. 11 U.S.C. § 1123(a)(5). The Plan satisfies this requirement by setting forth adequate means for its implementation, including, among others, (i) effecting a general settlement of Claims and Interests, (ii) authorizing the Debtors to consummate the Restructuring Transactions, (iii) setting forth the sources of consideration to be distributed under the Plan, (iv) providing for the cancellation of certain prepetition loans, liens, securities, and other instruments and obligations, and (v) setting forth the terms of the governance of the Reorganized Debtors and the manner of selection of their officers, managers, and directors. *See* Plan, Art. V. The Plan thus satisfies section 1123(a)(5) of the Bankruptcy Code.

f. Issuance of Non-Voting Equity Securities (§ 1123(a)(6))

60. Section 1123(a)(6) of the Bankruptcy Code requires that the constituent documents of a reorganized debtor that is a corporation must prohibit the issuance of non-voting equity securities. 11 U.S.C. § 1123(a)(6). Article V.H of the Plan provides that the organizational documents of the Reorganized Debtors do not provide for the issuance of any non-voting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code. *See generally* Plan Supplement, Ex. A [Dkt. No. 217]. Accordingly, the Plan satisfies this section of the Bankruptcy Code.

g. Directors and Officers (§ 1123(a)(7))

61. Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions with respect to the manner of selection of any director, officer, or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1123(a)(7). The Plan provides that, on the Effective Date, all managers and directors, as applicable, of the Debtors will be deemed to have resigned. Plan, Art. IV.I. The members of the Reorganized Parent Board will be appointed in accordance with the RSA and the New Organizational Documents (*id.* at Art. IV.I.1), and the members of the New Subsidiary Boards will be appointed in accordance with the applicable New Organizational Documents or as set forth in the Plan Supplement. *Id.* at Art. IV.I.3. The officers of each Debtor will continue as initial officers of each Reorganized Debtor, and will thereafter be selected in accordance with the New Organizational Documents. *Id.* at Art. IV.I.2; *see also* Plan Supplement, Ex. A, §§ 5.2, 5.8 [Dkt. No. 217] (LLC Agreement provisions concerning appointment of officers at Reorganized Parent). The Plan thus satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

3. *The Plan Complies with the Discretionary Provisions of Section 1123(b) of the Bankruptcy Code.*

62. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a chapter 11 plan, provided they are "not inconsistent" with any applicable provisions of the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(6). Among other things, section 1123(b) provides that a plan may: (i) impair or leave unimpaired any class of claims or interests, (ii) provide for the assumption or rejection of executory contracts and unexpired leases, and (iii) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estate. *See* 11 U.S.C. § 1123(b)(1)–(3).

63. As permitted by section 1123(b), the Plan provides for (i) the impairment or unimpairment of Classes of Claims and Interests (*see* Plan, Art. III), (ii) the assumption and rejection of Executory Contracts and Unexpired Leases (*see id.* at Art. V), and (iii) the compromise and settlement of all Claims, Interests, disputes, and controversies relating to the rights of Holders

of Claims and Interests (*see id.* at Art. VIII). As discussed in greater detail in Section IV below, the Plan also contains certain release, exculpation, and injunction provisions that are consistent with the Bankruptcy Code and applicable case law.

64. Accordingly, the Plan complies with the requirements of sections 1122 and 1123 of the Bankruptcy Code (as well as with the other applicable provisions of the Bankruptcy Code) and thus satisfies the requirements of section 1129(a)(1) of the Bankruptcy Code.

B. The Plan Complies with Section 1129(a)(2) of the Bankruptcy Code.

65. Section 1129(a)(2) of the Bankruptcy Code requires that the proponent of a chapter 11 plan comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(2). The legislative history of section 1129(a)(2) indicates that its principal purpose is to ensure that the plan proponent complies with the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95-595, at 412 ("[Section 1129(a)(2)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."). As previously discussed, the Debtors, as the proponents of the Plan, have complied with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code. Sections 1125(g) and 1126(b) of the Bankruptcy Code govern the solicitation of acceptances of a chapter 11 plan prior to the commencement of a chapter 11 case.

1. *The Debtors Have Complied with Section 1125 of the Bankruptcy Code.*

66. As discussed in Part I of this memorandum, the Debtors complied with the notice and solicitation requirements of section 1125 of the Bankruptcy Code. Further, the Voting Agent adhered to the procedures outlined in the Scheduling Order. *See* Voting Decl. at ¶ 7.

2. *The Debtors Have Complied with Section 1126 of the Bankruptcy Code.*

67. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization and provides that only holders of allowed claims and allowed interests in impaired classes of claims or interests that will receive or retain property under a plan on account

of such claims or interests may vote to accept or reject such plan. Specifically, section 1126 of the Bankruptcy Code provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive any property under the plan on account of such claims or interests.

11 U.S.C. §§ 1126(a), (f), (g).

68. As discussed in Part I of this memorandum and in accordance with section 1125 of the Bankruptcy Code, the Debtors solicited votes from Holders of Allowed Claims in Classes 6a, 6b, and 7, which were the only Classes entitled to vote on the Plan. The Debtors did not solicit votes from Holders of Claims and Interests in Classes 1, 2, 3, 4, 5, 8, 9, 10, 11, or 12 because Holders of such Claims and Interests are either Unimpaired and conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code or Impaired and conclusively deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code.

69. With respect to the Voting Classes, section 1126(c) of the Bankruptcy Code provides that a class accepts a plan where holders of claims holding at least two-thirds in amount and more than one-half in number of allowed claims in such class of those voting vote to accept such plan. The Voting Report reflects the results of the voting process that all Voting Classes voted unanimously to accept the Plan in accordance with section 1126 of the Bankruptcy Code. Based upon the foregoing, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(2) of the Bankruptcy Code.

70. Therefore, the Debtors respectfully submit that the Solicitation complied with sections 1125 and 1126 of the Bankruptcy Code and thus the Plan satisfies the requirements of section 1129(a)(2).

C. The Plan Complies with Section 1129(a)(3) of the Bankruptcy Code.

71. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). In the Third Circuit, the "good faith" requirement means that a "plan be 'proposed with honesty, good intentions, and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.'" *In re Zenith Elecs. Corp*., 241 B.R. 92, 107 (Bankr. D. Del. 1999) (quoting *In re Sound Radio, Inc*., 93 B.R. 849, 853 (Bankr. D.N.J. 1988)); *see also In re PPI Enters. (U.S.), Inc*., 228 B.R. 339, 347 (Bankr. D. Del. 1998) ("[C]ourts have held a plan is to be considered in good faith 'if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.'"), *aff'd sub nom. Solow v. PPI Enters.(U.S.)* (*In re PPI Enters.(U.S.)*), 324 F.3d 197 (3d Cir. 2003). Courts in this Circuit also consider the totality of the circumstances surrounding a plan to determine if it has been proposed in good faith. *See Azar v. THGH Liquidating LLC* (*In re THGH Liquidating LLC*), No. 19-11589 (JTD), 2020 WL 5409002, at *6 (D. Del. Sept. 9, 2020) ("[G]ood faith [under section 1129(a)(3)] is to be determined by the totality of the circumstances.") (internal citations omitted).

72. The Debtors have proposed the Plan in good faith, in consultation with their legal and financial advisors, as well as representatives of key case constituencies. The Plan is the result of extensive, arm's-length negotiations with the Consenting Stakeholders, as memorialized in the RSA. Further, the Debtors engaged in good-faith negotiations with CastleKnight, prior to and throughout the mediation, in an attempt to reach agreement with the only objecting lender. As a result of these good-faith efforts, the parties were able to negotiate and formalize the CastleKnight Settlement. The Debtors believe the Plan represents the best and, indeed, the only available option for their restructuring and thus was proposed with the legitimate purposes of maximizing both the value of the estates and distributions to the Holders of Allowed Claims. Accordingly, the Plan has

been proposed in good faith and not by any means forbidden by law, thus satisfying section 1129(a)(3) of the Bankruptcy Code.

D. The Plan Complies with Section 1129(a)(4) of the Bankruptcy Code.

73. Under section 1129(a)(4) of the Bankruptcy Code, the Court must find that "[a]ny payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case" be approved by the Court or subject to the Court's approval, as "reasonable." 11 U.S.C. § 1129(a)(4).

74. The only category of Claims that falls within the ambit of section 1129(a)(4) in these Chapter 11 Cases is the Professional Fee Claims. The Plan provides that the Professional Fee Claims will only be paid after they have been Allowed by this Court. The Professionals must file their final requests for payment of their Professional Fee Claims no later than forty-five (45) days after the Effective Date with objections due within 21 days after the filing of the final fee application, providing an adequate period of time for interested parties to review and, if necessary, object to any Professional Fee Claim. *See* Plan, Art. II.B.1. The Debtors' ordinary course professionals will be paid in the ordinary course consistent with the *Order (I) Authorizing Employment and Payment of Professionals Utilized in the Ordinary Course of Business and (II) Granting Related Relief* [Dkt. No. 265]. Accordingly, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(4).

E. The Plan Complies with Section 1129(a)(5) of the Bankruptcy Code.

75. Section 1129(a)(5) of the Bankruptcy Code requires that: (i) the proponent of a plan disclose the identity and affiliations of the proposed directors, officers, or voting trustees of the debtors, an affiliate of a debtor participating in a joint plan with a debtor, or a successor to the debtor under the plan; (ii) the appointment or continuance of such individuals be consistent with the interests of creditors and equity security holders and with public policy; and (iii) the identity and nature of the compensation of any insiders to be retained or employed by the reorganized debtors be disclosed. 11 U.S.C. § 1129(a)(5).

76. The identity of the members of the initial Reorganized Parent Board will be disclosed by the Debtors as soon as they are known and determined. *See* Plan Supplement, Ex. B [Dkt. No. 217]. The Plan discloses that the terms of the current members of the boards of directors or managers (as applicable) of the Debtors shall expire, such directors or managers (as applicable) shall be deemed to have resigned, and the initial members of the New Boards and the officers of each Reorganized Debtor shall be appointed in accordance with the respective New Organizational Documents. Further, the officers of the Debtors immediately before the Effective Date shall serve as the initial officers of the respective Reorganized Debtors on and after the Effective Date, except those officers who are employed by or partners of the Sponsor who shall be deemed to have resigned and shall bear no further duties to any of the Debtors or Reorganized Debtors. Accordingly, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. The Plan Complies with Section 1129(a)(7) of the Bankruptcy Code.

77. Section 1129(a)(7) of the Bankruptcy Code, commonly known as the "best interests of creditors test," provides, in relevant part:

> With respect to each impaired class of claims or interests—
> (A) each holder of a claim or interest of such class—
> (i) has accepted the plan; or
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date . . . .

11 U.S.C. § 1129(a)(7).

78. The best interests test is usually satisfied by the filing of a liquidation analysis that demonstrates that the estimated recoveries by dissenting stakeholders under the proposed plan are equal to or better than the recoveries the same stakeholders would receive in a hypothetical chapter 7 liquidation of that debtor's estate on the effective date of the plan. *See In re Affiliated Foods, Inc.*, 249 B.R. 770, 787 (Bankr. W.D. Mo. 2000) ("Under the best interests of creditors test,

a Chapter 11 plan can be confirmed over the objection of a holder of a claim or interest that is impaired by the plan only if the holder of the impaired claim or interest 'will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.'").

79. The best interests of creditors test must be applied to each holder of an Impaired Claim or Interest that rejected the Plan, regardless of whether the Class in which such Claim or Interest is placed, as a whole, accepts the Plan. *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *see also In re Cypresswood Land Partners, I*, 409 B.R. 396, 428 (Bankr. S.D. Tex. 2009) ("This provision is known as the 'best-interest-of-creditors-test' because it ensures that reorganization is in the best interest of individual claimholders who have not voted in favor of the plan.").

80. As demonstrated by the liquidation analysis attached to the Disclosure Statement as Exhibit D (the "**Liquidation Analysis**"), based on the assumptions and limitations described therein, the Plan provides all Holders of Impaired Claims and Interests with a recovery (if any) that is not less than they would have received in a hypothetical chapter 7 liquidation on the anticipated Effective Date. As demonstrated by the Liquidation Analysis, in a hypothetical liquidation, after satisfying ABL Facility Claims and DIP Claims, First-Out Claims could only be satisfied in part, and there would be no value left to satisfy any Claims or Interests junior to the First-Out Claims. *See* Liquidation Analysis, Disclosure Statement, Ex. D. Accordingly, the Debtors submit that the Plan satisfies section 1129(a)(7) of the Bankruptcy Code.

G. The Plan Satisfies Section 1129(a)(8) of the Bankruptcy Code.

81. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accepts the plan or is unimpaired. 11 U.S.C. § 1129(a)(8).

82. Classes 11 and 12 and, in the event that Intercompany Claims and Intercompany Interests are not Unimpaired, Classes 9 and 10, are Impaired and deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Accordingly, the Plan does not comply with section 1129(a)(8) of the Bankruptcy Code.

83. The Plan is nonetheless confirmable because, as discussed below, the Plan satisfies the "cram down" provisions of section 1129(b) of the Bankruptcy Code with respect to each of the deemed rejecting Classes.

H. The Plan Complies with Section 1129(a)(9) of the Bankruptcy Code.

84. Section 1129(a)(9) of the Bankruptcy Code requires that, "[e]xcept to the extent that the holder of a particular claim has agreed to a different treatment of such claim," a plan must provide that (i) all holders of allowed administrative expense claims will be paid in full in cash on the effective date of the plan and (ii) all holders of allowed priority claims will be paid in full in cash either on the effective date of the plan or (depending on the specific type of claim) over time with interest. 11 U.S.C. § 1129(a)(9).

85. The Plan provides that each Holder of an Allowed Administrative Claim will be paid in full in Cash on the Effective Date (or, if payment is not then due, when such payment otherwise becomes due in the applicable Reorganized Debtor's ordinary course of business) or as soon as practicable thereafter or as otherwise agreed by the Holder of such Claim. *See* Plan, Art. II.A. The Plan also provides that, except to the extent a Holder has agreed to alternative treatment, on the Effective Date, (i) each Holder of an Allowed DIP Claim will receive payment in full in Cash of its Allowed DIP Claim (*id.* at Art. II.C), and (ii) each Holder of an Allowed Priority Tax Claim and Allowed Priority Non-Tax Claim will be paid in full in Cash on the Effective Date or as soon as practicable thereafter or receive other treatment consistent with the provisions of section 1129(a)(9) of the Bankruptcy Code (*id.* at Art. II.D.; Art. III.B.1.). In each case, the Plan satisfies section 1129(a)(9).

I. The Plan Complies with Section 1129(a)(10) of the Bankruptcy Code.

86. Section 1129(a)(10) of the Bankruptcy Code requires that, "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10).

87. As set forth in the Voting Declaration, each of the Voting Classes (Classes 6a, 6b, and 7) accepted the Plan by the requisite amount and number of votes, without counting votes of any insider. *See* Voting Decl., Ex. A. Thus, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

J. The Plan Complies with Section 1129(a)(11) of the Bankruptcy Code.

88. Section 1129(a)(11) of the Bankruptcy Code requires the Court to find that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11).

89. This "feasibility" requirement is satisfied where, as here, a chapter 11 plan "offers a reasonable assurance of success." *Johns-Manville*, 843 F.2d at 649. "Success need not be guaranteed" for a plan to satisfy the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code; rather, the appropriate inquiry is whether a plan offers a reasonable probability of success. *Id.*; *see also In re Am. Cap. Equip., LLC*, 688 F.3d 145, 156 (3d Cir. 2012) (explaining that section 1129(a)(11) does not require "a plan's success to be guaranteed," but does require a "realistic and workable framework"); *In re W.R. Grace & Co.*, 475 B.R. 34, 115 (D. Del. 2012) ("[T]he bankruptcy court need not require a guarantee of success, but rather only must find that 'the plan presents a workable scheme of organization and operation from which there may be reasonable expectation of success.'").

90. In assessing feasibility, courts have identified the following non-exclusive probative factors:

- the adequacy of the capital structure;
- the earning power of the business;
- the economic conditions;
- the ability of management;
- the probability of the continuation of the same management; and
- any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

See In re Aleris Int'l, 2010 WL 3492664, at *28 (internal citations omitted). As discussed below, the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code.

91. The Debtors, with the assistance of their advisors, have prepared financial projections for fiscal years 2026 through 2029, which are set forth in Exhibit C to the Disclosure Statement (the "**Projections**"). The Debtors and their advisors have carefully evaluated the projected cash flows to ensure that the Plan provides the Reorganized Debtors with a reasonable assurance of commercial viability upon emergence. *See* Kelly Decl. ¶¶ 42–43.

92. As shown by the Projections, the Reorganized Debtors will begin to generate substantial net cash flow by the end of the projection period. *See* Projections, Disclosure Statement, Ex. C. The Debtors anticipate that the ongoing operational turnaround will continue to progress, resulting in annual EBITDA increasing from $124 million in fiscal year ("**FY**") 2026 to $221 million by FY 2029. Operating cash flow generation, which includes interest expense on funded debt, is similarly projected to grow from $104 million in FY 2026 to over $145 million in FY 2029, which will be more than adequate to fund necessary capital expenditures. Further, the significant debt reduction achieved through this chapter 11 process will substantially improve the Reorganized Debtors' liquidity, which is projected to be approximately $140 million at emergence, growing to over $425 million by FY 2029. This significant improvement in liquidity will give the Reorganized Debtors greater flexibility to continue to invest in the business, positioning it for long-term success. Kelly Decl. ¶ 42.

93. Further, the Plan will deleverage the Debtors' balance sheet, eliminating all existing funded indebtedness other than the Exit Financing, reducing the aggregate amount of the Reorganized Debtors' funded indebtedness by approximately $2.4 billion, which will position the Reorganized Debtors for success. *See* Kelly Decl. ¶ 42.

94. Furthermore, the economic stakeholders' overwhelming support of the Plan is clear indication of feasibility. *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 298 (Bankr. D. Del. 2013) ("The first, best indicator of feasibility is the position of the creditors whose economic interests are at stake."); *see also In re S B Bldg. Assocs. L.P.*, 621 B.R. 330, 360 (Bankr. D.N.J. 2020) (finding that overwhelming creditor support "is the best evidence of a Plan's feasibility"). Accordingly, the Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code.

K. The Plan Complies with Section 1129(a)(12) of the Bankruptcy Code.

95. Section 1129(a)(12) of the Bankruptcy Code requires that, as a condition precedent to the confirmation of a chapter 11 plan, "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12).

96. Article XII.C. of the Plan provides that all Statutory Fees will be paid in full in Cash on the Effective Date. Accordingly, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

L. Sections 1129(a)(6), (13)-(16) of the Bankruptcy Code Are Inapplicable.

97. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over the debtor after confirmation has approved any rate change provided for in the plan. 11 U.S.C. § 1129(a)(6). This section does not apply to the Plan because the Debtors are not subject to any such regulatory regime.

98. Section 1129(a)(13) of the Bankruptcy Code requires chapter 11 plans to continue all "retiree benefits" (as defined in section 1114 of the Bankruptcy Code). The Debtors have no obligations to pay such "retiree benefits" and, accordingly, section 1129(a)(13) of the Bankruptcy

Code is inapplicable to the Plan. Similarly, sections 1129(a)(14), 1129(a)(15), and 1129(a)(16) of the Bankruptcy Code are inapplicable because none of the Debtors is an "individual" or a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

M. The Plan Complies with Section 1129(c) of the Bankruptcy Code.

99. Section 1129(c) of the Bankruptcy Code provides that a bankruptcy court may confirm only one plan. 11 U.S.C. § 1129(c). The Plan is the only plan that has been filed in the Chapter 11 Cases. Accordingly, the requirements of section 1129(c) of the Bankruptcy Code have been satisfied.

N. The Plan Complies with the Other Applicable Provisions of Section 1129.

100. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code. The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act. *See* 11 U.S.C. § 1129(d). Furthermore, no governmental unit or any other party has requested that the Court decline to confirm the Plan on such grounds.

O. The Plan Satisfies the "Cram Down" Requirements of Section 1129(b).

101. As discussed above, the holders of Claims and Interests, as applicable, in Classes 11 (Existing Equity Interests) and 12 (Subordinated Claims Class) and, in the event that Intercompany Claims and Interests are not Unimpaired, Classes 9 (Intercompany Claims) and 10 (Intercompany Interests), are not receiving or retaining any property on account of their Claims or Interests, as applicable, and, thus, are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. The major economic parties, including the Consenting Stakeholders and CastleKnight, have voted to accept the Plan. It is notable that even Class 11 (Existing Equity Interests) is supportive of the Plan, despite being a Class which is deemed to reject the Plan for the technical reason that Class 11 is not receiving or retaining property on account of its equity interests. Further, Class 12 (Subordinated Claims Class) is a "vacant" Class. The Debtors submit that the Plan is confirmable with respect to each such Class pursuant to section 1129(b) of the Bankruptcy Code.

102. Section 1129(b) of the Bankruptcy Code provides a "cram down" mechanism for confirmation of a chapter 11 plan where the plan is not accepted by all impaired classes of claims. Under section 1129(b) of the Bankruptcy Code, the Court may confirm a plan over the dissenting vote of an impaired class so long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such dissenting class. *John Hancock Mut. Life. Ins. Co. v. Rte. 37 Bus. Park Assocs.* (*In re Rte. 37 Bus. Park Assocs.*), 987 F.2d 154, 157 n.5 (3d Cir. 1993).

1. *The Plan Does Not Discriminate Unfairly.*

103. Section 1129(b)(1) of the Bankruptcy Code does not prohibit discrimination between classes as long as such discrimination is not unfair. *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) ("The pertinent inquiry is not whether the plan discriminates, but whether the proposed discrimination is 'unfair.'"). Courts typically examine the facts and circumstances of the particular case to make the determination as to whether a plan reasonably or unfairly discriminates between classes. *See In re TCI 2 Holdings, LLC*, 428 B.R. 117, 157 (Bankr. D.N.J. 2010) (discussing "[v]arious standards" for a general analysis of unfair discrimination, including whether the discrimination is "supported by a reasonable basis" and is "proposed in good faith"); *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 310–311 (Bankr. S.D.N.Y. 2016) ("Courts generally will approve placement of similar claims in different classes provided there is a 'rational' or 'reasonable' basis for doing so."). In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so. *See, e.g.*, *In re Ocean View Motel, LLC*, No. 20-21165-ABA, 2022 WL 243213, at *1 (Bankr. D.N.J. Jan. 25, 2022) ("[U]nder 1129(b)(1), a plan unfairly discriminates when it treats similarly situated classes differently without a reasonable basis for the disparate treatment.") (quoting *In re Young Broad. Inc.*, 430 B.R. 99, 139–140 (Bankr. S.D.N.Y. 2010)).

104. Under the foregoing standards, the Plan does not "discriminate unfairly" with respect to Classes 9, 10, 11, and 12. The Claims and Interests in each such Classes are legally

distinct in nature from the Claims and Interests in any other Class. Therefore, the Plan does not discriminate unfairly with respect to Classes 9, 10, 11, and 12. Kelly Decl. ¶ 44.

2. *The Plan Is Fair and Equitable.*

105. Section 1129(b)(2) sets forth the standards for determining whether a plan is "fair and equitable" with respect to impaired dissenting classes. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority" rule. *See Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441–42 (1999) ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'"). This requires that an impaired rejecting class either be paid in full or that any class junior to the impaired rejecting class not receive any distribution under the plan. 11 U.S.C. § 1129(b)(2).

106. Distributions under the Plan will be made in the order of priority prescribed by the Bankruptcy Code and in accordance with the absolute priority rule. The "fair and equitable" test is satisfied as to the holders of Claims and Interests, as applicable, in Classes 9, 10, 11, and 12 because no Claim or Interest, as applicable, junior to the Claims and Interests in such Classes will receive or retain any property under the Plan on account of such junior Claim or Interest. *See* Kelly Decl. ¶ 45. Accordingly, the Plan is "fair and equitable" with respect to the rejecting Classes and, thus, the Plan may be confirmed under section 1129(b) of the Bankruptcy Code.

IV. THE PLAN'S RELEASE PROVISIONS ARE CONSISTENT WITH SECTION 1123(B) OF THE BANKRUPTCY CODE.

107. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). A debtor may release claims under section 1123(b)(3)(A) "if the release

is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co.* (*In re Spansion, Inc.*), 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Wash. Mut., Inc*., 442 B.R. 314, 327 (Bankr. D. Del. 2011) ("In making its evaluation [whether to approve a settlement], the court must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'"). A court's evaluation of the propriety of a debtor's release "is often dictated by the specific facts of the case." *In re Wash. Mut*., 442 B.R. at 345; *In re Tribune*, 464 B.R. 126, 186 (Bankr. D. Del. 2011) (same); *In re Indianapolis Downs*, 486 B.R. at 303 (stating that courts evaluating a debtor's releases weigh "the equities of the particular case after a fact-specific review").

108. As demonstrated below, the Plan's release, exculpation, and injunction provisions are fair, reasonable, and in the best interests of the Debtors and their Estates, and appropriate under the circumstances of the Chapter 11 Cases.

A. The Debtor Releases Are Appropriate.

109. Article VIII.D of the Plan provides for the release by the Debtors (the "**Debtor Releases**") of claims and Causes of Action against the Released Parties.[4] Courts in the Third Circuit generally consider the following "*Zenith* factors" to determine whether a debtor's release of claims in a chapter 11 plan is appropriate: (i) whether there is an identity of interest between the debtor and the released party, such that a suit against the released non-debtor is, in essence, a suit against the debtor or will otherwise deplete estate assets; (ii) whether the released party has made a

[4] "**Released Parties**" are defined to mean, collectively, and in each case solely 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, the Intercompany Credit Agreement Agent, the Third-Out Notes Trustee, the Amended Unsecured Notes Trustee, the Amended Term Loan Agent, and Wilmington Fund Savings Society, FSB, in its former capacity as administrative agent and collateral agent under the Amended Term Loan Credit Agreement, (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); *provided*, *however*, that any Holder of a Claim or Interest that (x) files an objection to the Plan, (y) opts out of the Third-Party Release, or (z) is listed in the Schedule of Retained Causes of Action, as applicable, shall not be a "Released Party"; *provided further*, *however*, that notwithstanding the preceding proviso, any Holder of a Claim or Interest that is party to or has otherwise signed the Restructuring Support Agreement or the CastleKnight Settlement shall be a Released Party and Releasing Party for all purposes under the Plan.

substantial contribution; (iii) whether the release is essential to the plan (*i.e.*, whether without the release the likelihood of success diminishes); (iv) whether a substantial majority of creditors supports the plan, particularly the impacted class or classes; and (v) whether the plan provides for payment of all or substantially all claims in the affected class or classes. *See In re Indianapolis Downs*, 486 B.R. at 303 (citing *In re Zenith Elecs. Corp*., 241 B.R. at 110); *see also In re Spansion*, 426 B.R. at 143 n.47. Importantly, a court need not find that all of the above factors apply to approve a debtor's release of claims. *See, e.g.*, *In re Wash. Mut*., 442 B.R. at 346. Rather, such factors are "helpful in weighing the equities of the particular case after a fact-specific review." *In re Indianapolis Downs*, 486 B.R. at 303.

110. Further, courts in the Third Circuit have held that, where a debtor's release is "an active part of the plan negotiation and formulation process, it is a valid exercise of the debtor's business judgment to include a settlement of any claims a debtor might own against third parties as a discretionary provision of a plan." *In re Aleris Int'l*, 2010 WL 3492664, at *20; *see also In re PWS Holding Corp.*, 228 F.3d 224, 238–39, 242 (3d Cir. 2000) (affirming debtor's release of claims against the equity sponsor in connection with a privatization transaction where the released claims were not likely to produce recoveries to the estate and were costly to pursue). The identified factors weigh in favor of approving the Debtor Releases here.

111. *First*, there is an identity of interest between the Debtors and many of the Released Parties. For example, the officers and directors of the Debtors and Reorganized Debtors have indemnification rights against the Debtors, and thus, any claim brought against an officer or director would be a claim against the Debtors. Accordingly, to the extent any claims are asserted against these Released Parties, such claims would result in additional Claims against the Debtors that will have to be paid in full (as General Unsecured Claims are Unimpaired). Additionally, courts have found that an identity of interest exists between a debtor and a released party where such party assists in formulating the chapter 11 plan, funds the plan, and/or shares the debtor's interest "in seeing that the [p]lan succeed and the company reorganize." *In re Zenith*, 241 B.R. at 110 (finding that the "funder of the Plan[] and the Bondholders' Committee, who were instrumental in formulating the Plan, share an identity of interest with Zenith"); *see also In re*

Coram Healthcare Corp., 315 B.R. 321, 335 (Bankr. D. Del. 2004) ("[T]he largest creditors and preferred shareholders . . . share a common goal of achieving a reorganization of the Debtors."). Whether through entering into the RSA and taking an active part in formulating the Plan, negotiating resolution of critical issues and participating in transactions that form the basis for the Plan and the Debtors' restructuring, or by providing the funding necessary to administer the Chapter 11 Cases and fund distributions under the Plan, each of the Released Parties shares the common goal with the Debtors of seeing the Plan and the Reorganized Debtors succeed and thus has an identity of interest with the Debtors.

112. *Second*, the Released Parties have made substantial contributions to the success of the Chapter 11 Cases. Specifically, the Released Parties, among other things (as applicable), (a) negotiated the RSA and the terms of the Plan and the Restructuring Transactions, (b) provided significant concessions to the Debtors and to each other that made the Plan possible (including by consenting to the Plan's equitization of Second-Out Claims and the Plan's unimpairment of all General Unsecured Claims), (c) negotiated the CastleKnight Settlement, (d) consented to the Debtors' use of cash collateral, (e) funded the DIP Facility, (f) entered into the ERO Backstop Agreement, and (g) committed to provide the Exit Financing. *See* Kelly Decl. ¶ 49. The Debtors' own Related Parties (e.g., the Debtors' directors, officers, and employees) have likewise been essential to conducting a smooth and successful process, both by personally participating in restructuring negotiations and by maintaining steady operations and communications with the Debtors' base of customers and vendors.

113. *Third*, the Debtor Releases are essential to the Debtors' emergence from chapter 11. The Debtor Releases are a critical component of the Plan. The Released Parties may not have made the considerable contributions to the Chapter 11 Cases and concessions reflected in the Plan without the assurance of receiving the Debtor Releases. *See* Kelly Decl. ¶ 50. Indeed, the RSA requires the Debtor Releases to be in form and substance acceptable to the Consenting Stakeholders. *See* RSA § 10.24.

114. *Fourth*, the Holders of Claims in all Voting Classes have unanimously voted in favor of the Plan, including the Debtor Releases, or are receiving satisfaction of their Claims in full as a result of the settlements and compromises contained in the Plan. *See* Voting Decl., Ex. A.

115. *Finally*, the Debtor Releases, like all elements of the Plan, were negotiated by sophisticated parties represented by able counsel and are the result of arm's-length negotiations. The Debtor Releases provide the Released Parties with a level of finality that is key to consummating the Plan and the Debtors' emergence from chapter 11, a result which would be impossible without the contributions and significant concessions of the Released Parties. Accordingly, the Debtor Releases are fair and equitable, in the best interest of the Estates, and should be approved.

116. Section VII.B sets forth the Debtors' response to the UST Objection regarding the scope of the Debtor Releases.

B. The Third-Party Releases Are Appropriate and Constitutional.

117. Article VIII.E of the Plan contains releases of the Released Parties by the Releasing Parties[5] (the "**Third-Party Releases**"). Courts in the Third Circuit have long recognized that a

[5] "**Releasing Parties**" are defined in the Plan to mean "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; provided that each Holder of Claims or Interests that is party to or has otherwise signed the Restructuring Support Agreement or CastleKnight Settlement shall not opt out of the Third-Party Releases. For the avoidance of doubt, unless expressly indicated on a Ballot voting to accept the Plan, the Revolving Credit Lenders participating in this Plan are doing so only in their capacity as holders of First-Out Revolving Loans Claims or ABL Facility Claims as of the Petition Date, and any actions taken by the Revolving Credit Lenders in connection with the Plan and the Restructuring Transactions as well as any releases provided in connection with the Plan are only with respect to such lender's interest in the First-Out Revolving Loans Claims or ABL Facility Claims that are now owned or subsequently acquired by the Revolving Credit Lenders. In addition, the provisions of this Plan shall only apply to such trading desk(s), fund(s), account,

chapter 11 plan may include a release of non-debtors by other non-debtors when the release is consensual. *See In re Spansion*, 426 B.R. at 144 (stating that "a third party release may be included in a plan if the release is consensual"); *In re Wash. Mut.*, 442 B.R. at 352 (noting that consensual third-party releases are permissible); *In re Zenith Elecs. Corp.*, 241 B.R. at 111 (approving releases by creditors that voted in favor of the plan); *cf. Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 226 (2024) (declining to "call into question *consensual* third-party releases offered in connection with a [chapter 11] plan"). The determination as to whether a third-party release is consensual depends on the particular circumstances of the particular case. *See In re Indianapolis Downs*, 486 B.R. at 306.

118. In the Third Circuit, a third-party release is consensual where the releasing parties have received conspicuous and detailed notice of the release (including an explanation of the consequences of granting the release), had the opportunity to opt out of the release, and failed to do so. *See In re Indianapolis Downs*, 486 B.R. at 306 (approving third party releases by "impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases" and who "were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots" as consensual). Since *Harrington v. Purdue*, courts have continued to approve third-party releases in chapter 11 plans where consent was obtained through a clear opt-out mechanism.[6] This approval is consistent with the majority

branch, unit and/or business group(s) that have a beneficial interest in such Claim and shall not apply to any other trading desk(s), fund(s), account, branch, unit and/or business group(s) of the Revolving Credit Lenders, which, so long as they are not acting at the direction of or for the benefit of such Revolving Credit Lender or such Revolving Credit Lender's investment in the Debtor, will not be considered 'Releasing Parties' under the Plan."

[6] *See, e.g.*, Order, *In re Powin, LLC*, No. 25-16137 (MBK) (Bankr. D.N.J. Dec. 1, 2025) [Dkt. No. 1165] (approving opt-out releases as consensual); Order, *In re New Rite Aid, LLC*, No. 25-14861 (MBK) (Bankr. D.N.J. Nov. 26, 2025) [Dkt. No. 3445] (same); *In re Spirit Airlines, Inc.*, 668 B.R 689, 721 (Bankr. S.D.N.Y. 2025) (approving third-party releases as consensual where parties could opt out); *In re Robertshaw US Holding Corp.*, 662 B.R. 300, 322–23 (Bankr. S.D. Tex. 2024) (approving opt-out releases for voting classes, and noting that "what constitutes consent, including opt-out features and deemed consent for not opting out, has long been settled in this District"); *see also* Hr'g Tr. 93:17–23, *In re CareMax, Inc.*, No. 24-80093 (MVL) (Bankr. N.D. Tex. Jan. 28, 2025) [Dkt. No. 584] (explaining ballots and opt-outs were designed to admonish recipients of "a duty to act"); Hr'g Tr. 27:15–16, *In re Number Holdings, Inc.*, No. 24-10719 (JKS) (Bankr. D. Del. Jan. 24, 2025) [Dkt. No. 1756] (holding opt-out releases were consensual); Hr'g Tr. 43:3–7, *In re The Container Store Grp., Inc.*, No. 24-90627 (ARP) (Bankr. S.D. Tex. Jan. 24, 2025) [Dkt. No. 201] (same); Hr'g Tr. 20:17–21, *In re Digit. Media*

view that an opt-out mechanism is sufficient to garner consent for third-party releases, where the releasing parties are informed clearly that their failure to act will have clearly defined consequences.[7]

119. Here, creditors who had the right to vote on the Plan were provided with Ballots that gave them the option to check a box to opt out from granting the Third-Party Releases, regardless of whether they voted to accept or reject the Plan. *See* Scheduling Motion, Exs. B-1–B-4. Similarly, the members of the Non-Voting Classes were given a similar opportunity to opt out of the Third-Party Releases via a form attached to the Notices of Non-Voting Status. *See id.*, Exs. F, G. The text of the Third-Party Releases was printed in bold type in the Disclosure Statement, the Plan, the Ballots, and the Notices of Non-Voting Status. Thus, all parties from whom Third-Party Releases were sought received timely, appropriate, conspicuous, and adequate notice of the Third-Party Releases, including the explanation that such creditors would be granting such releases if they failed to opt out by checking the opt-out box. *See id.*, Exs. B-1–B-4, F, G.

120. Moreover, the Third-Party Releases are an integral and necessary part of the Plan. As described above, the Released Parties provided significant contribution and support to the

Sols., Inc., No. 24-90468 (ARP) (Bankr. S.D. Tex. Jan. 15, 2025) [Dkt. No. 663] (same); Order, *In re Bowflex Inc.*, No. 24-12364 (ABA) (Bankr. D.N.J. Aug. 19, 2024) [Dkt. No. 614] (finding third-party releases to be consensual); Hr'g Tr. 14:10–16, *In re Invitae Corp*, No. 24-11362 (MBK) (Bankr. D.N.J. Jul. 23, 2024) [Dkt. No. 869] (overruling objections to the opt-out mechanism, among other things); Hr'g Tr. 64:19–22, *In re GigaMonster Networks, LLC*, No. 23-10051 (JKS) (Bankr. D. Del. Aug. 27, 2024) [Dkt. No. 888] ("[T]he Supreme Court declined to express a view on what constitutes a consensual release or the procedural mechanism to obtain a consensual release."); Hr'g Tr. 27:20–28:13, *In re Wheel Pros, LLC*, No. 24-11939 (JTD) (Bankr. D. Del. Oct. 15, 2024) [Dkt. No. 257] (approving opt-out releases); Hr'g Tr. 52:6-9, *In re Thrasio Holdings, Inc*., No. 24-11840 (CMG) (Bankr. D.N.J. June 10, 2024) [Dkt. No. 1153] (finding that the opt out provision was sufficient to support a finding of consensual third-party releases); Order, *In re Careismatic Brands, LLC*, No. 24-10561 (VFP) (Bankr. D.N.J. May 31, 2024) [Dkt. No. 775] (approving opt-out releases); Order, *In re WeWork, Inc*., No. 23-19865 (JKS) (Bankr. D.N.J. May 30, 2024) [Dkt. No. 2060] (same); Hr'g Tr. 60:9-16, *In re Cyxtera Techs., Inc.,* No. 23-14853 (JKS) (Bankr. D.N.J. Feb. 2, 2024) [Dkt. No. 905] (approving third party opt-out releases as consensual); Hr'g Tr. 109:4-16, *In re BlockFi Inc*., No. 22-19361 (MBK) (Bankr. D.N.J. Sept. 9, 2023) [Dkt. No. 1621] (finding opt-out releases to be appropriate); Order, *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. Sept. 14, 2023) [Dkt. No. 2172] (same).

[7] *See, e.g.*, *In re LaVie Care Ctrs., LLC,* No. 24-55507 (PMB), 2024 WL 4988600, at *15 (Bankr. N.D. Ga. Dec. 5, 2024) ("[I]f a creditor gets materials in a bankruptcy case, and the materials say if you do not take an action, you will be bound by the consensual release, you must do something. You cannot simply ignore it. If you do, you may be 'deemed' to consent to the release. Or you may have waived those rights. Or you may be estopped from enforcing them.").

Debtors and the Chapter 11 Cases, including by negotiating and executing the RSA, committing to effectuate the Restructuring Transactions, providing significant financial support to assure the success of the Chapter 11 Cases, and agreeing to the treatment of their Allowed Claims that facilitated confirmation of the Plan (including by making it possible to satisfy all Allowed General Unsecured Claims in full). Crucially, the Third-Party Releases are narrowly tailored and do not provide a blanket immunity, containing a carve-out for acts or omissions that constitute actual fraud or willful misconduct. *See* Plan, Art. VIII.D. Accordingly, the Third-Party Releases are fully consensual and consistent with the law in this Circuit.

121. Section VII.A sets forth the Debtors' response to the UST Objection regarding the opt-out mechanism for obtaining consent to the Third-Party Releases.

V. THE PLAN'S EXCULPATION PROVISION IS APPROPRIATE.

122. Article VIII.F of the Plan exculpates the Exculpated Parties[8] from liability in connection with the administration of the Chapter 11 Cases and related transactions, except for liability resulting from an act or omission that is a criminal act or constitutes gross negligence, intentional fraud, or willful misconduct as determined by a Final Order (the "**Exculpation Provision**").

123. Courts in the Third Circuit assess the appropriateness of exculpation provisions in light of each case's particular circumstances. *See In re PWS Holding Corp*., 228 F.3d at 247 (rejecting any "per se rule barring any provision in a [chapter 11] plan limiting the liability of third parties[,]" including exculpation). Unlike the Third-Party Releases, the Exculpation Provision does not affect the liability of the Exculpated Parties *per se* but establishes a standard of care in any hypothetical future litigation against the Exculpated Parties for acts arising out of the Chapter 11 Cases. *See id.* at 245.

[8] "**Exculpated Parties**" are defined to mean "collectively, and in each case in 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."

124. The Exculpation Provision is appropriate because the Exculpated Parties have participated in the Chapter 11 Cases in good faith, made meaningful contributions to the Debtors' restructuring efforts, and are essential to the successful implementation of the Plan. *See In re Congoleum Corp*., 362 B.R. 167, 195–197 (Bankr. D.N.J. 2007) (evaluating the appropriateness of the plan's exculpation provisions based on whether the parties played a significant role in the negotiations that led to the plan and whether the exculpation is necessary to the plan); *see also In re Wash. Mut., Inc.*, 442 B.R. at 350–51 (holding that an exculpation clause that encompassed "the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the [c]ommittees and their members, and the [d]ebtors' directors and officers" was appropriate). The Plan negotiations could not have occurred without protection from liability. *See In re Aegean Marine Petrol. Network, Inc.*, 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019) ("I believe that an appropriate exculpation provision should say that it bars claims against the exculpated parties based on the negotiation, execution, and implementation of agreements and transactions that were approved by the Court.").

125. Here, the Exculpated Parties have participated in the Chapter 11 Cases in good faith, made substantial contributions to the Debtors' efforts to maximize value of their Estates, and are essential to the successful implementation of the Plan. *See* Kelly Decl. ¶ 56. Thus, they should be entitled to protection from exposure to any lawsuits related to this Chapter 11 process. The Debtors and their officers, directors, and professionals actively negotiated the Plan with the Consenting Stakeholders and CastleKnight. *Id.* Those negotiations were extensive, and the compromises derived therefrom are embodied in the Plan and will maximize value for all stakeholders while enabling the Debtors to emerge swiftly from chapter 11 and give finality to all stakeholders.

126. Such exculpation provisions are customary and generally approved in this district under appropriate circumstances. *See In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Oct. 3, 2023) [Dkt. No. 1660] (confirming plan where exculpation provision covered the debtors and wind down debtors, the creditors' committee, and related parties, including current and former control persons and professionals); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr.

D.N.J. Sept. 14, 2023) [Dkt. No. 2172] (same). For these reasons, the Exculpation Provision is appropriate and should be approved.

127. Moreover, in response to the UST Objection and the SEC's comments regarding the temporal scope of the Exculpation Provision, the parties have agreed to limit the temporal scope of the Exculpation Provision, so as to only cover the period from the Petition Date through the Effective Date, as more fully described in Section VII.C below.

VI. THE PLAN AS MODIFIED SATISFIES THE APPLICABLE REQUIREMENTS.

128. Pursuant to section 1127(a) of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation so long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code and the proponent of the modification complies with section 1125 of the Bankruptcy Code. *See* 11 U.S.C § 1127(a). In addition, with respect to modifications made after acceptance but prior to confirmation of the plan, Bankruptcy Rule 3019 provides, in relevant part:

> [A]fter a plan has been accepted and before confirmation, the plan proponent may file a modification. For [creditors and equity security holders] who have not accepted [the modification] in writing but have accepted the plan, the modification is considered accepted if, after notice and a hearing, the court finds that it does not adversely change the treatment of [] claims or interests.

Fed. R. Bankr. P. 3019(a).

129. The Debtors have made certain modifications to the Plan since filing its solicitation version, to incorporate the terms of the CastleKnight Settlement and to address informal comments received from various parties in interest. Among other things, the amended Plan reflects the following terms of the CastleKnight Settlement:

- the Second-Out Term Loan Claims and the Amended Term Loan Claims will be classified separately;
- the Second-Out Term Loan Claims will receive (i) 100% of the Distributable New Common Shares and (ii) 100% of the Subscription Rights;
- the Amended Term Loan Claims will receive (i) Cash in the amount of approximately $10,600,000; and (ii) term loans issued under the

Exit Term Loan Facility, on identical terms to all other Exit Term Loans, with the principal amount (including Upfront Premium, as defined in the Exit Commitment Letter) of $14,000,000;

- CastleKnight's reasonable and documented advisor fees (which documentation may be provided in summary form), not to exceed $750,000, will be "Restructuring Expenses" under the Plan and will be paid in accordance with the terms of the Plan applicable to Restructuring Expenses;
- on account of all Third-Out Notes and Amended Unsecured Notes owned by CastleKnight, CastleKnight will receive its share of the Unsecured Funded Debt Claim Recovery as set forth in the Plan, and CastleKnight will not request or be entitled to receive any additional consideration on account of its Third-Out Notes and Amended Unsecured Notes beyond its treatment as a Holder of Class 7 Claims; and
- CastleKnight and its Related Parties will be Releasing Parties and Released Parties under the amended Plan.

