

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO**

In Re: Grupo HIMA San Pablo, Inc., Debtor (EIN #8245)	Case No. 23-02510 (ESL) Chapter 11
In Re: Centro Médico El Turabo, Inc. Debtor (EIN #5905)	Case No. 23-02513 (ESL) Chapter 11
In Re: HIMA San Pablo Properties, Inc. Debtor (EIN #2718)	Case No. 23-02515 (ESL) Chapter 11
In Re: Portal De Caguas, Inc. Debtor (EIN #4874)	Case No. 23-02516 (ESL) Chapter 11
In Re: General Contracting Services, Inc. Debtor (EIN #4903)	Case No. 23-02517 (ESL) Chapter 11
In Re: IA Developers, Corp. Debtor (EIN #4128)	Case No. 23-02519 (ESL) Chapter 11
In Re: CMT Development, LLC. Debtor (EIN #4351)	Case No. 23-02520 (ESL) Chapter 11

In Re: Jocar Enterprises, Inc. Debtor (EIN #5849)	Case No. 23-02521 (ESL) Chapter 11
In Re: Jerusalem Home Ambulance, Inc. Debtor (EIN #0175)	Case No. 23-02522 (ESL) Chapter 11
In Re: Host Security Services, Inc. Debtor (EIN #8802)	Case No. 23-02523 (ESL) Chapter 11

**UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' FIRST AMENDED
DISCLOSURE STATEMENT FOR FIRST AMENDED CONSOLIDATED
PLAN OF LIQUIDATION UNDER CHAPTER 11 OF THE
BANKRUPTCY CODE, AS SUPPLEMENTED**

To The Honorable Court:

Mary Ida Townson, United States Trustee for Region 21, pursuant to the authority granted by 11 U.S.C. § 307 and 28 U.S.C. § 586(a)(3)(B), objects to the First Amended Disclosure Statement for First Amended Consolidated Plan of Liquidation Under Chapter 11 of the Bankruptcy Code, As Supplemented (the "Supplemented DS"), that was filed by Grupo HIMA San Pablo, Inc., and its affiliated debtors (collectively, the "Debtors"), for the following reasons:

Preliminary Statement

As previously argued, nonconsensual third-party releases cannot be approved under the Bankruptcy Code after the Supreme Court's decision in *Harrington vs. Purdue Pharma L.P.*, 603 U.S. 204 (2024). The United States Trustee objected to the Debtors' original Disclosure Statement and Plan and argued that the use of an "opt-out" procedure to obtain creditors' "consent" to certain third-party releases ran afoul of *Purdue*.

The Debtors responded by presenting an Amended Disclosure Statement and Plan that implemented a hybrid opt-out/opt-in procedure, depending on whether creditors had filed a notice of appearance and were represented by an attorney on the record. Although the United States Trustee recognized this as an improvement, she nevertheless maintained her *Purdue*-based objections given that the Amended Plan did not completely abandon the use of opt-outs.

The Debtors thus went back to the drawing board and returned with a Supplemented Disclosure Statement and Plan that eliminates the opt-in procedure that would have applied to most creditors and instead doubles down on the use of opt-outs by making said procedure applicable to virtually all creditors, except those who vote to accept the Plan. These creditors will now be deemed to automatically consent to the Releases, even if they choose to fill out the opt-out form. Thus, far from remedying the United States Trustee's legitimate concerns as to the non-consensual nature of the Releases, the latest iteration of the Disclosure Statement and Plan effectively exacerbates them, by effectively deeming potentially thousands of creditors to have consented to the Releases of claims against non-debtor third parties, for practically no consideration—general unsecured creditors are only expected to receive 0.8% of their claims.

Thus, the United States Trustee is forced to renew her previous objections to the Disclosure Statement and Plan. The use of an “opt-out” procedure remains inadequate to obtain creditors’ consent to the third-party releases. The Supplemented Disclosure Statement provides no legal basis to equate a party’s failure to opt out with the type of affirmative, knowing, and voluntary action required to make a third-party release consensual under Puerto Rico and relevant case law. Instead, the Debtors posit that Puerto Rico law is inapplicable to the issue of whether silence constitutes consent in the context of an opt-out procedure and instead rely on several out-of-circuit cases that have approved opt-out procedures as consensual under federal bankruptcy law. But, as explained below, these cases rest on faulty legal premises or are distinguishable from the facts in this case.

The United States Trustee also argued that the inclusion of the Debtors as “Released Parties” effectively granted Debtors a discharge that they would otherwise not be entitled to obtain under § 1141(d)(3) of the Bankruptcy Code, at least as to any claims asserted by creditors who fail to opt out of the Releases, and those who, by virtue of voting in favor of the Plan, are deemed to automatically grant the Releases. Since it is reasonable to expect that most creditors will not take the time to read all pages of the Disclosure Statement and Plan—which span over 250 pages—the Debtors will in effect be receiving a discharge as to potentially thousands of claims, despite the Plan’s assertion that Debtors will not be receiving a discharge under § 1141(d)(3). This is because the Third-Party Release provisions in the Plan operate entirely independent of its Discharge provisions.

Lastly, the United States Trustee previously argued that, to the extent that applicable law authorizes exculpations beyond 11 U.S.C. § 1125(e), the Plan’s related Exculpation provisions were overly broad in contravention of First Circuit precedent. The Supplemented Plan expanded those provisions, and they continue to be objectionable under First Circuit precedent and that of other courts because they do not carve out gross negligence, they extend beyond case fiduciaries, and they would potentially cover post-Effective Date activity.

Thus, the United States Trustee reiterates her previous objections to the Debtors’ original and Amended Disclosure Statements and expands upon them below. The Supplemented Disclosure Statement does not currently provide adequate information as to the third-party releases, nor does it describe a confirmable plan as to the third-party releases and the exculpation provision.

Background

1. On June 24, 2024, Debtors filed their Disclosure Statement, as well as their *Joint and Consolidated Chapter 11 Plan of Liquidation Under Chapter 11 of the Bankruptcy Code for the Debtors’ Estates* (the “Original Plan”).¹

¹ ECF Nos. 951 and 954 (All docket citations are in reference to lead case 23-02510).

2. The Original Plan included certain injunctions arising from third-party releases (the “Releases”) and exculpations (the “Exculpations”).²

3. In summary, the Original Plan provided that certain “Releasing Parties” would have been deemed to have released several “Released Parties” from a wide variety of claims arising from or related to the Debtors’ operations or their conduct during the bankruptcy proceedings (excluding claims for willful misconduct or intentional fraud), unless the “Releasing Party” filled out an Opt-Out form.

4. On August 20, 2024, the United States Trustee submitted her *Objection to Debtors’ Disclosure Statement* (the “First Objection”).³ The United States Trustee incorporates the First Objection as if fully transcribed herein.

5. In her First Objection, the United States Trustee argued the Disclosure Statement should not be approved as it failed to provide a basis for: (1) deeming unimpaired creditors who are not eligible to vote to have consented to the releases; (2) deeming creditors who vote to accept or even reject the plan to have automatically consented to the releases unless they fill out an opt-out form; (3) deeming creditors who failed or abstained to vote on the plan to have also consented to the third-party releases unless they fill out an opt-out form; and (4) overly broad exculpation provisions in contravention to applicable First Circuit precedent.

6. On September 5, 2024, the Court held the hearing on approval of the Disclosure Statement.⁴ There, the Court ordered Debtors to supplement the Disclosure Statement and state their position as to the objections of the U.S. Trustee and AAFAF.

7. On November 1, 2024, after several requests for extensions of time, Debtors filed their *First Amended Disclosure Statement for First Amended Consolidated Plan of Liquidation Under*

² See *Original Plan*, § 10.05 (p. 48), § 10.06 (p. 49), § 10.07 (p. 49-50).

³ ECF No. 1031.

⁴ ECF No. 1056.

Chapter 11 of the Bankruptcy Code (the "Amended Disclosure Statement").⁵

8. Debtors also filed their *First Amended Consolidated Chapter 11 Plan of Liquidation Under Chapter 11 of the Bankruptcy Code for the Debtors' Estates* (the "Amended Plan").⁶

9. Debtors did not separately state their position as to the United States Trustee's First Objection. Rather, Debtors modified the Amended Plan to create a hybrid opt-out/opt-in procedure, where creditors who filed an electronic notice of appearance and were represented by an attorney would be required to opt-out of the Releases, while all other creditors would be required to opt-in.

10. On December 9, 2024, the United States Trustee filed an *Objection to Debtors' First Amended Disclosure Statement for First Amended Consolidated Plan of Liquidation Under Chapter 11 of the Bankruptcy Code* (the "Second Objection").⁷ The United States Trustee incorporates the Second Objection as if fully transcribed herein.

11. In the Second Objection, the United States Trustee reiterated that the use of an opt-out procedure remained an inadequate method of obtaining creditors' consent to the Releases, even if now limited to those creditors who filed an electronic notice of appearance and were represented by an attorney on the record. The United States Trustee also argued that: (1) the Amended Plan and Sample Ballots contained contradictory language as to who would be deemed to consent to the Releases; (2) the Amended Plan contained several provisions that in effect circumvented the Code's prohibition on Debtor's receiving a discharge, including a "Temporary Injunction;" and (3) the Amended Plan's Exculpation provisions did not carve out gross negligence, extended beyond case fiduciaries, and covered post-Effective date activity.

