UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	**Case No. 24-90377 (MI)**
ZACHRY HOLDINGS, INC., *et al.*,[1]	§	**(Jointly Administered)**
	§	
***Debtors*.**	§	**Chapter 11**

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF MODIFIED FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF ZACHRY HOLDINGS, INC. AND ITS DEBTOR AFFILIATES
(Relates to the Joint Chapter 11 Plan filed at ECF No. 1978)

TO THE HONORABLE MARVIN ISGUR, UNITED STATES BANKRUPTCY JUDGE:

Kevin M. Epstein, the United States Trustee for the Southern District of Texas (the "U.S. Trustee"), hereby files this Objection (the "Objection") to confirmation of the *Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* (the "Plan") [ECF No. 1978] and represents as follows:

SUMMARY

1. The United States Trustee objects to confirmation of the Plan for the following reasons:

i. The Plan imposes nonconsensual releases of non-debtor third parties by non-debtor third parties that are not authorized by the United States Bankruptcy Code;

ii. The opt-out provisions in the Ballots and the Non-Voting Notices — by which parties who (i) vote to accept or reject the Plan, (ii) are deemed to have accepted or rejected the Plan, or (iii) abstain from voting are all deemed to be bound by the Third-Party Releases unless they affirmatively and timely opt out—are ineffective to confer affirmative consent to Third-Party Releases;

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' proposed claims and noticing agent at www.veritaglobal.net/zhi. The location of the Debtors' service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.

iii. The Plan would also impose the granting of Third-Party Releases by a wide variety of "Related Parties" who are not identified, who are given no notice, and who will not be asked for their consent to the releases; and

iv. The Plan has an injunction to enforce the Third-Party Releases and exculpation in violation of the *Purdue* decision and the Bankruptcy Code, and the Debtors have not met the standard for entry of an injunction.

BACKGROUND

A. Procedural History

2. On January 23, 2025, Zachry Holdings, Inc. and its affiliated debtors (collectively, the "Debtors") filed their Plan and accompanying *Disclosure Statement for the Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* (the "Disclosure Statement") [ECF No. 1986].

3. In connection with filing the Plan and Disclosure Statement, the Debtors filed the *Revised Emergency Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure Statement, (III) Approving the Revised Confirmation Timeline, Solicitation Procedures, Solicitation Package, and Notices, (IV) Establishing Procedures for Objecting to the Disclosure Statement and First Amended Plan, and (V) Granting Related Relief* (the "Solicitation Motion") [ECF No. 1956] seeking, in part, (i) conditional approval of the Disclosure Statement (ii) approval of solicitation and notice procedures with respect to confirmation of the Plan (iii) approval of the form of ballots (iv) to schedule the confirmation hearing and (vi) to establish notice and objection deadlines for confirmation of the Plan.

4. On January 23, 2025, the Court conducted an emergency hearing on the Solicitation Motion. The U.S. Trustee's objections, asserted to the Solicitation Motion, were carried forward to Plan confirmation.

5. On January 23, 2025, the Court entered the *Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure Statement, (III) Approving the Revised Confirmation Timeline, Solicitation Procedure, Solicitation Package, and Notice, (IV) Establishing Procedures for Objecting to the Disclosure Statement and Modified First Amended Plan, and (V) Granting Related Relief* (the "Solicitation Order") [ECF No. 1991].

6. The Solicitation Order established the following solicitation and confirmation timeline:

Event	Date/Deadline (Central Time)
Voting Record Date	Wednesday, January 22, 2025
Hearing on Conditional Approval of the Disclosure Statement	Thursday, January 23, 2025, at 9:00 a.m.
Solicitation Deadline	Thursday, January 30, 2025, or 5 Business Days after entry of the Disclosure Statement Order
Publication Deadline	Thursday, January 30, 2025, or as soon as reasonably practicable thereafter
Deadline to: (i) file (A) GUC Trust Unsecured Note Term Sheet and (B) GUC Trust Agreement; and (ii) share the Debtors' most recent draft and the Prepetition Lenders' most recent draft of the A&R Credit Facility Term Sheet with the Committee on a "professional eyes only" basis	Wednesday, February 5, 2025
Deadline to File Rule 3018 Motions	Thursday, February 13, 2025, at 4:00 p.m.
Plan Supplement Deadline	Thursday, February 13, 2025
Deadline for Committee to File Plan Objection	Wednesday, February 19, 2025, at 1:30 p.m.
Voting, Plan Objection, and Third-Party Release Opt-Out Deadline	Thursday, February 20, 2025, at 4:00 p.m.
Deadline to File Confirmation Brief	Sunday, February 23, 2025, at 1:30 p.m.
Deadline to File Voting Report	Tuesday, February 25, 2025
Combined Hearing Date	Wednesday, February 26, 2025, at 1:30 p.m.

7. The hearing on confirmation of the Plan is set for February 26, 2025, at 1:30 p.m., prevailing Central Time. [ECF No. 1991].

B. Solicitation and Opt-Out Notices

8. The Solicitation Order approved: (a) the form of notice of the confirmation hearing, (b) the forms of ballots for voting classes (the "Ballots"), (c) the form of non-voting status notice and accompanying opt-out form (collectively, the "Non-Voting Notice"), all of which contain some form of notice (or actual language) of the releases, exculpations, and injunction from Article VIII. of the Plan and a box to opt out of the Third-Party Releases (collectively, the "Solicitation Materials"). [ECF No. 1991]

9. The Debtor transmitted the Solicitation Package and proposed Ballots to the holders of impaired claims in Classes 3 and 6, which classes are entitled to vote on the Plan (each, a "Voting Class" and, collectively, the "Voting Classes"). [ECF No. 1956]

10. The Debtor did not solicit votes from Holders of Claims in Classes 1, 2, 4, 5, 7, 8, and 9 (each, a "Non-Voting Class" and, collectively, the "Non-Voting Classes"), each of which is presumed to accept or deemed to reject the Plan. Instead, the Debtor served the Non-Voting Classes with the Non-Voting Notice and Opt-Out Form. [ECF No. 1956]

11. The following chart summarizes the Classes of Claims and Interests under the Plan and whether they are entitled to vote:

Class	Claims and Interests	Status	Voting Rights
Class 1	Other Secured Claims	Unimpaired	Presumed to Accept; Not Entitled to Vote
Class 2	Other Priority Claims	Unimpaired	Presumed to Accept; Not Entitled to Vote
Class 3	Prepetition Credit Facility Claims	Impaired	Entitled to Vote
Class 4	Deferred Compensation Plan Claims	Unimpaired	Presumed to Accept; Not Entitled to Vote
Class 5	Convenience Claims	Unimpaired	Presumed to Accept; Not Entitled to Vote
Class 6	General Unsecured Claims	Impaired	Entitled to Vote
Class 7	Intercompany Claims	Impaired/Unimpaired	Presumed to Accept/Presumed to Reject Not Entitled to Vote
Class 8	Intercompany Interests	Impaired/Unimpaired	Presumed to Accept/Presumed to Reject Not Entitled to Vote

Class	Claims and Interests	Status	Voting Rights
Class 9	Zachry Interests	Unimpaired	Presumed to Accept; Not Entitled to Vote

12. Based on the definition of "Releasing Party[2]," the Plan would impose the Third-Party Releases on all those who fail to affirmatively opt out of them, either on the Ballot or the

[2] In the Plan "Releasing Party" means, collectively, the following Entities, in each case in their capacities as such: (a) the Debtors; (b) the Reorganized Debtors; (c) each member of the Committee; (d) the Prepetition Credit Facility Agent; (e) the A&R Credit Facility Agent; (f) the Released Prepetition Lenders; (g) Golden Pass, but solely with respect to the Debtors and the Debtors' Related Parties consistent with the GPX Settlement; (h) the Sureties; (i) all Holders of Claims who vote to accept the Plan and who do not affirmatively opt out of the Third-Party Release provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the Third-Party Release provided in the Plan; (j) all Holders of Claims or Interests who are deemed to accept the Plan and who do not affirmatively opt out of the Third-Party Release provided by the Plan by checking the box on the applicable notice of non-voting status indicating that they opt not to grant the Third-Party Release provided in the Plan; (k) all Holders of Claims or Interests who are deemed to reject the Plan and who do not affirmatively opt out of the Third-Party Release provided by the Plan by checking the box on the applicable notice of non-voting status indicating that they opt not to grant the Third-Party Release provided in the Plan; (l) all Holders of Claims who abstain from voting on the Plan and who do not affirmatively opt out of the Third-Party Release provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the Third-Party Release provided in the Plan; (m) all Holders of Claims who vote to reject the Plan and who do not affirmatively opt out of the Third-Party Release provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the Third-Party Release provided in the Plan; and (n) each **Related Party** of each Entity in clause (a) through (m) for which such Entity is legally entitled to bind such Related Party to the releases contained in the Plan under applicable law; *provided*, *however*, notwithstanding anything to the contrary in this Plan, current employees of the Debtors as of the Voting Record Date shall not be Releasing Parties under this Plan. Plan, Art. I.A. at page 10-11 (emphasis added).

The Plan defines "Related Party" to expansively mean: with respect to an Entity, collectively, (a) such Entity's current and former Affiliates and (b) such Entity's current and former Affiliates' respective directors, managers, officers, shareholders, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, participants, successors, assigns (whether by operation of law or otherwise), subsidiaries, current, former, and future associated entities, managed or advised entities, accounts or funds, partners, limited partners, general partners, principals, members, management companies, fund advisors, managers, fiduciaries, trustees, employees, agents (including any disbursing agent), advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, other representatives, and other professionals, representatives, advisors, predecessors, successors, and assigns, each solely in their capacities as such (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), and the respective heirs, executors, estates, and nominees of the foregoing. Plan, Art. I.A. at page 10.

Non-Voting Notice, as applicable. Plan, Art. I.A. at pages 10–11. Specifically, the Plan imposes the Third-Party Releases on all those who (i) vote to reject the Plan, (ii) vote to accept the Plan, (ii) are deemed to accept or reject the Plan and thus ineligible to vote, or (iii) abstain from voting on the Plan, unless they opt out of them on either the Ballot or the Non-Voting Notice, as applicable. Plan, Art. I.A. at pages 10–11.

13. As such, the Plan would deem all those who fail to affirmatively opt out of the Third-Party Releases by timely and successfully returning their election on either a Ballot or Opt Out Form—whether they return a ballot or not, and regardless of how they vote—to have consented to the Third-Party Release.

14. As defined in the Plan, "Releasing Parties" are unidentifiable. Because the definition of "Related Parties" includes numerous groups of unidentified persons or entities, and because "Related Parties" are included within the definition of a "Releasing Party," it is not clear exactly who are the entities and persons who will be deemed to have released their claims against non-debtor third parties. The identities of who are the Releasing Parties is not specified or knowable and, therefore, all Releasing Parties are not given notice of the Plan and cannot be deemed to have consented to having their claims against non-debtor third parties released.

15. Similarly, the Plan cannot identify which claims and non-debtor third parties it is purporting to release. Indeed, the Third-Party Releases extend to all claims even if the Releasing Party does not know or suspect such claims to exist (Plan Art. VIII.D, at page 40-41) and against Released Parties.

16. Finally, Art. VIII.F of the Plan provides for a permanent injunction to enforce the Third-Party Releases and the exculpation upon confirmation. Plan, Art. VIII.F at pages 41–42.

17. The U.S. Trustee hereby renews his objection asserted in advance of the hearing to consider conditional approval of the Disclosure Statement to the Third-Party Release and opt-out

procedures contained in the Plan as well as the Plan's injunctive provisions and adopts and incorporates the arguments made therein[3]. The U.S. Trustee requests that confirmation of the Plan be denied.

C. Governing Law

18. Article I. Section D of the Plan defines the governing law for the Plan as the laws of the State of Texas.

OBJECTIONS

A. Statutory Standards

19. Section 1129(a) of the Bankruptcy Code provides that "[t]he court shall confirm a plan only if it complies with all" requirements of section 1129(a). 11 U.S.C. § 1129(a). The Bankruptcy Code further requires that the "[t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Among other requirements, section 1129(a) mandates that "[t]he plan complies with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The Debtors, as plan proponents, bear the burden to prove, by a preponderance of the evidence, that the Plan satisfies the confirmation requirements of section 1129(a). *Heartland Fed. Savs. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir. 1993) (stating that "[t]he combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown").