130. As discussed above, the Plan, as modified, complies with sections 1122 and 1123 of the Bankruptcy Code, and the Debtors have complied with section 1125 of the Bankruptcy Code in soliciting votes. Thus, the Plan modifications comply with sections 1127(a) and 1127(c) of the Bankruptcy Code, which require that a modified plan "meet the requirements of sections 1122 and 1123," 11 U.S.C. § 1127(a), and that a proponent of a modified plan "comply with section 1125." 11 U.S.C. § 1127(c).

131. Further, the modifications are consistent with Bankruptcy Rule 3019(a), which treats a plan modification as accepted by any creditor that "has accepted [the modification] in writing" or whose treatment is "not adversely change[d]." Fed. R. Bankr. P. 3019(a).

- As to the Amended Term Loan Claims, the Second Amended Plan provides more favorable treatment than the original Plan: approximately $10,600,000.00 in Cash and $14,000,000 in principal amount of Exit Term Loans, in place of approximately $10,600,000.00 in Cash, 1.780% of the Distributable New Common Shares, and 1.780% of the Subscription Rights. *See* Robbins Decl. ¶ 17.
- As to the Second-Out Claims, holders of approximately 92.87% of Second-Out Claims affirmatively accepted the Plan modifications by executing the settlement agreement for the CastleKnight Settlement. (Only one holder of Second-Out Claims, representing approximately 0.31% of the Class, voted prior to the filing of the amended Plan and was not a party to the CastleKnight Settlement.) *See* Voting Decl. ¶ 16, n.4.

- The Plan modifications did not materially affect the treatment of any holder of Unsecured Funded Debt Claims. Although the Second Amended Plan reduced the "Unsecured Funded Debt Claim Recovery" pool from $5,000,000 to $4,917,748.53, this reduction consists only of amounts that would have funded recoveries for the unsecured portions of Amended Term Loan Claims, which were classified within Class 7 under the original Plan. As a result of the modifications, the unsecured and secured portions of these Amended Term Loan Claims are now all classified within Class 6b and will receive their full recoveries within that class, and as such, the reduction to the Unsecured Funded Debt Claim Recovery pool does not reduce recoveries for any of the holders remaining in Class 7. *See* Robbins Decl. ¶ 18.

132. For these reasons, the Plan should be deemed accepted by all creditors and equity security holders who have accepted the Plan before the modifications were made. *See* Fed. R. Bankr. P. 3019(a).

VII. THE UST OBJECTION SHOULD BE OVERRULED.

A. The Third-Party Releases Are Appropriate and Constitutional.

133. The Office of the United States Trustee ("**UST**") has objected to the Third-Party Releases on the grounds that they are non-consensual under state law. Yet it is federal bankruptcy law that determines whether a third-party release is consensual, and the Third-Party Releases plainly satisfy the well-developed federal standard.

1. *Federal Law Governs the Question of Consent.*

134. As a general matter, federal law rather than state law governs the repercussions of inaction in a chapter 11 case, including the failure to respond to notices. For example, the Supreme Court looked to federal law to determine that a party waives its right to have "non-core" claims heard by an Article III court when it fails to object. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 683 (2015) ("Nothing in the [federal] Constitution requires that consent to adjudication by a bankruptcy court be express."). Bankruptcy courts have followed this guidance, holding that "bankruptcy judges may enter default judgments based on implied consent" when a defendant "fail[s] to respond to a summons and complaint." *Kravitz v. Deacons* (*In re Advance Watch Co.*), 587 B.R. 598, 602 (Bankr. S.D.N.Y. 2018). And both before and after *Harrington*, bankruptcy courts have evaluated third-party releases under much the same principle. *See, e.g.*, Hr'g Tr. 105:4-

12, *In re Wesco Aircraft Holdings, Inc.*, No. 23-90611 (MI) (Bankr. S.D. Tex. Dec. 16, 2024) [Dkt. No. 2502] (attached hereto as Ex. A) ("A sues B. B gets served. B doesn't respond. B is ordered to pay money to A. That's what courts do. Here the obligation to opt out . . . was sent out to everybody. Those that it didn't get sent to appropriately will be excluded because [of] the [federal] due process clause. . . . There's no requirement we comply with state law. Federal law can allow for consequences as a result of default."). Furthermore, it is federal law (specifically, subchapter II of chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1121-1129) that determines every other rule that governs the formulation, solicitation, and confirmation of a chapter 11 plan. There is nothing so exotic about a release provision that it alone should be analyzed under an imported state-law rule. *See Epstein, UST Region 7 v. Container Store Grp. Inc. (In re Container Store Grp. Inc.)*, No. H-25-618, at 18 (S.D. Tex. Feb. 12, 2026) [Dkt. No. 34] ("federal law is the answer to the threshold question of what law provides the bankruptcy court with authority to enter consensual third-party releases. Unique federal interests compel the application of a federal, not state, rule of decision").

135. Outside bankruptcy, federal courts look to federal law in evaluating the appropriateness of an opt-out mechanism in gauging consent. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 813-814 (1985) (holding opt-out procedure to be consistent with Due Process Clause). Reliance on a uniform federal standard is, if anything, even more compelling in the bankruptcy setting, where both the U.S. Constitution and judicial policy demand uniform treatment of creditors. *See, e.g.*, U.S. Const., art. I, § 8, cl. 4 (authorizing Congress to establish "uniform Laws on the subject of Bankruptcies"); *In re Orexigen Therapeutics, Inc.*, 990 F.3d 748, 754 (3d Cir. 2021) (interpreting 11 U.S.C. § 553 narrowly, since setoff is "at odds with a fundamental policy of bankruptcy, equality among creditors" (quoting *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 896 F.2d 54, 57 (3d Cir. 1990))); Hr'g Tr. 58:12–14, *In re New Rite Aid, LLC*, No. 25-14861 (MBK) (Bankr. D.N.J. Nov. 24, 2025) [Dkt. No. 3409] (attached hereto as Ex. B) (citing the Bankruptcy Clause and observing that "[t]his power displaces state law where state law interferes with uniformity or federal law directly governs . . . ."). State law might yield divergent results for geographically diverse releasing and released parties and underlying claims, even within the same bankruptcy case. *See* Hr'g Tr. 59:19-21, 59:25–60:1 ("If state contract doctrines

controlled consent, creditors in 50 states would be subject to differing assent requirements. . . . The results would be a nonuniform, unmanageable Chapter 11 landscape."); *cf.* Hr'g Tr. 105:16-18, *In re Wesco* (Ex. A) ("[S]ome states might permit [opt-outs], some states might not permit it. Where does that leave the bankruptcy court? I don't know.").[9]

136. It is true that some courts have regarded a voluntary third-party release as a species of "contract" and thereby strayed into nuances of state contract law. But a release is a different creature than a contract. *See* Hr'g Tr. 58:25-59:1, *In re New Rite Aid, LLC* ("A Chapter 11 plan is final federal judgment, not a contract."); *In re LaVie Care Ctrs.*, 2024 WL 4988600, at *14 ("[T]he basis for the enforcement of consensual releases has not . . . been described anywhere as a 'contract' for them."). Even under state law, the two concepts are different: a release need not be supported by consideration, *see* N.Y. Gen. Oblig. Law § 15-303, and it is anomalous to speak of an "offer" and "acceptance" in the context of a multilateral release.

137. For these reasons, the Court should apply general principles of federal law to determine that the Third-Party Releases are consensual.

2. *The Opt-Out Mechanism Enables Parties to Consent to a Third-Party Plan Release.*

138. Courts across the country have held for decades that consent to a third-party release contained within a chapter 11 plan may be obtained through an opt-out mechanism,[10] and continue

[9] Perhaps sensing the practical infeasibility of a 50-state survey, the UST suggests that New York law should apply universally to all creditors of a Delaware-organized, Idaho-headquartered Debtor that is subject to bankruptcy jurisdiction in New Jersey, simply because New York law governs the rights, obligations, construction, and implementation of the Plan. *See* Plan, § I.D. This argument omits to mention that the Plan specifically provides for *federal* law to govern whenever it is applicable. *See id.* The UST's argument also fails because, if one genuinely believes that a silent creditor has not consented to the Plan's Third-Party Releases, then the same silent creditor cannot have implicitly consented to the application of New York law.

[10] *See, e.g.*, *In re LaVie*, 2024 WL 4988600, at *15 ("[I]f a creditor gets materials in a bankruptcy case, and the materials say if you do not take an action, you will be bound by the consensual release, you must do something. You cannot simply ignore it. If you do, you may be 'deemed' to consent to the release. Or you may have waived those rights. Or you may be estopped from enforcing them."); *In re Indianapolis Downs*, 486 B.R. at 306 (characterizing as consensual third-party releases included in plan of reorganization where "parties were provided detailed instructions on how to opt out, and had the opportunity to do so"); *In re Conseco, Inc.*, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) (finding consensual third-party release included in plan of reorganization that bound "only

to hold so after the *Harrington* ruling, which explicitly declined to disturb precedent on this question. *See Harrington*, 603 U.S. at 226. This body of law should therefore guide the Court in evaluating the Third-Party Releases.

139. The logic supporting the use of an opt-out structure is consistent across these holdings and is squarely in line with longstanding law from other contexts. An opt-out mechanism—which provides a clear notice that failure to respond will carry clearly defined legal consequences—is consistent with many other examples in American procedural jurisprudence where a failure to act constitutes consent. Default judgments. Federal class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure. State-court class settlements, as in *Shutts*, 472 U.S. at 813–14 ("We reject petitioner's contention that the Due Process Clause . . . requires that absent plaintiffs affirmatively 'opt in' . . . ."). Bar dates in receiverships and bankruptcy cases. Consent to a bankruptcy court entry of a final order. *Cf.* Local Rule 7016-1(e) ("By default, the parties are deemed to have consented to the Bankruptcy Court's adjudication and entry of final judgment . . . ."). Arbitration consents and class-action waivers in the fine-print of consumer contracts. Uncontested motions. The list goes on and on. In each case, the source of the "duty to speak up" is the existence of a judicial process. Just as a party that fails to respond to a validly served summons can be defaulted, it is incumbent on a creditor to timely raise its objection to any aspect of a plan in the bankruptcy court. *See* Hr'g Tr. 40:3-8, *In re Bed, Bath & Beyond*, No. 23-

those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release"); *see also In re Insys Therapeutics, Inc.*, No. 19-11292 (KG) (Bankr. D. Del. Jan. 16, 2020) [Dkt. No. 1115] (confirming plan with opt out third-party releases over objections of U.S. Trustee and SEC); *In re Gen. Wireless Operations Inc.*, No. 17-10506 (BLS) (Bankr. D. Del. Oct. 26, 2017) [Dkt. No. 1117] (confirming plan with opt out third-party releases over objection of creditor); *In re Abeinsa Holding Inc.*, No. 16-10790 (KJC) (Bankr. D. Del. Dec. 15, 2016) [Dkt. No. 1042] (confirming plan with opt-out third-party releases over objection of U.S. Trustee); *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Oct. 3, 2023) [Dkt. No. 1660] (confirming plan and approving opt-out); *In re Cyxtera Technologies, Inc.*, No. 23-14853 (JKS) (Bankr. D.N.J. Nov. 17, 2023) [Dkt. No. 718] (same); *In re SLT Holdco, Inc.*, No. 20-18368 (MBK) (Bankr. D.N.J. Oct. 22, 2020) [Dkt. No. 548] (same); *In re SiO2 Medical Products, Inc.*, No. 23-10366 (JTD) (Bankr. D. Del. July 19, 2023) [Dkt. No. 478] (same); *In re Lannett Co.*, No. 23-10559 (JKS) (Bankr. D. Del. June 8, 2023) [Dkt. No. 243] (same); *In re Carestream Health, Inc.*, No. 23-10778 (JKS) (Bankr. D. Del. Sept. 28, 2022)[Dkt. No. 185] (same); *In re Mallinckrodt PLC*, No. 20-12522 (JTD) (Bankr. D. Del. Mar. 2, 2022) [Dkt. No. 6660] (same); *In re Riverbed Tech., Inc.*, No. 21-11503 (CTG) (Bankr. D. Del. Dec. 4, 2021) [Dkt. No. 169] (same); *In re Alex & Ani, LLC*, No. 21-10918 (CTG) (Bankr. D. Del. Sept. 9, 2021) [Dkt. No. 472] (same); *In re Extraction Oil & Gas, Inc.*, No. 20-11548 (CSS) (Bankr. D. Del. Dec. 23, 2020) [Dkt. No. 1509] (same).

13359 (VFP) (Bankr. D.N.J. Sept. 12, 2023) [Dkt. No. 2280] (approving opt-out process where notices were "conspicuous" and "clear" and not "burdensome"); Hr'g Tr. 109:8-10, *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Sept. 26, 2023) [Dkt. No. 1621] ("This Court, I, as well as my colleagues within the District, have approved opt-out releases, the lynchpin being the proper notice.").

140. *Harrington* did not change this landscape. *Harrington* merely announced a nationwide rule that third-party release must be consensual, while drawing careful attention to the fact that it was *not* passing judgment on "what qualifies as a consensual release." 603 U.S. at 226. For that reason, courts (including in this District) have continued to approve opt-out plan releases. *See* Hr'g Tr. 57:21–25, *In re New Rite Aid, LLC*, No. 25-14861 (MBK) (Bankr. D.N.J. Nov. 24, 2025) [Dkt. No. 3409] ("[T]his Court's position has not changed and joins other courts in this District, the Circuit and the 93 other districts which approve the use of informed opt out procedures to reflect consent, to proposed consensual releases . . . .").[11] It is true that one Delaware judge changed course in *Harrington*'s wake. *See In re Smallhold, Inc.*, No. 24-10267 (CTG), 2024 WL 4296938 (Bankr. D. Del. Sept. 25, 2024) (noting the court's previous approvals of opt-out releases, and stating that, after *Harrington*, "the third-party release is no longer a potentially permissible plan provision" as to creditors who did not submit ballots). But this change is unnecessary, overreads *Harrington*, and is inconsistent with a continuing stream of precedent from those circuits that have always demanded consensual releases.[12] Indeed, other judges in this Circuit have subsequently disagreed with *Smallhold*, observing that, "there's no prohibition on the use of opt-out releases" in light of *Harrington*. Hr'g Tr. 24:15-22, *In re Lumio Holdings, Inc.*, No. 24-11916

[11] *See also* Hr'g Tr. 31:7–32:2 *In re Number Holdings, Inc.*, No. 24-10719 (JKS) (Bankr. D. Del. Dec. 20, 2024) [Dkt. No. 1617] (approving opt-out releases in disclosure statement); Hr'g Tr. 27:20–28:13, *In re Wheel Pros*, No. 24-11939 (JTD) (Bankr. D. Del. Oct. 15, 2024) [Dkt. No. 257] (confirming plan with opt-out releases).

[12] *See, e.g.*, Hr'g Tr., *In re Ascend Performance Materials Holdings Inc.*, No. 25-90127 (CML) (Bankr. S.D. Tex. Dec. 9, 2025) [Dkt. No. 1231] (attached hereto as Ex. C); Hr'g Tr., *In re Eiger Biopharmaceuticals, Inc.*, No. 24-80040 (SGJ) (Bankr. N.D. Tex. Sept. 5, 2024) [Dkt. No. 752] (attached hereto as Ex. D) ("[T]his Court has ruled many times and is ruling here today that an opt-out provision . . . is permissible."); *In re Robertshaw US Holding Corp.*, 662 B.R. 300, 322-323 (Bankr. S.D. Tex. 2024) ("[*Harrington v.*] *Purdue* did not change the law in this Circuit. . . . [W]hat constitutes consent, including opt-out features and deemed consent for not opting out, has long been settled . . . .").

(JKS) (Bankr. D. Del. Jan. 3, 2025) [Dkt. No. 428] (at disclosure statement hearing, requiring opt-in releases for creditors that received no recovery); *see also* Hr'g Tr. 58:4–8, *In re New Rite Aid* ("This Court respectfully disagrees with . . . my thoughtful colleagues on the Bench in other districts that offer either questionable policy reasons or challenge the use of opt outs as being contrary to state law.").[13]

141. It follows, then, that, even after *Harrington*, a chapter 11 plan can bind creditors to a release of claims against third parties so long as (a) the release is properly and conspicuously noticed, (b) creditors are given the opportunity to be heard and to opt out of the release, and (c) the notice clearly explains the consequences of failing to opt out. Here, those conditions are satisfied. The UST Objection does not identify any case-specific inadequacies in the Debtors' Ballots and notices, which included, among other things, a conspicuously boxed notice on the cover page, in enlarged bold typeface, informing recipients of the opt-out option, the full text of the Third-Party Release, clear instructions for completing the opt-out form, and plain-English responses to questions such as "What is the Third-Party Release?", "Am I required to consent to the Third-Party Release?", and "How can I opt out?" *See* Scheduling Motion, Exs. B-1–B-4. The Ballots and notices in these Chapter 11 Cases are, if anything, a model of clear and conspicuous notice.

142. To the extent this Court changes course from its *New Rite Aid* bench ruling, the Third-Party Release should at least be approved as to those creditors that affirmatively returned their Ballots. Even when courts have disapproved of opt-out mechanisms, those same courts have typically accepted that the act of voting on a plan is an "affirmative step," such that failing to opt out binds the voting creditor to the release. *See* Modified Bench Ruling at 17–23, *In re Azul S.A.*,

[13] Even if state law were to apply to the question of whether the third-party releases here are consensual, the answer would remain the same: the releases are consensual. The UST contends that New York law should govern this question; New York law, like the Restatement of Contracts, recognizes that "silence and/or inaction may constitute consent in certain circumstances." *In re Azul S.A.*, No. 25-11176 (SHL), 2026 WL 40912, at *10 (Bankr. S.D.N.Y. Jan. 6, 2026). These circumstances include where parties "have been given reason to understand that assent may be manifested by silence or inaction, and that in remaining silent and inactive they intend to accept the offer." *Id.* That is precisely what happened here. Creditors received, through the Ballots, clear and prominent notice of the Plan's Third-Party Releases, their ability to opt out of granting them, and the consequences of opting out or declining to do so. Their "silence" in declining to opt out accordingly constitutes consent.

No. 25-11176 (SHL) (Bankr. S.D.N.Y. Jan. 6, 2026) [Dkt. No. 1182]; *Smallhold*, 665 B.R. at 723; *In re SunEdison, Inc.*, 576 B.R. 453, 457–60 (Bankr. S.D.N.Y. 2017); *In re Chassix Holdings, Inc.*, 533 B.R. 64, 79–80 (Bankr. S.D.N.Y. 2015).

143. Accordingly, the Third-Party Releases are consensual, appropriate, and narrowly tailored to the circumstances of the Chapter 11 Cases and should therefore be approved.

B. The Debtor Releases Are Not Overbroad and Should be Approved.

144. The UST Objection also argues that the Debtor Releases are "overbroad" in that they release "Related Parties" and certain estate fiduciaries.

145. As explained above, the Debtor Releases satisfy the so-called *Zenith* factors, through which courts in this Circuit commonly evaluate debtor releases.[14] The UST Objection concedes that the last two factors weigh in favor of approving the Debtor Releases. *See* UST Obj. ¶ 86. This concession is justified, since the Plan enjoys a 100% acceptance rate among the Impaired Voting Classes and will leave Holders of General Unsecured Claims Unimpaired. Indeed, the unanimous acceptance of the Voting Classes could end the analysis. Section 1123(b)(3)(A) of the Bankruptcy Code expressly allows a plan to provide for "the . . . adjustment of any claim . . . belonging to the debtor or to the estate," without any textual requirements for such an adjustment to be approved, beyond the acceptance requirements and other express standards of section 1129.

146. But even if the Court delves into an independent consideration of releases that 100% of voting creditors have accepted, the specific objection to the release of the Related Parties is not well-taken. The Released Parties act, and therefore provide the valuable consideration discussed herein, through their employees and/or agents (i.e., the Related Parties). Without a release of the Related Parties, the other Released Parties are exposed to an end-run around the releases with respect to the liabilities for essentially the same causes of action that have been

[14] The *Zenith* factors, also listed above, are (1) an identity of interest between the debtor and the non-debtor such that a suit against the non-debtor will deplete the estate's resources, (2) the non-debtor's substantial contribution to the plan, (3) the necessity of the release to the reorganization, (4) the overwhelming acceptance of the plan by creditors, and (5) the payment of all or substantially all creditor claims. *See In re Indianapolis Downs*, 486 B.R. at 303 (citing *In re Zenith Elecs. Corp*., 241 B.R. at 110).

released, which would render the releases of the Released Parties meaningless. As explained above, the Released Parties played a critical role in developing a fully consensual chapter 11 plan, and, as explained in the Kelly Declaration, it is unlikely that they would have supported a plan that preserved claims against themselves, or against their affiliates and employees. *See* Kelly Decl. ¶ 49. It would do little good to the Agents/Trustees, the DIP Lenders, the exit financing providers, or the Sponsor to receive releases under the Plan, only for the Reorganized Debtors to then sue one of their affiliates, officers, or employees—the same affiliates, officers, and employees that personally drove these Chapter 11 Cases forward to a successful conclusion. No court, to the Debtors' knowledge, has ever parsed the fine distinction between the contributions of a critical case constituent and those of its employees and affiliates. *Cf.* Hr'g Tr. 60:22–61:3, *In re New Rite Aid, LLC*, No. 25-14861 (MBK) (Bankr. D.N.J. Nov. 24, 2025) [Dkt. No. 3409] (overruling similar objection of the UST on the grounds that "the *Zenith* factors have indeed been satisfied," and commenting that "[t]here is no evidence of misconduct warranting exclusion. The releases are consistent with practice in complex Chapter 11 cases.").

147. Similarly, the Debtor Releases of estate fiduciaries are justified, notwithstanding that many of the same estate fiduciaries also benefit from the Exculpation Provision. The Debtor Releases and the Exculpation Provision serve different purposes. The Debtor Releases pertain solely to those claims and causes of action that belong to the Debtors or their estates, and are appropriate because of the overwhelming creditor support for a plan with release terms that recognize the considerable efforts of the estate fiduciaries in connection with the Debtors' restructuring and the absence of credible claims against them. The Exculpation Provision relates solely to acts or omissions during these Chapter 11 Cases, and sets a standard of care that applies to any party's claims against any Exculpated Party.

148. The Debtor Releases are consistent with Third Circuit precedent, including the *Zenith* factors. They have already been approved by impaired creditors, and should be approved by the Court.

C. The Exculpation Provision Is Appropriately Limited in Scope.

149. After receiving comments from the SEC, the Debtors limited the Exculpation Provision to "any act or omission occurring *on or after the Petition Date through the Effective Date*" (emphasis added)—the time when the Exculpated Parties are under the jurisdiction of this Court. *See* Am. Plan, § VIII.F. This temporal limitation also addresses the UST's objection that the Exculpation Provision applies to "any" act or omission concerning the given list of topics. *Cf.* UST Obj. ¶ 89. For the avoidance of any doubt, the Debtors intend this temporal limitation to apply to all matters within the scope of the Exculpation Provision, including those matters, such as development of the Restructuring, that primarily occurred on or after the "Petition Date through the Effective Date" period.

D. The Plan Injunction Is Appropriate.

150. Article VIII.G of the Plan enjoins various parties from taking any action on account of claims or interests that have been released under the Plan (the "**Plan Injunction**"). The Plan Injunction is a key provision of the Plan because it enforces the Debtor's discharge, the Debtor Releases, the Third-Party Releases, and the Exculpation Provision. Therefore, to the extent the Court finds that the releases and Exculpation Provision are appropriate, the Plan Injunction is also appropriate and should be approved.

151. The gatekeeping aspect of the Plan Injunction is a valid exercise of the Court's power under sections 105, 1123(b)(6), and 1141(a)–(c) of the Bankruptcy Code. It provides a measure of "quality control" to ensure that the Debtors and other Released Parties do not become enmeshed in frivolous or meritless lawsuits that contravene the Plan Injunction. Contrary to the UST's expressed concern, the Court will not rule on the underlying merits of an action, but rather only on whether it is consistent with the terms of the Plan.[15] "It makes no sense to urge parties to make contributions to a Chapter 11 case and in return secure releases . . . that will be undercut by

[15] The Debtors have amended the gatekeeping provision in the Second Amended Plan to remove any reference to "colorability" that might otherwise suggest that the Court will determine the merits of claims that are otherwise outside its jurisdiction.

then having to defend their position all across the country in front of separate courts . . . , with inconsistent results. The gatekeeping function ensures that a single court with the closest hands-on [] understanding of the plan and the terms of the confirmation order make an initial threshold determination as to whether a claim is direct or derivative and whether it's been released." Hr'g Tr. 112:15–25, *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Sept. 26, 2023) [Dkt. No. 1621].[16] For these reasons, the gatekeeping provision should be approved.

E. Good Cause Exists to Waive the Stay of the Confirmation Order.

152. The Debtors have targeted February 27, 2026 for emergence from chapter 11. This date was not selected, as the UST Objection suggests, "as a sword to evade appellate review" through equitable mootness. Rather, in the context of a broadly supported plan of reorganization, the Debtors simply wish to effectuate their restructuring with all deliberate speed and on a date (the last business day of February) that will simplify fresh-start accounting.

153. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of fourteen (14) days after the entry of the order, unless the Court orders otherwise." Fed. R. Bankr. P. 3020(e). Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory contract or unexpired lease under section 365(f) of the Bankruptcy Code. Fed. R. Bankr. P. 6004(h), 6006(d). Each rule also permits modification of the imposed stay upon court order.

154. It is appropriate to waive Rule 3020(e) to allow the Debtors to emerge on the target date of February 27. If the Debtors cannot meet this target (or shortly thereafter), they will face

[16] *See also In re Highland Capital Mgmt., L.P.*, 48 F.4th 419, 438-39 (5th Cir. 2022) (affirming injunction and gatekeeper provisions while narrowing exculpation); Hr'g Tr. 62:7-16*, In re Rite Aid Corp.*, No. 25-14861 (MBK) (Bankr. D.N.J. Nov. 24, 2025) [Dkt. No. 3409] (same); *In re Thrasio Holdings, Inc.*, No. 24-11840 (CMG) (Bankr. D.N.J. Jun. 13, 2024) [Dkt. No. 1124] (same); *In re Bed Bath & Beyond Inc.*, No. 23- 13359 (VFP) (Bankr. D.N.J. Sept. 14, 2023) [Dkt. No. 2172] (same); *In re Nat'l Realty Inv. Advisors, LLC*, No. 22-14539 (JKS) (Bankr. D.N.J. Aug. 10, 2023) [Dkt. No. 3599] (providing that the Bankruptcy Court maintained exclusive jurisdiction to adjudicate matters related to the chapter 11 case on a post-effective date basis).

additional case administration expenses, including the need to respond to a flow of litigation plaintiffs that intend to seek modifications of the automatic stay if the Debtors do not emerge by the end of February (or at least shortly thereafter), and will be delayed in implementing their post-emergence business plan. As noted above, these Chapter 11 Cases and the related transactions have been negotiated and implemented in good faith and the Debtors have undertaken great effort to exit chapter 11 as soon as possible. Therefore, good cause exists to waive any stay imposed by the Bankruptcy Rules so that the proposed Confirmation Order may be effective immediately upon its entry.

F. The Plan Is Appropriately Characterized as a Settlement.

155. The UST also objects to various aspects of the Plan that characterize the Plan as a "settlement." *See* UST Obj. ¶¶ 104-111. The amended Plan partly resolves this objection by removing express references to Rule 9019. To the extent this objection remains unresolved by those edits, the objection should be overruled for the following reasons:

- The objection to Article IV.A. presents a misreading of the Plan. That section accurately—indeed, almost tautologically—states that the Plan is a "compromise and settlement" of the Claims, Interests, Causes of Action, and controversies that are "resolved pursuant to the Plan."
- The objection to the phrase "good faith settlement and compromise" in Article VIII.D (Debtor Releases) is unfounded because the Debtors are in fact settling their own claims.
- The objection to the phrase "settlement and compromise" in Article VIII.E (Third-Party Releases) is a rerun of the UST Objection's attack on the Third-Party Releases. If the Third-Party Releases are consensual (see discussion above), then it is fair to call them a settlement.
- The objection to the boilerplate phrase "full and final satisfaction, settlement, release and discharge" in Article III.B (treatment of various Classes) is also unfounded. As used in that phrase, "settlement" bears the meaning of "payment, satisfaction, or final adjustment," rather than the meaning of "an agreement ending a dispute or lawsuit." *See* Black's Law Dictionary 1377 (7th ed. 1999). In that sense, the phrase is accurate and appropriate.

G. Other Aspects of the UST Objection Are Moot.

156. The UST Objection takes issue with Article III.E of the Plan, which 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* UST Obj. ¶¶ 114–115. The Debtors' position is supported by the only circuit-level decision to date. *See Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.)*, 836 F.2d 1263 (10th Cir. 1988). Nevertheless, the issue is moot, because at least one vote has been cast in all Voting Classes. *See* Voting Report.

157. The Debtors have deleted the language at Article XII.L that would have automatically closed all but one of the Chapter 11 Cases. *Cf.* UST Obj. ¶ 116-117. The Debtors will instead seek this relief through separate motion(s).

VIII. The OMJ Objections Should Be Overruled.

158. Most general unsecured creditors are happy when a chapter 11 plan leaves their claims unimpaired. OMJ LLC ("**OMJ**"), however, has still somehow found it worthwhile to object. OMJ is a disgruntled former landlord from Oregon that has asserted a claim for approximately $1.2 million in holdover rent and other damages dating back to 2024. *See* Proofs of Claim No. 58 and No. 63.[17] As far as the Debtors understand OMJ's two objections, OMJ's primary concern is with preserving its rights in connection with that claim. Despite OMJ's suggestions to the contrary, the Plan clearly does not impair OMJ's rights. Once the Reorganized Debtors emerge from bankruptcy, OMJ may "resolve any disputes over the validity and amounts of [its] Claims in the ordinary course of business as if the Chapter 11 Cases had not been commenced." Art. VII.A. In other words, OMJ will be free to file suit in any court of competent jurisdiction or otherwise pursue discussions with the Reorganized Debtor in regard to its asserted claim. If OMJ sues, the applicable Reorganized Debtor will defend itself.

[17] OMJ Initial Objection cites Proofs of Claim Nos. 58 and 63. Proof of Claim No. 63 is listed as being held by "OMG LLC."

159. Nonetheless, the OMJ Initial Objection makes several arguments, none of which are supported by the applicable facts or governing law. First, the Plan need not include a disputed claims reserve because the Reorganized Debtors will emerge as a financially sound business, with ample liquidity to satisfy a judgment (however unlikely) in OMJ's run-of-the-mill landlord-tenant dispute and all other ordinary-course litigation expenses. *See* Projections, Disclosure Statement, Ex. C, at 7 (reporting $139.6 million in available liquidity in March 2026, growing to $425.7 million by the end of 2029). If OMJ is fortunate enough to win a $1.2 million judgment, it has no reason to doubt that the Reorganized Debtors will pay it.[18]

160. OMJ further argues that because the Plan is a separate Plan for each Debtor, the Plan should indicate how much funding will be allocated to each Debtor. *See* OMJ Init. Obj. ¶ 9. As explained in the Debtors' cash management motion [Dkt. No. 7], the Debtors utilize a centralized cash management system that concentrates cash to be disbursed in the ordinary course to satisfy various operating expenses throughout the corporate structure. On the Effective Date, the Reorganized Debtors will remain an integrated business organization with a centralized cash management system. Therefore, there is no need to list the amount of funds to be allocated to each Debtor.

161. OMJ asks that the Plan expressly preserve OMJ's right to seek reimbursement of attorney fees, as well as OMJ's indemnity, setoff, or recoupment rights. OMJ has not pointed to any aspect of the Plan that impairs any such rights, and the Plan should not pre-judge whether any such rights exist. A court of competent jurisdiction will determine appropriate remedies if and when OMJ prevails in any action it chooses to file.

162. In addition to the OMJ Initial Objection, on February 18, 2026, OMJ filed the OMJ Supplemental Objection, well past the January 30 deadline to file objections to the Plan. While the Second Amended Plan was filed after the Plan objection deadline, the OMJ Supplemental

[18] OMJ raises a similar argument regarding reserves in its OMJ Supplemental Objection. The same response as set forth here applies to those repeated arguments, so the Debtors do not separately address the argument in their response to the OMJ Supplemental Objection *infra*.

Objection did not raise any arguments in response to new provisions introduced for the first time in the Second Amended Plan. Rather, the OMJ Supplemental Objection raises, for the first time, arguments that could have been made by the Objection Deadline but were not. Notwithstanding that these untimely objections should not be considered at all, all the arguments raised in the OMJ Supplemental Objection, like those raised in the OMJ Initial Objection, are without merit.

163. First, despite the fact that, in response to the OMJ Initial Objection, in the Second Amended Plan the Debtors made clarifying revisions to the section describing the treatment of General Unsecured Claims, OMJ continues to argue that the stated treatment of General Unsecured Creditors does not comply with Bankruptcy Code section 1124's requirements for unimpairment. *See* OMJ Supp. Obj. ¶¶ 5-10. But the Second Amended Plan now reads "each Holder of an Allowed General Unsecured Claim will, at the option of the Debtors or the Reorganized Debtors (i) be paid in full in cash, *or (ii) receive such other treatment that renders such Holder Unimpaired*", *id.* ¶¶ 6, 9 (emphasis added), and "Unimpaired" is defined as "with respect to a Class, Claim, Interest, or a Holder of a Claim or Interest, that such Class, Claim, Interest, or Holder is unimpaired within the meaning of section 1124 of the Bankruptcy Code." *See* Second Amended Plan, Art. IA. Therefore, by definition, General Unsecured Claims must be unimpaired under the Second Amended Plan.

164. OMJ argues that Class 8 is Impaired because of the "delay" in the process for the Reorganized Debtors and Holders of Claims to resolve issues relating to the validity and amount of claims. However, as a General Unsecured Creditor, all of OMJ's rights will be preserved. Upon emergence, OMJ will be permitted to pursue any claims against the Reorganized Debtors just the same as OMJ would have otherwise been able to prior to the Petition Date and without delay.

165. OMJ also argues that Article VII of the Second Amended Plan is "unclear as to the jurisdiction of the Bankruptcy Court to hear objections to Claims." OMJ Supp. Obj. ¶¶ 16, 17. OMJ's argument fails on this point as well. The Second Amended Plan expressly provides that the Bankruptcy Court retains jurisdiction to, among other things, "allow, disallow, determine, liquidate, classify, estimate, or establish the . . . amount of any Claim." *See* Second Amended Plan,

Art. XI.1. Furthermore, the period to do so should not be limited to "60 days following the Effective Date" as OMJ suggests (*see* OMJ Supp. Obj. ¶17(b)), as the Second Amended Plan expressly provides that Claim disputes can be resolved in the ordinary course of business. Further, in no way does the ability to object to a Claim render a Claim "Impaired", as the right of the Reorganized Debtors to object to a Claim does not limit the ability of the Holder of such Claim from disputing the objection or otherwise exercising its legal rights in respect of such objection.

166. There is also no need to modify the "Injunction" section of the Second Amended Plan to provide that such injunction does not impact the commencement of litigation by Holders of Claims, as OMJ argues, because the Second Amended Plan's injunction provision applies to Claims or Causes of Actions that have been "released, discharged, or are subject to exculpation." *See* Second Amended Plan, Art. VIII.G. General Unsecured Claims ride through the bankruptcy unaffected. Therefore, the Plan's injunction provision does not bar OMJ from pursuing litigation after the Effective Date.

167. Finally, while the Second Amended Plan is very clear on each of the foregoing issues, the Debtors have nonetheless sought to alleviate any concerns that OMJ may have – no matter how farfetched they may be – by including a provision in the proposed Confirmation Order that unambiguously preserves OMJ's rights:

> For the avoidance of doubt, the Plan and Confirmation Order shall leave unaltered any legal, equitable, and contractual rights of OMJ LLC and OMG LLC (collectively, "***OMJ***") in relation to its Claim as set forth in OMJ's proofs of claim [No. 58 and No. 63] (collectively, the "***OMJ Claim***"), including, for the avoidance of doubt, any existing right to indemnification, reimbursement of attorney fees, interest or other charges to the extent enforceable under applicable nonbankruptcy law and allowable under the Bankruptcy Code. This paragraph shall not alter or impair the Debtors' or Reorganized Debtors', as applicable, legal and equitable rights to contest, dispute, and defend themselves against the OMJ Claim, and any allegations therein or related thereto, or any other claim or Cause of Action.

Confirmation Order ¶ 127.

168. For the above reasons, the OMJ Objections should be overruled.

IX. RESERVATION OF RIGHTS.

169. The omission of any response to an objection should not be taken as a waiver of any arguments in opposition. The Debtors reserve the right to supplement the memorandum with arguments at the Combined Hearing.

[Remainder of page intentionally blank]

X. CONCLUSION.

170. For the reasons set forth herein, the Debtors respectfully request that the Court (i) overrule all outstanding Objections, (ii) approve the Disclosure Statement, (iii) confirm the Plan, and (iv) grant such other and further relief as is just and proper.

Dated: February 20, 2026

Respectfully submitted,

/s/ Michael D. Sirota

COLE SCHOTZ P.C.
Michael D. Sirota
Felice R. Yudkin
Daniel J. Harris
Court Plaza North, 25 Main Street
Hackensack, NJ 07601
Telephone: 1 (201) 489-3000
MSirota@coleschotz.com
FYudkin@coleschotz.com
DHarris@coleschotz.com

- and -

MILBANK LLP
Dennis F. Dunne (admitted *pro hac vice*)
Samuel A. Khalil (admitted *pro hac vice*)
Matthew Brod (admitted *pro hac vice*)
Lauren C. Doyle (admitted *pro hac vice*)
Benjamin M. Schak (admitted *pro hac vice*)
55 Hudson Yards
New York, NY 10001
Telephone: 1 (212) 530-5000
DDunne@Milbank.com
SKhalil@Milbank.com
MBrod@Milbank.com
LDoyle@Milbank.com
BSchak@Milbank.com

Co-Counsel to the Debtors and Debtors in Possession

EXHIBIT A

CONFIRMATION HEARING TRANSCRIPT

In re Wesco Aircraft Holdings, Inc., No. 23-90611 (MI) (Bankr. S.D. Tex. Dec. 16, 2024)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE:	Case No. 23-90611
	Chapter 11
WESCO AIRCRAFT HOLDINGS, INC., et al.,	515 Rusk Street
	Houston, TX 77002
Debtors.	
	Monday, December 16, 2024
	7:59 a.m.

TRANSCRIPT OF CONFIRMATION HEARING
BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY COURT JUDGE

For the Debtors:	Milbank LLP By: DENNIS DUNNE, ESQ. BENJAMIN SCHAK, ESQ. SAMIR VORA, ESQ. ANDREW LEBLANC, ESQ. 1850 K Street Northwest Washington, DC 20006 (202) 835-7574
For the U.S. Trustee:	Office of the United States Trustee By: ANDREW JIMENEZ, ESQ. 515 Rusk Street, Suite 3516 Houston, TX 77002 (713) 718-4668

APPEARANCES CONTINUED.

Audio Operator:	Courtroom ECRO Personnel
Transcription Company:	Access Transcripts, LLC 10110 Youngwood Lane Fishers, IN 46048 (855) 873-2223 www.accesstranscripts.com

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APPEARANCES: (Continued)

For the Ad Hoc 2024/2026 Noteholder Group:	Kobre & Kim LLP By: ZACHARY D. ROSENBAUM, ESQ. 800 Third Avenue New York, NY 10022 (212) 488-1279
For the Pimco and Silver Point Noteholders Group:	DavisPolk By: DAMIAN S. SCHAIBLE, ESQ. 450 Lexington Avenue New York, NY 10017 (212) 450-4000
For the Committee:	Morrison & Foerster LLP By: LORENZO MARINUZZI, ESQ. 250 West 55th Street New York, NY 10019-9601 (212) 468-8000

I N D E X
12/16/24

WITNESS		DIRECT	CROSS	REDIRECT	RECROSS
FOR THE DEBTOR:					
Patrick Bartels	Declaration		--	--	--
Brian Cejka	Declaration		--	--	--
Kevin Martin	Declaration		44	--	--
FOR THE COMMITTEE:					
Joseph Denham	Declaration		--	--	--

(Proceedings commenced at 7:59 a.m.)

THE COURT: All right. Good morning. We are here in the Wesco Aircraft Holdings case for confirmation of the plan. Case number is 23-90611. Everyone should have made an electronic appearance, so we're not going to take appearances this morning. If you wish to speak to the Court and you're on the phone, you can press "five star." I have one person who has done that so far. If you're in court, please come forward.

Good morning.

MR. DUNNE: Good morning, Your Honor. Dennis Dunne of Milbank, LLP, on behalf of Incora. I'm joined in the courtroom this morning with my colleagues, Andy Leblanc, Samir Vora, and Benjamin Schak. Just by way of quick introductions, we also have in the courtroom Dawn Landry, the general Counsel of Incora, and Brian Cejka of Alvarez & Marsal. On the line, we have Kevin Martin of Verita, our claims agent, as well as Patrick Bartels is directing one of our witnesses today, and David Coleal, the CEO of Incora.

Your Honor, at the outset, we're very pleased to be in front of the Court today to at least commence the confirmation hearing. We'll talk about that in a minute, but we wouldn't be here today without this steadfast attention of the Court. The order to show cause that Your Honor entered a few weeks ago helped to catalyze the filing of the revised plan, and the tireless efforts of Judge Shannon. Judge Shannon

adopts a truly refuse-to-lose attitude that kept the parties engaged and constantly closing issues. And so on behalf of the company, I'm sure I'm speaking for all the parties of the case, we're immensely grateful to both the Court and the mediator for your combined efforts.

And the plan before the Court today embodies those hours of ceaseless effort and ultimate agreement, but we don't yet have complete agreement among the parties. The principal area of ongoing negotiations revolves around corporate governance terms between the majority group and the minority group, and Judge Shannon has been helpful there to close those off. So we need a little more time for that.

I'd like to turn the podium over to Mr. Leblanc soon because he has more powers than I do. He can try to convince the Court how it's possible to proceed with a confirmation hearing today on a consensual plan that we don't yet have full consensus for, but there's lots of areas where we do, and it may be helpful today to present the evidence to the Court and use the hours that we have as efficiently as possible.

THE COURT: I think you -- before we do that, let me just see if we have a couple of people on the phone who tried to buzz in. I want to be sure they have the chance to speak or make any objection. I'd just want to join -- Judge Shannon is in hearing right now so he can't hear us, but he has just been amazing. So I want to extend my appreciation to him very much.

Thank you.

So on the phone, we do have a couple of people. Mr. Jimenez, good morning.

MR. JIMENEZ: Good morning, Your Honor. Andrew Jimenez from the United States Trustees.

THE COURT: Thank you. And from 929-284-1464? If you're on the phone from 929-284-1464, you may have your own line muted, but I have you unmuted in the courtroom.

All right. I don't know who that is. I'm going to go ahead and re-mute the line. If you need to speak later, you can press "five star." That person is not speaking up.

All right. Mr. Leblanc?

MR. LEBLANC: Good morning, Your Honor. Andrew Leblanc of Milbank on behalf of Incora. Your Honor, as Mr. Dunne said, we think this is a very good day for the company and for this bankruptcy process. Let me begin by just dealing with what Mr. Dunne just had laid out, which is, we have -- we are prepared to go forward to present our evidence with respect to our plan and to deal with objections that have been lodged with respect to the plan today. We do not have the full consensus from the parties that need to consent to this plan for it to go effective. And so what we'd like to do, subject to Your Honor's views -- and this is what we talked about with Judge Shannon in his capacity as mediator is, commence the confirmation hearing today, strive to get -- reach

the consensus that we need for this plan to be confirmed among the two parties that are negotiating with respect to the issues that Mr. Dunne said, which is primarily regarding the LLC agreement, but there are a couple of other issues. I -- not with respect to the plan, but all things that would be considered plan supplement documents, and then ask the Court to see if there's some time later in the week, if we can reach that consensus, to come back, to put everybody on notice of what the terms of those things are, which -- none of which I think affect any other party in the case. But everyone's rights, of course, would be reserved with respect to those issues.

