IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
PROTERRA INC, *et al.*, [1]	Case No. 23-11120 (BLS)
	(Jointly Administered)
	Re: D.I. 793
Debtors.	**Hearing Date**: Jan. 23, 2024 at 11:00 a.m.
	Obj. Deadline: Jan. 17, 2024 at 4:00 p.m. (For U.S. Trustee)

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (A) APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT; (B) APPROVING THE SOLICITATION AND NOTICE PROCEDURES WITH RESPECT TO CONFIRMATION OF THE DEBTORS' JOINT CHAPTER 11 PLAN OF REORGANIZATION; (C) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH; (D) SCHEDULING CERTAIN DATES WITH RESPECT THERETO; AND (E) GRANTING RELATED RELIEF

Andrew R. Vara, the United States Trustee for Region 3 ("U. S. Trustee"), through his counsel, files this objection (the "Objection") to *Debtors' Motion for Entry of an Order (A) Approving the Adequacy of the Disclosure Statement; (B) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Joint Chapter 11 Plan of Reorganization; (C) Approving the Forms of Ballots and Notices in Connection Therewith; (D)*

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Proterra Inc (9565); and Proterra Operating Company, Inc. (8459). The location of the Debtors' service address is: 1815 Rollins Road, Burlingame, California 94010.

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Scheduling Certain Dates with Respect Thereto; and (E) Granting Related Relief ("Motion") [D.I. 793] and in support of his Objection, states:

PRELIMINARY STATEMENT[2]

1. The U.S. Trustee objects to the Motion because it imposes on public shareholders the requirement to return an "opt out" form to avoid releasing their direct claims against non-debtor parties, including claims for fraud and intentional misconduct, even though the shareholders shall receive no distribution under the Plan. Further, the various notices and opt-out forms are unnecessarily confusing and, with respect to beneficial holders, their time to opt out of the releases is truncated. The U.S. Trustee further objects to the Motion because the Disclosure Statement does not contain adequate information concerning third-party releases, among other objections set forth below. For these reasons, all as set forth below, the U.S. Trustee submits that the Motion should be denied.

JURISDICTION, VENUE, STANDING

2. This Court has jurisdiction over the above-captioned cases pursuant to 28 U.S.C. § 1334. This Court is authorized to hear and determine the Motion and the Objection pursuant to 28 U.S.C. § 157(a, b), and the amended standing order of reference issued by the United States District Court for the District of Delaware dated February 29, 2012. Venue of the cases is proper in this District pursuant to 28 U.S.C. § 1408(1).

3. Pursuant to 28 U.S.C. § 586, the U. S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U. S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee*

[2] The Debtors have responded to certain of the U.S. Trustee's informal comments which, subject to review of revised documents, may resolve some of the objections raised herein.

v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.), 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U. S. Trustee as a "watchdog").

4. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in chapter 11 cases, and to comment on such plans and disclosure statements.

5. Pursuant to 11 U.S.C. § 307, the U. S. Trustee has standing to be heard with regard to this Objection.

FACTS

6. The above-captioned Debtors filed voluntary petitions for relief under chapter 11 in this Court on August 7, 2023.

7. On August 24, 2023, the U.S. Trustee appointed an official committee of unsecured creditors (the "Committee"). D.I. 126. An additional creditor was added to the Committee on September 21, 2023. D.I. 268.

8. The Debtors have utilized section 363 of the Bankruptcy Code to pursue sales of substantially all their assets. The Court has entered two orders approving the sales of the Debtors' Powered and Transit assets, as well as the sale of certain battery lease assets. The remaining assets, constituting the Debtors' Energy business, will either be reorganized through the Plan or wound down if a Plan Support Agreement Termination[3] occurs.

9. The Debtors filed their proposed plan and disclosure statement on December 17, 2023 at D.I. 737 and 738, respectively. The first amended plan and disclosure statement were filed

[3] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Plan.

on January 2, 2024 at D.I. 795 and 796, respectively. Throughout this objection, the Plan and Disclosure Statement refer to the first amended plan and disclosure statement at D.I. 795 and 796. The Debtors filed a second amended plan and disclosure statement on January 15, 2024 at D.I. 888 and 889, respectively.

