Michael D. Warner, Esq. (TX Bar No. 00792304)
Benjamin L. Wallen, Esq. (TX Bar No. 24102623)
PACHULSKI STANG ZIEHL & JONES LLP
700 Louisiana Street, Suite 4500
Houston, TX 77002
Telephone: (713) 691-9385
Facsimile: (713) 691-9407
Email: mwarner@pszjlaw.com
bwallen@pszjlaw.com

Bradford J. Sandler, Esq. (admitted *pro hac vice*)
Robert J. Feinstein, Esq. (admitted *pro hac vice*)
PACHULSKI STANG ZIEHL & JONES LLP
780 Third Avenue, 34th Floor
New York, NY 10017
Telephone: (212) 561-7700
Facsimile: (212) 561-7777
Email: bsandler@pszjlaw.com
rfeinstein@pszjlaw.com

Proposed Counsel to the
Official Committee of Unsecured Creditors

Andrew H. Sherman, Esq. (admitted *pro hac vice*)
Boris I. Mankovetskiy, Esq. (admitted *pro hac vice*)
SILLS CUMMIS & GROSS P.C.
The Legal Center
One Riverfront Plaza
Newark, NJ 07102
Telephone: (973) 643-7000
Facsimile: (973) 643-6500
Email: asherman@sillscummis.com
bmankovetskiy@sillscummis.com

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	Chapter 11
CAREMAX, INC., *et al.*,[1]	Case No. 24-80093 (MVL)
Debtors.	(Jointly Administered)

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO (I) FINAL APPROVAL OF THE ADEQUACY OF DEBTORS' DISCLOSURE STATEMENT FOR DEBTORS' AMENDED JOINT CHAPTER 11 PLAN AND (II) CONFIRMATION OF THE AMENDED JOINT CHAPTER 11 PLAN OF CAREMAX, INC. AND ITS DEBTOR AFFILIATES

(Related Docket Nos. 254 and 256)

[1] A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' claims and noticing agent at https://cases.stretto.com/CareMax. The Debtors' service address is 1000 NW 57 Court, Suite 400, Miami, Florida 33126.

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

RULES

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors in possession (the "Debtors") files this objection (the "Objection") to (I) the adequacy of the *Disclosure Statement for the Amended Joint Chapter 11 Plan of CareMax, Inc. and Its Debtor Affiliates* [Docket No. 256] (the "Disclosure Statement") and (II) confirmation of the *Amended Joint Chapter 11 Plan of CareMax, Inc. and Its Debtor Affiliates* [Docket No. 254] (the "Plan").[2] In support of this Objection, the Committee respectfully states as follows:[3]

PRELIMINARY STATEMENT

1. Confirmation of the Plan is being forced upon the unsecured creditors in these Chapter 11 Cases based upon a legally-deficient Disclosure Statement in support of a Plan with extensive infirmities such that it cannot be confirmed by the Court. As set forth in detail below, notwithstanding the preliminary conditional approval of the Disclosure Statement, the votes of unsecured creditors on the Plan have been solicited based on insufficient and misleading information which made it impossible for creditors to make an informed decision to vote on the Plan or "consent" to the broad Releases, including Third Party Releases (as defined below).

2. The Plan is nothing more than a vehicle for the Lenders[4] to improperly take or release unencumbered estate assets (including commercial tort claims potentially against insiders and other third parties) that should be provided to unsecured creditors and to procure blanket releases in favor of the Lenders and other third parties for no consideration. As such, the Plan violates the best interest of creditors test. The Plan also has an impermissible classification structure, unfairly discriminates against general unsecured creditors (in favor of the Lenders and

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan and, as applicable, the Disclosure Statement.
[3] The Committee incorporates herein by reference the objections raised in the Committee's initial objection to the adequacy of the Disclosure Statement [Docket No. 205].
[4] "Lenders" means the Prepetition Term Loan Lenders and/or the DIP Lenders, as defined in the Plan.

their deficiency claims) and contains improper Debtor and Third Party Releases and related exculpation and injunction provisions (which, among other problems, improperly give a discharge to the liquidating Debtors). The cumulative effect of these impermissible Plan provisions is that the Plan was filed in bad faith and this Court cannot make the requisite findings of Bankruptcy Code section 1129(a)(3).

3. The Debtors filed their proposed Plan and Disclosure Statement on the first day of these Chapter 11 Cases in accordance with a Restructuring Support Agreement ("RSA") between the Debtors and the Lenders, negotiated without any input from unsecured creditors. The Debtors filed their amended Plan a month later on December 17, 2024. As before, and to this date, the Debtors have declined to meaningfully discuss with the Committee on behalf of unsecured creditors any potential consensual resolution of the Chapter 11 Cases. The Plan does not contemplate the reorganization of any of the Debtors, but rather effectuates (a) a liquidation of the Debtors' primary business lines with all proceeds going to the Lenders, and (b) the granting of excessive and overreaching Debtor and Third Party Releases to numerous players, including the Debtors, their Lenders, most of their current and former respective officers, directors, professionals and others, as encompassed in the broad definition of Related Parties.

4. As discussed herein, the Committee objects to the Lenders, facilitated by the Debtors' Plan, attempting to take (and/or release) all of the value attributable to the Debtors' unencumbered assets (including D&O claims and other commercial tort claims) and/or property with asserted liens subject to challenge (collectively, the "Unencumbered Assets"). The value from Unencumbered Assets properly belongs to unsecured creditors, subject to the limited rights of the DIP Lenders.

5. Importantly, based on the Committee's preliminary, expedited investigation,[5] certain potentially valuable and unencumbered claims and Causes of Action against insiders and other third parties, including the following ("Potential Estate Claims"), either will be released pursuant to the Debtor Releases for no consideration or retained by the Plan Administrator to be settled or litigated for the benefit of the Lenders rather than unsecured creditors:

- Causes of Action of the Debtors against Dr. de la Torre,[6] Steward and persons and entities related thereto in connection with various actions and transactions, including, but not limited to, the VBC Sale Transaction and related management agreements.
- Causes of Action against certain Lenders asserting that certain assets of the Debtors are not included in the Prepetition Secured Collateral or are not subject to a valid and enforceable security interest.
- Causes of Action against the officers and directors who approved the acquisition of certain of the Debtors' primary operating assets in the VBC Sale Transaction from Steward two years ago for breaches of fiduciary duty and the duty of loyalty as well as negligence and gross negligence.
- Causes of Action relating to certain prepetition bonuses approved on the eve of the filing of these Chapter 11 Cases.
- Avoidance Actions.

Certain of these Causes of Action may be covered by the nearly $55 million in D&O insurance carried by the Debtors.

6. The Debtors' and Lenders' game plan is clear: To steamroll over unsecured creditors owed approximately $160 million, proposing a capped aggregate recovery of $350,000 under the Plan (an estimated recovery of less than 0.25%, expressly conditioned upon Plan

[5] Promptly after retaining counsel, the Committee diligently sought discovery to obtain relevant documents and information from the Debtors. However, as discussed herein, the Committee believes the Debtors impeded the discovery process, by, among other things, steadfastly refusing to identify the documents Mr. Borkowski (the Disinterested Director) reviewed or relied upon during his investigation but insisting that such documents were among the tens of thousands made available to the Committee. Then, despite being urged by the Debtors to inquire, Mr. Borkowski testified that he could not identify any e-mail or document that he reviewed or relied upon during his investigation. The Debtors should not be permitted to "hide the ball" in this manner.

[6] Dr. Ralph de la Torre is Steward's now-resigned Chairman and CEO, who became a member of the Board of Directors of the Debtors as part of the VBC Sale Transaction. Dr. de la Torre is alleged, among other things, to have engaged in illegal international activities and diverted funds from Steward to himself and his other companies to fund a lavish lifestyle at the expense of patients. *See, e.g.*, https://www.statnews.com/2024/09/29/steward-health-care-ceo-ralph-de-la-torre-will-resign/. Dr. de la Torre is subject to numerous investigations.

confirmation on an expedited schedule and subject to reduction to the point of elimination); purport to conduct an independent investigation of Potential Estate Claims and other related issues – done hastily and subject to conflict issues; and procure blanket Debtor and Third Party Releases and waivers of Potential Estate Claims, for no consideration.

7. The Disclosure Statement distributed to the Debtors' creditors utterly fails to explain why any such Releases are factually or legally necessary and appropriate in a liquidation case. Nor do the Debtors explain what claims and Causes of Action are being released against the various proposed Released Parties or what consideration is being provided to the Debtors (there is none) in exchange for the blanket release of all claims against the long list of Released Parties.

SUMMARY OF OBJECTIONS

8. The following is a brief summary of the Committee's objections to the Plan:

a. **The Plan violates the best interest of creditors test set out in section 1129(a)(7) of the Bankruptcy Code.** Unencumbered Assets and their value are either being allocated to the Lenders under the Plan or, in the case of certain Causes of Action against officers and directors, gratuitously released. In a hypothetical chapter 7 case, a trustee could pursue those Unencumbered Assets (some of which may be covered by D&O insurance), the proceeds of which could pay unsecured creditors. If monetization of the Unencumbered Assets yields even one cent on the dollar to unsecured creditors, they would do better in a liquidation than in sharing in the $350,0000 capped GUC Cash Pool under the Plan which results in at best, a less than a quarter of one percent recovery. Therefore, the Plan fails the best interest test.

b. **The purported Rule 9019/Section 1123 Plan Settlement is unsupported and should not be approved.** As discussed in the context of the Releases, the Plan recites in boilerplate fashion that confirmation of the Plan will constitute the Court's approval of a compromise and settlement under Bankruptcy Rule 9019 and Bankruptcy Code section 1123. This purported Plan Settlement, including the Third Party Releases, are unsupportable under Rule 9019 and applicable Fifth Circuit law.

c. **The Plan cannot be confirmed because it contains an improper classification scheme that unfairly discriminates against general unsecured creditors.** The Debtors and Lenders do not expressly explain in the Plan in which class the Lenders' deficiency claims are placed. The Lenders' class (Class 2 First Lien Debt Claims) appears to include all claims related to the prepetition loan obligations, including presumably deficiency claims. Assuming the Lenders' secured and deficiency claims are all in a single class (Class 2), the Debtors' classification structure impermissibly places substantially

dissimilar claims (the secured and the unsecured deficiency claims of the Lenders) in one class. This results in the Lenders' deficiency claims being treated better and receiving significantly more consideration than other general unsecured claims in Class 3 (General Unsecured Claims). Such unfair discrimination and disparate treatment preclude confirmation of the current Plan.

d. **The Plan improperly discharges the liquidating Debtors in violation of section 1141 of the Bankruptcy Code.** The Plan fails to comply with section 1141(d)(3) because the Plan's Exculpation[7] and Plan Injunction[8] provisions effectively function as a complete discharge of the Debtors. Section 1141(d)(3) makes clear that a liquidating corporate debtor – as in these Chapter 11 Cases where the Plan implements a Wind-Down – is not entitled to a discharge in bankruptcy.

e. **The Plan's insurance-related provisions are problematic and may prejudice the Estates.** The Debtors' proposed assumption of all D&O Liability Insurance Policies and the costs associated with such assumption, and certain other insurance-related provisions discussed herein, may be ill-advised, improper or otherwise potentially prejudicial to the Estates.

f. **The Releases – both the Debtor Releases and the Third Party Releases – are improper and do not comply with applicable law.** The so-called "consensual" Third Party Releases are neither consensual nor permissible. The Debtor Releases are not in exchange for any consideration and are not necessary for confirmation of the liquidating Plan. Indeed, as to both types of Releases, exactly what claims and Causes of Action being gratuitously released are not even specifically identified. The Third Party Releases are not consensual and the opt out provision is improper as neither the Court nor the Debtors have the ability to require creditors, who are receiving no recovery, from taking affirmative action to release non-debtors and consent cannot be implied from inaction. Additionally, not one Released Party is paying any consideration for either the Third Party Releases or the Debtor Releases.

g. **The Plan was filed in bad faith in contravention of section 1129(a)(3) of the Bankruptcy Code.** The totality of the circumstances, as summarized above and discussed in detail below, prevent this Court from determining that the Plan was filed in good faith and not by any means forbidden by law.

9. As set forth above and in more detail below, the Disclosure Statement does not contain adequate information and should not be finally approved. Additionally, the Plan fails to meet the requisite standards for confirmation and cannot be confirmed.

[7] *See* Plan, Art. X.C.
[8] *See* Plan, Art. X.D.

BACKGROUND

A. General Background

10. On November 17, 2024 (the "Petition Date"), each Debtor filed a voluntary petition with this Court under the Bankruptcy Code.

11. The Debtors have continued in possession of their property and are operating and managing their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 Cases.

12. On December 4, 2024, the Office of the United States Trustee appointed the Committee pursuant to section 1102 of the Bankruptcy Code [Docket No. 154].

13. On November 17, 2024, the Debtors filed the first version of the Plan [Docket No. 18] and the first version of the Disclosure Statement [Docket No. 19]. On November 17, 2024, the Debtors filed *Debtors' Motion For Entry Of An Order (I) Scheduling A Combined Disclosure Statement Approval And Plan Confirmation Hearing; (II) Conditionally Approving The Disclosure Statement; (III) Establishing A Plan And Disclosure Statement Objection Deadline And Related Procedures; (IV) Approving The Solicitation Procedures; (V) Approving The Combined Notice And Patient Combined Notice; And (VI) Granting Related Relief* (the "DS Approval Motion"). The DS Approval Motion sought preliminary conditional approval of the Disclosure Statement and a combined hearing on final approval of the adequacy of the disclosure statement and the hearing to confirm the plan.

14. On December 15, 2024, the Committee filed its objection to the conditional approval of the disclosure statement and to the DS Approval Motion [Docket No. 205.]

15. On December 17, 2024, the Debtors filed the amended Plan [Docket No. 227] and the amended Disclosure Statement [Docket No. 226]. The amended Plan and Disclosure

Statement failed to address any of the objections to conditional approval of the Disclosure Statement raised by the Committee on December 15,2024. The Debtors filed the solicitation versions of the Plan and Disclosure Statement on December 19, 2024 [Docket Nos. 254 and 256]. The DS Approval Motion was granted pursuant to an order entered on December 20, 2024 [Docket No. 270], subject to the terms thereof.

16. On January 17, 2025, the Debtors filed their *Notice of Filing Plan Supplement* [Docket No. 422] (the "Plan Supplement"), and attached the (a) Schedule of Assumed Contracts and Unexpired Leases, (b) Schedule of Retained Causes of Action, (c) Draft Plan Administrator Agreement, and (d) List of Parties Excluded from the Debtor Releases and Third Party Releases. A review of the Plan Supplement underscores the deficiencies in disclosure as, among other things:

> (a) The Debtors do not identify any specific claims or Causes of Action being investigated or retained, other than claims against Steward Health Care System, LLC, and its affiliated debtors, jointly administered under Case No. 24-90213 in the United States Bankruptcy Court for the District of Southern District of Texas (the "Steward Debtors");[9]
>
> (b) While the Debtors indicate the Releases set forth in Articles IX.A and B of the Plan will not extend to Ralph de la Torre, the Steward Debtors,[10] or any other person or entity identified by the Disinterested Director prior to the Combined Hearing,[11] no Causes of Action or bases for these exclusions are identified; and
>
> (c) The Plan Administrator Agreement makes clear that the Plan is a total liquidation of the Debtors and the Plan Administrator is precluded from taking any actions inconsistent with the orderly liquidation of the Estates or as are required by

[9] *See* Plan Supplement, Ex. B (Schedule of Retained Causes of Action).