And assuming we do, in fact, have that -- the consensus that we understand we will with respect to the plan, then move forward at that later date to try to do -- and I think this would be a very quick telephonic hearing. We would introduce the new voting statistics based upon that -- reaching -- having reached that consensus.

THE COURT: Yeah, the old ones didn't look too good.

MR. LEBLANC: They -- they're -- the old ones would not allow us to commence a confirmation hearing. And let me just say at the outset -- I want to be crystal clear about this, and I'm sure everyone's going to say this as well. We understand that we do not have a plan that would be confirmable in the absence of the consensus, of both the 2026 noteholders

and the 1L group. I don't want to -- I'm not --

THE COURT: No, I got it. I got it. I got it.

MR. LEBLANC: -- it would only be -- and Your Honor said that in July, that you put us in a position where we need the consent to both of them and we understand that. So --

THE COURT: I didn't do that on purpose.

MR. LEBLANC: I also understand that, Your Honor, but you did and that is what has led us to what, I think, is a little bit unusual procedural posture, but one that I think makes sense because everyone agrees on the fundamentals of the plan itself. And I'll walk through that in a moment, if Your Honor permits, I'll walk through what the plan does and what it achieves. They just need to come to ground. And everyone has the right -- everyone, meaning those two parties, the 2026 noteholders and the 1L group represented by Kobre and Kim and Davis Polk in this court, they each have the right to consent or not consent to the full suite of documents, including the governance agreements.

And so until those are done and dusted, we don't have a consensual plan, but we are very confident that we can get those done. I -- we had discussions with Judge Shannon yesterday. I spoke with the parties yesterday. Everyone appears -- everyone is of a belief that, if we had the original date of Friday, the confirmation hearing that we -- that would've been achievable. And I think if we can find a little

bit of time with the Court on Friday, I think that is achievable.

THE COURT: So there's no time on Friday. I have Wednesday afternoon. That's it for the week, and then next week. But --

MR. LEBLANC: And would Your Honor be amenable to doing this remotely?

THE COURT: Sure.

MR. LEBLANC: Okay. What -- why don't we -- I'll defer to the other parties. We're -- we are -- the debtors are not directly -- we are involved in these negotiations, but they're really -- they -- they're negotiations that are happening between the business people on those sides. And I -- I'm not in the best position to tell the Court whether it's feasible to expect this can happen by Wednesday so that we could have a short catch-up hearing, or by Monday. What -- I -- I'm assuming Monday -- I think Tuesday is actually a court holiday, if I -- if I understand it correctly.

THE COURT: I don't know if it is, but I would like to give my staff time off on Christmas Eve.

MR. LEBLANC: Yes.

THE COURT: But on Monday, we could do it if we had to, but that would, frankly -- you know, I think, assuming that everybody agrees that we should bifurcate the confirmation hearing in the manner that you've described, we'll come back

Wednesday and people need to reach a deal by Wednesday. So let me -- let's see if anybody objects to your bifurcation concept before we move ahead --

MR. LEBLANC: Sure. Understood.

THE COURT: -- down that road, but I do want you to know my availability. And so I am available on Monday. I think that's a bad idea because if we just do it on Monday, then we won't have a decision on Wednesday. But if we do it on Wednesday, we'll have a decision on Wednesday. So -- maybe, anyway.

MR. LEBLANC: I will -- Your Honor, we -- we're not the ones who have to resolve the few -- the very few remaining issues. And I'll also say, to Mr. Dunne's point, not only has Judge Shannon put in tireless efforts to date; he also, in a discussion I had with him yesterday, said he will make himself available over the course of these next two days to try to resolve any of these remaining issues. They're just -- they've obviously proven to be very difficult to resolve, but he's made himself available. So I'll stand back, Your Honor, and let people see if there's consensus with respect to what we propose as a process. And then we'll go forward from there.

THE COURT: All right. From 929-284-1464.

MR. ROSENBAUM: Good morning, Your Honor. I've now figured out that (indiscernible). Mr. Rosenbaum.

THE COURT: Good morning.

MR. ROSENBAUM: (Indiscernible).

THE COURT: Mr. -- Mr. Rosenbaum, your are -- your voice is very muffled.

MR. ROSENBAUM: Okay. Any better now? Let me -- let me move the -- is this better?

THE COURT: A little bit.

MR. ROSENBAUM: Well, let me give it a shot and I can dial in with a different phone if the Court can't hear me.

Well, good morning. Zachary Rosenbaum, Kobre and Kim, for the 2024/2026 Noteholders. We don't have an objection to proceeding in this bifurcated path. I expect that the Davis Polk group will agree, you know, that there is a full reservation of rights because the exit notes (indiscernible) venture still under negotiation, as is the LLC brief, and that that is subject to those ancillary documents. We do not have a firm plan unless --

THE COURT: Okay. So the phone isn't working.

MR. ROSENBAUM: It isn't? All right. I will dial in on a different phone with apologies.

THE COURT: No, that's fine. We'll come back to you when you get there. I've got one -- no, that's it on the phone. Go ahead, please. Good morning.

MR. SCHAIBLE: Your Honor, good morning. Damian Schaible with Davis Polk on behalf of the Pimco and Silver Point Noteholder Group. I'm almost certain, because we spent

24 hours a day with Mr. Rosenbaum and his clients for the past number of weeks, that what Mr. Rosenbaum is going to say is that there's no objection by either us or them to proceeding this way. All rights are reserved. There's very real issues that remain open with respect to -- luckily, less about the economic issues in the plan. Luckily, not about what the plan is supposed to do in preserving appellate rights and preserving parties' rights in various ways and the way the plan is supposed to work. Luckily, Mr. -- sorry, Judge Shannon has gotten us through all of that Herculeanly and has done an amazing job with all of that. Really, it's down to governance and the exit indenture, and we're working through it as quickly as we can.

And so Your Honor, it's, you know, it's trading drafts, principals on the phone almost around the clock trying to do it. I agree with what Mr. Leblanc said that if Friday had worked, we almost certainly would've been done. We could potentially get it done by Wednesday, and I do support proceeding, reserving everyone's rights. We're putting everything on the record, but we're not asking Your Honor to rule. And then hopefully, we're able to come back to Your Honor through a virtual hearing and just thumbs up and have Your Honor consider it at that point.

But I do think -- there's a lot of people here and there's a lot that everyone has gotten ready for for today. So

I would propose that we do proceed.

THE COURT: Thanks.

MR. SCHAIBLE: Thanks.

THE COURT: Mr. Rosenbaum, welcome back.

MR. ROSENBAUM: Thank you, Your Honor. Good morning again. Can you hear me better now?

THE COURT: I can. Yes. Thank you.

MR. ROSENBAUM: Okay. So did -- I did hear what Mr. Schaible said, and I certainly heard what Mr. Leblanc said. We do not have an objection to this bifurcated path, so long as it's clear, which I think it is, that confirmation -- the (indiscernible) plan (indiscernible) subject to the (indiscernible) convertible indenture, and the LLC agreement, which are under active negotiation, but are not yet agreed upon. I personally think that Wednesday is ambitious, but I don't want to stand in the way of progress either, and I certainly don't want to interfere with anyone's holidays. So I -- we don't have an objection to putting another time on the calendar for Wednesday, and hopefully we can meet that.

THE COURT: Thank you.

All right. I find that all parties' rights are reserved, not only the two people that spoke up, but anyone else, on matters that we don't rule on today. I think that it may make some sense, as we proceed during the day, if there are discrete issues that are not related to the reserved issues,

that we would make interlocutory rulings. And to the extent that these are issues on matters not reserved, I intend to do that, because we do have a number of objections out there. I think some of them may be resolvable much more easily than others, but I want to go through those. I don't think that any of them have to do with the issues that are being reserved, and I want to rule on those so that we don't have to come back on Wednesday and then pick back up stuff that was already litigated today.

So that -- that'll be the way we proceed, Mr. Leblanc.

MR. LEBLANC: Thank you, Your Honor. Again, Andrew Leblanc on behalf of Incora. Your Honor, I do think, just at the outset, I believe that the only remaining unresolved objection is that of the U.S. -- the Office of the United States Trustee. My colleague, Mr. Schak, is going to address that at the end, but what I propose for the sort of quick run of show, Your Honor, would be I will walk through the plan. I -- we've got a small deck. I'll explain to the Court what we've done in bankruptcy, what the plan entails. We'll introduce our evidence, give other parties the opportunity to speak. I know Mr. Schaible wanted to say a few words. And then we would turn to addressing those objections. And Mr. Schak will address at least the Office of the United States Trustee.

THE COURT: So given that, and given parties believe that we might not be ready by Wednesday, why don't we set the Wednesday -- but the Wednesday hearing literally is going to be a half an hour hearing, right? It -- it's either yea or nay on Wednesday?

MR. LEBLANC: Correct, Your Honor.

THE COURT: Why don't we do it at five o'clock Wednesday? So to where -- really, that's the same thing as doing it Thursday morning, which is what you've requested. So I'll try and give you just as much time as I can to get it done on Wednesday, and I am not going to be averse if the parties have reached an understanding as to what the deal will be that they can announce in court. I don't know that I need to review the precise two documents that are at issue, as opposed to understanding that the parties have agreed, and these will be the essential terms of those documents. If the parties are uncomfortable with that, that's fine. But if they're in a position where they've reached a handshake, the parties can announce a deal that I'm then empowered to enforce the announced deal if the parties can't agree on final language, to me, that shouldn't stop confirmation. I'll hear others if -- maybe that just doesn't work, you know, but --

MR. LEBLANC: Unfortunately, we -- it certainly would work from the company's perspective, Your Honor. I think -- I think you may hear from the two parties that they want -- given

the nature of these negotiations, they want the final documents.

THE COURT: That's fine with me, but that -- just at 5 -- at five o'clock on Wednesday, we can either proceed or not proceed. I'm just telling people, if they choose, you know, perhaps there is a memorandum that's in writing that says what happens and the revisions that need to take place. If they don't choose, I'm not making people do that. I do understand, probably not the intensity of the negotiations, but the issues.

MR. LEBLANC: Yeah. And Your Honor, I mean, we -- we've expressed a similar view. Like, we -- we've expressed the view that we'll -- we're happy to proceed on the term sheets. The view has been expressed that we're not going to do it on term sheets, and our response to that is, I think, the one Your Honor just said, which is, I don't care. If you want to do it on full documents, that's fine. Just get it done.

THE COURT: Yeah.

MR. LEBLANC: That's our perspective on it.

THE COURT: So anyway, Wednesday at 5, will --

MR. LEBLANC: Wednesday at 5.

THE COURT: -- be the hearing.

MR. LEBLANC: We'll be here, hopefully with --

THE COURT: And it'll be a virtual hearing where parties are free to appear here in court, but I don't anticipate people appearing in court and would prefer they not.

But it's a public courtroom, so I'll be -- I'll be here, and you can be here if you want to be.

MR. LEBLANC: We appreciate that, Your Honor. So if -- with the Court's indulgence, I'll do probably 15 minutes, 10 minutes, just walk through where we are and what the plan entails, and then we'll proceed with producing -- introducing the evidence and then give parties a chance to -- but, Your Honor, we have a slide deck. If Your Honor could give broadcast authority to my colleague Dan Porat, P-O-R-A-T.

THE COURT: All right, Mr. Porat, you should be able to accept the presenter role at this point.

MR. LEBLANC: And Your Honor, we have copies available in the courtroom for any parties, but I've got a couple here if you -- if Your Honor would like a hard copy.

THE COURT: Sure.

MR. LEBLANC: May I approach, Your Honor?

THE COURT: Please. Thank you.

MR. LEBLANC: So Your Honor, when you were first -- when you first took over this case in October, Mr. Dunne walked you through what the goals of the company are. And if you look at Slide 1, or Slide 2, I guess it is, Your Honor, we talked about -- most of the time spent in this courtroom has been with respect to the adversary proceeding and with respect to resolving what the debtor's capital structure is in light of the 2022 transactions. But in point of fact, the

reorganization here was really focused, from the company's perspective, on the first two issues: normalizing their commercial relationships, stabilizing operations, and then renegotiating their contracts.

And the company, in that regard, has been wildly successful and has positioned itself for success to come out of this bankruptcy as a much leaner, much more efficient company with contracts that really are right sized for the supply chain issues that occurred and the inflationary environment that we face. Again, we've spent an enormous amount of time on the capital structure, but fortunately, even with the resolution of that, there's been no contest between the parties about what the ultimate capital structure of this company is going to be on emergence, and that has been critical.

And so if we turn the page, Your Honor, just with respect to that first issue, the company has renegotiated the vast majority of its customer contracts and mitigated those inflationary effects, but also, where necessary -- and Your Honor may remember the Gulf Stream contract where we had to reject the contract because we couldn't get to a renegotiated outcome. We used the power of the bankruptcy court and the Code to effectuate changes where we needed to.

We -- we've -- these two -- the company, Wesco and Incora, that was obviously the product of a merger in 2020, where we hadn't fully realized the synergies that were expected

because of the interruption of COVID and the need to respond to that. But the company's now been able to right-size its capital structure, its organizational structure, and reduce its expenses going forward by more than $20 million, and we've been able to negotiate the overwhelming majority of our contracts. And if we turn to the next page, we've got a short slide that shows that.

We renegotiated over 100 contracts, almost all of which now have inflationary protection built into them, whether they're variable or that they have inflation clauses built into them. That reflects $500 million worth of revenue that contracts have been renewed for, and a gross profit built into those, we expect, of approximately $150 million. Those are the operational outcomes from the reorganization that we've been able to achieve that are built into the plan, and that is what everybody's betting on when they come to the consensual plan agreement that we think we have here, is to realize the value that comes from the use of the Bankruptcy Code in the way that we have. And that's been a great success. Now --

THE COURT: On the inflationary side, are we talking that you've negotiated that your revenues will increase with inflation or that your supply costs will not increase with inflation? I don't know which --

MR. LEBLANC: It's -- I think it is more the former than the latter. But Your Honor, if you look at the right, the

inflation protection status, in the pie chart, you can see that some of them have variable pass-through pricing. So that means our margins would remain fixed, and as prices increase, as our costs go up, we would pass through those increased costs to our customers. Others have an inflation clause in place so that the cost would just go up without -- regardless of what our supply costs would happen.

And then the third category in the hardware side is you have an annual repricing where you -- the parties just renegotiate what those prices are on an annual basis, whereas many of these contracts are long-term, five years, where prices were fixed under the previous iteration of these contracts, which really put a damper on the company when you had the double effect during COVID of both an inflationary environment and the supply chain issue, where our costs and our margins were being squeezed because we had to pay extra for -- to get the supply.

THE COURT: Right.

MR. LEBLANC: And we were paying more for the goods and not being able to pass those costs on to our customers. And so the company has done what it can do. On the chemical side, it's a little bit more straightforward because you just do have the pass-through in the annual repricing. So that -- that's the general nature of what the company's been able to achieve on the operational side with respect to it and just to

position itself better for whatever the market is. If inflation stays where it is today at, you know, 2.4 percent on a quarterly basis, then these changes aren't going to be necessary. But if it increases again, where it was, you know, 6, 8, almost 10 percent, then the company will be in a better position than it was three years ago to deal with those inflationary changes.

Now, that takes us through the -- really what the company has been focused on. Now, there's obviously been this battle going on between the two groups of creditors with respect to what our capital structure's going to look like, but we've now achieved -- we're now at the point, if we can turn the slide, where the plan that is before the Court has brought support among all of the creditor groups. And again, I don't -- I'm not taking away from the reservation of everyone's rights because it is not done. It won't be done until it's done. The two yellow parties, they -- they're still negotiating the terms, and until those are done, no one is consenting. But we anticipate that we will, by the end of this, the consensus of all five groups of these leading creditor groups.

We -- we've had, for almost a year now, a settlement with the UCC that is baked into the plan, and we've been very successful with all the parties, ensuring that there -- when parties have been negotiating over the term -- when the

parties, meaning the 2026 group and the 1L group, have been negotiating over how to resolve their disputes with respect to the capital structure, they're not changing the terms of the plan and the RSA that we've negotiated with the other three groups. And I think we've been successful.

We've dealt with some comments from some people to make sure that they're not adversely affected by what has changed in the plan, and I think we've been successful. And we'll continue to deal with those. To the extent that anybody believes that a change that has been made in the governing documents or the exit facilities adversely affects the negotiated settlement, they have, we will talk with them, deal with them. And we've been successful in resolving all of those issues to date. And so we do believe that when we are back before the Court on Wednesday, we will have a consensual plan that has the broad support of all of our leading creditors.

Now, the voting record may not show that, and I'll -- I want to explain that. And the reason for that, Your Honor, is we solicited -- we have not re-solicited the general unsecured class. That class is primarily made up of noteholders, the 2024 noteholders, the 2027 noteholders. We're not bothering to re-solicit them, even though they're part of the Kobre group, because it frankly doesn't matter if we have the consent of the secured class of creditors, and we can still confirm. But even though the voting record will not show the

general unsecured class as a supporting class, it really is, because we will have the support of that Kobre group. But again, we're not going to waste the time to re-solicit that class.

THE COURT: So just so I understand the numbers, if the Kobre group joins on Wednesday, their votes in favor of the plan will then result in an accepting class?

MR. LEBLANC: Correct.

THE COURT: Okay. That's what I thought you were saying. I just wanted to be sure.

MR. LEBLANC: That is -- yes, that is correct, Your Honor.

So let me talk about what the structure of the plan does for the company going forward. And if we turn the slide -- and I think this is critical. As important as those operational achievements are to the outcome that we hope to have here, the de-leveraging that we're achieving under this plan is quite remarkable. So Your Honor can see on the left-hand -- in the chart in the middle, when we filed for bankruptcy, we had a capital structure that had $3.4 billion or almost $3.5 billion of debt, secured, unsecured, one and a half, one and a quarter, all different types of debt.

When we emerge, Your Honor, we're going to have a capital structure -- the illustrative post-emergence has a capital structure that has $1.247 billion worth of debt, and I

want to actually walk through that a little bit more, because even that doesn't really correctly articulate just how much de-leveraging occurs. And the reason for that is -- so at the top of that, we have an ABL facility. That ABL facility, Bank of America is our current agent. They're -- they've agreed to the terms of the plan. And Bank of America is contemplated to be the ABL facility agent coming out of bankruptcy. We have not syndicated that ABL facility yet. We have every confidence and the market seems to be champing at the bit to get an opportunity to make that investment. We haven't done it because Your Honor may be aware that we've been a little uncertain as to when we might get to consensus and emerge. And so we have not done that solicitation process yet, but that will start in earnest as soon as we can.

The next piece of the debt structure is going to be the new exit notes. That's 324 million from -- that constitutes -- that's always been in our plan. That has been the rollover into the exit facility of the existing debt facility. So that part has always been contemplated. In addition, the plan contemplates an incremental hundred million dollars being funded. Because of the delays and the additional costs associated with the negotiations, will -- the lenders will fund an additional hundred million dollars. One of the issues that is -- remains open is how that hundred million dollars is allocated among the lenders, and I won't say any

more about that, but that -- so that will form --

THE COURT: But that's some subset of the existing DIP lenders?

MR. LEBLANC: Correct, Your Honor. It -- the -- well, the DIP lenders and the Kobre group.

THE COURT: Okay.

MR. LEBLANC: So collectively, they will. So anyone who is currently under Your Honor's decision, a 1L holder, will have the opportunity to fund that. And the question is, how do you allocate that among them with over and under subscription opportunities? That -- that's really the issue. But that will be part of the capital structure as well.

And then the last piece is those new tech take-back notes of $420 million. Again, Your Honor, this has always been part of the plan. And those take-back notes, while they are structured and they show up here as part of the capital structure, they are fully convertible, no cash pay, and the company will treat them as equity on its books and records. And so the right way, we think, to think about this is that this company will emerge having come into bankruptcy with almost three and a half billion dollars of debt. It will emerge with just over $800 million of debt. And with all the cost savings and the improvements in the contracts, we think the company is very well positioned for success coming out of this bankruptcy.

Now, Your Honor, in the bottom left corner of this chart, the pro forma equity ownership, Your Honor has seen numbers quite similar to this before, but this is the company's -- this is the agreement of the parties to effectuate the decision that Your Honor rendered in July. And so under that decision, the 1L notes have an ownership interest at 74.4 percent and the 2026 notes collectively, the Kobre group has an ownership interest of 24 percent of the equity. Now there's an incremental 1.6 percent of that. That 1.6 percent, which is being shared by the 2024 notes and the 2027 notes, those are the Langur Maize notes, that is pursuant to the agreement with the Unsecured Creditors Committee.

Now, when we reached that agreement in January, the allocated amount of equity going to the unsecured pool was 3.5 percent. But what had happened subsequent to that is Your Honor made your decision and took out of the unsecured pool all of the 2026 notes, which then became secured and are sharing the primary equity. And so that three and a half percent was reduced to 1.6 percent.

One wrinkle, just so Your Honor is aware, is in the mediation, the 1L notes and the 2026 notes agreed that the cost of this -- the Committee settlement, the 1.6 percent, that's coming only out of the 1L notes side of the balance sheet, not out of the 2026 notes. That's just how they agreed to do it. It's a small difference, but they were able to reach that

agreement because that settlement had already been negotiated prior to the 2026 notes being secured.

And so, Your Honor, that -- that's the nature of the plan and how the allocated distributions are going to go. Now, there's obviously one other feature of the plan that must be mentioned, and that is -- well, this is the capital structure that will exist on emergence. The parties have negotiated and this is really -- we -- we're not aware of another situation. You could look at Sanchez maybe, where there continue to be disputes over the capital structure post-emergence, but this is one where the parties have actually negotiated to preserve all parties' appellate rights with respect to Your Honor's decision. And so the appeals that have not yet commenced will commence with respect to Your Honor's decision, and the plan and all of the organizational documents are built with the understanding that that appeal will go forward, and built with the understanding that the capital structure, and in particular these equity ownership interests and the take-back note interests could change depending on a decision of an appellate court in that -- in those decisions, and then to the extent necessary, decision on remand that changes the capital structure. And that -- I mean, I -- I've said it in a couple of sentences, but that concept is what has taken months and months and months to negotiate, that complicated structure. So obviously --

THE COURT: Only if you beg the District Court not to ever remand this case to me again.

MR. LEBLANC: We could until after Your Honor retires if you want. But Your Honor -- and so the appeal, which hasn't yet been filed because there -- we don't have a final order, there will be an appeal. That will proceed, and the parties will argue their case, continue to argue their case before whatever court they choose to. The debtors are only a nominal party to that. So as part of the mediation and the negotiations, the debtors agree that we would not take part. We're not going to take a side in that, we're not going to litigate on behalf of either side. We will appear as necessary to preserve everyone's appellate rights, so we may be a nominal party. We may file a me-too brief to the extent that that is necessary, but we are not taking a side in those appeals.

THE COURT: So on the oral opinion that we gave, do the parties want that at this point converted to a written opinion?

MR. LEBLANC: They -- the parties do, Your Honor. I think I mentioned that a couple of weeks ago, but one of the things that will be necessary will be that there is an oral -- that Your Honor's oral decision be reduced to writing so they can appeal, not only with respect to the July ruling, but also with respect to the tortious interference disputes that are live. Because those appeals can continue as well. And so an

appeal of that by either side and/or by both, frankly, can continue. So I think with respect to both of those, the parties would be looking for a decision from the Court. Yes.

THE COURT: Okay. Those are being worked on. I just want to be sure, when they're ready, nobody -- it's not going to cause heartburn to go ahead and issue them, right?

MR. LEBLANC: I would ask you not to do it before Wednesday, but -- so as to not disrupt anything, but other than that, Your Honor, yes. I think the parties are hoping and anticipating and look -- and anticipating --

THE COURT: Well, with respect to the oral ruling, this literally is going to be a cleaned-up version of the oral ruling. We're -- I'm not changing a thing from the oral ruling substantively, so -- but it needs cleaning up, and that's basically what the written part will be.

MR. LEBLANC: Yep. And the parties do anticipate that.

Your Honor, the one other thing I'll say with respect to the appellate preservation concept is, it was very important to the company that, on emergence we -- we'd be out of this, not only substantively, not only as a litigating party, but also as a funding source. So the parties have agreed that, going forward, that the company, the reorganized debtor, is not going to be funding either side's litigation costs. They -- obviously, to the extent the company may file a brief, that

it --

THE COURT: Right.

MR. LEBLANC: -- would pay its own lawyers, but the company is not going to be funding either side's litigation costs on a go-forward basis. They're bearing their own expenses with respect to that.

THE COURT: Do we have an appellate judge in this case yet or we don't have one yet?

MR. LEBLANC: No appeal has been taken at this point, Your Honor.

THE COURT: All right. Okay.

MR. LEBLANC: So Your Honor, that is where things stand with respect to the plan.

Let me just turn to Page 7, Your Honor. And this is where I believe we are with respect to the status of any objections. The U.S. Trustee objected -- filed two objections, one in May and one more recently. Partly -- that has been partly resolved, but the two primary issues that remain there are to deal with the exculpation question, and I think the oft-made consensual release issue. It -- it's actually funny. I'm -- we -- I have a confirmation hearing this morning, I have one this afternoon in front of Judge Lopez, same issue, same U.S. Trustee, arguing the same point. So we'll be arguing this this afternoon in front of Judge Lopez in the interim case. But Mr. Schak is going to handle that. I think every other

objection that has been made, Your Honor, has been resolved. And you can see them there on Page 7 and Page 8.

And so Your Honor, with that, we -- the next page in the slide deck, Your Honor, has -- it is just the summary of our response to the U.S. Trustee's objection, but I'll leave that from Mr. Schak. What I propose to do is obviously first answer any questions the Court may have of me, and then proceed to introduce our evidence.

THE COURT: Thank you. Well, let me see if anyone disagrees with your presentation before we go any further. And I appreciate the thoroughness of it. Is there anyone that wishes to speak in response in any way to what Mr. Leblanc said? Yes?

MR. MARINUZZI: Good morning, Your Honor. Lorenzo Marinuzzi on behalf the Committee. The only thing I would add, Your Honor, is while it's true the LLC agreement that's still being negotiated is largely between the 1Ls and the 26 noteholders, there's equity being distributed to the unsecured creditors, including the Langur Maize Group, and I'm sure they want to see the LLC agreement before it's approved by the Court. So we would urge the parties to get it on file as quickly as possible. Thank you.

THE COURT: Either on file or bring you into the loop maybe.

MR. MARINUZZI: Thank you.

THE COURT: Yeah, I think getting it on file is probably hard.

MR. MARINUZZI: Or bringing us into the loop as well, Your Honor. Yes.

THE COURT: Yeah. Thank you. Anyone else wish to address any issues, dispute anything Mr. Leblanc said? No one else? All right.

MR. LEBLANC: So with that, Your Honor -- and I'll just for Mr. Marinuzzi's benefit, Mr. Bennett and I have been talking frequently about it, although he may not have seen a draft of it. I think we -- he understands where we are, but we -- we'll certainly communicate with Mr. Bennett on behalf of his client, Langur Maize. But with that, Your Honor, I'll yield the podium to my partner, Samir Vora, to introduce our declarations.

THE COURT: Thank you.

Mr. Vora. Good morning.

MR. VORA: Good morning, Your Honor. Samir Vora, Milbank LLP, on behalf of Incora. I'll be introducing the evidence today, which will consist of three declarations from witnesses, one of whom is here in the courtroom, two of whom who are appearing virtually. And then --

THE COURT: If I can get the two virtual witnesses to go ahead and turn on their cameras.

MR. VORA: That'd be fine. That would be --

THE COURT: And to press "five star" on their phone.

MR. VORA: Yeah, Mr. Bartels and then Mr. Martin.

THE COURT: Thank you.

MR. VORA: I see Mr. Bartels.

THE COURT: Okay. I've got two people that are buzzing in.

MR. VORA: Okay.

THE COURT: Mr. Bartels, good morning. Mr. Bartels, I have your line unmuted from my end. You should be able to speak at this point.

MR. BARTELS: Can you hear me, Your Honor?

THE COURT: I can. Good morning.

MR. BARTELS: Good morning, sir. How are you?

THE COURT: Good. Thank you.

From 310-708-6851, who do we have? 310-708-6851, please be sure your own line isn't muted from your end.

MR. MARTIN: Your Honor, Kevin Martin from Verita.

THE COURT: I'm sorry, could you repeat that?

MR. MARTIN: Kevin Martin from Verita.

THE COURT: Good morning, Mr. Martin.

MR. MARTIN: Morning, Your Honor.

MR. VORA: Thanks, Your Honor. That's Kevin Martin of Verita Global, the claims noticing solicitation.

THE COURT: All right. So --

MR. VORA: Okay, so --

THE COURT: -- however you wish to proceed.

MR. VORA: Yeah. Thank you, Your Honor. So first I'll seek to admit the declaration of Patrick Bartels, Director of Wolverine Intermediate Holding Corporation, which can be found, Your Honor, at doctor -- at Docket 2478. Mr. Bartels is attending by video and is available for examination.

THE COURT: Thank you. Is there any party that objects to the admission of 2478 as substantive evidence subject to cross-examination that should be admitted today?

MR. ROSENBAUM: Good morning, Your Honor. Zachary Rosenbaum for the 2024/2026 holders. We do not object to the admission of Mr. Bartels's declaration, but with a reservation of rights. For the record, Article 4, Section 2, Outline of the Plan, outlined in more detail that reservation. But to the extent of an appeal that Your Honor's declaration is served in any matter of course, the (indiscernible) case is on an argument that the company, not the 2026 or 2024 holders, possess the remedy that Your Honor proposed, this proceeding would be reopened de novo.

And as agreed among the parties at this portion of the proceeding, this is the -- what we're calling the UCC settlement will be re-reviewed, and there will be a supplementation of the record. I'm summarizing the plan. I'm not intending to receive the plan, but I just want to make sure that that statement is on the record in the event of this

provision actually becoming activated.

THE COURT: So --

MR. ROSENBAUM: And I'm sorry. Your Honor, you just pointed out to me, so that we're clear on the record, is Article 4 (indiscernible) of the plan on file.

THE COURT: So if -- I just want to repeat back to you what you're asking me to do. You are not objecting to the admission of this for today's hearing, but if the case comes back on remand, then you're reserving your rights to object to its consideration at the remand hearing. Is that what you're telling me?

MR. ROSENBAUM: I am, Your Honor, and reserving our rights to supplement the record based on certain potential circumstances on that remand. And that has been agreed upon subject to everyone's overarching reservation of rights (indiscernible) the plan as we have voted on. But that is the principal agreement that's reflected in Article 4 --

THE COURT: Right.

MR. ROSENBAUM: -- and 2.

THE COURT: But in terms of any decision that we might be making in the next 72 hours, you do not have any cross-examination or any objection to the admission of Mr. Bartels's declaration for those purposes. Is that correct?

MR. ROSENBAUM: That is correct.

THE COURT: Thank you.

Does the debtor have any problem with that reservation?

MR. SCHAK: No problem, Your Honor.

THE COURT: All right.

MR. SCHAK: Thank you. Is that --

THE COURT: Wait a second. You got a problem right behind you.

MR. SCHAK: The debtor does not, but perhaps somebody else does.

MR. DUNNE: Nor do I, Your Honor. I -- and I agree with increasingly many things that Mr. Rosenbaum says. But I agree that no one is looking to overwrite or rewrite what is -- was painfully crafted in the plan. Suffice it to say, Your Honor, from our perspective, and I believe Mr. Rosenbaum would agree with this, the plan doesn't work unless the debtors have made a determination -- the debtors have made a determination to settle certain estate causes of action.

Today, Your Honor is going to hear evidence, including the testimony by Mr. Bartels and other evidence, of the sufficiency of the consideration provided for the debtor's release of the debtor's causes of action against certain parties, including my clients. Mr. Rosenbaum does not need to challenge that settlement at this point. However, we have baked into the plan a very complicated set of provisions that permit, in certain limited circumstances, Mr. Rosenbaum to come

back and have a de novo review by Your Honor of the 9019 settlement that is approved today.

So his rights are reserved to add evidence, to contest evidence, to argue for the insufficiency of consideration provided. Our rights are reserved, again in those limited circumstances, to add evidence and convince Your Honor that the -- that under Rule -- under 9019, the standard was met for release of, again, just the estate causes of action. So it's limited, yet complicated.

THE COURT: I got it. But for the purpose of any ruling we might make in the next 72 hours, I can ignore the reservation.

MR. DUNNE: Correct.

THE COURT: That reservation will neither expand nor restrict what is contained in the plan about what could happen on remand. And so we don't need to deal with it now.

MR. DUNNE: Correct.

THE COURT: We need to deal with it in the highly unlikely event that you guys don't keep your word and get this remanded, right?

MR. DUNNE: Correct. Everything except the last thing you said. Thank you, Your Honor.

THE COURT: No, you can appeal it all you want. Just don't get it remanded.

MR. DUNNE: Thank you, Your Honor.

THE COURT: All right.

MR. SCHAK: Thank you, Your Honor.

THE COURT: So with --

MR. SCHAK: I think --

THE COURT: -- with that --

MR. SCHAK: -- limited but complicated --

THE COURT: Right.

MR. SCHAK: -- is an appropriate description of what we're doing.

THE COURT: I'm admitting the declaration on -- filed by the debtor of Mr. Bartels at 2478 for the purpose of the hearing that we are conducting this week and perhaps next week only. And after that, its application will be determined by a confirmed plan if a plan is confirmed.

(Exhibit 2478 admitted into evidence)

THE COURT: Mr. Bartels, would you raise your right hand, please, sir?

PATRICK BARTELS, DEBTOR'S WITNESS, SWORN

THE COURT: Thank you.

Is there any cross-examination of Mr. Bartels? Right. Then we --

MR. ROSENBAUM: No, Your Honor, on the basis that we just described.

THE COURT: Thank you. All right. All right. It is admitted for all purposes without cross-examination. Thank

you.

MR. SCHAK: Thank you, Your Honor.

THE COURT: Thank you, Mr. Bartels.

MR. BARTELS: Thank you, Your Honor.

(Witness excused)

MR. SCHAK: Next, I'll seek -- I'll seek to admit the declaration of Brian Cejka of Alvarez & Marsal, one of the debtor's restructuring advisors, which attaches as Exhibit A certain consolidated financial projections of the debtors. The Cejka declaration and the accompanying exhibit can be found in Docket Number 2477. Mr. Cejka, as I noted, is here in the courtroom and is available for examination to the extent necessary.

THE COURT: All right. Mr. Cejka, would you come forward, please? Good morning, Mr. Cejka.

MR. CEJKA: Good morning.

THE COURT: Is there any party that has any objection to the admission of Mr. Cejka's declaration that was filed at ECF 2477?

MR. ROSENBAUM: Your Honor, no objection, based on the same reservation that was just articulated and accepted both by the Court and the parties.

THE COURT: Thank you. All right. I'm admitting the declaration.

(Exhibit 2477 admitted into evidence)

THE COURT: Mr. Cejka, would you raise your hand please, sir?

BRIAN CEJKA, DEBTOR'S WITNESS, SWORN

THE COURT: Thank you.

Is there any cross-examination of Mr. Cejka by any party?

MR. ROSENBAUM: No, with the same reservation, Your Honor.

THE COURT: Thank you.

Mr. Jimenez, only -- I'm just calling on you just because this does address certain of the issues that you're involved in to be sure you're okay without any cross-examination, Mr. Cejka.

MR. JIMENEZ: Thanks, Your Honor. Andrew Jimenez for the United States Trustee. I was waiting my turn to cross-examine Mr. Martin on the balloting issues.

THE COURT: All right. No, that's fine. I just wanted to be sure we're good. And then I'm going to admit Mr. Cejka's declaration for all purposes.

Thank you, Mr. Cejka. All right.

(Witness excused)

MR. SCHAK: Thank you, Your Honor. Finally, I'll introduce the declaration of Kevin Martin of Verita Global, the debtor's claims noticing and solicitation agent, which is -- which attaches this Exhibit A and B, certain tabulation summary

issues. Mr. Martin, I believe, is available at least by phone, and his declaration together with the exhibits, Your Honor, can be found at Docket Number 2472.

THE COURT: So I just -- I want some clarification of why we're doing that. It's critically important, but right now unavailing. And so since it has to be refiled for you to confirm, why are we introducing this at this stage?

MR. SCHAK: Well, there's certain aspects of his declaration that I think are sort of faked at this point. You're right, Your Honor. The classes 4A and 6A are still subject to the termination of the voting period, which is December 20th. But I think there are certain aspects of the evidence that I --

THE COURT: Okay. Fair enough. Yeah. I just wanted to know what we're doing there. So you're going to change the attachment, but leave the narrative the same basic --

MR. SCHAK: Yes.

THE COURT: -- or maybe add a paragraph.

MR. SCHAK: That's correct, Your Honor.

THE COURT: All right. Is there any objection to the admission of Mr. Martin's declaration that was filed at ECF 2472, subject to cross-examination?

MR. JIMENEZ: Andrew Jimenez for the United States Trustee.

(Simultaneous speaking)

THE COURT: Hold on. Mr. Jimenez, go ahead. I'm going to let you go first.

MR. JIMENEZ: Thank you, Your Honor. Andrew Jimenez for the United States Trustee. No objection. I just would like the opportunity to cross-examine Mr. Martin.

THE COURT: Of course.

Mr. Rosenbaum?

MR. ROSENBAUM: No objection, Your Honor, with the (indiscernible) clarification that we have not voted that (indiscernible) declaration or testimony.

THE COURT: Thank you.

All right. Mr. Martin, would you raise your right hand please, sir, and tell me when you have it raised?

MR. MARTIN: Sure, sir.

KEVIN MARTIN, DEBTOR'S WITNESS, SWORN

THE COURT: All right. The Martin's declaration -- Mr. Martin's declaration filed at 2472 is admitted. It is admitted for all purposes subject to the reservations.

(Exhibit 2472 admitted into evidence)

THE COURT: And we are now going to have Mr. Jimenez and then anyone else that wishes to cross-examine Mr. Martin. So we'll take all the cross-examination. Please press "five star" if you do want to cross-examine him, but Mr. Jimenez can proceed at this point.

Go ahead, Mr. Jimenez.

MR. JIMENEZ: Thanks, Your Honor. Andrew Jimenez for the U.S. Trustee. And just before we start, I don't see Mr. Martin on the camera. I just want to make sure or confirm whether we have him available on camera or not.

THE COURT: Mr. Martin, are you available on camera?

THE WITNESS: I am, Your Honor. I have the camera turned on on my GoTo.

THE COURT: It's not showing up. That's interesting. Hold on.

THE WITNESS: I can see my own image on my camera preview.

THE COURT: Interesting. Hold on. Can you see everyone else's image as well?

THE WITNESS: I cannot.

THE COURT: Because I don't see that you're connected into this GoTo Meeting. Let me get you to, if you don't mind, disconnect your --

MR. ROSENBAUM: Your Honor?

THE COURT: Yes?

MR. ROSENBAUM: I believe that it might have been (indiscernible) session only.

THE COURT: There we go. There we go.

MR. DUNNE: I think --

THE COURT: There. You're here now. Thank you. I don't know what happened, but you're here now. So welcome. Go

ahead, Mr. Jimenez.

MR. JIMENEZ: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. JIMENEZ:

Q Once again, Andrew Jimenez with the United States Trustee. Good morning, Mr. Martin. I am an attorney for the United States Trustee. Before I begin, can you confirm that you can hear me?

A I can, Mr. Jimenez.

Q Thank you. Mr. Martin, did Verita, as claims agent, receive ballots in which claimant opted out to the third-party releases?

A We did.

Q Did Verita receive opt-out forms from non-voting claimants?

A We did.

Q Did Verita tabulated the opt-outs?

A We did.

Q Okay. What was the result of such tabulation?

A Give me a moment, Mr. Jimenez.

Q Yes.

A Those results were actually reported in our May 2024 deposition results. So I could pull --

Q And they are not filed in the declaration and exhibit filed at Docket Number 20 -- 2472?

A Correct. Which, we can't include them in the final declaration we filed after the 20 --

Q Okay. Okay.

A -- December 20th deadline.

Q Okay. Because we're dealing here today with the exhibit file of 2472, and it's not showing here. Do you have a recollection of what was the tabulation of the opt-outs?

A I know out of the Class 8s, there are only two opt-outs out of the GUC class. I would have to go back and look at my -- at the original declaration from May 2024.

THE COURT: So I'm going to open ECF 1740, which is Mr. Martin's prior declaration. And if -- unless there is some objection, I'm going to put it on the screen so that Mr. Jimenez and Mr. Martin can communicate about what got filed.

Will that be helpful, Mr. Jimenez?

MR. JIMENEZ: Certainly, Your Honor. We're trying to get as much information as possible. I was just restricting my question to 2472 because that's what has been presented for the Court's consideration today.

THE COURT: Yeah. Do you want to look at 1740 or not? I -- I'm just -- I'm making that available if you wish but not if you don't wish.

MR. JIMENEZ: So Your Honor, I will say yes. We can look at that today, but I think it will be important -- I think

it was stated earlier that the declaration is going to be supplemented or amended. I think it would be important that, when that happens, information regarding the opt-outs be included in that amended declaration.

THE COURT: Fair enough. For the purpose of today's hearing, is there any objection by any party for the admission of 1740 solely for the question of opt-outs and not for any other purpose?

Okay. Given that there are no objections, I am going to admit 1740 solely for the purpose of determining the opt-outs.

(Exhibit 1740 admitted into evidence for limited purpose)

THE COURT: Let me get this shown up on the screen, except that that means you all can't see it in the courtroom. Well, yes, you can. Hold on. All right.

Is that helpful?

(Pause)

THE WITNESS: I believe that is it, Your Honor.

THE COURT: All right. Go ahead, please.

MR. JIMENEZ: Thanks, Your Honor.

BY MR. JIMENEZ:

Q Mr. Martin, so in Docket Number 1740, we see an Exhibit C that purports to contain a summary of the claimants that opted out. Is that correct?

A That's correct.

Q Okay. Have the opt-outs or the valuation of the opt-outs -- so this document was filed with the Court on May 7, 2024. So my question is, has this opt-out tabulation changed since May 7 of 2024?

A It has not.

Q I couldn't hear your answer. I'm sorry?

A No, sir. It has -- it has not.

Q Okay. You have not -- Verita has not received any additional opt-outs after May 7, 2024?

A We have not, since we only re-solicited the classes of Class 4A and 6A. So the new opt-outs will be reflected on the final tabulation declaration filed at a later date.

Q Is there in -- either in this summary on Docket 1740 or the one at Docket 2472, have you tabulated any returned ballots or non-voting -- non-voting forms?

A I'm sorry. Mr. Jimenez, you (indiscernible).

Q Yes. And what I mean -- have you received any returned ballots or non-voting forms? And what I mean, "returned," that they were not deliverable and, you know, they were not received by that claimant, and they were returned to you?

A Yes. There were undeliverables, sir.

Q Where can we find those?

A We would have to run an undeliverable report to indicate -- there are certain opt-out forms that were not delivered as -- returned undelivered by the USPS.

Q Okay.
A The undeliverables were not included in our declaration.
Q Okay. So those are not -- those have not been tabulated yet or accounted for?
A Well, if the -- it's -- if the mail was not deliverable, they could not have submitted an opt-out. So no, they were not tabulated.
Q And let me clarify my question. My question is, if you have, in any way or form, counted those forms that you know for a fact were not deliverable --
A I'm not sure how -- how to count --
Q -- that were returned to you as undeliverable?
A How can we count a form that was -- that was sent out undeliverable?
Q If they were returned to you as undeliverable?
A Right. So then we would not have an address for that creditor. How -- how would we have an opt-out form?
Q So my question is, have you counted those forms or ballots that were returned as undeliverable?
A No. We -- we do not tabulate them. We can run a report of undeliverable mail for classes that are eligible for opt-out.
Q Okay. And that report was not included in your declaration?
A No, it was not.

MR. JIMENEZ: That is all the questions I have, Your Honor. Thank you.

THE COURT: Thank you.

Does any other party have any cross-examination for Mr. Martin? Is there any redirect by the debtor of Mr. Martin?

Mr. Martin, thank you, sir.

THE WITNESS: Thank you, Your Honor.

(Witness excused)

THE COURT: All right.

MR. SCHAK: The last piece of evidence, Your Honor, I should have introduced either in connection with Mr. Cejka's declaration. It is the liquidation analysis that is attached as Exhibit C to the Disclosure Statement and can be found at Docket Number 2083.

THE COURT: Is there any objection to the admission of the liquidation analysis filed as Exhibit C to 4 -- to 2083?

MR. ROSENBAUM: No objection, Your Honor, but with the reservation of rights that I engaged in, the Court attested, and the parties accepted earlier in these proceedings.

