UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK
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In re	Chapter 11
Fairport Baptist Homes, *et al*.,	Case No. 22-20220 (PRW)
Debtors.[1]	

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OBJECTION OF THE UNITED STATES TRUSTEE TO: (I) JOINT DISCLOSURE STATEMENT IN SUPPORT OF THE JOINT PLAN OF LIQUIDATION SUBMITTED BY FAIRPORT BAPTIST HOMES, FBH COMMUNITY MINISTRIES, FBH DISTINCTIVE LIVING COMMUNITIES, INC., AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, AND (II) JOINT PLAN OF LIQUIDATION SUBMITTED BY FAIRPORT BAPTIST HOMES, FBH COMMUNITY MINISTRIES, FBH DISTINCTIVE LIVING COMMUNITIES, INC., AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS[2]

TO: THE HONORABLE PAUL R. WARREN, UNITED STATES BANKRUPTCY JUDGE:

William K. Harrington, the United States Trustee for Region 2 (The "United States Trustee"), files this objection (the "Objection") to the (i) Joint Disclosure Statement (the "Disclosure Statement") in support of the Joint Plan of Liquidation Submitted by Fairport Baptist Homes, FBH Community Ministries, FBH Distinctive Living Communities, Inc., and the Official Committee of Unsecured Creditors [ECF No. 852], and (ii) Joint Plan of Liquidation (the "Plan") submitted by Fairport Baptist Homes, FBH Community Ministries, FBH Distinctive Living Communities, Inc., and the Official

[1] The case numbers initially assigned to each of the Debtors: (i) Fairport Baptist Homes ("FBH") (Case No. 22-20220); (ii) FBH Adult Care (Case No. 22-20221); (iii) FBH Community Ministries (Case No. 22-20222); and (iv) FBH Distinctive Living Communities, Inc. (Case No. 22-20223).

[2] Unless otherwise defined herein, all capitalized terms not defined herein shall have the meanings ascribed to them in the Disclosure Statement and Plan.

Committee of Unsecured Creditors [ECF No. 853]. In Support of the Objection, the United States Trustee respectfully states as follows:

PRELIMINARY STATEMENT

The primary purpose of a disclosure statement is to provide sufficient information to enable creditors to make an informed decision with respect to a proposed plan. The Disclosure Statement here fails to satisfy this obligation because it does not contain adequate information about, among other things, the Plan's third-party releases (the "Third-Party Releases"), including the Debtor's justification for imposing third-party releases. No information is provided about the consideration that a number of third parties have or have not given in order to benefit from the release of claims or causes of action that the Debtors' estates could otherwise have brought.

Even if the Court should determine that the Disclosure Statement contained sufficient information regarding the Third-Party Releases, the Plan is unconfirmable because the Plan violates the law on such releases. On June 27, 2024, the Supreme Court reversed the Second Circuit, holding that the "Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants." *Harrington v. Purdue Pharma L.P.*, 603 U.S. ___, 144, S. Ct. 2071 (2024). Here, the Plan Proponents conflate a vote for the Plan, which is governed by the Bankruptcy Code dealing with relations between a debtor and its creditors, with acceptance of the Third-Party Releases, which are contracts governed by state law dealing with relations between non-debtor parties. For a creditor to be deemed to have affirmatively consented to the Third-Party Releases, each creditor must have indicated express consent to be bound by a contract with the non-debtor beneficiaries of

these releases. A vote to accept the Plan cannot demonstrate consent to such a contract with a non-debtor. As discussed herein, the scope of the Third-Party Releases is also impermissibly broad and confusing, as the Plan proposes to improperly release claims against non-estate assets and against an unenumerated bevy of "Related Parties" and "Related Persons."

Similarly, to the extent that applicable law authorizes exculpation beyond 11 U.S.C. § 1125(e), the Disclosure Statement describes a Plan that contains an overly broad Exculpation. The Plan also contains impermissible Injunctions Provisions that enforce this exculpation, despite the lack of statutory authority authorizing such provisions, and despite the parties not meeting the standards for an injunction.

Finally, it appears that the Disclosure Statement and Plan contain conflicting language, may unfairly discriminate, and are not fair and equitable with respect to Class 3 and Class 4 creditors, both of which are general unsecured creditors.

In sum, the Disclosure Statement falls far short of the level of disclosure required under the Bankruptcy Code, and the Plan that it supports is not confirmable. For these reasons, as detailed more fully below, the United States Trustee respectfully requests that the Court deny the approval of the Disclosure Statement, unless modified to address these issues.

BACKGROUND

General Background

1. On May 6, 2022, Fairport Baptist Homes and its debtor affiliates (the "Debtors") each filed a petition for relief under chapter 11, title 11, United States Code (the "Bankruptcy Code").

2. On May 10, 2022, the Court entered an order directing that these Chapter 11 cases be jointly administered. ECF No. 20.

3. On June 2, 2022, the United States Trustee filed his Appointment of Committee of Unsecured Creditors (the "Creditors' Committee"). ECF No. 86.

4. No trustee or examiner has been appointed in these cases. The Debtors are authorized to continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

The Plan and Disclosure Statement

5. On September 20, 2024, the Debtors and the Creditors' Committee (the Debtors and the Creditors' Committee are collectively referred to as the "Plan Proponents") filed a Joint Disclosure Statement in Support of the Joint Plan of Liquidation Submitted by Fairport Baptist Homes, FBH Community Ministries, FBH Distinctive Living Communities, Inc., along with a Joint Plan of Liquidation. ECF Nos. 852 and 853.

6. Also on September 20, 2024, the Debtors and the Creditors' Committee filed their Motion (the "Motion") for Entry of an Order (I) Approving Disclosure Statement; (II) Approving Solicitation Packages and Distribution Procedures; (III) Approving the Forms of Ballots and Establishing Procedures for Voting on Joint Plan; (IV) Approving the Form, Manner, and Scope of Confirmation Notices; (V) Establishing Certain Deadlines in Connection with Approval of the Disclosure Statement and Confirmation of the Joint Plain [sic]; and (VI) Granting Related Relief. ECF No. 854.

7. On September 23, 2024, the Court entered an Order for Hearing on Disclosure Statement and Fixing Time for Filing Written Objections, Combined with Notice Thereof. ECF No. 856.