12. On January 17, 2025, Debtors filed a *Response to United States Trustee's "Objection to*

⁵ ECF No. 1100.

⁶ ECF No. 1101.

⁷ ECF No. 1133.

'Debtor's First Amended Disclosure Statement.'" (the "Response").⁸ As to the Releases, Debtors argued the following: (1) the Supreme Court's decision in *Purdue* did not express a view on what constitutes consent to a release and this Court should adopt the view expressed by several courts that have held that a party's failure to opt out is sufficient manifestation of consent; (2) the Court should apply federal common law regarding what constitutes consent and not state law contract principles, as advocated by the United States Trustee; and (3) the Releases are justified under the particular circumstances of these cases, particularly given the use of the hybrid opt-out/opt-in procedure.

13. As to the Exculpation provisions, the Debtor argued that similar provisions were approved as reasonable by the United States District Court for the District of Puerto Rico in the Title III cases of the Puerto Rico Highways and Transportation Authority ("HTA") and the Puerto Rico Sales Tax Financing Corporation ("Cofina") and by the Third Circuit in *In re PWS Holding Corp.* 228 F.3d 224 (3d Cir. 2000), despite that case only allowing exculpation for estate fiduciaries during the case and including an exception for gross negligence.

14. As to the Temporary Injunction, Debtors argued that said provision did not amount to a *de facto* discharge, and that the same was necessary to protect the post-Effective Date entities from interference by the creditors while they carry out the distribution of assets contemplated by the Plan.

15. Lastly, Debtors argued that the United States Trustee's objections to the Amended Disclosure Statement were really objections as to the confirmability of the Amended Plan and thus should be deferred until the confirmation hearing.

16. On January 21, 2025, the Court held the hearing on approval of the Amended Disclosure Statement.⁹ The parties made their arguments, and the Court took the matter of the Third Party Releases under advisement.

⁸ ECF No. 1191.

⁹ ECF No. 1205.

17. On May 2, 2025, the Debtors filed their *First Amended Disclosure Statement for the First Amended Consolidated Plan of Liquidation Under Chapter 11 of the Bankruptcy Code, As Supplemented* (the “Supplemented DS”).¹⁰ Debtors also filed their *First Amended Consolidated Chapter 11 Plan of Liquidation Under Chapter 11 of the Bankruptcy Code for the Debtors’ Estates, As Supplemented* (the “Supplemented Plan”).¹¹

18. On the same day, Debtors, along with Island Healthcare, LLC, and Alter Domus (US), also filed a *Joint Motion to Supplement Debtors’ Response to the United States Trustee’s Objection to the Plan’s Consensual Releases in Light of Recent Court Decisions* (the “Response Supplement”).¹² There, Debtors and Alter Domus cite two additional cases, *Mercy Health Network, Inc. v. Mercy Hospital et als*, 2025 WL 1000782 (N.D. Iowa, March 3, 2025) and *In re Spirit Airlines, Inc.*, No. 24-011988 (SHL), 2025 WL 737068 (Bankr. S.D.N.Y. March 7, 2025), as further support for their position that opt-out procedures are an appropriate way to secure consensual third-party releases.

19. The Debtors and the Lender Parties go on to claim that, “since the circumstances of these cases align so closely with the rulings in the above-discussed decisions (as well as the other decisions cited by the Debtors in their Response), the Debtors have decided to streamline this issue by eliminating the hybrid ‘opt-out / opt-in’ process contained in the prior version of the Plan in favor of a straightforward ‘opt out’ procedure that will be clearly identified and notified to all parties-in-interest, and which will be unequivocally understood by all creditors in these proceedings.”¹³ Thus, the Debtors now revert to the procedures outlined in their Original Plan, where most creditors would be deemed to consent to the Releases, unless they explicitly opted out.

20. Consequently, the United States Trustee renews her previous objections to the newest

¹⁰ ECF No. 1329.

¹¹ ECF No. 1330.

¹² ECF No. 1331.

¹³ *Id.*, p. 6.

iteration of Debtors' Disclosure Statement. The United States Trustee believes the non-consensual releases are more troubling than before, as Debtors' Supplemented DS and Plan now seek to impose the Releases on potentially thousands of different creditors who will most likely abstain from participating on the plan voting process.

21. The United States Trustee begins by summarizing the Release and Exculpation provisions as they now stand in the Supplemented Plan.

Third Party Releases

22. Section 1.135 of the Supplemented Plan defines "Released Parties" as:

collectively (a) the Debtors and; (b) Debtors appointed reorganization officers which are limited to include: (i) the current and former members of the Special Committee and; (ii) the Ankura professionals who serve as officers of the Debtors; (c) the Prepetition First Lien Secured Parties; (d) the Prepetition Second Lien Secured Parties; (e) the DIP Agent; (f) the DIP Lender; (g) with respect to each of the foregoing entities in clauses (a) through (f), each of their current and former affiliates (except non-debtor affiliates or non-debtor subsidiaries of the Debtors); and (h) with respect to each of the foregoing entities in clause (b), such entities' predecessors, successors and assigns, subsidiaries, affiliates (except nondebtor affiliates or non-debtor subsidiaries of the Debtors), managed accounts or funds, and all of their respective current and former officers, directors, principals, shareholders, members, partners, employees, agents, and advisory board members; *provided, however*, no Expressly Excluded Released Parties shall be considered a Released Party.¹⁴

23. The Prepetition First Lien and Second Lien Secured Parties, as well as the DIP Agent and DIP Lenders, having been struck from the definition of Released Parties in the Amended Plan, are now included again.

24. The Supplemented Plan further exempts from the group of Released Parties several "Expressly Excluded Released Parties," which are defined as including, "but not limited to," the following:

(i) non-Debtor subsidiary Sabiamed Corporation, (ii) non-debtor affiliates or nondebtor subsidiaries of the Debtors and (iii) all current and former

¹⁴ Supplemented Plan, § 1.135.

directors and officers of the Debtors, except for those current and former directors and officers of the Debtors who are Exculpated Parties pursuant to Section 1.69 of this Plan or Released Parties pursuant to section 1.133 of this Plan. For the avoidance of doubt, no member of the Rodriguez family, including but not limited to Armando J. Rodriguez-Benitez or Heidi L. Rodriguez-Benitez, shall be an Exculpated Party or Released Party, and each is included in the definition of Expressly Excluded Released Parties.

25. The United States Trustee understands that Debtors' inclusion of its non-filing affiliates and subsidiaries in the above list is meant to exclude entities like HIMA-San Pablo Captive Insurance Co., Limited, from the definition of Released Parties.

26. Section 1.136 of the Supplemented Plan defines "Releasing Parties" to mean, collectively:

(a) the Debtors; (b) the Prepetition First Lien Secured Parties; (c) the Prepetition Second Lien Secured Parties; (d) the DIP Agent; (e) the DIP Lender; (f) with respect to each of the foregoing parties under (a) through (e), each of their current and former affiliates and/or subsidiaries; (g) with respect to each of the foregoing entities in clauses (a) through (e), such entities' predecessors, successors and assigns, subsidiaries, affiliates, managed accounts or funds, and all of their respective current and former officers, directors, principals, shareholders, members, partners, employees, agents, and advisory board members, and such persons' respective heirs, executors, estates, servants, and nominees; and (h) without limiting the foregoing, each Holder of a Claim against or Interest in the Debtors that (i) (a) has filed an electronic appearance on the record of these cases, or (b) is represented by legal counsel on the record of these cases, or (c) was duly notified in these cases and received copies of the Plan and the ballots; and either (ii) has voted to accept the plan; or (iii) voted to reject the Plan, and did not elect to opt out of the releases provided for in the Plan; or (iv) abstained from voting or was not entitled to vote on the Plan and did not elect to opt out of the releases provided for in the Plan.

27. The United States Trustee previously noted the following as to these parties: (1) some of them, such as Sabiamed Corp. and possibly HIMA-San Pablo Captive Insurance Co., Limited, are non-filing debtor affiliates who are not parties to these proceedings; (2) others, such as the current and former affiliates of the secured creditors and the Respective Related Parties of all the named Releasing Parties, are mostly unknown. As before, the Debtors have still not provided a legal basis to support a finding that these non-filing, non-appearing, or otherwise unknown parties have consented to any type of

release.

28. Most importantly, the definition of “Releasing Parties” now does away with the hybrid opt-out/opt-in procedure that Debtors previously touted as an acceptable way of “heed[ing] the concerns raised by the UST on their previous objection to the disclosure statement as to the complexity and length of the documents and the lay persons examining them.”¹⁵

29. The term “Releasing Parties” now potentially includes all creditors who: (1) have filed an electronic notice of appearance; (2) are represented by legal counsel on the record; *or* (3) are duly notified in these cases and received copies of the Plan and the ballots.

30. These creditors will now be deemed to consent to the Releases in the following manner:

(a) Those who vote to accept the Plan are deemed to automatically consent to the Releases (presumably, even if they check the opt-out box).

(b) Those who vote to reject the Plan are deemed to consent to the Releases unless they check the opt-out box.

(c) Those who abstained from voting, or were not entitled to vote, on the Plan are deemed to consent to the Releases unless they check the opt-out box.