[10] Curiously, the Plan Supplement's exclusion from the Releases does not directly identify the *non-debtor* Steward entities, such as parent companies Steward Health Care Investors LLC and MPT Sycamore Opco LLC or the over 20 non-debtor Steward entities identified on the organizational chart filed in the Steward Debtors' bankruptcy cases. Although the non-debtor affiliates of the Steward Debtors may fall within the exclusion as Related Parties, it is not clear that the directors and officers of the non-debtor affiliates (which likely overlap partially or completely with the directors and officers of the Steward Debtors) are not enjoying the benefit of the Releases from these Chapter 11 Cases. *See Declaration of John R. Castellano in Support of Debtors' Chapter 11 Petitions and First-Day Pleadings* [Docket No. 38 (*In re Steward Health Care System LLC, et al.*, Bankr. S.D. Tex., Case No. 24-90213) (the "Steward Bankruptcy")] at 15, Ex. B.

[11] *See* Plan Supplement, Ex. D (List of Parties Excluded from the Debtor Releases and Third Party Releases).

applicable law, the Plan, or the Confirmation Order.[12] Once the Wind-Down is complete, the Plan Administrator is responsible for dissolving the Debtors.[13] Thus, the Debtors cannot be entitled to a discharge, or the use of the Injunction and Exculpation provisions as a "back door" to an impermissible discharge.

B. Summary of Proposed Plan[14]

17. The Plan and RSA were designed to effectuate and consummate the sales of the Debtors' managed-services organization business (the "MSO Business") (acquired from Steward Health Care System in November 2022) and non-MSO clinical care centers. Other than administrative clean-up, the post-Effective Date Debtors will have no business operations, as all such operating assets will have been sold as of the Effective Date. In short, the Debtors are liquidating their assets through a Wind-Down in chapter 11, not reorganizing or restructuring any of their businesses.[15] While use of chapter 11 to effectuate an orderly liquidation is not impermissible, the process does not typically reward shuttering businesses and their past and former officers and directors with non-debtor releases and a discharge because those bonus protections are designed to protect the integrity of a fresh start for a reorganizing debtor, not shield the officers, directors and lenders of an entity that will cease operations. Under the Plan, general unsecured creditors will receive a nominal (one quarter of one percent) or no distribution, depending upon when the Plan is confirmed.

18. Under the Plan, in lieu of a liquidating trustee and a liquidating trust, a "Plan Administrator" will be appointed by the Debtors with the reasonable consent of the Required

[12] Plan Supplement, Ex. C (Plan Administrator Agreement) §§ 2.3(a), (b), (g), (r), (s), 2.5(e), 2.7 at 2-6 (setting out the role of the Plan Administrator to effectuate the Wind Down, appointing the Plan Administrator as the sole post-Effective Date officer and director of the Debtors and prohibiting the Plan Administrator from operating any businesses.)

[13] *Id.* § 5.2 at 12-13.

[14] For sake of brevity, the summary of the Plan set forth below only relates to those provisions of the Plan relevant to the Committee's Objections to the Plan and Disclosure Statement.

[15] *See, e.g.*, Plan, at Art. IV.B.3 (Wind-Down) ("Following the Effective Date and subject to the Wind-Down Budget and the Plan, (x) the Plan Administrator shall administer the Wind-Down including winding-down the affairs and operations of the Post-Effective Date Debtors, their Estates, and their Affiliates."); Plan Supplement, Ex. C (Plan Administrator Agreement) §§ 2.3(a), (b), (g), (r), (s), 2.5(e), 2.7 at 2-6; 2.6(c), (e) at 5; § 5.2 at 12-13.

Consenting Term Loan Lenders to serve on behalf of the Post-Effective Date Debtors and to implement and take all actions on behalf of the Debtors and their Estates under the Plan, in consultation with the Required Consenting Term Loan Lenders."[16] The Committee was afforded no role in the appointment of a Plan Administrator or the structure of the Plan. On and after the Effective Date, subject to the terms of the Plan, the Plan Administrator shall have the power and authority to take any action(s) necessary to effectuate the Wind-Down using funds in the Wind-Down Account in accordance with the Wind-Down Budget. The Plan Administrator will liquidate or otherwise dispose of the Remaining Assets – defined as "any assets of the Debtors not sold or transferred pursuant to the Sale Transactions" which would not include any estate claims and Causes of Action released and waived under the Release Provisions. The ***sole*** beneficiaries of the Wind Down are the Lenders – regardless of whether the Lenders had liens on the assets being administered by the Plan Administrator.

19. The Plan contains (a) an extremely broad release of claims against the unidentified Released Parties (which is defined to include the DIP Lenders and Lenders, all the Debtors' present and former officers and directors (except Dr. de la Torre), and the Debtors' employees, among numerous other third parties) by the Debtors (the "Debtor Releases");[17] (b) a blanket, purportedly consensual release of the Released Parties by certain third parties (defined as the "Releasing Parties") with a creditor opt out mechanism offered to all creditors ***except*** those who vote for the Plan (the "Third Party Releases");[18] (c) an exculpation of certain Exculpated Parties (the "Exculpation"); [19] and (d) a permanent, far-reaching Plan injunction enjoining actions

[16] Plan, Art. IV.N at 34-35.
[17] *See* Plan, Art. IX.A.
[18] *See* Plan, Art. IX.B.
[19] *See* Plan, Art. IX. C. Under the Plan, "Exculpated Party" means "collectively, and in each case, in its capacity as such: (a) the Debtors; (b) the Debtors' directors and officers who served at any time between the Petition Date and the Effective Date; (c) the managing members of those Debtors who are limited liability companies; (d) such Released Parties that are fiduciaries to the Debtors' Estates; (e) the Committee; (f) the members of the Committee in their

against the Debtors and Released Parties, among other provisions (the "Plan Injunction" and together with the Debtor Releases, the Third Party Releases and the Exculpation, the "Releases" or "Release Provisions").[20]

20. Notably, the Release Provisions do not even exclude claims or Causes of Action for fraud, willful misconduct or gross negligence by the Released Party – typical carveouts routinely required by bankruptcy courts for obvious policy reasons. In all events, as discussed further herein, any Release approved by the Court should include at a minimum such typical exclusions.

C. Disinterested Director's Investigation[21]

21. In the Disclosure Statement, the Debtors represented that an investigation was being conducted by the Debtors' so-called "Disinterested Director", Mr. Ed Borkowski ("Borkowski"),[22] "to review the releases proposed in the Plan and to investigate, evaluate, and control the disposition or resolution of potential claims and causes of action related to certain prepetition transactions that the Debtors, its shareholders, or its creditors, could bring on the Debtors' or their Estates' behalf against parties that would be released in connection with the proposed Plan."[23]

---

capacity as such; (g) the individual Persons who served on the Committee on behalf of any member of the Committee; and (h) all Professionals retained by the Debtors and the Committee in these Chapter 11 Cases." Plan, Art. I at 9.

[20] *See* Plan, Art. IX.D.

[21] The use of "friendly" independent directors by debtors' counsel is a frequently used strategy which often results in reduced recoveries for unsecured creditors. *See* Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, Southern California Law Review, Vol. 95:1083 (2022) (detailing the extensive use of this strategy by Kirkland and other firms with significant debtor practices and the incestuous relationship between the law firms and the individuals who repeatedly serve as independent directors).

[22] While the Debtors refer to Borkowski as a Disinterested Director, there is no support for this. Borkowski was named to this position by the existing Board (who are conflicted) and was involved in certain decisions of the Board made prior to the filing which may be suspect. Additionally, the Debtors chose for whatever reason not to employ the *In re Mountain Express Oil Co*., Case No. 23-090147 (Bankr. S.D. Tex.) approach of seeking to confirm Borkowski's appointment post-petition coupled with robust disclosure about his appointment, qualifications and potential conflicts, so as to insure the transparency and credibility of the appointment.

[23] Disclosure Statement, Art. IV.F at 25.

22. The Debtors further represented in the Disclosure Statement: "Upon the conclusion of the Investigation, the Disinterested Director will determine if there are any valuable, colorable claims or causes of action belonging to the Debtors related to the transactions or any conduct of the Debtors' directors and officers in connection with any transactions and if any such claims should be excluded from the proposed releases in the Plan or resolved in some other fashion. In addition, if any consideration is to be provided on account of such releases by a released party, such consideration will be disclosed in the Plan Supplement."[24]

23. On January 17, 2025, as noted above, the Debtors filed the Plan Supplement. The Plan Supplement contained a schedule of Retained Causes of Action and a List of Parties Excluded from the Debtor and Third Party Releases. As to the latter, the only parties being excluded from being Released Parties under the Debtor Release and Third Party Releases are Dr. de la Torre and the Steward Debtors, as well as "any such other person or entity so designated by the Disinterested Director prior to the Combined Hearing." The Committee believed that deferring the identification of other parties excluded from the Releases was problematic because it kept the final list of excluded parties further open-ended until confirmation of the Plan – well after the deadline for creditors to vote on the Plan and make any determination on the opt out provision for the Releases.

24. As to the Schedule of Retained Causes of Action, other than Causes of Action against the Steward Debtor, all Causes of Action were described in generic boilerplate, with no specific Causes of Action being identified. There was no elaboration on the Investigation or specific Causes of Action in the Plan Supplement.

[24] Disclosure Statement, Art. IV.F at 26.

25. Therefore, on January 22, 2025, the Committee took the deposition of Mr. Borkowski which confirmed the Committee's greatest fears.[25] The "investigation" conducted by Mr. Borkowski was essentially completed by Sidley (prior to the retention of conflicts counsel) [26] and was extremely limited in scope.[27] Mr. Borkowski had no previous experience determining whether a company held colorable claims or causes of action against other parties,[28] was unable to identify even a single email message he reviewed in connection with his purported investigation,[29] was unable to identify any specific claims or Causes of Action being released, was unable to specifically identify each Released Party,[30] could not identify any basis for the Third Party Releases and admitted that no consideration was being paid by any Released Party in exchange for the Releases,[31] and that in fact, the Debtors had never even requested consideration.[32]

26. Mr. Borkowski admittedly did not investigate possible claims or causes of action against Dr. de la Torre for breach of fiduciary duty, corporate waste, or other claims.[33] It also appears he failed to investigate whether there are breach of fiduciary duty claims against the directors who approved the VB Sale Transaction, as distinguished from the related party loan. In both of these areas, not only did Mr. Borkowski not investigate, but relied upon conflicted counsel to do the investigation for him (and such counsel never disclosed its conflicts).[34] Until Mr. Borkowski retained Neligan LLP just a few weeks ago, he had no independent counsel to advise

[25] *See* Transcript of Remote Deposition of Edward Borkowski, January 22, 2025 (the "1/22/25 Borkowski Deposition Transcript").
[26] *Id.* at 84:10-25; 88:4-13; 150:9-23; 165:24-166:4; 167:2-23.
[27] *Id.* at 42:13-20; 51:18-52:7.
[28] *Id.* at 28:3-9; 47:20–48:4.
[29] *Id.* at 93:10-25.
[30] *Id.* at 189:2-194:22
[31] *Id.* at 181:10-18; 182:15-21; 183:24-184:20.
[32] *Id.* at 183:3-23.
[33] *Id.* at 71:19-23; 73:6-16.
[34] *Id.* at 65:16-25 – 66:1-2.

him. Incredibly, until the Committee (and the Court and the US Trustee) raised the issue, Mr. Borkowski made no inquires, and Sidley made no disclosures, concerning conflicts of interest.[35]

27. Thus, the Debtors have not only failed to provide the full scope and pertinent details of the Releases to general unsecured creditors and this Court, they have admitted that ***innumerable unidentified persons will be released from unidentified causes of action for no consideration whatsoever***. Such lack of adequate disclosure and notice, let alone any specific information and evidence justifying the Releases in favor of each Released Party, precludes the approval of the Releases.

D. The Committee's Investigation

28. The Committee investigation focused both on the secured status of the Lenders as well as identifying any potential Causes of Action owned by the Debtors. Immediately after the Committee was formed, the Committee commenced its Lender perfection review and identified several categories of Unencumbered Assets as set forth in the *Stipulation with Prepetition Secured Parties Determining Certain Committee Rights Pursuant to Final Financing Order* [Docket No. 447] (the "Challenge Stipulation"). Pursuant to the Challenge Stipulation, the Committee, the Ad Hoc Group of Lenders, and the Debtors agreed that the Prepetition Secured Collateral securing the obligations under the Prepetition Secured Documents does not include, and/or the Prepetition Secured Parties do not have a perfected or otherwise enforceable security interest in, the following assets of the applicable Debtors or the proceeds thereof, as of the Petition Date: (a) any owned or leased real estate or any fixtures located thereon to the extent not Prepetition Secured Collateral securing the obligations under the Prepetition Secured Documents; (b) any commercial tort claims that are not specifically identified in the Prepetition Secured

[35] *Id.* at 66:4-1-66:11

Documents; (c) any money or currency, provided that, the Prepetition Secured Collateral does include money or currency that constitutes the identifiable proceeds of other Prepetition Secured Collateral or are in deposit accounts that are subject to a valid and enforceable control agreement in favor to the Prepetition Secured Parties; (d) any deposit accounts at any bank or financial institution that are not subject to a valid and enforceable control agreement in favor of the Prepetition Secured Parties, provided that, the Prepetition Secured Collateral does include funds in deposit accounts that constitute the identifiable proceeds of other Prepetition Secured Collateral; (e) any insurance policies relating to director and officer or management liability, to the extent not Prepetition Secured Collateral securing the obligations under the Prepetition Secured Documents; (f) any licenses or permits that cannot be pledged under applicable non-bankruptcy law or regulation; and (g) any Excluded Assets (as defined in the Prepetition Secured Documents).

29. Further, in accordance with the Challenge Stipulation, the parties have agreed that all rights of the Committee are preserved to contest: (a) the allowance of any interest accrued under the Prepetition Secured Documents; (b) the accuracy of the calculation of the amount of any principal, interest, fees, costs or charges owed under the Prepetition Secured Documents; and (c) any adequate protection or diminution claim that may be asserted by any of the Prepetition Secured Parties against the Debtors' Estates, provided that, all of the Prepetition Secured Parties rights, defenses, and offsets with respect to (a)-(c) above are preserved.