Key Definitions and Provisions of Disclosure Statement and Plan

8. The Plan defines "Related Persons" as follows:

> "Related Persons" shall mean, subject to any exclusions expressly set forth in the Plan, with respect to a specific Person, said Person's current and former shareholders, affiliates, subsidiaries, employees, agents, investment managers, subagents, officers, directors, managers, trustees, partners, members, professionals, representatives, advisors, attorneys, financial advisors, accountants, and consultants.

Plan, Art. I.1.75.

9. The Plan defines "Released Parties" as follows:

> "Released Parties" shall mean, collectively, and in each case, solely in their capacities as such: (a) the Debtors; (b) the current and former directors, officers, and employees of the Debtors; (c) the Liquidating Trustee; (d) the Creditors' Committee and the members of the Creditors' Committee; (e) FBHCM; and (f) each of such Entities' Related Persons.

Plan, Art. I.1.76.

10. The Plan defines "Releasing Parties" as follows:

> "Releasing Parties" shall mean collectively, and in each case, solely in their respective capacities as such: (a) the Released Parties (other than the Debtors and the Liquidating Trustee); (b) all Holders of a Claim who vote to accept the Plan; and (c) with respect to any Person or Entity solely in their capacity as such (provided that with respect to any Related Persons identified herein, each such Person constitutes Releasing Party under this clause solely with respect to derivative claims that such Related Person could have properly asserted on behalf of a Person identified in clauses (a) and (b) of the definition of Releasing Parties).

Plan, Art. I.1.77.

11. The Plan defines "Exculpated Parties" as follows:

> "Exculpated Parties" shall mean collectively, and in each case, solely in the capacities as such: (a) the Debtors; (b) the Creditors' Committee and the members of the Creditors' Committee; and (c) with respect to each of the foregoing Entities, all Related Persons

> who acted on their behalf in connection with the matters as to which exculpation is provided herein.

Plan, Art. I.1.36.

12. Article 9.1 sets forth the Plan's provision concerning exculpation (the "Exculpation Provision"). The Exculpation Provision provides, in relevant part, that:

> Effective as of the Effective Date, to the extent permitted under §§ 1103(c) and 1125(e) of the Bankruptcy Code, and except as otherwise specifically provided in this Plan, the Exculpated Parties shall neither have nor incur any liability to any Entity or Person for any claims or causes of action arising on or after the Petition Date and before the Effective Date for any act taken or omitted to be taken in connection with, or related to: (i) the Chapter 11 Cases; (ii) formulating, negotiating, preparing, disseminating, implementing, administering, confirming, or effecting the consummation of the Plan, the Disclosure Statement, or any other contract, instrument, release, or other agreement or document created or entered into in connection with the Plan; (iii) ***any other prepetition*** or postpetition ***act taken or omitted to be taken in connection with preparation of or in immediate contemplation of the Chapter 11 Cases***; or (iv) the approval of the Disclosure Statement or confirmation or consummation of the Plan; provided, however, that the foregoing provisions shall have no effect on: (a) the liability of any Entity or Person that results from any such act or omission that is determined in a Final Order of the Bankruptcy Court or other court of competent jurisdiction to have constituted actual fraud, gross negligence, or willful misconduct, and (b) any Cause of Action related to any liability of professionals to their clients pursuant to N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.8 Rule 1.8(h)(1); provided, further, however, that, for the avoidance of doubt, any such exculpation shall not act or be construed to exculpate, channel, release, enjoin, or otherwise affect any civil or criminal enforcement action by a Governmental Unit; ***provided, further, however, that the Exculpated Parties shall each be entitled to rely upon the advice of counsel concerning their duties pursuant to, or in connection with, the above-referenced documents, actions, or inactions.***

Plan, Art. IX.9.1 (emphasis added).

13. Article 9.2(b) sets forth the Plan's provision concerning Third-Party Releases. The release provision provides as follows:

> As of the Effective Date, except (i) for the right to enforce the Plan or any right or obligation arising under the Liquidating Trust Agreement; (ii) for the right to defend against any objections to Claims that may be asserted under the Plan; or (iii) as otherwise expressly provided in the Plan or in the Confirmation Order, in exchange for good and valuable consideration, including the obligations of the Debtors under the Plan and the contributions of the Released Parties to facilitate and implement the Plan, to the fullest extent permissible under applicable law, as such law may be extended or integrated after the Effective Date, the Released Parties shall be deemed conclusively, absolutely, unconditionally, irrevocably, and forever, released, and discharged by the Releasing Parties in each case, from any and all Claims, Interests, or Causes of Action whatsoever, including any derivative Claims asserted on behalf of a Debtor, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, that such Entity would have been legally entitled to assert (whether individually or collectively), based on, relating to, or arising prior to the Effective Date from, in whole or in part, the Debtors, the restructuring, the Chapter 11 Cases, the pre- and postpetition marketing and Sale process, 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, the restructuring of Claims and Interests before or during the Chapter 11 Cases, the negotiation, formulation, preparation, or consummation of the Plan or arising out of the Sale, the Disclosure Statement, the Plan, the DIP/Cash Collateral Orders, or any related agreements, instruments, or other documents, the solicitation of votes with respect to the Plan, in all cases based upon any act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date; provided, that nothing in this Section 9.2(b) shall be construed to release the Released Parties from any gross negligence, willful misconduct, or intentional fraud as determined by a Final Order. The Releasing Parties shall be permanently enjoined from prosecuting any of the foregoing Claims, Interests, or Causes of Action released under this Section 9.2(b) against each of the Released Parties.

Plan, Art. IX.9.2(b).