10. The Motion was filed on January 2, 2024.

11. To summarize some facts pertinent to this Objection: (i) one of the Debtors is a publicly-traded company; (ii) there are individual shareholders affected by these cases; (iii) the purchase price for the Proterra Powered assets was $210 million; (iv) the Plan will result in the reorganization of the Proterra Energy business, resulting in the cancellation of all public shares, and the equity of Reorganized Proterra will be distributed to holders of Allowed Second Lien Convertible Notes Claims unless a Plan Support Agreement Termination occurs; (v) public shareholders will receive no distributions under the Plan; (vi) public shareholders will be deemed to release all Released Parties, which include the Debtors, the Debtors' officers and directors, and an unknown list of additional parties, unless they return an opt-out form; and (vii) the releases do not carve out causes of action based on fraud, gross negligence or intentional misconduct and the release expressly extends to causes of action that any Releasing Party may not currently know or suspect to exist in their favor.

12. The Plan defines Released Parties as Releasing Parties. Releasing Parties includes numerous currently unknowable and undisclosed parties, including holders of claims and interests who do not successfully opt out or object to the releases, and numerous related parties to such holders and other Releasing Parties.

Procedures Related to Third-Party Releases

13. The Debtors' proposed solicitation procedures provide that the Debtors will not mail the Plan or Disclosure Statement to holders of either unimpaired or fully impaired claims.

14. Holders of claims that are Unimpaired will receive the Non-Impaired Non-Voting Status Notice found at Exhibit 4-A of the Approval and Procedures Motion and, presumably, the Confirmation Notice attached as Exhibit 1 to the Plan. The Non-Impaired Non-Voting Status Notice does not inform holders of these claims that they are providing the third-party releases and, in fact, does not mention the releases. The Confirmation Notice does not include the definition of Releasing Parties. These creditors will also not be receiving copies of the Plan or Disclosure Statement. As such, these creditors will not be informed (a) that they are deemed to provide third-party releases to a laundry list of Released Parties, or (b) of the need to and the manner for opting out or objecting to such releases.

15. Holders of fully impaired claims and interests will receive the Impaired Non-Voting Status Notice found at Exhibit 4-B of the Motion. This notice is written in dense legalese and does not, clearly and at the beginning of the document, warn these holders that they are the parties granting the releases and the need for them to act. This notice includes an Opt-Out Form.

16. In addition, public shareholders will receive an additional opt-out form. If the shares are held in street name, the bank, broker or other financial institution will receive the Notice and Master Opt-Out Form at Exhibit 5-B of the Motion and will be required to send the Form of Notice & Opt-Out Form: Beneficial Holders at Exhibit 5-A to the beneficial holders, and return a Master Ballot. Beneficial shareholders must return their ballot to their nominee and the nominee must return the Master Ballot by the opt-out deadline.

17. Registered shareholders will receive the Form of Notice and Opt-Out Form: Registered Shareholders found at Exhibit 5-C to the Motion.

18. It is unclear if a holder of an unimpaired interest must return both the opt-out form attached to the Impaired Non-Voting Status Notice *and* the Opt-Out form sent to Beneficial

(through their nominee) and Registered Shareholders separately. Further, the Opt-Out forms themselves are unnecessarily confusing and appear to be easily misunderstood as to where to check to indicate that the party opts out of the releases.

19. The Plan provides the following definition of **Released Parties**:

> collectively, the Releasing Parties; provided that, in each case, an Entity shall not be a Released Party if it: (a) elects to opt out of the releases contained in the Plan, provided, however, that Avoidance Actions shall not be pursued and shall be released against any vendor or trade creditor notwithstanding whether any such vendor or trade creditor elects to opt out of the releases; (b) files with the Bankruptcy Court an objection to the Plan that is not consensually resolved before Confirmation or supports any such objection or objector, or (c) is an LG Party..

Plan at Art.I.A.128.

20. The Plan provides the following definition of **Releasing Parties**:

> collectively, and in each case solely in its capacity as such: (a) the Debtors, (b) the First Lien Agent, (c) the Second Lien Agent, (d) any Statutory Committee and each of its members, (e) the holders of all Claims or Interests who vote to accept the Plan, (f) the holders of all Claims or Interests whose vote to accept or reject the Plan is solicited but who do not vote either to accept or to reject the Plan and do not opt out of granting the releases set forth herein, (g) ***the holders of all Claims or Interests who*** vote, **or** ***are deemed to vote, to reject the Plan but do not opt out of granting the releases set forth herein***, (h) ***the holders of all Claims and Interests who are Unimpaired under the Plan***, (i) with respect to each of the foregoing Persons, in clauses (a) through (h***), each of their Affiliates, and (j) with respect to each of the foregoing Persons in clauses (a) through (i), each of their and their Affiliates' predecessors, successors, assigns, subsidiaries, affiliates, current and former officers and directors, principals, equity holders, members, partners, managers, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors, and other professionals, and such Persons' respective heirs, executors, estates, and nominees, in each case in their capacity as such***; provided that an Entity shall not be a Releasing Party if it files with the Bankruptcy Court an objection to the Plan that is not consensually resolved before Confirmation or supports any such objection or objector..