THE COURT: Thank you. Any other objections? So subject to the procedures of the plan, if the plan is confirmed, for what might happen on a remand, we're admitting 2083-4, which is Exhibit C to the Disclosure Statement.

(Exhibit 2083-4 admitted into evidence)

MR. SCHAK: Thank you, Your Honor. That concludes our presentation of the evidence.

THE COURT: Thank you.

MR. SCHAK: There may be other parties, including the UCC, who may have evidence, and I'll cede the podium.

THE COURT: All right. Mr. Marinuzzi?

MR. MARINUZZI: Good morning again, Your Honor.

THE COURT: Morning.

MR. MARINUZZI: We do have some evidence we'd like to put in in connection with the Committee's settlement, and that would be the Declaration of Joseph Denham of Piper Sandler, who I believe is available online.

THE COURT: Mr. Denham, would you press "five star" for me one time on your phone?

MR. MARINUZZI: Your Honor, early this morning, we filed a statement in support of the plan settlement, and that was Docket 2480. And next to that, as 2480-1, is the Declaration of Joe Denham, which we would like to offer in support of the settlement.

THE COURT: Mr. Denham, good morning.

MR. DENHAM: Good morning, Your Honor.

THE COURT: Mr. Denham, would you raise your right hand, please?

JOSEPH DENHAM, COMMITTEE'S WITNESS, SWORN

THE COURT: Thank you. So give me just a minute,

Mr. Denham.

Is there any objection to the admission of 2480-1, which is the Declaration of Joseph Denham filed by the Committee?

MR. ROSENBAUM: Your Honor, no objection, but again, subject to the reservation of rights that the Court accepted and the parties agreed upon as reflected in the plan and the record today.

THE COURT: Thank you, sir. I hadn't read this, so give me just a minute to read it.

(Pause)

THE COURT: All right. Given the absence of any objections on the reservation of rights, we're admitting Mr. Denham's Declaration that was filed at 2480-1, subject to cross-examination.

(Exhibit 2480-1 admitted into evidence)

THE COURT: Is there any party that has any cross-examination for Mr. Denham?

MR. ROSENBAUM: No cross-examination, but again, Your Honor, subject to reservation of rights.

THE COURT: Thank you. All right.

Mr. Denham, thank you for coming this morning. Your declaration has been admitted, and there is no cross-examination. Thank you, sir.

MR. DENHAM: Thank you, Your Honor.

(Witness excused)

MR. MARINUZZI: Thank you, Your Honor. That concludes the evidence in this case.

THE COURT: Thank you. Any other evidence in support of confirmation of the plan? Subject to the reservation contained in the plan with respect to what would occur if we confirm and the case is later remanded, is there any party that wishes to introduce any evidence in opposition to confirmation of the plan?

All right. I find the evidentiary record is closed. So I want to now go to deal with the matters to which an objection has been filed that the debtor believes has been resolved, and then we'll go to unresolved matters.

MR. DUNNE: I think, actually, Mr. Schaible had mentioned that he wanted to say a few words in support of the plan. I told him that I thought the best time would be right after evidence, but it's Your Honor's courtroom, so whatever you'd like to do.

THE COURT: It is my courtroom, but I'll let Mr. Schaible do whatever he wants to do.

Mr. Schaible?

MR. DUNNE: Your Honor, I'm glad we got that on the record.

MR. SCHAIBLE: Your Honor, again, for the record, Damian Schaible, Davis Polk, on behalf of the Pimco and Silver

Point noteholders. I'll be brief. I just wanted to clarify a couple of things in the complicated plan that we've put together. But let me start by thanking Your Honor and thanking this Court and thanking Judge Shannon for the incredible work that everyone has put together.

Your Honor's status conferences were scary when they were noticed on the docket, but they helped people come together, and so we greatly appreciate all of that and the time you gave us. We also appreciate the unbelievable amounts of time Judge Shannon gave us, including literally typing emails from the campfire on a Boy Scout camping trip on a Friday night. So we greatly appreciate everything that he did.

Your Honor, I -- Mr. Leblanc walked through the plan construct, and I'm not going to I'm not going to belabor those points, but to state the obvious, the construct that we've painstakingly put together over the past many, many months is bespoke, at the very least. The concept of a debtor coming out of bankruptcy and giving effect to a series of complicated rulings after a year-long litigation, but making sure that those rulings and the effect of those rulings and the capital structure the debtors are emerging with are all effectively subject to appellate rights, is not something that people do every day.

And so it was a complicated road, but we believe we've reached a careful balance where all parties understand

what we're all agreeing to and parties' rights are preserved to the extent they need to be. And so frankly I'm, I don't know if you can call it proud, but of having been part of working together with the Kobre and Kim and the Fried Frank groups and the '24 and '26 noteholders incredibly well, and all the parties, including the debtors, to be able to get to something that can get this company out of bankruptcy, which is first and foremost of importance so that the employees can continue to do their job and the business cannot -- no longer be impacted by the shadow of this bankruptcy. So we're gratified for that.

Your Honor, two points, just to make sure that we -- that Your Honor is kind of, you know, focused on and aware of. And so Your Honor, you'll remember that I filed a motion seeking to compel mediation a number of months ago, maybe the first of those in history that wasn't immediately overruled. Your Honor was kind enough to take it under advisement and let me continue to fight another day. I think it's still pending, which is great. I take great comfort in that.

But when we did that, Your Honor, what we said was we wanted to mediate two things. We wanted to mediate global resolution if it could be reached. Unfortunately, based on the many, many, many months of conversations prior to that, I was not sure that global resolution was going to be able to be reached. And in the absence of that, we were focused on having the parties mediate on what we called Plan B, which was what we

ended up with today through quite a lot of work.

And that Plan B, from our client's perspective, there is a lot that they gave for that plan. But what they were getting for that plan was to have their appellate rights preserved, and not just preserved in name but preserved in substance, in reality, that no party -- none of the parties here today, none of the parties that may be buying debt or buying equity going forward, no subsequent transferees -- no one could argue that our appellate rights were not fully preserved or that somehow this plan, in coming out of bankruptcy, had mooted any anyone's appellate rights, either technically under the law or in substance by not having an available remedy.

And so Your Honor, if you -- as you read through the plan, I'm sure you saw quite a lot of mechanics. The idea there was to make clear that there was at least one effective remedy that Your Honor or an appellate court -- and we'll beg the appellate court to do it and not send it back to Your Honor -- could use to the extent that any portion of your decision was addressed differently and that the capital structure should look different. And that is on both sides. It's both ways. It's not a one-way ratchet.

But if, in fact, Your Honor's ruling is adjusted on appeal or by settlement, effectively, then all parties would know that there is at least one available remedy that would be

available to this Court or an appellate court, and that remedy is turnover. The securities that are going to be issued are going to be labeled. The party is going to be -- the debtors are going to be maintaining records and maintaining, you know, situations. Purchasers have to sign on to agreements that they, you know, agree to take the security subject to turnover.

Mr. Rosenbaum will tell you, and we don't disagree, that there may be other remedies and all rights are preserved for arguing that there may be other remedies that could be used in lieu of turnover. And we would have rights, and everyone would have rights, to figure out what the right remedy is, but no one would argue that turnover is not available, and no one would argue that turnover could not be done.

And so the whole idea of the plan was to set up a construct where a turnover would be both technically and substantively available. And so subsequent purchasers will be well on notice that any equity, any securities, any debt that they might buy, would -- for -- on all sides, may be subject to being adjusted or subject to turnover to the extent that we need to adjust the capital structure subsequent to appeal or settlement.

The second point, we -- we've really already covered, Your Honor, but that is debtors' releases in the plan. Your Honor has now introduced -- evidence has been introduced of the -- what we view as rather significant contributions that our

debtor -- that our clients have made in connection with the plan as part of a finely negotiated settlement with the debtors and with the UCC for estate cause of action and for release of estate cause of action against our clients.

I won't belabor it, and it's all in the record, but, you know, recoveries to general unsecured creditors that are coming only out of our clients' distributions is part of the consideration that has been paid. Waivers of various rights, deficiency claims, make-whole claims, indemnification claims, 507(b) claims, all of those things, again, are consideration that our clients are providing as part of this settlement. The financing of the cases through the DIP notes, the -- Your Honor -- as Your Honor well knows, continued extension of the deadlines and the maturities of the DIP notes throughout the case is, again, consideration provided.

Exit financing for the debtors by not requiring that the debtors -- the DIP be paid in full but instead be rolled into exit financing, again, consideration being provided. And very importantly, agreements to pay a number of different parties' fees and expenses effectively out of the estate, an agreement to do that and to not challenge that was, again, value that was provided. And then funding additional amounts, as Your Honor heard today, in the exit notes that are being funded upon bankruptcy.

There's other things that are all in the record. But

today, Mr. Rosenbaum's clients have preserved limited rights, as you heard, on potential remand to argue anew that, under 9019, those amounts were not sufficient to -- or were not sufficient to meet the 9019 standard for release of claims in cause of action. Again, just relating to my clients, that those are preserved in a limited way as set forth in the plan.

But today, Your Honor is considering whether, based on the record, those settlements and those payments are sufficient to release those causes of action because, obviously, without release of those causes of action, we effectively don't have a client. So with that, Your Honor, I won't go into the other aspects, but it's just, again, a bank's --

THE COURT: So let me just be clear that I don't believe that any party other than Mr. Rosenbaum's client has an objection to those releases. The evidentiary record is now closed. And in my view, the evidentiary record, which does not include the record of why it's not a good deal because Mr. Rosenbaum is reserving that right for a later day, so I have to rule on the evidentiary record before me. The evidentiary record before me supports the releases.

MR. SCHAIBLE: All right. Thank you, Your Honor. Appreciate it.

THE COURT: Thank you. Anyone else wish to make a --

MR. ROSENBAUM: Your Honor --

THE COURT: -- a statement in support of or an opposition to confirmation, other than Mr. Jimenez, where we're going to hear full argument about that unresolved matter.

Mr. Rosenbaum?

MR. ROSENBAUM: Good morning, again, Your Honor. I was hoping to get through today without having to disagree with Mr. Schaible, but I do have to disagree with him in some respects. But I do not disagree with him on the pleasure that I think everyone has in being this close to the -- to confirmation, subject to everything that we discussed. But neither of us can or should attempt to summarize or restate what is in the plan for (indiscernible) negotiation. But there are a couple of points that I just want to make.

First of all, we are highly confident that there will be no remand and there will be no reversal. The idea of a remedy that is reserved for in the plan of -- likely, again, in our view, will never come to pass. But if it were to come to pass, the plan itself is what a potential (indiscernible) order may or may not look like. And I don't disagree that turnover is mentioned, but I won't comment further other than agreeing with Mr. -- one of Mr. Schaible's statements that we otherwise do not agree to any such remedies by virtue of (indiscernible).

THE COURT: So I'm going to make this easier. Nothing that you say today about what occurs on remand and nothing that he says today about what occurs on remand is

evidence. I won't consider it. I'm going to ignore you all.

MR. ROSENBAUM: I -- then I have nothing further other than I do feel compelled to just say one thing, Your Honor, just to make sure -- we appreciate (indiscernible) the Court what this preservation of rights is in Article 4 that I mentioned earlier, and this 9019 issue.

This plan reflects the (indiscernible) group receiving 24 percent of the equity, which is predicated on Your Honor's ruling and the declarations that were the results of the adversarial proceeding. If -- and I'll just (indiscernible). If there were ever an event that a court found that there was a breach of the agreement as Your Honor found (indiscernible), but somehow our client didn't possess that direct remedy to obtain that 24 percent of the equity. But somehow, that revenue was property of the state, it is in that circumstance that we would be on remand and dealing with this de novo issue.

As I said, I don't expect to come -- it to come to pass. Your Honor has already said that nothing that is (indiscernible) there -- nothing that was said is evidence. But I just want to make sure I made that statement on the record, (indiscernible).

THE COURT: Thank you. I'll ignore you. All right.

Mr. Leblanc? Or -- I'm sorry. Mr. Schak?

MR. SCHAK: Thank you, Your Honor. Benjamin Schak,

for the record. I think that brings us to the one contentious objection that we do not expect to be resolved in relation to mediation, with the exception, I'll say, of -- there are quite a few objections to particular contract assumptions and cures, which are on the docket, which we're not planning to treat today. We're planning to take the time between confirmation or emergence to resolve those consensually and, if necessary, to come back to the Court. But we think all those are going to be resolvable, and the plan contemplates that they can be adjourned.

THE COURT: And the parties that have filed those objections, have they consented to a confirmation that reserves the amount of the cures and appropriateness of the cures until later?

MR. SCHAK: Well, we have sent messages to them. We haven't received response in all instances. If anyone has an objection to this, we're happy to work with them sooner rather than later.

THE COURT: So let me understand. Right now, is there anyone here at the hearing with respect to any objection other than one filed by the United States Trustee that wishes to be certain it is resolved pre-confirmation as opposed to placing into the confirmation order a reservation that the matters will be resolved post-confirmation? If so, please press "five star" on your phone. No one is doing that.

Are there any of the parties who are active in the case who believe it's inappropriate to postpone the cure issues until later? All right. We will postpone with respect to all of the cure objections in the confirmation order. If we confirm to a later date -- and I will ask you to propose a date. When do you want to do it in? Maybe I'll give you a date right now, so you can put it in the order. Do you want to do it in January?

MR. SCHAK: I'd rather do it in January than December, Your Honor.

THE COURT: By when in January do you anticipate having all of the cure matters either resolved or teed up for hearing, or do you want to start with a status conference in January for the ones that are resolved and then set evidentiary for later? You tell me what you want to do and I'll get you some dates.

MR. SCHAK: I think, Your Honor, a mid-January status conference would make a lot of sense. I would not anticipate that we would be emerging before then. So if we could do a mid-January status conference and then see where we are from there --

THE COURT: Any party have any problem with having a status conference on all reserved cure objections on January 14th at 10:00 in the morning, Central?

All right. Mr. Jackson, if you would go ahead and

reserve from ten o'clock until noon for a status conference in Wesco on the 14th, and we will do that. There is no objection to doing it that way.

So how do you want to proceed, then, on the remaining objection, the one by the U.S. Trustee?

MR. SCHAK: Your Honor, these are purely legal issues. I would be happy to deliver a brief argument restatement and then perhaps hear it from Mr. Jimenez.

THE COURT: Mr. Jimenez, do you want to go first or second? What do you want to do?

MR. JIMENEZ: I -- I'll go second, Your Honor. Thank you. And I apologize, I think you have to lock the video connection. I don't know if you can see me.

THE COURT: You're frozen on my screen, maybe forever. So if you want me to disconnect you and let you reconnect, we can do that. But I definitely want to have that working before we take this up. So why don't I disconnect you and then you can connect right back?

MR. JIMENEZ: Yeah. I will disconnect.

THE COURT: Okay. You're disconnected. Let's wait until he's on so that --

MR. SCHAK: Yes, sir.

THE COURT: I'm going to just close a few of the lines of people that are on, but aren't intending to speak right now.

Mr. Jimenez, does it look like it's working, or do you want me to take a short break? Oh, wait. You just got back into -- there we are.

MR. JIMENEZ: Okay. Can you hear me, Your Honor?

THE COURT: I can. And you're not frozen. So welcome back.

MR. JIMENEZ: Okay. Thank you, Your Honor.

THE COURT: All right.

Mr. Schak?

MR. SCHAK: Thank you, Your Honor. Again, Benjamin Schak, for the record. Your Honor, we have been working through the U.S. Trustee's Office, filed two different objections on the record, and we -- glad to say that we've been able to resolve most of those consensually. Very much appreciate the efforts of Mr. Jimenez and his colleague, Mr. Ruff, to do that.

As always, those include their objection regarding the temporal limitation of the exculpation provision. They are -- have accepted the language that's in the plan now, and regarding the waiver of the case, they stated a confirmation order.

As I just indicated a minute ago, Your Honor, there's no way we're going to be emerging within 14 days of confirmation. So that's one -- I don't think we could have advocated for a waiver of that state, and we were happy to give

that up.

There are, however, Your Honor, two issues that remain unresolved where we simply don't see eye to eye with the Office of the United States Trustee. And I think we will need a resolution from the Court. One of those, Your Honor, is the issue of exculpation of the independent director in this case, an issue that I know Your Honor is familiar with the Instant Brands case, which is currently under advisement. And the other issue is the objection just filed last week from U.S. Trustee regarding the opt-out process for the consensual third-party notices under the claim.

Your Honor, I'm not going to say a whole lot about the exculpation issue, because I know it's been fully briefed and argued very recently, Your Honor, in the Instant Brands case. And candidly, I don't think there's much I can say that would distinguish this case from that case, or that would add to the arguments that have been canvased in that case.

I'll just say we agree with the debtors in that case, that the reasoning of the 5th Circuit in Highland does not hinge on any sort of special mechanism that was put in place in Judge Jernigan's governance order in Highland. We think their reasoning refers to Section 11078 for the point that a debtor in possession always has substantially the same duties as a Chapter 11 Trustee. And therefore, it makes sense to extend the circuit's precedent regarding exculpations of a Chapter 11

Trustee to the board. In particular, to the independent board of direct --

THE COURT: So let me see the language. And I want to understand, in this case, what is the difference between the -- I always forget which section it is, but is it the exculpation that is built into the Code for the direction and planning and all of that concerning the plan? Let me just find that, or you can quote it to me.

MR. SCHAK: Yeah.

MR. JIMENEZ: Are you referring to 1125(e), Your Honor?

THE COURT: I am. So I want to know, what is the difference between 1125(e), which I don't think is subject to reasonable dispute, that that would include the independent director?

And then I want to compare that to the exculpation that you're seeking. And I want to understand, substantively, what issues are covered by your exculpation that aren't already covered by 1126(e)? So can I see your exculpation provision?

MR. SCHAK: Yes, Your Honor. I'll pull it up.

THE COURT: It's currently modified. I know you may have modified it with the U.S. Trustee a little bit.

MR. SCHAK: Yes, Your Honor. It's filed at Article 8F of the plan. The -- finding it here in my binder.

THE COURT: Is this part of 2473, which is the plan

you filed yesterday?

MR. SCHAK: Yes, Your Honor. Article 8, F as in Frank.

THE COURT: Okay. So I am looking at 8F.

MR. SCHAK: Your Honor, 1125(e), as I read that section, Your Honor, is limited to the post-petition disclosure and solicitation of the Chapter 11 plan. So it's the things that go into the disclosure statement, of what gets told to creditors about the plan, perhaps even the formulation of the plan.

What I don't think it covers is some of the other activities in the bankruptcy case, such as the operational restructuring that the debtors have done here. I think, Your Honor, a typical exculpation plan provision in this district, including ours, does go beyond the solicitation-oriented text of 1125(e), and goes to other activities during the course of the bankruptcy case.

It is limited, Your Honor, to the temporal period after the petition date. So this is not an exculpation that tries to reach back to pre-petition activities. It certainly doesn't cover anything whatsoever having to do with the 2022 up-tier transactions, but it does go beyond the --

THE COURT: I mean, Mr. Bartels, as I recall, was retained three to four weeks before those transactions, right?

MR. SCHAK: I --

THE COURT: For the 2022 transactions.

MR. SCHAK: I think it was more than that, Your Honor, but it was before those transactions.

THE COURT: Okay. So under 1129(e), and I want Mr. Jimenez to participate in this conversation, I think it's certainly broader than the issuance of the security. Someone that works in good faith on the formulation of the plan that is later solicited, for example, would also be covered, I think, by 1126(e).

But you're telling me that there are some operational kinds of decisions during -- at post-petition operational decisions that you want exculpation for -- well, what petition operational decisions did Mr. Bartels participate in post-petition?

MR. SCHAK: Your Honor, I'll give one example. When the board approves a key employer incentive program, for instance, for the management team of the company and for the lower-level employees, that's the sort of operational decision, or when the debtors decide to reject a contract or to approve a -- an amendment to a contract, those are the sort of operational --

THE COURT: So let me divide this up a little bit, and I want to see if Mr. Jimenez agrees or disagrees with this. I think that an individual that serves as a director within an office, whether independent or not, that takes action that is

approved by the Court, so they submit something for court approval, and we approve it, cannot be sued for that, because we have approved it.

If we didn't approve it, there can't be any damage from it, because we didn't approve it. So I -- if there's a disagreement about that, that's fine. But I think I'm interested in operational decisions that we didn't approve that we want to protect somebody for, because I can't imagine that -- I do want to hear from Mr. Jimenez, because maybe I'm just imagining it wrong, that if a 9019 is submitted, and we approve it on notice, if a key employee retention program is submitted, and we approve it on notice that anyone thinks that anybody is liable for that.

Am I misstating anything, Mr. Jimenez? Because there are other things that aren't included in that kind of a list. I got it. You know, maybe some other operational decisions, but in terms of ones that get court approval, which are what Mr. Schak is identifying, is there a dispute that people are protected by getting the Court order?

MR. JIMENEZ: So I agree with the Court's statement about the effect that a court order will have, Your Honor.

THE COURT: So I want to hear, then, assuming he agrees with that, because we can fix the exculpation to include you're exculpated from anything that was approved by the Court, which -- for which there is no dispute, because I don't want a

frivolous lawsuit brought. Mr. Jimenez doesn't normally bring frivolous lawsuits. In this case, he's saying upfront, he agrees with my statement. That may cover everything you need. Is there something else that we're worried about?

MR. SCHAK: I think it comes close, Your Honor. But the board does do things during a bankruptcy case that do not rise to the surface of the Court. So one example I can think of is, we touched on in the initial presentation today that there's been an internal organizational restructuring, which has saved the company a bundle of money. There are different people now at the executive level with different lines of responsibility that we think is a vast improvement on what the company had during -- coming into the case.

THE COURT: But aren't we approving all of that at confirmation?

MR. SCHAK: I --

THE COURT: We're approving the whole reorganization, which includes all the new people and all the new structure, right?

MR. SCHAK: I don't think there is anything black and white in the confirmation order that says, for instance, the decision of the Board to divide hardware and chemicals up into separate business lines was a good decision. I think it was a good decision.

THE COURT: Well, I think we ought to put into the

confirmation order -- I mean, it was an essential part of the opening presentation, which came in without objection -- that the reorganization of the business as described in the opening statement is ratified by the Court. And then it'll be covered under the things that are covered. I really want -- I -- what I'm -- if I were Mr. Jimenez, let me tell you what I'd be worried about. And I think that this is what he probably is worried about from listening to him -- something he doesn't know about.

So there is some secret decision that got made, not part of the plan, not part of the public restructuring of the company, not something we've approved, but something that occurred that hasn't been disclosed. Him giving exculpation of that would make him nervous, I think. And if we can find a way to get this done, I don't know that we're going to have a problem because I don't know there's a principal disagreement.

I'm assuming that you agree that, if there is some -- and maybe you don't agree with this. Let -- let's assume that Mr. Bartels has secretly approved something and didn't disclose it to you or to the Court, but it nevertheless resulted in an outflow of $1 million of company funds because he, as a director, approved it and didn't tell you about it. I don't think Mr. Bartels would've done that, but let's -- I -- because I'm not -- I -- I'm just saying that is the kind of thing Mr. Jimenez is worried about.

Do you need protection for those secret kind of activities?

MR. SCHAK: I don't think we're trying to get protection for, you know, gross negligence or willful misconduct. And those are the --

THE COURT: Well, let's assume that, you know, he thought it was a good business decision to pay somebody $1 million and didn't disclose it, and it should have been disclosed.

MR. SCHAK: I think, if it violated the Bankruptcy Code and violated 363(b) in the sense that it should have come before the Court, I don't think our exculpation provision, as drafted, would protect him whatsoever.

THE COURT: Show me where it would not protect him. Because this only carves out gross negligence, willful misconduct, or actual fraud. Not talking about that. I -- Mr. Bartels would not have done any of those three things. He is not going to have any problem that carve-out. What if he approved something that, like you said, ordinarily should get 363 approval but didn't? Why is he being exculpated for that is, I think -- this is a very narrow range of stuff we're talking about, right?

MR. SCHAK: It is a very narrow range. And I admit I don't think I've ever thought before of the hypo that a director would do such a thing. I do think it would be

reasonable to carve out matters undertaken in violation of the Bankruptcy Code or in -- you know, in violation of prevailing law. Anything that's flatly unlawful I don't think we're --

THE COURT: Would you include in that something for which Court approval would ordinarily be required but wasn't sought?

MR. SCHAK: That makes sense to me, Your Honor.

THE COURT: Mr. Jimenez, if we change the exculpation and deal with the fact that, if we've approved something by an order, there is no liability, but if something should have had an order but wasn't presented to the Court, it gets added to the list of exclusions from the exculpation, is there anything else that you're worried about other than that?

MR. JIMENEZ: So Your Honor, I think what -- the language that the Court has suggested will be very helpful in providing guidance and clarification of what is exculpated or not. I think the only remaining matter is -- it goes directly to the definition of "exculpated parties." The definition of "exculpated parties" as drafted in this plan includes the debtor, the Committee and its members, and the -- and any independent director of any of the debtors. That, Your Honor, is what I submit that -- it is not allowed under the Fifth Circuit precedent of Highland Capital.

I have a different view, from Highland Capital, from what has been suggested by the debtors. Highland Capital

presented extreme circumstances under which the Court was forced to session a relief to take care of governance issues that occurred post-petition. And in that case, you had circumstances that justified appointing independent directors by the Court that would serve as bankruptcy trustees.

That is not the situation we have here, Your Honor. Here, we have a debtor in possession that is fulfilling its fiduciary duties as debtor in possession. We don't have any governance issues, any governance problems. Therefore, there is no legal or factual justification to provide a -- an exculpation to independent directors that is separate from the exculpation that a debtor in possession is entitled to receive. And --

THE COURT: So let me ask you this because I -- look, I -- this is a repetitive problem, and I would -- really would like to explore a good solution to it. If we were to eliminate the independent director and the other directors, if they're included, from the exculpation provision, but add a provision that says protection of parties for court-approved matters -- that says what we've said, which is parties are protected for any matter -- from any lawsuit by any person, from any matter for which Court approval was required and sought, but are not protected from matters for which Court approval was required and not sought, and are also protected under applicable non-bankruptcy law from their actions taken as decision-makers so

long as such actions were not the result of gross negligence, willful misconduct, or actual fraud because they're all protected for that, anyway, under state law. Does that solve everybody's problem?

MR. JIMENEZ: So as to, first, the striking out independent directors? Yes. And to the other part of the Court's suggestion, I think that sounds very reasonable, Your Honor. However, I would like the opportunity to consult with my client before giving the Court an answer. I just don't want to -- make sure that I don't get ahead of myself.

THE COURT: I also don't want Mr. Schak to get ahead of himself.

MR. SCHAK: I don't want to get ahead of myself, either, Your Honor, but what Your Honor laid out sounds very constructive and very sensible.

THE COURT: But I'm not sure it should be different for an independent director than a regular director, right?

MR. SCHAK: I -- I'm not sure either. And I know we only put in the plan a request to exculpate the independent director. But --

THE COURT: So this is not going to be an exculpation in the traditional sense that the Fifth Circuit was addressing. It's going to just be a new thing that really is a declaration of the law.

MR. SCHAK: Yeah.

THE COURT: So that people can feel protected by that because it's important that people be able -- it's very important that both directors and independent directors and officers know that they have a duty to go to court. And if they go to court and they get approval for something, they don't get sued for it later because people are making hard decisions in bankruptcy cases, whether they're independent or not independent.

And I think this may be something for you to think about, and I would like for you, and I'd like for Mr. Jimenez, to think about it, and maybe we'll come back this afternoon and hear whether or not that kind of thing works. Does that -- I'm looking over at a couple partners of yours over there.

Does -- is there any heartburn from thinking about it at this time?

UNIDENTIFIED: No. No heartburn, Your Honor. But what I might suggest is why -- could we use Wednesday's hearing to tack this on at the end? That way, Mr. Jimenez has time to consult with his client, and we can --

THE COURT: Well, I'm hoping he can consult with him today because if -- let's assume there is not an agreement about this. Then, we can't proceed to -- in the manner that everybody is expecting on Wednesday. I'd like to get it resolved today, if -- can you all decide today?

UNIDENTIFIED: We can, Your Honor. Unless there's --

THE COURT: Mr. Jimenez, can you decide by sometime later this afternoon?

MR. JIMENEZ: I think so, Your Honor. As soon as we're done with this hearing, I will consult with my client and do my best to have an answer today.

THE COURT: So why don't we come back for this question at four o'clock today, unless that causes calendaring problems for people?

MR. SCHAK: That is fine for me, at least, Your Honor. I'm just looking at the rest of the people.

UNIDENTIFIED: You may be by yourself.

MR. SCHAK: Okay.

THE COURT: All right. So and again, if you all can't -- if you can't get to your clients by then and can't make a decision by then, I got it. And we may have to come back another time, but I don't want to crowd Wednesday with stuff when, Wednesday, I really want to try and see if we can reach the ultimate conclusion.

So let's move to the second half, then, of the consensual or non-consensual releases, I think, is what is remaining, if that concept works for everybody.

MR. SCHAK: Thank you, Your Honor. That makes sense. So the second open objection of the U.S. Trustee, Your Honor, has to do with opt-outs as a means to obtain consent to the third-party releases under the Chapter 11 plan. And this

issue, Your Honor, was filed by the U.S. Trustee in its Supplemental Objection last Thursday, Docket 2437.

And the threshold issue that I want to raise, Your Honor, is that we do think this objection is late and simply should not be considered a threshold. This is a point that Mr. Dunne raised at the disclosure statement re-solicitation hearing a few months ago. And the point here, Your Honor, is that this op-out mechanic has actually been in our plan ever since the very first rendition of the plan was filed 13 months ago, and nothing has changed since the original objection deadline for that original plan way back in May.

The plan hasn't changed. It has had an opt-out mechanic all the -- along. And I think, most importantly, the legal doctrine surrounding this issue has not, in fact, changed. The U.S. Trustee mentions Purdue as an intervening case, but I don't think that holds water, Your Honor, because Purdue, in fact, sided with the Fifth Circuit doctrine that pre-existed Harrington v. Purdue. And the U.S. Trustee's new objection even -- it seems to concede that Purdue did not address the issue of what constitutes a consensual release.

So perhaps, Your Honor, in a different circuit, it would be appropriate to revisit this issue in light of Purdue. But here, Your Honor, we think that if it was fair game for the U.S. Trustee to file this objection before Purdue in the -- in this circuit, they should have presented in that case. And if

they would like the bankruptcy judges in this district to revisit local practice, I think it's more appropriate for them to do so in the first instance with a plan that is being filed afresh, particularly in this case where we have not gone out and re-solicited the general unsecured creditors.

THE COURT: Yeah. I -- I'm going to -- I'll cut you short. I have an independent mandatory duty to be certain that the plan is confirmable. This is a hot issue. It's not a surprise to anybody. It may be late. I don't care. I'm going to meet my independent duty and hear the argument.

They may have forfeited the argument for appeal. I'm not dealing with that. I'm dealing with my independent duty only, but I want to hear the parties' arguments about my independent duty and whether to approve this. And I don't need to cross the bridge of timeliness or untimeliness because I'm going to cover it on the same basis with respect to my independent duty.

MR. SCHAK: I think, Your Honor, it's -- it remains a pretty clear question on the merits. And Judge Lopez got it right, I think, very recently, in the Robert Shaw opinion. He pointed out that there have been hundreds of cases approving consents on an opt-out basis under the Pacific Lumber regime, which was a Fifth Circuit case holding that third-party releases must be consensual. He then went on to say Purdue did not change the law of this circuit.

So Your Honor, if opt-outs worked under Pacific Lumber and Purdue did not change Pacific Lumber, then it logically follows that the opt-out custom in this district still satisfies the consent requirement. And I think, Your Honor, that is consistent with ordinary principles of jurisprudence that, you know, the law abounds with waiver and forfeiture doctrines. The Supreme Court, for instance, has squarely held, and Your Honor touched on this at the disclosure statement hearing, that opt-out procedures are permissible under the due process clause. That is the Phillips v. Shutts case from 1985. That what is -- what is required is clear notice and then an opportunity to be heard.

THE COURT: So I -- I've read the U.S. Trustees' brief on that question. They address not the due process question in their brief, which is what we had talked about, but really that there are differences between class actions and bankruptcy cases. And they're right about that. But I do want to focus solely on the due process question for a moment.

If your client, by way of example, failed to send notice to a known creditor of this opt-out right in violation of the due process clause, you're not looking for me to ratify violations of the due process clause, right? So we could include in the confirmation order that the opt-outs are effective subject to compliance with the due process clause, right? If there -- it could just be a mistake by your client.

I'm certainly not talking about something intentional. That is not what I -- that didn't happen.

But let's say that you had a known creditor and they didn't make the list, and so they didn't get an opt-out notice. I think, under the due process clause, known creditors have to get mail, not publication notice. So if you -- if there is that kind of an error, that gets visited on you, not on the non-opt-out party, right?

MR. SCHAK: I agree with that, Your Honor. Known creditors have to get actual notice sent to the correct address. We can't send it to the wrong address if we know the right address.

THE COURT: So if, in five years, someone comes in and says, I'm not bound by this because of the due process clause, that is just something that has to be dealt with. And we can put an exception into the confirmation order that deals with that?

MR. SCHAK: That is right, Your Honor. And we would have to, at that point, dig up what we knew about their address way back when. And hopefully, the statute of limitations simply deals with a lot of those issues because that can be a difficult exercise.

THE COURT: It might. I've got three of those cases right now, and they're not fun, but we might have to be there, right?

MR. SCHAK: That is right.

THE COURT: Okay. I -- I'm going to -- Mr. Jimenez, you may or may not agree with all that. I'm -- I'll go to you separately on this. I just wanted to explore with the debtor what they're seeking. So an exception for the due process problem is acceptable to the debtors?

MR. SCHAK: We are not trying to override Amendment 5 of the Constitution, Your Honor.

THE COURT: Or 14?

MR. SCHAK: Or 14, although this is federal court.

THE COURT: I guess that is right, but these may be state law rights.

MR. SCHAK: That is true.

THE COURT: All right. Go ahead.

MR. SCHAK: So Your Honor mentioned class action, and the U.S. Trustee's objection does discuss how this is not a class action. Rule 23 does not apply. And I -- I'm not going to stand here and argue that we are trying to do something under Rule 23. What I think, though, is correct is that the bankruptcy situation is much closer in flavor to a federal class action or a state class action than it is to the U.S. Trustee's analog of an ordinary contractual transaction between private individuals.

And the reason I say that, Your Honor, is -- there are several. One is that the class action, like the

bankruptcy, is a proceeding where a mass of creditors has been brought under the jurisdiction of a single court and under the purview of a single case. The U.S. Trustee points out that class actions have lots of auxiliary protections built around them, and that is absolutely true. But I also think, Your Honor, that the bankruptcy process in the United States is one of the quintessential examples of another process where there are lots of protections for creditors.

There are statutory fiduciaries that work here at these two tables, just like there are through the class action representative in a -- in a Rule 23 case. There is a court-supervised noticing process that we undertook here at the disclosure statement hearing. And perhaps most importantly, and special to bankruptcy, is that the third-party releases under a plan could not get off the ground if we didn't have the sufficient votes from the creditor base to confirm the plan. I -- in other words, Your Honor, I don't think you could come into bankruptcy court --

THE COURT: I'm not sure I agree with that one because it would be possible. I mean, it doesn't happen in this case, but it would be possible, for example, that you have a cram down of the unsecured class of creditors where they all vote "no" but they still are bound by the releases. And so I'm not sure that I agree that the voting matters to it.

I think that the other protections you're talking

about have analogs. But the voting -- you can correct me if I'm wrong, but I think that, if we're going to establish this as sort of a follow-up, I don't want to then run into a case where, you know, all the unsecureds voted "no" but they still have an opt-out. And somebody says, "well, yeah, but that means they voted no."

MR. SCHAK: I won't belabor the point. Your Honor, I do think that, at least in bankruptcy, you need some threshold level of creditor group, maybe not within one particular class or another, and that is one collective protection for the creditor base. And I think the key difference here, between bankruptcy or class actions on one side and contract on another side, is the very practical difference between receiving a piece of junk mail in the mail and receiving a legal notice.

If someone sends me a letter on some company's letterhead saying, check this box and return it or you will hereby have bought a bunch of wheelbarrows from me, I'm just going to throw that in the trash because I throw junk mail in the trash each day. But here, Your Honor, we have legal notices that point out, are recognizable to anyone who gets it as a legal notice. And just like in a class action, Your Honor, they can choose to throw that out at their own peril, or they can choose to actually look at what the legal notice said.

And I think that is the major, major difference, or one of them, between class actions and bankruptcies and other

legal proceedings on one side and the contract example on the other side. The U.S. Trustee also picks up on this hypo from Judge Goldblatt's decision in Smallhold, which is a recent case. And I think those are worth looking at. They -- there are two hypos. One is one litigant sends a letter to the other, saying, object within 10 days or I am hereby released. Another is that Chapter 11 says, check this box or else you owe $100 to the CEO's child.

And Judge Goldblatt, I think, is correct that those are absurd. Those would never work legally. I -- but I think he is incorrect, though, and it pains me to say that because I have such admiration for Judge Goldblatt, is that those are distinguishable, in fact, from the ordinary third-party releases with an opt-out that you see in Chapter 11 plans. And I think the statutory basis, Your Honor, for that distinction is 1123(b)(6), which specifically says, "Under a plan, a debtor or a plan proponent can include any other appropriate provision not inconsistent with the applicable provisions of this title."

That provision, Your Honor, it sometimes portrayed as the last refuge of a scoundrel, what a debtor will look to when they can't find any other statutory hook. But I think it actually does a lot of work here to answer Judge Goldblatt's hypothetical. I think that, if a debtor proposed to say, check this box or you owe the CEO $100, a court would immediately recognize that that is not an appropriate provision to put in a

plan. I think any bankruptcy court, going back to the days of British bankruptcy commissioners, would recognize that you can't force someone to pay money into a bankruptcy case.

So that is why I think this is very distinguishable from Judge Goldblatt's hypos because this is a third-party release that serves the bankruptcy purpose.

THE COURT: So really, then, when you read Purdue, Purdue is -- the foundation of Purdue is that (a)(6) doesn't allow provisions inconsistent with the Code. And when, for example, they look at the asbestos provisions, it makes no sense to say that the bankruptcy courts, when Congress limited this to asbestos, could then expand it into some other -- the drug field, to have releases imposed on people that are objecting to them and that that would be, then, inconsistent with what the drafters wrote.

Is what you're proposing consistent or inconsistent with what the drafters wrote?

MR. SCHAK: I think it is consistent, Your Honor, because the asbestos provisions specifically spoke to non-consensual releases. Those are releases that can channel in formulas that apply to all creditors, whether they like it or not. I just think consensual releases, Your Honor, are categorically different. And the question that faces the Court in examining the appropriate of a -- appropriateness of a consensual release is, one, does this have anything whatsoever

to do with the case? And I think that is easily satisfied here.

And two, does this give people a fair shot, if they want to excuse themselves from the releases, to do that? And I think, Your Honor, that we, in fact -- I would even say set the gold standard here for the quality of notice. We don't just put it in a very conspicuous box. It was in the ballot with a plain English FAQ. Anyone who wanted to opt-out could have. And on the voting report from May that we put on the screen earlier, I think it was clear that dozens, if not hundreds, of creditors had --

THE COURT: $418 million of opt-outs. Yeah. That is a lot of opt-outs.

MR. SCHAK: That is correct, Your Honor. And -- but even small creditors, Your Honor, opted out. There were at least a couple of individuals on that list who, you know, were former employees of the company. Maybe they have a bone to pick. Maybe they just want to preserve their rights. And they figured it out very easily, how to opt-out of the consensual release.

THE COURT: All right. Mr. Jimenez, what is your response to that?

MR. JIMENEZ: Thank you. Thank you, Your Honor. Andrew Jimenez for the United States Trustee. First, Your Honor, I think I want to start by conveying to the Court that I

think what we are asking the Court is to make a determination on whether the opt-out procedures, applied to the facts of this case, are enough to provide consent, affirmative consent, and therefore to create a consensual release.

I don't think it is -- that the right way to interpret opt-outs is to treat them as a magic formula that will apply in each and every case. I don't think that is the case, and I don't think that is what applicable law supports. I think that the question of whether a particular opt-out mechanism applied to the circumstances of a particular case -- that has never been answered in the Fifth Circuit.

We have Fifth Circuit cases where -- have been ratified that included opt-outs. But the question of whether the opt-out mechanism used in those cases was not a question before the Court. So I don't think that particular question was addressed even though they contained that mechanism.

THE COURT: So I think, largely, I agree with you that there is a case or two, and I can't cite it to you right now, where there were opt-out releases. Someone violated the opt-out release, and the Court enforced the opt-out release. Now, that is after the fact, so it's after the confirmation order has been entered and it potentially can't be amended. But the Fifth Circuit doesn't raise any questions about the opt-out, so that is a little bit different.

Can I, though, set maybe a different framework than

I've seen argued in these cases, because I think I may not have approached all of these entirely correctly and others may not have, which is -- I want to start where I think I have to start, which is 1129.

If all of the requirements of 1129 are satisfied, then confirmation is mandatory, I think. I believe the term of art is "shall," right?

MR. SCHAK: Yes, Your Honor. And I see "shall" at 1129. Right.

THE COURT: So the issue for me has to start with, on confirmation, have all the requirements of 1129 been satisfied because, if they have, I have to confirm. And if I'm wrong about that, I want people to correct me. And if I'm right about that, I want to have sort of question one, which provision of 1129 is not being satisfied by the plan. And then we will look potentially to 1320 -- I'm sorry to 1122. But I don't even get to 1122 until I figure out where does this fit under 1129, which is mandatory. And I want to know if anybody disagrees with that.

MR. JIMENEZ: So your --

THE COURT: I'm sorry, go ahead, Mr. Jimenez.

MR. JIMENEZ: So Your Honor, I appreciate the question. And I -- and I would submit to the Court that the issue of the opt-out will fall within 1120 -- 29(a)(1). The plan -- the plan complies with applicable provisions of the

Bankruptcy Code and then 1129(3), the plan has been proposed in good faith and not by any means forbidden by law. And I think in this particular instance at the upsell, Your Honor, and we as we have brief state law, I don't think allows for silence on opt-out form to constitute affirmative consent. So in those cases I --

THE COURT: So let's -- no, let's -- I want to deal with that though, because I think that's really critical. So under 1129(a)(1), let me assume you're right that under state law, this wouldn't work. How does that not comply with the provisions of the Bankruptcy Code? I don't think it doesn't. So really, I think your argument is really 1129(a)(3), but if you have a separate argument under one, I'm missing it.

MR. JIMENEZ: You -- Your Honor, because there is no bankruptcy provision that allows for a consensual release or that the consensual release be authorized under the Bankruptcy Code, you have to look into state law to find what constitutes consent. So there is independent of the state law requirements, there is no bankruptcy provision that allows for this type of mechanism --

THE COURT: So hold on.

MR. JIMENEZ: -- for a (indiscernible) release.

THE COURT: I want to start with (a)(1), you told me they don't comply with (a)(1). How does that statement show non-compliance with (a)(1)?

MR. JIMENEZ: Because there is no provision that authorizes specifically what the debtors are attempting to do with that mechanism.

THE COURT: So it's a --

MR. JIMENEZ: And I'll make the comparison with --

THE COURT: I'm sorry. Go ahead.

MR. JIMENEZ: And I think I want to make the comparison with the asbestos provision. So the Bankruptcy Code gives you a specific statute or section of the Code for the special permission. You don't have anything similar to that for this type of release.

THE COURT: Yeah, but I want to back up for a second. You said that we have to look at this case by case to see whether the non-consensual releases fit into this case and are appropriate. I'm sorry, the consensual releases. Well, that implies that there are some consensual releases that are appropriate. So which provision of the Bankruptcy Code allows for any consensual releases? I think that has to be an 1122(a)(6), if you're correct. But you tell me, what were you referring to when you said there's sometimes it works and sometimes it doesn't work. When does it work ever? If your argument is that you can't do them in a plan.

MR. JIMENEZ: When you have affirmative consent, and an example of that --

THE COURT: And where is that -- where is that

written into the Bankruptcy Code? You're telling me it needs to affirmatively be in the Bankruptcy Code. Where does the Bankruptcy Code says if there's affirmative consent, you can have mutual releases?

MR. JIMENEZ: So it doesn't, Your Honor. It -- so my --

THE COURT: So it's an 1122(a)(6) that allows you to include some form of consensual releases. You just don't like this form, right?

MR. JIMENEZ: I -- I'm saying that this one does not satisfy the question of consent. And then -- and then that --

THE COURT: Yeah. But let's assume that what we have is the one that's perfect in your mind, which is the debtor has signed a release and the creditor has signed a release and they're both there and they both say, this is subject to confirmation of the plan. And the plan says, the release is signed by the debtor and the creditor will be enforced under the plan. So sort of your, as I understand it, ideal situation, what under the Code allows me to approve that.