31. According to § 10.05 of the Supplemented Plan, on the Effective Date, the Releasing Parties will “conclusively, absolutely, unconditionally, irrevocably, and forever discharge and release” the Released Parties, from any claim that arose prior to the Effective Date, and which may relate to the following:

liabilities, operations, or business of the Debtors, the Chapter 11 Cases, the purchase, sale, or transfer of any debt, security, asset, right, or interest of the Debtors or the Liquidating Debtors, the making of any loan to the Debtors or the Liquidating Debtors, the subject matter of, or the transactions or events giving rise to, any Claim against or Interest in the Debtors that is treated in the Plan, the business or contractual arrangements between any

¹⁵ ECF No. 1991, ¶32.

Debtor and any Released Party, the negotiation, formulation, or preparation of the DIP Credit Agreement documents or related agreements, instruments, or other documents, the negotiation, formulation, or preparation of the Plan, the Global Term Sheet, the Prepetition First Lien Credit Agreement, the Prepetition Second Lien Credit Agreement, or any related agreements or instruments, or the solicitation of votes with respect to the Plan, or any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date; *provided* that nothing in the Plan shall be construed to release the Released Parties from any claims based upon willful misconduct or intentional fraud as determined by a Final Order; *provided further*, that the provisions of this paragraph shall not apply to the Excluded Released Parties or any Claims, Interests, or Causes of Action that constitute Liquidating Trust Assets, including, but not limited to, Avoidance Actions (except for any Avoidance Actions that exist, may exist, or could have existed against the Prepetition First Lien Secured Parties, the Prepetition Second Lien Secured Parties, the DIP Agent, and/or the DIP Lender, which such Avoidance Actions shall be released pursuant to the Plan), and D&O Claims.¹⁶

32. The Supplemented DS contains a sample ballot as Exhibit G.¹⁷
33. The sample ballot now only contains an Opt-out form.
34. On the second page, the ballot provides the following warning in bold print:

Please be advised that Article X of the Plan contains release, exculpation and injunction provisions. These provisions are included in the Ballot. You are advised to review and consider the Plan carefully because your rights might be affected thereunder even if you abstain from voting. If you (a) abstain from voting or (b) vote to reject the Plan and, in each case, do not check the box in Item 3 below, as may be applicable to you, you *may* be deemed to have consented to the release provisions set forth in Article X of the Plan.¹⁸

We note that the use of the word “may” above is problematic, since it implies the granting of the Release may be dependent on an additional factor, aside from the failure to check the opt-out box.

35. The fourth page of the sample ballot states the following:

If you vote to accept the Plan, you shall be deemed to have consented to the release, provisions set forth in Article 10.05 of the Plan.

If you vote to reject the Plan and, do not check the box in Item 3 below, you

¹⁶ Supplemented Plan, § 10.05 (Emphasis in original).

¹⁷ Supplemented DS, ECF No. 1329-7.

¹⁸ *Id.*, p.2 (emphasis added).

shall be deemed to have consented to the release provisions set forth in Article 10.05 of the Plan.

If you abstain from voting or you are not entitled to vote and you are a holder of a Claim against the Debtors which either (i) has filed an electronic appearance on the record of these cases, or (ii) is represented by legal counsel on the record of these cases, or (iii) was duly notified in these cases and received copies of the Plan and the Ballot, you are required Opt Out from releases. If you do not check the box in Item 3 below, you shall be deemed to have consented to the release provisions set forth in Article X of the Plan.

The Disclosure Statement and the Plan must be referenced for a complete description of the release, injunction, and exculpation provisions in Article 10.05 of the Plan.

Please be advised that your decision to opt out does not affect the amount of distribution you will receive under the Plan. Specifically, your recovery under the Plan will be the same if you opt out.¹⁹

Exculpation

36. The Supplemented Plan, at § 1.69, provides a list of parties that will be deemed to be

Exculpated:

(a) the Debtors; (b) the Creditors' Committee and each of its members, solely in their capacities as such; (c) the Liquidating Debtors, solely if acting in a capacity as fiduciaries for the Debtors' estate; (d) the current and former members of the Special Committee; (e) the Ankura professionals who serve as officers of the Debtors; (f) the Prepetition First Lien Secured Parties; (g) the Prepetition Second Lien Secured Parties; (h) the DIP Agent; (i) the DIP Lender; (j) Liquidating Trustee; (k) with respect to each of the foregoing entities in clauses (a) through (i), each of their current and former affiliates (except non-debtor affiliates or non-debtor subsidiaries of the Debtors); and (l) with respect to each of the foregoing entities in clauses (a) through (j) such entities' predecessors, successors and assigns, subsidiaries, affiliates, managed accounts or funds, and all of their respective current and former officers, directors, principals, shareholders, members, partners, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors, and other professionals, and such persons' respective heirs, executors, estates, servants, and nominees.²⁰

¹⁹ *Id.*, p. 4.

²⁰ Supplemented Plan, § 1.69

37. The Supplemented Plan also provides for a list of “Expressly Excluded Exculpated Parties,” which are the same parties included in the “Expressly Excluded Released Parties.”²¹

38. As before, the Supplemented Plan provides that the Exculpated Parties will be released and exculpated from any conceivable claim that arises from the administration of the chapter 11 cases, except those based on fraud or willful misconduct.²² It does not except gross negligence.

39. The Supplemented Plan does expand the Exculpation Provision to cover any claims arising from “the Global Term Sheet; the transfer, creation, and constitution (as applicable) of the Liquidating Trust and the Liquidating Debtors; the distributions or actions to be taken by the Liquidating Trustee and the Liquidating Debtors in consummation of the Plan.”

40. The Supplemented DS states that, “[i]f the releases and exculpations are not approved, certain parties may not be considered Releasing Parties, Released Parties, or Exculpated Parties, and certain Released Parties or Exculpated Parties may withdraw their support for the Plan.”²³

Argument

Nonconsensual third-party releases are not authorized under the United States Bankruptcy Code. *Harrington v. Purdue Pharma, L. P.*, 144 S. Ct. 2071, 2082–88 (2024). The United States Trustee maintains her position that the use of opt-outs to secure consent to third-party releases is impermissible under *Purdue* and thus renders the Plan unconfirmable. Nor does the Supplemented DS provide adequate information as to all the entities that will be receiving Releases, or why creditors who vote to accept the Plan will be deemed to automatically consent to the Releases. Neither does it explain why the Released Parties should be entitled to the Releases, what contributions they are making to the Plan, or why it is in the best interest of creditors for the Releases to be granted.

A court may only approve a disclosure statement if it contains “adequate information.” 11

²¹ Supplemented Plan, § 1.70

²² Supplemented Plan, § 10.06.

²³ Supplemented DS, p. 46.

U.S.C. § 1125(b). The Bankruptcy Code defines said term 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 hypothetical investor typical of the holders of claims or interests in the relevant class “to make an informed judgment about the plan.” 11 U.S.C. 1125(a)(1). In making this inquiry, the Court “shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.” *Id.*

“The phrase ‘adequate information’ has been deliberately left vague by Congress to give a bankruptcy court ‘wide discretion to determine on a case-by-case basis’ whether the disclosure is reasonable.” *In Re Ferretti*, 128 B.R. 16, 18 (Bank. D.N.H. 1991). “A disclosure statement should provide the creditors with an accurate basis for determining their position and their ability to make an informed decision with regard to the acceptance or rejection of the plan.” *In re Destilería Nacional, Inc.*, 2021 WL 3177287, at *2 (Bankr. D.P.R. July 27, 2021). The adequacy of the disclosure depends on several factors, such as: (1) the size and complexity of the chapter 11 case, (2) the type of plan proposed, (3) the type of creditors and claims impaired by the proposed plan, and (4) the access by impaired creditors to relevant information from other sources.” *In re El Comandante Mgmt. Co., LLC*, 359 B.R. 410, 415 (Bankr. D.P.R. 2006).

Moreover, the Court also has discretion to deny approval of a disclosure statement when it describes a plan that is unconfirmable. As this Court previously noted in *El Comandante*,

At the hearing on the approval of a disclosure statement, the court may consider issues pertaining to the plan, and may rule upon such issues, when the plan defects will make it unconfirmable, *In re Felicity Associates, Inc.*, 197 B.R. 12, 14 (Bankr.D.R.I.1996), that is, when the “plan is so fatally, and obviously flawed that confirmation is impossible.” *In re Mahoney Hawkes, LLP*, 289 B.R. 285, 294 (Bankr.D.Mass.2002). *See also Phoenix*, 278 B.R. at 394. The court may disapprove a disclosure statement that contains adequate information, when the proposed plan “cannot possibly be confirmed.” *In re CRIIMI MAE, Inc.*, 251 B.R. 796, 799 (Bankr.D.Md.2000). Relevant issues pertaining to the plan are classification

of claims, an artificial classification of a claim, whether the plan unfairly discriminates against a class of claims, and the solicitation procedure. *See In re Hillside Park Apts., L.P.*, 205 B.R. 177 (Bankr.W.D.Mo.1997). Thus, it is within this court's discretion to address these issues prior to the confirmation of the plan.

Id.