Plan at Art.I.A.129 (emphasis added).

21. The Plan contains the following Third-Party Release:

> As of the Effective Date, each of the Releasing Parties other than the Debtors shall, and shall be deemed to have, expressly, absolutely, unconditionally, irrevocably, generally, individually, and collectively, released, acquitted, and

discharged each of the Released Parties from any and all Causes of Action, including any Avoidance Actions or derivative Causes of Action asserted or assertable by or on behalf of a Debtor, the Reorganized Debtors, any Wind Down Debtor, or any of their Estates, and any Causes of Action asserted or assertable by or on behalf of the Holder of any Claim or Interest or other Entity, whether known or unknown, foreseen or unforeseen, asserted or unasserted, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort, or otherwise that the Releasing Parties (whether individually or collectively) ever had, now have, or thereafter can, shall, or may have, based on or relating to, or in any manner arising from, in whole or in part: (a) the Debtors, the Debtors' in- or out-of-court restructuring efforts, the Marketing Process, intercompany transactions, the Chapter 11 Cases, the purchase, sale, or rescission of any security of the Debtors, any Sale, the formulation, preparation, dissemination, negotiation, or filing of the Sale Documents, the Plan Support Agreement, the Disclosure Statement, or the Plan, including the Plan Supplement; (b) any Restructuring Transaction, contract, instrument, release, or other agreement or document (including any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Released Party on the Plan or the Confirmation Order in lieu of such legal opinion) created or entered into in connection with the Sales, the Plan Support Agreement, the Disclosure Statement, or the Plan, including the Plan Supplement; (c) the business or contractual arrangements between any Debtor and any Releasing Party, whether before or during the Debtors' restructuring, or the restructuring of Claims and Interests before or during the Chapter 11 Cases; (d) the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is affected by or classified in the Plan; (e) the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of consummation of the Plan, the administration and implementation of the Plan, including any issuance or distribution of securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement; or (f) any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date arising from or relating to any of the foregoing, including, without limitation, the Prepetition Loan Documents, any Interests, and all matters relating thereto.

Notwithstanding anything to the contrary in the foregoing, the releases set forth above shall not release, prejudice, limit, impact, or otherwise impair: (a) to the extent that any Causes of Action against any Releasing Party are not released or discharged pursuant to the Plan, any rights of such Releasing Party to assert any and all counterclaims, crossclaims, offsets, indemnities, claims for contribution, defenses, and similar claims in response to such Causes of Action; (b) any rights of the First Lien Agent or Second Lien Agent to (i) payment of fees, expenses, and indemnification obligations as against any money or property distributable to holders of Claims under the First Lien Credit Facility or the Second Lien Convertible Notes, respectively, including any rights to priority of payment and/or

to exercise charging liens or (ii) seek compensation and/or reimbursement of fees and expenses in accordance with the terms of the Plan and Confirmation Order, as applicable; (c) any commercial Cause of Action arising in the ordinary course of business, such as accounts receivable and accounts payable on account of goods and services being performed; (d) any post-Effective Date obligations of any party or Entity under the Plan, any Restructuring Transaction, or any document, instrument, or agreement executed to implement the Plan (including those set forth in the Plan Supplement); (f) any obligations of any party or Entity under the Sale Documents; or (g) any Cause of Action asserted or assertable by any Releasing Party against any non-Debtor party to any Retained Cause of Action.

Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the Third-Party Release, which includes by reference each of the related provisions and definitions contained herein, and, further, shall constitute the Bankruptcy Court's finding that the Third-Party Release is: (a) essential to the Confirmation of the Plan; (b) given in exchange for the good and valuable consideration and substantial contributions provided by the Released Parties; (c) a good faith settlement and compromise of the Causes of Action released by the Third-Party Release; (d) in the best interests of the Debtors and their Estates; (e) fair, equitable, and reasonable; (f) given and made after due notice and opportunity for hearing; (g) consensual; and (h) a bar to any of the Releasing Parties asserting any Claim or Cause of Action released pursuant to the Third-Party Release.