MR. JIMENEZ: So I -- I'm not concerned about those, Your Honor, because those are releases with the debtor.

THE COURT: No.

MR. JIMENEZ: Our concern is with the third-party releases --

THE COURT: I -- I'm sorry. So third party -- so --

a third-party release, the debtor release includes a release of all of its officers, directors, et cetera. The creditors agreed to that. So everybody gets released under these signed mutual releases subject to Court approval. How can I approve those under your theory? What provision of the Code allows me to do that?

MR. JIMENEZ: So Your Honor, I -- again, I think my argument was that we need to look at 1129(a)(1) and (a)(3), and (a)(3) specifically deals with the state law components of what constitutes consent. (Indiscernible) --

THE COURT: I want to -- but I want to go to (a)(1)s first. What about (a)(1) isn't complied with if what we have is both parties sign these releases that release third parties, everybody signs them. Is there an (a)(1) violation?

MR. JIMENEZ: I would say no, Your Honor, because both parties are -- if you have an affirmative consent of all the parties, I think that the question is that it's clear and you have --

THE COURT: So -- no, so -- no, so what --

MR. JIMENEZ: -- you have --

THE COURT: -- no, no, no, I want to stick with this. What under the law lets me approve the example of where everybody has signed and is agreeing to it? What provision under the law? I understand you don't object to those, but we have to find a legal basis that is different between one that

has acquiescence consent versus signature consent. And you're telling me (a)(1) is violated. That means under (a)(1), the ones with signature consent complies and the ones with acquiescence consent doesn't apply. I don't understand how (a)(1) applies at all if you're telling me you can only do it sometime. I do understand your (a)(3) argument, but I want to focus on (a)(1).

MR. JIMENEZ: Yes, Your Honor. So Your Honor, I think you -- you're trying to identify a Code provision that would allow under that circumstance?

THE COURT: Yeah, because I think -- I think that's 1120 -- that is why we have in that circumstance it seems to me, it's one of the reasons why we have 1123(a)(6). So 1123(a)(6) can work. It may not work, but it can work to allow these mutual releases. And I appreciate your focus on, we got to worry about this case, but to do that, we have to agree that 1123(a)(6) could authorize this.

But let's move to (a)(3). Tell me what is -- you -- you've talked about what is -- what works under state law. That is not what (a)(3) says. It says it's been proposed in good faith and not by any means forbidden by law. What is forbidden by law with respect to a consent by acquiescence as opposed to approved by law? Those are different statements. What is forbidden by law?

MR. JIMENEZ: Well, I don't think the -- the sentence

that is contemplated in this opt-out is -- which is that silent, you know, not returning an opt-out form, not checking the opt-out box on the ballot that will -- that will be interpreted as an acceptance.

THE COURT: Yes. And where's the --

MR. JIMENEZ: I think that has --

THE COURT: -- where does the -- where does the law -- where does the law forbid that? Your argument is it's ineffective.

MR. JIMENEZ: What's that?

THE COURT: That's different than saying it's forbidden by law. What forbids it?

MR. JIMENEZ: Well, Your Honor, if it doesn't comply with the law, I think that's -- I think that's falls under the forbidden by law.

THE COURT: Why?

MR. JIMENEZ: And you cannot -- you cannot -- because, you know, the law states out the rules of what can constitute affirmative consent and state law provides us the rules of how you provide affirmative consent. So if you don't have affirmative consent under state law, you cannot get this type of consensual release, because it would not be consensual.

THE COURT: This -- I mean, I -- in what state is it forbidden for someone to seek approval by acquiescence? I understand there's states that say that will not suffice, but

in what state is it forbidden to seek it?

MR. JIMENEZ: So Your Honor, I think in our brief we addressed that, and we address it under Texas law. I think that question is -- the answer is similar under New York law as well.

THE COURT: So show me under Texas Law or New York law, where it is forbidden to seek consent by acquiescence?

MR. JIMENEZ: When you say for -- well, Your Honor, if you're asking me if there's a statute that says you shall not do this specifically --

THE COURT: That's what forbidden means.

MR. JIMENEZ: -- I don't think I can provide --

THE COURT: That's what forbidden means to me, right.

MR. JIMENEZ: I don't think --

THE COURT: Forbidden means there's a statute that says it's for forbade, right?

MR. JIMENEZ: I don't think I can provide you with that, but there is clear law of what constitutes acceptance in a contract and what does not. And I think that's what gives us the legal basis of what the debtors can do under state law and what they cannot do.

THE COURT: Yeah. So look, I want to make the distinction with Purdue and then I know I've been questioning you and I'm going to be quiet and let you just argue to me for a minute. Purdue holds that a mandatory release without more

is forbidden under the Bankruptcy Code, because the Bankruptcy Code limits that asbestos cases. That's the whole thing.

So it relies on forbidden conduct under the Bankruptcy Code. I don't know why this is forbidden conduct as opposed to conduct that -- your argument is there could be better conduct. There could be more fulsome things. There could be more enforceable things. There could be more effective things, more permitted things. I don't think that puts them into the forbidden category. And that's why I sort of started with the premise that if 1129(a) is satisfied, I don't have a choice, but to confirm. So that's the concern I've got. I'll be quiet and I'll let you deal with that or any other issue that you want to deal with.

MR. JIMENEZ: Yes. So Your Honor, thank you. And let me go back for a moment to the due process, which is something that the Court touched upon earlier. And the due process, it's fundamental for a plan and the content of the plan to have -- to bind creditors. And when we talk about due process, Your Honor, I just want to make the distinction that the one thing is when you send a legal notice in a bankruptcy proceeding and you trying to have legal effect or define what are going to be the legal relationships between debtor and its creditors. That's one thing. I think in those -- in that scenario, the legal notice can be sufficient to have an effect, but it's not the same when you're sending a legal notice that

it's going to have effect on non-debtor third parties.

And that's what we have here, Your Honor. We have non-debtor third parties that are going to be releases. And you know, the -- I think in small hold that it's discuss what is, you know, the theories of default. Whether sending a legal motive that if you don't take action or do this within certain -- with a -- within a certain specified sign, you can have these legal consequences and that that theory of default should not -- really just should not apply in the scenario of third-party releases, because the bankruptcy, the Chapter 11 plan and the bankruptcy is designed to settle plans between debtors and its creditors, not between non-debtor third parties. And I think that's an important distinction for due process.

And the way to address that, Your Honor, I think under these circumstances is to have a simple opt-in. That way I think that covers the due process concerns and there can be no question as to whether that party is agreeing to the releases. I think we don't have a clear evidentiary record for the third-party releases, Your Honor. We don't have a report of the undeliverable ballots and non-voting notices that were that were sent out. We have some information, some partial information of the opt-outs ballots that were actually received, but we don't have a complete picture of the number of creditors out there and the number of claimants that were sent out this notices and ballots with opt-outs. And how many of

them were received and how many of those were returned.

THE COURT: Right. So let's assume for a minute because I just want you to define what your argument is, that the debtor sent a notice to the last known address of an employee. And at that address, the employee had cashed a paycheck two weeks ago, but then that notice to that employee got returned to the debtor. Take that as my hypothetical. Does that meet the due process clause?

MR. JIMENEZ: I'm sorry, can you repeat the question, Your Honor?

THE COURT: Does that notice which got returned, but it was sent to the last known address, valid address, meet the due process clause?

MR. JIMENEZ: It does not, Your Honor.

THE COURT: Why not?

MR. JIMENEZ: Because there was no actual notice to the person that is going to be affected by the plan.

THE COURT: But it meets the due process clause in a class action case. How can it -- how can that exact same notice meet the due process in a class action case, but not meet the due process notice in a bankruptcy case?

MR. JIMENEZ: And as we explained in our objection that the class action, I think, is very different from the bankruptcy process and has all the kinds of safeguards that are simply not present here.

THE COURT: Yeah. I'm just -- they are different, but why is one meeting -- it's -- we're talking about the due process cause of the constitution. Sending a notice that someone doesn't get. And how can that meet the due process clause in class action, but not meet the due process clause in bankruptcy?

MR. JIMENEZ: Your Honor, I think a distinction in class action is that the members of a class in a class action are the parties that are affected by that litigation. And specifically, by the -- by what is being addressed in that litigation. In a bankruptcy, what's being addressed is the relationship between debtors and creditors. It is not relationship between third-party non-debtors. And people don't have a legal obligation to reply to those type of notices that are just dealing with third-party -- with releases of third parties, not between the debtor and the creditor.

THE COURT: Thank you. But go ahead with your argument.

MR. JIMENEZ: Your Honor, I think to summarize with respect to the opt of our position is that silence should not be interpreted as acceptance of third-party releases. I think the appropriate way to meet the due process concerns is to have an opt-in form. And again, I don't think that the full theories are proper in these particular -- our circumstances, because what is being addressed in those releases is not a

claims between debtors and creditors, but between third-party non-debtor parties.

And finally, Your Honor, as I said, I don't think we have a complete evidentiary record as to all the ballots and funds that were sent. We just have a partial picture of some of the ballots that were returned without ballots. Under those basis, Your Honor, I don't think this opt-out mechanism is confirmable under 1129(a)(3) and 1129(a)(1).

THE COURT: Mr. Jimenez, thank you. All right. I am going to approve with the one limitation that we have talked about, the third-party opt-out releases in this case. The one limitation being I'm going to require confirmation order make clear that we're not overriding the due process clause with respect to the notice requirements of what occurred. Here are the reasons why I am making that. We have jurisdiction, obviously under 28 U.S.C. Section 1334. Confirmation of a plan of which this is an essential part in this case is a core matter under 28 U.S.C. Section 157. As I read 1129 and as I believe the overwhelming case law supports, if a plan meets the requirements of 1129, confirmation is mandatory, not discretionary by the Court. The most recent pronouncement of this concept, I think by the Fifth Circuit was actually in a Chapter 13 case, which has the same language, and the Fifth Circuit, In re Diaz, 972 F.3d 713 (2020), said that the term shall with respect to confirmation leaves no discretion on the

part of the Court.

And in that particular case, they were overriding a decision that respected a Chapter 13 trustee's objection, which might have made for a better plan for the creditors, but was not required by the Code. And they said, no, once you meet the Code requirements, the Court must confirm. That means that the issue is not whether opt-in or opt-out is best. They each have their advantages and disadvantages. But whether the process, and I agree with Mr. Jimenez, the process in this case was sufficient to allow people to opt out. And I'll note that $418 million worth of creditors have opted out. This is not an unnoticed provision that sort of went out and was hidden under the radar screen. Nevertheless, even if the Code requires or allows this -- and we're going to go through whether it allows it -- the due process clause must be satisfied.

Under class action lawsuits, the due process clause is satisfied as the Supreme Court has held when you send notice to people that is consistent with the due process notice requirements. I disagree with the United States Trustee arguments that the identical notice one sent of class action suit and the other sent in a bankruptcy case would be treated differently under the due process clause. They are treated differently because of statutory issues and those statutory issues differ, which may make one enforceable and the other not enforceable, which is a separate question that we're going to

answer. But those do not arise under the due process clause. They arise under what's the Court's authority. You'll recall in the Purdue case, for example, the Supreme Court even said that the bankruptcy court could be given authority for non-consensual third-party releases.

They just hadn't been given authority for non-consensual third-party releases. I don't think it's a due process question. I am going to require due process protections and that'll be in the confirmation order. So I'm to go through for a moment, what Purdue counsels. The issue in Purdue is whether it was permissible under Section 1123 to include a release provision that released parties that did not wish to grant a release from the ability to -- or the enjoin parties in effect from being able to sue third parties, the Sackler family, by virtue of the plan and which was imposed on them, not withstanding their objections. That is a very far cry from what we have here, what the Supreme Court found was that under Section 1123, that the imposition of a non-consensual release on an objecting party could not occur because it was inconsistent with other provisions of the Code.

And in particular, one of the most important findings, I think in the Supreme Court opinion was that by including asbestos third-party release provisions under the Code that would allow for mandatory third-party releases with the proper vote. That the bankruptcy court could not write

around those provisions and make the same things apply, frankly, with even a lesser vote in non-asbestos cases. The Court held that duty of expanding non-consensual release provisions was left to Congress to amend.

All parties here, including the United States Trustee agree that a consensual release of claims is not inconsistent with other provisions of the Code. And that's the hypothetical example of, everybody signs this release, you're releasing third parties, can that be incorporated into the plan? And the conclusion is yes. So it isn't that there is anything in the Code that prohibits consensual releases. The issue is whether those consensual releases are being sought in the correct manner by having an opt-out or an opt-in provision.

The issue is whether this consensual, what I'll call release by acquiescence, somebody that doesn't check a box and return it, but a lot of people did, after full notice and a hearing works. And there is nothing in the Code that forbids it. And that is the language of 1129(a)(3). It has to not be any means by forbidden by law. Consensual releases. Consensual releases in a bankruptcy case are not forbidden by law, nor are they forbidden by state law. No one has cited to me any case that says that parties cannot do consensual releases. The sole issue here isn't whether you can do a consensual release or a non-consensual release, but whether this one is being done the right way. As counsel argues, there

are all sorts of times in the law where a Court requires people to respond. And if you don't respond, there is then a consequence of the non-response.

I mean, the easiest example is a lawsuit. A sues B. B gets served. B doesn't respond. B is ordered to pay money to A. That's what courts do. Here the obligation to opt out was sent out. It was sent out to everybody. Those that it didn't get sent to appropriately will be excluded because the due process clause. There's simply nothing forbidden or inconsistent about that. Do we need to comply with state law? There's no requirement we comply with state law. Federal law can allow for consequences as a result of default. And I don't know why we look to state law at all to try and resolve this question. I'm not convinced we should look to state law to resolve that question, because there is a consequence of not responding. Even if you do look to state law, some states might permit it, some states might not permit it. Where does that leave the bankruptcy court? I don't know. But we go back to 1129(a). I frankly am not persuaded at all by the argument, if 1129(a)(1) would be a bar towards confirmation of something that has opt-out provisions.

There is nothing non-compliant with the applicable provisions of the title. Purdue may have been non-compliant by including a consensual -- I'm sorry, a non-consensual release of a third-party claim. And I think it is, now that you can

review the Supreme Court's opinion. It simply doesn't apply to consensual.

And then the only other argument is 1129(a)(3), whether the plan has been proposed in good faith and not by any means forbidden by law. There's not really a challenge to good faith. There's a question as to whether this has been forbidden by law.

The argument is not -- that has been made, is not that it is forbidden by law, but rather that it is being done in any manner that wouldn't be enforceable if it were solely done under state law.

It's not being solely done under state law. And that is not something that is forbidden by state law. It's something that might not be enforceable under state law. Congress wrote, it has to have been forbidden, to mean that you couldn't include it in 1123.

There is no argument that this is forbidden. And I decline to expand the word forbidden to mean there might be something better or there might be an alternative or some state might have held something differently. These are non-forbidden by law, assuming that the rest of confirmation is satisfied, which we'll learn on Wednesday. I am overruling this objection and find that it does not bar confirmation. And I will approve the plan with the non-consensual release provisions.

What else do we need to cover today -- this morning,

other than coming back at four o'clock on the issue with respect to exculpation?

MR. SCHAK: Thank you, Your Honor.

THE COURT: Thank you.

MR. LEBLANC: Good afternoon, Your Honor. Good morning still, I guess. Andrew Leblanc, Milbank, on behalf of Incora. Your Honor, I think that's all we have to do today. We will obviously come back. We'll be back at least some subset of us, Mr. Doug, and I have a hearing --

THE COURT: You can do it virtually.

MR. LEBLANC: Yeah, we just have a hearing next door. So we won't be here, but Mr. Schak and others may be --

THE COURT: Oh, you're just going to be down the hall?

MR. LEBLANC: Correct.

THE COURT: Yeah. Just tell him that I've been here longer than he has. And that he can take a break.

MR. LEBLANC: Well, I'm -- I will tell him you ruled on the very same issue this morning that it's going to be one of the issues we'll be hearing. So no transcript yet available, but you can listen to the audio this evening, I think.

But, Your Honor, so -- we -- some of us will be here at 4. We'll be back Wednesday at 5 p.m. virtually. And with every hope that that brings us to a point where we can walk the

Court through the steps to get to a confirmation.

I do want to express our thanks, Your Honor, for Your Honor taking this somewhat unusual procedural step and I'll echo Mr. Dunne's comments at the beginning, thanking Judge Shannon for all his efforts, not only in the past, but what I'm sure he is about to do for the next 36 or so hours.

THE COURT: All right. Thank you. Does anybody else have anything you need to say before we conclude this morning's portion of the hearing?

MR. JIMENEZ: We've done one additional note, as Mr. Leblanc mentioned, it's clearly in the proceeding, the 24 holders have not been re-solicited so they are in that tally of opt-out. But between now and Wednesday, if Wednesday holds, they may opt in. And the point will be the -- or -- they may change their opt-out status. So I just wanted that to be clear on the record since this was part of dialogue today.

THE COURT: Yeah, I think up until we confirm, any party can change and can opt in and opt out. If somebody shows up Wednesday at 5 and says, I've thought about this, and I want to opt out, I'm going to let them opt out. These are consensual. So until we sign the order, people can go either way.

All right. We are in a recess till 4. Four o'clock hearing will be virtual, but parties will clearly be able to come into Court and participate if that's what they prefer to

do. I'm hoping that between now and then that the principle of this, which can then be included in the final confirmation order can be agreed to by both the U.S. Trustee and by the debtor.

I sort of like this solution. I think it's really more consistent with the Code than doing exculpations. And I would really hope people could think about this as a solution to sort of this nagging problem that keeps hitting us. But I think what we're talking about is probably the right thing to do. So I -- we'll leave it up to y'all as to whether you can agree to it. And if not, then we -- we'll deal with it.

We're in recess until this afternoon when we'll take up a different case. But we're in recess in this case until four o'clock. Thank you.

MR. JIMENEZ: Thank you, Your Honor.

THE COURT: Thank you.

(Recess taken at 10:38 a.m.)

(Proceedings resumed at 4:00 p.m.)

THE COURT: All right. We're going back on the record for the Wesco confirmation hearing 23-90611. I've activated Mr. Jimenez's line on the phone. If anyone else wishes to speak at this afternoon's hearing, you'll need to press 5 Star. Let's go ahead and remake though your appearances, if we could.

MR. SCHAK: Thank you, Your Honor. Benjamin Schak of

Milbank, LLP, for the debtors, for the record.

THE COURT: And Mr. Jimenez, let's go ahead and get your appearance as well.

MR. JIMENEZ: Good afternoon, Your Honor. Andrew Jimenez for the United States Trustee.

THE COURT: Thank you. So have you all been -- had a chance to talk with one another and with your clients?

MR. SCHAK: We have, Your Honor, and Your Honor, the courtroom's a little less crowded than it was before, hopefully that means everyone's resolving the governance matters over the next hour or so. I'm pleased to report on this issue that we have some progress but not total resolution.

On the due process point, Your Honor, we do have a brief language that I'd like to just read into the record that would go into the confirmation, where the language is, "For the avoidance of doubt, the third-party release shall not be binding against any releasing party that has not received notice consistent with the United States Constitution and applicable law."

THE COURT: All right. Mr. Jimenez, that works for the U.S. Trustee?

MR. JIMENEZ: That language is acceptable, Your Honor.

THE COURT: Thank you, sir. Okay.

MR. SCHAK: On the points about exculpation, Your

Honor, we're not quite there. And there are two separate points, I think, to mention. One is the temporal scope of the exculpation.

Your Honor, we walked into the hearing this morning with the understanding we have a deal. We discussed a little more and we do think we have a deal now. It is the language that the debtor has filed in the exculpation proceeding at 8F.

And also the debtors are agreeing to remove the phrase "reorganized debtors" from the definition of exculpated party. And that's, as I understand it, acceptable to both sides regarding the issue of the temporal scope of the exculpation provision.

Separately, Your Honor, there's an issue that we dwelled on this morning about what kinds of protections are available to the individuals who were responsible for managing the debtor's business during the course of the Chapter 11 cases.

And on that issue, Your Honor, I think there does remain just a little bit of a disconnect about the outcome of, and the direction that we got at this morning's hearing. We had understood, Your Honor, that there was a suggestion that we would go off and draft some language that would recognize that those individual directors benefit from protections to the extent that they're effectuating something that the Court has blessed.

So they're conducting some sort of transaction or act that it -- has been approved or authorized by an order of this Court. And also, that they would -- that they would have the usual protections available to them under state law, such as Delaware corporate law.

We, as the debtor drafted language that we thought addressed those points. I think the U.S. Trustee's Office just had a different takeaway from the hearing. And, you know, I -- I'll let Mr. Jimenez present his understanding, but I think it would be helpful, Your Honor, just to better understand the direction --

THE COURT: I think that would be helpful. For what it's worth, I asked whether parties would agree to something, I didn't direct them to do anything. And so -- but -- so I didn't declare this is the outcome this morning, but let me hear Mr. Jimenez's views on that.

MR. JIMENEZ: Thank you, Your Honor. So Your Honor, when we started the hearing this morning and we discussed the issue of exculpation, I am not sure if we neglected to update the Court on the progress that we had previously made regarding that objection.

Because prior to the hearing, the U.S. Trustee had agreed to the exculpated provision language that was included in the Second Amendment plan. The only remaining issue was what parties are included in the definition of exculpated

parties.

So it was part of our objection that "the reorganized debtor" and "the independent director" should be removed from the definition. That was the only last issue regarding this objection.

We have no objection regarding the language of the exculpation provision. It was just about refining who are the parties in the exculpated parties definition. That's it. I think that's all -- that's the only thing we brought for the Court's consideration this morning.

And I think that the only thing that needs to be resolved is the parties -- the definition of exculpated parties. I think the debtor is suggesting here that they would agree to remove "the reorganized debtor". It is -- it seems that they're not agreeing to remove "the independent director". From what I actually heard, though I thought they were going to agree to that.

The language that was proposed by the debtors, Your Honor, I -- they were not acceptable to my client. I think it -- that language was over broad. It includes many things that are really verbally not discussed. And I think goes around the limitations of Highland Capital.

I don't think that we have -- that -- the issue that we have here is very limited, Your Honor, it is just -- it has nothing to do with the exculpation provision language that we

agreed prior to the hearing.

It is only about the parties included in the definition of exculpated parties. And as we stated earlier, Highland Capital is clear about that. And that "independent director" and the "reorganized debtors" shouldn't have been included in that definition.

THE COURT: All right. I do think you all have a difference of opinion. I'm going to issue a ruling on this and put some language down which I haven't drafted yet. So we're going to do this sort of on the spot.

MR. SCHAK: If it would be helpful, Your Honor, I can send Your Honor the language we drafted?

THE COURT: I don't want to see that.

MR. SCHAK: Okay.

THE COURT: That's the opposite of what I want.

MR. SCHAK: I thought Your Honor might say that.

MR. JIMENEZ: And that's the language we have objections on, Your Honor.

THE COURT: Right. I -- let me at least start by seeing if I can draft something that makes sense here. Why don't you have a seat, this is going to take me a while and I'm just going to make you all wait.

MR. JIMENEZ: Thank you, Your Honor.

(Pause)

THE COURT: I think we're all in somewhat of an

urgent situation to get this done one way or the other and try and just deal with it.

MR. SCHAK: Your Honor, begging pardon. I can see what Your Honor is doing on the screen here, but not through the GoTo Meeting.

THE COURT: Oh, I -- I'll --

MR. SCHAK: I don't know if that was intentional.

THE COURT: Yep. It was not intentional. Let me fix that. Thank you.

MR. SCHAK: Okay.

THE COURT: I haven't typed very much yet, Mr. Jimenez, but I -- I'll show it to you right away. Apologies for this.

(Pause)

THE COURT: I would like your comment on the language. What I have done is found that the United States Trustee has objected to the inclusion of both the independent director, Mr. Bartels, as well as the reorganized debtors themselves, as exculpated parties. Under the facts of this case, I find that neither Mr. Bartels nor the reorganized debtors qualify as exculpated parties under the laws of -- under the law of the Fifth Circuit. I find that Mr. Bartels was appointed to serve as an independent director, but because his conduct did not reflect that level of independence that would be expected of an independent director, that he may not

serve as an exculpated party under Highland Capital.

But the argument that has been made and that was made this morning deals with, well, then, what should happen to somebody that acted in accordance with a court order and what should the liabilities be? And I think it is appropriate for the Court, sua sponte, to clarify what those liabilities are so that everybody knows where they stand.

So first of all, with respect to the language of 1126(e), that provides a broad level of protection written into the Bankruptcy Code having nothing to do with exculpation, other than it may cover some of the same ground as exculpation. But it was never addressed by Highland Capital, and I don't think anyone is trying to override 1126(e).

And then I find that, if someone complies with one of our court orders, it's -- they are simply protected by operation of the law for acting in conformance with a court order. And if they don't comply with a court order but do something for which a court order is required, they shouldn't be protected from liability. And finally, there's nothing about the Bankruptcy Code that should make someone lose their state law limitations on what liability is imposed for. We're not making people more liable because they're in bankruptcy court for things that are, for example, simple negligence for which a director, under most state laws, would be protected.

And so I'm finding that exculpation should not apply

but that we then lack as to what should happen in the future, and I'm going to insist on clarity, and that is the language that I am trying to draft. I want to know what the parties think of Paragraphs 1 and 2, and I want to hear that. And then I may think about this more, too. But I wanted to put out there what I'm thinking of doing.

So go ahead. Do you want to start, and then we'll go to Mr. Jimenez?

MR. SCHAK: Thank you, Your Honor. Again, Benjamin Schak, for the record. Your Honor, no issues in concept with the language that Your Honor has drafted. I think it makes a lot of sense. Just a few minor drafting comments. So if you could describe them as -- that -- we were discussing, at counsel's table, one is that some of the debtors are organized outside the United States. So it may make sense to refer to "state" or "jurisdiction" of organization.

THE COURT: I am not sure this language captures it perfectly, but you're right. I shouldn't say "state of incorporation," but I also shouldn't limit it to fraud, gross negligence, or willful misconduct. It ought to be whatever the applicable non-bankruptcy law providing those restrictions or expansions would be there.

What else do you have?

MR. SCHAK: I think that is fair, Your Honor. I think you may need a -- an end parenthesis right where the

cursor is right now.

THE COURT: All right.

MR. SCHAK: The citation, Your Honor, to 1126(e) -- I think those should be 1125(e).

THE COURT: You're right. Sorry. Thank you.

MR. SCHAK: And if, Your Honor, the order refers to a confirmation order, I think we would probably want to put this into the plan itself since, at some point, we'll be filing a -- likely to be filing another go-round of the plan.

THE COURT: That is up to you. I wouldn't --

MR. SCHAK: I -- I'm happy to just do that on our own without that going in here.

THE COURT: Yeah. I think you could do that on your own. Yeah. I don't want to order what you ought to put in a plan. I will order what goes in my proposed order.

MR. SCHAK: That is fair. We're the plan proponents, and you're the judge, Your Honor. The last comment, Your Honor, is that Mr. Bartels' name has one L. That is it.

THE COURT: Thank you.

Mr. Jimenez, what are your thoughts about this?

MR. JIMENEZ: Thank you, Your Honor. So I have a comment for Paragraph 1. The definition of "exculpated parties" refers to -- with respect to the independent directors, it refers to "any independent director of a debtor," and then, in parentheses, "including Patrick Bartels as

independent director of Wolverine Intermediate Holding." I would suggest that it be clarified that "any independent director of a debtor" should be removed from the definition.

THE COURT: Let's just see if you -- if this works better. I agree with you that I need to fix that. Is that better?

MR. JIMENEZ: Yes, Your Honor.

MR. SCHAK: Your Honor, that works for the debtors. In point of fact, Mr. Bartels is the only independent director.

THE COURT: I think, from a factual point of view, that is right. But given the language that we have in the plan, we're better off using the language from Mr. Jimenez, so.

MR. SCHAK: Agreed, Your Honor.

THE COURT: What do you have next, Mr. Jimenez?

MR. JIMENEZ: So my other observation has already been pointed out -- was about the correct citation for 1125(e). And I think those are all the comments I have.

THE COURT: Are you okay with Paragraph 2 here? Is it properly reflecting what the law to be?

MR. JIMENEZ: I am, Your Honor. I think that is the right resolution to this issue.

THE COURT: Okay. I have a comment that you all are all afraid to make, which is I think my language in this long paragraph, in Paragraph 2, is very awkward. And so I want a chance to fix it. Or maybe you all want to talk about how to

fix it. But I would like to get it better written than what I'm able to do sitting out here on the bench.

So I think I'm going to just kind of save this. Do you -- I -- I'll just ask the two of you all. Do you all want to work jointly on language, or do you want me to just clean this up and revise it? I have the concept down, I think, at this stage, so maybe I can do it, or probably my law clerks can do it better. Or if you all want to take a stab, that is fine. But I'm not going to sign this order because it's just -- we all pieced it together in 10 minutes on something very important, and it's awkward. And I want to get a better draft.

MR. JIMENEZ: Your Honor. I --

THE COURT: Mr. Jimenez?

MR. JIMENEZ: I think that you got the concept right. And I will be confident in letting the Court fix it to the standard that you think it is appropriate. But I think it would be better if it comes from the Court.

THE COURT: You okay with -- if I just take some time, I'll redraft it, and sort of, before I go to bed tonight, I'll have this entered on the docket so you can see what it says?

MR. SCHAK: Yes, Your Honor.

THE COURT: You're still going to get to object to it, but I think you would agree that I didn't do a great job here, right?

MR. SCHAK: Your Honor, I think the language is just fine. And given that we took a stab at it between the two of us earlier today and weren't able to resolve it, I think this is the clearest path to finishing this issue up.

THE COURT: Okay. I'll get it fixed. Thanks for putting up with me. I just -- I have a feeling this may be important to do not only here but elsewhere, in other cases, and I want to be sure I get the language fine-tuned a bit.

MR. SCHAK: Yes, Your Honor. And I'm sure debtors' counsel, in future cases, will transform this into several more paragraphs of legalese.

THE COURT: Please don't do that. No. Let me get it down to one shorter paragraph and see if I can get this done. All right. I think that is it for this afternoon. I believe that the only confirmation issue that is now outstanding is the issue of governance, and that is to be resolved, one hopes, and then announced at five o'clock on Wednesday.

MR. SCHAK: Knock on wood, Your Honor.

THE COURT: All right. We'll see you all then.

MR. SCHAK: Thank you, Your Honor.

THE COURT: Thank you. Thank you all for dialing in.

MR. JIMENEZ: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings concluded at 4:34 p.m.)

* * * * *

C E R T I F I C A T I O N

I, Lisa Luciano, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

LISA LUCIANO, AAERT NO. 327 DATE: December 18, 2024

ACCESS TRANSCRIPTS, LLC

EXHIBIT B

CONFIRMATION HEARING TRANSCRIPT

In re New Rite Aid, LLC, No. 25-14861 (MBK) (Bankr. D.N.J. Nov. 24, 2025)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	.	Case No. 25-14861-MBK
	.	
NEW RITE AID, LLC, et al.,	.	Clarkson S. Fisher U.S. Courthouse
	.	402 East State Street
Debtors.	.	Trenton, NJ 08608
	.	
	.	November 24, 2025
. . . . .	.	11:31 a.m.

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE MICHAEL B. KAPLAN
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES:

For the Debtors:	Cole Schotz P.C. By: FELICE R. YUDKIN, ESQ. 25 Main Street Hackensack, NJ 07602 Paul, Weiss, Rifkind, Wharton & Garrison LLP By: ALICE BELISLE EATON, ESQ. SEAN A. MITCHELL, ESQ. 1285 Avenue of the Americas New York, New York 10019
For Bank of America, N.A.:	Choate, Hall & Stewart LLP By: JONATHAN D. MARSHALL, ESQ. Two International Place Boston, MA 02110
Audio Operator:	Linda Brakel

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, New Jersey 08619
Email: jjcourt@jjcourt.com

(609) 586-2311 Fax No. (609) 587-3599

TELEPHONIC APPEARANCES (Cont'd):

For NBPIV Delran LLC:	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. By: IAN HAMELL, ESQ. One Financial Center Boston, MA 02111
For Landlord Creditors:	Allen Matkins Leck Gamble Mallory & Natsis LLP By: IVAN GOLD, ESQ. 3 Embarcadero Center, 12th Floor San Francisco, CA 94111-4074
For the U.S. Trustee:	U.S. Department of Justice Office of the U.S. Trustee BY: JEFFREY M. SPONDER, ESQ. One Newark Center, Suite 2100 Newark, NJ 07102
For Various Landlords:	Kelley Drye & Warren LLP By: ROBERT L. LEHANE, ESQ. 3 World Trade Center 175 Greenwich Street New York, NY 10007
For Various Landlords:	Stark & Stark PC BY: THOMAS S. ONDER, ESQ. 100 American Metro Boulevard Hamilton, NJ 08619
For CVS:	Foley & Lardner LLP By: GEOFFREY S. GOODMAN, ESQ. 321 North Clark St., Suite 3000 Chicago, IL 60654
For Rite Aid Sub-Trust B:	Gilbert LLP By: DANIEL I. WOLF, ESQ. 700 Pennsylvania Ave., SE Suite 400 Washington, DC 20003
For the Unsecured Creditors Committee:	Willkie Farr & Gallagher, LLP By: JESSICA GRABER, ESQ. BRETT H. MILLER, ESQ. TODD G. GOREN, ESQ. 787 Seventh Avenue New York, NY 10019

TELEPHONIC APPEARANCES (Cont'd):

For Martin C. Gordon II and Putative WARN Class:	Raisner Roupinian LLP By: JACK A. RAISNER, ESQ. 270 Madison Avenue, Suite 1801 New York, New York 10016
For McKesson Corporation:	Sidley Austin LLP By: DENNIS M. TWOMEY, ESQ. One South Dearborn Chicago, IL 60603
For Pension Benefit Guaranty Corporation:	Office of the General Counsel By: KELSEY L. OWENS, ESQ. 445 12th Street, S.W. Washington, D.C. 2004-2101
For Chubb Companies:	Duane Morris LLP By: JESSICA K. BONTEQUE, ESQ. 1540 Broadway New York, NY 10036
Southern California UFCW Unions and Drug Employers Pension Fund and Southern California Drug Benefit Fund:	McDowell Law PC By: ELLEN M. McDOWELL, ESQ. 46 West Main Street Maple Shade, NJ 08052 Adelman & Gettleman, Ltd. By: HOWARD L. ADELMAN, ESQ. 53 W. Jackson Blvd., Suite 1050 Chicago, IL 60604

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EXHIBITS:

(Proceedings commenced at 11:31 a.m.)

THE COURT: Okay. Good morning everyone.

This is Judge Kaplan. We'll be starting the hearing today with respect to the New Rite Aid, LLC, final disclosure statement and confirmation hearing.

Let me just allow people to adjust their screens.

We have one counsel here in Court. Otherwise, we have everybody appearing remotely.

As usual, to the extent you wish to be heard and I haven't called upon you, please make use of the raise-hand function.

All right. So, we had a little delay. Hopefully, the parties were able to make useful progress to where we are at this moment. Let me turn to debtor's counsel.

Good morning, Mr. Mitchell and Ms. Eaton.

MR. MITCHELL: Good morning.

MS. EATON: Your Honor, Alice Eaton with Paul Weiss.

And in a moment, I'll turn it over to my partner, Sean Mitchell, who'll be handling the hearing.

Just to report, Your Honor, our plan today is to go forward with confirmation, and we will ask you to approve confirmation today. There is an open issue on the confirmation order, specifically Paragraph 134 of the order, as among the DOJ and some of the parties. It's our --

THE COURT: Which paragraph?

MS. EATON: 134 of the confirmation order.

THE COURT: Okay.

MS. EATON: And what we expect, we have asked the parties to consider language modifying that paragraph. The parties have to discuss it with their respective clients. I don't know that that will be agreed today. I suspect that it will take the balance of today for parties to get comfortable. And what we plan to do is once the parties get comfortable, we would submit an agreed order to Your Honor for entry.

But we do, just to be clear, we expect to address all confirmation-related issues today. And if for some reason the parties can't get to agreement on the language for that particular paragraph, we will alert Your Honor as to next steps.

THE COURT: All right. Sounds somewhat promising.

Let me continue or defer to Mr. Mitchell.

MS. EATON: Thank you, Your Honor.

MR. MITCHELL: All right. Thank you. Good morning, Your Honor.

THE COURT: Good morning.

MR. MITCHELL: For the record, Sean Mitchell, Paul Weiss, on behalf of the debtors. Also joined here -- well, also joining in the virtual courtroom by Ms. Felice Yudkin, Cole Schotz, and the whole Paul Weiss team.

I'd like to take a moment to introduce a few other

individuals who are joining us in the virtual courtroom today.

The first is Mr. Marc Liebman. He's the company's chief transformation officer. We are working on his name. It's coming up as Konal Kulmani (phonetic) right now, but we will try to fix that.

THE COURT: I see him.

MR. MITCHELL: Okay.

THE COURT: That's fine.

MR. MITCHELL: And then, we are also joined by Mr. Craig Johnson from Kroll, who's our other witness today. I believe he is having some technical difficulties in terms of the video, but I do believe he is on the phone.

I believe he's working on his video, and once we move to enter his declaration into evidence, if folks need to cross-examine, we can tackle his video issues.

THE COURT: All right. We'll proceed when we get to that point.

MR. MITCHELL: Thank you, Your Honor.

So, Your Honor, we really appreciate the Court's time today. We've had a very robust weekend, productive weekend, Your Honor. And of the 20 objections, both formal and informal, received, we're down to just two today, putting aside the Department of Justice.

We're down to the pension funds as well as the U.S. Trustee. And for a sub-issue for the U.S. Trustee on the

statutory fees, we are hopeful that we can, if not by the end of this hearing, come to an arrangement as between the consultation parties and U.S. Trustee on that issue.

So, I would like to thank the professionals involved here, particularly for their professionalism to get us to this point, working through the myriad of issues that have emerged. Their conduct has been a real credit to the profession. I'd also like to thank the debtors' management team and its advisors.

So, as everyone knows, since the petition day, the debtors have accomplished a great deal in these cases. And before I get into my opening remarks, the way I propose to proceed is opening remarks, move the two declarations into evidence, and then I'd walk through a couple of resolutions, the number of resolutions that we've reached, and then we would handle the, the two remaining objections.

THE COURT: Sounds fine. Thank you.

MR. MITCHELL: Thank you, Your Honor.

So as everyone knows, since the petition date, the debtors have accomplished a ton in these cases, despite the complexity and the challenges arising out of them. Shortly after we started, the debtors implemented several robust multi-track marketing sale processes pursuant to the bidding procedures, store closing order, and lease option procedures, resulting in value-maximizing sales of substantially all of

their assets as they wound-down their retail pharmacy business.

Unfortunately, however, the cost savings resulting from the wind-down, together with the sale proceeds, did not produce sufficient assets to pay priority creditors in full at the time. So in order to formulate a value-maximizing strategy and to bring these cases to an orderly resolution, as Your Honor will recall, the debtors explored outcomes which would permit distributions to administrative claimants, notwithstanding the lack of unencumbered value in these estates. This led to the administrative claims procedures, which permitted a consensual resolution of the administrative and priority claims of certain owners.

So with the resolution of a significant number of administrative and priority claims, the debtors began exploring pathways towards an exit from these cases. Initially, this involved the debtors engaging in arm's-length and hard-fought negotiations with key stakeholders, including the DIP lenders and McKessons, and these negotiations resulted and culminated in the restructuring support agreement. Based on the restructuring transactions contemplated by the RSA, the debtors' team worked to negotiate a global settlement with the remaining stakeholders. These negotiations were conducted via a Court-supervised mediation process, and that has brought us where we are today.

Now, the debtors stand poised to confirm a plan which

contemplates the best actionable restructuring transactions available to debtors' estates, maximizes value for the benefit of all stakeholders, reflects a balanced compromise with the complex issues presented in these Chapter 11 cases, and achieves a comprehensive value-maximized resolution that winds down these estates in an orderly manner and positions the reorganized debtors with a focused footprint, sustainable cost, and capital structure.

So I'd like to address a few housekeeping issues here. So I believe the team recently filed an updated objection chart. So that should be hitting the docket and getting to Your Honor momentarily, but that reflects the resolution of 18 of the 20 objections received.

THE COURT: All right. I'll wait for it to pop up here. You can proceed.

MR. MITCHELL: Okay. Thank you, Your Honor.

With that, I'd like to move to the evidentiary portion of today.

So we have filed two declarations. The first is the declaration of Mr. Craig E. Johnson of Kroll Restructuring Administration that was filed at Docket Number 3299.

So I would like to move Mr. Johnson's declaration into evidence at this time.

THE COURT: All right.

Mr. Johnson's declaration addresses the voting

tabulation issues, correct?

MR. MITCHELL: That's correct, Your Honor.

THE COURT: All right.

Is there any counsel or party appearing who wishes to object to the admission of the declaration, Docket 3299.

(No audible response)

THE COURT: All right. Hearing and seeing no one, the declaration is admitted as D-1 for Debtors' 1.

(Debtors' Exhibit D-1 admitted to evidence)

THE COURT: And at this point, let me ask, is there any counsel or party that wishes the opportunity to cross-examine Mr. Johnson with respect to his declaration?

(No audible response)

THE COURT: Again, hearing and seeing no one, Mr. Mitchell, please continue.

MR. MITCHELL: Thank you, Your Honor.

Next, I'd like to move into evidence the declaration of Mr. Marc Liebman that is at Docket Number 3300.

THE COURT: All right. Let's do the same inquiry.

Are there any counsel or parties who wish to object to the admission of Mr. Liebman's declaration? Mr. Liebman is the Chief Transformation Officer, docketed at ECF 3300.

(No audible response)

THE COURT: Hearing and seeing no one, the declaration of Mr. Liebman comes in as D-2.

(Debtors' Exhibit D-2 is admitted to evidence)

THE COURT: And at this time is there anyone who wishes the opportunity to cross-examine Mr. Liebman with respect to the contents of his declaration?

(No audible response)

THE COURT: All right. I don't see any raised hands. Counsel in Court isn't jumping up and down, so we're set.

Then, thank you, you may continue Mr. Mitchell.

MR. MITCHELL: Thank you, Your Honor.

So next I'd like to turn to the modifications, the deals we cut. We have a couple --

THE COURT: Yes, please.

MR. MITCHELL: -- of reservations here to read into the record.

THE COURT: You may continue.

MR. MITCHELL: Thank you.

So, Your Honor, 14 objections or reservations of rights were filed on the docket and we received several informal plan comments and objections. Many of these are resolved and I'll describe these resolutions.

So this first resolution is our resolution with certain of our landlords. Those objections were filed at Docket Number 3267, 3269, 3271, 3272, 3277, and 3284. So in order to resolve these objections, in addition to certain technical modifications to the confirmation order, the debtors

have agreed to provide on the record certain clarifications regarding the administrative/priority claims reserve.

Debtors have also agreed to file a plan supplement in an amended form of the wind-down budget containing certain clarifying language regarding the funding of the administrative and priority claims reserve that I'll read into the record momentarily. And then after I'm finished, I will turn to Mr. Marshall of Choate on behalf of Bank of America for confirmation.

So as to the administrative/priority claims reserve, debtors would like to clarify that the administrative claims distribution pool from which settled claims under administrative claims procedures will be paid is separate and apart from the 10.4 million that is funded on or before the effective date into the administrative/priority claims reserve. That's a separate (indiscernible).

The debtors would like to clarify as well that, as defined professional fees as defined in the plan will also not be paid from the administrative/priority claims reserve. That comes from a different pot of money.

The debtors expect that the unpaid DIP admin claims line item budgeted for $4.5 million in the wind-down budget will be comprised almost entirely occupancy related claims. It is the debtors' expectation that all other administrative claims not otherwise captured by the administrative claims

procedures will be included in other/the other AP reserves line item budgeted at 5.9 million in the wind-down budget.

And lastly, we'd like to read into the record a footnote which will be added to the "unpaid DIP admin claims" line item in the wind-down budget that was filed with Mr. Liebman's declaration. The footnote will say as such. "Without prejudice to the rights of the liquidating Trustee to object to any claim, to the extent that claims filed in respect of occupancy related costs, e.g., including 365 D-3 obligations arising under the 'unpaid DIP admin claims' line item (collectively 'the asserted occupancy related claims') exceed 4.5 million as of the claims bar date, then specified receipts as received shall be retained by the administrative priority claims reserve together with amounts already budgeted under the unpaid DIP admin claims line item such that the sum of these amounts is equal to 1.5 times the asserted occupancy-related claims.' The liquidating Trustee shall maintain this ratio as it reconciles the asserted occupancy-related claims."

So to button this, I would ask Mr. Marshall, who I believe is on, to confirm on behalf of the DIP agent, regarding his client's understanding.