In addition, Federal Rule of Bankruptcy Procedure 3016(c) requires that, if a plan provision would enjoin conduct not otherwise enjoined under the Code, the disclosure statement must describe the enjoined conduct and identify the enjoined parties “in specific and conspicuous language” such as bold or italicized text. *See 7 Collier on Bankruptcy P 1125.02 (16th 2024).*

A. The Amended Disclosure Statement Does Not Provide Adequate Information

As set forth above, the Supplemented DS fails to provide adequate information as to several issues related to the third-party releases. Specifically:

- The Supplemented DS does not explain why the Released Parties should be entitled to the Releases, what contributions they are making to the Plan, or why it is in the best interest of creditors for the Releases to be granted
- The Supplemented DS does not identify all parties who are receiving releases nor giving releases under the Plan. In particular, the releases apply to virtually any conceivable entity related to the Released Parties, which includes a broad swath of unnamed parties including such entities’ predecessors, successors and assigns, subsidiaries, affiliates, managed accounts or funds, and all of their respective current and former officers, directors, principals, shareholders, members, partners, employees, agents, and advisory board members.
- The Supplemented DS does not provide a basis for deeming creditors who vote to accept the Plan as having consented to the Releases.
- The Court should also reject the Amended Disclosure Statement to the extent it provides

no explanation as to how creditors will benefit from the release (and exclusion from Liquidating Trust Assets) of the avoidance actions against the DIP Agent, DIP Lender, and Prepetition First Lien Agent and First Lien Lenders.

B. The Amended Disclosure Statement Cannot be Approved Because it Describes a Plan that Is Not Confirmable Because it Imposes Nonconsensual Third-Party Releases.

i. Introduction

The Supreme Court held in *Harrington v. Purdue Pharma L.P.* that bankruptcy courts cannot involuntarily alter relationships between non-debtors by imposing nonconsensual releases of, or injunctions barring, claims between them. 603 U.S. 204, 209, 227 (2024). The Court did not prohibit chapter 11 plans from memorializing consensual third-party releases, and it did not “express a view on what qualifies as a consensual release.” *Id.* at 226.

A consensual third-party release is a separate agreement between non-debtors governed by nonbankruptcy law. As the Supreme Court recognized in *Purdue*, a release is a type of settlement agreement. *Purdue*, 603 U.S. at 223 (explaining that what the Sacklers sought was not “a traditional release” because “settlements are, by definition, consensual”) (cleaned up). A bankruptcy court can acknowledge the parties’ agreement to a third-party release, but the authority for a consensual release is the agreement itself, not the Bankruptcy Code. If a claim has been extinguished by virtue of the agreement of the parties, then the court is not using the forcible authority of the Bankruptcy Code or the bankruptcy court to extinguish the property right.

Here, there is no existing release agreement between non-debtors. Debtors instead seek a confirmation order that would use the power of the court to impose a third-party release on claimants without their affirmative and voluntary consent. Such a confirmation order would impermissibly alter the relations between non-debtors because a valid release does not exist under nonbankruptcy law.

ii. State Law Governs the Question of Whether a Third-Party Release is Consensual.

“[T]he basic federal rule in bankruptcy is that state law governs the substance of claims.” *Travelers Cas. & Sur. Co. of America v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) (cleaned up); accord *Butner v. United States*, 440 U.S. 48 (1979). Thus, courts apply state law when the question is whether a debtor has entered a valid settlement agreement. 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.”).

The rule is no different for third-party releases. They are separate agreements between non-debtors governed by state law. Unlike a bankruptcy discharge, which “is an involuntary release by operation of law,” “[i]n the case of voluntary releases, the nondebtor is released from a debt, not by virtue of 11 U.S.C. § 1141(b), but because the creditor agrees to do so.” *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 503, 507 (Bankr. D.N.J. 1997) (emphasis in original). See also *Continental Airlines Corp. v. Air Line Pilots Assn., Int’l (In re Continental Airlines Corp.)*, 907 F.2d 1500, 1508 (5th Cir. 1990) (holding that for settlement provisions “unrelated to substantive provisions of the Bankruptcy Code,” “the settlement itself is the source of the bankruptcy court’s authority”). Thus, “the Bankruptcy Code has not altered the contractual obligations of third parties, the parties themselves have so agreed.” *Arrowmill*, 211 B.R. at 507.

Because the Bankruptcy Code does not authorize the imposition of an involuntary release, *Purdue*, 603 U.S. at 209, 227, the release must be consensual under non-bankruptcy law. There is no Bankruptcy Code provision that preempts otherwise applicable state contract law governing releases between non-debtors. 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)); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”). Section 105(a), for example, “serves only to carry out authorities expressly conferred elsewhere in the code.” *Purdue*, 603 U.S. at 216 n.2 (quotation marks omitted). But the Code does not confer any authority to impose a release of claims between non-debtors that would not be valid under state law. The Bankruptcy Code does not define a “consensual release.” See 11 U.S.C. § 101. “There is no rule that specifies an ‘opt out’ mechanism or a ‘deemed consent’ mechanism” for third-party releases in chapter 11 plans. *In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). And no Code provision authorizes bankruptcy courts to deem a non-debtor to have consented to release claims against other non-debtors where such consent would not exist as a matter of state law.

Debtors argue that federal rather than state law applies to determine whether a third-party release is consensual. But because there is no applicable Code provision, whether a non-debtor has consented to release another non-debtor is not, as one case cited by Debtors concluded, a “matter of federal bankruptcy law.” *In re Spirit Airlines, Inc.*, No. 24-11988, 2025 WL 737068, at *18, *22 (Bankr. S.D.N.Y. Mar. 7, 2025); see also *In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 (Bankr. S.D. Tex. 2024) (relying on caselaw in the district rather than any provision of the Bankruptcy Code). Absent express authority in the Code, federal courts cannot simply make up their own rules for when parties have given up property rights by releasing claims. Bankruptcy courts cannot “create substantive rights that are otherwise unavailable under applicable law,” nor do they possess a “roving commission to do equity.” *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (quotation omitted). Indeed, nearly a hundred years ago, the Supreme Court rejected the notion that federal courts can displace state law as “an unconstitutional assumption of powers by the Courts of the United States which

no lapse of time or respectable array of opinion should make us hesitate to correct.” *Erie*, 304 U.S. at 79 (cleaned up); *accord Rodriguez v. FDIC*, 589 U.S. 132, 133 (2020) (holding state law applies to determine allocation of federal tax refund resulting from consolidated tax return). Courts thus may not invent their own rule for when parties may be “deemed” to have given up property rights by releasing claims.

Accordingly, state-law contract principles govern whether a third-party release is consensual. *See, e.g., Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 684-85 (E.D. Va. 2022) (describing bankruptcy courts in the District of New Jersey as “look[ing] to the principles of contract law rather than the bankruptcy court’s confirmation authority to conclude that the validity of the releases requires affirmative consent”); *In re Smallhold, Inc.*, 665 B.R. 704, 720 (Bankr. D. Del. 2024) (recognizing that “some sort of affirmative expression of consent that would be sufficient as a matter of contract law” is required); *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) (“Courts generally apply contract principles in deciding whether a creditor consents to a third-party release.”); *Arrowmill*, 211 B.R. at 506, 507 (explaining that a third-party release “is no different from any other settlement or contract” and thus “the validity of the release . . . hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court’s confirmation order”) (internal quotation marks omitted) (alterations in original). Because ““nothing in the bankruptcy code contemplates (much less authorizes it)’ . . . any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent.” *In re Tonawanda Coke Corp.*, 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024) (quoting *Purdue*, 603 U.S. at 223). And “any such consensual agreement would be governed by state law.” *Id.*

Even if federal law applied, however, it would not lead to a different result. That is because “federal contract law is largely indistinguishable from general contract principles under state common law.” *Young v. BP Expl. & Prod., Inc. (In re Deepwater Horizon)*, 786 F.3d 344, 354 (5th Cir 2015)

(cleaned up). *See also Deville v. United States*, 202 F. App'x 761, 763 n.3 (5th Cir. 2006) (“The federal law that governs whether a contract exists ‘uses the core principles of the common law of contracts that are in force in most states.’ . . . These core principles can be derived from the Restatements.”) (quoting *Smith v. United States*, 328 F.3d 760, 767 n.8 (5th Cir. 2003)).

Debtors have argued that federal common law should apply rather than state law. But, to quote the Supreme Court: “Should federal courts rely on state law, together with any applicable federal rules, or should they devise their own federal common law test? To ask the question is nearly to answer it.” *Rodriguez v. FDIC*, 589 U.S. 132, 133 (2020). That is because “[t]he cases in which federal courts may engage in common lawmaking are few and far between.” *Id.*

“[B]efore federal judges may claim a new area for common lawmaking, strict conditions must be satisfied.” *Rodriguez*, 589 U.S. at 136. The “few and restricted” instances when courts may do so “fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests and those in which Congress has given the courts the power to develop substantive law.” *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (cleaned up). “Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts.” *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (cleaned up) (holding there is no federal common law governing standard of care owed by directors of federally chartered bank). Congress has not granted courts the power to create substantive federal law regarding when non-debtors have given up their property rights in state-law claims against other non-debtors. As noted above, there is no Code provision that confers this power.

That leaves the “most basic” of the conditions for federal common lawmaking: it “must be necessary to protect uniquely federal interests.” *Rodriguez*, 589 U.S. at 136 (cleaned up); *accord Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116 (2022) (“Judicial creation of federal common law to displace state-created rules must be ‘necessary to protect uniquely federal

interests.”) (quoting *Texas Indus.*, 451 U.S. at 640). “[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.” *Texas Indus.*, 451 U.S. at 641; accord *Atherton*, 519 U.S. at 218 (“[W]hen courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some federal policy or interest and the use of state law must first be specifically shown.”) (cleaned up). “In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.” *Texas Indus.*, 451 U.S. at 641 (holding courts may not create federal common law right of contribution for defendants held liable on federal antitrust claims).