14. Article IX.9.3 sets forth the Plan's provision concerning injunctions (the "Injunction Provision"). The Injunction Provision provides, in relevant part, that:

> EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THE PLAN, RELATED DOCUMENTS, OR FOR OBLIGATIONS

> ISSUED PURSUANT TO THE PLAN, ***ALL ENTITIES WHO HAVE HELD, HOLD OR MAY HOLD CLAIMS OR INTERESTS THAT ARE SUBJECT TO THE EXCULPATORY PROVISIONS OF ARTICLE 9.1, SHALL BE PERMANENTLY ENJOINED, FROM AND AFTER THE EFFECTIVE DATE, FROM TAKING ANY OF THE FOLLOWING ACTIONS: (I) 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***; (II) 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; (III) CREATING, PERFECTING, OR ENFORCING ANY ENCUMBRANCE OF ANY KIND AGAINST SUCH ENTITIES OR THE PROPERTY OR ESTATE OF SUCH ENTITIES ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS OR INTERESTS; (IV) COMMENCING OR CONTINUING IN ANY MANNER ANY ACTION OR OTHER PROCEEDING OF ANY (II) 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; (III) CREATING, PERFECTING, OR ENFORCING ANY ENCUMBRANCE OF ANY KIND AGAINST SUCH ENTITIES OR THE PROPERTY OR ESTATE OF SUCH ENTITIES ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS OR INTERESTS; (IV) 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 RELEASED, DISALLOWED, EXCULPATED, OR SETTLED PURSUANT TO THE PLAN; AND (V) ACTING OR PROCEEDING IN ANY MANNER, IN ANY PLACE WHATSOEVER, THAT DOES NOT CONFORM WITH THE PROVISIONS OF THE PLAN TO THE FULL EXTENT PERMITTED BY APPLICABLE LAW.

Plan, Art. IX.9.3(b) (emphasis added).

Claims Classification and the Right to Object to Claims

15. The Disclosure Statement and Plan appear to bifurcate general unsecured claims, *i.e.*, Class 3 and Class 4 claims, as well as set forth conflicting language as to their treatment under the Plan.

16. Under the Plan, Class 3 "shall contain the General Unsecured Claims, including Rejection Damages Claims, but excluding General Unsecured Claims that are separately placed in a Class in this Plan." *See* Plan, Art. IV.4.3(c). The Plan further states that "[s]uch claims in Class Three are, therefore, Impaired and entitled to vote on the Plan." *See* Plan, Art. IV.4.4(c).

17. Article IV.4.4(d) of the Plan sets forth the following treatment of the New York State Workers' Compensation Board Claim (Class 4):

> The Claim in this class is unliquidated and disputed. Such Claim is subordinated to Allowed Claims in ***Class Three and is only entitled to a Distribution*** from the Liquidating Trust (i) ***if such Claim becomes an Allowed Claim and (ii) after all Allowed Claims in Class Three are paid in full.*** Such Claim in Class Four is, therefore, Impaired and entitled to vote on the Plan.

Plan, Art. IV.4.4(d) (emphasis added).

18. Notwithstanding the above language in the Plan, the Disclosure Statement provides that Class 4 claims may receive the same distribution as Class 3 claims. The Disclosure Statement provides, in relevant part, the following treatment regarding the New York State Workers' Compensation Board Claim (Class 4):

> The Debtors' Plan seeks to subordinate the New York State Workers' Compensation Board Claim to Allowed Claims in Class Three such that the New York State Workers' Compensation Board Claim will only be entitled to a Distribution from the Liquidating Trust (i) if such Claim becomes an Allowed Claim and (ii) after all Allowed Claims in Class Three are paid in full. ***If (i) the Bankruptcy Court declines to separately classify the New***

> ***York State Workers' Compensation Board Claim*** or (ii) the Debtors, with the consent of the Creditors' Committee, or Liquidating Trustee, as applicable, agree to settle the claim with the New York State Workers' Compensation Board in an allowed amount, the portion of ***such Claim that becomes an Allowed Claim shall paid be pari passu with Allowed Claims in Class Three***. Such Claim in Class Four is, therefore, Impaired and entitled to vote on the Plan.

Disclosure Statement, Art.II.2(d) (emphasis added).

19. Article VIII.8.1 of the Plan provides, in relevant part, that:

> The Liquidating Trustee shall have exclusive authority, but not the obligation, to do any of the following with respect to any Claims or Interests after the Effective Date: (i) File, withdraw, or litigate to judgment, Objections to and requests for estimation of Claims. . . .

Plan, Art.VIII.8.1.

The Ballot

20. The Motion seeks entry of an order (the "Proposed Order") in the form attached as Exhibit "A" to the Motion. The Proposed Order includes, among other things, approval of a form ballot (the "Ballot").

21. As shown below, the Ballot does not include an option for creditors to consent to the Third-Party Releases - - instead, ***the Ballot purports to bind creditors by their vote***. For example, the Class 3 Ballot sets forth the following:

Item 2. Vote on the Plan

The holder of the Class Three — General Unsecured Claim set forth in Item 1 votes to (please check one):

☐ ACCEPTS the Plan	-or-	☐ REJECTS the Plan

ANY BALLOT THAT IS EXECUTED BY THE HOLDER OF A CLAIM BUT THAT INDICATES BOTH AN ACCEPTANCE AND A REJECTION OF THE

PLAN OR DOES NOT INDICATE EITHER AN ACCEPTANCE OR REJECTION OF THE PLAN WILL NOT BE COUNTED.

22. On the following page of the Ballot - - **after you vote and sign the form** - - are the following disclaimers:

Notice regarding certain release, exculpation, and injunction provisions are contained in the Plan and Disclosure Statement. Specifically, Article IX of the Plan releases and exculpates (a) the Debtors; (b) the current and former directors, officers, and employees of the Debtors; (c) the Liquidating Trustee; (d) the Creditors' Committee and the members of the Creditors' Committee; (e) FBHCM; and (f) each of such Entities' Related Persons. You are advised and encouraged to carefully review and consider the Plan, including the release, exculpation, and injunction provisions, as your rights may be affected.

The releases, exculpations and injunctions relating to Fairport Baptist Homes Caring Ministries ("FBHCM"), the non-debtor, non-operational parent entity of the Debtors, will only be binding on you if you vote in favor of the Plan.

23. Additionally, the Ballot fails to list all the "Related Persons" and incorrectly identifies FBHCM as an exculpated party.

OBJECTION

A. The Disclosure Statement Failes to Comply with Legal Standards

Section 1125 of the Bankruptcy Code provides that a disclosure statement must contain "adequate information" describing a confirmable plan. 11 U.S.C. § 1125. The Bankruptcy Code defines "adequate information" as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable a such a hypothetical reasonable investor . . . to make an informed judgment about the plan . . . .