Each of the Releasing Parties expressly acknowledges that although ordinarily a general release may not extend to Claims or Causes of Action that the Releasing Party does not know or suspect to exist in its favor, which if known by it may have materially affected its settlement with the party released, they have carefully considered, and taken into account in determining to enter into the above releases described in this Plan, the possible existence of such unknown losses or Claims or Causes of Action. Without limiting the generality of the foregoing, each Releasing Party expressly waives and relinquishes any and all rights and benefits such party may have or conferred upon it under any federal, state, or local statute, rule, regulation, or principle of common law or equity that provides that a release does not extend to Claims or Causes of Action that the claimant does not know or suspect to exist in its favor at the time of providing the release or that may in any way limit the effect or scope of the releases with respect to released Claims or Causes of Action that such party did not know or suspect to exist in such party's favor at the time of providing the release, which in each case if known by it may have materially affected its settlement with any Released Party, including, without limitation, California Civil Code § 1542, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO

> EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.
>
> Each of the Releasing Parties expressly acknowledges that the releases and covenants not to sue contained in the Plan are effective regardless of whether those released matters or released Claims or Causes of Action are presently known or unknown, suspected or unsuspected, or foreseen or unforeseen.

Plan at Article IX.C.

Additional Issues

22. The Disclosure Statement purports to contain adequate information, but it does not contain a Liquidation Analysis, although it does include a placeholder to include one.

23. The Disclosure Statement does not, and could not, provide adequate information about who the Released Parties are, such that creditors and interest holders could make an informed decision regarding granting or opting out of the third-party releases. Because Released Parties are defined as Releasing Parties, no Releasing Party can know the universe of who they are releasing until after they are bound to the releases.

24. The proposed solicitation order provides:

> The Debtors are not required to mail Solicitation Packages or other solicitation materials to: (a) holders of Claims that have already been paid in full during these Chapter 11 Cases pursuant to an order previously entered by this Court; or (b) any party to whom notice of the Disclosure Statement Hearing was sent but subsequently returned as undeliverable. The Debtors are likewise authorized to rely on the address information for the Voting and Non-Voting Classes as compiled and maintained by the Solicitation Agent as of the Voting Record Date, such that the Debtors and Solicitation Agent will not be required to conduct any additional research for updated addresses based on undeliverable Solicitation Packages or Notices of Non-Voting Status and will not be required to resend Solicitation Packages or other materials, including Notices of Non-Voting Status, that are returned as undeliverable unless the Debtors are provided with accurate addresses for such parties at least seven (7) days prior to the Voting Deadline.

ARGUMENT

I. The Imposition of Releases on Public Shareholders in Favor of Non-Debtors Conflicts with Established Law.

25. The Debtors propose an opt-out procedure to measure "consent" to the Third-Party Release with respect to their impaired voting classes that might receive some distribution under the Plan.[4] The creditors in voting classes will receive ballots that allow them to vote to accept or reject the Plan. Parties who vote to reject may opt out of the releases. Parties who vote to accept cannot opt out of the releases, but can file a confirmation objection. In contrast, public shareholders are to receive a notice of non-voting status applicable to their class and a separate opt-out form, either directly or through their nominee. This "opt out" should not be approved, given that the Plan provides that shareholders will receive no distribution under the Plan, or any other consideration for the extinguishment of their direct claims against non-debtors.

26. Some judges of this Court have determined that third party releases of non-debtors should be allowed only to the extent the releasing parties have given affirmative consent. *See In re Washington Mutual, Inc*., 442 B.R. 314 (Bankr. D. Del. 2011). In *Washington Mutual*, the Court held that "any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases." *Id*. at 355 (emphasis added). Moreover, the Court clarified that merely having an opt-out mechanism is not enough, holding that an "opt out mechanism is not sufficient to support the third party releases . . . particularly with respect to parties who do not return a ballot (or are not entitled to vote in the first place). Failing to return a ballot is not a sufficient manifestation of consent to a third party

[4] The U.S. Trustee reserves all objections to the third-party releases at confirmation, including the right to argue that this procedure is not adequate to establish the releases are consensual.

release." *Id*. (emphasis added, citing *In re Zenith Elecs. Corp*., 241 B.R. 92, 111 (Bankr. D. Del. 1999)).