THE COURT: Mr. Marshall.

MR. MARSHALL: Good morning, Your Honor.

THE COURT: Good morning.

MR. MARSHALL: Jonathan Marshall at Choate, Hall &

Stewart on behalf of Bank of America in its capacity as the DIP agent.

I can confirm what Mr. Mitchell read into the record is our understanding.

THE COURT: All right. Thank you.

MR. MARSHALL: Thank you, Your Honor.

THE COURT: What I'm going to do, Mr. Mitchell, is allow you to lay out all of the resolutions that you've reached, and then I'll turn to hear if there are any objectors who wish to weigh in.

MR. MITCHELL: Okay. Thank you, Your Honor.

So in addition to the changes regarding feasibility just discussed, we also addressed the landlord's objections with changes to the confirmation, which are in agreed form. So I believe that covers all of the open points for the landlords of that objective.

So I'll now address the other resolutions, the formal objections of the plan, other than U.S. Trustee and the pensions, which I'll get to at the end.

So next is Element Fleet Corporation. Element's objection was resolved by including language in the confirmation order that its set-off rights are reserved and that it is not required to file a separate motion to preserve those set-off rights. So that is Element. Its objection was at 3263.

Next is Chubb. Chubb filed an objection at 3265. Chubb's objection was resolved by clarifying in the confirmation order that the plan does not modify or assign Chubb's insurance programs without consent, that workers' compensation and direct action claims may continue in the ordinary course, and by addressing Chubb's concern about the gate keeping and release provisions.

CVS Pharmacy, Docket Number 3289.

THE COURT: One second. With respect to Chubb and the language, is this all being put into the confirmation order?

MR. MITCHELL: Yes.

THE COURT: Okay.

MR. MITCHELL: Yes, Your Honor.

THE COURT: All right. Thank you.

MR. MITCHELL: And we intend to submit a revised form of confirmation order to Your Honor this afternoon.

THE COURT: All right.

Continue, please.

MR. MITCHELL: Thank you, Your Honor.

CVS, Docket Number 3289. CVS's objection was resolved by providing in the confirmation order that the terms of the indemnity escrow agreement and the various CVS asset purchase agreements are not affected by the confirmation order, provided that the reorganized debtors shall not be liable to

CVS on account of such matters described in or reserved under the agreed language of the confirmation order, while preserving CVS's rights to injunctive relief against the reorganized debtors to the extent that the reorganized debtors use the Rite Aid website or brand name.

Next. We're almost done here.

On the Sub-Trust at Docket Number 3270.

THE COURT: All right.

MR. MITCHELL: That would be the (indiscernible)?

THE COURT: Yeah, I'm here.

MR. MITCHELL: So the Sub-Trust, the debtors have agreed to certain changes to the data retention plan that we believe resolve their objections.

The next are the Putative Class Action plaintiff at 3275. We believe from counsel that that claimant is no longer pressing his confirmation objection, so it's resolved.

THE COURT: All right. That's Mr. Gordon?

MR. MITCHELL: Yes.

The last two here, Ms. Ebony Bates at Docket Number 3297. Ms. Bates' objection was resolved through language confirming that nothing in the plan affects her appeal for the prior confirmation order in the previous cases.

THE COURT: All right.

MR. MITCHELL: And then finally, NBPIV Delran LLC, the Central Fill Landlord, at Docket Number 3294.

Here, the Central Fill Landlord and McKesson agreed on revised lease terms and assumption of the applicable lease.

THE COURT: All right.

Mr. Mitchell, I'm going to ask you, if you don't mind, to go back and read out the objections resolved with the landlord's objection numbers, just their docket numbers.

MR. MITCHELL: Oh, yeah, absolutely.

So they were at Docket Numbers 3267.

THE COURT: Okay.

MR. MITCHELL: 3269, 3271, 3272, 3277, and 3284.

THE COURT: All right. Thank you.

MR. MITCHELL: So with that, Your Honor, I will pause. I believe you wanted to give time for the settle folks to speak if they have something to say.

THE COURT: Right.

I'll hear from anyone whose claims have been addressed so far, or I'm sorry, whose objections have been addressed so far.

Ms. Bonteque.

MS. BONTEQUE: Good morning, Your Honor. Apologies. I seem to be having trouble with my camera. Apologies for that.

THE COURT: That's okay.

MS. BONTEQUE: I just rise to simply state on the record that while I agree with counsel for the debtors that --

I'm sorry, let me back up.

Jessica Bonteque appearing on behalf of the Chubb Companies.

THE COURT: All right.

MS. BONTEQUE: I rise to clarify and agree with counsel that we do have an agreement as to language to put in the confirmation order.

I rise simply to say that while I agree that this summary includes some of the points that are in the language, the language is longer and more involved and includes other points. But we have agreed to specific language to be included in the confirmation order and based upon the inclusion of that language, the Chubb's objection is resolved.

THE COURT: Thank you. Obviously, the language will govern. I appreciate it.

MS. BONTEQUE: Thank you, Your Honor.

THE COURT: Thank you.

MS. BONTEQUE: Apologies for the technical issue.

THE COURT: Not a problem.

Mr. Hamell?

MR. HAMELL: Yes. Good morning, Your Honor. Ian Hamell on behalf of NBPIV Delran LLC.

We're obviously a supporting party here today given the resolution that was just mentioned by Mr. Mitchell.

Just a quick housekeeping point, Your Honor. We did

hash out language over the weekend, which we understand will be included in the revised form of confirmation order that was mentioned a short while ago. We would like to have an opportunity to take a look at that before it's submitted if that's possible.

THE COURT: Certainly.

All right. Thank you.

Thank you, Mr. Hamell.

Mr. Gold.

MR. GOLD: Good morning, Your Honor. Ivan Gold of Allen Matkins.

THE COURT: Good morning.

MR. GOLD: Always good to see you.

THE COURT: Nice to see you.

MR. GOLD: I represent a large group of landlords at Docket Number 3271.

I would like to start by thanking the debtor team. This wasn't easy. This has been a challenging case. Not that we're not given the hand we have been dealt, we have worked hard and I really want to applaud the hard work of the professionals in getting us to this point.

We have worked with great detail and truly arm's length negotiations with debtors' counsel in achieving resolution of the larger objections, the administrative claims reserve that you heard about and those changes and

clarifications and detailed language on the indemnity and exculpation provisions of the plan.

The reason I'm speaking is there was a very specific resolution with respect to the Sunland, California, location that we have discussed with debtors. That was the one that suffered the unfortunate damage with respect to the removal of fixtures.

And debtors had previously agreed to make a brief statement on the record regarding how that claim is being accommodated. I know Mr. Mitchell may not have that script in front of him, but I would just like to note before we leave, I would appreciate if that could be read into the record as previously agreed.

THE COURT: All right.

MR. GOLD: Thank you.

THE COURT: Thank you, Mr. Gold.

Mr. Mitchell, do you have that information at this point?

MR. MITCHELL: I need to confer with my colleagues.

THE COURT: Sure.

MR. MITCHELL: I believe we agreed in principle with Mr. Gold, I just need to confer with my colleagues who are sitting right here with me.

THE COURT: All right. I'll give you time to do that.

MR. GOLD: I'll forward Mr. Mitchell the script that one of his colleagues sent me so he has it. Maybe it will speed us along.

Thank you, Your Honor.

THE COURT: All right. That'll help. And Mr. Mitchell, when you're ready, you'll let me know.

In the meantime, let me turn to Mr. LeHane.

Thank you, Mr. Gold.

MR. LEHANE: Thank you very much, Your Honor. Robert LeHane, Kelley Drye & Warren, on behalf of a group of landlords, including Brixmore, First Washington, Regency Centers.

We filed an objection at Docket Number 3277 and echo Mr. Gold's thanks to the very hard work of the debtors' team and everybody else involved. A lot of landlord attorneys worked very hard over the weekend as well. So appreciate the hard work and the representations that were put on the record.

We also represent, Your Honor, Thomas Pitta as the Trustee for RAD Sub-Trust A, who together with RAD Sub-Trust B, we had filed an objection to the data retention plan, Your Honor. And our objection really sought two things.

With some more time to deal with the data retention issues and what we saw was a more equitable cost sharing mechanism, and very happy to report that, although, as is almost always the case, this is not perfect. It's a very

difficult situation. We understand that. But we worked over the weekend at length with the debtors' team and Mr. Mitchell and came up with what we believe to be an appropriate modification to the data retention plan.

Your Honor, there still are open issues. As Your Honor may recall, we filed a motion to compel the turnover of certain documents. We've agreed to adjourn the hearing on that until December 8th, and the parties will continue to try to work to try to come to a consensual resolution and hopefully a modified protective order that will supersede the cooperation agreement that was embodied in the --

THE COURT: First case.

MR. LEHANE: -- 2023 plan, Your Honor.

So again, thank you, and we are happy to have been able to resolve the issues in advance of today's hearing.

THE COURT: Thank you, Mr. LeHane. I appreciate that.

Mr. Goodman, good to see you.

MR. GOODMAN: Good to see you as well, Your Honor. Geoff Goodman on behalf of CVS Pharmacy.

I'm pleased that Mr. Mitchell accurately, I think, summarized our resolution. It is subject to specific language as a few others that would be incorporated into the confirmation order. So we have our limited objection reservation of rights was resolved. I'm happy to be here, not

fighting with the debtor for a change, Your Honor.

And we've resolved a few things recently. We're on a bit of a roll. But, with that, I did want to thank the Paul Weiss team and Mr. Mitchell, in particular, as well as counselor for McKesson for doing some work over the weekend.

So thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Goodman. It's good to hear.

Mr. Onder, good morning.

MR. ONDER: Good morning, Your Honor. Thomas Onder from the law firm of Stark & Stark on behalf of a number of landlords.

I just echo the same sentiments that my fellow attorneys have echoed. We appreciate working with the debtor and getting some of these objections, or mostly all of these objections resolved, I believe, on Sunday. And one thing I just wanted to add in, I think a couple of the other landlords' attorneys. There was some specific language for one of our clients, specifically, Santiago Holdings, that I believe is going to also be in there as well. I just want to make sure that that's noted for our objection 3267, Your Honor.

THE COURT: All right. Thank you. Noted.

MR. ONDER: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Wolf, good morning.

MR. WOLF: Good morning, Your Honor. Daniel Wolf on behalf of RAD Sub-Trust B.

I just want to echo what Mr. LeHane said about the fact that we are happy to have reached a resolution with the debtor on our document-related objections in the motion that we filed in connection with Sub-Trust A, but also that there are a few document issues that were reserved for the hearing on December 8th.

THE COURT: All right. Appreciate your efforts. Thank you.

Mr. Raisner.

MR. RAISNER: (No audible response)

THE COURT: Mr. Raisner, are you there?

MR. RAISNER: (No audible response)

THE COURT: I see a raised hand, but you're still muted.

Now, I see you. There you are.

MR. RAISNER: Oh, yes. Apologize, Your Honor. Jack Raisner, the firm of Raisner Roupinian, on behalf of Martin Gordon.

I'm happy to verify that that was our word to Mr. Mitchell that we are not going forward with the objection that was filed on behalf of the Putative WARN Class for a reserve in the amount of their anticipated or maximum claims.

But I would just like to note on the record, Your

Honor, that we received, after filing our objection, word that there had been in a priority claims pool set up for 48 members of the Putative Class who opted out of the administrative settlement pool. That came to us over the weekend and we've been working with Mr. Mitchell and his team to sort out how that pool was created, for whom, on what basis, what it includes, and so forth. And we were given a sense that our base claim of a $5 million reserve should not be sought, but we do have a concern about how the 48 members of the Putative Class for whom this priority claims pool has been reserved, how those claims are going to be liquidated.

And I would hope and expect that the debtor will consider working together with us collegially and in a logical way to provide for some due process for those individuals and to come up constructively with a way to resolve their claims as well.

THE COURT: All right. Thank you.

I'll turn to Mr. Mitchell.

Thank you, Mr. Raisner.

MR. RAISNER: Thank you.

MR. MITCHELL: Thank you, Your Honor.

So, I think I can circle back to Mr. Gold's point, or I can address what Mr. Raisner said.

THE COURT: Why don't we just address Mr. Raisner and then we'll circle back to Mr. Gold's issue.

MR. MITCHELL: Thank you, Your Honor.

So, Your Honor, the debtors are committed to working constructively with all of our stakeholders. As the evidence showed today in Mr. Liebman's declaration, the debtors believe that they have reserved appropriately for the administrative claims that may be asserted in the future. Mr. Raisner is correct. There were a few of the opt-outs. It is still to be sorted in the adversary proceeding who is in the Putative Class and all parties' rights there are reserved.

THE COURT: All right. I assume there will be continued dialogue.

MR. MITCHELL: That's correct, Your Honor.

THE COURT: Thank you.

And now, if you can touch on Mr. Gold's concerns.

MR. MITCHELL: Yes. I've been handed a note on a laptop.

THE COURT: Technology.

MR. MITCHELL: Text is kind of slow.

So, I believe the statement to be read in the record for Mr. Gold is, "The debtors understand that the landlord associated with Store Number 5532 located in Sunland, California, is asserting a contingent claim in the amount of approximately $85,000 against the debtors for damage arising from the alleged negligence of a contractor retained in connection with the surrender of property. While the debtors

reserve all rights in connection with this contingent claim, the debtors have agreed to state on the record that the wind-down budget includes sufficient reserve to make payment in full in respect of this contingent claim to the extent it were allowed in such amount."

THE COURT: All right.

Mr. Gold, does that do the trick for you?

MR. GOLD: With that and the broader statement regarding the administrative claims reserve, Your Honor, it does.

Thank you very much, and thank you, Mr. Mitchell.

THE COURT: Thank you. Thank you, counsel.

All right, Mr. Mitchell, please continue.

MR. MITCHELL: All right.

Your Honor, so we're coming to the last piece of today's presentation on the two objections that we have outstanding. And as I mentioned before, that is the pension funds as well as the U.S. Trustee.

So the pension, I'll start with the pension funds first and then I'll turn to Mr. Sponder and the Office of the United States Trustee.

So, Your Honor, with respect to the pension funds, they asserted objection on feasibility grounds, on the discharge, and on the third-party release. I will take those a little bit out of order.

But on the discharge, Your Honor, we have reached a resolution with Mr. Sponder, which I will describe later, such that I think will resolve that concern. And we would ask that the third-party release objection be overruled as we ask for that ruling in connection with Mr. Sponder.

So that leaves me with plan feasibility. So, while the debtors must prove feasibility by the preponderance of evidence, which they have done through Mr. Liebman's testimony, I think it's important to note here that the burden for carrying this is generally viewed as modest and the case law supports this. In courts within the Third Circuit have observed that the Bankruptcy Code does not require debtors to prove that success is inevitable and that it is not necessary for plan success to be guaranteed.

And here, the Court need only find that the plan offers a reasonable expectation of success. The testimony of Mr. Liebman, who has worked tirelessly as the debtors' chief transformation officer the last eight months, has provided ample evidentiary basis for that finding. In that declaration, Mr. Liebman's testimony walks through the extraordinary efforts taken by the debtors and their advisors to account for all required payments under the plan.

The result of these efforts takes the form of the wind-down budget attached to Mr. Liebman's declaration as Exhibit A. And the wind-down budget sets forth the sources and

uses of cash after the effective date and reflects a comprehensive risk-adjusted accounting of receipts and disbursements, all in the service of confirming the likelihood that the required payments under the plan will be made in accordance with the wind-down budget.

And a few points which I think are worth highlighting here. So, first, the wind-down budget provides that, on or before the effective date, the administrative priority claim reserve, as well as the wind-down reserve, will be funded in full in amounts of 10.4 million and 4.3 million, respectively. And second, by committing to establish and fund these two reserves on or before the effective date, the debtors have accounted for the payment in full, among other obligations, allowed administrative claims that are not settled claims under the administrative claims procedures, allowed administrative claims that are not subject to the administrative procedures on their own terms, and certain commitments related to retiree benefits within the meaning of Section 1141 of the Bankruptcy Code.

And, finally, by committing to establish and fund the wind-down reserve on or before the effective date, the debtors have accounted for payment in full, among other obligations, data retention, construction costs, information technology, and other operating expenses, and various ordinary course costs, and expenses of the liquidating Trustee.

And specifically, with respect to the objecting pension fund, as Mr. Liebman testified, the debtors were aware that these pension funds would potentially seek to assert administrative claims related to these putative liabilities and accounted on a risk-adjusted basis for the possibility that such administrative claims would be allowed when sizing the reserve.

So, for the foregoing reasons, the debtors would submit that the evidence has demonstrated that the plan satisfies the requirements under Section 1129(a)(11) of the Bankruptcy Code because the plan offers a reasonable expectation of success. So, accordingly, the debtors request that Your Honor overrule the pension's objection of feasibility.

THE COURT: All right. Thank you.

Does counsel for the pension funds wish to be heard?

MS. McDOWELL: Yes, Your Honor. Thank you. This is Ellen McDowell from McDowell Law PC on behalf of Southern California UFCW Unions and Drug Employers Pension Fund and Southern California Drug Benefit Fund. With me, appearing remotely, is our co-counsel Howard Adelman from Adelman & Gettleman. His pro hac application is pending, but we would request Your Honor's permission for him to state what our client's position is concerning our objection.

THE COURT: All right. Welcome, Mr. Adelman.

You may proceed.

MR. ADELMAN: (No audible response)

THE COURT: I'm not hearing you. Are you muted?

MR. ADELMAN: (No audible response)

THE COURT: No.

Maybe it would be best, what do you think, Bec, if he just dials in?

THE CLERK: He can dial in. He can check his mic, you can tell him, in the bottom left corner, you can check your input.

THE COURT: Maybe check your input on your mic. If not, if you could --

THE CLERK: He can just dial in.

THE COURT: Otherwise, if you just dial in, we don't need the video, we can hear you.

I know you're trying.

MS. McDOWELL: Looks like he's calling in, Judge.

THE COURT: All right.

MS. McDOWELL: Thank you for your patience.

THE COURT: Not a problem.

MS. McDOWELL: Maybe logging out and logging in will do the trick.

THE COURT: We'll see. It seems close.

One minute.

MR. ADELMAN: Can you hear me now? I apologize.

THE COURT: Yes, we can.

MR. ADELMAN: Thank you.

Your Honor, thank you for the opportunity. We are new on the scene and we appreciate the reality of this case.

THE COURT: I feel like I'm at Yankee Stadium with the echo. But go ahead.

Do the best you can.

MR. ADELMAN: I apologize again.

THE COURT: It's all right.

MR. ADELMAN: Okay.

Your Honor, we stand on our objection. We are concerned that the disclosure statement nor the materials provide a universe of administrative claims and therefore we cannot discern whether there is sufficient funding.

We look forward to working with the debtor and the Trustee to find common ground and resolve our claim, but at this juncture, we have to stand on our objection and we will work toward reaching an agreement with the debtor in the coming weeks.

THE COURT: All right. I appreciate that. Thank you, Mr. Adelman.

And, Ms. McDowell, thank you.

MS. McDOWELL: Thank you, Judge.

THE COURT: All right. We can turn to the U.S. Trustees' objections.

MR. MITCHELL: Yes. Actually, I have a quick response on that, Your Honor.

So first, I would note that they did not object to the disclosure statement. All the disclosure statement objections have been resolved today. And in terms of the debtors' ability, or the excuse me, the wind-down debtors' and liquidating Trustees' ability to pay the admin claims, Your Honor, we believe that has been adequately established in the Liebman Declaration in the evidence that's been submitted to Your Honor today.

THE COURT: All right. Thank you, Mr. Mitchell.

Now, let's turn to our U.S. Trustee.

MR. MITCHELL: Now, we turn to the U.S. Trustee.

THE COURT: I have a sense I know what's coming.

Mr. Mitchell, do you want to lead off?

MR. MITCHELL: Yes, I would, Your Honor. We can stay with the baseball theme.

So, first, I will speak to where we've reached resolution with Mr. Sponder. Then, I will circle back to where we still have dispute.

So the first issue we reached resolution on is their settlement objection. So the U.S. Trustee objected that the plan exceeded the scope of what could be settled under 1123(b)(3)(A) of the Bankruptcy Code. We've resolved that with language to be added to the plan.

We're not asking Your Honor to rule on the statutory fee piece. We believe we can reach a resolution there between Mr. Sponder, McKesson, and the lender, so we will endeavor to get that done shortly. And then we have a couple of the miscellaneous objections that we were also able to resolve.

So, first, we've removed the plan provision that provided for presume accepting and for voting class for which no members voted.

Second, the debtors have removed the indemnification and exculpation of the liquidating Trustee.

Third, the debtors, with the support of the Official Committee, have removed language that would release and discharge the Committee from liability arising on or before the effective date. The release of the Committee from rights, duties, and responsibilities as of the effective date remains, as does the exculpation of the Committee and its members.

Fourth, the debtors have revised the plan to provide the definition of substantial consummation. In the plan is co-extensive with its definition of the Bankruptcy Code.

And fifth, the debtors are hereby disclosing the identity of the liquidating Trustee, Mr. Eric Kaup of Hilco Global.

So then, that brings me to the areas in which we require a ruling from Your Honor.

THE COURT: All right.

MR. MITCHELL: So first, Your Honor, is that it's a third-party release. The U.S. Trustee objects to the third-party release, asserting among other things that it's non-consensual under Perdue and applicable law. The debtors disagree and believe that the opt out structure is consensual, and that this Court has approved such releases in prior Chapter 11 plans, and accordingly, the debtors submit that it should be approved.

Next is the debtor release. The U.S. Trustee asserts the debtor release is over broad and not supported under the applicable factors. The debtors disagree and believe that the facts and circumstances support the debtor releases, including when applying the Zenith factors.

The debtors further note that the releases are supported by the debtors' economic stakeholders, including the DIP lenders whose liens encumber such release claims and would otherwise receive the value, if any, attributable to said claims.

Next is the exculpation. The U.S. Trustee objects to the scope of the exculpation. In response, the debtors have agreed to limit the time period from which exculpation applies from the petition date to the effective date, which we understand resolves part of the objection.

Otherwise, the debtors believe that the exculpated parties and the Section 1125(e) covered parties are

appropriately included and the parties -- are appropriately included, and the parties' entitled to it under applicable law. And similar provisions have been included in prior Chapter 11 plans confirmed by this Court, including the prior Chapter 11 plan in the 2023 case.

On the discharge and the injunction, so here, the debtors have agreed to remove the discharge of the wind-down debtors, which we understand resolves one objection from the U.S. Trustee. We believe that should also address the concerns stated by the pension in part of their objection.

The debtors have agreed to modify the injunction in favor of the wind-down debtors such that instead of being permanent it would last only until the property vested in the wind-down debtors is distributed in accordance with the plan. The debtors understand that this resolves a portion of the objection to the discharge and objection -- to the discharge and injunction; excuse me.

U.S. -- we understand the U.S. Trustee further objects to the injunction to the extent that it implements the third-party releases. We believe this is derivative of the third-party release argument, and that it rises and fall is -- falls on whether the third-party release is appropriate.

And of course, Your Honor, we believe the third-party release is entirely appropriate in these circumstances. Last two issues are the gatekeeper provision. So the U.S. Trustee

objects to what the debtors view as a customary gatekeeper provision included in the plan. The debtor believes that it's permitted under Sections 105, 1123(b)(6), 1141, and it's customary with prior -- and it's consistent and customary with prior gatekeeper provisions approved in this Court, and should be approved here, as well.

And then finally, we believe -- we understand the U.S. Trustee asserts that the debtors have not demonstrated cause to support waiving the 14-day stay of the confirmation order. Since that objection the debtors have filed Mr. Liebman's declaration in which he testifies that, among other things, cause exists because the debtors intend to emerge on or around December 8th, and certain steps must be accomplished prior to emergence, including effectuating the transfer of the 401(k) plans to a new entity to sponsor such plans, and certain of the tax debts and the restructuring steps in the memorandum.

Accordingly, the debtors believe the Court should waive the stay. So with that, Your Honor, the debtors would request the Court overrule the U.S. Trustee's objection.

THE COURT: All right. Thank you, Mr. Mitchell.

Mr. Sponder, good after -- now it's afternoon. Good afternoon.

MR. SPONDER: Good afternoon, Your Honor. I will be relatively brief, understanding Your Honor's schedule today. As Your Honor is aware, the United States Trustee filed an

objection to confirmation on the second amended joint plan of reorganization of New Rite Aid, LLC, and its debtor affiliates at Docket No. 3266, which included at least 13 separate objections, including some that had been resolved.

As previously disclosed by Mr. Mitchell since the filing of the objection, the United States Trustee and the debtors were able to narrow the issues concerning the objection and reach those resolutions. I heard most of them, but want to make sure that they are all on the record.

They include, as I recall from Mr. Mitchell, a limit -- limiting exculpation from the petition date to the effective date, Article 10(e) of the second amended plan concerning the good faith filing. A finding under 1125(e) is going to be revised.

The injunction concerning the wind-down debtors is being revised to allow it to extend through and until the date upon which all remaining property of the debtors' estates vested in the wind-down debtors has been liquidated and distributed in accordance with the terms of the plan.

A provision will be added that the wind-down debtors will not receive a discharge pursuant to 11 U.S.C. 1141(d)(3), to revise Articles 4(a), 10(c) and 10(d) by deleting any references to Sections 1123(b) and Rule 9019, and agreeing to certain other revisions in those articles concerning the releases, third-party as well as debtor releases.

As I understand it, that language is going to be added that provides that no class of claims or interest under the plan will -- that shall be presumed to vote to accept the plan, to the extent that the class is entitled to vote on the plan and no members of such class voted, that as I recall Mr. Mitchell advising, that the indemnification and exculpation to the liquidating trustee will be removed.

Substantial consummation is being revised and the separate release and discharge to the Committee and its members will be revised to remove the phrase "and liabilities." So what remains, Your Honor, as Mr. Mitchell went through our -- the United States Trustee's objections to the third-party releases, the debtor releases, the scope of the parties receiving exculpation, the scope of the injunction as to the organized debtors, gatekeeping rule -- and Rule 3020(e) waiver.

With respect to statutory fees, Your Honor, I do understand and can advise the Court that we have been negotiating that language up until prior -- right before this hearing. I believe we are relatively close. I believe we are a few words close.

I'm still hopeful. All I ask with respect to that, Your Honor, is that -- that we be allowed that additional time to reach an agreement, and if we're unable to reach an agreement, to allow the parties the opportunity to provide argument at a later date.

For purposes of confirmation, the United States Trustee does not object to the Court ruling on confirmation, subject to the parties continuing to negotiate acceptable statutory fee language.

Moving on, Your Honor, and I'll start first with third-party releases, and of course, Your Honor, the United States Trustee acknowledges Your Honor's pre-Perdue and post-Perdue decisions concerning nonconsensual releases, opt out plans, injunctions, exculpations and gatekeeping.

Notwithstanding Your Honor's ruling, as Your Honor knows, the United States Trustee continues to object to these provisions in these types of plans. As Your Honor is also aware, the Supreme Court in Perdue -- in the Perdue case held that nonconsensual third-party releases are not authorized under the Bankruptcy Code.

However, the Supreme Court of course left open what constitutes consent. Here, the plan is not confirmable because it proposes nonconsensual third-party releases that are not authorized by the Bankruptcy Code and we believe are not consensual.

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 nondebtors. In addition, Your Honor, an opt out mechanism is not sufficient to support third-party releases,

particularly with respect to parties who do not return a ballot.

The United States Trustee continues to assert that the Court should follow the decisions in the Merge, Chassix, Tonawanda, Washington Mutual and Sunedison that require affirmative consent to a third-party release. Furthermore, Your Honor, the term "related party" in the plan includes unknown persons and entities that would be receiving the third-party releases.

It is difficult to understand how a creditor or equity security holder could grant a consensual release to existing or past persons or entities that are not specifically identified in the plan, much less ones that may not yet exist. As the plan proposes nonconsensual third-party releases, Your Honor, the United States Trustee believes it should not be confirmed.

The U.S. Trustee further relies on its written objection that includes all of the arguments concerning third-party releases, instead of going through them at length here, Your Honor. Next, Your Honor, the debtors seek to release certain parties included in the definition of released parties, which includes, among others, current and former affiliates of each entity and each related party of each entity.

A related party is defined to include many unknown persons and entities that would be receiving the debtor

release. The plan does not establish that each of these parties, including the related parties, are providing adequate consideration in exchange for receiving the debtor release.

In addition, Your Honor, the debtors have not established the necessity of the debtor release under applicable case law, including the Zenith case, for each person or entity receiving such release. Further, it appears that several estate fiduciaries, including the Committee, its members and professionals and the debtors' professionals, are included in the debtor release.

However, these same estate fiduciaries are included in the exculpation for their actions or inactions between the petition date and the effective date. As these estate fiduciaries receive an exculpation and do not satisfy the Zenith factors, they should not receive a release from the debtor.

Your Honor, next, turning to exculpation, the exculpation provision is over broad, as it is not limited to estate fiduciaries and includes a host of former persons. The organized debtors and the wind-down debtors are included as an exculpated party, but the reorganized debtors and the wind-down debtors are not estate fiduciaries, because they will only come into existence after the second amended plan's effective date.

In addition, Your Honor, certain parties are being granted the protection and benefits of Section 1125(e), but not

all of those parties are entitled to such protections. As such, Your Honor, it is requested that the definition of exculpated parties be revised to remove the reorganized debtors and the wind-down debtors, that the phrase, and I quote, "including any attorneys or other professionals retained by any current or former director or manager in his or her capacity as director or manager of an entity," be removed, and that the following be added to the end of the definition, and I quote, "but only to the extent that such party served in such a capacity during the Chapter 11 cases."

Your Honor, it is also requested that the definition of 1125(e), covered parties, be removed or that such parties only include the exculpated parties and not the debtors' affiliates, and any and all related parties which are included in the definition of 1125(e), covered parties.

Next, Your Honor, we turn to the over broad and impermissible injunction. As the Court noted in Perdue, the Bankruptcy Code allows courts to issue an injunction in support of nonconsensual third-party releases in exactly one context, asbestos-related bankruptcies, and these cases are certainly not asbestos-related.

Here, Your Honor, the injunction enjoins claim holders from proceeding against third parties. Even if the third-party releases are found to be consensual, that does not mean that the Court has the authority to impose an injunction.

In the context of a consensual third-party release the parties themselves are ultimately in the relationship. The Court is not using its own judicial power to effect that change.

Next, Your Honor, and almost done, is the gatekeeping provision. And as Your Honor is aware, this provision create a gate keeper role for Your Honor that requires a nondebtor who wishes to pursue a claim or cause of action against another nondebtor to come to this Court for a determination of whether such claim or cause of action is released.

This provision would apply, even after the debtors' bankruptcy cases have been closed, which would require a nondebtor seeking to pursue a claim against another nondebtor to first move to reopen the bankruptcy if the bankruptcy is closed.

Your Honor, there does not appear to be any reason why another court in which the relevant action has been filed cannot determine whether a claim is released. This provision is not the only way to enforce the releases. If the estates where a released party believes a claim assert in a non-Bankruptcy Court is subject to the releases, to the estate and/or the released party -- well, the estate and/or a released party may file a motion with the Bankruptcy Court to enforce the provisions in the plan.

Your Honor, this provision shifts the burden from the estate and/or the released party moving to enforce the second

amended plan to a claim of having to file a motion seeking approval to bring any nonderivative, direct claims that are not released.

As to the Rule 3020(e) waiver, Your Honor, it should not be allowed in this situation. The goal of Rule 3020(e) is to provide sufficient time for a party to request a stay pending appeal of a confirmation order before a plan is implemented and an appeal becomes moot.

I understand here the debtor is looking for December 8th, which is actually 14 days from today. So I don't think it's that much of a burden. The debtor can continue in the process of getting everything ready for the plan to become effective with the stay in place.

Your Honor, the U.S. Trustee reserves all rights concerning the language included in the confirmation order that was -- that had -- has been already circulated. I will note that in going through the confirmation order I did look at probably 15 different sections that need to be revised, based on the agreements that the United States Trustee and the debtors have reached.

So with that, Your Honor, I turn the podium over and I thank Your Honor.

THE COURT: Thank you, Mr. Sponder. I appreciate the efforts and I understand there was an exhaustive written objection and you're simply supplementing it with oral

argument.

Ms. Graber, you wish to be heard?

MS. GRABER: Hi, Your Honor, yes, briefly. Jessica Graber, Wilkie, Farr and Gallagher, co-counsel to the Committee. I'm here today with my colleagues, Brett Miller and Todd Goren. The Committee would just like to thank Your Honor and chambers for all the accommodations throughout these cases.

This case was presenting very difficult challenges and circumstances for unsecured creditors, but the Committee believes that confirmation of the plan is the best outcome here, and that confirming a plan is the best way to protect unsecured creditors.

We would like to thank the debtors for their efforts over the past several months, and we would also like to thank the Committee members for their professionalism and dedication throughout the course of these cases, and we'll refrain from rehashing the change made to Article 14(d) for the third time, and unless Your Honor has any questions, the Committee does not have anything further.

THE COURT: No. Thank you. I appreciate the efforts and the professionalism of the Committee, its members and counsel. Thank you.

MS. GRABER: Thank you.

THE COURT: Mr. Mitchell, did you want to respond to Mr. Sponder's supplemental oral argument?

MR. MITCHELL: Your Honor, I will just -- I will just say that we will rest on our papers. And in terms of process, Your Honor, we would ask -- we would ask Your Honor to rule here, and on the statutory fee issue we would like to take a 30-minute adjournment after you rule, and hopefully, we can iron that out. If not, we'll come back to Your Honor.

THE COURT: All right. Before I rule, we have counsel here coming to the podium.

MS. OWENS: Yes. Your Honor, Kelsey Owens, for the Pension Benefit Guaranty Corporation. I reiterate all the wonderful things --

THE COURT: Oh, okay.

MS. OWENS: Can everyone hear me?

THE COURT: Yes. Go ahead.

MS. OWENS: Reiterate all the wonderful things everyone has said about the great work done in this case. As a Committee member, PBGC has had the benefit of getting a preview of the next version of the draft confirmation order during the course of this hearing, and so on the record, PBGC would just like to clarify that the term "United States" as used throughout the confirmation order does not include the PBGC.

Paragraphs 130 and 136 of the most recently filed confirmation order represent PBGC's entire agreement with the debtors. Paragraph 134 of the most recent version of the confirmation order deals with DOJ and does not pertain to PBGC.

THE COURT: All right. Thank you, counsel. Appreciate your perseverance this morning.

MS. OWENS: Thank you.

THE COURT: All right. Then, Mr. Mitchell, I assume your -- you've laid the groundwork and it's -- it's the Court's turn, at the request, to give a ruling. Is that correct?

MR. MITCHELL: Yes, Your Honor.

THE COURT: All right. Well, then, I'm going to try to put together my thoughts, assemble my thoughts, and I would ask for everyone's indulgence and patience as I issue a ruling. Get comfortable. It may take a while. Well, let me start at the outset.

First, this ruling is of course a Bench ruling and it's subject to New Jersey District Court Rules, which allow the Bankruptcy Court to supplement a ruling. In the event of an appeal there's a short window of an opportunity for the Bankruptcy Court to supplement any oral ruling, if necessary.

At the outset, I'd like to make a few observations. By far, for this Court, the first Rite Aid case was the most difficult Chapter 11 proceeding to oversee, with challenges coming from all directions. The case involved a complicated capital structure, mass tort exposure, sizable 503(b)(9) claims, contentious landlord disputes, state attorney general push back, funding issues and difficult sale issues, as well as substantial insurer resistance.

As with most films, where the sequels usually disappoint, except "The Godfather," the second filing, New Rite Aid, was equally difficult. In fact, the Court faced as many if not more challenges. There were, again, the ever present liquidity issues, landlord/tenant disputes, contentious sales and a tenant litigation, Warnack claims, nondischargeable False Claims Act and PBGC exposure, massive 503(b)(9) claims by a primary supplier, and of course, most pressing was the need to protect the public health by facilitating the transfer of millions of prescriptions through the sale and liquidation of hundreds of pharmacies.

Yet, through it all and the professionals in this case, and I refer to all the professionals, including the Committee's, the debtors, the lenders, the landlords, government counsel, together with Mr. Liebman, the chief transformation officer, and the remaining workforce all persevered through negotiations and litigation to address these challenges and bring this case to where we are today on the cusp of a confirmation hearing.

To those who say, to what end, and point to the administrative insolvency of this estate, as an illustration of a Chapter 11 case gone awry, I offer a challenge to that perspective. This Chapter 11 case likely was destined to be administratively insolvent in some respects, recognizing the administrative cap that's been put in place from the outset,

given the tremendous hurdles and substantial work necessary to pull it through to the finish line.

Yet I know of no reasonable, efficient, fair and secure method of insuring the timely and safe closure of over 1400 pharmacies and the transfer of millions of prescriptions of -- and health records for patients and customers. It is inconceivable for this Court to believe that a Chapter 7 trustee or someone responsible outside of court for the liquidation and closure process could process the sale of the prescriptions and transfer of the health records, handle and liquidate an inventory of regulated pharmaceuticals, insure the capture of value in the assumption and assignment of hundreds of store leases, as well as address the myriad of tax filings and governmental regulatory protocols, all of which would be without funding or a meaningful workforce.

This is a case where the lender -- where the lenders are underwater by hundreds of millions of dollars, and yet, along with debtors' transition team, the Committee's professionals, the estate's professionals, the equity-holders, the suppliers and the land -- and most -- and most landlords, as well as government officials, everyone recognized that a structural liquidate -- a structured liquidation offered the most viable and sensible pathway to insure that the best possible recoveries for all stakeholders were produced, while also addressing the needs of Rite Aid's patients, suppliers,

landlords and remaining employees.

Now, having given that opening, let me turn to more concrete ruling. This ruling addresses the request of final approval of the debtors' second amended disclosure statement, which had been conditionally approved at ECF 3216, and confirmation of the debtors' second amended joint Chapter 11 plan of reorganization, which is docketed at ECF 3215.

The Court has reviewed the plan, the disclosure statement, the plan supplement, the declaration of Mr. Liebman and Mr. Johnson, both of which are on record, as well, the debtors' memorandum and all of the timely objections. For the reasons I will state and summarize, unless otherwise resolved, and we've spent today really outlining all of the objection resolutions, this plan will be confirmed and the objections overruled to the extent they are -- they have not otherwise been resolved, except for such -- subject to such reservations of rights have been placed on the record and the opportunity to address language in a confirmation order.

This Court has jurisdiction under 28 USC Section 1334 and 28 USC Section 157; confirmation as a core proceeding under 157(b)(2). The evidentiary record, including the two sworn declarations, as well as the financial protections, the liquidation analysis and the wind-down budget is both, in this Court's view, credible and sufficient to support confirmation and the feasibility of the plan, and to demonstrate that the

plan's been proposed in good faith and satisfies the requirements of 1129(a) and 1129(b).

Now, let me go through the declaration of Mr. Liebman, who the Court has found to be credible and whose testimony holds sufficient weight to support the various findings underlying confirmation. Mr. Liebman, as noted, has been the debtors' chief transformation officer and has testified as to the sale process and negotiating and consummating the sale of substantially all of the debtors' assets, as well as the preparation of wind-down budget and formulation of a confirmable plan, as -- and all the attendant settlements.

A central component of Mr. Liebman's testimony has been the description of the global settlement underlying this reorganization. The settlement is a multiparty compromise involving the debtors, the DIP secured parties, McKesson, Department of Justice, PBGC, Centerbridge and equity holders.

It has resulted in a set of interlocking agreements whose terms include a consensual resolution of administrative claims through a capped distribution process, the transfer of all equity in the reorganized debtors to McKesson in satisfaction of a significantly multimillion dollar 503(b)(9) claim, McKesson's payment of $20 million and its commitment to purchase inventory, Centerbridge's withdrawal of objections in exchange for partial fee reimbursement, PBGC's settlement of

its pension termination claims in the range of $225,000 -- I said million -- amendments to resolve DOJ claims under the 2024 settlement, substantial DIP lender concessions, including the waiver of recovery from certain nondebtor entities and the creation of a liquidating trust.

The global settlement, as the testimony reveals, was a critical inducement to the stakeholder support, with each component heavily negotiated and interdependent. And it's clear to the Court that altering any aspect of the global settlement would jeopardize the entire resolution.

With respect to the statutory requirements, the Liebman declarations identifies the requisite Section 1125 requirements with respect to the disclosure statement, and this Court finds that the disclosure statement contains adequate information across multiple categories, including corporate history, the events leading to Chapter 11, risk factors, liquidation analysis, tax considerations, wind-down mechanics, plan mechanics, securities law issues and the solicitation procedures.

The testimony also goes through the various 1129(a) requirements, that the plan properly classifies claims, provides uniform treatment within the classes, specifies impairment, includes adequate means for implementation and provides governance mechanisms conforming with public policy.

Mr. Liebman in through his testimony explained that

the plans provide -- the plan provides adequate cure procedures for executory contracts and is in compliance with nonbankruptcy law. The debtors have fully complied with Sections 1125 and 1126.

There's been only one class, Class 3, the pre-petition FILO claims, that was impaired and entitled to vote under 1129(a)(10) and required to vote, and they have unanimously accepted the plan. All other impaired classes are deemed to have rejected the plan. That's Classes 4, 7 and 8.

Nevertheless, the plan satisfies the 1129(b)'s cram down standards, in that the plan does not discriminate unfairly, and no junior class receives property ahead of an objecting, impaired creditor class. A significant portion of Mr. Liebman's declaration and testimony focuses on the best interest of creditors test through his preparation of a liquidation analysis prepared by his team, which reflected a comprehensive, hypothetical Chapter 7 liquidation upon conversion on November 1 of 2025.

The analysis estimates liquidation proceeds of 98 to $128 million before wind-down costs and after applying the proceeds under a Chapter 7 priority scheme, every impaired class would receive equal or greater recovery under the plan, and so finds the Court by the Court.

The declaration includes, as I've indicated, an in-depth explanation of feasibility under 1129(a)(11) for the

reorganized debtors, feasibility supported by McKesson's capitalization and stripped down business structure, and for the wind-down debtors feasibility is demonstrated through the wind-down budget.

Mr. Liebman details projected operating receipts, liquidating receipts, reserve funding, vendor payments, retiree obligation and administrative claim estimates. This is -- obviously has been supplemented by the concessions made and the clarifications put on record today by Mr. Mitchell.

The budget predicts that there should be at least $209 million in receipts sufficient to pay the remaining administrative and priority claims, as well as the trust and wind-down expenses that are estimated at I guess approximately $49.7 million.

The wind-down reserve and administrative claims reserve are fully funded or will be fully funded at or before the effective date. The declaration also addresses the various discretionary provisions, including the releases, exculpations and injunctions.

The testimony demonstrates and evidence is that these provisions were heavily negotiated. They are customary in many complex cases and they are supported by substantial consideration from the released parties, including the DIP lenders and McKesson, who certainly would not have supported the plan otherwise.

The Court again notes the substantial concessions made by landlords, the United States through the DOJ and the PBGC, although we recognize PBGC is not part of the United States -- kind of like the postal service -- equity holders and McKesson.

The debtor release and third-party releases contain carve-outs for gross negligence, willful misconduct and actual fraud, and the third-party release -- this Court finds the third-party releases are entirely consensual, and I'm going to address -- let me address the third-party release issues now.

Of the objections by the U.S. Trustee I'd like to focus on the opt out argument and the dispute with respect to the opt out mechanism. The U.S. Trustee and other objectors have taken the position that the opt out mechanism provided under the opponent's plan is insufficient under Perdue, and applicable state law to support consensual third-party releases under a plan.

The U.S. Trustee and several parties submitting written objections seemed well aware of this Court's views as expressed in prior cases, such as BlockFi, Bed, Bath & Beyond, and Vitae and the first Rite Aid case. To be clear, this Court's position has not changed and joins other courts in this district, the circuit and the 93 other districts which approve the use of informed opt out procedures to reflect consent, to propose consensual releases under the Chapter 11 plan.

Indeed, in the District of New Jersey our court -- our courts have been rather uniform in recognizing opt out provisions as fundamentally fair and consistent with due process and applicable bankruptcy law. This Court respectfully disagrees with the parties, and my thoughtful colleagues on the Bench in other districts that offer either questionable policy reasons or challenge the use of opt outs as being contrary to state law.

I of course incorporate my reasoning comments from past decisions, but I will add the following. Under the United States Constitution, Article I, Section 8, Clause 4, "Congress has the authority to enact uniform bankruptcy laws. This power displaces state law where state law interferes with uniformity or federal law directly governs the matter."

Opt Out consent procedures are governed by federal rules. They involve questions concerning balance structure, disclosure adequacy, plan solicitation and release mechanisms, and they are governed by Sections 1125, 1126 and Federal Rule of Bankruptcy Procedure 3017 and 3018.