11 U.S.C. § 1125(a)(1); *see also Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994); *In re Adelphia*

Commc'ns Corp., 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006); *Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999).

To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. *See In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) ("substantial financial information with respect to the ramifications of any proposed plan will have to be provided to, and digested by, the creditors and other parties in interest in order to arrive at an informed decision concerning the acceptance or rejection of a proposed plan"). Although the adequacy of the disclosure statement is determined on a case-by-case basis, the disclosure statement must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy Code] alternatives . . . ." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988).

Section 1125 of the Bankruptcy Code is biased towards more disclosure rather than less. *See In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990). The "adequate information" requirement merely establishes a floor, and not a ceiling, for disclosure to voting creditors. *Adelphia*, 352 B.R. at 596 (citing *Century Glove, Inc. v. First American Bank of New York*, 860 F.2d 94, 100 (3d Cir. 1988)). Once the "adequate disclosure" floor is satisfied, additional information can go into a disclosure statement too, at least so long as the additional information is accurate, and its inclusion is not misleading. *Adelphia*, 352 B.R. at 596. The purpose of the disclosure statement is to give creditors enough information so that they can make an informed choice of whether to approve or reject the debtor's plan. *In re Duratech Indus.*, 241 B.R. 291, 298 (Bankr. E.D.N.Y. 1999), *aff'd*, 241 B.R. 283 (E.D.N.Y. 1999). The disclosure

statement must inform the average creditor what it will receive and when and what contingencies might intervene. *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

Moreover, Section 1129(a)(2) conditions confirmation of a plan upon compliance with applicable Bankruptcy Code provisions. The disclosure requirement of Section 1125 is one of those provisions. *See* 11 U.S.C. § 1129(a)(2); *In re PWS Holding Corp*., 228 F.3d 224, 248 (3d Cir. 2000). Therefore, a disclosure statement should not be approved if the plan it describes is unconfirmable on its face, because approving the disclosure statement and proceeding to a confirmation hearing would be a fruitless exercise. *In re Dow Corning Corp*., 237 B.R. 380 (Bankr. E.D. Mich. 1999); *In re 266 Washington Assoc.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992); *In re H.K. Porter Co*., 156 B.R. 16 (W.D. Pa. 1993); *In re Monroe Well Service*, 80 B.R. 324 (Bankr. E.D. Pa. 1987); *In re Valrico Square Ltd. P'ship*, 113 B.R. 794, 796 (Bankr. S.D. Fla. 1990); *John Hancock Mutual Life Ins. Co. v. Route 37 Business Park Assocs.*, 987 F. 2d 154 (3d Cir. 1993).

This Court (Hon. Chief Judge Bucki) recently stressed this point in denying approval of the disclosure statement in *In re Tonawanda Coke Corp.*, 662 B.R. 220 (Bankr. W.D.N.Y. 2024). "[T]he proponent of a plan may not solicit its acceptance unless there is transmitted to creditors 'the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing by the court as containing adequate information.'" *Id*. at 1 (citing Section 1125(b)). "Implicitly, such adequate information includes a representation that the proposed plan is one that can be confirmed." *Id*.

The United States Trustee submits that the Disclosure Statement should not be approved both because it "aims to solicit votes in favor of an unconfirmable plan" and

because it does not provide adequate information to creditors regarding its release, exculpation, and injunction provisions. *Id*.

B. The Plan is Unconfirmable Because it Includes a Nonconsensual Third-Party Release

Nonconsensual third-party releases are not authorized under the United States Bankruptcy Code. *Purdue Pharma,* 144 S. Ct. at 2082-88. Yet the Plan would impose nonconsensual third-party releases on anyone who votes to accept the plan. Merely voting to accept a plan does not constitute consent to non-debtor releases. Consent requires an express manifestation of agreement. Because such consent is absent here, the Disclosure Statement and Plan should not be approved.

As this Court has held, contract principles govern whether a release is consensual. *See Tonawanda Coke Corp*., 662 B.R. at 222-23; *see also In re Smallhold, Inc.*, No. 14-10267, 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024); *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017). That is because a third-party release is essentially a settlement between a non-debtor claimant and another non-debtor. Whether parties have reached an agreement—including an agreement not to sue—is governed by state law. The only exception is if there is federal law that preempts applicable state contract law. *See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (plurality) ("For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law must govern because there can be no other law.'") (quoting *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)).

No federal law applies to the question of whether the non-debtor Releasing Parties have agreed to release the non-debtor Released Parties. The Bankruptcy Code does not

apply to agreements between non-debtors. And no Bankruptcy Code provision authorizes courts, as part of an order confirming a chapter 11 plan, to "deem" a non-debtor to have consented to an agreement to release claims against other non-debtors where consent would not exist under state law. Nor does 11 U.S.C. § 105(a) confer any power to override state law. Rather, section 105(a) "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue Pharma, L.P.*, 144 S. Ct. at 2082 n.2 (internal quotation marks omitted). Bankruptcy courts cannot "create substantive rights that are otherwise unavailable under applicable law," nor do they possess a "roving commission to do equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (quoting *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). Thus, the state-law definition of consent is not diluted or transformed by the Bankruptcy Code.

Indeed, even as to a debtor, it is well settled that whether parties have entered into a valid settlement agreement is governed by state law. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) ("Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law."); *De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)*, 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009) ("Where the United States is not a party, it is well established that settlement agreements in pending bankruptcy cases are considered contract matters governed by state law."). *See also Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) ("[T]he 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.") (internal 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.").

