IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	**Chapter 11**
SUNPOWER CORPORATION, *et al.*[1]	)	**Case No. 24-11649 (CTG)** **(Jointly Administered)**
Debtors.	)	
	)	**Hearing Date: September 23, 2024 at 10:00 a.m.** **Obj. Deadline: September 20, 2024 at 4:00 p.m.** **(extended for the SEC by consent of the Debtors)**

OBJECTION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT

The U.S. Securities and Exchange Commission ("**SEC**") objects to the approval of the Amended Disclosure Statement for the Joint Plan of SunPower Corporation and its Debtor Affiliates (the "**Disclosure Statement**") [Docket Nos. 313, 515].

INTRODUCTION

1. The SEC is the federal agency responsible for regulating the U.S. securities markets, protecting investors, and enforcing the federal securities laws. In that capacity, the SEC is formally investigating whether SunPower Corporation ("**SunPower**"), its Debtor Affiliates (collectively, the "**Debtors**") or others may have violated the anti-fraud and other provisions of the federal securities laws.

2. The Disclosure Statement describes a plan that violates the Bankruptcy Code, including by impermissibly releasing and enjoining claims of non-voting public shareholders

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: SunPower Corporation (8969); SunPower Corporation, Systems (8962); SunPower Capital, LLC (8450); SunPower Capital Services, LLC (9910); SunPower HoldCo, LLC (0454); SunPower North America, LLC (0194); Blue Raven Solar, LLC (3692); Blue Raven Solar Holdings, LLC (4577); BRS Field Ops, LLC (2370); and Falcon Acquisition HoldCo, Inc. (3335). The location of the Debtors' service address for purposes of these chapter 11 cases is: 880 Harbour Way South, Suite 600, Richmond, CA 94804.

against numerous non-debtor persons and entities. A shareholder's failure to return an unsolicited opt-out form is insufficient evidence of consent to the release, which consent is now required after the Supreme Court's decision in *Harrington v. Purdue Pharma L.P.* Additionally, the books and records provision of the plan should be amended to provide the SEC with advance notice of any contemplated abandonment or destruction of documents.

3. The SEC staff has communicated to Debtors' counsel its concerns about the deficiencies set forth below. To date, counsel has not adequately addressed those concerns.

BACKGROUND

4. SunPower is a publicly-traded company based in Richmond, California, and operated in the residential solar energy and storage market in North America for over 30 years.

5. On August 5, 2024, each of the Debtors filed their voluntary chapter 11 petitions.

6. On September 6, 2024, the Debtors filed their disclosure statement and Joint Chapter 11 Plan. [Docket Nos. 311, 312.]

7. On September 7, 2024, the Debtors filed a motion for an order shortening the notice period for, among other things, approval of the disclosure statement, which was granted on September 16, 2024. [Docket Nos. 314, 410.]

8. On September 19, 2024, the Debtors filed their Amended Disclosure Statement and a revised Joint Chapter 11 Plan (the "**Plan**"). [Docket Nos. 514, 515.]

9. Under the Plan, most stakeholders are impaired, with shareholders and holders of Section 510(b) Claims deemed to reject the Plan. [Plan, Docket No. 514 at p.17.] The Plan provides that SunPower's shareholders will receive nothing under the Plan and their shares will be canceled on the Plan effective date. [*Id.* at p. 20.]

10. Even though shareholders will receive nothing under the Plan and cannot vote,

they must return an opt-out form to avoid releasing a wide range of claims against the Released Parties. [*Id.* at p. 38-39.] Only shareholder claims for actual fraud, willful misconduct, and gross negligence are excluded from the release. *Id.* The Disclosure Statement offers no evidence that the releases by shareholders are necessary to the Debtors' reorganization, fair to the releasing shareholders, or integral to the Plan.

DISCUSSION

A. The Disclosure Statement Cannot Be Approved Because the Plan Contains Non-Consensual Third-Party Releases and The Court Lacks Constitutional Authority to Release and Enjoin Shareholder Claims

16. If a disclosure statement describes a plan that cannot be confirmed, the court may refuse to approve it. *In re Main Street AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999); *In re Allied Gaming Mgmt., Inc.*, 209 B.R. 201, 202 (Bankr. W.D. La. 1997). Here, the Debtors seek to solicit a Plan that contains non-consensual, third-party releases which make it unconfirmable.