30. The Challenge Stipulation also establishes (see n.2 therein) that the following seven Debtors are not obligated under the Prepetition Secured Documents at all as of the Petition Date as they were neither obligors nor pledgers (collectively, the "Non-Obligor Debtors"):

- Debtors Sapphire Holdings, LLC;
- CareMax Medical Centers of Louisiana, L.L.C.;

- Care Optical, L.L.C.;
- Medical Care of Texas, P.L.L.C.;
- Medical Care of Tennessee, P.L.L.C.;
- Medical Care of NY, P.C.;
- RX Marine, Inc.

Thus, the assets of the Non-Obligor Debtors might also be available for unsecured creditors.

31. In addition to a full review of the Debtors' credit facilities, the Committee and its advisors attempted to review several of the Debtors' transactions. One of those was the VBC Sales Transaction with Steward.[36] While the extent of the Mr. Borkowski's investigation into the VBC Sale Transaction remains unclear, the Committee's investigation has raised numerous questions that may give rise to Potential Estate Claims against officers and directors of the Debtors and others. In November of 2022, CareMax paid over $52 million in cash (which includes $27.2 million of net financing for pre-closing Medicare accounts receivables purchases), as well as CareMax equity worth over $138.5 million and over $210.9 million in contingent equity consideration (based on the volume weighted average price of the Class A Common Stock for the five trading days immediately prior to November 10, 2022) for Steward's value-based care business.

32. The VBC Sale Transaction with Steward was structured in such a manner that CareMax was left highly dependent on, and exposed to, Steward and its own chapter 11 bankruptcy cases and the ultimate rejection of contracts that were a large part of the value that CareMax was supposed to receive in the VBC Sale Transaction.[37] While this dependency was known to CareMax at the time of the transaction, the CareMax board opted to close the transaction and CareMax downplayed these risks in the market. In fact, at the contract rejection hearings that

[36] *See* Disclosure Statement, Art. III.D.1 at 18.
[37] Steward was represented in the VBC Sale Transaction by Sidley Austin LLP (https://ir.caremax.com/news/news-details/2022/CareMax-Inc.-to-Acquire-Medicare-Value-Based-Care-Business-of-Steward-Health-Care-System/default.aspx).

took place in the Steward Bankruptcy, it was disclosed that while Steward and CareMax originally contemplated that the Steward entities would assign their contracts with the various Managed Care Organizations ("MCOs") to CareMax under the Merger Agreement, many or most MCOs refused to consent to such assignment.[38] As a result of this construct, CareMax remained dependent on Steward and vulnerable to its contract rejection such that Steward could essentially resell many of the contractual assets that CareMax supposedly had purchased. Notwithstanding this significant financial issue and risk, the CareMax board went through with the transaction, Dr. de la Torre was given a seat on the CareMax board, and both CareMax and Steward ended up in chapter 11 within two years.

33. In light of the red flags in the Debtor's history and filing, the Committee propounded 2004 discovery on the Debtors on December 23, 2024 seeking, *inter alia*, documents related to the Disinterested Director Investigation, board matters, transfers to and releases of insiders, estate assets and claims, and various transactions undertaken by the Debtors. The Debtors produced approximately 47,000 documents to the Committee on a rolling basis, although the documents produced, other than certain non-Bates stamped documents provided in a data room, were limited to an email search run by the Debtors through October 18, 2024 of four custodians and related to only a limited number of transactions. The Debtors did not search for documents related to insider transfers, repayment of the Super Senior Facility, Deerfield, or other requested items. In fact, the Debtors did not produce highly relevant board materials until after the deposition of Mr. Rundell (the Debtors' designated representative), despite asserting at the deposition and in a subsequent email that they had previously been produced. Moreover, the Debtors refused to identify which documents the Disinterested Director reviewed or relied upon during his

[38] *See Declaration of Dr. Joseph Weinstein* [Doc. 1542, p. 4] in the Steward Bankruptcy.

investigation and merely insisted that such documents were among the tens of thousands made available to the Committee.

34. The Committee took the depositions of Mr. Rundell and Mr. Borkowski on January 17 and January 22, respectively. The Disinterested Director testified that he could not identify any email or document that he reviewed or relied upon during his investigation.

35. The Committee has not had the time, nor, given the temporal and subject-matter limitations on Debtors' production, sufficient access to the Debtors' information to reach firm conclusions concerning the potential liability of the Debtors' directors and officers, or of third parties. Nonetheless, on the record and materials produced to this point, the Committee believes that on a full investigation, the Debtors or their stakeholders may be able to develop colorable claims against Dr. de la Torre and directors or officers of the Debtors for breach of fiduciary duty, and potentially certain of Debtors' service providers, for negligence or breach of contract.

36. The Committee also believes that the Debtors may have clams for various Avoidance Actions with respect to some payments within 90 days (or one year) of the Petition Date (depending upon whether the recipient was an insider), and that certain of Debtors' subsidiaries may have intercompany claims and/or fraudulent transfer actions based on the improper sweep of funds from accounts not subject to Lenders' security interests to one that was subject to a Deposit Account Control Agreement.

37. Mr. Borkowski significantly failed to investigate these and potentially other claims, and the Committee therefore believes that, in the absence of substantial consideration from any Released Party or a real, thorough, documented, unbiased and reliable investigation, no Entity, not otherwise entitled to a release under the Plan (i.e., the purchasers under the Sales Transactions), should receive a release.

ARGUMENT AND AUTHORITIES

38. The Committee requests that the Court deny final approval of the Disclosure Statement and deny confirmation of the Plan. Votes on the Plan were solicited based on a Disclosure Statement containing inadequate information and the Plan does not comply with applicable provisions of the Bankruptcy Code or Fifth Circuit law.[39]

39. As a technical matter, the Plan should not be confirmed because the Disclosure Statement, as preliminarily approved by the Court, does not contain sufficient information for unsecured creditors to make an informed decision as to how to vote on the Plan, and specifically, whether to (a) accept the proposed Plan treatment that does not properly account for valuable Unencumbered Assets of the Estates and the net proceeds thereof which should go to unsecured creditors, and (b) opt out of the Releases in favor of the Released Parties.

I. OBJECTIONS TO THE ADEQUACY OF THE DISCLOSURE STATEMENT

A. The Disclosure Statement Should not be Finally Approved Because It Does Not Contain Adequate Information.

40. Notwithstanding the preliminary approval of the Disclosure Statement,[40] the Disclosure Statement disseminated to solicit the votes of unsecured creditors did not contain

[39] A court cannot confirm a plan unless it finds that both the plan and the plan proponent have complied with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1), (2). One of those provisions is section 1125(b) which requires that solicitation of votes on a plan must be accompanied by a disclosure statement containing adequate information. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648-49 (2d Cir. 1988); *In re Cypresswood Land Partners I*, 409 B.R. 396, 424 (Bankr. S.D. Tex. 2009); *In re Seatco, Inc.*, 257 B.R. 469, 479 (N.D. Tex. 2001); *see also* 7 COLLIER ON BANKRUPTCY P 1129.02 (16th ed. 2024).

[40] Use of the combined disclosure statement/plan approval procedures of section 105(d)(2)(B)(vi) of the Bankruptcy Code does not abrogate the requirement that a disclosure statement contain adequate information. "Section 105(d)(2) lets this Court 'mix and match' the opportunities and timing for a debtor, creditors, and parties-in-interest, to file plans and disclosure statements, and solicit acceptances of such plans. It is an omnibus provision with which the Court can customize Chapter 11 preconfirmation procedures, as long as those procedures are not inconsistent with other provisions of the Code. Thus, the Court is authorized to use Section 105(d)(2) options as long as they don't conflict with Sections 1121 and 1125." *In re Aspen Limousine Serv.*, 187 B.R. 989, 995 (Bankr. D. Col. 1995) (emphasis added).

information sufficient to allow unsecured creditors to make an informed decision whether to accept or reject the Plan, and in some instances, contains incomplete, inaccurate or misleading information. Thus, the Disclosure Statement should not be finally approved and the confirmation hearing should not proceed.

41. "Disclosure is the 'pivotal' concept in Chapter 11 reorganization."[41] A disclosure statement is the primary source of information creditors and other parties in interest rely on in making informed decisions about a debtor's plan of reorganization.[42] Full disclosure is fundamental to the proper functioning of the bankruptcy process:

> The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of "adequate information."

Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 2013).[43]

42. In determining whether a plan proponent has provided "adequate information" to creditors and parties in interest, the standard is not whether the failure to disclose information would harm creditors but whether "hypothetical reasonable investors receive such information as will enable them to evaluate for themselves what impact the information might have on their claims and on the outcome of the case, and to decide for themselves what course of action to take."[44]

43. Adequate information is defined by the Bankruptcy Code as: "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and

[41] *Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999) (*citing* 5 Lawrence P. King, COLLIER ON BANKRUPTCY ¶ 1125.03 (15th ed. 1992)).
[42] *Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion)*, 844 F.2d 1142, 1157 (5th Cir. 1988).
[43] *See also Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) ("Because creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated.").
[44] *In re Applegate Prop., Ltd.,* 133 B.R. 827, 831 (Bankr. W.D. Tex. 1991).

history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan...."[45]

44. As more fully discussed below, no such adequate information is contained in the Disclosure Statement. Specifically, there is no disclosure regarding any of the following:

- Who are the actual persons or entities identified as the "Released Parties"?
- What potential claims or Causes of Action against the Released Parties are being investigated by the Disinterested Director? Who are the targets and what are the potential legal theories of recovery?
- What is the value of the potential claims or Causes of Action owned by the Estates against the non-debtor Released Parties under the Plan?
- What potential Causes of Action do the Debtors believe are owned by creditors (non-derivative, direct claims) against the Released Parties such that the Third Party Releases of ***direct claims owned by creditors*** are necessary to the Plan?
- What, if any, consideration is being provided to the Estates and/or the creditors in exchange for both the Debtor Releases and the Third Party Releases? If they are gratuitous releases, what is the justification for granting the Releases?
- How could the Releases be necessary to the reorganization or confirmation of the Plan when the Debtors are not reorganizing.

Without this information, the Disclosure Statement is woefully deficient and cannot be approved.

B. <u>The Disclosure Statement Contains no Information in Support of the Releases.</u>

45. The Plan contains two categories of broad general releases benefiting a litany of parties and their professionals (including Debtors' counsel): (a) Debtor Releases[46] and (b) Third Party Releases.[47] The Plan recites that the Debtor Releases are "***in exchange for good and valuable consideration, the adequacy of which is hereby confirmed,***" and that each Released Party is released by the Debtors and "***any and all other Entities who may purport to assert any Cause of Action, directly or derivatively,***" from "***any and all Claims and Causes of Action, including any derivative Claims, asserted on behalf of the Debtors***, . . . ***that the Debtors*** . . .

[45] *See* 11 U.S.C. § 1125(b).
[46] Plan, Art. IX.A.
[47] *Id.* Art. IX.B.

would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim."[48] The definition of "Released Party"[49] and its internal defined term "Related Party"[50] broadly include every past and present officer and director of the Debtors, every employee of the Debtors, and the various Lenders and purchasers.

46. The Third Party Releases are also alleged to be "***in exchange for good and valuable consideration, the adequacy of which is hereby confirmed,"*** and effectuate a release of each Released Party (inclusive of each Related Party) from any and all claims and Causes of Action, including, among other things, state and federal law, equity, contract and tort, ***both derivative and direct***, that any Releasing Party would have been legally entitled to "***based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the capital***

[48] *Id.,* Art. IX.A (emphasis added).

[49] "Released Party" means collectively, and in each case in its capacity as such: (a) ***each Debtor***, ***Post-Effective Date Debtor***, and each Transferred Entity, as applicable; (b) each Consenting Term Loan Lender; (c) the DIP Lenders; (d) the DIP Agent; (e) the Prepetition Term Loan Lenders and the Prepetition Agent; (f) the ACO Purchaser; (g) the Core Centers Purchaser; (h) the Stalking Horse Purchaser; (i) the Committee and its members, each in their capacities as such; and (j) ***each Related Party of each Entity in clause (a) through clause (h)***; provided, that, in each case, an Entity shall not be a Released Party if it: (x) ***elects to opt out of the Third Party Release; or (y) timely objects to the Third Party Release***, either through (i) a formal objection Filed on the docket of the Chapter 11 Cases or (ii) an informal objection provided to the Debtors by electronic mail, and such objection is not withdrawn on the docket of the Chapter 11 Cases or via electronic mail, as applicable, before Confirmation; provided, further, that ***such Persons designated by the Disinterested Director prior to the Combined Hearing shall not be a Released Party***; provided, however, that notwithstanding anything to the contrary in this Plan, Confirmation Order, or any other document filed or executed in connection with the Chapter 11 Cases, (A) ***the Disinterested Director may not so designate*** (1) the Purchasers (including the Stalking Horse Purchaser, as applicable), (2) the Consenting Term Loan Lenders, (3) the DIP Lenders, (4) the DIP Agent, (5) the Prepetition Term Loan Lenders, and (6) the Prepetition Agent (and each Related Party of each of the foregoing Entities); and (B)(1) the Purchasers (including the Stalking Horse Purchaser, as applicable), (2) the Consenting Term Loan Lenders, (3) the DIP Lenders, (4) the DIP Agent, and (5) the Prepetition Term Loan Lenders (and each Related Party of each of the foregoing Entities) ***shall indefinitely remain Released Parties under the terms of the Plan***. *Id.* Art. I (emphasis added).

[50] "Related Party" means, with respect to any Person or Entity, each of, and in each case in its capacity as such, ***current and former directors, managers, officers***, Committee members, ***members of any Governing Body***, equity holders (regardless of whether such Interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, ***employees***, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors of any such Person or Entity, in each case solely in their capacities as such, and any such Person's or Entity's respective heirs, executors, estates, and nominees. *Id.* (emphasis added).

structure, management, ownership, or operation thereof), . . . ***the subject matter of, or the transactions or events giving rise to, any Claim*** or Interest ***that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party***, . . . ***or upon any other act or omission, transaction, agreement, event, or other occurrence related or relating to any of the foregoing taking place on or before the Effective Date*** (including before the Petition Date)."[51]

47. Thus, each Releasing Party is being required to release any direct claims or Causes of Action[52] it may have against any officer, director or employee of the Debtors – unless it expressly opts out of the Releases. Given that some of the Debtors' employees are doctors who practiced in nursing homes in Florida and other states, any personal claims for malpractice, negligence, gross negligence or other torts, are being released. The Third Party Release provisions could have dramatic consequences for patients of the Debtors' numerous health care facilities. As drafted, the Third Party Release would ***automatically*** cut off patients' claims against doctors, nurses and other staff employed by the Debtors in their numerous care centers unless these patients submit an opt out form or object to the Releases. ***There is simply no disclosure to injured patients and nursing home residents that their right to sue their health care providers employed by the Debtors will be cut off pursuant to the Plan***.

48. The impact of the Third Party Releases on creditors with direct claims was never even investigated by the Debtors. Mr. Borkowski could barely articulate what the Third Party Release was, let alone identify any causes of action – including causes of action of patients

[51] *Id.*, Art. IX.B (emphasis added).