27. In *Emerge Energy Services LP*, Case No. 19-11563, 2019 WL 7634308 (Bankr. D. Del, Dec. 5, 2019), the Court ruled that consent to a third party release "cannot be inferred by the failure of a creditor or equity holder to return a ballot or Opt-Out Form." *Id*. at *52. The Court reached this conclusion even though the Opt-Out Forms provided conspicuous notice of how to opt out and the consequences of not doing so. The Court also rejected the debtor's argument that inferring consent from "silence" should be approved as typical, customary, and routine. *Id.* The Court held that it could not, "on the record before it, find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations." *Id*. at *53; *accord In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Exide Technologies*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (identifying release provision had to be modified to permit third-party releases of non-debtors only for those creditors who voted in favor of the plan); *see also Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 688 (E.D. Va., 2022) (holding that "the Bankruptcy Court erred both factually and legally in finding the Third-Party Releases to be consensual. Failure to opt out, without more, cannot form the basis of consent to the release of a claim."); *In re SunEdison, Inc.*, 576 B.R. 453 (Bankr, S.D.N.Y. 2017) (stating under principles of New York contract law, a creditor could not be deemed to consent to third-party releases merely

by failing to object to the plan, even when the disclosure statement made it clear that such a consequence would result); *In re Chassix Holdings*, 533 B.R. 64, 79-80 (Bankr. S.D.N.Y. 2015) (limiting third-party releases to those who voted to accept the plan, or affirmatively elected to provide releases).

28. Some decisions of this Court have not required affirmative consent for third party releases. However, such decisions are (i) distinguishable from the present cases and/or (ii) support the view that such releases cannot be imposed on parties who will not receive any distribution under a plan. In *In re Indianapolis Downs, LLC*, 486 B. R. 286 (Bankr. D. Del. 2013), this Court reached a different conclusion than that of *Washington Mutual* and *Emerge* concerning the need for affirmative consent to third party releases, and allowed for an opt-out process to be used. In so doing, however, the Court pointed out that, "the third party release provision ***does not apply to any party that is deemed to reject the Plan***." *Id.* at 305 (emphasis added).

29. In *In re Spansion, Inc.*, 426 B.R. 114 (Bankr. D. Del 2010), the Court held that affirmative consent was not required, but only as to releases being given by unimpaired classes, who were "being paid in full." *Id.* at 144. In contrast, the Court held that non-consensual releases that were being deemed to be given by parties who were not receiving any distribution under the plan did "not pass muster under *Continental*." *Id.* at 145 (emphasis added), referencing *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203 (3d Cir. 2000). The same is true here.

30. In *In re Mallinckrodt*, 639 B.R. 837 (Bankr. D. Del. 2022), this Court allowed third-party releases to be imposed on mass tort claimants without the opportunity to opt out, as well as on certain other classes of creditors and equity holders who were provided the ability to opt out, holding that the imposition of such releases was permissible under *Continental* because of the mass

tort context of the case. *See* 639 B.R. at 873, 881*; see also In re Boy Scouts of America*, 642 B.R. 504, at 674-75 (Bankr. D. Del. 2022) (approving an opt-out process for third-party releases in a mass tort case, but noting that the definition of parties giving such releases did not include any "claimant who abstains from voting"). Unlike *Mallinckrodt* and *Boy Scouts*, the above-captioned cases are not mass tort cases.

31. A typical "opt-out" procedure whereby the Debtors mail opt-out forms to their stockholders should not be approved here because the Debtors' public shareholders will receive no distribution under the Plan or any other consideration for releasing direct claims against non-debtors. *See Spansion, Inc.*, 426 B.R. at 144. The release extends to non-Debtors, including the Debtors' officers and directors, and releases claims based on fraud, intentional misconduct and gross negligence. However, most -- if not all -- of these released parties have provided no monetary contribution to support the release, and no distributions are being made to shareholders. The Debtors' equity interest holders are not limited to a few institutions. Instead, it appears there are hundreds, if not thousands, of public shareholders who likely have not yet even received notice of these proposed procedures and the Disclosure Statement.

32. Sending opt-out forms to public shareholders, and deeming the non-return of the same to evidence of consent to give releases, would not be fair, because the non-return of an opt-out form could be caused by factors such as the opt-out notice being wrongly addressed or misdelivered, or other mail failures or delays. The risk of mail errors should be borne by the beneficiaries of the releases, not by the Debtors' public shareholders who are receiving no consideration. In addition, much of the stock of the Debtors is likely held in street name, and therefore the Debtors would not be mailing out opt-out forms (or any other information) directly to most of the beneficial stockholders. Rather, the Debtors will employ a complicated process to

mail these opt-out forms, which process will not ensure that all beneficial shareholders receive the opt-out form in a timely manner, if at all. In addition, such process will truncate an already short period of time to opt out and places the responsibility to timely serve the opt outs on the nominees.