Because the Bankruptcy Code does not govern relationships between claim holders and non-debtor third-parties, state contract principles are the only source of authority when considering whether a release is consensual. *See, e.g.*, *Tonawanda Coke Corp*., 662 B.R. at 222-23; *In re Smallhold, Inc.*, 2024 WL 4296938, at *11 (requiring "some sort of affirmative expression of consent that would be sufficient as a matter of contract law"); *Patterson v. Mahwah Bergen Retail Grp., Inc.,* 636 B.R. 641, 684-85 (E.D. Va. 2022) (describing bankruptcy courts in the District of New Jersey as "look[ing] to the principles of contract law rather than the bankruptcy court's confirmation authority to conclude that the validity of the releases requires affirmative consent"); *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third-party release."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 506-07 (Bankr. D.N.J. 1997) (holding that a third-party release "is no different from any other settlement or contract" and that that "the validity of the release . . . hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order.") (citation omitted). As this Court recently held, because "nothing in the bankruptcy code contemplates (much less authorizes it)' . . . . any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent." *In re Tonawanda Coke Corp*., 662 B.R. 220, 2024 WL 4024385, at *2 (quoting *Purdue*, 144 S. Ct. at 2086). Accordingly, "any such consensual agreement would be governed by state law." *Id.*

Here, the Plan Proponents do not meet the state-law burden of establishing that the Releasing Parties will expressly consent to release their property rights. Rather, as this and other courts have held, an affirmative agreement is required to support a

consensual third-party release. *See In re Tonawanda Coke Corp.,* 662 B.R. 220; *Smallhold,* 2024 WL 4296938, at *3 ("[A] creditor cannot be deemed to consent to a third-party release without some affirmative expression of the creditor's consent."); *see also id*. at *8; *Patterson*, 636 B.R. at 686.

That is because the "general rule of contracts is that silence cannot manifest consent." *Patterson*, 636 B.R. at 686. "Acceptance by silence is exceptional. Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

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

Thus, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). *See also Patterson*, 636 B.R. at 686 (discussing how contract law does not support consent by failure to opt out). Further, "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." RESTATEMENT (SECOND) OF CONTRACTS § 69, cmt. c (1981). *See also Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1227-28 (9th Cir. 2022) ("[E]ven though the offer states that silence will be taken as consent, silence on the part of the offeree cannot turn the offer into an agreement, as the offerer cannot prescribe conditions so as to turn silence into

acceptance.") (quoting *Columbia Malting Co. v. Clausen-Flanagan Corp.*, 3 F.2d 547, 551 (2d Cir. 1924).

New York common law, as a point of reference, is in accord.[3] *See, e.g.*, *Karlin v. Avis*, 457 F.2d 57, 62 (2d Cir. 1972). Absent limited exceptions not triggered here, silence and inaction are not assent to an offer. *See also Albrecht Chem. Co. v. Anderson Trading Corp.*, 298 N.Y. 437, 440, 84 N.E.2d 625, 626 (1949) ("where the recipient of an offer is under no duty to speak, silence - - when not misleading, may not be translated into acceptance merely because the offer purports to attached that effect to it."); s*ee Matter of Tanenbaum Textile Co. v. Schlanger*, 287 N.Y. 400, 404, 40 N.E.2d 225, 226 (1942); *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 318 *et seq.*, 110 N.E. 619, 621 (1915); *More v. New York Bowery Fire Ins. Co.*, 130 N.Y. 537, 545, 547, 29 N.E. 757, 758, 759 (1892); *see also 1 Williston on Contracts* [Rev.Ed.], § 91, pp. 279, 280; Restatement, Contracts, § 72(1).

Here, the Plan would force claimants who vote to accept the Plan to release non-debtors without such claimants' affirmative consent.[4] The Plan's conflation of voting for the Plan with acceptance of the Third-Party Release is contrary to state law. Voting for a

[3] While the Plan provides that its construction and enforcement is governed by the laws of the State of New York, debtors cannot choose the law to apply to contracts between non-debtors. Rather, ordinary choice of laws principles govern which state's law applies to contracts between non-debtors, although a choice of law analysis may not be necessary absent any assertion of a difference in potentially applicable state laws. *See Smallhold*, 2024 WL 4296938, at *13 n.57.

[4] There is no need to provide a release to FBHCM, the non-debtor, non-operational parent entity of the Debtor. Not only are the Debtors liquidating and not entitled to a discharge, so is FBHCM. According to the Plan Proponents, FBHCM "intends to wind-down and dissolve following the conclusion of these Chapter 11 Cases." *See* Disclosure Statement, Art. I.1.4. Under 11 U.S.C. § 1141(d)(3)(A), a liquidating debtor in a chapter 11 is not entitled to a discharge. Thus, the third-party release is particularly odd here. *See In re Midway Gold US., Inc*., 575 B.R. 475, 503 (Bankr. D. Colo. 2017) ("[T]he justification for granting [third-party] releases in a liquidation is far less compelling than in a reorganization."); *In re City Homes III, LLC*, 564 B.R. 827, 870-71 (Bankr. D. Md. 2017) (recognizing that the need for third-party releases, if any, does not apply in liquidations); *In re Berwick Black Cattle Co.*, 394 B.R. 448, 461 (Bankr. C.D. Ill. 2008) ("The rationale for granting third-party releases is far less compelling, if it exists at all, in a liquidation than in a reorganization.").

plan does not reflect the unambiguous assent necessary to find consent to a release. *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) (holding that, because consensual releases are premised on the party's agreement to the release, "it is not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan").

First, creditors who vote for a plan are not "silently tak[ing] offered benefits" from the released non-debtors, such that consent may be inferred. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). The only benefits received are through distributions from the debtor's chapter 11 plan. Because the plan's distributions are not contingent on agreeing to the non-debtor release, one cannot infer consent from the acceptance of those distributions. *See Norcia v. Samsung Telecomms. Am, LLC*, 845 F.3d 1279, 1286 (9th Cir. 2017) (holding customer did not retain any benefits when warranty applied regardless of failure to opt out). Further, acceptance of a "benefit"—distributions under the plan—that the offeror had no right to refuse the offeree does not manifest acceptance of the offer. *See Railroad Mgmt. Co., L.L.C. v. CFS La. Midstream Co*., 428 F.3d 214, 223 (5th Cir. 2005) ("In the absence of any evidence that Strong had the right to exclude CFS from the property in question or that CFS accepted any service or thing of value from Strong, no reasonable jury could conclude that CFS's failure to remove its pipeline upon Strong's demand constituted consent to a contract.").

Second, those voting on the chapter 11 plan have not "manifest[ed] [an] intention that silence may operate as acceptance" of an offer to release claims against non-debtors. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a. Because impaired creditors have a federal right under the Bankruptcy Code to vote on a chapter 11 plan under 11 U.S.C.