[52] "Causes of Action" means any claims, interests, damages, remedies, causes of action, demands, rights, actions, controversies, proceedings, agreements, suits, obligations, liabilities, accounts, defenses, offsets, powers, privileges, licenses, Liens, indemnities, guaranties, and franchises of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, secured or unsecured, assertable, ***directly or derivatively***, matured or unmatured, suspected or unsuspected, whether arising before, on, or after the Petition Date, in contract, tort, law, equity, or otherwise. *Id.* Art. I (emphasis added).

against employee doctors and nursing home staff – and the impact of the Third Party Releases on those direct claims.[53]

49. Pursuant to the Plan, all creditors are automatically designated as Releasing Parties.[54] The Debtors contend the Third Party Releases are consensual because creditors are given the opportunity to "opt out" of them. As discussed more fully below in the Objections to the Plan, this is a fallacy and the Releases are non-consensual and improper.

50. However, assuming Releasing Parties can be deemed to have consented to the Third Party Releases from a failure to affirmatively opt out of or object to the Releases, the law requires "deemed consent" to be based on sufficient information so that it can be "knowing and voluntary".[55]

51. The Debtors, however, provide no substantive information in the Disclosure Statement about any of the claims and Causes of Action to be released – whether direct or derivative. The Plan Supplement did not cure these numerous disclosure deficiencies. Indeed, the paucity of the Plan Supplement only underscores that the Debtors are trying to get to confirmation with as little detailed disclosure as possible. The Debtors should not be permitted to rely on generic

[53] 1/22/25 Borkowski Deposition Transcript at 214-217.

[54] "Releasing Party" means each of, and in each case in its capacity as such: (a) the Consenting Term Loan Lenders; (b) the Prepetition Term Loan Lenders and the Prepetition Agent; (c) the DIP Lenders and DIP Agent; (d) ***all Holders of Claims*** *or Interests* ***that vote to accept the Plan****;* (e) ***all Holders of Claims*** or Interests ***that are deemed to accept the Plan and who do not affirmatively opt out of the releases provided in the Plan***; (f) ***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***; (g) ***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,*** (h) each Purchaser, (i) the Committee and its members, each in their capacities as such; and (j) ***each Related Party of each Entity in clause (a) through clause (i) solely to the extent such Related Party may assert Claims or Causes of Action on behalf of or in a derivative capacity by or through an Entity in clause (a) through clause (i)***; provided that, in each case, an Entity shall not be a Releasing Party if it: (x) elects to opt out of the Third Party Release; or (y) timely objects to the Third Party Release, either through (i) a formal objection Filed on the docket of the Chapter 11 Cases or (ii) an informal objection provided to the Debtors by electronic mail, and such objection is not withdrawn on the docket of the Chapter 11 Cases or via electronic mail, as applicable, before Confirmation. Plan, Art. I.

[55] *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015) ("It bears emphasizing, however, that a litigant's consent—whether express or implied—must still be knowing and voluntary.") (dealing with consent to adjudication by a bankruptcy court).

statements and recitation of boilerplate terms, thus depriving creditors of the relevant facts from which they can exercise informed consent. If a release is to be at all consensual, the Debtors have an obligation to disclose to creditors which claims and Causes of Action are being released, the basis for the release and the consideration being paid for it – especially as to the Third Party Releases.[56] The Disclosure Statement pays lip service to this requirement by stating merely that:

> ***Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the releases*** contained in this Article IX.B, 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 Releases are: (a) ***consensual***; (b) ***essential to the Confirmation of the Plan***; (c) ***given in exchange for the good and valuable consideration provided by the Released Parties that is important to the success of the Plan***; (d) ***a good faith settlement and compromise of the Claims released by the third-party releases***; (e) in the best interests of the Debtors and their Estates; (f) ***fair, equitable, and reasonable***; (g) given and made after due notice and opportunity for hearing; and (h) a bar to any of the Releasing Parties asserting any Claim or Cause of Action released pursuant to this Article IX.B.[57]

However, the support for these conclusory statements is ***nowhere*** to be found in the Disclosure Statement or the Plan Supplement and this Court should disregard any argument that the Debtors will provide the evidentiary support for these statements at the combined disclosure statement/confirmation hearing (the "Combined Hearing"). The Combined Hearing takes place

[56] For example, in *In re Fieldwood Energy LLC*, 2021 Bankr. LEXIS 1829, *50 (Bankr. S.D. Tex. June 25, 2021), at the confirmation hearing the bankruptcy court made express findings regarding the evidence presented in support of the consensual releases referencing (i) the consideration paid for the releases; (ii) the consent of the parties to the releases after appropriate disclosure and notice; (iii) the substantial benefit conferred on the estate from the releases; (iv) that the releases were tailored to the facts and circumstances of the case; (v) that the releases were integral to the formulation and implementation of the plan; (vi) that the releases were fair and equitable; and (vii) that the releases were negotiated in good faith. 2021 Bankr. LEXIS 1829, *45-50. Information supporting these findings was contained in the debtors' disclosure statement so that creditors could make an informed decision whether or not to opt out of the releases. *See, e.g.*, *In re Fieldwood Energy LLC,* Case No. 20-33948 (Bankr. S.D. Tex.), *Disclosure Statement for Fourth Amended Joint Chapter 11 Plan of Fieldwood Energy LLC and Its Affiliated Debtors* [Docket No. 1285] at Art. V.N, pp. 45-46 ("Independent Investigation" discussing results of investigation by Independent Director of certain transactions involving officers and directors) and Art. VI.B, pp. 50-51 ("Approval of Apache Transactions" discussing basis, benefits and consideration for settlement with major party in interest and related releases).

[57] Disclosure Statement § XI.B. This identical conclusory statement is contained in the Debtor Releases set out in Section IX.A of the Plan.

after the voting deadline, and evidence presented at that time in support of confirmation cannot override the statutory obligation of the Debtors to solicit votes – as well as consent to the Releases – based on a Disclosure Statement that contains adequate information.

52. The Disclosure Statement fails to contain any information from which can be ascertained:

(a) ***How are the Releases – both the Debtor Releases and Third Party Releases – "essential" to confirmation of a what is essentially, a liquidating Plan***.

(b) ***What potential claims and Causes of Action owned by the Debtors (both direct and derivatively) are being released pursuant to the Debtor Releases***[58] including a discussion of whether any investigations were previously performed or in the case of the investigations allegedly being performed by the Disinterested Director, the status and findings of such investigations; the nature and value of the claims being released and exculpated; the availability of insurance coverage for any such claims; and the basis for the Debtors' assertion that the Releases are necessary to the reorganization[59] of the Debtors.

(c) ***What are the potential direct claims and Causes of Action owned by creditors against non-debtor Released Parties that the Debtors believe must be released pursuant to the Third Party Releases and the basis for the Debtors' assertion that the Third Party Releases are necessary to the reorganization of the Debtors?***

(d) Exactly ***what consideration is being paid by each Released Party to either the Debtors or the creditors in exchange for each of the Debtor Releases and the Third Party Releases*** such that creditors can make an informed decision whether to opt out of the Releases and the Court can make an informed decision on the alleged adequacy and sufficiency of such consideration.

(e) ***If no consideration is being paid by any or a particular Released Party for a Claim or Cause of Action owned by the Debtors or directly by a creditor, why is that Released Party entitled to a Release?***

(f) ***Why are each of the Debtor Releases and Third Party Releases necessary to the success of the Plan?*** The Debtors' assets are being sold. While it is understandable that a good faith purchaser would ask to be protected with a release as part of the confirmation/sale approval order, it is hard to understand why such Releases – especially Third Party Releases – must be for the benefit of officers, directors and employees or why the Prepetition Term Loan Lenders and the Prepetition Agent who are getting the same

[58] The Liquidation Analysis filed by the Debtors does not identify or value ***any*** potential causes of action.
[59] As noted, the Debtors are liquidating all of their assets, not reorganizing, begging the question of why ***any*** releases are necessary or appropriate.

recovery they would have gotten had they foreclosed on all the Debtors' assets need to be released by creditors.

(g) ***How are the Releases "fair, equitable, and reasonable" when creditors are essentially receiving no recovery under the Plan?***

(h) ***How do the Releases meet the standard for approval of a settlement under Bankruptcy Rule 9019.*** None of the factors are discussed in the Disclosure Statement; nor are any supporting facts provided. Here, the causes of action being settled in exchange for the Releases are not even identified, let alone valued, and nothing in the Disclosure Statement informs creditors of how the Debtors' so-called settlement can satisfy the above factors which are required before this Court can approve the Releases as a settlement under Bankruptcy Rule 9019. Mere recitation of the relevant standards for approval of Rule 9019 settlements, without more, does not accomplish anything in the way of relevant disclosure of the operative facts.

53. Three weeks after the Court strongly suggested that any investigation of the VBC Sale Transaction would be infected with conflicts given the role played by Debtors' counsel in representing the seller (the pre-bankruptcy Steward Debtors) as well as Dr. de la Torre in that transaction and others, conflicts counsel was retained. However, no such investigation was ever undertaken. While the Disinterested Director appeared to be investigating various undefined events and transactions, such investigation was limited, truncated and not designed to yield any real results.[60] The Debtors have been less than transparent about the investigation allegedly being conducted by the Mr. Borkowski – producing thousands of documents but refusing to identify what documents Mr. Borkowski reviewed or relied upon in conducting his investigation and reaching his conclusions.

[60] The "Disinterested Director may not so designate the Purchasers (including the Stalking Horse Purchaser, as applicable), the Consenting Term Loan Lenders, the Prepetition Term Loan Lenders, the Prepetition Agent, the DIP Lenders, or the DIP Agent, and the Purchasers, the Consenting Term Loan Lenders, the Prepetition Term Loan Lenders, the Prepetition Agent, the DIP Lenders, and the DIP Agent shall be and shall indefinitely remain Released Parties under the terms of the Plan." Disclosure Statement at 59. These limitations on the power of the Disinterested Director's ability to exclude certain parties from the Release remove any doubt that the "investigation" is a sham, since the Disinterested Director may not remove such parties from the roster of Released Parties, even if the Estates hold valuable claims against them. The hamstringing of the Disinterested Director, assisted initially by hopelessly conflicted counsel and subsequently by counsel who had two – three weeks to conduct an investigation, makes clear that the Committee is the only disinterested party who can conduct an unbiased and complete investigation of the Estates' claims and highlight how the expedited investigation timeline and lack of disclosures about the investigation are prejudicial to the Estates and creditors.

54. As evident from the Borkowski Deposition, Mr. Borkowski conducted little, if any investigation – primarily relying on counsel – including conflicted counsel. Any questions relating to the actual analysis or basis for conclusions relating to the limited transactions reviewed by Mr. Borkowski was shut down as being privileged. In general, Mr. Borkowski reviewed the following transactions: (i) the Debtors' 2021 de-SPAC transaction; (ii) a related party loan in connection with the VBC Sale Transaction; (iii) the Debtors' receivable that was transferred to Steward; (iv) the Debtors' expansion of its Core Centers Business; and (v) the Debtors' issuance of retention bonus payments.

55. In respect to these transactions, Mr. Borkowski could not identify any specific documents he reviewed or what those document contained. He could not identify any potential causes of action. With respect to Dr. de la Torre and Steward who are excluded from the Releases, he did not conduct any investigation into potential causes of action because they were already excluded.[61] Borkowski did not produce a report on any investigations.[62] He received a summary analysis from Sidley on which he relied and nothing further was created upon the retention of conflicts counsel. And notwithstanding the complex nature of the transactions at issues, Mr. Borkowski neither retained any financial advisors nor utilized the Debtors' financial advisors.[63]

56. When presented with the Disclosure Statement description of the investigation he was tasked with conducting, he did not even understand the scope of the investigation and what it entailed.[64] He simply relied upon counsel[65] – including counsel who is

[61] 1/22/25 Borkowski Deposition Transcript at 67:12-25 – 69:1-13.
[62] *Id.* at 85:8-14.
[63] *Id*. at 62:17-20.
[64] *Id*. at 163:9-25 – 169:1-3.
[65] Id. at 187:10-25 – 188:1-19.

conflicted on one transaction, the VBC Sale Transaction, which failed miserably and resulted in these Chapter 11 Cases.

57. The Plan Supplement does not add any substantive information to the Disclosure Statement to give creditors any information on the Releases. While the Plan Supplement clarifies that neither Mr. de la Torre nor Steward are Released Parties, it does not elaborate on why they are excluded. Nor does the Plan Supplement elaborate on any claims or Causes of Action that are being released against the remaining Released Parties (including present and former officers and directors and employees) nor contain any information on potential direct claims that are being released pursuant to the Third Party Releases – specifically, for example, any direct claims of patients against doctors and staff (all of whom come under the definition of "Released Parties") at nursing homes owned and operated by the Debtors. ***This is the exact information the Court requested be included at the hearing seeking preliminary approval of the Disclosure Statement***.[66]

58. Nor does the Plan Supplement identify any consideration being paid by any Released Party in exchange for the Releases even though the Plan expressly states as to both the Debtor and Third Party Releases that they are: "***in exchange for good and valuable consideration, the adequacy of which is hereby confirmed***".[67] The Disclosure Statement expressly states: "In addition, ***if any consideration is to be provided on account of such releases*** by a released party, such consideration will be disclosed in the Plan Supplement."[68] It is now apparent that no consideration is being paid for any of the Releases. ***Thus, the Disclosure Statement was***

[66] "If there is a series of transactions, if they're investigating the releases, just a little bit more in here on exactly what -- if the independent board director, if Mr. Borkowski is as busy as you say he is, I bet you can explain a little bit more of what he's doing." Hearing Transcript, December 17, 2024, at 113:6-11 (the "12/17/24 Transcript"). "But I do believe that the more color that you can give, the better as it pertains to eventual actual approval of disclosure statement." 12/17/24 Transcript at 114:17-19.
[67] Plan, Art. X.A and B (emphasis added).
[68] Disclosure Statement, Art. IV.F (emphasis added).

disseminated with inaccurate and misleading information as creditors were lead to believe consideration was going to be paid for the Releases. This Court has recognized that consideration is a mandatory requirement for releases. At best, the Debtors must be required to disclose why they are entitled to an exemption from the consideration requirement set out in applicable Fifth Circuit law.

59. Given the automatic nature of the Releases and the "presumed consent" standard this Court is being asked to apply, it is vital that the Disclosure Statement adequately set forth the basis for the Releases so creditors can make an informed decision whether or not to opt out of them. As one court put it: "[T]hird-party releases are not a merit badge that somebody gets in return for making a positive contribution to a restructuring. They are not a participation trophy, and they are not a gold star for doing a good job. Doing positive things in a restructuring case - even important positive things - is not enough."[69] The self-interested actions of the Released Parties in these Chapter 11 Cases, benefitting no one but themselves, cannot merit a release without some indication of the value of the claims being released and the consideration being paid.

60. All of this information must be contained in the Disclosure Statement. Failing that, the Disclosure Statement fails to contain adequate information as required by the statute and should not be approved on a final basis eliminating any need to proceed with a hearing on confirmation of the Plan.