[3] See *United States Trustee's Objection to Debtors' Emergency Motion for Entry of Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure Statement, (III) Approving the Confirmation Timeline, Solicitation Procedures, Solicitation Package, and Notices, (IV) Establishing Procedures for Objecting to the Plan and Final Approval of the Disclosure Statement, and (V) Granting Related Relief* [ECF No. 1369] ("Disclosure Statement Objection")

20. Consistent with the requirements set forth in sections 1125(a) and 1129(a), the U.S. Trustee objects to confirmation of the Plan because it contains third-party releases to which creditors have not consented. The Debtors have failed to show the requisite affirmative consent has been given by all parties subject to the "consensual" third-party releases in the Plan. The opt-out procedures incorporated into the solicitation of the Plan are insufficient to show the affirmative consent required by law. Indeed, the third-party releases contained in the Plan include conduct that are unrelated to these cases and the reorganization. As the Supreme Court in *Purdue* made clear, the Bankruptcy Code does not permit non-consensual third-party releases, and therefore, the Debtors cannot show that they meet the requirements for approval of the Disclosure Statement and ultimately, confirming the Plan.

B. Objection No. 1 – The Bankruptcy Code Does Not Authorize Nonconsensual Third-Party Releases

State Law Governs Whether a Release is Consensual

21. The foundation of a consensual release is an agreement between the parties. Whether non-debtor parties have reached an agreement—including an agreement to release one's claims against another (*i.e.*, not to sue)—is governed by state law. The only exception is if there is federal law that preempts applicable state contract law in some specific context. *See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (plurality) ("For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law must govern because there can be no other law.'") (quoting *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)).

22. No such exception applies here. The Bankruptcy Code does not define a "consensual release." It contains no provision that addresses how to determine whether one non-debtor has agreed to extinguish its direct claims against another non-debtor. And no Code

provision authorizes courts, as part of an order confirming a chapter 11 plan or otherwise, to "deem" a non-debtor to have consented to an agreement to release claims against other non-debtors where such consent would not otherwise be found to exist as a matter of state law. Nor does 11 U.S.C. § 105(a) itself confer any power to override state law. Rather, section 105(a) "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue*, 144 S. Ct. at 2082 n.2 (quotation marks omitted). Bankruptcy courts cannot "create substantive rights that are otherwise unavailable under applicable law," nor do they possess a "roving commission to do equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (quotation omitted). Accordingly, any authority to include third-party releases in a plan must derive from some other source of law. Thus, the Bankruptcy Code does not change the state-law definition of consent as applicable to claims among non-debtor parties.[4]

23. As courts have recognized, because the Bankruptcy Code does not govern relationships between claim holders and non-debtor third-parties, state-law contract principles serve as controlling authority when considering whether a release is consensual. *See, e.g.*, *Patterson v. Mahwah Bergen Retail Grp., Inc.,* 636 B.R. 641, 684-85 (E.D. Va. 2022) (describing bankruptcy courts in the District of New Jersey as "look[ing] to the principles of contract law

[4] Indeed, even as to a debtor, it is well settled that whether parties have entered a valid settlement agreement is governed by state law. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) ("Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law."); *De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)*, 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009) ("Where the United States is not a party, it is well established that settlement agreements in pending bankruptcy cases are considered contract matters governed by state law."). That is because "the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) (quotation marks omitted); *Butner v. United States*, 440 U.S. 48 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").

rather than the bankruptcy court's confirmation authority to conclude that the validity of the releases requires affirmative consent"); *Smallhold, Inc.*, No. 14-10267, 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024) (recognizing that "some sort of affirmative expression of consent that would be sufficient as a matter of contract law" is required); *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third-party release."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 506, 507 (Bankr. D.N.J. 1997) (explaining that a third-party release "is no different from any other settlement or contract" and thus "the validity of the release . . . hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order") (internal quotation marks omitted) (alterations in original). As one court recently held, because "'nothing in the bankruptcy code contemplates (much less authorizes it)' . . . . any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent." *In re Tonawanda Coke Corp*., 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024) (quoting *Purdue*, 144 S. Ct. at 2086). Accordingly, "any such consensual agreement would be governed by state law." *Id.*

24. Here, the Debtors do not meet their burden of establishing that the Releasing Parties will affirmatively agree to release their property rights in a manner sufficient to demonstrate consent under state law.

Under State Law, Silence Is Not Acceptance

25. The "general rule of contracts is that silence cannot manifest consent." *Patterson*, 636 B.R. at 686; *see also, e.g., McGurn v. Bell Microproducts, Inc.*, 284 F.3d 86, 90 (1st Cir. 2002) (recognizing "general rule" that "silence in response to an offer . . . does not constitute acceptance of the offer"). Moreover, "[o]rdinarily[,] an offeror does not have power to cause the silence of the offeree to operate as acceptance." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981); *accord* 1 Corbin on Contracts § 3.19 (2018); 4 Williston on Contracts § 6:67 (4th ed.);

Reichert v. Rapid Investments, Inc., 56 F.4th 1220, 1227 (9th Cir. 2022) ("[T]he offeror cannot prescribe conditions so as to turn silence into acceptance."). Instead, under state law, an agreement to release claims—like any other contract—generally requires a manifestation of assent to that agreement. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 17(1) ("[T]he formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and a consideration."). Consent cannot be imputed or "deemed" based on a party's failure to object—rather, consent must be affirmatively shown to exist. See, e.g., id.; RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a.

26. There are only very limited exceptions to this principle. "[T]he exceptional cases where silence is acceptance fall into two main classes: those where the offeree silently takes offered benefits, and those where one party relies on the other party's manifestation of intention that silence may operate as acceptance. Even in those cases the contract may be unenforceable under the Statute of Frauds." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

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

28. Both New York and Texas common law, as a point of reference, are in accord.[5] *See, e.g.*, *Advantage Physical Therapy v. Cruse*, 165 S.W.3d 21 (Tex. App. 2005) (quoting

[5] Although the Plan provides that its construction and enforcement is governed by the laws of the State of Texas, debtors cannot choose the law to apply to contracts between non-debtors. Rather, ordinary choice of law principles govern which state's law applies to contracts between non-debtors, although a choice of law analysis

Restatement (Second) of Contracts § 69 (1981)); *See, e.g., Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors*, Inc., 768 A.2d 983, 991 (Del. Super. Ct. 2000) (quoting Restatement (Second) of Contracts § 69 (1981))]. Absent limited exceptions not triggered here, silence and inaction are not assent to an offer. See *Texas Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.*, 52 S.W.3d 128, 131-33 (Tex. 2000) (quoting 2 Williston on Contracts § 6:49 (4th ed. 1991)**.** *See also Urban Green Techs., LLC v. Sustainable Strategies*, 2050 LLC, No. N136-12-115, 2017 WL 527565, at *3 (Del. Super. Ct. Feb. 8, 2017).