33. Where, as here, a proposed third-party release is non-consensual, the release must, at a minimum, meet the exacting "hallmarks of permissible non-consensual releases[,]" which were described as "fairness, necessity to the reorganization, and special factual findings to support these conclusions." *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000). In *Continental*, the Third Circuit surveyed cases from various circuits as to when, if ever, a non-consensual third party release is permissible. The court acknowledged that a number of circuits do not allow such non-consensual releases under any circumstances. *See id.* at 212. Other circuits, the court found, "have adopted a more flexible approach, albeit in the context of extraordinary cases." *Id.* at 212-13 (citing Second Circuit cases where releases were upheld for "widespread claims against co-liable parties" and a Fourth Circuit mass tort case). "A central focus of these three reorganizations was the global settlement of massive liabilities against the debtors and co-liable parties. ***Substantial debtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities*** and made these reorganizations feasible." *Id.* at 213 (emphasis added; *see also In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005) (noting a third party release may be granted "only in rare cases").

34. The Third Circuit in *Continental* ultimately determined that the proposed releases in that case, which, like the releases in this case, enjoined shareholder lawsuits against debtors' directors and officers, did "not pass muster under even the most flexible test for the validity of non-debtor releases." 203 F.3d at 214. Therefore, the Court determined that it "need not speculate

on whether there are circumstances under which we might validate a non-consensual release that is both necessary and given in exchange for fair consideration." *Id.* at 214, n.11.

35. The Third Circuit Court of Appeals referenced *Continental* in *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019), *cert. denied sub nom. ISL Loan Tr. v. Millennium Lab Holdings*, 19-1152, 2020 WL 2621797 (May 26, 2020), as one of the precedents, along with *In re Global Industrial Technologies, Inc.*, 645 F.3d 201, 206 (3d Cir. 2011), regarding nonconsensual third-party releases. The Third Circuit indicated that these decisions "set forth ***exacting standards*** that must be satisfied if such releases and injunctions are to be permitted." 945 F.3d at 139 (emphasis added).[5]

36. In *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001), the Court held that a clause in the plan which released claims of any creditors or equity holders against the senior lenders for any act or omission in connection with the bankruptcy cases and reorganization process required factual showings under *Continental* – that the releases were necessary for the reorganization and were given in exchange for fair consideration. *Id.* at 607. The Court elaborated that "necessity" under *Continental* requires a showing: (a) that the success of the debtors' reorganization bears a relationship to the release of the non-consensual non-debtor parties and (b) that the non-debtor parties being released from liability have provided "a critical financial contribution to the debtors' plan" in exchange for the receipt of the release. *Id.* at 607. A financial contribution is considered "critical" if without the contribution, the debtors' plan would be infeasible. *Id.* Fairness of a release is determined by examining "whether nonconsenting creditors [are being] given reasonable consideration in exchange for the release." *Id.* at 608 (citing

[5] The Third Circuit in *Millennium Lab* ultimately did not address whether the non-consensual third-party releases in that case met the standards of *Continental* or *Global*, because the Court held the appeal to be equitably moot. 945 F. 3d at 144.

Continental, 203 F.3d at 215). In most instances, this will entail examining the proposed dividend that non-consenting creditors or shareholders will receive under a plan with the releases compared to what they would receive under a plan without the releases. *See id.*; *see also In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (applying same factors).

37. The *Genesis* Court found that the senior lenders had made a financial contribution to the plan, which allowed the debtors to make the 7.34% distribution to the unsecured creditors, who otherwise would be "out of the money." *Id.* at 608. Ultimately, though, the Court found that such contribution was not enough, because "even if the threshold *Continental* criteria of fairness and necessity for approval of non-consensual third-party releases were marginally satisfied by these facts . . . . [the] financial restructuring plan under consideration here would not present the *extraordinary circumstances* required to meet even the most flexible test for third-party releases." *Id.* (emphasis added).

38. The Debtors' Plan and proposed solicitation procedures do not comply with the holding of *Continental* or *Genesis*. In the present cases, there is nothing in the record to indicate the presence of "extraordinary circumstances," or that that the high threshold necessary for approval of non-consensual third-party releases has been met with respect to each of the non-debtor parties that would be the recipients of these non-consensual releases. The Debtors also cannot meet the second *Continental* requirement that the releases be given "in exchange for fair consideration," because the shareholders will receive no distribution under the Plan (or any other consideration) in exchange for such releases. Further, numerous Released Parties have provided no consideration for the release -- for example, the Debtors' officers and directors.