[69] *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 726-727 (Bankr. S.D.N.Y 2019).

II. THE PLAN SHOULD NOT BE CONFIRMED

A. The Plan Does Not Meet the Best Interest of Creditors Test

61. The Plan cannot be confirmed because it does not meet the best interest of creditors test. The value of the Unencumbered Assets exceeds the $350,000 GUC Cash Pool.[70] Such value would be available to unsecured creditors in a hypothetical chapter 7 case. Perhaps the greatest but by no means the only category of Unencumbered Assets are the Debtors' Avoidance Actions and Commercial Tort Claims, which under the final DIP Financing Order are only pledged to secure the New Money DIP Loans of $30.5 million, not the DIP Rolled-Up Loans of $90 million. The Prepetition Secured Parties cannot look to those assets "unless the Prepetition Secured Parties had valid, perfected, and unavoidable Prepetition Secured Liens on commercial tort claims and proceeds thereof as of the Petition Date." Since the Prepetition Lenders listed as collateral only the Debtors' claims against Steward, all other claims – including D&O claims against Dr. de la Torre which were never investigated – remain unencumbered and are available to satisfy unsecured claims (and yet the Plan hands these assets over to the Prepetition Secured Parties anyway, a fatal flaw).

62. Section 1129(a)(7),[71] commonly known as the best interest of creditors test, prohibits confirmation of a chapter 11 plan if a dissenting impaired class would receive less than

[70] "GUC Cash Pool" means Cash equal to $0; provided that it shall be $350,000 if the Confirmation Order is entered within (75) days of the Petition Date; provided, further that the GUC Cash Pool shall be $250,000 if the Confirmation Order is entered within 76-90 days of the Petition Date. Plan, Art. I.

[71] Section 1129(a)(7) provides as follows:

> (a) The court shall confirm a plan ***only*** if ***all*** of the following requirements are met:
> (7) With respect to each impaired class of claims or interests –
> (A) each holder of a claim or interest of such class –
> (i) has accepted the plan; or
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; . . . .

11 U.S.C § 1129(a)(7).

it would in a chapter 7 liquidation.[72] Courts uniformly conclude that the debtor or any other applicable plan proponent has the burden of proving the test is met.[73] The test "focuses on individual creditors rather than classes of claims ... [and] requires that each holder of a claim or interest either accept the plan or receive or retain property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were LIQUIDATED under Chapter 7."[74] Thus, section 1129(a)(7) guarantees each creditor that it will receive as much in a reorganization as it would in liquidation.[75]

63. There are several categories of Unencumbered Assets. As an initial matter, the Challenge Stipulation sets forth the Unencumbered Assets not subject to Lenders' liens as well as those assets whose liens are still subject to challenge. These Unencumbered Assets should be available to general unsecured creditors but under the Plan, their value is being liquidated and distributed to the Lenders. That would not happen in a chapter 7. As it is highly likely that the value of these assets exceeds $350,000, unsecured creditors would receive a greater recovery under chapter 7 than they are receiving under the Plan.

64. Additional Unencumbered Assets are Potential Estate Claims – contingent Causes of Action against certain current and former officers and directors of the Debtors. These Potential Estate Claims have value because they are colorable and the Debtors have $55 million in D&O insurance. For example, Potential Estate Claims exist relating to the VBC Sales Transaction against the board members who approved the transaction notwithstanding the known significant

[72] *In re Ultra Petroleum Corp*., 624 B.R. 178, 201 (5th Cir. 2020).
[73] *In re Ditech Corporation*, 606 B.R. 544, 606-607 (Bankr. S.D.N.Y 2019), *citing In re GSC, Inc*., 453 B.R. 132, 179 n.66 (Bankr. S.D.N.Y. 2011); *ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 366 (S.D.N.Y. 2007); *In re Jennifer Convertibles, Inc*., 447 B.R. 713, 724 (Bankr. S.D.N.Y. 2011).
[74] *In re Drexel Burnham Lambert Group, Inc*., 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992) (internal citation omitted); *see also,* I*n re Leslie Fay Cos., Inc.*, 207 B.R. 764, 787 (Bankr. S.D.N.Y. 1997) (stating that in applying the best interest test, the court "must find that each [dissenting] creditor will receive or retain value that is not less than the amount he [or she] would receive if the debtor were liquidated.") (citation omitted).
[75] 7 COLLIER ON BANKRUPTCY ¶ 1129.02[7].

risks posed by Seward's inability to transfer certain contract rights to the Debtors. This breach of duty by these board members put the Debtors at risk that those contracts, upon which the Debtors' business depended, could be rejected in a Seward bankruptcy case. These Causes of Action (which are nowhere identified or discussed by the Debtors) are being released.

65. On the other side of the VBC Sales Transaction, the Debtors have expressly excluded Dr. de la Torre from the Releases. Dr. de la Torre became a member of the Debtors' board contemporaneous with the closing of the VBC Sales Transaction. Given the alleged improprieties of Dr. de la Torre in the Seward Bankruptcy, the fact that Seward was represented by Sidley in the sale transaction, and Sidley's prior representations of Dr. de la Torre, Potential Estate Claims for, among other things, breach of duty and misrepresentation exist.

66. Causes of Action may exist against current board members in regard to certain bonus payments paid on the eve of bankruptcy. The Debtors received approximately $40 million on the eve of the Petition Date that was immediately spent days before the bankruptcy filing causing the artificial need to borrow the new money DIP. Of the $40 million received, approximately $25 million was repaid to the Prepetition Secured Lenders, $10 million was escrowed for the benefit of certain physicians, and bonuses to three executives (the Chief Financial Officer, the Chief Medical Officer, and the General Counsel), who had already received "key employee" bonuses in anticipation of the bankruptcy six months prior, were paid out on November 15, 2024 (two days prior to the Petition Date). An investigation must be made into the validity of these transactions which could result in causes of action against the Board, especially in light of representations made by the Debtors at the first day/second day hearings that payments made to executives prior to the Petition Date were all done in the ordinary course.

67. Additionally, the Debtors' Schedules identify approximately $58 million in 90 day payments (potential preference claims) that would also be available to unsecured creditors in a chapter 7. The Potential Estate Claims discussed above are just some of the Unencumbered Assets that would be available to unsecured creditors in a chapter 7 case. Given the timing of these cases, the Committee cannot be expected in 30 days to have conducted a full scale investigation of all potential Causes of Action. That is why these Causes of Action should be placed in a trust for the benefit of unsecured creditors. The refusal of the Debtors to do so with Causes of Action potentially worth millions of dollars prevents the Plan from meeting the best interest test.

68. As discussed above, Mr. Borkowski was charged with investigating the Releases and any potential Causes of Action. He did not. Remarkably, in their Liquidation Analysis attached to their Disclosure Statement, the Debtors ascribe zero value to any of the foregoing claims, which defies credibility. Moreover, they posit that there would be no sale proceeds in a chapter 7 case to satisfy the New Money DIP Loan because there would be NO sale of assets in a chapter 7. That is absurd, as the Core Centers Asset Sale is ready to close and bring in tens of millions of dollars, and no doubt a chapter 7 trustee could close on the sale the day after conversion. As will be shown at the confirmation hearing, the Debtors' Liquidation Analysis is rife with erroneous assumptions intended to skew the recoveries downward to the point of absurdity.

69. By granting releases to officers and directors who were never investigated and by not releasing Sidley's client but retaining the unidentified Causes of Action against Dr. de la Torre, the Debtors have insured that all Potential Estate Claims are either released and buried or handed over to the DIP Lenders who do not have a lien on them (since the New Money DIP

Lenders' claims will be satisfied without resorting to those claims, leaving them unencumbered).[76] The Debtors' Liquidation Analysis contains no discussion of contingent claims – which is neither reasonable nor appropriate. With respect to the Unencumbered Assets identified in the Challenge Stipulation – these are allocated to the Lenders in the Debtors' Liquidation Analysis, an allocation that would not occur in a chapter 7 case.

70. It is the Debtors' burden to prove that unsecured creditors would do better under the Plan than in a hypothetical chapter 7 case. All of the Potential Estate Claims discussed above, as well as the Unencumbered Assets on which the Lenders do not have liens, would be available in a chapter 7 case to unsecured creditors. Here, the Debtors are either giving the value of those assets to the Lenders through the Plan Administrator or simply releasing the Causes of Action. Creditors would do better if all Potential Estate Claims were investigated by an impartial fiduciary (the chapter 7 trustee) and pursued or settled by that trustee. The Plan does not meet the best interest of creditors test and confirmation should be denied.

B. The Debtor and Third Party Releases are Improper and Cannot Not Meet the Test for Approval of a Settlement under Section 1123(b) and Rule 9019.

(1) The Debtor Releases are Improper.

71. The Plan contains a Release by the Debtors of various third parties under the guise of a "settlement". While section 1123(b)(3)(A) of the Bankruptcy Code permits a plan to provide for the settlement of causes action owned by the estate, the Bankruptcy Code requires that the proper procedures be followed for approval of a settlement and that the evidence support the proposed releases. The Fifth Circuit requires consideration of the following factors in

[76] In accordance with the DIP Orders, the DIP Lenders had a lien on Causes of Action against Dr. de la Torre up to the amount of the new money loaned, not the full roll up. Since the Prepetition Lenders did not have a lien on certain commercial tort claims and the new money DIP loan will be paid in full from the Plan Sale Transactions, commercial tort claims, including any claims against Dr. de la Torre, would be available to unsecured creditors.

approving a settlement under Rule 9019: (a) the probability of success in litigation; (b) the likely difficulties in collecting any judgment; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors with deference to their reasonable views; and (e) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.[77]

72. This test was established to ensure that a debtor is settling claims and causes of action for the benefit of the estate, not for the benefit of some other person. A debtor is a fiduciary and has a duty to maximize value for its estate. Here, the Debtors cannot meet the requirements for approval of a settlement and release of all claims and Causes of Action. As a preliminary matter, no claims or Causes of Action are identified and no Released Party is giving any consideration in exchange for its release from any unidentified claims and Causes of Action.

73. The Plan expressly provides that the Releases are in exchange for good a valuable consideration. The Debtors expressly represented to the Court that if any consideration was being paid by any Released Party in exchange for the Releases, such consideration would be identified in the Plan Supplement.[78] ***Notwithstanding these representations, no consideration is identified in the Plan Supplement and Mr. Borkowski, the director who was responsible for analyzing and investigating the Releases, has acknowledged they are wholly gratuitous.***

74. Nor are the actions of the Debtors and certain Released Parties in proposing a plan and working on the Chapter 11 Cases sufficient to constitute consideration for the Releases.

[77] *In re Age Refining, Inc.*, 801 F.3d 530, 540 (5th Cir. 2015); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980).
[78] *See* Disclosure Statement Art. IV.F; 12/17/24 Transcript at 99:16-18 ("[W]e'll put in the plan supplement if any additional consideration is given on behalf of these releases." (statement of Mr. Hufendick).

Courts have indicated that "facilitating" the Debtors' restructuring does not constitute consideration for a release.[79]

75. ***This lack of consideration begs the question: Are there any claims and Causes of Action (direct or derivative) owned by the Estates against the Released Parties?*** If no such claims and Causes of Action exist[80] – why are any releases needed and how can such releases be necessary to the liquidating Plan? The Debtors primary assets are being liquidated and sold to various third parties after an extensive and fair marketing process. The Bankruptcy Code provides clear protections for good faith purchasers. No other non-debtor party requires a comfort order release from unidentified or nonexistent claims and Causes of Action and there is nothing for the Debtors to "settle" in accordance with section 1123(b)(3)(A) or Rule 9019 necessitating the Debtor Releases.

76. On the other hand, if claims and Causes of Action do exist[81] – or even could potentially exist – they must be identified and evidence presented to meet the Fifth Circuit's test for approval of a settlement of such claims and Causes of Action. The Court does not have the

[79] *See, e.g., Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 252-253 (5th Cir. 2009) (exculpation clause designed to absolve the released parties, including the non-debtor plan proponent, from any negligent conduct that occurred during the course of the bankruptcy not permissible); *U.S. Bank Nat'l Assoc. v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 145 (Bankr. D. Del. 2010) ("While I have little doubt that many of the Debtor Releasees undertook substantial (and certainly sometimes exhausting) efforts to formulate and negotiate the current (and former) Plans, I do not believe that those contributions rise to the level of the critical financial contribution contemplated in *Continental* and *Genesis* that is needed to obtain approval of non-consensual releases.) (cites omitted); *In re Continental Airlines*, 203 F.3d 215 ("[W]e have found no evidence that the non-debtor D&Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release*"); In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 606-607 (Bankr. D. Del. 2001) ("[T]here is no showing that the individual releasees have made a substantial contribution of assets to the reorganization. As in Zenith, the officers and directors of the debtors no doubt made meaningful contribution to the reorganization by designing and implementing the operational restructuring of the companies, and negotiating the financial restructuring with parties in interest. However, the officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of "assets" to the reorganization.").

[80] A conclusion the Committee disputes as discussed above.

[81] None are identified on the Schedules filed by any of the Debtors and the Schedule of Retained Causes of Action attached to the Plan Supplement (Ex. B) is a generic boilerplate list save for the claims of the Debtors asserted against Seward in its chapter 11 proceedings.

authority to grant blanket approval of Debtor Releases without knowing what claims and Causes of Action exist against which Released Party; what consideration is being paid by the applicable Released Party in exchange for the settlement of such claims and Causes of Action; the value, likelihood of success on the merits, and costs and risks associated with the potential claims and Causes of Action; the *bona fides* of the settlement negotiation process; and the interests and views of creditors in regard to the settlement of the claims and Causes of Action.[82]

77. This Court was very clear at the hearing on the preliminary approval of the Disclosure Statement that the standard for approving the Releases and so-called settlements had to be met at the confirmation hearing and that consideration was essential: "And I think the evidence has to be there. There has to be some reliance upon this release. There has to be a consideration factor."[83] None of this evidence is exists, and the Court should not approve the Debtor Releases without such evidence.

78. Most significantly, Fifth Circuit precedent provides that in approving a settlement, critical factors are (a) whether creditors support the settlement and (b) whether the settlement was reached between insiders without the participation of creditors.[84] Given that creditors had absolutely no role in the negotiation of the Plan or the Releases in favor of the Released Parties, some of whom are insiders of the Debtors, and that the sole beneficiaries of the Plan and primary beneficiaries of the Releases are each the various categories of Lenders, and the Debtors' officers, directors and employees – all of whom negotiated the Plan and the "settlement"

[82] *In re Age Refining, Inc.*, 801 F.3d at 540; *In re Jackson Brewing Co.*, 624 F.2d at 602.
[83] 12/17/24 Transcript at 96:17-19, and at 97:3-17 (discussing *KidKraft* case and how each released party paid something for the releases and stating: "If it's still a big fat goose egg at confirmation, well, that's going to be the evidence and we'll judge it then.").
[84] *Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995) ("In examining such a compromise, the bankruptcy court must consider the 'paramount interest of the creditors' and the nature of the negotiations as factors bearing on the wisdom of the compromise. The court's scrutiny must be great when the settlement is between insiders and an overwhelming majority of creditors in interest oppose such settlement of claims.").

on behalf of themselves without any creditor input – this Court cannot make the findings required by the Fifth Circuit in approving the so-called settlement and the concomitant Debtor Releases. The Debtor Releases, as currently set out in the Plan, are impermissible and cannot be approved.