§ 1126(a), merely exercising that right does not manifest consent to release claims against non-debtors. Rather, voting on a chapter 11 plan is governed by the Bankruptcy Code, and a favorable vote reflects only approval of the plan's treatment of the voters' claims *against the debtor*. *See Arrowmill*, 211 B.R. at 507; *Congoleum Corp.*, 362 B.R. at 194; *In re Digital Impact, Inc*., 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998). Further, creditors have no state law duty to respond to an offer to release nondebtors such that their silence can be understood as consent, nor have they any prior course of dealing with the released nondebtors that would impose such a duty. *See, e.g., Norcia*, 845 F.3d at 1285-86. Nor do creditors have any affirmative obligation to act on a plan, either to vote or to opt out. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors "may" vote on a plan); *SunEdison, Inc.*, 576 B.R. at 460–61 (holding that creditors have no duty to speak regarding a plan that would allow a court to infer consent from silence). A claimant's vote in favor of a plan while remaining silent regarding a non-debtor release thus does not fit within the exception to the general rule that consent cannot be inferred from silence.

As explained in *Arrowmill*, a voluntary release arises only "because the *creditor agrees*" to it. 211 B.R. at 507 (emphasis in original). Because "a creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings," "it is not enough for a creditor . . . to simply vote 'yes' as to a plan." *Id*. (quotation marks omitted); *accord Congoleum Corp.*, 362 B.R. at 194; *Digital Impact, Inc*., 223 B.R. at 14. Rather, a creditor must "unambiguously manifest[] assent to the release of the nondebtor from liability on its debt." *Arrowmill*, 211 B.R. at 507.

A person cannot be compelled to accept a non-debtor release as a condition of receiving the benefits of a plan. That is not consent under governing state law. For those who believe the plan is the best way to maximize the return of their money from the

debtor, requiring them to vote "no" on the Plan—thus raising the possibility that the Plan may not be able to be confirmed and they thus cannot receive the economic benefit under the Plan—to reject the nondebtor release would be penalizing them for exercising their right to vote in favor of the Plan. That an offeree is penalized unless an "offer" is accepted "preclude[es] an inference of assent." *Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1230-31 (9th Cir. 2022).

In addition, as the *Smallhold* court recognized, if voting to accept a plan means a non-debtor release is imposed on the voter, that will discourage creditors from voting for the Plan and may distort the voting process, which is intended to provide a valuable signal about the extent of creditor support, within each voting class, for the plan's treatment of creditors' allowed claims. *In re Smallhold, Inc.,* 2024 WL 4296938, at *7.

Because affirmative consent is required for a non-debtor release, this Court in *Tonawanda Coke* rejected the argument that there is consent to a third-party release that is imposed on unsecured creditors, whether or not the creditor voted to accept the plan, unless the creditor opt outs of the release.

Citing to New York statutory authority, the Court held that failure to opt out of a non-debtor release will not suffice to bind a creditor. *Id.* Under that New York statute:

> An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any ... obligation ... shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such ... obligation ... shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.

Id. at 222 (citing N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 2022)). Under this provision, "the creditor must affirmatively sign a writing under which it expressly agrees to discharge the non-debtor parties." *Id*. at 222-23.

This Court further held that, "[e]ven aside from the specific requirements for a writing under the General Obligations Law," the proposed plan was "deficient in securing the consent of creditors." *Id*. at 223. "Absent a writing expressly agreeing to a release of non-debtors, creditors have not given consent as required by the Supreme Court in *Harrington v. Purdue Pharma*." *Id*.

Furthermore, this Court has stated that:

> An agreement to settle litigation is a 'contract that is interpreted according to general principles of contract law.' *In re Motors Liquidation Co.*, 580 B.R. 319, 343 (Bankr. S.D.N.Y. 2018) (quoting *Omega Eng'g, Inc. v. Omega S.A.*, 432 F.3d 437, 444 (2d Cir. 2005)). "The party seeking to enforce a purported settlement agreement bears the burden of proving that such a binding and enforceable agreement exists." *In re Motors Liquidation Co.*, 580 B.R. at 343 (quoting *Grgurev v. Licul*, Case No. 1:15-cv-9805-GHW, 2016 U.S. Dist. LEXIS 156162, at *3 (S.D.N.Y. Nov. 10, 2016)). "For a contract to exist, there must be mutual assent to be bound . . . ." *Schoninger*, 763 Fed. Appx. at 4 (citations omitted). "Moreover, under well-settled New York law, the existence of a binding contract is not dependent on the subjective intent of either party. Rather, it depends upon the objective manifestations of the intent of the parties as gathered by their expressed words and deeds." *Id.* (internal quotation marks omitted) (quoting *Brown Bros. Elec. Contractors v. Beam Constr. Corp.*, 361 N.E.2d 999, 1001 (N.Y. 1977)).

Continental Ins. Co. v. The Diocese of Rochester (In re The Diocese of Rochester), Adv. No. 23-02014, 2024 WL 4438724, *7 (Bankr. W.D.N.Y. Oct. 7, 2024).

Because a vote in favor of a plan without opting out of a non-debtor release does not constitute consent, *a fortiori*, there is no consent to a non-debtor release based merely on the fact that a claimant voted in favor of the Plan.

C. The Debtor Has Failed to Provide Adequate Information Concerning the Proposed Releases, Injunctions, and the Exculpation Provision

The Disclosure Statement fails to fully address material terms of the Plan in a manner that allows creditors to make an informed choice. Not only must the proposed releases, injunctions, and exculpations be narrowed to comply with applicable law,

they should be sufficiently explained so that interested creditors can determine exactly what releases will be imposed upon them and the releases' impact on their claims.

1. The Terms of the Releases and Injunctions are Unclear and Insufficiently Described

The Disclosure Statement fails to explain in a clear and succinct manner what releases are being imposed on creditors and the relevant legal authority to support such releases. The releases in this case are all-encompassing. Claimants who vote to accept the Plan are bound by the releases and injunctions. Furthermore, it appears that the Injunction Provision bars parties from commencing actions against Exculpated Parties despite the fact that there is a carve out for certain actions.