These are procedural federal rules and Federal Court statutes and, thus, the Federal Courts maintain exclusive authority over them. State law cannot dictate the legal effect of federal voting and solicitation process, and applying state law would defeat national uniformity.

A Chapter 11 plan is a federal judgment, not a

contract. Confirmation under Section 1141 binds all creditors, including nonvoting, dissenting or silent creditors. Courts have repeatedly emphasized that a Chapter 11 plan is a Federal Court order, not merely a private contract with state law consent requirements.

Courts evaluating releases, therefore apply federal bankruptcy standards, such as good faith, fairness, adequacy of notice and not necessarily state assent doctrines. Bankruptcy laws routinely treats silence as consent. Bankruptcy law often recognized deemed consent in various contexts.

It says Section 1126(f) where unimpaired classes are deemed to accept; 1126(g), where nonrecovering classes are deemed to reject; Rule 3007, claim objections are sustained if there's been no response; Rule 4001, stay relief is granted if there's no opposition.

Thus, federal law already treats notice and no objection as consent in appropriate situations. State contract law, which often requires affirmative consent, conflicts with this fundamental bankruptcy structure. If state contract doctrines controlled consent, creditors in 50 states would be subject to differing assent requirements.

For instance, some states requires affirmative signatures. Some states treat silence and acceptance only in limited circumstances, or impose a heightened waiver standard. The results would be a nonuniform, unmanageable Chapter 11

landscape.

For this Court there is bottom line a strong policy argument supporting the use of an opt out mechanism. How to best protect those very disinterested creditors who don't read their mail. Often, Chapter 11 plans will offer some measure of monetary incentives to creditors who grant third-party releases.

Creditors who ignore the plan process may indeed miss out if they're required to opt in. The very constituency that the U.S. Trustee wishes to protect may fare worse in an opt in process, all in the name of providing them with an opportunity to bring lawsuits, which in reality are highly unlikely to pursue.

So for those reasons the Court overrules the U.S. Trustee's objection to the opt out mechanism in this plan. Bear with me. With respect to debtor releases, the Court overrules the trustee's objection. The Court finds that the releases involve estate causes of actions, which have been approved by the true economic stakeholders.

The Court is cognizant and has noted that the causes of actions which may be extant have already been pledged to the lenders who are significantly underwater. There is no evidence of misconduct warranting exclusion. The releases are consistent with practice in complex Chapter 11 cases.

The Court finds that the Zenith factors have indeed

been satisfied. There have been the necessary consideration provided and identity of interest among the parties. I'm not going to go through the Zenith standards. With respect to exculpation, the Court certainly is familiar with the Third Circuit's ruling in PWS Holding.

The Third Circuit has held that a plan may exculpate a creditors' committee, its members and estate professionals for their actions in bankruptcy cases except where those actions amount to willful misconduct or gross negligence. the Court is also aware that the -- that the courts in the district of -- Bankruptcy Courts from the District of Delaware in Washington Mutual case and Mallinckrodt and Tribune I think, have found that this language in the holding in PWS limits the availability of exculpations to estate fiduciaries.

I don't necessarily read PWS as limiting. It focused on the standard of care that was undertaken by those being exculpated. The exculpation clause at issue here is consistent with the highest standard of care imposed on estate fiduciaries.

I see no reason to limit the availability of exculpation to the estate fiduciaries as long as other parties are acting at that same heightened level of care. I note that there have been other courts in other circuits which have disagreed with the interpretation relied upon in Washington Mutual and the Tribune Company case.

Look to in re Murray Holdings, 623 B.R. 444. Actually, it's in re Murray Metallurgical Holdings -- Metallurgical Coal Holdings, and I recognize that those are -- that's an out of circuit decision, but again, I don't necessarily read PWS as being as narrow as proffered by the U.S. Trustee.

I do agree, however, that the exculpation cannot extend to the post-confirmation entities, such as the wind-down debtor or the reorganized debtor, and would agree to limit the holdings -- and would agree that the plan must be limited in that respect.

With respect to the injunction and the gatekeeping, the injunction of course is the plan and does not confer a discharge on the liquidating debtors. It is a necessary, in this Court's view, a necessary tool in order to enforce the language and the intent of the plan and confirmation order.

And the gatekeeping function just insures that review will be undertaken by the Bankruptcy Court initially, the Court that I view as most familiar with the plan's provisions and the terms of the confirmation order with respect to any post-confirmation litigation brought by opt out parties, and it's under -- the gatekeeping role's intended to insure that such litigation is consistent with the terms of the plan and comports with the releases or discharges, if applicable, that are provided under the plan.

Again, I'll incorporate by reference comments I have made in other cases. They have been included in the debtors' legal memorandum. I do take issue with the use of the term "colorability." I want to make it clear, as far as gatekeeping, color -- and this Court determining the colorability of claims that are being brought post-confirmation, the Court is not in any way ruling on the merits and the substantive merits of the claims, and colorability should not be interpreted as -- in such a fashion.

The Court is limiting its initial gatekeeping role to reviewing whether the proposed litigation comports with the terms of the plan and confirmation order, and in no way addresses the underlying litigation, and I would ask that the confirmation order make that clear.

I think I have addressed everything that I was prepared to address. I'm sure I've missed much, but again, I want to thank all of the professionals in this case, debtors' professionals, Committee professionals, the debtors' transition team, Mr. Liebman, as well as the counsel representing the lenders and the other negotiating parties in a very difficult case.

Let me throw this now -- I gave a mouthful. It's 1:00 o'clock. Let me throw this to anyone who -- else who wishes to be heard. Mr. Mitchell, is there anything the debtor wishes to address further or ask me to clarify?

MR. MITCHELL: Your Honor, I think your -- your ruling was -- was quite clear, and I thank you for that. Your Honor, I think our only last housekeeping issue is we would like to speak to Mr. Sponder and count -- and Mr. Marshal, as well as Mr. Garbey (phonetic) around the statutory fee issue, and hope to be back to Your Honor in 30 minutes or so.

THE COURT: Well, let me go to Mr. Twomey and then we'll talk about when I can hope back on.

MR. MITCHELL: Okay.

THE COURT: Because as you all know, I have a dead stop at 2:00 o'clock. So we'll see what we can do.

Mr. Twomey.

MR. TWOMEY: Thank you, Your Honor. Dennis Twomey, with Sidley Austin, on behalf of McKesson. Your Honor, again, would like to reiterate everyone else's thanks to you for your repeated accommodations throughout this case. It has been quite a process.

I just wanted to touch base on one issue that Ms. Eaton mentioned at the beginning. We do intend to work with the Paul Weiss team, as we have been, and with the DOJ to see if we can come to ground on the open issues there that would be built into the confirmation order.

I just wanted to, you know, just note again for Your Honor those issues aren't immaterial. So we still do have some work to do there, and hopefully, we can get there, but just

wanted to, you know, make that point explicit, that we do still have some issues on that front that we're hoping to resolve and get reflected in the order.

THE COURT: I recognize that. I know we're not there yet. We're just getting closer. And I want to also say, forgive me, I may have excluded my thanks and appreciate to counsel for McKesson, who's been an integral part of all of the lengthy negotiations throughout this case and the last case.

So again, hopefully, you all can come to language that works. Let me -- it is now 1:05. Can we -- if I adjourn can we reassemble at 1:40?

MR. MITCHELL: Yes.

THE COURT: And basically, I can just take an update at that point. Mr. Sponder, I do see you -- did you -- is there anything I can clarify or address that I may have missed?

MR. SPONDER: Thank you, Your Honor. Jeff Sponder, from the Office of the United States Trustee. No; understood your ruling, Your Honor. Thank you. With respect to the statutory fee issue, it -- I have provided revisions to the language.

If there are going to be other revisions, I may not have a response by 1:40. That's going to go up the chain, as well. If the debtors and all the other parties agree to the language that I propose, then I think we're settled, but I just want everybody to be aware that I can't just agree if there are

anymore changes.

THE COURT: The other -- Thank you, Mr. Sponder. The other option, Mr. Mitchell, is simply -- we know I'm not entering an order today that -- I'm leaving and there's no order yet to even work on. We're all working on language. I could carve out an hour tomorrow morning before my next hearing, if you all want to -- rather than coming back in a half-hour, if you want the rest of the day to work out language issues.

MR. MITCHELL: Yes, Your Honor. I think that would -- yeah, that would work quite well.

THE COURT: I think it's probably more productive. Becca, we have a hearing at 10:00, correct?

THE CLERK: Yes. Well, we have a call at 10:00.

THE COURT: Call at 10:00.

THE CLERK: And a hearing at 11:30.

THE COURT: Hearing at 11 -- how about 9:30 tomorrow morning?

MR. MITCHELL: That certainly works for the debtors, Your Honor.

THE COURT: All right. And it's -- if -- Mr. Mitchell, if your firm would send around a Zoom link.

MR. SPONDER: Your --

THE COURT: Or shall we do -- Becca --

THE CLERK: We can re-use this --

THE COURT: We'll re-use this link.

MR. MITCHELL: Okay.

THE COURT: That we're using.

MR. SPONDER: And Your Honor, from the Office of the United States Trustee, as I'm going to be in court for the Powin confirmation hearing later that morning, I just wanted to make sure you didn't have any issue with me appearing in court.

THE COURT: I'd welcome it. All right.

MR. SPONDER: Excellent. Thank you, Your Honor.

THE COURT: Look, need the company. All right. Then thank you all. Appreciate everybody's time and efforts. I know it's been a long weekend and a long morning. Until tomorrow morning at 9:30, take care.

MR. MITCHELL: Thank you.

THE COURT: We are adjourned.

* * * * *

C E R T I F I C A T I O N

We, KAREN WATSON and ELIZABETH REID-GRIGSBY, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CD, playback number 12:17:29 to 1:07:31, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

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EXHIBIT C

CONFIRMATION HEARING TRANSCRIPT

In re Ascend Performance Materials Holdings Inc., No. 25-90127 (CML) (Bankr. S.D. Tex. Dec. 9, 2025)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

	)	CASE NO: 25-90127-cml
	)	
ASCEND PERFORMANCE MATERIALS HOLDINGS, INC. AND OFFICIAL	)	Houston, Texas
COMMITTEE OF UNSECURED CREDITORS,	)	Tuesday, December 9, 2025
Debtors.	)	1:00 p.m. to 1:41 p.m.

TRIAL

BEFORE THE HONORABLE CHRISTOPHER M. LOPEZ
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtors:	JONATHAN LOZANO JASON GARY COHEN Bracewell LLP 711 Louisiana Street Houston, TX 77002
	OLIVER PARE Kirkland & Ellis LLP 601 Lexington Avenue New York, NY 10022
For The US Trustee:	JAYSON B. RUFF Office of the United States Trustee 515 Rusk Street Houston, TX 77002
For Wells Fargo Capital Finance and Wells Fargo Bank:	JULIA FROST-DAVIES T. CHARLIE LIU WILLIAM MUCHNIK Greenberg Traurig, LLP 1000 Louisiana Street Houston, TX 77002
For Puffer Sweiven:	MARY ELIZABETH HEARD Grable Martin, PLLC 7700 Broadway Street San Antonio, TX 78209

For PNC Bank:	CHRISTOPHER V. ARISCO Padfield & Stout, LLP 100 Throckmorton Street Fort Worth, TX 76102
For SK Titan Holdings:	JONATHAN GORDAN Latham & Watkins LLP 330 North Wabash Avenue Chicago, IL 60611
For Todd Arden Charlie Piper and Michael Wartell:	STEVEN J. REISMAN Katten Muchin Rosenman LLP 50 Rockefeller Plaza New York, NY 10020
For Official Committee Of Unsecured Creditors:	BENNETT S. SILVERBERG SHARON ILANA DWOSKIN Brown Rudnick 7 Times Square New York, NY 10036
For Ad Hoc Group of Lenders:	ANNELYSE SCARLETT GAINES Gibson Dunn 1700 M Street, N.W. Washington, D.C. 20036
For Texas Commission of Environmental Quality:	LAYLA DANIELLE MILLIGAN Texas Attorney General's Office PO Box 12548 Austin, TX 78711
Court Reporter:	YESENIA LILA
Courtroom Deputy:	YESENIA LILA
Transcribed by:	Veritext Legal Solutions 330 Old Country Road, Suite 300 Mineola, NY 11501 Tel: 800-727-6396

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P R O C E E D I N G S

THE COURT: Okay. Good afternoon. This is Judge Lopez. Today is December the 9th. I'm going to call the 1:00 p.m. case, Ascend Performance, 25-90127. I'll take appearances in the courtroom. Anyone on the line who wishes to make an appearance, please hit 5 star, and I will unmute your line. Good afternoon.

MR. RUFF: Good afternoon, Your Honor. Jayson Ruff for the U.S. Trustee.

THE COURT: All righty. Good afternoon. Okay. It's an 847 number.

MS. GAINES: Good afternoon, Your Honor. This is AnnElyse Gaines of Gibson Dunn on behalf of the ad hoc group of lenders.

THE COURT: Good afternoon. Okay. 512 number.

MR. LOZANO: Good morning, Your Honor. Jon Lozano with Bracewell, LLP, on behalf the Debtors, also joined today by my colleague Jason Cohen and by my co-counsel Kirkland & Ellis Oliver Pare.

THE COURT: Good afternoon. A 617 number.

MS. DWOSKIN: Good afternoon, Your Honor. Sharon Dwoskin of the official Creditors committee from Brown Rudnick.

THE COURT: Good afternoon. An 857 number.

MS. FROST-DAVIES: Good afternoon, Your Honor.

Julia Frost-Davies of Greenberg Traurig. I'm joined by my colleagues William Muchnik and Charlie Liu. We represent Wells Fargo Capital Finance as agent for the DIP ABL lenders and also Wells Fargo Bank n/a as agent for certain proposed exit ABL lenders.

THE COURT: Good to see you, Ms. Davies.

MS. FROST-DAVIES: Nice to see you, Judge.

THE COURT: It's a 412 number. A 412-973 number? All right. Let's go with a 646 number.

MR. PARE: Good afternoon, Your Honor. Oliver Pare, Kirkland Ellis, on behalf of the Debtors.

THE COURT: Good afternoon. A 512 number. Got about four more to go.

MS. MILLIGAN: Good afternoon, Your Honor. Layla Milligan appearing along with my colleague (indiscernible) of the Texas Attorney General's Office, appearing on behalf of the Texas Commission Environmental Quality.

THE COURT: Good afternoon. A 210 number.

MS. HEARD: Good afternoon, Your Honor. Mary Elizabeth Heard on behalf Puffer Sweiven.

THE COURT: Good afternoon. An 817 number.

MR. ARISCO: Good afternoon. This is Christopher Arisco on behalf of PNC Bank.

THE COURT: Good afternoon. A 312 number.

MR. GORDON: Good afternoon, Your Honor. Jonathan

Gordon of Latham & Watkins on behalf of SK Capital.

THE COURT: Good afternoon. We got two more to go. A 212 number.

MR. REISMAN: Good afternoon, Your Honor. Steven Reisman with Katten Muchin & Rosenman on behalf of Todd Arden, Charlie Piper, and Michael Wartell, the independent directors who together comprise the special committee of the Debtors.

THE COURT: Okay. And a 212 number.

MR. SILVERBERG: Good afternoon, Your Honor. Bennett Siverberg of Rudnick for the committee.

THE COURT: Good afternoon. Anyone else? Please hit 5 star, and I will unmute your line. Okay. Who do I turn this over to?

MR. LOZANO: Good afternoon. Again, for the record, Jon Lozano with Bracewell on behalf of the Debtors. I believe I said good morning earlier so good afternoon this time.

In a moment I'll hand the podium off to Mr. Pare, but before doing so, I wanted to take a moment, as always, to thank the Court for working with us, scheduling certainly over the life of this case, but especially in the last couple of months. As you'll hear Mr. Pare's presentation and have seen in the notices, that time was used very productively and as always, we just wanted to thank the

Court and especially Ms. Saldana for working with us. And with that, I'll hand it off to Mr. Pare.

THE COURT: Okay. Actually, before you do, I just got two more -- let me just do this -- three more -- before I forget. These are the last three that I do for now. Is a 212 number.

MAN 1: (indiscernible) appearing on behalf of the committee. Apologies for being late.

THE COURT: No. No worries. Good afternoon. Another 212 number.

MR. MACWRIGHT: Yes. Hi, Your Honor. Tom MacWright from White & Case on behalf of MHBA.

THE COURT: Good afternoon. And a 267 number.

MR. LAWALL: Good afternoon, Your Honor. Fran Lawall, Troutman Pepper, on behalf of SDI, Inc.

THE COURT: Where is area code 267?

MR. LAWALL: Your Honor, are you able to hear me?

THE COURT: Yes.

MR. LAWALL: Okay. Good afternoon. It's Fran Lawall, Troutman Pepper, on behalf of SDI, Inc. I'm having some audio problems. I apologize for the confusion.

THE COURT: No. No worries. No, I was asking where area code -- where's 267, the area code, is from.

MR. LAWALL: Yeah. It's Philadelphia.

THE COURT: Oh. Philly. Okay. Thank you. All

righty. Now I'll turn it over.

MR. PARE: Thank you very much, Your Honor. Are you able to hear me okay?

THE COURT: Just fine. And if parties whose line I have unmuted, if you could mute yourselves. I will keep your line unmuted on this side just so we can all hear each other with as little back noise as possible. Thank you.

MR. PARE: Thanks very much, Your Honor. So, Your Honor, on October 20th, last we were before you, the Debtors received Your Honor's blessing to solicit a plan that enjoyed the full support of the Debtor's lenders, provided for meaningful recovery to key unsecured stakeholders, consensually resolved all seven of the Debtor's asset finance arrangements, and represented a value maximizing path forward for these Chapter 11 cases.

Solicitation began immediately after Your Honor entered the DS order, and as Mr. Lozano said, while it was in process, the Debtors kept hard at work and continued to negotiate with key stakeholders to optimize their go-forward capital structure. I'll address the outcome of those negotiations in just a second, but suffice it to say that the most important question here has been asked and answered. Every voting class of Creditors voted overwhelmingly to approve the plan, including the new capital structure, and with Your Honor's approval, the

Debtors are prepared to consummate a restructuring that nearly eight months ago felt impossible.

None of this could have been achieved without the support of our lenders, the collaboration of the UCC, and the grit and determination of our management team who have been working nights and weekends around the clock for just about a year now in addition to all of their day jobs.

We'd also be remiss, Your Honor, not to thank you and the entire crew at the Southern District of Texas and the court staff for so graciously accommodating our shifting schedule.

As I mentioned, Your Honor, the plan has improved since we last spoke as a result of good faith, arm's length negotiations among the Debtors and their key stakeholders. Specifically, the latest iteration the Debtor's plan eliminates the equity rights offering, upsizes the debt rights offering to 235 million, staples a $75 million equity commitment onto the exit term loan, and, Your Honor, these changes were not only critical in maintaining the support of exit financing parties but also an increasing available post-petition financing from the rights offering from a total of 200 million to a total of up to 310 million.

The Debtors are also actively working withs stakeholders to negotiate to negotiate, document, and syndicate an approximately $335 million exit ABL facility

which is anticipated to be a critical component of the exit financing that will commit the Debtors to emerge as a viable business.

Importantly, Your Honor, none of these changes directly impact the treatment of any voting parties, but rather reflect negotiations among certain exit financing parties, the term loan DIP lenders, and the ABL DIP lenders. And Your Honor, as set forth in the revised financial projections filed at docket number 1150, the plan, as amended for this new exit capital structure, clearly continues to be feasible.

As further evidence, Your Honor, of the overwhelming support for the plan, the only economic actors to object to the plan limited their objection to reservations of rights, all of which were resolved through language additions to the confirmation order and cure objections, none which are set to be heard today.

The loan objection to the plan itself comes from the United States Trustee who opposes the plan on several familiar bases. I'll address the U.S. Trustee's arguments in due course, but now, suffice it to say the U.S. Trustee misstates the law and the objection should be overruled for the reason set forth in the Debtor's papers.

Before I turn to our case in chief, Your Honor, unless Your Honor has any questions at the outset, the

Debtors would suggest reviewing the evidence in support of the relief requested today.

THE COURT: Okay.

MR. PARE: Great. And, Your Honor, bear with me. We put a lot of paper on the witness and exhibit list so I will list them all out. We filed affidavits of publication and certificate of service regarding the disclosure statement, plan, disclosure statement order, solicitation packages, confirmation hearing notice, and related documents. Those are at docket numbers 1024, 1025, 1027, 1028, 1042, and 1048, as well as notices of adjournment of the confirmation hearing at docket numbers 1070 and 1085.

In addition, the Debtor's filed declarations from Mr. Bob Del Genio which addresses the 1129 factors at docket number 1185, the declaration of Mr. David Rush which addresses best interest at docket number 1186, the declaration of Mr. Matthew O'Connell which addresses valuation at docket number 1187, and the declaration of Mr. Charlie Piper which addresses the special committee's investigation at docket number 1188. The Debtors also file the voting report of Ms. Emily Young at docket number 1189. All five declarants are available in the virtual courtroom should anybody wish to cross-examine them.

So, unless Your Honor has any questions, the Debtors respectfully request that all of these documents be

moved into evidence.

THE COURT: Any objection to the admission of any of these documents for purposes of today's hearing?

MAN 1: Your Honor --

THE COURT: Oh. Okay. They're admitted.

(Witness lists, Exhibit lists, Affidavits of publication, Certificate of service for disclosure statements, Plan, Disclosure statement order, Solicitation package, Confirmation hearing notice, Related documents, Notice of adjournment of confirmation hearing, Declarations of Bob Del Genio, David Rush, Matthew O'Connell, Charlie Piper, Voting report of Emily Young entered into evidence)

MR. PARE: Thank you very much, Your Honor. Now if it pleases the Court, I'll move to our case in chief.

Your Honor, the Debtor's arguments in support of confirmation are all laid out in detail in the confirmation brief so I'll spare the Court a recitation of each of the 1129 factors, but suffice it to say that between the brief and the several declarations that are now in evidence, the Debtors believe it's clear that they've demonstrated by a preponderance of the evidence that they've satisfied the 1129 factors, including with respect to feasibility and best interests, and the voting report make clear that the Debtors have complied with the requirements of the disclosure statement order.

So, Your Honor, I expect the bulk of our time will ultimately be spent on the U.S. Trustee's objection, but before we turn to that, I'll just flag that we filed a revised confirmation order early this afternoon at docket number 1195. The updates are primarily incorporating reservations of right language, certain clerical changes, and languages -- language to resolve Nobis's potential confirmation objections and setting a framework for resolution of the Debtor's motion to reject the Nobis contract. I'd be happy to walk Your Honor through the changes. I've kept an eye on the docket. I assume Your Honor was rather busy today and may not have had time to review. I'm happy to walk you through the changes.

THE COURT: I'm going to blame Mr. Del Genio for keeping me busy earlier today. I did not get a chance to review, but I promise to review them. I did get a chance to review them just a few minutes ago, but please highlight the main points for me.

MR. PARE: Certainly, Your Honor. There should have been a redline attached at docket number 1195, Your Honor. Please let me know when you have that pulled up.

THE COURT: Yep. I got it up.

MR. PARE: The first change is in Paragraph 21, service of the opt-out form. We added the word -- and don't let me rush you, Your Honor. Please let me know when you're

--

THE COURT: No, no. Go ahead. Keep going.

MR. PARE: We added the word "validly" there to correct some confusion about the opt-out form. The next change is a large addition of Page 50. This is Paragraph 96. This is related to the Nobis settlement as I previewed. As Your Honor may remember, the Debtors filed a motion to reject the Nobis contract.

The parties have been working in good faith over the past several weeks to come to an agreement as to a path forward, both on Nobis's potential objections to the plan and on the Debtor's rejection motion. So, this charts a path forward.

The parties will, beginning in January of 2026 if they haven't already come to an agreement, enter into good faith mediation, and if that mediation which would address all of the commercial issues outstanding as between the parties -- if that mediation is unsuccessful, the parties would then be able to litigate before Your Honor the rejection motion that is currently pending but adjourned indefinitely.

Any questions on this, Your Honor? I know --

THE COURT: No, no. That makes sense to me. That makes sense to me. Who's the -- have you -- my only question -- has a mediator been selected?

MR. PARE: We have not selected a mediator, Your Honor, and I know counsel to Nobis or MHBA is on the line, so please speak up if you disagree. I think we talked about this being most likely a commercial mediator, perhaps someone local in Texas, but the parties have not conferred in detail and that ultimately is an open point.

THE COURT: The only question I have is, is there something you think you all are going to need from me on that or do you -- or just by signing a confirmation order, do you think you can do it on your own? I leave it up to you all. If you do -- if you feel like you need something, I want to comfort. Just upload something. I won't get -- obviously, I'm not going to get into selection of mediation -- of mediator but if there's something that you all need.

But I think you all can just go get it if I approve this. I don't think you need me, but if you need some comfort or something just upload something and let us know. Okay?

MR. PARE: Yep. That works for the Debtors, Your Honor. Thank you.

THE COURT: All right.

MR. PARE: The next change is to Paragraph 118, settled transactions. There's a parenthetical we added there.

THE COURT: The -- this looks like an avoidance of

doubt. I'm right. Okay. Go ahead.

MR. PARE: Yeah. It is an avoidance of doubt, although, it kicks to a document that is -- negotiating will be in the plan supplement so I just want to highlight it here, but it references a lien that the go-forward exit financing parties have agreed to grant --

THE COURT: Oh.

MR. PARE: -- the first priority liens as to certain additional collateral used for Ansley Park. They are an asset financing party.

THE COURT: Got it.

MR. PARE: There are then several changes, Your Honor, beginning on Paragraph 167, titled Chubb insurance program. Your Honor, this language may look familiar to you. It's very similar to language we've negotiated in the past with Chubb in similar cases but essentially reserving rights and making clear these agreements are being assumed. Rights will be reserved and the rights of the various parties under the agreements will continue after the effective date.

THE COURT: Yep, yep.

MR. PARE: Similarly, familiar language I would imagine, Your Honor, Paragraph 168 for the Texas Commission of Environmental Quality. Again, preserving rights.

THE COURT: Confirming that they opted out and

that they're a governmental unit, right?

MR. PARE: Correct.

THE COURT: Yep.

MR. PARE: That's Paragraph 170 and Paragraph 171.

THE COURT: Okay. Oh, there it is. Yep --

MS. MILLIGAN: Your Honor --

THE COURT: Yes.

MS. MILLIGAN: Apologies. This is Layla Milligan for the Texas Commission on Environmental Quality. I'm looking at the order, and I want to make sure I'm correct at 1191-1, Paragraph --

THE COURT: No. I'm looking at --

MS. MILLIGAN: I'm sorry. Was there a newer --

THE COURT: -- I'm looking at 1195-2.

MS. MILLIGAN: Oh, I'm sorry -- -2. Okay. Thank you.

THE COURT: Okay.

MS. MILLIGAN: In Paragraph 168, we had been negotiating this protected language that is pretty routine in our case (indiscernible) 161, 169, and 170, and 171. And there is one revision that we made that is not corrected in this version, so we'll continue discussions with Debtor just to fix that issue. I don't think it's controversial or something the Court needs to determine. It's just a matter of language structure.

So, I just wanted to point that out that (indiscernible) I'm just seeing this now. So, I apologize, Your Honor. I haven't had the chance to communicate our concerns, but we'll work this out and we appreciate the Debtors wanting to work with us to get this language agreed upon.

THE COURT: Okay.

MR. PARE: No problem. Happy to connect.

THE COURT: But connect today so I can sign this.

MR. PARE: Yep. We'll connect immediately after.

THE COURT: All righty.

MR. PARE: Yeah.

MS. MILLIGAN: Your Honor. I'm sorry. This is Layla. I'm getting an email from counsel as we speak saying they'll correct it, so we appreciate their willingness to fix that quickly. Thank you.

THE COURT: All right.

MR. PARE: Thank you, Your Honor.

Similar. I think this will be familiar language, Paragraph 172. This is from the department of justice, again, reserving rights here.

THE COURT: Yes. The governmental unit -- yep. The only thing I would ask is, if you're going to go in there, I think we can just tweak the defined language for -- is not a claim. I think you have like -- well, I'm okay

with it. I don't care. It's just kind of used twice but I think we've already defined "claim" in 168 and I think you can just say, "is not a claim" big C for -- and not kind of do the same as a claim as defined a claim. But I don't really care.

MR. PARE: Yeah.

THE COURT: But matter of fact, let's just keep it. Less is more. I think everybody would know. But just to kind of -- it's negotiated language. It's okay. It's repetitive. It's not doing anything more. It's just duplicative, but it works so let's just keep it.

MR. PARE: Understood. Thank you, Your Honor.

THE COURT: And --

MR. PARE: The final --

THE COURT: Go ahead.

MR. PARE: The final change to flag is a footnote, Footnote 9. This is in Paragraph 193. Here we are just listing out additional intercompany amounts that are addressed in this fact language.

THE COURT: Okay.

MR. PARE: That, Your Honor, is the extent of the changes to the confirmation order.

THE COURT: Okay. Perfect. Thank you.

MR. PARE: Thank you, Your Honor. So, if it please the Court, I'll return to the case in chief as

discussed.

THE COURT: All right.

MR. PARE: Your Honor, I mentioned the main focus would likely be on the loan objection here from the U.S. Trustee.

THE COURT: Mm hmm.

MR. PARE: The U.S. Trustee objects on several elements of the Debtor's plan -- first, the third-party releases; second, the scope of the exculpation provision; third, the injunction enforcing the release in exculpation; fourth, treatment of certain claims of government entities; and fifth, the Debtor's request for waiver of the 14-day stay of the confirmation order.

Your Honor, the Debtor, as always, have been in touch with the United States Trustee and have been working in good faith to resolve this objection and I understand that we have an agreement with respect to both exculpation and the treatment of certain government claims which were addressed with changes to language in the plan and the confirmation order.

THE COURT: Okay. Can you say again, Mr. -- can you repeat that again, counsel?

MR. PARE: Yes. Happy to, Your Honor. So, we connected with the United States Trustee, and I believe we're resolved on exculpation and on language they requested

that we add with respect to certain government entities and government plans. It's the same paragraph we covered with the DOJ.

THE COURT: That's the DOJ language? Okay.

MR. PARE: The DOJ asked for similar language to what they U.S. Trustee asked for so we housed it all in the same paragraph.

THE COURT: Got it. Okay. Okay.

MR. PARE: Thank, Your Honor. The remainder of the U.S. Trustee's objection, again, is to third-party releases, the injunction, and Rule 3020 should be overruled. I'll start with the releases. Your Honor, the U.S. Trustee misstates the law and asks Your Honor to depart from years of precedent in this court and others. As a threshold matter, the Purdue case cited by the U.S. Trustee explicitly does not prohibit consensual third-party releases. In fact, consensual third-party releases properly structured are one of the few things the majority in the dissent in Purdue actually agreed on.

So, the only question here from the Debtor's perspective is whether the releases are in fact consensual. For that question, Your Honor, given that the Debtors are in Chapter 11 and notwithstanding the U.S. Trustee's argument to the contrary, we look to federal and not state law to determine the question of consent. In Republic Supply, the

Fifth Circuit ruled that properly constructed opt-out releases are consensual and from that case and the ones that followed, it's clear that consent turns on notice, the opportunity to opt out, and adequate disclosure.

All of those requirements are met here, Your Honor, and holders of claims and interests received notice of the commencement of the cases, the bar date order, the filed schedules, the disclosure statement order, and this confirmation hearing -- all of that before the parties received ballots or notices of non-voting status and opt-out forms, both of which included the precise release language in the plan in full (indiscernible) response.

And, Your Honor, we're happy to say the releases worked. Over 50 holders exercised their right to opt out as evidenced by the voting report. And so, Your Honor, from the Debtor's perspective, it's very hard to argue that parties and interests were not given notice of the release, that there wasn't adequate disclosure, and that the parties did have ample opportunity to opt out, which again are the core considerations in determining whether a third-party release is consensual.

The releases are also consistent, Your Honor, with post-Purdue cases in this jurisdiction and others, including Robert Shaw.

So, for all those reasons, Your Honor, the U.S.

Trustee's objection as to the third-party releases should be overruled.

Next, the injunction. I think this follows naturally, Your Honor, from the third-party releases, but given that the releases are consensual, the U.S. Trustee's argument on injunction falls apart. The objection hinges on the erroneous conclusion, again, that the injunction is not consensual, but as discussed, the third-party releases, the injunction actually enforces are consensual under controlling precedent so it follows that the injunction itself is consensual with respect to any party that did not object to the third-party release.

Once again, the U.S. Trustee's reliance on Purdue and Highland is misplaced given that both of those cases concerned non-consensual third-party releases which is not the case here.

So, again, Your Honor, if Your Honor overrules the U.S. Trustee on third-party releases, it follows that the objection to injunction should overruled as well.

Finally, Your Honor, the U.S. Trustee argues that the Debtors have not demonstrated cause to waive the 14-day stay of the confirmation order under Rule 3020. To the contrary, Mr. Del Genio's declaration which in is evidence and unchallenged clearly lays out the time sensitivity of the Debtor's circumstances and the need to obtain exit

financing and exit these cases expeditiously.

The Debtors have been in Chapter 11, Your Honor, for nearly eight months, taking haymakers to their teeth on an almost daily basis, but through it all, they've negotiated in good faith and at every turn conducted these cases with a high degree of transparency. Prolonging them now would only drive additional administrative fee burn and destroy value for all parties and interests.

Your Honor, it's for precisely this set of facts that Rule 3020 gives the Court discretion to shorten the stay, and the Debtors believe they have met their burden for that relief in these cases.

So, I'm happy to answer any questions you have, but otherwise, the Debtors request that Your Honor overrule the U.S. Trustee's objection and confirm the plan.

THE COURT: Thank you. No questions. Let me just ask if anyone else wishes to be heard who supports the confirmation of the plan. Mr. Stark, I can't hear you.

MR. STARK: Is that a little better?

THE COURT: Yes. Thank you. Perfect.

MR. STARK: Okay. Thank you, Your Honor. I'll look a little funny on the Zoom. I won't belabor, but I'm happy to answer any questions you have. I just have a few prepared remarks if you will.

THE COURT: Okay.

MR. STARK: Your Honor, when we were last before you in this case -- at least I was before you in connection with the disclosure statement hearing --

THE COURT: Mm hmm.

MR. STARK: I asked if Your Honor would allow just a quick pause and try to retrace steps back to April of 2025 because when Ascend filed and the way that it filed, it was kind of a newsworthy event. This is very big, very important, and very complicated company with a very big, very complicated capital structure and it was free filing -- free fall filing.

And many of us -- I think Ms. Gaines and I might -- Ms. Gaines might even smile at this -- we spent a lot of time with one another outside of the courtroom wondering how this case would end and whether it would end in a conciliatory way or devolve into litigation because, certainly, when Ms. Gaines and I started talking, it certainly seemed like litigation over valuation and others were likely to happen. That's not how it ended.

THE COURT: That makes three of us, Mr. Stark. You can add me in there too.

MR. STARK: And -- thank you, Your Honor. And that did not happen here, and it's really important because in the day and age where bankruptcy does not look the same as it looked, say, 20 years ago, with this whole idea of a

business rehabilitation has sort migrated to a different form today.

A company like this -- sort of a little old school, a little old economy company but still very big and very important -- it might move in a different direction than it did. Though we had very good leadership on the company side -- Mr. Del Genio, Mr. Perry. We learned a new talent in this case, Mr. Perry entering the scene for some of us old-timers -- we had good stewardship. We had good leadership and we had thoughtful conversation, good negotiations.

This plan -- I don't know how many settlements are stacked in it, but there's a lot in there. Very good hard work and so we end up at the end of this case -- and I'd end up looking back in this case not getting a little bit nostalgic for what we did 20 years ago -- but this is the case that we did 20 years ago. We got -- we did what Chapter 11 wants us to do and I'm frankly very thankful for it. It's a little bit of a tonic every now and then that we can look back and see the system is working the way it's supposed to, and the committee is very pleased to support the confirmation of this plan. Thank you, Your Honor.

THE COURT: Thank you very much.

MR. REISMAN: Your Honor, briefly. Steven Reisman --

THE COURT: Yeah. Of course.

MR. REISMAN: -- on behalf of the special committee. Your Honor, I echo the comments of Mr. Stark. We're supportive of confirmation of the plan. There's a list of excluded parties that have been carved out. We worked -- the independent directors, Mr. Arden, Mr. Piper, Mr. Wartell -- worked very diligently here to analyze whether there were any valuable or viable claims worthy of pursuit. There's a list of excluded parties. There are those claims. There's going to be a litigation trust. There'll be pursuit of those claims in that regard.

We worked with the ad hoc group of lenders, Ms. Gaines, very -- in a very cooperative manner, and Mr. Stark, Brown Rudnick and others, including counsel for SK Latham in cooperative, productive, constructive manner, tried to reach agreement to resolve those claims or see if there's a way that we could get it done in the context of the Chapter 11 case.

The independent directors -- Katten, Provence -- on behalf of the disinterested directors and the directors looked at, you know, more than 125,000 documents, 825,000 pages. SK produced, you know, almost 6,000 documents. It conducted 9 witness interviews and tried to get to a resolution of those claims. Were unable to. they've been carved out.

They'll go to a litigation trust to either resolve or pursue in that regard in an effort to maximize value, to maximize recovery here and did it in a way -- everyone was extremely cooperative, productive, as I said, and did it in a way that -- we didn't have to come more burden the Court in that regard. We didn't have to go with 2004s and fight before Your Honor in that regard.

And so, I just I just -- my compliments to the various professionals that were involved here and acted in a manner -- there was healthy disagreement and that disagreement will be heard down the road in that regard. Hopefully, it will be resolved. Hopefully, through a mediation or something along those lines in that regard or the pursuit of litigation in that regard, not speaking as to what's going to happen.

But we have a very narrowly tailored list of excluded parties in that regard that the independent directors believe there are valuable and viable claims worthy of pursuit. Different parties take different positions in that regard. Not looking to get into that today, not looking to say anything that's binding on anybody.

Just want to say that, you know, the process worked in the context of this -- in this case and this could have held up confirmation and it did not and we're happy to

be here on confirmation and fully -- and the disinterested directors fully support the relief we're requesting -- that the Debtors are requesting be granted today. Thank you.

THE COURT: Thank you. Anyone else? Okay. I'll hear from the Trustee.

MR. RUFF: Thank you, Your Honor. Again, Jayson Ruff for the U.S. Trustee's Office. I'll be brief. I know you've heard all the arguments before. I first want to thank the Debtors and their team for I think narrowing the issues that remain in our objection and I think the Debtors are correct. It really is just the opt outs and our disagreement that that indicates any sort of affirmative consent required to enter into an agreement.

And -- but I know the Court's, you know, prior rulings on that and so -- and then same thing with the injunction. It kind of follows along with that. So, Your Honor, unless you have any questions for me, I'll just rest on the pleadings because I know you've heard all the arguments many times.

THE COURT: Thank you very much. And just, you know, for the record, the Court now considers confirmation of this Chapter 11 plan.

This case -- I'll find that there's been proper notice and service of all required documents and notices of hearings today. The Court considers the evidence that is

before the Court today.

This case started in April of 2025 and as parties have noted, came in very litigious, very contentious, very old school in a lot of ways in terms of the free fall bankruptcy case. There was very heated litigation in an adversary proceeding and then the Court could also tell that wasn't the only issue that needed to be resolved. There were going to be complicated Chapter 11 related issues as well.

Every hearing that I held in this case that can I remember -- I went back and looked at the adversary docket and the main case. Everything early on was contested. Everything was disputed. Very little agreement on everything -- on anything or there were heavy reservations of rights about what may be coming later. This was going to be a very contested adversary proceeding followed one way or the other depending on the rulings in that case with a very contested plan confirmation hearing coming from numerous parties.

Everything has come together. Mr. Stark, I think you're right. This has a very old school feel to it. It think really smart professionals worked together and achieved an incredible outcome in this case, and I'm -- want to just express the Court's appreciation for the argument, all the briefing, all the efforts that went in to kind of

getting to where one is today with a fully consensual among Creditors and economic stakeholders Chapter 11 plan.

I note plan confirmation requires looking at a few different sections of the code. I'll highlight a few. I'll note that 1122 has been satisfied. 1123 -- everything that the plan is supposed to contain is in there. Every -- there is no section in the plan that runs afoul of the code.

So, turning to 1129, I'll note that the plan has been filed in good faith, and I'm going to make good faith findings on behalf of the Debtors, their professionals, the independent directors. I'll take notice of the docket in this case. They've all acted in good faith throughout every proceeding before me here and is reflected in the settlements as well.

I'm (indiscernible) good faith findings on behalf of the committee and their professionals and the lenders as well. Ms. Gaines and her clients have all acted in good faith, kind of getting to where we are today (indiscernible).

Mr. Del Genio, you've been a -- you must have been incredibly busy because this case could have gone in a bunch of different directions, and a credit to really smart restructuring professionals of doing their job. And so, I very much appreciate the work of the Debtors.

I also just want to express appreciation to the

committee and its professionals. I think, you know, it's a -- did their job and I -- at high level and so it's just -- gives the Court comfort that there's a -- yeah, to have someone looking out for unsecured Creditors who hasn't been involved in this case, and so I take comfort in approving everything today.

I'm going to approve confirmation of the plan. I'm going to approve all the settlements that are contained within the plan and I know that there's still some final tweaking with TCEQ and I'm confident that's going to be easily worked out, and I'll sign something today.

But the settlements contained within the plan easily satisfy Debtor's business judgment and are fair and reasonable and getting to plan confirmation is an easy -- I mean, it's not easy -- but breaching terms with the TCEQ, with the DOJ, insurance companies in the language contained in the proposed confirmation order are all approved.

The other settlements that are contained with the lender groups and the proposed funding are all approved and fair and reasonable and the best -- on the best terms that are available and I'll make those findings as well.

I'm going to overrule the Office of the United States Trustee's objections to the opt outs and I'll -- I'm -- note that the opt outs I do believe provide consent in accordance with applicable law in this circuit. I think --

every -- I think you got to look at every case and the form of notice that has been provided to parties has conspicuous language about the opt outs and I feel the notice and the service was proper. And as parties know, I'm a big stickler on the process when it comes to making sure that if one is going to provide an opt out that people actually have the opportunity to opt out in accordance with the procedures that have been approved by the court and I find that they have in this case. And I'll rely on decisions in this circuit as well -- decisions that I've made in Robert Shaw and I think Judge Perez in Container Storage.

So, I'll overrule the objection. And with respect to the waiver, the 14-day stay, I know that this is something that the Trustee's been focused on recently and I think they're right to do so. I'm going to overrule their objection in this case. I think this company has a lot of moving pieces and really all the economic parties are -- that are heavily involved in this case and the -- with so many settlements in here, what makes sense is for this company is to emerge and to -- there's cause to do so and so I'm going to overrule the objection.

I do think -- with respect to the exculpations, I think the language that you have here is I think the right answer in this circuit and so I appreciate the parties working on that. And so, I would just ask that you just get

the final confirmation order and send it so that when it hits the docket, everybody's kind of clear on what that is.

I really -- if all you're doing is tweaking TCEQ language, I don't think I really need a redline. You can just file a proposed final and if it's fine with the parties but -- you can send internal redlines if you want. If you want to file a change pages only. Whatever's easier but just get something and just let me know when you need -- I'm getting on a plane tomorrow morning so I really want to sign stuff today to the extent we can and so I would very much appreciate the ability to do that.

So, is there anything else we need to take care of today?

MR. LOZANO: Nothing else from the Debtors, Your Honor. We'll be sure to get you that revised language as soon as possible and safe travels tomorrow. Thank you so much for your time on this case and looking forward to taking this one effective. Thank you.

THE COURT: All righty, folks. Thank you very much. We're adjourned.

(Whereupon these proceedings were concluded at 1:41 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions
330 Old Country Road
Suite 300
Mineola, NY 11501

Date: December 15, 2025

EXHIBIT D

CONFIRMATION HEARING TRANSCRIPT

In re Eiger Biopharmaceuticals, Inc., No. 24-80040 (SGJ) (Bankr. N.D. Tex. Sept. 5, 2024)

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, CHIEF JUDGE

In Re:	)	Case No. 24-80040-sgj11
	)	
EIGER BIOPHARMACEUTICALS, INC.,	)	PLAN CONFIRMATION HEARING
	)	
Debtor.	)	September 5, 2024
	)	Dallas, Texas

Appearances:

For the Debtors:	Thomas R. Califano Veronica A. Courtney William E. Curtin (via WebEx) Anne G. Wallice (via WebEx) Andrew Townsell (via WebEx) Jake A. Landreth (via WebEx) Sidley Austin LLP 787 Seventh Avenue New York, New York 10019 Parker G. Embry Rakhee Patel (via WebEx) Nathan Elner (via WebEx) Chelsea McManus (via WebEx) Sidley Austin LLP 2021 McKinney Avenue, Suite 2000 Dallas, Texas 75201 Amanda Rahie Jackson T. Garvey (via WebEx) Sidley Austin LLP One South Dearborn Chicago, Illinois 60603 Sam Newman (via WebEx) Sidley Austin LLP 1999 Avenue of the Stars, 17th Floor Los Angeles, California 90067
For Innovatus Life Sciences Lending Fund I, LP:	Jeff P. Prostok Forshey & Prostok, LLP 777 Main Street, Suite 1550 Ft. Worth, Texas 76102

Appearances continued on next page.