29. As the Fifth Circuit explained: "Tacit acquiescence between relative strangers ignores the basic tenets of contract law. . . . While there may be exceptions in cases involving parties with longstanding relationships, generally speaking, 'silence or inaction does not constitute acceptance of an offer.'" *Imperial Ind. Supply Co v. Thomas*, 825 F. App'x 204, 207 (5th Cir. Sept. 2, 2020) (quoting *Norcia v. Samsung Telecomms Am., LLC*, 845 F.3d 1279, 1284 (9th Cir. 2017)).

30. No exception to the rule—that silence cannot be equated to consent—applies here.

Failing to Opt-Out Does Not Constitute Consent.

31. Here, beyond the named parties, the Plan would impose the Third-Party Release on the following parties, without their affirmative consent: (i) all Holders of Claims or Interests that vote to accept the Plan and do not opt out, (ii) all Non-Voting Holders of Claims or Interests that are deemed to accept or reject the Plan and who do not affirmatively opt out of the releases provided in the Plan; (iii) all Holders of Claims in Voting Classes that the Debtors have determined are not entitled to vote and that do not affirmatively opt out of the releases provided in the Plan;

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may not be necessary absent any assertion that there is a difference in potentially applicable state laws governing what constitutes consent. *See Smallhold*, 2024 WL 4296938, at *13 n.57.

(iv) all Holders of Claims or Interests that abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan; (v) all Holders of Claims or Interests that vote to reject the Plan or are deemed to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan; and (vi) each Related Party (which may have no notice of this provision) of each Entity described above.

32. As such, the Plan and Disclosure Statement operates to effectuate the granting of a broad non-debtor Third-Party Release by any Holder of a Claim or Equity Interest (and parties "related" thereto—regardless of class, claim status, voting status, or treatment)—*unless they return an opt out form*.

33. An affirmative agreement—something more than a mere failure to opt out—is required for a non-debtor release to be consensual. *See In re Tonawanda Coke Corp.,* 662 B.R. 220, 222-23 (Bankr. W.D.N.Y. 2024); *Patterson*, 636 B.R. at 686. Failing to "opt out" of an offer is not a manifestation of consent unless one of the exceptions to the rule that silence is not consent applies, such as conduct by the offeree that manifests an intention that silence means acceptance or taking offered benefits. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). For example, the *Patterson* court, in applying black letter contract principles to opt-out releases in a chapter 11 plan, found that contract law does not support consent by failure to opt-out. *Patterson*, 636 B.R. at 686. "Whether the Court labels these 'nonconsensual' or based on 'implied consent' matters not, because in either case there is a lack of sufficient affirmation of consent." *Id.* at 688.

34. The Ninth Circuit's decision in *Norcia*, F.3d 1279, 1286 (9th Cir. 2017), cited with approval by the Fifth Circuit in *Imperial Ind. Supply Co. v. Thomas,* 825 F. App'x 204, 207 (5th Cir. 2020), illustrates the point. In *Norcia*, a consumer bought a Samsung phone from a Verizon Wireless store and signed the Verizon Wireless Customer Agreement. *Norcia*, 845 F.3d at 1282. Among the contents of the phone's box was a Samsung "Product Safety & Warranty Information"

brochure that contained an arbitration provision, which "stated that purchasers could opt out of the arbitration agreement by providing notice to Samsung within 30 calendar days of purchase, either through email or by calling a toll-free telephone number." *Id.* It also stated that opting out would not affect the warranty coverage. *Id.* The customer did not take any steps to opt out. *Id.* When the customer later sued Samsung, Samsung argued that the arbitration provision applied. *Id.* at 1282-83.

35. As an initial matter, the *Norcia* court rejected the argument that the customer agreed to the arbitration provision by signing his contract with Verizon: "The Customer Agreement is an agreement between Verizon Wireless and its customer. Samsung is not a signatory." 845 F.3d at 1290.

36. The Ninth Circuit in *Norcia* further held that the customer's failure to opt out did not constitute consent to arbitrate. Unsurprisingly—because there was no applicable federal law—the court applied the "general rule," applicable under California law, that "silence or inaction does not constitute acceptance of an offer." 845 F.3d at 1284 (quotation marks omitted); *accord e.g., Tex. Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.,* 52 S.W.3d 128, 132–33 (Tex. 2000). The customer did not agree to arbitrate because he did not "sign the brochure or otherwise act in a manner that would show his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement." *Norcia*, 845 F.3d at 1285 (quotation marks omitted). This was true, even though the customer did take action to accept the offered contract from Verizon Wireless. "Samsung's offer to arbitrate all disputes with [the customer] cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, unless an exception to this general rule applies." *Id.* at 1286 (quotation marks and citation omitted).

37. The Ninth Circuit explained that there are two exceptions to this rule—when the offeree has a duty to respond, or when the offeree retains the offered benefits—but held neither exception applied. *Norcia*, 845 F.3d at 1284-85. There was no state law imposing a duty on the customer to act in response to the offer, the parties did not have a prior course of dealing that might impose such a duty, and the customer did not retain any benefits by failing to act given that the warranty applied whether or not he opted out of the arbitration provision. *Id.* at 1286.

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

39. Likewise, voting on a chapter 11 plan cannot be equated with consent to release non-debtor third parties. Not only are the non-debtor released parties not signatories to the chapter 11 plan, a chapter 11 plan is a creature of the Bankruptcy Code specifically for determining how the debtor will pay its creditors, not a contract to resolve claims between non-debtors. As the Ninth Circuit has explained, "[w]hen a bankruptcy court discharges the debtor, it does so by operation of the bankruptcy laws, not by consent of the creditors . . . . [T]he payment which effects a discharge is not consideration for any promise by the creditors, much less for one to release non-party obligators." *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020) (quotation marks omitted).