(2) The Third Party Releases are Neither Consensual Nor Supportable Under Applicable Law.

79. The Debtors allege the Third Party Releases are: (a) consensual and thus permissible; (b) essential to the Confirmation of the Plan; (c) given in exchange for the good and valuable consideration provided by the Released Parties that is important to the success of the Plan; (d) a good faith settlement and compromise of the Claims released by the third-party releases.[85]

80. Not one of these statements is accurate. As a preliminary matter, the Third Party Releases are wholly gratuitous. Not one Released Party is paying any consideration to either the Debtors or any Releasing Party in exchange for the Third Party Release. This alone prevents the Court from approving the Releases.

81. Additionally, although a third-party release arguably may be approved ***if consensual***, the Debtors must still disclose what is being released, the basis for the release, and the consideration being paid for it. Under Fifth Circuit law which is still applicable post-*Purdue*, non-debtor releases do not violate the Bankruptcy Code ***only*** if they are (a) ***consensual***, (b) specific in language, (c) ***a condition of settlement***, ***and*** (d) ***given for consideration***.[86] This test is not met in these Chapter 11 Cases with this Plan.

82. With respect to the consent element, the Plan's Third Party Releases presume consent from either a vote for the Plan or inaction by creditors who fail to vote or opt out,

[85] Plan Art. IX.B.

[86] *See*, *e.g.*, *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 776 (Bankr. N.D. Tex. 2007), *aff'd*, 255 F. App'x. 909, 911-12 (5th Cir. 2007) (emphasis added); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987). *See also In re Bigler LP*, 442 B. R. 537, 543-44 (Bankr. S.D. Tex. 2010) ("But, such releases must satisfy the requirements of a valid settlement of claims under the Code. It would require, *inter alia*, consent and consideration by each participant in the agreement to be valid.").

thereby presuming that creditors have some legal obligation or incentive to respond to the "ask". That is not consent; it is coercion. The Third Party Releases are not essential to the confirmation of the Plan or important to the success of the Plan which is nothing more than a foreclosure sale sanitized by chapter 11 procedures which already protect the asset purchasers. The Third Party Releases are not in exchange for good and valuable consideration as none of the Released Parties is paying anything for the Releases. Nor are the Third Party Releases a good faith settlement of the claims or Causes of Action being released as no such claims or Causes of Action – especially direct claims of creditors – have even been identified or valued such they could even be settled.

83. This Court has previously indicated it will require evidence on claims and Causes of Action subject to the Releases and consideration to be paid for the Releases. None of this evidence exists and the Third Party Releases should be stricken from the Plan.

(a) This Court Lacks Jurisdiction to Require Creditors to Respond to the Opt Out Election.

84. Creditors are automatically bound by the Third Party Releases included in the Plan and the burden is on the claimant to opt out. The Debtors argue that this makes the Third Party Releases "consensual". The problem with this convenient sleight of hand is that this Court does not have the authority to default creditors into releasing non-debtors or find implied consent from inaction where nothing in the Bankruptcy Code or the jurisdiction of the Bankruptcy Court enables it to compel creditors to take any action other than with respect to the creditors' Claims against the Debtors. Mandating that a creditor take an affirmative step to avoid releasing a direct claim it has against a non-debtor is not within the purview of this Court.

85. The jurisdiction of the bankruptcy court, like that of other federal courts, is based upon and limited by statute. Pre-*Purdue*, courts determined they had jurisdiction over the claims of third parties against non-debtors by using the related-to jurisdictional provisions of 28

U.S.C. § 1334.[87] "Proceedings 'related to' the bankruptcy include (a) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (b) ***suits between third parties which have an effect on the bankruptcy estate***." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5) (citation omitted, emphasis added). Thus, in approving third party releases, courts customarily made findings that the third party claims the debtor sought to release would have an impact on the estate (such as in the case of a claim against a director who was indemnified by the debtor or a tortfeasor who shared insurance coverage with the debtor).[88]

86. There are two issues of consent at play here. First – does the Bankruptcy Court have jurisdiction to order the procedure being used by the Debtors which requires creditors to "opt out" of the automatic Third Party Releases or binds them to such releases if they vote for the Plan? Second, if the Bankruptcy Court has jurisdiction to authorize the procedure, does the procedure constitute consent under the facts and circumstances of these cases?

87. The Committee submits that this Court lacks jurisdiction to order the procedure itself under *Purdue*. The Bankruptcy Code sets out the procedures and requirements by which a debtor can address the ***claims against and property of the debtor***.[89] Nothing in the Bankruptcy Code authorizes the Bankruptcy Court to release, discharge or even determine the validity of the debt owed by one non-debtor to another.[90] Thus, declaring a release "consensual" does not eliminate the requirement that this Court, who is being asked to infer consent from either a vote for the Plan or a failure to vote and opt out, have jurisdiction to set out the procedure to

[87] *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, 301 F.3d 296, 304 (5th Cir. 2002) ("A proceeding is 'related to' a bankruptcy if 'the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy.'").
[88] *See, e.g. Johns-Manville Corp. v. Chubb Indemnity Ins. Co.*, 517 F.3d 52, 66 (2d Cir. 2008).
[89] *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 216 (2024).
[90] *Id*. at 215, *citing* 11 U.S.C. § 524(e).

determine consent in the first place.[91] Additionally, given that no Causes of Action are identified, no such claims could have an impact on the Estates.

88. The decision of the Supreme Court in *Wellness International, Ltd. v. Sharif*[92] is instructive. In *Sharif*, the Supreme Court held that a party could consent to the jurisdiction of the bankruptcy court to determine an Article III matter, but that such consent had to be "knowing and voluntary".[93] Thus, it is necessary for this Court to first determine if creditors have knowingly and voluntarily consented to this Court establishing the procedure for determining their direct claims against non-debtors before this Court can make the determination of whether they have consented to the Third Party Releases themselves. Simply put – the Court must have jurisdiction to require creditors respond to the "ask" before it can determine the legal effect of the "ask." The Committee submits that under the fact of this case and applicable law, the Court does not have the jurisdiction to require creditors to opt out of the Releases.

(b) <u>The Releases are Not Consensual and Neither a Vote for the Plan nor a Failure to Vote or Opt Out Makes them So.</u>

89. As relevant to unsecured creditors, the Plan provides that the following are Releasing Parties:

a. any Holders of Claims who vote for the Plan;

b. any Holders of Claims who are deemed to accept the Plan and do not opt out of or object to the Releases;

c. any Holders of Claims who do not vote or abstain from voting and do not opt out of or object to the Releases;

[91] A bankruptcy court's authority "to provide finality to a third-party is defined by its jurisdiction, not its good intentions." *Travelers Casualty & Surety Co. v. Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 66 (2d Cir. 2008), *rev'd and remanded on other grounds*, *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009); *see also Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 753-54 (5th Cir. 1995) (desire to foster, encourage and preserve settlement does not confer jurisdiction). The burden to establish federal jurisdiction rests on the party invoking it – here, the Debtors. *McNutt v. GMAC*, 298 U.S. 178, 189 (1936).
[92] 525 U.S. 665 (2015).
[93] *Id.* at 685.

d. any Holders of Claims who vote to reject the Plan and do not opt out of or object to the Releases.

None of these categories of claimants can be deemed to have consented to the Third Party Releases.

90. *Purdue* did not just establish that nonconsensual releases are impermissible. It also clarified earlier case law[94] that the ability of bankruptcy courts to take certain actions was limited by the express terms of the Bankruptcy Code. *Purdue* is a strict construction case.[95] Thus, if this Court is going to establish implied consent from certain actions (a vote in favor of the Plan or a no or non-vote plus a requirement that a second affirmative opt out step is exercised), this Court must determine if it has the authority to require creditors to make such a decision as to a non-debtor under the Bankruptcy Code, which is the statutory framework that only determines the rights of a debtor and its creditors – not those of third parties.

91. The Committee submits that this Court does not have the authority to strip a creditor of its rights and claims against a non-debtor simply by authorizing the Debtors to send out a Plan that purports to do so.[96] There must be something – *e.g.*, a statute that enables a court to require such action or a course of dealing -- that obligates a party to respond to an offer.[97] Unless

[94] In interpreting the Bankruptcy Code, the inquiry begins with the "language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (*citing Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). Where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Id.*, (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

[95] As the Supreme Court has indicated, the "only proper task [of courts] is to interpret and apply the law as we find it". *Harrington v. Purdue Pharma L.P.*, 603 U.S. at 226.

[96] Counsel for the Committee and the Court touched on the issue of authority of the court to send out the notice at the Disclosure Statement preliminary approval hearing, but as the issue was deemed one for confirmation, no conclusion was reached. *See* 12/17/24 Transcript at 79:4-14.

[97] *Norcia v. Samsung Telcoms. Am., LLC*, 845 F.3d 1279, 1284-1285 (9th Cir. 2017) ("An offeree's silence may be deemed to be consent to a contract when the offeree has a duty to respond to an offer and fails to act in the face of this duty"); *Rivera-Colón v. AT&T Mobility P.R., Inc.*, 913 F.3d 200, 211 (5th Cir. 2019) ("It is basic contract law that an offeror cannot unilaterally impose on another party the obligation to respond and reject their offer. See, e.g., 1 Corbin on Contracts § 3.19 (2018) ("It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to do so."); 2 Williston on Contracts § 6:50 (4th ed. 1993) ("Merely sending an unsolicited offer does not impose upon the party receiving it any duty to speak or deprive the party of its privilege of remaining silent without accepting.")"

there is some basis for the Court to require a non-debtor to opt out of a release of another non-debtor or otherwise be bound in the context of a Plan whose terms and procedures are established by the Bankruptcy Code which does not contain any such provision, the Third Party Releases cannot be deemed consensual by default.

92. *Purdue* and applicable Fifth Circuit law mandates that third party releases may only be included in a plan if they are consensual. It is the duty of the Bankruptcy Court to ensure that such consent actually exists – otherwise "consent" is a sham and a mere work-around to avoid the implications of the Supreme Court's *Purdue* ruling. The legal definition of consent is a person's voluntary and informed agreement to participate in an activity. Consent can be given verbally or in writing or inferred from actions or signs.[98] This is consistent with the Supreme Court's ruling in *Sharif*.

93. In determining what does or does not constitute consent from both a legal and factual basis, the first question is does the Bankruptcy Code contain provisions instructing the Court as to what constitutes consent? It does not.[99] Nor does any federal law generally govern when or whether the non-debtor Releasing Parties have agreed to release the non-debtor Released Parties. Thus, the Bankruptcy Court must look elsewhere to enable it to determine whether one non-debtor has agreed to release its claims and causes of action against another non-debtor.

94. That source can only be applicable state law. Outside of bankruptcy, debtor/creditor relations are governed by state law[100] – and the applicable state law may vary

[98] *See* LII Legal Information Institute, WEX Definitions at https://www.law.cornell.edu/wex/consent, ("Consent means that a person voluntarily and willfully agrees in response to another person's proposition.").

[99] Nor does 11 U.S.C. § 105(a) confer any power to create a separate consent provision. Rather, section 105(a) "serves only to 'carry out' authorities expressly conferred elsewhere in the code." *Purdue*, 603 U.S. at 216, n.2.

[100] Even as to a debtor, 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. 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.

depending on the nature of the cause of action (contract or tort) and other factors that courts use to determine choice of law. In ordinary circumstances, where a creditor agrees to settle or release its claim against an obligor, state law provides the basis for such an agreement.[101] Thus, the Court must look to state law to determine whether consent can be implied from inaction (a failure to opt out) or must be express (an opt in).[102]

95. A number of courts have made this extensive analysis post-*Purdue*. In *In re Tonawanda Coke Corp*., 662 B.R. 220 (Bankr. W.D.N.Y 2024), the bankruptcy court held that because *Purdue* did not indicate what constitutes a consensual release, any proposal for a release of non-debtors was an ancillary contractual offer subject to state law acceptance principles.[103] The court determined that New York contract law (which the court found applied to the tort claims subject to the releases in that case) requires that an agreement to "discharge" an "obligation" must be in writing and signed by the party against whom it would be enforced.[104] The court stated: "'Consent and failure to object are not synonymous.'"[105] Therefore, in order for a plan to effectuate a non-debtor third party release, creditors must be permitted to expressly opt in to effectuate consent.[106]

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.").

[101] *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."); *Patterson v. Mahwah Bergen Ret. Grp., Inc*., 636 B.R. 641, 684-85 (E.D. Va. 2022) (state contract law governs a determination as to whether a party has agreed to a release.)

[102] *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)).

[103] *Id.* at 622.

[104] *Id*. at 222-223.

[105] *Id*. at 223 (*quoting In re Arch Hospitality, Inc*., 530 B.R. 588, 591 (Bankr. W.D.N.Y. 2015)).

[106] *See also In re Ebix*, Case No. 24-80004-SWE-11 (Bankr. N.D. Tex.) (Transcript of Aug. 2. 2024 confirmation ruling) (court declined to enforce non-debtor releases against creditors who did not return ballots, determining that under Texas law, consent could not be implied from inaction); *In re Red Lobster Management LLC*, Case No. 24-02486 (Bankr. M.D. Fla), *Order Granting Debtors' Expedited Motion for Entry of an Order (I) Conditionally Approving Disclosure Statement for the Proposed Joint Chapter 11 Plan of Red Lobster Management LLC and Its Debtor Affiliates, (II) Approving the Solicitation and Voting Procedures with Respect to Confirmation of the Proposed Joint Chapter 11 Plan of Red Lobster Management LLC and Its Debtor Affiliates, and (III) Granting Related Relief* [Docket No. 736, July 29, 2024] (determining that anyone with legal claims against non-debtors must expressly

96. Exactly what state law would be applicable here is hard to determine as the Debtors have failed to identify any actual claims and Causes of Action owned by the Releasing Parties it believes are included in the Non-Debtor Releases. Of special concern must be any tort claims of patients and nursing home residents against employee Released Parties, as such claims are generally governed by the law of the state in which the tort occurs.

97. In *Ebix*, the bankruptcy court opted to analyze the law of the state in which the bankruptcy case was located – Texas. In analyzing Texas law, federal courts have indicated:

> Texas embraces the classic definition that waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming the right. To establish abandonment or waiver under Texas law, there must be proof of intent to relinquish a known right. A waiver of rights may result where a party demonstrates intentional relinquishment of rights of which the party has full knowledge. Waiver is largely a question of intention and may be either express or implied. Implied waiver must be evidenced by clear, unequivocal, and decisive acts from which can be inferred an intent to relinquish the right in question. Waiver by implication will be applied only to prevent fraud or inequitable consequences. As is clear from a reading of Texas law, waiver is principally an issue of the intent of the party possessing the right. In Texas, questions such as intent are considered inherently to be for the trier of fact.[107]

The Court cannot make these findings in regard to the Third Party Release opt out provisions of the Plan.