39. Thus, both the "exchange for fair consideration" and "necessity to the reorganization" elements specified in *Continental* are absent here. Therefore, the Plan cannot be

confirmed with the inclusion of the non-consensual third-party releases. *See Continental*, 203 F.3d at 214 and n. 11.

40. The allegedly consensual third-party releases are especially problematic where the Debtors propose that they do not need to serve shareholders with copes of the Plan and Disclosure Statement. Bankruptcy Rule 3017 requires that all fully impaired classes of creditors be served with a copy of the plan, or court-approved summary of the plan, and the approved disclosure statement. The court has the authority to eliminate the need to serve the disclosure statement on *unimpaired* creditors, but not as to fully impaired creditors. Fed.R.Bankr.Pro. 3017(d).

41. For the reasons set forth above, the public shareholders should be carved out of the definition of "Releasing Parties."

42. If the Court were to approve an opt-out process for public shareholders, the proposed procedures are unnecessarily confusing and do not provide sufficient time for beneficial shareholders to exercise opt-out rights. First, the Plan and Disclosure Statement must be served on all shareholders. Second, the various notices are written in confusing legalese, and the notices do not explicitly and clearly warn shareholders that they will be providing releases to potentially thousands of parties, including the Debtors and their officers and directors, in the absence of action. Finally, the time period to opt out is further truncated for beneficial holders who, under the proposed procedures, are relying on their nominee to return the master opt-out form properly and timely.

II. Unimpaired Creditors are Not Provided Sufficient Information Concerning Third-Party Releases.

43. Unimpaired creditors are granting the third-party releases absent filing an objection to the Plan. However, the notices being sent to unimpaired creditors do not mention the third-

party releases, let alone provide a clear, easy-to-understand statement that such creditors are providing the releases unless they object.

44. The general confirmation notice, which presumably is also being sent to unimpaired creditors, does not contain the definition of Releasing Parties, and therefore likewise does not inform these creditors of the need to act to opt out of the releases. Further, the Debtors propose to not send the Plan or Disclosure Statement to these creditors, further making it difficult for them to determine that they are providing the releases absent action.

45. In addition, the proposed order would provide that the Debtors need not serve anything on creditors who have already been paid in full. To the extent that these creditors fall within the definition of "Releasing Parties," they must be informed of the third-party releases and the need to act to opt out of the releases.

III. The Proposed Solicitation Procedures Do Not Provide Notice to Numerous Persons That Their Claims Against Non-Debtors Will Be Released Under the Plan.

46. The Plan and Disclosure Statement include a recitation of the Third-Party Release, and the Plan includes the relevant definitions. However, the Debtors do not propose to serve any part of the Solicitation Package, or the Confirmation Hearing Notice, or any other document on the Affiliates of Releasing Parties (who are also granting the release) or the numerous related parties of the Releasing Parties and their Affiliates (who are also granting the release) that would notify them that the Plan will strip them of their right to pursue their direct claims against a large number of non-debtor entities for no consideration. Moreover, it likely would be impossible for the Debtors to arrange to provide such notice, because the identity of many of these Affiliates and related parties– such as all agents, employees and consultants of all Releasing Parties and Affiliates of Releasing Parties – cannot be known by the Debtors.

47. In *Folger Adam Security, Inc. v. DeMatteis/MacGregor*, 209 F.3d 252 (3d Cir. 2000), the Third Circuit ruled that "[d]ue process requires 'notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 265 (citations omitted).

48. The Debtors' proposed solicitation procedures will not provide notice to the related parties that is "reasonably calculated, under all the circumstances, to apprize [them] of the pendency of the action and afford them an opportunity to present their objections" to having Third-Party Releases extracted from them. *Id.* In fact, most, if not all, of the related parties will receive no notice at all, because they are not themselves creditors or interest holders of the Debtors. The Motion, therefore, must be denied unless the Plan is modified so that no Affiliates of Releasing Parties, or parties related to the Releasing Parties or their Affiliates, are deemed to give releases to non-debtors. *See In re Boy Scouts of America*, Case No. 20-10343 (LSS), 2022 WL 3030138, at * 128 (Bankr. D. Del. July 29, 2022) (Court was unable to find that the 22 categories of "Related Releasing Parties" received notice, and because Court had concluded that "a request for opt-out consent must be grounded in adequate notice, it is inconsistent to permit releases from persons who do not receive notice by virtue of creditor (or shareholder) status."); *see also Joel Patterson v. Mahwah Bergen Retail Group, Inc.*, No. 3:21CV167 (DJN), 2022 WL 135398 *7 (E.D. Va. Jan. 13, 2022) (in vacating the Bankruptcy Court's order confirming the plan, the District Court noted that "[t]he Bankruptcy Court did not order that any notice or opt-out forms be sent to all of the Releasing Parties, including the current and former employees, consultants, accountants or attorneys of Debtors, their affiliates, lenders, creditors or interest holders.").