Voting to accept a Plan Without Opting Out Does Not Provide the Required Affirmative Consent

40. *First*, voting for a plan without checking an opt-out box does not constitute the affirmative consent necessary to reflect acceptance of an offer to enter a contract to release claims against non-debtors. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

41. Voting for a plan disposing of claims against one party does not reflect the unambiguous assent necessary to find consent to a release of claims against other parties. *See,*

e.g., In re Congoleum Corp., 362 B.R. 167, 194 (Bankr. D.N.J. 2007) ("[A] consensual release cannot be based solely on a vote in favor of a plan."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 507 (Bankr. D.N.J. 1997). And the mere act of voting on the chapter 11 plan does not "manifest[] [an] intention that silence may operate as acceptance" of a proposal that the creditor release claims against non-debtors. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a. Rather, voting on a chapter 11 plan is governed by the Bankruptcy Code, and a favorable vote reflects only approval of the plan's treatment of the voters' claims against the debtor. *See Arrowmill*, 211 B.R. at 507; *Congoleum Corp.*, 362 B.R. at 194; *In re Digital Impact, Inc*., 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998).

42. As explained in *Arrowmill*, a voluntary release arises only "because the *creditor agrees*" to it. 211 B.R. at 507 (emphasis in original). There is nothing in the Code that authorizes treating a vote to accept a chapter 11 plan as consent to a third-party release. Instead, the "validity of th[at] release" necessarily "hinges upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order." *Id.* (citation and alterations omitted). Because "a creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings," "it is not enough for a creditor . . . to simply vote 'yes' as to a plan" in order to destroy its rights against other non-debtor parties under nonbankruptcy law. *Id*. (quotation marks omitted); *accord Congoleum Corp.*, 362 B.R. at 194; *In re Digital Impact, Inc*., 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998). Rather, a creditor must "unambiguously manifest[] assent to the release of the nondebtor from liability on its debt." *Arrowmill*, 211 B.R. at 507.

43. Because merely voting to approve a plan does not manifest consent to a non-debtor release, such a vote, plus a failure to opt out, is still nothing more than silence with respect to the offer to release claims against non-debtors. Voting to accept a plan but remaining silent about a

non-debtor release by failing to check an opt-out box does not fit within any of the exceptions to the rule that silence is not acceptance of an offer.

44. Creditors who vote for a plan without opting out of a non-debtor release are not "silently tak[ing] offered benefits" from the released non-debtors, such that consent may be inferred. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). The only benefits received by the creditors are distributions from the debtor's chapter 11 plan. Thus, "[e]ssentially, creditors are being asked to give releases to third parties for no consideration." *Tonawanda Coke Corp.*, 662 B.R. at 222. Because creditors are entitled to whatever distributions the Plan allocates them—regardless of whether they opt out of the non-debtor releases—consent to the non-debtor release cannot be inferred from mere acceptance of the benefits of the debtor's plan. *See Norcia*, 845 F.3d at 1286 (explaining that customer's failure to opt out did not imply his consent where warranty applied regardless, meaning that customer did not thereby obtain any additional benefit).

45. Further, non-debtors have no right to prevent a debtor's creditors from receiving distributions under the debtor's chapter 11 plan, and thus acceptance of those distributions does not manifest acceptance of an offer to release non-debtors. *See Railroad Mgmt. Co., L.L.C. v. CFS La. Midstream Co.*, 428 F.3d 214, 223 (5th Cir. 2005) ("In the absence of any evidence that Strong had the right to exclude CFS from the property in question or that CFS accepted any service or thing of value from Strong, no reasonable jury could conclude that CFS's failure to remove its pipeline upon Strong's demand constituted consent to a contract.").

46. Nor does voting to approve a chapter 11 plan, while remaining silent about a non-debtor release, "manifest [an] intention that silence may operate as acceptance" of an offer to release claims against non-debtors. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a. Because impaired creditors have a federal right under the Bankruptcy Code to vote on a chapter 11 plan, 11 U.S.C. § 1126(a), merely exercising that right does not manifest consent to release claims against

non-debtors. Rather, voting on a chapter 11 plan is governed by the Bankruptcy Code, and a favorable vote reflects only approval of the plan's treatment of the voters' claims *against the debtor*.

47. And as in *Norcia*, creditors have no state law duty to respond to an offer to release non-debtors such that their silence can be understood as consent, nor have they any prior course of dealing with the released non-debtors that would impose such a duty. *See Norcia*, 845 F.3d at 1285-86. Creditors have no affirmative obligation to act on a plan, either to vote or to opt out. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan); *SunEdison, Inc.*, 576 B.R. at 460–61 (recognizing that creditors have no duty to speak regarding a plan that would allow a court to infer consent to third-party releases from silence). A claimant's vote in favor of a plan while remaining silent regarding a non-debtor release thus does not fit within the exception to the general rule that consent cannot be inferred from silence.

48. Because the Plan would impose non-debtor releases on these parties without their affirmative consent as to those releases, the releases are not consensual and thus cannot be approved under *Purdue*.

Voting To Reject A Plan Without Opting Out Is Not Consent To Release Non-Debtors.

49. *Second*, for the same reasons, releases cannot be imposed on those who vote to reject the plan but do not opt out. It is implausible to suggest that a party returning a ballot rejecting the plan, but neglecting to opt out of the third-party release, is evidencing consent to the third-party release. Not only is there no "mutual agreement" as to the plan, much less the third-party release, the creditor has expressly stated its rejection of the plan. As the court in *In re Chassix Holdings, Inc.*, reasoned: "[A] creditor who votes to reject a plan should also be presumed to have rejected the proposed third-party releases that are set forth in the plan. *The additional 'opt out' requirement, in the context of this case, would have been little more than a Court-endorsed trap*

for the careless or inattentive creditor." 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015) (emphasis added).

Not voting and not opting out does not constitute consent to release non-debtors.

50. Third, even more obviously, as courts have previously held, the releases cannot be imposed on those who do not vote and do not opt out. *See Smallhold,* 2024 WL 4296938, at *2[6]; *SunEdison*, 576 B.R. at 458–61; *Chassix Holdings*, 533 B.R. at 81–82; *In re Wash. Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011). This applies both to those creditors who simply abstain from voting and those creditors who are not entitled to vote on a plan. Those who abstain from voting cannot be said to be consenting to anything—they are taking no action with respect to the plan. The same is true for those who have no right to vote on a plan—whether an unimpaired creditor who is deemed to accept the plan or an impaired creditor receiving nothing under a plan who is deemed to reject the plan. Creditors who do not vote on a plan do not manifest consent to a non-debtor release by failing to return an opt out form.