1. The Plan's Third-Party Releases Are Impermissible Because They Are Nonconsensual

17. The United States Supreme Court, in *Harrington v. Purdue Pharma L.P.*, 219 L. Ed. 2d 721 (2024), has altered the legal landscape in the area of third-party releases. In *Purdue*, the Court identified the question as "whether a court in bankruptcy may effectively extend to *nondebtors* the benefits of a Chapter 11 discharge usually reserved for *debtors.*" *Id.* at 732 (emphasis in original). The Court answered in the negative.

18. Nothing in the Bankruptcy Code "authorize[s] a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of the affected claimants." *Id.* at 739-40; *see also In re Parlement Techs., Inc.*, No. 24-10755, 2024 Bankr. LEXIS 1627, *10-11 (Bankr. D. Del. July 15, 2024)

(Goldblatt, J.) (same). A critical implication of this ruling is that a third-party release provision is *not* just another plan provision that can bind non-consenting creditors under Section 1141(a).[2] *See Purdue*, 219 L. Ed. 2d at 732-36 (explaining that, under Section 1123(b), a third-party release is not an "appropriate provision" in a Chapter 11 plan).

19. Thus, the only basis for approving a nondebtor release that *might* remain post-*Purdue* is an adequate showing by the plan proponent that the release is consensual. The *Purdue* court did not express a specific view about what qualifies as a "consensual" release. *Id.* at 739-40. But the Court did cite approvingly to *In re Specialty Equipment Cos*., 3 F.3d 1043 (7th Cir. 1993). *See* 219 L. Ed. 2d at 739. In *Specialty Equipment*, the Court found that the release was consensual because "[i]t binds only those creditors voting in favor of the plan of reorganization." 3 F.3d at 1047. Thus, "consent" required an affirmative act, *e.g.*, voting to accept the plan, and the *Specialty Equipment* court noted that "a creditor who votes to reject the Plan or abstains from voting may still pursue any claims against third-party nondebtors." *Id.*

20. Since no provision of the Bankruptcy Code authorizes third-party releases, "any such consensual agreement would be governed instead by state law." *In re Tonawanda Coke Corp.*, No. 18-12156, 2024 Bankr. LEXIS 2032, *4-6 (Bankr. W.D.N.Y. Aug. 27, 2024) (finding that "a failure to opt out will not suffice to bind a creditor"). 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 holders reason to understand that assent may be manifested

[2] Under Section 1141(a), aside from certain exceptions, "the provisions of a confirmed plan bind the debtor, . . . any creditor, [or] equity security holder . . . whether or not the claim or interest of such creditor, [or] equity security holder . . . is impaired under the plan and whether or not such creditor, [or] equity security holder . . . has accepted the plan." *See* 11 U.S.C. § 1141(a).

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." *In re Emerge Energy Servs. LP*, No. 19-11563, 2019 Bankr. LEXIS 3717, *53-54 (Bankr. D. Del. Dec. 5, 2019) (Owens, J.) (citations omitted). The Debtors have made no such showing here.[3]

2. The Court Lacks Constitutional Authority to Enter a Final Order Confirming a Plan That Releases and Enjoins Shareholder Claims

21. If the Court concludes that failure to opt out qualifies as consent, the Court nevertheless lacks constitutional authority to confirm a Plan that releases and enjoins nondebtor claims. The Court must determine whether the released and enjoined claims fall within the Court's "core" or "non-core" jurisdiction for purposes of 28 U.S.C. §157. *Patterson v. Mahwah Bergen Retail Group, Inc.,* 636 B.R. 641, 668 (E.D. Va. 2022). The Plan's shareholder release includes numerous claims that might exist under state law. As such, permanently enjoining these non-bankruptcy claims between nondebtors is a non-core proceeding. *In re Combustion Eng'g*, 391 F.3d 190, 225-26 (3rd Cir. 2004) (defining "core" proceedings as "proceedings arising under title 11, and proceedings arising in a case under title 11"). In this Circuit, a bankruptcy court lacks constitutional authority to enter a final order releasing and enjoining state law (non-core) claims under a plan, unless the debtor shows that the release is integral to the restructuring. *See In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 135-37 (3rd Cir. 2019).

[3] Article IV.A. of the Plan states that the Plan's releases, including those provided by shareholders and holders of Section 510(b) Claims, comprise part of a consensual and good faith settlement that is being given in exchange for consideration. But settlement agreements are contracts. *See Walters v. Wal-Mart Stores, Inc.*, 703 F.3d 1167, 1172 (10th Cir. 2013). "It is a basic tenet of contract law that, in order to be binding, a contract requires a meeting of the minds and a manifestation of mutual assent. . . . As a general matter, courts look to the basic elements of the offer and acceptance to determine if there was an objective meeting of the minds sufficient to create a binding and enforceable contract." *Fisher v. Aetna Life Ins. Co.*, 32 F.4th 124, 136 (2d Cir. 2022). The Debtors have proffered no evidence of mutual assent. Silence is not enough. *See* Restatement (Second) Contracts, § 69 (1981) (with very few exceptions, none of which are applicable here, silence or inaction does not evidence acceptance).