IV. The Disclosure Statement Does Not Contain Adequate Information Concerning Third-Party Releases.

49. Section 1125 of the Bankruptcy Code provides that a disclosure statement must contain "adequate information" describing a confirmable plan. 11 U.S.C. § 1125; *see also In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007). 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 reasonable investor of the relevant class to make an informed judgment about the plan*** . . . .

11 U.S.C. § 1125(a)(1) (emphasis added); *see also Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994); *Kunica v. St. Jean Fin., Inc*., 233 B.R. 46, 54 (S.D.N.Y. 1999).

50. The disclosure statement requirement of section 1125 of the Bankruptcy Code is "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co*., 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.)*, 848 F.2d 414 (3d Cir. 1988)).

51. The Plan term Released Parties is defined as the Releasing Parties. Claims that are being released include claims for fraud, gross negligence and intentional misconduct. In addition, unknown claims are being released.

52. Because Released Parties are defined as Releasing Parties in the Plan, no Releasing Party will know who they are releasing until after the deadline to opt out of the releases. The Disclosure Statement does not discuss or specifically disclose that the identity of Released Parties

cannot be known until after the deadline to opt out of the releases and does not contain any discussion regarding the lack of identification of the Released Parties. There is no attempt to inform creditors and interest holders of the potential universe of Released Parties by, for example, referring creditors to the Schedules and Claims Register for a list of potential Released Parties.

53. Furthermore, there is no procedure for identifying Released Parties after the opt-out deadline. To the extent these releases are approved, the Debtors should be required to serve notice of (a) creditors and interest holders who have become Released Parties; and (b) the names of creditors and interest holders who have opted out of the releases and are not Released Parties.

V. The Debtors Must Conduct a Reasonable Search for Known Creditors' Addresses Whose Solicitation Mailings Were Returned as Undeliverable.

54. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) sets forth the requirements for providing notice: "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

55. The Debtors' proposed order would permit the Debtors to not provide service on known creditors whose notices or solicitation packages were returned as undeliverable.

56. However, once the Debtors become aware that service to a known creditor was not made, more is required:

> It is true that this Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent. . . . In each of these cases, the government attempted to provide notice and heard nothing back indicating that anything had gone awry, and we stated that "[t]he reasonableness and hence the constitutional validity of [the] chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." . . . . But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. That is a new

> wrinkle, and we have explained that the "notice required will vary with circumstances and conditions." . . . . The question presented is whether such knowledge on the government's part is a "circumstance and condition" that varies the "notice required."

Jones v. Flowers, 547 U.S. 220, 226-27 (2006).

57. The Supreme Court stated that it does not think that "a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one 'desirous of actually informing' the owners would simply shrug his shoulders as the letters disappeared and say 'I tried.' Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." *Id.* at 229.

58. Here, the Debtors seek an order eliminating the need to take any reasonable actions to ascertain a creditor's address despite actual knowledge, through the returned solicitation package, that service was not completed. Rather, the order should require that the Debtors conduct a reasonable search before eliminating the requirement that the creditor be provided notice. A reasonable search may include: (a) checking the address on the envelope with the address on the books and records to ensure that the address was not written incorrectly; (b) comparing the address on the books and records with the last correspondence from the creditor to ensure that the address was properly updated and transcribed accurately; (c) calling the creditor; or (d) conducting an internet search. These actions are all reasonable and would be of the type that a person who "actually desired to inform" a creditor would undertake.

RESERVATION OF RIGHTS

59. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, including but not limited arguments in the context of final approval of the Disclosure Statement and confirmation of the Plan, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection, file an appropriate motion and/or conduct any and all discovery as may be deemed necessary or as may be required, and to assert such other grounds as may become apparent upon further factual discovery.

CONCLUSION

WHEREFORE, the U.S. Trustee requests that this Court issue an order denying the Motion and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: January 17, 2024
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE, REGION 3

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CERTIFICATE OF SERVICE

I, Linda J. Casey, hereby attest that on January 17, 2024, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and courtesy copies upon the following parties via email:

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