No such “uniquely federal interest” exists here. See *Rodriguez*, 589 U.S. at 136; *Texas Indus.*, 451 U.S. at 640. Whether a non-debtor has agreed to release state-law claims against another non-debtor does not concern the rights and obligations of the United States or involve interstate or international relations. To the contrary, state law is “well equipped” to handle disputes about property rights. *Rodriguez*, 589 U.S. at 137. That a property-rights question arises “in the context of a federal bankruptcy . . . doesn’t change much.” *Rodriguez*, 589 U.S. at 137; accord *Walker v. The Cadle Co. (In re Walker)*, 51 F.3d 562, 567 (5th Cir. 1995) (“[A]lthough bankruptcy might seem to be a ‘uniquely federal interest,’ the [Supreme] Court has stated that, ‘the existence of congressional authority under Art. I [does not] mean that federal courts are free to develop a common law to govern those areas until Congress acts.’”) (quoting *Texas Indus.*, 451 U.S. at 641). “As [the Supreme] Court has long recognized, ‘Congress has

generally left the determination of property rights in the assets of a bankrupt's estate to state law.”²⁴ *Rodriguez*, 589 U.S. at 137 (quoting *Butner*, 440 U.S. at 54). That is even more true for property rights in claims belonging to non-debtors—as the Supreme Court held in *Purdue*, the Bankruptcy Code does not authorize bankruptcy courts to extinguish those rights

iii. Under Puerto Rico Commonwealth Law, Silence is not Acceptance

Debtors bear the burden to prove that their plan is confirmable. *In re American Cap. Equip., LLC*, 688 F.3d 145, 155 (3d Cir. 2012); *In re Alco Corp.*, 2013 WL 1123853, *1 (Bankr. D.P.R. March 11, 2013)(“The plan proponent bears the burden of demonstrating by preponderance of the evidence that each element of § 1129 has been met.”). They have not met this burden because they have failed to establish that the third-party release is consensual under applicable Puerto Rico law.

Under Puerto Rico law, like in other states, an agreement to release claims—like any other contract—requires a manifestation of assent to that agreement.²⁵ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (“[T]he formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and a consideration.”); 31 L.P.R.A. § 9751 (“The contract is the bilateral legal transaction by which two or more parties express their consent in the form provided by law, in order to create, regulate, modify, or extinguish obligations.”)(our translation).

Thus, “[o]rdinarily[,] an offeror does not have power to cause the silence of the offeree to operate as acceptance.” RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). *See also Reichert v. Rapid*

²⁴ Indeed, bankruptcy courts routinely apply state law. *See, e.g., Little Hearts Marks Family II L.P. v. Carter (In re 305 E. 61st St. Grp. LLC)*, No. 23-1202, 2025 WL 678645, at *4 (2d Cir. 2025) (applying state law to determine whether legal claims belonged to the bankruptcy estate or the creditor that sought to assert them in post-petition proceeding); *Spyglass Media Group, LLC v. Bruce Cohen Prods. (In re Weinstein Co. Holdings LLC)*, 997 F.3d 497, 504 (3d Cir. 2021) (applying “relevant state law governing the contract” to determine if a contract is executory).

²⁵ The Court may apply Puerto Rico law because no party has suggested that any other state's law applies. *See, e.g., Wood v. Mid-Valley Inc.*, 942 F.2d 425, 426 (7th Cir. 1991) (“The operative rule is that when neither party raises a conflict of law issue in a diversity case, the federal court simply applies the law of the state in which the federal court sits.”).

Investments, Inc., 56 F.4th 1220, 1227 (9th Cir. 2022) (“[T]he offeror cannot prescribe conditions so as to turn silence into acceptance.”); *Jacques v. Solomon & Solomon P.C.*, 886 F. Supp. 2d 429, 433 n.3 (D. Del. 2012) (“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.”); *Elfar v. Wilmington Trust, N.A.*, No. 20-0273, 2020 WL 7074609, at *2 n.3 (E.D. Cal. Dec. 3, 2020) (“The court is aware of no jurisdiction whose contract law construes silence as acceptance of an offer, as the general rule.”), *adopted by* 2020 WL 1700778, at *1 (E.D. Cal. Feb. 11, 2021); *accord* 1 Corbin on Contracts § 3.19 (2018); 4 Williston on Contracts § 6:67 (4th ed.).

The First Circuit has adopted these principles and stated that, “it’s basic contract law that an offeror cannot unilaterally impose on another party the obligation to respond and reject their offer.” *Rivera-Colón v. AT&T Mobility of Puerto Rico, Inc.*, 913 F.3d 200, 211 (1st Cir. 2019). Instead, “silence can operate as acceptance ‘[w]here the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.’” *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(b)). This exception applies in situations where “given a certain relationship between two people, the current way of proceeding implies the duty to speak.” *Id.* at 213 (quoting *Danosa Caribbean, Inc. v. Santiago Metal Mfg. Corp.*, 179 D.P.R. 40, No. CC-2008-882, slip op. at 21 (2010) (Rodríguez Rodríguez, J., dissenting) (citing Carlos Lasarte, 3 Principios del Derecho Civil 63 (4th ed. 1996))). However, “acceptance by silence is exceptional.” RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. A (1981).

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

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

As previously argued, Puerto Rico law is in accord with these black-letter contract principles. In *Teachers Annuity v. Soc. De Gananciales*, 15 P.R. Offic. Trans. 372, 387-88 (P.R. 1984), the Supreme Court of Puerto Rico recognized the existence of implied consent, but only when it cannot be compatible with another intent and cannot be subject to different interpretations. In *Teachers Annuity v. Soc. De Gananciales*, 15 P.R. Offic. Trans. 372, 387-88 (P.R. 1984), the Court stated that:

[T]he determining element of the implied consent is the person's conduct and not the words used to express such consent. That is why, according to professor De Castro, consent is considered implied when it is the result of “facts and not words.” F. De Castro y Bravo, *El negocio jurídico* 67, sec. 84, Madrid, Ed. Ins. Nac. Est. Jur. (1967). **The facts should unequivocally [sic] show the will to consent. They cannot be compatible with another intent, or be subject to many different interpretations.** 1 F. Puig Peña, *Compendio de derecho civil español* 620, Barcelona, Ed. Nauta (1966); F. Soto Nieto, *La estimación jurídica del silencio*, 11 *Rev. Der. Esp. y Amer.* 121 (1966).

(Emphasis added).

In addition, Puerto Rico law requires that settlement agreements be consensual, in writing, and based on mutual concessions. Article 1497 of the Puerto Rico Civil Code defines a settlement contract or “compromise” as “one where the parties, through reciprocal concessions, put an end to a litigation or to their uncertainty as to a juridical relation.” 31 L.P.R.A. § 10641 (our translation). Article 1503 states that such a contract “must be in a writing signed by the parties or in a resolution or judgment issued by the court.” 31 L.P.R.A. § 10647 (our translation). Even where a settlement agreement exists in writing, the Supreme Court has stated that such an agreement must be interpreted “restrictively.” *See Crespo Cardona v. Autoridad de Carreteras*, 136 D.P.R. 938, 939 (P.R. 1994) (our translation).

This Court, in interpreting the previous version of the Civil Code, has defined a settlement as “a contract by means of which each of the parties in interest, by giving, promising, or retaining something—i.e., through reciprocal concessions—avoids the provocation of a suit, or terminates one that has already been instituted.” *In re Empresas Inabon, Inc.* 358 B.R. 487, 523 (Bankr. D.P.R. 2006)(citing 31 L.P.R.A. § 4821 (repealed); *Blas v. Hospital Guadalupe*, 167 D.P.R. 439 (P.R. 2006); *Neca Mortgage Corp. v. A & W Dev. S.E.*, 137 D.P.R. 860, 1995 P.R.-Eng. 905,58 (P.R. 1995)).

Article 14 of the Puerto Rico Civil Code states that “the rights that are conferred by law may be renounced as long as the renouncement is not prohibited or contrary to law, morality, or public order, or in prejudice to a third party.” 31 L.P.R.A. § 5333 (our translation). The Supreme Court of Puerto Rico has stated that, “for it to be understood that a person renounces their rights, they must have full and current knowledge of them *and their intention to renounce them must be clear.*” *Mendoza Aldarondo v. Asociación de Empleados*, 94 D.P.R. 564, 577 (P.R. 1967) (emphasis added) (our translation). The waiver of rights must also be “clear, conclusive, and unequivocal.” *Chico v. Editorial Ponce*, 1 P.R. Offic. Trans. 1036, 1058; 101 D.P.R. 759 (P.R. 1973). The Supreme Court of Puerto Rico has enumerated three prerequisites for the release or settlement of a claim: (i) “an uncertain legal relationship,” (ii) “an intent to eliminate [the] uncertainty,” and (iii) “reciprocal concessions.” *Ruiz Sanchez v. Goodyear Tire & Rubber Co.*, 717 F.3d. 249, 253 (1st Cir. 2013) (quoting *Citibank v. Dependable Ins. Co.*, 21 P.R. Offic. Trans. 496, 505–06, 121 D.P.R. 503 (1988)).

iv. Merely Voting for a Plan Does Not Provide the Required Affirmative Consent

As noted above, the Supplemented Plan now imposes nonconsensual third-party releases on creditors who vote to accept the plan, regardless of whether they opt out. This type of procedure results in the Releases not being consensual under state law and thus illegal under *Purdue*.