Appearances continued:

Conflicts Counsel for Debtors:	Patrick J. Neligan, Jr. (via WebEx) Neligan LLP 4851 LBJ Freeway, Suite 700 Dallas, Texas 75244
	John D. Gaither Neligan LLP 325 North St. Paul Street, Suite 3600 Dallas, Texas 75201
For Acting Assistant United States Trustee Lisa L. Lambert:	Elizabeth Ziegler Young, Trial Attorney U.S. Department of Justice Office of the United States Trustee Earle Cabell Federal Building 1100 Commerce Street, Room 976 Dallas, Texas 75202
For the Official Equity Security Holders' Committee:	S. Margie Venus McKool Smith 600 Travis Street, Suite 7000 Houston, Texas 77002
	Brett S. Moore Porzio, Bromberg & Newman, P.C. 1675 Broadway, Suite 1810 New York, New York 10019
For the Official Unsecured Creditors Committee:	Daniel N. Gonzalez Meland Budwick, PA Munsch Hardt Kopf & Harr, P.C. 200 South Biscayne Boulevard, Suite 3200 Miami, Florida 33131
For Innovatus Life Sciences Lending Fund I, LP (via WebEx):	Andrew J. Citron Adam C. Rogoff Paul B. O'Neill Kramer Levin Naftalis & Franken LLP 1177 Avenue of the Americas New York, New York 10036
For Merck Sharp & Dohme LLC (via WebEx):	Martin E. Beeler Ethan White Covington & Burling LLP 620 Eighth Avenue New York, New York 10018

Appearances continued on next page.

Appearances continued:

For Oaktree Fund Administration (via WebEx):	Benjamin Beller Sullivan & Cromwell LLP 125 Broad Street New York, New York 10004-2498 Jonathan Lozano Bracewell LLP 111 Congress Avenue, Suite 2300 Austin, Texas 78701-4061
Digital Court Reporter:	United States Bankruptcy Court Northern District of Texas Michael F. Edmond Sr., Judicial Support Specialist Earle Cabell Building, U.S. Courthouse 1100 Commerce Street, Room 1254 Dallas, Texas 75242 (214) 753-2062
Certified Electronic Transcriber:	Susan Palmer, CERT 00124 Palmer Reporting Services

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Thursday, September 5, 2024 9:36 o'clock a.m.

P R O C E E D I N G S

COURT SECURITY OFFICER: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, the Honorable Stacey Jernigan presiding.

THE COURT: Good morning, everyone. Please be seated.

All right. For the record, we have settings in Eiger BioPharmaceutical this morning, Case Number 24-80040.

We have a lot of folks in the courtroom and we have even more, I think, on the WebEx. We had about 30 parties sign the digital, the electronic sign-in sheet.

So I understand there may be agreements or settlements in the works, so rather than get full formal appearances right now, I will ask Mr. Califano to come forward and tell us what you're — what you're in the middle of this morning.

MR. CALIFANO: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIFANO: I can't believe I'm saying it, but we have a universal and global settlement.

THE COURT: I can't believe you're saying it either.

MR. CALIFANO: I know. I'm sorry. I am.

(Laughter.)

THE COURT: Someone pinch me.

MR. CALIFANO: Yes. And it was — and, you know, I'm

sorry we couldn't phone the Court earlier, but we were negotiating until like 1:00 this morning, and then we started again at 6:00 this morning, but everything is done.

THE COURT: Wow.

MR. CALIFANO: And then what I just beg the Court's indulgence, to give us an hour, an hour and a half, we're papering it right now. They sent me down here because I was the least important person.

THE COURT: Ah, okay.

MR. CALIFANO: So they're back in the office now papering it. We're going to get, you know, redlined orders to everyone. So if it's okay with the Court, if we could come back at 11:00?

THE COURT: Um-hum.

MR. CALIFANO: 11:00 Central. And then we'll have it, you know, a consensual confirmation hearing and we'll be done. And Your Honor's afternoon will be free.

THE COURT: Okay. Well, number one, that is certainly good with me. We — we cleared the whole day for you all except 1:30. I have a lift stay docket at 1:30 and it sounds like — well, number one, that will be a short, you know, maybe 20-minute docket, but it sounds like you think you're going to be out of here if we start at 11:00, before even that.

MR. CALIFANO: Yes.

THE COURT: All right. And, again, I just want to

double check. We of course had Innovatus' objection, the Equity Committee objection, and the United States Trustee objection. You're telling me all of those have been resolved?

MR. CALIFANO: Except for one issue that we need to —

THE COURT: Well, Ms. Young is standing up, so I think she might want to answer my question.

MR. CALIFANO: It's — it's going to be about the opt-in versus opt-out releases.

THE COURT: Um-hum.

MR. CALIFANO: And we are fine with that language on the injunction that you just sent, —

MS. YOUNG: I —

MR. CALIFANO: — so that's just one issue.

THE COURT: Um-hum.

MS. YOUNG: So hopefully, Your Honor, it won't take gobs and gobs of time, so especially if we can get parties some time to work through the global settlement. I think we're certainly comfortable arguing the —

THE COURT: You want to speak in the mic, just so they hear you on the WebEx.

MR. CALIFANO: I'm sorry.

MS. YOUNG: We're certainly comfortable coming back at 11:00 to argue the — the very, the last issue which is with regard to the third-party releases, at 11:00.

THE COURT: Okay. So it is strictly that opt-in,

opt-out aspect of it?

MR. CALIFANO: Yes.

THE COURT: Because I know there were other objections to the releases.

MR. CALIFANO: We resolved those.

THE COURT: They're all resolved.

MS. YOUNG: It is — it is — the only — the only outstanding objection is with regard to whether or not the opt-out releases in this plan were consensual.

THE COURT: Okay. All right. And I know probably you and everyone is well aware that, you know, conceptually I have approved opt-outs very much. And I know my good, wonderful colleague who I hired to work for me back at a law firm many years ago, I know in a recent case he said, 'I don't like opt-outs, and — but opt-ins are my mechanic.' I just — we respectfully disagree. And I'm not — I'm not shutting down your argument ahead of time, but I just want to make sure everyone knows that historically I've been okay. But there may be facts you think are different about this one, so.

MS. YOUNG: And, Your Honor, and this will just be — we understand, I can honestly say I think I have argued and lost this issue before Your Honor multiple times in a number of cases.

THE COURT: Um-hum.

MS. YOUNG: This is one where in the wake of

Harrington versus Purdue Pharma, consent is back on the table. So we are revisiting this sort of on a more national basis, whether or not this has changed the rubric or moved the needle for anybody, so this is not — this is an acknowledgment that we understand that you have been comfortable in the past.

THE COURT: Um-hum.

MS. YOUNG: We are in a slightly new world and so that is why we are raising these issues again before Your Honor here today.

THE COURT: Okay, understood. So, again, just wanted to throw that out so if we could make it a concise — you know where I've stood in the past and why you think this situation might be different. And I respect hearing how you think it might be different, okay.

MS. YOUNG: And we respect that, Your Honor, so we thank you —

THE COURT: Okay.

MS. YOUNG: — for giving us the opportunity to make our arguments.

THE COURT: All right. Very well.

MR. CALIFANO: So I was on — I was on, that was my case where Judge Everett went the other way.

THE COURT: Ah, I did not remember that.

MR. CALIFANO: So I told — I told the U.S. Trustee that she owes me one, and we've got to get this one —

THE COURT: Eww, okay.

(Laughter.)

THE COURT: Okay. Well, you know, another one of my former colleagues on the bench, Judge Mullin, over in Fort Worth, I mean inside baseball, we've all talked about this topic a lot, you know. And you will hear Judge Mullin say the same thing that is kind of my mantra: Facts matters, facts matter. I'm always kind of a clean slate, an open book. If there's something about a particular case that — you know, but I mainly focus on how conspicuous was the language to the world about, you know, you have a chance not to be bound by this if you check the box. And — and did we have people who opted out? I don't know, I can't — I haven't looked at your —

MR. CALIFANO: We did.

THE COURT: — tally yet, but historically I have always had a few people, if not, a lot of people opt out. And that's always assurance to me that, okay, we got both conspicuous notice. And — and I tend to compare it to also the class action world where the opt-out mechanism is, you know, pretty commonplace in that. And I know there are distinctions that are, you know, good arguments that people have on that, but all right. So I will hear, you know, the argument on that, but it sounds like you have promised me we are down to just that issue.

MR. CALIFANO: I did.

THE COURT: Okay.

MR. CALIFANO: I was afraid that I wasn't going to be able to.

THE COURT: All right. Well, Mr. Prostok is sitting there very quietly. So I will say not that that's an unusual thing but it is kind of an unusual thing.

Any — anybody want to say anything before we adjourn till 11:00?

Did you say 11:00 or 11:30?

MR. CALIFANO: 11:00. 11:00, Your Honor.

THE COURT: Anyone?

Okay, well, then I will see you all at 11:00. And I don't know if you have, it looks like boxes and stuff. Mike, he can lock up the courtroom after you're all gone, to make sure, —

MR. CALIFANO: Yes.

THE COURT: — you know, your stuff is safe. My — my one — well, you're going to be gone by 1:30, so never mind.

MR. CALIFANO: All right. Thank you, Your Honor.

THE COURT: All right. Thank you.

COURT SECURITY OFFICER: All rise.

(Hearing recessed from 9:43 to 11:37 a.m.)

COURT SECURITY OFFICER: All rise.

THE COURT: All right. Good morning again. Please be seated. All right. Well, after a couple hours break, I hope we have still the good news we heard of a mostly consensual plan.

For the record, we're back in the Eiger BioPharmaceutical case, Case Number 24-80040. As I noted earlier, we've got lots of people on the video and I have an electronic sign-in sheet that I will enter on the docket later.

Let's go ahead for the record and get appearances from lawyers in the courtroom.

MR. CALIFANO: Thank you, Your Honor. Thank you for your patience with us this morning. It's all worked as we would hope, so —

THE COURT: Okay.

MR. CALIFANO: — we'll be out of your hair very shortly.

THE COURT: Okay.

MR. CALIFANO: So, Your Honor, Tom Califano, Sidley Austin, on behalf of the debtors. With me in court today are my associates Parker Embry, Veronica Courtney, and Amanda Rahie. Also is the debtor's CEO David Apelian and debtor's CRO Mr. Douglas Staut.

THE COURT: Okay. Thank you.

Next.

MS. VENUS: Good morning, Your Honor. Excuse me. Margie Venus with McKool Smith on behalf of the Equity Security Holders Committee. And with me is Mr. Brett Moore with Porzio, Bromberg. We had filed his motion pro hac vice. I'm not sure if that's been signed yet. I just wanted to bring that to the

Court's attention.

THE COURT: Okay. Well, you will be allowed to speak if you choose to speak today.

MR. MOORE: Thank you very much, Your Honor. Appreciate it.

THE COURT: Thank you. Okay.

MR. PROSTOK: Good morning, Your Honor. Jeff Prostok, Forshey & Prostok. With me today is co-counsel Bradley O'Neill, Andrew Citron — who is making his way over — with Kramer Levin. And also I think on the phone is Adam Rogoff with Kramer Levin, who was instrumental in getting us to this settlement.

THE COURT: Okay. I show he has signed in and is there on the video. Thank you.

MR. GONZALEZ: Good morning, Your Honor. Daniel Gonzalez of Meland Budwick on behalf of the Unsecured Creditors Committee.

THE COURT: Thank you. Good morning.

Okay. I did sign your pro hac vice order, Mr. Moore, yesterday.

MS. YOUNG: Good morning, Your Honor. Liz Ziegler Young the U.S. Trustee.

THE COURT: Good morning.

MR. GAITHER: Good morning, Your Honor. John Gaither, conflicts counsel for the debtor on the Merck issues.

THE COURT: Okay. Good morning.

All right. Well, I am ready when you are, Mr. Califano. How did you want to proceed?

MR. CALIFANO: Well, I thought we could go through first the agenda, —

THE COURT: Okay, got it.

MR. CALIFANO: — Your Honor, and then I can tell you what is not going forward today in light of the global settlement. And, you know, while we were here waiting, teams from the various groups were working at the last terms of the order. They will be coming up. And we can walk the Court through the order. But if we go through the agenda, the emergency motion for a stay pending appeal is now resolved and is off.

THE COURT: Okay.

MR. CALIFANO: And the motion in limine that my firm filed to preclude the testimony of Matthew Dundon, and that is also off.

THE COURT: Okay.

MR. CALIFANO: Okay. The amended disclosure statement is subsumed into the plan.

And then, Your Honor, we have the fourth amended plan of liquidation of Eiger BioPharmaceuticals. What I'd like to do is introduce our two declarations that will be the basis for the confirmation findings. We have the declaration of Mr. Staut that goes through the 1129 requirements. Mr. Staut is in the

courtroom today. I'd like to introduce, subject to objection, his declaration as his direct testimony. And he is available for cross-examination.

THE COURT: All right. This shows at Docket 574 on the docket, I think, unless it was subsequently amended. I don't think it was amended. All right. So any objection to the Court considering that as direct evidence in support of confirmation?

All right. I hear no objection.

Is anyone going to wish to cross-examine Mr. Staut?

All right. Hearing no request, I —

MS. [SPEAKER]: It's Exhibit 3.

THE COURT: Well, it's Exhibit 3. I guess it was first filed at Docket 574.

All right. So that declaration of Mr. Staut is admitted into evidence.

(Declaration of Douglas Staut received in evidence.)

MR. CALIFANO: Okay. Thank you, Your Honor.

Your Honor, our second declaration I'd like to introduce is the declaration of Adam J. Gorman. He is a director of what was formerly known as Kurtzman Carson Consultants, now known as Verita Global. Kurtzman Carson was our balloting agents and noticing agent for this case.

Mr. Gorman is in the courtroom. Okay. The solicited class, the impaired class was the class of equity that voted in

favor of the plan. And Mr. Gorman is in the courtroom, subject to cross-examination, and we would like to introduce Mr. Gorman's testimony as direct — Mr. Gorman's declaration as his direct testimony on the solicitation and voting results.

THE COURT: All right. For the record, I note this was first filed at Docket Entry 607 and now is Exhibit 5, as part of the filed debtor exhibits.

Does anyone have any objection to this being admitted as direct testimony, or does anyone want to cross-examine Mr. Gorman?

All right. Hearing no response, the Court does accept into the confirmation record this declaration of Mr. Gorman and of course the attachments thereto with regard to the tabulation and whatnot.

(Declaration of Adam Gorman received in evidence.)

MR. CALIFANO: All right. And, Your Honor, for later, for argument later, I would just ask the Court to look to Exhibit C of Mr. Gorman's declaration, which lists the creditors and shareholders that opted out of — opted out of the third-party releases.

THE COURT: Okay, I do see that.

MR. CALIFANO: So, Your Honor, the debtor's plan is very simple and straightforward at this point. There — all the assets have been liquidated. The last sale closed. Okay. A liquidating trust will be appointed to resolve the claims and

make distributions.

The Innovatus claim, there is an agreed, allowed amount for the Innovatus claim. Those numbers are, and the calculation is on its way here, but in exchange for payment which can be paid on the effective date, that agreed, allowed amount, then mutual releases will be exchanged.

With respect to the other issue that is —

THE COURT: And let me be clear, maybe you're going to be elaborating, but no escrow anymore?

MR. CALIFANO: No escrow anymore.

THE COURT: And I noted from the Gorman tabulation, Innovatus had opted out of the releases. I guess I'm getting clear that's —

MR. CALIFANO: They are granting releases, —

THE COURT: Okay.

MR. CALIFANO: — okay, as part of the settlement.

THE COURT: Okay.

MR. CALIFANO: Okay. There will be a reserve for disputed, unsecured claims, but that's the typical disputed unsecured —

THE COURT: Okay.

MR. CALIFANO: — reserve.

THE COURT: Okay.

MR. CALIFANO: So that's the resolution of the Innovatus claim. And Innovatus has agreed to withdraw their —

their appeals, so the venue appeal, the estimation appeal, those are resolved. And Innovatus is getting releases and the Innovatus issues are resolved.

With respect to the debtor releases, Your Honor, not — not the third-party releases, the debtor releases, the Equity Committee has agreed to support the debtors' grant of releases to all the directors and officers who were directors and officers during the pendency of the Chapter 11 case. Okay, so that is resolved. There is language in the confirmation order that when the tiers go, a point that I will walk Your Honor through the blackline confirmation order.

THE COURT: Okay.

MR. CALIFANO: So now that is the resolution, okay. So I mean the parties worked — I know this has been a tough case for everybody, but all the parties and Innovatus, the Equity Committee, the debtors worked as hard as they could at the same time that they were throwing rocks at each other to get the settlement done. And it was literally done overnight. And it's — you know, it's a great result, in my opinion, for all. Innovatus is paid in an amount that it agrees to. All the general unsecured creditors are paid. There is going to be a significant distribution to equity. And all these drugs that were in various stages of development are in the hands of responsible parties who can develop them.

So despite the many bumps along the way, it — things

worked out as they should. So I don't know if Your Honor has any questions.

THE COURT: I do not at this point, no.

MR. CALIFANO: Okay. And I don't know if anybody else would like to this say anything.

THE COURT: Well, I certainly want to hear from all the other parties-in-interest and I'll start with Innovatus, please.

MR. PROSTOK: Your Honor, Jeff Prostok for Innovatus. And there's obviously just a couple loose ends that we're dealing with on the — on the releases. And I think there's an issue of whether we'll get paid under the plan or through a settlement order before the plan goes effective, but it's nothing that we think is going to be any type of problem.

The Court didn't get to hear our —

THE COURT: Mr. Curtin, you're standing up —

MR. CURTIN: Did you say a settlement order? I'm sorry.

MR. PROSTOK: Oh, po- — possibly.

MR. CURTIN: There's no settlement order.

MR. CALIFANO: It's a confirmation. It's a confirmation.

MR. PROSTOK: No, I know, but a thought is I've heard that the Equity Committee may want to pay us pursuant to a court order if they want to get us paid faster than us going —

MS. YOUNG: In the confirmation order —

MR. CALIFANO: In the confirmation —

(Simultaneous talking.)

MR. CURTIN: And that's in the confirmation order.

MR. PROSTOK: All right.

THE COURT: Okay.

MR. PROSTOK: So that — but that issue — we're not negotiating. I just wanted to —

THE COURT: Okay.

MR. PROSTOK: — all be aware that the deal's — and, Your Honor, my only regret is that you didn't get to hear my client's side of the story. My client does a lot of good things in this space, and the Court didn't get to hear that. But it's a really good result for all the constituencies.

I want to compliment first this Court, Your Honor, for your hard work. We would not have gotten here but for you. I want to compliment the various constituencies: Counsel for the debtor, counsel for the Equity Committee, the UCC, their advisors worked really hard to get there.

Your Honor, as you know, it's easy to fight, it's much harder to reach a resolution. It's easy to spend millions of dollars of attorneys' fees. But in this case I think the parties found a way to a solution that we think is going to maximize value for all of the constituencies. And we're proud of the result and we thank you, Your Honor.

THE COURT: Okay. Thank you.

Shall we hear from — well, whoever wants to go first. You're — the Creditors Committee is like next on the priority rung.

MR. GONZALEZ: Absolutely.

THE COURT: But, you know, they've been, it sounds like, kind of caught in the middle here, and I hope they're happy today.

MR. GONZALEZ: Switzerland, Judge.

THE COURT: You're — you're neutral, okay. It's rare that we have an unsecured creditors committee that's Switzerland.

MR. GONZALEZ: Yeah. And it's rare for me to be in a position where I'm not the one kind of kicking — kicking things around a little bit. But Dan Gonzalez on behalf of the UCC. Judge, we're very pleased with the results. We were, you know, always involved in the sense of protecting this a hundred percent payout to the creditors.

I want to thank the debtors and their counsels. They listened to our comments to the plan revisions that were made. They listened to our comments on the liquidating trust agreement. They incorporated those comments into them without much of a fight at all. And, you know, for the most part, we're just — we're happy with the results. We're happy with, you know, how the Court has treated this case, and it's been a great

result for everybody.

THE COURT: Okay. Thank you, Mr. Gonzalez.

MR. GONZALEZ: Thank you, Judge.

THE COURT: All right. Now, Mr. Moore, you want to go next?

MR. MOORE: Thank you, Your Honor. Brett Moore, Porzio, Bromberg & Newman, on behalf of the Equity Committee.

I echo everyone's comments, worked really hard. I came into the case a little bit later, some of my colleagues, like we were on the way here, got to live the full version of the case, but I echo what Mr. Califano said. People worked very hard through last night trying to reach a resolution, so we're happy with that we were able to — to get that. Thank you.

THE COURT: Okay. Thank you.

All right. Well, are we going to have any more evidence from either the debtor or, I should say, other parties-in-interest? I don't — again, I've got the declarations of Mr. Staut, Mr. Gorman, and the attachments thereto. Anyone else wanting to put evidence in the record?

And I was going to let you comment, but I had a feeling you were either going to have evidence or argument, so we were going to certainly get to you.

MS. YOUNG: Okay. And I don't know if this is the appropriate time, but we just didn't have the — we filed our witness and exhibit list. I don't think we need to include

Exhibit A, which was the third, I think, amended version of the plan. But we did have Exhibits B and C, which were the two transcripts of Judge Everett's ruling, which are behind — I think it's — Docket Number 604. So with those, again, that was the limited piece of evidence that we would like to include for the purposes of today's record.

THE COURT: All right. Well, I have seen those and I will admit them as formal evidence.

(The U.S. Trustee's Exhibits, noted above, received in evidence.)

THE COURT: Anyone else have evidence?

All right. Well, Mr. Curtin.

MR. CURTIN: I think, Your Honor, as you know, I have walked in in the middle — William Curtin for — from Sidley Austin for the debtors. The only thing I just want to check with Your Honor, we did file a confirmation brief that goes through the 1129 factors. I'm happy to do the traditional presentation, which would probably take me about 10 minutes, or not, and just rely on the brief. Whatever is Your Honor's preference.

THE COURT: All right. So we back in chambers have gone through that, and so I don't think you need to —

MR. CURTAIN: Thank you, Your Honor.

THE COURT: — go back through it. I will — I will take judicial notice of the arguments that have been presented

in that supplemental memorandum of law.

All right. Well, I will hear closing arguments if there is no further evidence.

I don't know, Mr. Califano, if you have anything more you want to add in the way of an argument or simply have rebuttal to the other —

MR. CALIFANO: No, Your Honor. It is so anticlimactic, isn't it?

(Laughter.)

THE COURT: Well, it is, but, yeah, we'll wait and let Ms. Young see if — yeah.

MR. CALIFANO: Exactly. So I will just yield to Ms. Young.

THE COURT: Okay. All right. Any other closing arguments? I assume it's probably just down to Ms. Young now, so.

MS. YOUNG: Thank you, Your Honor, and we're certainly used to being in this position of being the one holdout for unfortunately what could be a completely consensual confirmation, but —

THE COURT: Well, your client won at the Supreme Court in *Purdue Pharma*.

MS. YOUNG: We did.

THE COURT: So I'm guessing that's part of what this is about.

MS. YOUNG: This is and that is really what it is about.

THE COURT: Um-hum.

MS. YOUNG: And we do think — and, again, we have this concern about what is consent. That is what is the issue that has been left open by the Supreme Court. And we are taking the position that we need to have affirmative consent to these third-party releases. And my client's position is that affirmative consent needs to be done by some active. There needs to not just be consent by silence, but there has got to be some overt act affirming that: Yes, I am entering into this contract.

THE COURT: And you're about to get to this, but you don't think checking the box or not is an affirmative act?

MS. YOUNG: We do not, Your Honor. And, in thinking through this, we've always had the analogy for the ascent to — you know, silence is not actual — apologies — silence does not equal consent, is the idea of: You make me an offer, an unsolicited offer to buy my house. I don't respond to that offer. You come in 10 days later saying, oh, I'm under contract to — to purchase your house for this price. Well, obviously that is no — there is no ascent to that contract.

In thinking through this, it would be the analogy of you and I actually do enter into a contract to sell the house. But in that contract, you put a term that says if you don't

check this box, part of what I'm buying is the grand piano that is in your living room. And I look at that and I say, well, you know what, that grand piano, that's not my grand piano, why would they have this in this contract, I'm just going to ignore it. So I ignore that.

We go to closing. The sale closes. And you say: I'm so excited that I'm going to be able to use this grand piano. But I didn't actually affirmatively say you could sell that grand piano. And that is why you are concerned about whether or not the opt-out mechanism is truly effective to confer consent to those terms. Because what we are talking about here is a contract that is going between two third parties, so it is a creditor and it is one of these third parties who are getting the relief. That is the contract. And that is what needs to be manifestly consented to as part of these — these opt-out ballots or opt-in ballots or as part of the process.

And if we go and we look at what your statement of contracts and what Texas law says, there are few instances in which silence manifests consent when we talk about contract law. And that is really the holding and really the thrust of Judge Everett's ruling in both Ebix as well as his comments in the 4 West Holdings case, both of which transcripts are included, is this lack of overt consent.

And we understand that there are times in which the Bankruptcy Code itself provides for, you know, a lack of

consent. So, for example, claims objections or a lease rejection. Those are all provided for in the plan as part — or, I'm sorry — as part of in the Bankruptcy Code as examples where your silence does manifest a loss of a right. But here we are concerned whether or not the opt-outs are sufficient in this context to, again, infer consent based on contract principles between those two parties. And that is why we raise these issues and why we took this issue all the way to the Supreme Court and why we are still bringing this issue, because we do think that consent is important.

And it's important in this concept — in this case because we want to ensure that the rights of those third parties are not extinguished without having Your Honor make the determination whether or not under the facts and circumstances of this case they are sufficient. And, again, going back to contract law, that is where we say there needs to be affirmative ascent. And that is why opt-ins work much better, because then it is an actual affirmative act of saying: I understand, I release these rights.

We're also concerned because the opt-out doesn't confer any additional benefit. If you don't opt out, you don't get some, you know, bonus at the end of the day to these creditors. It's just part of your bargained-for rights whether or not you opt in or opt out.

So what is the consideration? If you're going to have

this be a valid, binding contract, there's got to be some kind of a consideration that is also paid. These are the concerns. This is why we raised these issues with you for today as part of the — our objection to confirmation, but we do understand, you know, in the past you have looked at these issues and you have said that that manifests consent. But, again, we are in a different world now and that is why we are bringing these issues to your attention again.

I'm happy to answer any questions you may have.

THE COURT: Well, the one question I have, and I alluded to this I think earlier, this Court has always thought the class action analogy is a more powerful analogy than your contract analogy, the piano analogy. And I've noted in the past that for decades federal district courts have allowed this mechanism, you know, here class of potential tort claimants is something that has been negotiated with the target defendant as far as a settlement. If you don't respond, you're going to be deemed to be part of the class and part of the distribution of the settlement proceeds. But you can opt out and have at it. You can sue this target defendant or defendants, you know, as you choose.

So to me that's always been a powerful analogy. Why does the U.S. Trustee not think this is very close to that situation?

MS. YOUNG: And I think we have to go back to what the

Supreme Court said in *Purdue*. And it didn't, you know, hook its head on the consent to something in the Bankruptcy Code. It went to contract law. And if we again take your analogy about the class action lawsuits, those are something that are operative by a federal statute. We don't have a comparable federal statute in the Bankruptcy Code that provides that kind — that same kind of relief. And that's really why —

THE COURT: Okay. Elaborate on that. You said we have a federal statute. There's something —

MS. YOUNG: The — for class actions —

THE COURT: — that specifically says opt-outs are permissible?

MS. YOUNG: No, no, no, no.

THE COURT: Okay.

MS. YOUNG: But you have the federal class action lawsuit litigation or statutes that provide for mechanisms to do exactly that.

THE COURT: But we have a federal Bankruptcy Code federal statute.

MS. YOUNG: Within the Bankruptcy Code, though, there aren't those provisions that provide for the class action kind of mechanism, if that makes sense.

THE COURT: Um-hum.

MS. YOUNG: So you've got — it's sort of the idea that if Congress wanted that to be included as part of the Bankruptcy

Code, why is it not in the Bankruptcy Code. They knew how to do it for class action, why do we not have the comparable lit- — legislation for this mechanism within the Bankruptcy Code itself. And that's, again, in the wake of *Purdue*, is that something that has now reopened that as a door. We understand that you have made this analogy in the past, but is there — is there wiggle room now? Is this going to be something that because we don't have an operative statute within the confines of bankruptcy, can you make that analogy under — after — and especially after *Purdue*.

THE COURT: Um-hum. You would acknowledge that the Supreme Court did, some people say, went out of its way to say: You know we're talking about nonconsensual releases. There was that sentence or two to that effect.

MS. YOUNG: Correct.

THE COURT: So why do you think — I'm asking you to read — was it Gorsuch — Gorsuch's mind, —

MS. YOUNG: To consent, yes.

THE COURT: — why would he throw that out there, you think?

MS. YOUNG: I — I can't —

THE COURT: If they're not allowed by the Code, they're not allowed by the Code.

MS. YOUNG: If they're not allowed by the Code, they're not allowed by the Code.

THE COURT: And yet he mentioned nonconsensual, this —

MS. YOUNG: I can't — I can't go behind in why he may have included that.

THE COURT: I can't either, but I just thought maybe you were smarter than me.

MS. YOUNG: Unfortunately, no, Your Honor.

THE COURT: Okay.

MS. YOUNG: But I think we are — we are all sort of faced with what do we do in the wake of this decision, and this is the position that we are taking, that —

THE COURT: Understood.

MS. YOUNG: — that it really does mean consent means affirmative consent and that an opt-out is not sufficient in this context.

THE COURT: Um-hum. I'm going to ask you one more question. The evidence was that there were 135 opt-outs among equity holders and another seven of claim holders who — you know, non — nonvoting, they — not people, the seven claim holders not voting. So do you think that is relevant evidence as far as consent by silence, your concern about you can't bind someone with their silence.

I mean I always focus on how bold, how conspicuous, how easy to understand was a particular opt-out in a case. And that's why I and I think my colleague Judge Mullin are careful to say facts matters, facts — you know, you shouldn't assume

it's always going to be approved, because maybe someone blows the type of conspicuous, bold, and notice, among other things, you know, that might be relevant in a case.

So here, am I wrong to think this is pretty powerful evidence that people knew and understood?

MS. YOUNG: It is, Your Honor. Our concern overall, though, we are dealing in this case with very sophisticated parties, sophisticated creditors. They understand. They probably have legal counsel to assist them in analyzing whether or not they do have any claims. So while the position may not be specific for this case, and overall we're talking about potentially people who don't understand what they're giving up.

THE COURT: You're talking about the janitor who may have an unsecured claim.

MS. YOUNG: Which — exactly —

THE COURT: I mean no — no offense to a janitor, but it's not —

MS. YOUNG: That is a hundred percent, that's a hundred percent it.

THE COURT: A janitor is not going to have a lawyer.

MS. YOUNG: And that is exactly it, Your Honor.

THE COURT: Um-hum.

MS. YOUNG: And here we are very fortunate that I do think if you look at the equity holders and the constituencies, these are people who understand bankruptcy.

THE COURT: Um-hum.

MS. YOUNG: That's not always going to be the case.

THE COURT: Yeah. Here is my last question. I thought my last one was the last one, but I have wondered to myself many times, maybe wondered out loud a time or two is this much ado about nothing. And the reason I say that is are third parties really going to have direct claims against some of these releasees or are they really going to be derivative claims, debtor claims in the vast majority of situations?

MS. YOUNG: I mean arguably it's going to be derivative claims, but I think — I think, as we all know, landscapes of cases change, landscapes of potential causes of action. I mean it may not be, again, a one size fits all for this case, but there may be actual times where you've got actual, direct claims against those third parties.

THE COURT: Yeah, gotcha, um-hum.

MS. YOUNG: And so our policy is uniformity across the country, and so while we look at that for specifically the facts of this case, where again, and I come back to it, it's sophisticated parties who understand and know what they're giving up or what they're holding on to. That may not always be the case. And we may have some truly bad actors out there and those are the people who we're raising those red flags for. And it's up to, again, as you know, every fact and every case is going to be different. And we raise these issues to make sure

somebody has looked at it to make a determination whether or not the facts of this specific case support the requested relief.

THE COURT: Okay. Thank you, Ms. Young.

MS. YOUNG: Thank you.

THE COURT: All right. Mr. Califano, you get to answer all these same questions.

MR. CALIFANO: Okay. Thank you.

THE COURT: Um-hum.

MR. CALIFANO: Thank you, Your Honor. And, you know, I can't — I really can't address the nationwide, you know, concept and trying to make it as a rule of law. I mean in this case, you know, the U.S. Trustee has pretty much made my case and it's sophisticated parties. And we should — I mean we have the factual basis here, Your Honor. We have Mr. Gorman's declaration and the exhibits that show a number of parties from each class opted out.

We have the opt-out which is Document 623, Exhibit 1, on docket. That's the form. And, Your Honor, the form is the form that we have used in this district for years. And it's got, you know, bold, it's got the definitions. You know, clearly sets forth what people are releasing. And, you know, we have the solicitation procedures, which were complied with.

So I mean I've always — the U.S. Trustee, you know, uses the house example. I'm not sure it's a great example because, you know, it — we're not in a situation where somebody

who doesn't know their house is for sale is being put up for sale, right? These are people who have participated in the case. They have been receiving notices throughout the case. They are aware there is a Chapter 11 case, okay.

So this is one of the rare cases where we have an active equity committee. So every — everybody knows what is going on here. It's not coming out of the blue.

And I just sold my house, to keep torturing this example, but I just sold my house. And there were fixtures, right, we had chandeliers. If I didn't put in the contract that those were excluded, those would have been sold with the property. So that's — you know, and that may just be as bad an example as they were using, but I'm not sure —

(Laughter.)

MR. CALIFANO: — it's direct, but —

THE COURT: Wow. Okay.

MR. CALIFANO: — if you look at —

THE COURT: A chandelier, a piano, I don't know.

(Laughter.)

MR. CALIFANO: But the chandelier at least as an argument, it could go. So I mean I agree with the point on class actions. And it's not just the federal class action in Texas. So if we're looking at the law of Texas of applying for a contract, well, Texas has its own version of Federal Rule 26, Texas Civil Procedure 26, which provides for the same opt-out

procedure.

But we don't need to have a specific code or rule provision that say opt-outs are permissible for it to be within the Bankruptcy Code, right. So 1123 clearly provides that a plan can have releases, can have settlements. And that's what these releases are, these are settlements. And the consideration —

THE COURT: Are you relying on that same provision of 1123 that *Purdue Pharma* relied on and Justice Gorsuch said no, no?

MR. CALIFANO: Except that I'm saying there is consent here, and I want to draw a parallel —

THE COURT: Okay.

MR. CALIFANO: — between 1123 and other Code provisions, okay.

THE COURT: Okay.

MR. CALIFANO: So, for example, 365 governs assumption and rejection of contracts, right? In every court in this country, you send out lists of cures, right? Though people have to object to those cures or are they deemed set at the number that the debtor puts in their pleading. There is no Code provision that says you can send out a mass executory contract list and a mass cure list, and if people don't respond, they're bound, but that's the way it works. And no one has ever, and to my knowledge, successfully argued that you actually need

somebody's affirmative consent for them to come in and say, yes, that is my cure amount for them to be out. Okay.

Similarly, claims objections. All right. The Code provides for claims to be resolved and be object- — and to be objected to. And they had — but in every case across the country you're going to have omnibus claims objections, right? And if people don't respond, their claims are set at that amount. So they are deemed bound without action. But there is nothing in 502 that says you can send an omnibus objection that people have to respond to.

Now when they revised the Code, they — they changed — they provided in the rules limits on omnibus objections. But they didn't address that fact. They didn't say you can send it out and if people don't respond, they're bound. Or you need an affirmative. So there are provisions — there are actions under the Code, there are rights under the Code, there are consequences under the Code that are provided for in the Code that don't address the procedure, okay. And those are considered consistent with the Bankruptcy Code.

But I'm not arguing that the debtor is entitled to have — to confirm a plan that has nonconsensual releases. That obviously is not allowed after *Purdue*. But what I am saying is there is nothing in the Code or in *Purdue* or in anything else that says that this procedure is an improper way to determine whether parties who are subject to the releases have consented

or not.

All right. And if the Court doesn't have any questions, I'm —

THE COURT: Maybe this is just academic discussion, but what do you think about my comment that maybe this is much ado about nothing? Maybe in most cases, you know, maybe in this case, I don't know. There aren't any —

MR. CALIFANO: It did —

THE COURT: — direct claims of the third-party releasers against the third-party releasees. It's mostly debtors who might have claims and a third party would only be asserting those derivatively. And we know claims of a debtor are property of the estate and a debtor can compromise its own claims.

MR. CALIFANO: Yeah. And, Your Honor, I have been doing this for a long time. I cannot recall a situation where I had to go back and enforce a release in this circumstance. But what it really is about is about repose, right? It's not about the — you know, really resolving claims that are out there.

It's different than the *Purdue* situation, where you knew there were claims, right. This is not a mass tort case. We do know there are claims. But what it does do, in the circumstances of this case, and I really do think we should be limited to the circumstances of this case, it gives everyone a repose.

Now could there be — and we had a number of shareholders who opted out, right. Now any shareholder claim would likely be a derivative claim, but shareholders could assert direct claims. They wouldn't be valid, but a shareholder could assert the direct claim conceivably against an officer or a director, or argue that, you know, somehow they have a direct claim. It wouldn't be a valid claim, but it gives repose.

The other thing is, and I don't want to, you know, sound selfish, but we can't get exculpations anymore for the professionals in — after *Highland*. So, you know, somebody could, you know, sue one of the professionals here, trying to assert a new — a claim.

And what it does, what this does is, to the extent possible, it gives the parties and the participants in the case some comfort that there is an end, that it has been wrapped up, and that is, you know, pretty much a reason why we go through this confirmation process, is to wrap things up and to put an end to it. So it's probably academic in the vast majority of circumstances, but it does serve a purpose in the context of Chapter 11 cases.

THE COURT: Okay.

MR. CALIFANO: Thank you, Your Honor.

THE COURT: Thank you.

All right. I imagine that's it, but speak now or forever hold your peace if anyone wants to add anything to this

argument or the record.

MR. CALIFANO: All right. So, Your Honor, I'm learning that we're just cleaning up the language on the confirmation order. What we can do is, if everybody agrees, we could just share it again and upload it to the Court this afternoon, because it — I'm told there's no disagreement on the terms. There's just — we're just trying to get the language right. So if everybody in the courtroom consents, I would suggest we just do that and we can notify Your Honor's chambers when it's uploading.

THE COURT: All right. Well, I'm going to give you an oral ruling.

MR. CALIFANO: Thank you, Your Honor.

THE RULING OF THE COURT

THE COURT: And I think it sounds fine to upload later. You know, give everyone reasonable time to look at all the final changes.

But, for now, my oral ruling is this:

As we've talked about today, the evidence in support of confirmation that I have heard is the declaration of Douglas Staut, the CRO; the declaration of Adam Gorman from Verita, regarding the voting report, and various attachments thereto. I have also taken judicial notice of certain items. And, among them, were the transcripts that the U.S. Trustee submitted of my colleague Judge Everett's ruling — rulings in a couple of

Chapter 11s regarding third-party releases. With — with this evidence, the Court finds that the debtors have met their burden of proof for confirmation of their plan, as modified under Section 1129 and other applicable authority. And so the plan, as modified, as it's been announced here today, will be confirmed.

First, some basics. Among other things, the Court finds that the disclosure statement is approved on a final basis. The Court earlier conditionally approved it. The Court finds under 1125 that it contained adequate information to allow parties-in-interest to form informed decisions — positions on the plan. The Court also finds that notice in the solicitation process was reasonable and fair and consistent with the Bankruptcy Code and rules.

The plan modifications, I should specifically say, are permitted under 1127 and no further notice or solicitation is necessary in that the modifications, as I've heard them, did not materially and adversely affect or change the treatment of anyone under the plan who did not accept — accept these modifications in writing.

I've heard today that all objections have either been resolved or withdrawn except for the U.S. Trustee's objections about the third-party releases, and the Court is hereby overruling the U.S. Trustee's objection as well as any other pending objections that we have not addressed.

With regard to the third-party releases and the Court's overruling of the U.S. Trustee's objections, I want to say that the Court respects and fully understands the U.S. Trustee's positions it is taking. After all, as we all noted, the U.S. Trustee won at the Supreme Court in *Purdue Pharma*. And there are questions that remain regarding consensual releases and what constitutes consent.

As I've noted, this Court has ruled many times and is ruling here today that an opt-out provision, such as we had here, is permissible with regard to these third-party releases. It was conspicuous. It was understandable, as I said, I think for even an unrepresented party, even an unsophisticated party to — to know what was happening. You know, I continue to think this is very analogous to class action lawsuits where courts for decades have said that the opt-out mechanism is fair and provides due process, as a general rule.

You know I was flipping through my rules at the time. I don't know that anyone has ever mentioned this rule in one of these arguments about opt-in, opt-out. But 3016©, there may be a logical explanation for it that goes beyond this conversation, but it does read: Injunctions under a plan. If a plan provides for an injunction against conduct, not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and conspicuous language, bold, italic, or underlined text, all acts to be enjoined and identity — and identify the

entities that would be subject to the injunction.

Again, maybe there's been court interpretations or maybe there's an interpretation of the rulemaking committee that would throw me off on my assumption here. But to me, this seems to assume that a plan might have an injunction, i.e., something like a third-party release that's not otherwise addressed under the Code. And, you know, the rule of thumb is: It has to be bold, underlined, italics, something to make it conspicuous, and identify what entities are subject.

So, you know, maybe — maybe one day someone will take me on in that invitation. What are — what are we talking about here if we're not contemplating there might be something like a third-party release.

Anyway, I respect the heck out of my colleague down the hall. And I'm just going to note we're not the only district where there has been an internal divide, Southern District of New York, as we all know we've had different judges go different ways. Most recently, Judge Michael Wiles in one of his cases had an argument why 503 might be violated with the third-party release, as I recall.

So, anyway, again I find that the third-party releases here, as they have been modified as announced, do pass legal muster and I will approve them as consensual third-party releases.

Again I will just be clear, the plan as modified, I

think, complies with 1122, 1123, 1124, 1129. And I will add that all assumptions and rejections on executory contracts or unexpired leases contemplated by the plan are approved as reasonable business judgment and compliant with 365. And I reserve the right to supplement and amend.

I have looked at, of the thousands of pages of paper that I was so happy to receive, I did look carefully at the 64-page previous form of confirmation order, findings and conclusions, that I think you filed at one o'clock something yesterday, and I have no questions, but I realize that's what you're working on to incorporate all the new stuff.

So is there anything else in the way of a housekeeping matter?

MR. CALIFANO: No, Your Honor.

THE COURT: Okay. Well, I think — I thank you all. You know, lawyers always tell clients that a good settlement is one where you walk away a little bit annoyed by it but, nevertheless, you're kind of glad to have it over. So I will just say to clients: Lawyers are not just feeding you a line on that. It is especially true in bankruptcy. But bankruptcy is not, you know, overall pretty and happy for the clients. But I think the professionals and if I knew the details, many clients probably just did heroic work in recent hours and days to make this happen. And so I congratulate you on — on your wisdom of making this consensual. It's not just me not wanting to do hard

work or the lawyers not wanting to do hard work. It's a product of very wise, I think, judgment, ultimately. And so, anyway, I congratulate you and hope you feel good about it, even if you don't completely feel good about it.

All right. I will be on the lookout for the order. and you might just check in if it's getting to be 5:00 or so and you don't think you're going to have it until after hours, just contact my courtroom deputy so we know who to ask to work late or who not to ask to work late.

MR. CALIFANO: Yes, Your Honor. Thank you.

THE COURT: All right. Thank you.

MR. CALIFANO: And thank you for your patience through this case.

THE COURT: Okay. All right. Thank you.

COURT SECURITY OFFICER: All rise.

(The hearing was adjourned at 12:27 o'clock p.m.)

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State of California)
) SS.
County of Stanislaus)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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Susan Palmer
Palmer Reporting Services
2129 Golden West Lane
Modesto, California 95350
(209) 915-3065

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