98. In *In re Smallhold, Inc.*, 2024 Bankr. LEXIS 2332, *4 (Bankr. D. Del. Sept. 25, 2024), the bankruptcy court did an extensive analysis of consent in the context of opt in vs. opt

---

consent with an opt-in before their claims against non-debtors are released, citing *Purdue*); *In re Lumio Holdings, Inc.*, Case No. 24-11916 (Bankr. D. Del.) (Stickles, J.), Jan. 3, 2025 ruling on preliminary approval of the disclosure statement ("I'm skeptical at this point that opt out is appropriate for any class of a creditor who's already been told they're not entitled to vote and they are not entitled to a recovery, or with respect to the GUCs, the GUC recovery is unknown" (*quoted* at https://www.law360.com/articles/2279357/optout-releases-in-lumio-s-ch-11-plan-rejected?copied=1.)

[107] *Biesel v. Billings (In re Biesel)*, 2002 U.S. Dist. LEXIS 7357, *22-23 (N.D. Tex. April 24, 2002) (*quoting Holloway v. HECI Exploration Co. Employees' Profit Sharing Plan*, 76 B.R. 563 (N.D. Tex. 1987) (Fitzwater, J.), *aff'd*, 862 F.2d 513, 572-73 (5th Cir. 1988)); *see also Bott v. J.F. Shea Co.*, 388 F.3d 530, 533 (5th Cir. 2004) (discussing Texas law).

out provisions and concluded that the default analysis used to justify implied consent from a failure to opt out is no longer viable after *Purdue*. The court reasoned that consent by default, using the analogy of a default judgment, was based on the authority of a court to default someone for relief the court was authorized to grant in the first place – such as giving a creditor notice of a cure payment upon the Bankruptcy Code-sanctioned assumption of a contract.[108] However, since nonconsensual releases are no longer permitted, there must be some other basis upon which the court can enter such relief. That must come from actual consent – an opt in by which a creditor can affirmatively inform the court it agrees to release its claims against non-debtors.

99. The *Smallhold* court also discussed the convenience of opt out provisions[109] and determined that the procedural convenience of treating claims collectively in the release context is no longer appropriate post-*Purdue*. While the Bankruptcy Code is, by analogy, a collective process, like a class action lawsuit, for resolving claims against ***a debtor*** which are classified into categories each of which must receive equal treatment, nothing in the Bankruptcy Code creates that procedure for the claims of one non-debtor against another – even if such claims may have some relation to the debtor.[110]

100. Consent can only be implied from circumstances where there is a duty to speak or act. The Bankruptcy Code does not impose such a duty on creditors as to the claims of non-debtors and this Court cannot unilaterally impose such a duty.[111] Thus, giving notice of the

[108] *Id*. at *5-6.
[109] *Id.* at *3.
[110] Confirmation is not a class action and is not intended to deal with the claims of non-debtors against other non-debtors. *In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015) ("people who fail to respond to class action notices are bound because that is the legal consequence that the [class action] Rule specifies, and not on the theory that their inaction is the equivalent of an affirmative joinder in an action."). No such process or procedure is established in the Bankruptcy Code for the claims of non-debtors against other non-debtors.
[111] *In re SunEdison, Inc*., 576 B.R. at 458-61 (creditors failing to vote did not implicitly consent to third party releases, explaining that under generally accepted principles of contract law, silence does not imply consent absent a duty to speak).

Third Party Releases in the Solicitation Package is not the same as giving notice of the requirement that a proof of claim be filed or that a default judgment will be entered if a party does not respond to a complaint because in those situations, the obligation of the noticed party to take action and the repercussions of the failure to act are set out in a statutory scheme. No such statutory scheme exists here that enables the Court to require that a party take action to avoid being bound by a Third Party Release.

101. In the context of this Plan, this structure effectuates a forced nonconsensual release. Once a creditor determines that it is not getting any recovery on its Claims against the Debtors, why would such creditor read any further to learn that the potential impact of its failure to act will effectuate a gratuitous release of unidentified personal claims that creditor might have against an amorphous universe of Released Parties and that the creditor is required to take immediate action to prevent that from occurring?

102. Even prior to *Purdue*, the practice of conferring consent to plan provisions impacting non-debtor relationships from unresponsive creditors has been the subject of criticism.[112] In refusing to confirm the terms of a plan containing so-called consensual third-party releases subject to a negative notice opt out process, the court in *Emerge Energy Services* dealt with the exact fact scenario that exists here – ***a plan-dictated requirement that creditors who are receiving no distribution affirmatively opt out of a release***. The court discussed the issues in the context of basic contract principles, holding as follows:

> For the Court to infer consent from the nonresponsive creditors and equity holders, the Debtors must show under basic contract principles that the Court may construe silence as acceptance because (1) the creditors and equity holders accepted a benefit knowing that the Debtors, as offerors, expected compensation; (2) the Debtors gave the creditors and equity

[112] *In re Emerge Energy Services LP.*, 2019 Bankr. LEXIS 3717 (Bankr. D. Del. December 5, 2019); *In re SunEdison, Inc.*, 576 B.R. at 458-61*; see also In re Wash. Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011); *In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del 1999).

> holders reason to understand that assent may be manifested by silence or inaction, and the creditors and equity holders remained silent and inactive intending to accept the offer; or (3) acceptance by the creditors and equity holders can be presumed due to previous dealings between the parties. The Debtors cannot do so. The Class 6 creditors and Class 9 equity holders are receiving no distribution under the Plan and no previous dealings between the parties are in evidence. Moreover, while the Debtors included on the ballot and Opt-Out Form notice to the recipients of the implications of a failure to opt-out**, *the Court cannot 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.***
>
> The Court must respectfully disagree with its colleagues who have held differently as it has concluded that a waiver cannot be discerned through a party's silence or inaction unless specific circumstances are present. 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.[113]

103. While certain courts have continued to deem consent from a vote for the Plan as well as from a failure to opt out, the Committee submits such cases are wrongly decided and that the analysis used by the Supreme Court to invalidate nonconsensual releases will be utilized to insure that any so-called consensual release is actually consensual as to each category of "releasing party" regardless of whether such claimant votes for, votes against or, for whatever reason, refrains from voting on, the plan.

104. The mere fact that a creditor votes for a plan is legally insufficient to deem such vote to include consent to the release of a non-debtor because the Bankruptcy Code expressly gives creditors the right to vote on a Plan that determines their claims against the Debtor – not against third parties. A vote to approve a plan cannot, by itself, constitute consent to a non-debtor

[113] 2019 Bankr. LEXIS 3717, at *53-55 (emphasis added).

release.[114] There is nothing in the Bankruptcy Code that authorizes treating a vote to accept a chapter 11 plan as consent to a third-party release.[115]

105. This is especially the case here where creditors who vote for a Plan are deemed to have "consented" to the Third Party Releases notwithstanding that they are not getting any benefit from the Third Party Releases as no consideration is being paid for them. No theory of law permits the Debtors to force creditors to waive their claims against non-debtors yet pay nothing for that waiver. Because creditors are statutorily 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 Debtors' Plan.

106. Indeed, the Debtors' definition of Releasing Party is evidence of the coercive nature of the Third Party Releases. A creditor who votes for the Plan is immediately deemed to have consented to the Releases, but a creditor who votes against the Plan is not deemed to have rejected the Releases – only the Plan – and must take the second step of opting out of the Releases. This defies logic as the creditor who votes against the Plan has clearly rejected the Plan in its entirety, including the Third Party Release. As the court stated in *Chassix*: "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. at 79.

[114] *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) (a voluntary release arises only "because the creditor agrees" to it and "a creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings").
[115] *See Congoleum Corp.*, 362 B.R. at 194; *In re Digital Impact, Inc.*, 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998).

107. Meanwhile, anyone who does not vote is deemed to have consented to the Releases without any evidence as to whether notice was actually received or any evidence – as required by state law – that the consent was intentional and knowing. Such a presumption, without a statutory basis for making it, cannot meet the test of consent being "knowing and voluntary".[116]

108. The Releases here are coercive, not consensual, and should not be approved without further explanation of their scope and necessity, and with the coercive elements and processes removed. Otherwise, unsecured creditors are effectively being forced to "consent" to Third Party Releases of unknown claims in exchange for no consideration whatsoever.

(b) Third Party Releases are Not Necessary to the Plan.

109. The Debtors allege the Debtor and Third Party Releases are necessary to the Plan. Nothing in the Disclosure Statement supports this allegation and the Debtors cannot present any evidence on this point. The Plan is a pure liquidation. All of the Debtors' operating assets have been sold with closing of such Sale Transactions to occur on or before the Effective Date. All remaining assets will be liquidated by the Plan Administrator. No operating entity remains post-confirmation. No officers or directors (current or former) will continue to serve and the Plan Administrator will assume their roles.[117] The Plan Administrator's role is to effectuate the Wind Down,[118] and the Plan Administrator is expressly prohibited from receiving or retaining any operating assets or taking any action inconsistent with the liquidation of the Debtors' Estates.[119]

[116] *Sharif*, 525 U.S. 685.
[117] *See* Plan, Art. IV.N.2 (indicating all officers and directors will be deemed to have resigned as of the Effective Date with their role assumed by the Plan Administrator).
[118] Wind-Down" means, following the closing of the Sale Transactions, the process to wind down and dissolve the Estates and sell or otherwise distribute any Remaining Assets in accordance with the Plan, as described in more detail in Article IV.B. herein. Plan, Art. I.
[119] *See* Plan Supplement, Ex. C, Plan Administrator Agreement, § 2.6(c) and (e).

110. None of the Released Parties have expressly stated that they would not propose or agree to the Plan unless they get the Third Party Releases. The Committee is not opposed to the protections afforded by the Bankruptcy Code being provided to the various purchasers (against whom no creditor is likely to have any direct claim related to the Debtors). The various Lenders are getting paid the proceeds of their collateral and no doubt, would agree to receive such recovery even if the Plan did not contain Third Party Releases. The current officers and directors should have no say in the matter as they have a fiduciary duty to maximize value for the Estates and have no post-effective date role in the Debtors. The former officers and directors certainly have impact on the ability of the Debtors to confirm a plan.

111. Additionally, the mere fact that parties can opt out of the Releases, shows they are unnecessary. The Third Party Releases should be stricken from the Plan, or alternatively, subject to an opt in procedures such that consent can be knowingly granted by those creditors who wish to grant them.

C. The Plan Contains an Improper Classification Scheme that Unfairly Discriminates Against General Unsecured Creditors in Favor of the Lenders.

112. Section 1122 of the Bankruptcy Code governs the classification of claims and interests under a chapter 11 plan.[120] Section 1122(a) provides, in relevant part, that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."[121]

[120] Section 1122 of the Bankruptcy Code provides as follows:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

[121] 11 U.S.C. § 1122(a).

113. The Debtors and Lenders try to hide the ball, not expressly explaining in the Plan in which class the Lenders' deficiency claims are placed; indeed, the term "deficiency claim" is not used in the Plan or Disclosure Statement. The Lenders' class (Class 2 First Lien Debt Claims) appears to include all claims related to the prepetition loan obligations, including presumably deficiency claims, but this point is unclear.[122] Assuming the Lenders' secured and deficiency claims are all in a single class (Class 2), then the Debtors' classification structure impermissibly places substantially dissimilar claims (*i.e.*, the secured and the unsecured deficiency claims of the Lenders) in one class.[123]

114. Moreover, until and unless the Debtors explain and prove otherwise, the Lenders' deficiency claims, being in Class 2, are being treated better and receiving significantly more consideration than other general unsecured claims in Class 3. This is because under the Plan, the Lenders are not only getting all the proceeds from the sale of their collateral, they are getting the proceeds of the Wind-Down. To the extent the Lenders receive in excess of the .025% being paid to general unsecured creditors on their deficiency claims, the Lenders' unsecured claims are getting superior treatment in violation of the Bankruptcy Code.

115. Such unfair discrimination and disparate treatment preclude confirmation of the current Plan.[124]

---

[122] *See* Plan, Art. I at 10 ("First Lien Debt Claims" is defined as "any Claim on account of the Prepetition Term Loans").

[123] *See, e.g., In re D & W Realty Corp*., 165 B.R. 127, 129 (S.D.N.Y. 1994) (mortgagee's secured claim and unsecured deficiency claim cannot be classified in same class because "a secured claim and an unsecured claim, even those of the same creditor, are about as dissimilar as two claims can be"); *In re 266 Washington Assocs*., 141 B.R. 275, 285 (Bankr. E.D.N.Y. 1992), *aff'd sub nom. In re Washington Assocs*., 147 B.R. 827, 828 (E.D.N.Y. 1992) (plan impermissibly classified mortgagee's secured claim and unsecured deficiency claim in one class); *In re Sullivan*, 26 B.R. 677, 678 (Bankr. W.D.N.Y. 1982) (classification of secured claim and unsecured priority claim in same class was improper).

[124] *See, e.g., In re Bankston*, 2010 Bankr. LEXIS 854, at *35 (Bankr. W.D. La. Jan. 15, 2010) ("an unsecured deficiency claim may be classified separately from trade vendors, but that separate classification does not authorize different treatment. *See* H. Rep. No. 595, 95th Cong., 1st Sess. pp. 413 to 418 (1977)"); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986*)* (plan proponent "may not segregate two similar claims or groups of claims into separate classes and provide disparate treatment for those classes"), *aff'd in part, rev'd in part on other grounds*, 78

D. The Plan's Exculpation/Injunction Provisions Act as an Improper Discharge of the Debtors.

116. The Debtor's Plan should not be confirmed because it fails to comply with section 1141(d)(3) of the Bankruptcy Code. The Plan's Exculpation[125] and Plan Injunction[126] function in effect as a complete discharge of the Debtors in violation of section 1141(d)(3).

B.R. 407 (S.D.N.Y. 1987), *aff'd, Kane v. Johns-Manville* Corp. 843 F.2d 636 (2d Cir. 1988). The burden is on the Debtors to prove that the Plan does not discriminate unfairly. *In re Idearc, Inc*., 423 B.R. 138, 171 (Bankr. N.D. Tex. 2009) ("At a minimum, however, the unfair discrimination standard prevents creditors and equity interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so."); *In re Cypresswood Land Partners, I*, 409 B.R. 396 (Bankr. S.D. Tex. 2009) ("'The concept of unfair discrimination was designed to maintain equity among creditors of equal priority.'") (*quoting In re Orawsky*, 387 B.R. 128, 141 (Bankr. E.D. Pa. 2008)).