Debtors mistakenly equate a vote for the Plan, which is governed by the Bankruptcy Code’s provisions for adjusting relations between a debtor and its creditors, with acceptance of proposed third-

party releases, which are contracts governed by state law dealing with relations between non-debtor parties. Those are distinct legal constructs involving distinct parties: the Plan disposes of a creditor's claims against the debtor, while a third-party release disposes of a non-debtor's right to sue other non-debtors. There is nothing in the Code that authorizes treating a vote to accept a chapter 11 plan as consent to a third-party release. "[A] creditor should not expect that [its] rights [against non-debtors] are even subject to being given away through the debtor's bankruptcy." *Smallhold*, 665 B.R. at 721.

Debtors' conflation of voting for the Plan with acceptance of the third-party release violates black-letter contract law, which requires a manifestation of intent to be bound by the third-party release. *See supra* Part iii. Voting to accept a plan does not manifest that intent. A chapter 11 plan allocates how the bankruptcy estate will pay claims and interests against the debtor. *See* 11 U.S.C. § 1123. If the plan is confirmed, only claims and interests against the debtor are discharged. 11 U.S.C. § 524(e). And it is "[b]ecause discharge affects a creditor's rights, [that] the Code generally requires a debtor to vie for the creditor's vote first." *Keystone Gas Gathering, L.L.C. v. Ad Hoc Comm. (In re Ultra Petroleum Corp.)*, 943 F.3d 758, 763 (5th Cir. 2019). The right to vote on a plan depends solely on how the plan treats claims and interests against the debtor. *See* 11 U.S.C. §§ 1124, 1126, 502, 501, 101(10); *Ultra Petroleum Corp.*, 943 F.3d at 763; 7 Collier on Bankruptcy ¶ 1126.02 (16th 2025). Claims and interests that are not impaired by the plan are deemed accept it. *See* 11 U.S.C. §§ 1124, 1126; *Ultra Petroleum Corp.*, 943 F.3d at 763. Because the purpose of a chapter 11 plan is to determine how claims and interests *against the debtor* will be treated, voting to accept a chapter 11 plan does not manifest an intent to be bound by the third-party release. *See In re Congoleum Corp.*, 362 B.R. 167, 194 (Bankr. D.N.J. 2007); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (Bankr. D.N.J. 1997); *In re Digital Impact, Inc.*, 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998). And it does not meet the requisites for a settlement agreement under Puerto Rico law: a writing, a clear intention to renounce legal rights, and reciprocal concessions. *See* 31 L.P.R.A. § 10641; *Mendoza Aldarondo*, 94 D.P.R. at 577; *Ruiz*

Sanchez, 717 F.3d. at 253.

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.” *Arrowmill*, 211 B.R. at 507 (quotation marks omitted); *accord Congoleum Corp.*, 362 B.R. at 194 (“[A] consensual release cannot be based solely on a vote in favor of a plan.”); *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. The “validity of th[at] release” necessarily “hinges upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court’s confirmation order.” *Id.* (citation and alterations omitted).

In addition to the lack of consent under Puerto Rico law, imposing a third-party release on everyone who votes to accept the plan may discourage creditors from voting. This would 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 against the debtor. *Smallhold*, 665 B.R. 716.

v. Failing to Opt Out Does Not Provide the Required Affirmative Consent

The Supplemented Plan imposes nonconsensual third-party releases on creditors who vote to reject the plan, as well as those who do not vote (whether because they are ineligible or they choose to abstain) unless they decide to opt-out. In other words, Debtors purport to impose an otherwise non-existent duty to speak on claimants regarding the offer to release non-debtors, and their silence—the failure to opt out—is “deemed” consent. But under black-letter law that silence is not acceptance of the offer to release non-debtors. *See, e.g., Patterson*, 636 B.R. at 688 (“Whether the Court labels these ‘nonconsensual’ or based on ‘implied consent’ matters not, because in either case there is a lack of sufficient affirmation of consent.”).

The United States Trustee previously cited a case from the Ninth Circuit as illustrating the point. In *Norcia v. Samsung Telecom. Am., LLC*, 845 F.3d 1279, 1286 (9th Cir. 2017), cited with approval by the Third Circuit in *Noble v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-118 (3d Cir. 2017), and the Fifth Circuit in *Imperial Ind. Supply Co. v. Thomas*, 825 F. App'x 204, 207 (5th Cir. 2020), the court held that a failure to opt out did not constitute consent to an arbitration agreement. A consumer bought a Samsung phone and signed the Verizon Wireless Customer Agreement. *Norcia*, 845 F.3d at 1282. The phone came with a Samsung warranty brochure that contained an arbitration provision but gave purchasers the ability to opt out of it without affecting the warranty coverage. *Id.* The customer did not opt out. *Id.* When the customer later sued Samsung, Samsung argued that the arbitration provision applied. *Id.* at 1282-83.

The Ninth Circuit in *Norcia* held that the customer's failure to opt out did not constitute consent to arbitrate. The court applied the "general rule," applicable under California law, that "silence or inaction does not constitute acceptance of an offer." *Norcia*, 845 F.3d at 1284 (quotation marks omitted); accord *Danosa Caribbean*, 179 D.P.R. at 75 (holding that, as a general norm, silence cannot be interpreted as assent to an offer). The customer did not agree to arbitrate because he did not "sign the brochure or otherwise act in a manner that would show his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement." *Norcia*, 845 F.3d at 1285 (quotation marks omitted). This was true, even though the customer *did* take action to accept the offered contract from Verizon Wireless. "Samsung's offer to arbitrate all disputes with [the customer] cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, unless an exception to this general rule applies." *Id.* at 1286 (quotation marks and citation omitted).

The Ninth Circuit held that none of the exceptions to this rule applied. *Norcia*, 845 F.3d at 1284-85. There was no state law imposing a duty on the customer to act in response to the offer, the parties

did not have a prior course of dealing that might impose such a duty, and the customer did not retain any benefits by failing to act given that the warranty applied whether or not he opted out of the arbitration provision. *Id.* at 1286.

Here, too, the creditors—regardless of whether they voted to accept or reject the plan or did not vote at all—have not consented to the third-party release as required. As in *Norcia*, creditors have no state law duty to respond to an offer to release non-debtors such that their silence can be understood as consent, nor have they any prior course of dealing with the released non-debtors that would impose such a duty. *See Norcia*, 845 F.3d at 1285-86. 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 (recognizing that creditors have no duty to speak regarding a plan that would allow a court to infer consent from silence). A claimant’s failure to return an opt-out form thus does not fit within the exception to the general rule that consent cannot be inferred from silence.

Nor does the opt-out procedure meet the specific requirements of Puerto Rico law for settlement agreements. First, the creditors have not signed an agreement to release the non-debtor releasees nor acted in any other manner to suggest that their silence manifests an intention to accept an offer to release the non-debtors. A creditor’s failure to fill out an opt-out form is not the required “writing signed by the parties.” 31 L.P.R.A. § 10647. Without a written agreement from each affected creditor, the release becomes a mere proposal that is unenforceable under black-letter contract law. For example, in applying similar New York contract law, a court recently refused to approve a disclosure statement for a plan that would bind creditors to a third-party release unless the creditors opted out. *In re Tonawanda Coke Corp.*, 662 B.R. 220, 222-23 (Bankr. W.D.N.Y. 2024). The court reasoned:

To each creditor, Tonawanda Coke Corporation already owes far in excess of any proposed distribution. Any payment under the plan serves as consideration for pre-petition obligations. No further consideration is given on account of the separate liabilities of the non-debtor beneficiaries of the

releases. Indeed, the plan contemplates the same distribution whether or not a creditor opts out of the release. Essentially, creditors are being asked to give releases to third parties for no consideration.

Id., at 222. Because there was no consideration for the releases, New York law required that they be in writing and signed by the creditors. The court concluded that, without such a writing, “the release becomes a mere proposal that no one can enforce.” *Id.* at 223.

Second, the third-party release is not based on mutual concessions, as required by Puerto Rico law. 31 L.P.R.A. § 10641; *Ruiz Sanchez*, 717 F.3d. at 253. Rather, the creditors who are being asked to opt-out will receive the same distributions as those who choose not to opt out. The only benefits received by the creditors are distributions from the debtor’s chapter 11 plan. Thus, “[e]ssentially, creditors are being asked to give releases to third parties for no consideration.” *Tonawanda Coke Corp.*, 662 B.R. at 222.

Third, as discussed above, implied consent is only recognized under Puerto Rico law where the intention of the party granting the release is “clear, conclusive and unequivocal.” *Chico v. Editorial Ponce*, 1 P.R. Offic. Trans. 1036, 1058; 101 D.P.R. 759 (P.R. 1973). The conduct must not be compatible with another intent and cannot be subject to different interpretations. *Teachers Annuity v. Soc. De Gananciales*, 15 P.R. Offic. Trans. 372, 387-88 (P.R. 1984). A failure to opt out, even where a party is represented, however, is not such unequivocal conduct. Rather, a creditor may fail to opt out for many other reasons, including a failure to read or understand the ballot or opt-out form (even if explained by counsel²⁶), a failure to receive those documents, or an inadvertent failure to return the form.

A. Not voting and not opting out is not consent to release non-debtors.

²⁶ The fact that counsel has entered an appearance says nothing about the terms of engagement and whether, for example, the creditor would have to incur additional legal fees for counsel to review and explain the disclosure statement and ballots.