Moreover, the provision regarding "Released Parties" is confusing and overly broad, and it is not clear what the language regarding Related Persons means as applied to that definition, nor what it modifies.[5] But to the extent Released Parties include "Related Persons," that is defined as, with respect to a specific Person, said Person's current and former shareholders, affiliates, subsidiaries, employees, agents, investment managers, subagents, officers, directors, managers, trustees, partners, members, professionals, representatives, advisors, attorneys, financial advisors, accountants, and consultants. These "Related Persons" are otherwise unidentified. Given the breadth of the parties being released, this incredibly broad provision should be narrowed. The Disclosure Statement should identify these parties and the consideration given for the release.

[5] The definition provides that "(c) with respect to any Person or Entity solely in their capacity as such (provided that with respect to any Related Persons identified herein, each such Person constitutes Releasing Party under this clause solely with respect to derivative claims that such Related Person could have properly asserted on behalf of a Person identified in clauses (a) and (b) of the definition of Releasing Parties)." *See* Plan, Art. I.1.77.

2. The Exculpation Provision Should Not Be Approved

Similarly, to the extent that applicable law authorizes exculpation beyond 11 U.S.C. § 1125(e), the Plan contains an Exculpation Provision that is overly broad and inconsistent with applicable caselaw. Courts have held that trustees, the debtor's officers and directors, official committees and their members, and counsel to estate fiduciaries may not be exculpated for conduct that is not court-supervised conduct that carries out estate fiduciary duties during the chapter 11 case, that is, conduct that occurs after the petition has been filed and before the plan's effective date. *See, e.g., In re Highland Capital Mgmt., L.P.*, 48 F.4th 419, 437 (5th Cir. 2022) ("any exculpation in a Chapter 11 reorganization plan [must] be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties . . . ."); *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (court considered whether an official committee of unsecured creditors could be exculpated and held that 11 U.S.C. § 1103(c) implies both a fiduciary duty and a limited grant of immunity to members of the unsecured creditors' committee); *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 700-01 (E.D. Va. 2022) ("Exculpation is appropriate when it is solely limited to fiduciaries who have served a debtor through a chapter 11 proceeding.") (citing *In re Health Diagnostic Lab. Inc.*, 551 B.R. 218, 232 (Bankr. E.D. Va. 2016)); *In re Washington Mutual, Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) ("[An] exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers."); *In re PTL Holdings LLC*, 2011 WL 5509031 at *12 (Bankr. D. Del. Nov. 10, 2011) ("the exculpation clause here must be reeled into include only those parties who have acted as estate fiduciaries and

their professionals"); *see also Blixseth v. Credit Suisse,* 961 F.3d 1074, 1082 (9th Cir. 2020) (essential participants in the plan process).

The Exculpation Provision here inappropriately extends to prepetition and post-Effective Date activity that cannot be exculpated. But exculpation "only extends to conduct that occurs between the Petition Date and the effective date." *In re Mallinckrodt PLC*, 639 B.R. 837, 883 (Bank. D. Del. 2022).

Exculpation clauses should not extend past the effective date of a plan, to avoid exculpating actions that have not yet occurred, are yet unknown, and are not subject to court supervision. *See In re Aegean Marine Petroleum Network, Inc*. 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019) (exculpating parties for actions "that were approved by the Court"); *In re Washington Mut., Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011) (exculpations cover "actions in the bankruptcy case") (citing *In re PWS Holding Corp*., 228 F.3d 224, 246 (3d Cir. 2000)).

The Exculpation Provision here also applies to "any other *prepetition* . . . act taken or omitted to be taken in connection with preparation of or in immediate contemplation of the Chapter 11 Cases." *See* Plan, Art. IX.9.1(a) (emphasis added). Such conduct likewise is not conduct that occurred during the bankruptcy case, or by an estate fiduciary, and including such language would turn this provision into a release of prepetition claims rather than an exculpation.

Additionally, the Exculpation Provision improperly includes a finding of "good faith" for future conduct relating to "Distributions" and relieves any Exculpated Party from all liability "at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such Distributions made pursuant to the Plan." *Id.*, Art. IX.9.1(b). As such, this provision exceeds the

bounds allowed by the Bankruptcy Code. *See, e.g., SEC v. Universal Exp., Inc.*, 475 F. Supp. 2d 412, 425 (S.D.N.Y. 2007) (Lynch, J.), *aff'd sub nom. SEC v. Altomare*, 300 F. App'x 70, 71 (2d Cir. 2008) ("The liability shield of § 1125(e) specifically applies to the disclosure and solicitation period prior to approval of a reorganization plan . . . .").

Accordingly, the clause relating to prepetition and Post-Effective Date activities or omissions should be stricken from the Plan's Exculpation Provision.

Additionally, the purported exculpation extends beyond what bankruptcy courts have allowed in this District for "claims against exculpated parties based on the negotiation, execution, and implementation of agreements and transactions that were approved by the Court." *Aegean Marine Petroleum Network,* 599 B.R. at 721. Here, the purported exculpation provides for parties to be exculpated for a panoply of items that are not tied to Court approval and that may occur after the Effective Date. *See* Plan, Art. IX.9.1(a) (for "contract, instrument, release, or other agreement or document created or entered into in connection with the Plan").

Furthermore, the United States Trustee also objects to the extent the Exculpation Provision shields Exculpated Parties who rely upon the advice of counsel. Although reliance may be raised as an affirmative defense, it should not be an absolute bar against liability. The Exculpated Parties should have a claim against their legal advisors for any improper or mistaken advice, and the exculpation should not protect such advice.

Neither the Disclosure Statement nor the Plan provides any basis for an Exculpation Provision of the breadth and scope as proposed in the Plan. Accordingly, the Plan violates section 1129(a)(1) and (3) of the Bankruptcy Code and the Disclosure Statement describing it cannot be approved.

3 . The Injunction Provision Enforcing the Exculpation Should Not Be Approved

Article IX.9.3 includes an Injunction Provision that would enforce the Exculpation Provision, but, even if the Exculpation Provision is approved, the Injunction Provision should not be because it is not supported by any statutory authority nor have the Plan Proponents met the standards for an injunction.