51. Thus, even where there are conspicuous warnings in the ballots or an opt out form that silence or inaction will constitute consent to a release, that is not sufficient to recast a party's silence as consent to the release. *SunEdison*, 576 B.R. at 458–61. Just as creditors have no federal or state law duty to vote on a plan, they also have no obligation to read a plan. Here, a significant number of the parties (including those Class 5 general unsecured creditors that the Debtors have determined are not presently entitled to vote) who are being asked to make an election with respect

[6] The United States Trustee recognizes that the court in *Smallhold* found that, in at least some circumstances, the act of voting on a debtor's plan (whether to accept or reject it) combined with a failure to exercise an opt-out option can constitute consent to a non-debtor release. *See Smallhold,* 2024 WL 4296938, at *14. The *Smallhold* decision, however, although stating it was applying "ordinary contract principles," 2024 WL 4296938, at *3, failed to faithfully apply those principles to the question of when silence can constitute consent. For the reasons discussed above, contract principles do not support imputing consent for a third-party release based merely upon a creditor's neglect to exercise an opt-out option and that remains true even when that option is conspicuous or well-advertised.

to releasing their claims against non-debtor third parties will not receive and may be unable to access a copy of the Plan. For creditors who do receive a full package, the plan and associated solicitation materials, including the disclosure statement, run several hundred pages, and are so voluminous, dense and confusing that one cannot assume that the failure to return a ballot or opt out form represents an informed and deliberate decision to consent to the releases, after a thorough evaluation and understanding of the Plan and solicitation materials.

52. Moreover, parties who are solicited but do not vote may have failed to vote for reasons other than an intention to assent to the releases[7] including confusion, misunderstanding and lack of comprehension concerning the Plan, the ballot, the opt out form and related materials. This is particularly so given that even if a creditor actuall does receive the solicitation materials here, they are so voluminous, dense, and confusing that they effectively obscure the two salient aspects of the Plan, namely, (i) what unsecured creditors will likely receive on account of their claim (which, actually, is not valued or well described) and (ii) that they risk having their claims against non-debtors released. The failure of a creditor to return the Opt-out form, under these circumstances (and within the unreasonably short period of 30 days), certainly cannot be presumed to evidence a knowing, intentional and informed consent by that creditor to having their claims against non-debtor third parties released.

53. Recognizing that creditors may have other reasons for not returning a ballot (other than their agreement to the releases), the court in *SunEdison* rejected the debtors' argument that the warning in the disclosure statement and on the ballots regarding the potential effect of silence gave rise to a duty to speak, and the non-voting creditors' failure to object to or reject the plan should be deemed their consent to the release. *SunEdison, 576 B.R.* at 460–61. The court found

[7] *SunEdison*, 576 B.R. at 461.

that the nonvoting creditors' silence was not misleading and did not signify their intention to consent to the release (finding that silence could easily be attributable to other causes). *Id*. at 460-61.

54. Simply put, "[f]ailing to return a ballot is not a sufficient manifestation of consent to a third-party release." *In re Wash. Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011); *see also Chassix Holdings*, 533 B.R. at 81–82. 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)." *Wash. Mut., Inc.*, 442 B.R. at 355.

55. "Charging all inactive creditors with full knowledge of the scope and implications of the proposed third-party releases, and implying a 'consent' to the third-party releases based on the creditors' inaction, is simply not realistic or fair and would stretch the meaning of 'consent' beyond the breaking point." *Chassix Holdings*, 533 B.R. at 81. "It is reasonable to require creditors to pay attention to what the debtor is doing in bankruptcy as it relates to the creditor's rights against the debtor. But as to the creditor's rights against third parties – which belong to the creditor and not the bankruptcy estate – a creditor should not expect that those rights are even subject to being given away through the debtor's bankruptcy." *Smallhold, Inc.*, 2024 WL 4296938, at *12; *see also id.* at *10 (discussing *Chassix*). As the court in *Emerge Energy Services, LP*, similarly explained, "[a] party's receipt of a notice imposing an artificial opt-out requirement, the recipient's *possible* understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as implied consent through a party's silence or inaction. No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (emphasis in original). "[B]asic contract principles" require affirmative assent, not inferences drawn from inaction that in fact may reflect only "[c]arelessness, inattentiveness, or mistake." *Id.*

56. Furthermore, failure to return an opt out form is not consent because—whether they are asked to vote or not—claimants have no reason to expect that an offer to contract with non-debtors will be included in the plan solicitation. As the Third Circuit has explained, there can be no presumption that someone has agreed to contractual provisions of which they are "on notice," unless "there is a reasonable basis to conclude that consumers will have understood the document contained a bilateral agreement." *See Noble v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-118 (3d Cir. 2017).

There is Insufficient Notice to Procure Affirmative Consent from the Related Parties of the Third-Party Release Imposed Upon Them

57. Moreover, the Plan forces the granting of the Third-Party Release by numerous categories of unidentified "Related Parties" who have no ability to consent or even opt-out. But as the Supreme Court held in *Mullane v. Central Hanover Bank & Trust Co.*, an "elementary and fundamental requirement of due process . . . is 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." 339 U.S. 306, 314 (1950). Here, not all affected parties will receive notice or an opportunity to object or opt-out of the third-party releases, and certainly cannot expressly consent to the broad releases in the Plan. Accordingly, even if the Court were to approve the releases as to the parties discussed above, imposing non-debtor releases on these related parties is inarguably nonconsensual and in violation of the Supreme Court's recent ruling in *Purdue.*

Opt-Outs in Class Actions are Distinct from Opt-Outs in a Chapter 11 Plan

58. The court in *Robertshaw* referenced opt outs in class actions as support for deeming a failure to opt out as consent to a non-debtor release. *In re Robertshaw*, 662 B.R. 300, 323 n.120 (Bankr. S.D. Tex. 2024). That analogy to class-action procedure is inapt.

59. Rule 23, incorporated by Bankruptcy Rule 7023 only for adversary proceedings, is irrelevant. This is not an adversary proceeding to which Bankruptcy Rule 7023 applies and no one has sought class treatment here. Fed. R. Bankr. P. 7023. Thus, by their own terms, neither Rule 23 nor Bankruptcy Rule 7023 applies.

60. And Congress has not seen fit to enact a Code provision authorizing imposing non-debtor releases in chapter 11 plans on those who fail to opt out. Importantly, "people who fail to respond to class action notices are bound because that is the legal consequence that the Rule specifies, and not on the theory that their inaction is the equivalent of an affirmative joinder in an action." *Chassix Holdings*, 533 B.R. at 78. By contrast, in the context of non-debtor releases imposed via a chapter 11 plan, "[t]here is no rule that specifies an 'opt out' mechanism or a 'deemed consent' mechanism." *Id.* Absent a duly enacted statute or federal rule of procedure, a court cannot unilaterally transplant Rule 23(b)(3)'s class-action "opt out" procedure to bankruptcy proceedings to confirm a chapter 11 plan.