Third-party releases cannot be imposed on those who do not vote and do not opt out. *See Smallhold*, 665 B.R. at 709; *SunEdison*, 576 B.R. at 458–61; *Chassix*, 533 B.R. at 81–82; *In re Washington Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011). 442 B.R. 314, 355 (Bankr. D. Del. 2011). There is no basis to infer consent by those who do not vote and are taking no action with respect to the plan.

Even where there are conspicuous warnings that a party will be bound if they remain silent, that is not sufficient to recast a party's silence as consent to a third-party release. *SunEdison*, 576 B.R. at 458–61. Creditors have no legal duty to vote on a plan, much less to respond to an offer to release non-debtors included in a plan solicitation. *See, e.g.*, 11 U.S.C. § 1126(a) (providing that creditors “may” vote on a plan); *SunEdison*, 576 B.R. at 460–61 (recognizing that creditors have no duty to speak regarding a plan that would allow a court to infer consent to third-party releases from silence). Consent thus cannot be inferred from their silence because “[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). Nor can it “impose on him any duty to speak.” *Id.* § 69 cmt. a.

Further, “[w]hen the circumstances are equally consistent with either of two facts, neither fact may be inferred.” *See In re Couture Hotel Corp.*, 554 B.R. 369, 383 n.80 (Bankr. N.D. Tex. 2016). Consent thus cannot be inferred here because parties who are solicited but do not vote may have failed to vote for reasons other than an intention to assent to the releases.²⁷ *SunEdison*, 576 B.R. at 461.

“Charging all inactive creditors with full knowledge of the scope and implications of the proposed third-party releases, and implying a ‘consent’ to the third-party releases based on the creditors’ inaction, is simply not realistic or fair and would stretch the meaning of ‘consent’ beyond the breaking point.” *Chassix*, 533 B.R. at 81. “It is reasonable to require creditors to pay attention to what the debtor

²⁷ Here, the plan and associated materials, including the disclosure statement, run to 252 pages.

is doing in bankruptcy as it relates to the creditor's rights against the debtor. But as to the creditor's rights against third parties—which belong to the creditor and not the bankruptcy estate—a creditor should not expect that those rights are even subject to being given away through the debtor's bankruptcy." *Smallhold*, 665 B.R. at 721; *see also id.* at 719-20 (discussing *Chassix*). "A party's receipt of a notice imposing an artificial opt-out requirement, the recipient's *possible* understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as consent. *Emerge Energy Services, LP*, No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (emphasis in original). "[B]asic contract principles" require affirmative assent, not inferences drawn from inaction that in fact may reflect only "[c]arelessness, inattentiveness, or mistake." *Id.*

Simply put, an "opt out mechanism is not sufficient to support the third-party releases . . . particularly with respect to parties who do not return a ballot (or are not entitled to vote in the first place)." *In re Washington Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011); *see also Chassix*, 533 B.R. at 81–82.

vi. There Was Insufficient Notice of the Non-Debtor Releases.

The third-party releases also cannot be approved because there will be insufficient notice of them. Imputing state-law consent to a non-debtor release assumes that the creditor understands that his or her decision to vote to accept the plan, or to reject or abstain from voting on the plan and not marking the opt out box, will have this dramatic impact, which would require both that the creditor sees the non-debtor release provision and that the creditor understands its terms. But that assumption has no evidentiary support based on the terms of the Plan documents.

There is no acceptance of an offer when there is insufficient notice of the alleged contractual terms. *See Norcia*, 845 F.3d at 1285. "[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *Id.* (quotation marks omitted); *see also Noble v. Samsung*

Elec. Am., Inc., 682 F. App'x 113, 117-118 (3d Cir. 2017) (reaffirming that a person cannot be presumed to have agreed to contractual provisions unless “there is a reasonable basis to conclude that consumers will have understood the document contained a bilateral agreement”). Hence, voting for the plan or does not reflect actual and knowing consent, particularly in the context of “an immensely complicated plan” where “it would be difficult for any layperson to comprehend all of its details.” *In re Congoleum Corp.*, 362 B.R. at 194.

Here, the release language provisions are found in a couple of paragraphs scattered about the Plan. The sample ballot and opt out form span over 15 pages. In total, the Disclosure Statement and Plan amount to over 250 pages. Many of the Released Parties are unidentified or unknown; they are simply identified as predecessors, successors and assigns, subsidiaries, affiliates, etc. The Plan provisions are also overly complex in nature, which will no doubt present challenges for lay persons who will struggle to understand what they are entitled to and what they are being asked to give up in exchange. Since there are potentially as many as 10,000 creditors who will be subjected to the Releases, it is hardly conceivable that most of them will understand the Plan's terms and the nature of the Releases.

Furthermore, a failure to return an opt-out form is not consent because—whether they are asked to vote or not—claimants have no reason to expect that an offer to contract with non-debtors will be included in the plan solicitation. As the Third Circuit has explained, there can be no presumption that someone has agreed to contractual provisions of which they are “on notice,” unless “there is a reasonable basis to conclude that consumers will have understood the document contained a bilateral agreement.” *See Noble v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-118 (3d Cir. 2017). *See also Norcia*, 845 F.3d at 1289 (“[N]o contract is formed when the writing does not appear to be a contract and the terms are not called to the attention of the recipient.”) (quotation marks omitted).

For example, the assumption that Opt-Out Creditors understand that the ballot includes a non-debtor release and understand its terms lacks evidentiary support. “[A]n offeree, regardless of apparent

manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious.” *Norcia*, 845 F.3d at 1285 (quotation marks omitted); *Noble v. Samsung Elec. Am., Inc.*, 682 F. App’x 113, 117-118 (3d Cir. 2017) (reaffirming that a person cannot be presumed to have agreed to contractual provisions unless “there is a reasonable basis to conclude that consumers will have understood the document contained a bilateral agreement”). Hence, failing to opt out does not reflect actual and knowing consent, particularly in the context of “an immensely complicated plan” where “it would be difficult for any layperson to comprehend all of its details.” *In re Congoleum Corp.*, 362 B.R. at 194.

We are thus not before the same circumstances that were present in the *Spirit* case, where the court noted that, “[s]ince the beginning, the proposed releasing parties here have all been promised a full or substantial recovery and have had every incentive to follow the case to see if the promised recoveries come to fruition.” *In re Spirit*, 2025 WL 737068, at *12. Here, as mentioned earlier, unsecured creditors are expected to only recover 0.8% of their claims, thus deterring any incentive to follow the case and pay attention to the Plan and its associated materials.

vii. Opt Outs Cannot be Imposed Based on a Procedural Default Theory

The Debtors’ Supplemented Response cites two cases where courts approved opt outs, seemingly based on the application of a procedural default theory: (1) *In re Spirit Airlines, Inc.*, 2025 WL 737068 (Bankr. S.D.N.Y. Mar. 7, 2025),²⁸ and (2) *Mercy Health Network, Inc. v. Mercy Hospital et als.*, 2025 WL 1000782 (N.D. Iowa, Mar. 3, 2025).²⁹

²⁸ Although the court in *Spirit* disclaimed relying on a default theory, *Spirit Airlines*, 2025 WL 737068, at *17, it based its holding on the same rationale: that a party may be deemed to consent based on notice and a failure to respond, *id.* at *9-*10, *12-*13.

²⁹ The *Mercy Health* court also did not claim to rely on a procedural default theory, but it cited to several cases that were also cited by *Spirit* which applied the same rationale. In any event, the *Mercy Health* court, as observed by Debtors, dismissed the appeal due to appellant’s lack of standing. Thus, its holdings as to the permissibility of the opt-out procedure appear to constitute dicta. The United States Trustee also notes the decision in *Mercy Health* was appealed to the Eighth Circuit on April 2, 2025, where it remains pending. *See* Case No. 25-01654 (8th Cir.).

But applicable state contract law cannot be disregarded on the basis of said theory, under which creditors who remain silent are held to have forfeited their rights against non-debtors if they received notice of the non-debtor release but failed to object, just as they would forfeit their right to object to a debtor's plan if they failed timely to do so. *See, e.g., In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 WL 2655592, at *5-*6 (Bankr. D. Del. Mar. 27, 2023), *abrogated by Smallhold, Inc.*, 665 B.R. at 716; *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022); *In re DBSD North America, Inc.*, 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009), *aff'd on other grounds*, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *rev'd in part and aff'd in part*, 634 F.3d 79 (2d Cir. 2011); *In re Robertshaw US Holding Corp.*, No. 24-90052, 2024 WL 3897812, at *17 (Bankr. S.D. Tex. 2024) (citing *Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592, at *6-8). These courts reasoned that so long as the creditors received notice of a proposed non-debtor release and were informed of the consequences if they did not opt out or object to that release, there is no unfairness or deprivation of due process from binding them to the release. *Cf. Smallhold*, 665 B.R. at 708 (describing this reasoning as having treated a mere "failure to opt out" as "allow[ing] entry of the third-party release to be entered by default").