There is no Bankruptcy Code provision that authorizes chapter 11 plans or confirmation orders to include injunctions to enforce exculpation provisions. Further, such an injunction is not warranted by the traditional factors that support injunctive relief because there is no threatened litigation and no need for an injunction to prevent irreparable harm to the exculpated parties. A party seeking an injunction "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also City and County of San Francisco v. Trump*, 897 F.3d 1225, 1243 (9th Cir. 2018). An exculpation provision may serve as an affirmative defense in later litigation, but there is no basis for an injunction precluding parties from bringing exculpated claims before any court has had an opportunity to determine the effect of the Exculpation Clause on those claims.

D. The Plan Discriminates Unfairly and the Disclosure Statement Does Not Provide Adequate Information Regarding this Treatment

Section 1129(b) provides that a plan can be confirmed if it "does not discriminate unfairly . . . with respect to each class of claims or interests that is impaired under, and

has not accepted, the plan." 11 U.S.C. § 1129(b). The Bankruptcy Code does not define unfair discrimination. *In re SunEdison, Inc.*, 575 B.R. 220, 226 (Bankr. S.D.N.Y. 2017) ("The Bankruptcy Code does not define unfair discrimination, but it is designed to protect against horizontal discrimination in the same way that the absolute priority rule prevents against nonconsensual vertical discrimination.").

In *In re Breitburn Energy Partners LP*, the court found unfair discrimination where one unsecured class, Class 5B, received a 4.5% recovery and the other unsecured classes received recoveries of between 7% and 100%. 582 B.R. 321, 350–52 (Bankr. S.D.N.Y. 2018). In *Breitburn*, the court evaluated the recoveries of the four unsecured classes. *Id.* at 351. The court determined that Class 5A would receive 11.94%; Class 5B would receive approximately 4.5%; Class 6 would receive approximately 7%; and Class 7A and 7B would receive 100%. *Id.* The court noted that the plan discriminated between the classes and that the debtors had "not demonstrated why it is reasonable or necessary to pay Class 5B so much less percentagewise than Class 5A or Class 7, and less than Class 6." *Id.* The court also noted that "Class 5A is receiving over two times greater value than Class 5B." *Id.* Given these facts, the court "conclude[d] that the Debtors have failed to sustain their burden under 11 U.S.C. § 1129(b) to prove that the Plan does not unfairly discriminate against Class 5B." *Id.* at 352. Courts in other districts have found unfair discrimination at similar thresholds. *See In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 538 (Bankr. E.D. Tenn. 1997) (holding unfair discrimination existed where one unsecured class party recovers 50% and another unsecured class recovers 100%); *In re Barney & Carey Co.*, 170 B.R. 17, 25-26 (Bankr. D. Mass. 1994) (finding unfair discrimination where one class is paid 100% over ten years and the other class is paid 15% ninety days after Plan is effective).

Here, Class 3 and Class 4 appear to be general unsecured claims. Class 3 projected recovery is 24-36%; Class 4 projected recovery is 0%. The Plan subordinates Class 4 to Class 3. *See* Plan, Art. IV.4.4(d). But the Disclosure Statement states that Class 4 may receive distributions *pari parsu* with Class 3. *See* Disclosure Statement, Art. II.2(d). Not only should the Plan Proponents clarify this issue to provide adequate information to creditors, but it is also unclear if the Class 3 projected recoveries take into account distributions to Class 4.

To the extent a class rejects the Plan, and such treatment unfairly discriminates between classes, pursuant to section 1129(b) of the Bankruptcy Code, the Court should not confirm the Plan. Moreover, the Disclosure Statement should not be approved to the extent it does not provide adequate information about the treatment to Class 3 and Class 4.

E. The Disclosure Statement Does Not Provide Adequate Information to Address Whether the Plan is Fair and Equitable

In addition to the unfair-discrimination requirement, section 1129 requires a plan to be "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Section 1129(b)(2) outlines what "fair and equitable" means, providing in relevant part:

> With respect to a class of unsecured claims—
>
> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, . . .

11 U.S.C. § 1129(b)(2)(B); *see also In re DBSD N. Am., Inc.,* 634 F.3d 79, 94 (2d Cir. 2011) ("The Code does not define the full extent of 'fair and equitable,' but it includes a form of the absolute priority rule as a prerequisite.").

As stated above, it is unclear what, if anything Class 4 is receiving under the Plan. According to the Plan, Class 4 projected recovery is 0%. *See, e.g.,* Plan, Art. IV.4.1 (Summary of Claims, Classes, Voting, and Projected Recoveries). Yet, the Disclosure Statement states that Class 4 may be paid *pari passu* with Class 3. *See* Disclosure Statement, Art. II.2(b). And the Plan provides that the Class 3 will receive a 24-36% distribution. *See* Plan, Art. IV.4.1

Accordingly, the Disclosure Statement and Plan should be revised to explain the treatment and conflicting language with respect to Class 3 and Class 4 claims; otherwise, it appears to describe a Plan that is not fair and equitable.

F. The Liquidating Trustee Should Not Be the Sole Entity That Can Object to Proofs of Claim

Section 502(a) of the Bankruptcy Code provides that a proof of claim "is deemed allowed, unless a party in interest . . . objects. 11 U.S.C. § 502(a). By contrast, under the Plan, only the Liquidating Trustee may object to proofs of claim. Plan, Art. VIII.8.1. Specifically, the Plan gives the Liquidating Trustee "exclusive authority, but not the obligation, to do any of the following with respect to any Claims or Interests after the Effective Date: (i) File, withdraw, or litigate to judgment, Objections to and requests for estimation of Claims. . . ." *Id.* This provision should be either stricken or revised to

provide that any party in interest may object to a proof of claim in accordance with Section 502(a) of the Bankruptcy Code.

CONCLUSION and RESERVATION OF RIGHTS

WHEREFORE, the United States Trustee respectfully requests that this Court (i) sustain the Objection, (ii) deny the Motion, (iii) disapprove the Disclosure Statement, and (iv) grant such other relief as is just and proper.

Additionally, the United States Trustee reserves his rights to supplement this Objection and object at the hearing on the Disclosure Statement and Motion to other amendments, including supplemental disclosures and documents. The United States Trustee further reserves his rights to object to confirmation of the Plan, or any future amendments or supplements thereto.

Dated: New York, New York
November 5, 2024

Respectfully submitted,

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