61. Further, a rule of procedure, including Bankruptcy Rule 7023, cannot modify or abridge state law regarding what constitutes consent to a release. 28 U.S.C. § 2075. That follows from the fact that no provision in the Code authorizes treatment of creditors' claims against non-debtors as a class action. There is no federal class action statute that preempts state contract law, which (as discussed above) requires affirmative consent.

62. Indeed, as the court found in *Patterson*, "the comparison to class action litigation highlights the impropriety of finding releases consensual based merely on a failure to opt out" because in class actions, unlike chapter 11 plan confirmations, "courts must ensure that the class

action complies with the unique requirements of Rule 23 of the Federal Rules of Civil Procedure."[8] 636 B.R. at 686.

63. Federal class actions may proceed only after a court certifies that the class meets a series of rigorous procedural requirements designed to ensure the appropriateness and fairness of class-wide litigation. For any class to be certified, Rule 23(a) requires a court to find: (1) commonality ("questions of law or fact common to the class"); (2) typicality (named parties' claims or defenses "are typical . . . of the class"); and (3) adequacy of representation (representatives "will fairly and adequately protect the interests of the class"). *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting Fed. R. Civ. P. 23); *see id.* at 621 (noting that these standards protect against the variability of equitable justice).

64. Once those threshold showings are made, Rule 23(b) then requires that one of three further predicates satisfied. Speaking generally, Rule 23(b)(1) authorizes class treatment where "individual adjudications would be impossible or unworkable," while Rule 23(b)(2) authorizes class actions where "the relief sought must perforce affect the entire class at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). Rule 23(b)(3), in turn, authorizes class treatment only where a court finds both that "the questions of law or fact common to class members predominate over any questions affecting only individual members" and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Opt-out procedures are only available in class actions under Rule 23(b)(3),

[8] Further, "in the class action context there is a public policy that favors the consolidation of similar cases and that justifies the imposition of a rule that binds class members who have not affirmatively opted out." *In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). By contrast, in the context of non-debtor releases imposed via a chapter 11 plan, there is no "general 'public policy' in favor of making third party releases applicable to as many creditors as possible." *Id*.

not those under Rule 23(b)(1) and 23(b)(2). *See Wal-Mart Stores*, 564 U.S. at 362 (explaining that "unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory").

65. Class action procedures also entail additional procedural safeguards. A class must be specifically defined to identify the class members and the class claims. Fed. R. Civ. P. 23(c)(1)(B). Moreover, the court must appoint class counsel that can best "represent the interests of the class." Fed. R. Civ. P. 23(g). And for classes certified under Rule 23(b)(3), class members must receive "the best notice practicable" that must "clearly and concisely state in plain, easily understood language:" the nature of the action, who the class is, what their claims or defenses are; their right to appear in the action through an attorney; their right to exclude themselves from the action; how and when to exclude themselves; and the binding nature of the judgment if they do not. In other words, the Federal Rules of Civil Procedure set objective procedural protections before a class can be certified and potential members bound.

66. Further, "any class settlement that would bind absent class members requires court approval." *Patterson*, 636 B.R. at 686 (citing Fed. R. Civ. P. 23(e)). And approval may only be granted if, after a hearing, the court finds the settlement is "'fair, reasonable, and adequate' taking into account whether '(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate; and (D) the proposal treats class members equitably relative to each other.'" *Id*. at 687 (quoting Fed. R. Civ. P. 23(e)(2)). "The inquiry appropriate under Rule 23(e) . . . protects unnamed class members from unjust or unfair settlements affecting their rights." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

67. None of these protections exist in the context of a non-debtor release in a bankruptcy action." *Patterson*, 636 B.R. at 686. "[N]o party litigates on behalf of the absent releasing party." *Id*. And "[n]o party with a typical claim has a duty to ensure that he fairly and

adequately represents the best interests of the absent releasing party." *Id*. "Moreover, the absent releasing party does not enjoy counsel that will represent his best interests in his stead."[9] *Id*.

68. Finally, in a class action, members that fail to opt out have claims litigated on their behalf, and they may receive whatever proceeds are won in that litigation. Under a chapter 11 plan with non-debtor releases, although creditors may receive a distribution under the plan for their claims against a debtor (to which they are entitled independent of their releasing their claims against non-debtors), creditors are subjected to forfeiting their claims against non-debtor parties and any corresponding recovery forever if they (1) are unaware of the release and (2) fail to take affirmative action to opt out or object. Indeed, if a mere failure to opt out constitutes consent to a non-debtor release in bankruptcy, "then no court carries an obligation to ensure the fairness, reasonableness and adequacy of the relief afforded the absent releasing parties." *Patterson*, 636 B.R. at 687.

69. Notably, state law also provides class-action procedures, with similar procedural protections to federal class actions, in which unnamed class members are bound by a court-approved class settlement unless they opt out. *See* Tex. R. Civ. P. 42. But outside of that class-action context, ordinary contract principles apply, and a person cannot force a contract on someone else by deeming silence, such as a failure to "opt out," to be consent, except in narrow circumstances inapplicable here. *See supra* ¶¶ 11-23.

[9] Although the official committee of unsecured creditors owes a fiduciary duty to the creditor body as a whole, it does not owe a duty to any individual creditor or any specific group of creditors, and the diverse body of creditors to whom it owes duties often has conflicting interests. *See In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992) (fiduciary duty of individual members of an official committee "extends to the class as a whole, not to its individual members"). Further, the committee's duties relate only to claims against the debtor, not claims against non-debtors.

Rule 9019 Cannot Be Used to Evade Purdue

70. The Plan asserts that Bankruptcy Rule 9019 authorizes the imposition of the Third-Party Releases upon confirmation.[10] Plan, Art. VIII.D, at page 40-41. Given that it is a rule, Bankruptcy Rule 9019(a) cannot be read to supersede what constitutes consent, as defined by state law. And Rule 9019(a) does not purport to do anything of the sort.