22. In this case, the shareholder release includes state law and other non-bankruptcy claims. Accordingly, under *Millennium Lab*, the Court lacks constitutional authority to release and enjoin these shareholder claims under the Plan unless the Court finds that doing so is integral to the Debtors' restructuring. The shareholder releases in this case are not integral to the Debtors' restructuring as evidenced by the fact that shareholders are permitted to opt out of the release and confirmation of the Plan does not turn on how many opt-out forms are returned.

23. In addition, shareholders have not consented to non-Article III adjudication of their state law claims. Supreme Court precedent "make[s] clear that courts can discern the implication of consent to a non-Article III court based on a party's *actions*. However, [these cases] do not permit a finding of consent based on *inactions*." *Patterson*, 636 B.R. at 674 (emphasis in original); *see also In re Paragon Offshore PLC*, 598 B.R. 761, 769 (Bankr. D. Del. 2019) (failure to object to the plan's jurisdictional provisions does not constitute consent to final orders). Here, the Debtor's shareholders have taken no action that could be interpreted as a knowing and voluntary consent to waive their right to an Article III tribunal. Because the shareholder releases here clearly implicate Article III of the Constitution, the Court should submit any confirmation order approving those releases to the district court as proposed findings of fact and conclusions of law, for *de novo* review, in accordance with 28 U.S.C. §157(c)(1).[4]

B. The Debtors Should Retain Documents Relevant to the SEC Investigation

24. The Debtors have an obligation to preserve records and information relevant to governmental requests. *See In re Delta/Airtran Baggage Fee Antitrust Litig*., 770 F. Supp. 2d

[4] The Plan contemplates, at the Debtors' election, the creation of a Creditor Trust. The Debtors have recently added bracketed language to the Plan addressing the Creditor Trust's compliance with federal law. [Docket No. 514, at p. 24.] The SEC reserves its rights to address this issue at confirmation should the parties be unable to reach agreement as to the specific language.

1299, 1307-08 (N.D. Ga. 2011) (recognizing that preservation obligations apply to government investigations). Disposal of a debtor's books and records is governed by sections 363 and 554 of the Bankruptcy Code. *See* 11 U.S.C. §§ 363, 554(a); Fed. R. Bankr. P. 6007(a) (authorizing abandonment on advance notice); *see also In re Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984) ("The abandonment power embodied in Section 554 enables the trustee to rid the estate of burdensome or worthless assets, and so speeds the administration of the estate . . . and also protects the estate from diminution."); *Mele v. First Colony Ins. Co*., 127 B.R. 82, 85 (D.D.C. 1991) (same). Accordingly, the SEC has requested that the addition of the following document retention language to the Plan and any proposed confirmation order:

> The Debtors and the Wind Down Debtors shall not destroy or otherwise abandon any documents or records without providing advance notice to the SEC (c/o William M. Uptegrove, U.S. Securities and Exchange Commission, 950 East Paces Ferry Rd., N.E., Suite 900, Atlanta, GA 30326, uptegrovew@SEC.GOV) and seeking further authorization from this Court. Nothing in the Plan or the Plan Confirmation Order shall affect the obligations of the pre-Effective Date Debtors, the post-Effective Date Debtors, the Wind Down Debtors, and/or any transferee or custodian to maintain all books and records that are subject to any governmental subpoena, document preservation letter, or other investigative request from a governmental agency.

RESERVATION OF RIGHTS

The SEC reserves all rights to object to confirmation of the Plan, including on grounds not raised in this objection, and to supplement this objection prior to the final hearing on the approval of the Disclosure Statement.

WHEREFORE, for the foregoing reasons, the SEC respectfully requests that the Court deny approval of the Disclosure Statement and grant such other and further relief that is just and proper.

Dated: September 20, 2024
Atlanta, Georgia

Respectfully submitted,

U.S. SECURITIES AND EXCHANGE COMMISSION

By: */s/ William M. Uptegrove*

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Objection to be served upon counsel or parties of record by the Court's CM/ECF system on September 20, 2024.

By: */s/ William M. Uptegrove*
William M. Uptegrove