[125] *See* Plan, Art. X.C. The Plan, at p. 9, defines "Exculpated Party" to include (a) the Debtors; (b) the Debtors' directors and officers who served at any time between the Petition Date and the Effective Date; (c) the managing members of those Debtors who are limited liability companies; (d) such Released Parties that are fiduciaries to the Debtors' Estates; (e) the Committee; (f) the members of the Committee in their capacity as such; (g) the individual Persons who served on the Committee on behalf of any member of the Committee; and (h) all Professionals retained by the Debtors and the Committee in these Chapter 11 Cases.

[126] *See* Plan, Art. X.D. As noted above, the Plan's injunction provision at Article IX.D is sweeping:

> "Except as otherwise expressly provided in the Plan or the Confirmation Order or for obligations issued or required to be paid pursuant to the Plan or the Confirmation Order, all Entities who have held, hold, or may hold Claims or Interests or Causes of Action, as applicable, that have been released, discharged, or are subject to exculpation are permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Post-Effective Date Debtors, the Exculpated Parties, or the Released Parties: (1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests or Causes of Action, as applicable; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests or Causes of Action, as applicable; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or the Estates of such Entities on account of or in connection with or with respect to any such Claims or Interests or Causes of Action, as applicable; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims or Interests or Causes of Action, as applicable, unless such Holder has Filed a motion requesting the right to perform such setoff subrogation, or recoupment on or before the Effective Date, and notwithstanding an indication of a Claim or Interest or Cause of Action or otherwise that such Holder asserts, has, or intends to preserve any right of setoff, subrogation, or recoupment pursuant to applicable Law or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests or Causes of Action, as applicable, released or settled pursuant to the Plan…. Upon entry of the Confirmation Order, all Holders of Claims and Interests and their respective current and former employees, agents, officers, directors, principals, and direct and indirect affiliates shall be enjoined from taking any actions to interfere with the implementation or Consummation of the Plan. Except as otherwise set forth in the Confirmation Order, each Holder of an Allowed Claim or Allowed Interest, as applicable, by accepting, or being eligible to accept, distributions under or Reinstatement of such Claim or Interest, as applicable, pursuant to the Plan, shall be deemed to have consented to the injunction provisions set forth in this Restructuring Term Sheet and the Plan."

117. Section 1141(d)(3) of the Bankruptcy Code makes clear that a liquidating corporate debtor is not entitled to a discharge in bankruptcy. It states, "[c]onfirmation of a Chapter 11 plan does not discharge a debtor if: (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title."[127] Section 727(a) does not grant a discharge if the debtor is not an individual.[128]

118. As noted above, the Plan and the Plan Administrator Agreement implement the liquidation of the Debtors. The Plan Administrator's role is to "effectuate the Wind-Down" within the constraints of the "Wind-Down Budget" and the Plan Administrator is responsible for (among other duties) implementing all sales orders and "tak[ing] all actions reasonably necessary to wind down the Estates …," "sell[ing] or abandon[ing] any Remaining Assets …," "implement[ing] the Wind-Down" and "fil[ing] one or more motions to close the Chapter 11 Cases."[129] The Plan Administrator is prohibited from "receiv[ing] or retain[ing] any operating assets of an ongoing business" or "tak[ing] any actions inconsistent with the orderly liquidation of the Estates or as are required by applicable law, the Plan, or the Confirmation Order."[130] Once the Wind-Down is complete, the Plan Administrator is responsible for dissolving the Debtors.[131]

119. Section 1141(d)(3) "prevents corporations and partnerships from proceeding under chapter 11 with a plan that is nothing more than a liquidation in order to circumvent section 727(a)'s prohibition against a discharge of a corporation or partnership in a

[127] 11 U.S.C. § 1141(d)(3).
[128] 11 U.S.C. § 727(a)(1).
[129] Plan Supplement, Ex. C (Plan Administrator Agreement) §§ 2.3(a), (b), (g), (r), (s), 2.5(e), 2.7 at 2-6.
[130] *Id.* §§ 2.6(c), (e) at 5.
[131] *Id.* § 5.2 at 12-13.

chapter 7 liquidation case."[132] Confirmation of a liquidating plan operates as a denial of discharge.[133]

120. As the Fifth Circuit has stated:

> Whether a corporate debtor "engages in business" is "relatively straightforward." *Um v. Spokane Rock I, LLC*, 904 F.3d 815, 819 (9th Cir. 2018) (contrasting the more complex question for individual debtors); *see Grausz v. Sampson (In re Grausz)*, 63 F. App'x 647, 650 (4th Cir. 2003) (*per curiam*) (same). That is, "a business entity will not engage in business post-bankruptcy when its assets are liquidated and the entity is dissolved." *Um*, 904 F.3d at 819 (collecting cases).[134]

This is exactly the fact scenario in these Chapter 11 Cases post-Effective Date.

121. Because under section 1141(d)(3), a liquidating chapter 11 plan may not provide for the discharge of the debtor, an injunction preventing post-confirmation claims prosecution operates as an impermissible discharge of the Debtors.[135]

122. Similarly, the Plan's Exculpation provision, as applied to the Debtors, impermissibly provides them with a *de facto* discharge.[136]

---

[132] 6 COLLIER ON BANKRUPTCY ¶ 727.01[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2021).

[133] *Teamsters' Pension Tr. Fund v. Malone Realty Co*., 82 B.R. 346, 349 (E.D. Pa. 1988). "[T]he lack of a discharge means that the creditor is not barred from proceeding against the corporation itself and whatever assets might subsequently come into its possession." *In re Fairchild Aircraft Corp*., 128 B.R. 976, 982 (Bankr. W.D. Tex. 1991).

[134] *Nexpoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 432-433 (5th Cir. 2022).

[135] *See, e.g., In re Bigler LP*, 442 B.R. at 545–46 ("An injunction preventing the post-confirmation prosecution of claims would certainly operate as a discharge of the [d]ebtors. . . . For the same reasons, actions against property of the Estate may not be enjoined after the confirmation of a liquidating plan"); *In re Fairchild Aircraft Corp*., 128 B.R. at 981-82 ("corporate debtors which are liquidated by [a] plan do not receive a discharge"; "Congress designed Section 1141(d)(3) to discourage trading in corporate shells" (*citing* H.R. Rep. No. 595, 95th Cong. 1st Sess. 384 (1977)); *In re New Towne Dev., LLC*, 410 B.R. 225, 230, 232 (Bankr. M.D. La. 2009) ("New Towne is not entitled to a discharge under the proposed Plan because it provides for liquidating substantially all the debtor's assets; New Towne will not continue to operate post-confirmation; and the debtor, which is not an individual, is not entitled to a chapter 7 discharge. 11 U.S.C. §§ 1141(d)(3), 727(a)(1)."); *In re Capco Energy, Inc*., 2011 WL 13508, at *5 (Bankr. S.D. Tex. Jan. 4, 2011) (holding that the debtor was not entitled to a discharge because the debtors are corporations which filed liquidating chapter 11 plans).

[136] *See, e.g., In re Sis Corp*., 120 B.R. 93, 96 (Bankr. N.D. Ohio 1990) (language that limits a debtor's liability is impermissible in a liquidating plan because the language would effectively "provide the [d]ebtors with a discharge on those specific obligations which are not otherwise treated in the Plan. Such an effort is contrary to the letter and intent of § 1141(d)(3) of the Code"); *In re The Fairchild Corp*., C.A. No. 09-10899, 2014 WL 7215211, at *3 (D. Del. Dec. 17, 2014) (confirmation of a liquidating plan denies a discharge and dissolves the automatic stay). The Plan's Exculpation provision also suffers from other defects including exculpating claims relating to prepetition actions or omissions (not just postpetition) and potentially covering non-debtor parties that are not estate fiduciaries. These

123. Accordingly, the Debtors' liquidating Plan violates Bankruptcy Code section 1141(d)(3) and cannot be confirmed.

E. The Debtors' Assumption of All Insurance Policies and the Costs Associated with Such Assumption, and Certain Other Insurance Related Provisions, May Be Prejudicial to the Estates.

124. Under the Plan, the Debtors propose to treat all D&O Liability Insurance Policies (which the Committee understands could provide up to approximately $45 million in coverage) as executory, and to assume them.[137] The Disclosure Statement does not indicate why such express assumption is necessary or advisable. The Debtors need to disclose their reasoning and the associated costs. Salient questions for the Debtors include what is the need (if any) for assumption of any policies where the premium has been paid.[138]

125. Further, the Releases proposed by the Plan release all current and former directors and officers of the Debtors (covered as "Related Parties" of the Debtors). The Disclosure Statement does not explain the grounds for releasing all directors and officers of the Debtors, including former ones. As discussed herein, this information was critical for creditors to assess whether to have opted out of the Releases, as well as to assess the impact of the assumption of all D&O Liability Insurance Policies.

provisions are impermissible and must be stricken as violative of section 524(e). *Nexpoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th at 435-38.

[137] *See* Plan, Art. V.D at 38-39.

[138] Other questions and issues include (i) why is there discussion of who gets the benefit of the applicable D&O Liability Insurance Policies in Article V.D of the Plan, where the policies' definitions of "Insured Person" will govern; (ii) whether sufficient consideration has been given to whether the use of the Plan Administrator, instead of a liquidating trustee, to prosecute causes of action against directors and officers may prejudice the Estates and unnecessarily create potential insured v. insured exclusion issues; and (iii) whether the Plan definition of the D& Liability Insurance Policies should be expressly broadened (*e.g.*, policies (such as SIDE A policies) otherwise covering the Debtors' directors, officer or executives as insureds).

F. The Debtors' Plan was Filed in Bad Faith.

126. Section 1129(a)(3) requires that a plan be proposed in good faith in order to be confirmed. An overarching confirmation inquiry for the Court is whether the Plan represents a fair, reasonable and viable alternative to maximize recoveries for creditors under all pertinent circumstances of these Chapter 11 Cases, including (a) the valuations of the Debtors (which the Debtors submit will be evidenced by the Debtors' sale process in lieu of any expert valuation), (b) the extent of unencumbered and potentially unencumbered property and assets of the Debtors (including potential D&O and other litigation claims), the value of which should be shared by general unsecured creditors, and (c) the validity and extent of all applicable Lenders' and insiders' claims, liens and security interests, and whether such parties are subject to any potential Estate claims and Causes of Action.

127. Ultimately, the fundamental question is whether the Lenders may receive under the Plan more value than they are entitled to under the Bankruptcy Code and applicable state law (*e.g.*, the Uniform Commercial Code), at the expense of unsecured creditors. However, based on the Committee's preliminary expedited investigation of the Lenders' and other third parties' asserted secured claims and liens, suspect prepetition transactions and actions, and other case matters, undue value will be provided to the Lenders and/or effectively released and waived by the Estates under the Debtor Releases for no consideration.

128. Based on the Committee's preliminary investigation, there are various Unencumbered Assets, which assets and their value properly belong to unsecured creditors. Based on the Committee's expedited investigation and as set forth in detail above, the Committee believes there are various potentially valuable claims and Causes of Action against insiders and other third parties. The proposed Releases will effectuate the release and waiver such Potential Estate Claims

for no consideration whatsoever while the Retained Causes of Action and other Unencumbered Assets are utilized for the benefit of the Lenders rather than unsecured creditors.

129. The Court's determination of whether a plan has been proposed in good faith is to be made in light of "the totality of the circumstances surrounding confirmation" of the plan.[139] As discussed herein, since the Petition Date, the Debtors and Lenders have refused to engage in meaningful plan negotiations with the Committee. This is not an unusual case. The Plan structure here should have provided for a post-effective date liquidating trust for the benefit of general unsecured creditors into which any Unencumbered Assets and retained Causes of Action could distributed to be liquidated, prosecuted or settled with an allowance of reasonable funding for operating the trust. Instead, the unsecured creditors are receiving nothing and no effort has been made by the Debtors to even negotiate a consensual resolution of these Chapter 11 Cases. The Lenders are purely pursuing their own agenda here, and the Debtors have acquiesced, in setting up a Plan with basically nothing for general unsecured creditors.

130. In sum, the totality of the circumstances demonstrates the lack of good faith in the filing of the Plan. The chapter 11 process is not intended to unfairly benefit the debtor's secured lenders, and it cannot deprive creditors and parties-in-interest of their due value entitlements, reallocate such entitlements to the lenders or other favored stakeholders, and otherwise over-compensate preferred parties.[140]

---

[139] *In re Jasik*, 727 F.2d 1379, 1385 (5th Cir. 1984).

[140] *See, e.g., In re Quigley Co., Inc.,* 437 B.R. 102 (Bankr. S.D.N.Y. 2010) (plan process benefitting certain preferred creditors to the detriment of others not proposed in "good faith"); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 240 (Bankr. D. N.J. 2000) ("Of course, the classification and treatment of classes of claims is always subject to the good faith requirements under § 1129(a)(3)."); *In re Bashas' Inc*., 437 B.R. 874, 909 (Bankr. D. Ariz. 2010) ("Good faith is an inherent requirement which runs throughout the entire Bankruptcy Code. Because the bankruptcy court is a court of equity, as well as a court of law, and because of the fluidity of bankruptcy proceedings, equity demands a constant balancing of the competing needs of the various constituencies. It is essential that bankruptcy proceedings be transparent, candid and always operate in that spirit.").

RESERVATION OF RIGHTS

131. The Committee reserves its right in all respects to supplement this Objection at or prior to the Confirmation Hearing, and to further object to both the Disclosure Statement and the Plan.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Committee respectfully requests that the Court deny final approval of the Disclosure Statement, deny confirmation of the Plan and grant the Committee such further relief as may be just and proper under the circumstances.

(*Remainder of page intentionally left blank*)

Dated: January 24, 2025

Respectfully submitted,

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Michael D. Warner

Michael D. Warner, Esq. (TX Bar No. 00792304)
Benjamin L. Wallen, Esq. (TX Bar No. 24102623)
700 Louisiana Street, Suite 4500
Houston, TX 77002
Telephone: (713) 691-9385
Facsimile: (713) 691-9407
Email: mwarner@pszjlaw.com
bwallen@pszjlaw.com

- and -

Bradford J. Sandler, Esq. (*pro hac vice* forthcoming)
Robert J. Feinstein, Esq. (*pro hac vice* forthcoming)
780 Third Avenue, 34th Floor
New York, NY 10017
Telephone: (212) 561-7700
Facsimile: (212) 561-7777
Email: bsandler@pszjlaw.com
rfeinstein@pszjlaw.com

-and-

Andrew H. Sherman, Esq. (admitted *pro hac vice*)
Boris I. Mankovetskiy, Esq. (admitted *pro hac vice*)
SILLS CUMMIS & GROSS P.C.
The Legal Center
One Riverfront Plaza
Newark, NJ 07102
Telephone: (973) 643-7000
Facsimile: (973) 643-6500
Email: asherman@sillscummis.com
bmankovetskiy@sillscummis.com

Proposed Counsel to the Official Committee of Unsecured Creditors

CERTIFICATE OF SERVICE

I certify that on January 24, 2025, I caused a copy of the foregoing document to be served via the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas.

/s/ Michael D. Warner
Michael D. Warner