71. Bankruptcy Rule 9019(a) provides that, "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). "In making its evaluation, the court must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" *In re Washington Mutual, Inc.*, 442 B.R. 314, 328 (Bankr. D. Del. 2011) (quoting *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). The purpose of Bankruptcy Rule 9019 is thus not to determine the existence or validity of consent to a proposed settlement (which remains a question of state contract law), but instead to ensure that the proposed settlement is fair.

72. Importantly, Bankruptcy Rule 9019 applies to settlements to which the debtor is a party. Nothing in Bankruptcy Rule 9019 permits bankruptcy courts to impose nonconsensual non-debtor releases. The Rule is limited to approvals of a debtor's "compromise or settlement." Fed. R. Bankr. P. 9019(a). But a debtor lacks standing to pursue its creditors' direct claims against third

[10] The Plan provides, in part: " Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the foregoing 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: (1) consensual; (2) essential to the confirmation of this Plan; (3) given in exchange for the good and valuable consideration provided by the Released Parties; (4) a good faith settlement and compromise of the Claims released by the Third-Party Release; (5) in the best interests of the Debtors and their Estates; (6) fair, equitable, and reasonable; (7) given and made after due notice and opportunity for hearing; and (8) a bar to any of the Releasing Parties asserting any claim or Cause of Action released pursuant to the Third-Party Release." Plan, Art. VIII.D, page 40-41.

parties. *See Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 426-29 (1972). Moreover, a compromise or settlement is, by definition, consensual. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added) (defining a "settlement" as "an *agreement ending a dispute* or lawsuit," and defining an "agreement" as "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons") (emphasis added). By its plain terms, Bankruptcy Rule 9019 does not authorize the imposition of non-consensual releases between non-debtors.

73. Nor could Bankruptcy Rule 9019 authorize the imposition of nonconsensual releases, even if, counterfactually, it purported to do so. Because 28 U.S.C. § 2075 commands that bankruptcy rules shall not abridge substantive rights, Bankruptcy Rule 9019 cannot authorize bankruptcy courts to approve something the Supreme Court held in *Purdue* no Bankruptcy Code provision permits. *Purdue*, 144 S. Ct. at 2088 ("[T]he bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.").Nor can such a "settlement" be included in a chapter 11 plan. A plan and a settlement are not one and the same thing. What may be permissible under a negotiated settlement agreement that is considered "fair, reasonable, and in the best interest of the estate" is different than what may be permissible under a plan, which is subject to the requirements of sections 1123 and 1129 of the Bankruptcy Code. *See, e.g., In re Tribune Co.*, 464 B.R. 126, 176 (Bankr. D. Del. 2011) (concluding at confirmation stage that a negotiated settlement could be approved because it was fair, reasonable and in the best interest of the Debtors' estates and making an express finding that the settlement was properly part of the plan pursuant to section 1123(b)(3)(A)). Section 1123(b)(3)(A) of the Bankruptcy Code allows a plan proponent to propose "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) (emphasis added). Thus, under section 1123(b)(3)(A), the Plan may only provide for the settlement of claims or interests belonging to the Debtor or the estate—not the settlement of claims held by third parties. *Purdue*, 144 S. Ct. at 2084 ("[P]recisely nothing in § 1123(b) suggests those claims can be bargained away without the consent of those affected, as if the claims were somehow Purdue's own property.").

C. Objection No. 2 – The application of the Injunction to Enforce Third-Party Releases and the Exculpation Violates *Purdue* and the Bankruptcy Code and Debtors will be unable to satisfy the standard for entry of an Injunction

74. The Plan is also patently unconfirmable because it includes an injunction enforcing the Third-Party Release and Exculpation.

75. This Court may not approve the injunction enforcing the non-debtor releases because non-consensual third-party releases and injunctions are not permitted by the Bankruptcy Code. *See Purdue,* 144 S. Ct. at 2088.

76. However, even if the Court were to deem the non-debtor releases consensual, there is no Bankruptcy Code provision that authorizes chapter 11 plans or confirmation orders to include injunctions to enforce them. Further, the purported plan injunction is improper because the Debtors cannot demonstrate that the requisite traditional factors that support injunctive relief are satisfied. A party seeking an injunction "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)* ("An injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'") *(quoting Cavanaugh v. Looney, 248 U.S. 453, 456*

(1919)); id. (noting that an injunction is an "extraordinary remedy"). The Debtors have made no attempt to show that any of these factors are met. Nor could they. If the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent irreparable harm to either the estates or the released parties.

77. A consensual release, if any, would serve as an affirmative defense in any ensuing, post-effective date litigation between the third-party releasees and releasors, but there is no reason for this Court to be involved with the post-effective date enforcement of those state-law releases. Importantly, such disputes (between two non-debtor parties) would have no relationship to or effect on the Plan, the Reorganized Debtor or its property. Moreover, this injunction essentially precludes any party deemed to consent to the Third-Party Release from raising any issue with respect to the effectiveness or enforceability of the release (such as mistake or lack of capacity) under applicable non-bankruptcy law.

78. Similarly, to the extent that applicable law authorizes exculpation beyond 11 U.S.C. § 1125(e), there is no statutory authority in the Bankruptcy Code that justifies an injunction to enforce an exculpation, and the Debtor has shown no need for an injunction to prevent "irreparable harm" to either the estate or the released parties.

D. Objection No. 3 - The Court Should Not Waive the Rule 3020 Stay

79. The U.S. Trustee objects to the request to shorten the 14-day stay imposed by Federal Rule of Bankruptcy Procedure 3020(e), which provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 3020(e). The Committee Notes explain that subsection (e) was "added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot." *Id.* The Debtors have presented no exigencies that would justify departing from

the Rule's imposition of an automatic 14-day stay and impeding the ability to obtain appellate review.

CONCLUSION

80. The Debtors' use of the opt-out provisions in the Solicitation Materials and Plan are insufficient to evidence a party's manifested consent to the release of its claims against third parties. Further, many of the individuals and entities included as Releasing Parties have not been identified or provided notice of the third-party releases and the Debtors will be unable to provide evidence that any such parties have consented. Absent the Debtors' showing appropriate, affirmative, and informed consent from all parties affected by the third-party releases in the Plan, the Court should not confirm the Plan.

WHEREFORE, the United States Trustee respectfully request this Court deny confirmation of the Plan and grant such other and further relief as it may deem just and proper.

Date: February 19, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that, a true and correct copy of foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas on those parties registered to receive electronic notices on the date this was filed.

/s/ Jana Smith Whitworth
Jana Smith Whitworth, Trial Attorney