A fuller explanation of this theory was articulated prior to the *Purdue* ruling in *In re Mallinckrodt PLC*, 639 B.R. 837, 879-80 (Bankr. D. Del. 2022), a case cited by Debtors in their Response. The *Mallinckrodt* court stated that "the notion that an individual or entity is in some instances deemed to consent to something by their failure to act is one that is utilized throughout the judicial system." *Id.* "When a party to a lawsuit is served with a complaint or a motion, they need to file an answer or otherwise respond, or a judgment is automatically entered against them." *Id.* at 879. The court reasoned that "[t]here is no reason why this principle should not be applied in the same manner to properly noticed releases within a plan of reorganization." *Id.*

This is wrong. First, when a party in litigation is bound to a result based on a failure to timely respond, it is not because the defaulting party has *consented* to an adverse ruling. Rather, "failure to

make timely assertion of [a] right before a tribunal having jurisdiction to determine it” results in forfeiture of the right. *United States v. Olano*, 507 U.S. 725, 731 (1993). Forfeiture, unlike waiver, is not an intentional relinquishment of a known right. *Id.* at 733. *Cf. Smallhold*, 665 B.R. at 718 (“In this context, the word ‘consent’ is used in a shorthand, and somewhat imprecise, way. It may be more accurate to say that the counterparty forfeits its objection on account of its default.”). Forfeiture principles thus do not show consent.

Second, there is no basis to hold that parties have forfeited claims against non-debtor third parties based on their silence in response to a debtor’s chapter 11 plan. No one has submitted the released claims for adjudication by the bankruptcy court. *See Olano*, 507 U.S. at 731.

And under *Purdue*, imposition of a nonconsensual non-debtor release is not available relief through a debtor’s chapter 11 plan. *See Purdue*, 603 U.S. at 215-227 & n.1; *see also Smallhold*, 2665 B.R. at 709 (“After *Purdue Pharma*, a third-party release is no longer an ordinary plan provision that can properly be entered by ‘default’ in the absence of an objection.”). It is therefore “no longer appropriate to require creditors to object or else be subject to (or be deemed to ‘consent’ to) such a third-party release.” *Smallhold*, 665 B.R. at 719.

The Supreme Court’s *Purdue* decision rejected a fundamental premise of the procedural default theory—that a bankruptcy proceeding legally could lead to the destruction of creditors’ rights against non-debtors, so they had best pay attention lest they risk losing those rights. *Smallhold*, 665 B.R. at 708-09; *see also id.* at 708 (“The possibility that a plan might be confirmed that provided a nonconsensual release was sufficient to impose on the creditor the duty to speak up if it objected to what the debtor was proposing.”). The courts that relied on this procedural-default theory had reasoned that non-debtor releases were no different from any other plan provision to which creditors had to object or risk forfeiture of their rights, because pre-*Purdue* a chapter 11 plan could permissibly include nonconsensual, non-debtor releases under certain circumstances. *Id.* at 717-18. As the *Smallhold* court

explained, however, under the default theory, a plan's opt-out provision functions not as a method to secure consent, but rather serves as "an administrative shortcut to relieve those creditors of the burden of having to file a formal plan objection." *Id.* at 709; *see also id.* at 718 ("In this context, the word 'consent' is used in a shorthand, and somewhat imprecise, way. It may be more accurate to say that the counterparty forfeits its objection on account of its default.").

But "[u]nder established principles," courts may enter relief against a party who procedurally defaults by not responding "only after satisfying themselves that the relief the plaintiff seeks is relief that is at least potentially available to the plaintiff" in contested litigation. *Id.* at *2; *see also id.* at *13 ("[T]he obligation of a party served with pleadings to appear and protect its rights is limited to those circumstances in which it would be appropriate for a court to enter a default judgment if a litigant failed to do so."); *see also Thomson v. Wooster*, 114 U.S. 104, 113 (1885) (holding a decree *pro confesso* may only be entered if it "is proper to be decreed"); *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1245 (11th Cir. 2015) ("Entry of default judgment is only warranted when there is a sufficient basis in the pleadings for the judgment entered.") (cleaned up).

"[After *Purdue*], that is no longer the case in the context of a third-party release." *Smallhold*, 665 B.R. at 722. A third-party release is not "an ordinary plan provision that can properly be entered by 'default' in the absence of an objection." *Id.* "It is unlike the listed cure amount where one can properly impose on a creditor the duty to object, and in the absence of such an objection bind the creditor to the judgment." *Id.* That is because, unlike for a creditor's claims against the debtor, the Bankruptcy Code affords no affirmative authority to order a release of claims against third parties. Because imposition of a nonconsensual non-debtor release is not relief available through a debtor's chapter 11 plan, it is not "appropriate to require creditors to object or else be subject to (or be deemed to 'consent' to) such a third-party release." *Id.* at 719-20.

Because *Purdue* establishes that a *nonconsensual* third-party release is “*per se* unlawful,” it follows that a third-party release “is not the kind of provision that would be imposed on a creditor on account of that creditor’s default.” *Id.* at 709. And besides the now-discredited default theory, there is “no other justification for treating the failure to ‘opt-out’ as ‘consent’ to the release [that] can withstand analytic scrutiny.” *Id.* Because a chapter 11 plan cannot permissibly impose non-debtor releases without the affirmative consent of the releasing parties, a release cannot be imposed based on their mere failure to respond regarding the non-debtor release.³⁰ Rather, an “*affirmative expression of consent* that would be sufficient as a matter of contract law” is required. *Id.* at 720 (emphasis added).

viii. Rule 9010 Cannot be Used to Evade Purdue

The Supplemented Plan, at § 10.05, states that “Entry of the Confirmation Order shall constitute the Bankruptcy Court’s approval, pursuant to Bankruptcy Rule 9019, of the Third-Party Release.”

Given that it is a rule, Bankruptcy Rule 9019(a) cannot be read as superseding a party’s right to consent as defined by state law. And Rule 9019(a) does not purport to do anything of the sort.

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

Nothing in Bankruptcy Rule 9019 permits bankruptcy courts to force non-debtors who have not consented to release their rights to sue other non-debtors under applicable state law. The Rule is limited

³⁰ For those reasons, the *Smallhold* court expressly disapproved of its prior decision in *Arsenal*, which had relied on the procedural default theory. *See id.* at 716 (“On the central question presented, the Court concludes that its decision in *Arsenal* does not survive *Purdue Pharma.*”).

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

Nor could Bankruptcy Rule 9019 authorize the imposition of nonconsensual releases, even if, counterfactually, it purported to do so. Because 28 U.S.C. § 2075 commands that bankruptcy rules shall not abridge substantive rights, Bankruptcy Rule 9019 cannot authorize bankruptcy courts to approve something the Supreme Court held in *Purdue* no Bankruptcy Code provision permits. *Purdue*, 603 U.S. at 227 ("[T]he bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.").

Nor can such a "settlement" be included in a chapter 11 plan. A plan and a settlement are not one and the same thing. What may be permissible under a negotiated settlement agreement that is considered "fair, reasonable, and in the best interest of the estate" is different than what may be permissible under a plan, which is subject to the requirements of sections 1123 and 1129 of the Bankruptcy Code. *See, e.g., In re Tribune Co.*, 464 B.R. 126, 176 (Bankr. D. Del. 2011) (concluding at confirmation stage that a negotiated settlement could be approved because it was fair, reasonable and in the best interest of the debtors' estates and making an express finding that the settlement was properly part of the plan pursuant to section 1123(b)(3)(A)). Section 1123(b)(3)(A) of the Bankruptcy Code

allows a plan proponent to propose “the settlement or adjustment of any claim or interest *belonging to the debtor or to the estate.*” 11 U.S.C. § 1123(b)(3)(A) (emphasis added). Thus, under section 1123(b)(3)(A), a chapter 11 may only provide for the settlement of claims or interests belonging to the debtor or the estate—not the settlement of claims held by third parties. *Purdue*, 603 U.S. at 219-20 (“[P]recisely nothing in § 1123(b) suggests those claims can be bargained away without the consent of those affected, as if the claims were somehow *Purdue’s* own property.”).

ix. The Court Should Not Waive the Rule 3020 Stay

The Supplemented Plan, at § 13.02, states that “[t]he requirements under Bankruptcy Rule 3020(e) that an order confirming a plan is stayed until the expiration of fourteen (14) days after entry of the order shall be waived by the Confirmation Order. The Confirmation Order shall take effect immediately and shall not be stayed pursuant to the Bankruptcy Code, Bankruptcy Rules 3020(e), 6004(h), 6006(d), or 7062 or otherwise.”

The U.S. Trustee objects to the request to shorten the 14-day stay imposed by Federal Rule of Bankruptcy Procedure 3020(e). The Committee Notes explain that subsection (e) was “added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot.” *Id.*

Plan proponents frequently include stay waiver provisions to invoke the doctrine of “equitable mootness” as a sword to evade appellate review. *See In re Chemtura Corp.* No. 09–11233, 2010 WL 4607822, at *1 (Bankr. S.D.N.Y. Nov. 3, 2010). Courts, however, should be “wary of wholly denying any party at least an opportunity to seek a stay to avoid the mootness of its appeal” in deciding whether to waive Rule 3020(e)’s 14-day stay. *Id.*; *see also In re Adelpia Comm. Corp.*, 368 B.R. 140, 282 (Bankr. S.D.N.Y. 2007) (denying request to waive automatic stay because “fairness to [objecting creditors] . . . requires that I not take an affirmative step that would foreclose all opportunities for judicial review”). “An orderly bankruptcy process depends on a concomitantly efficient appeals process,” *In re*

Syncora Guarantee Inc., 757 F.3d 511, 517 (6th Cir. 2014) (citations omitted), and a waiver of the 14-day stay undermines this goal by forcing parties to seek an emergency stay.

Debtors have presented no exigencies that would justify departing from the Rule's imposition of an automatic 14-day stay and impeding the ability to obtain appellate review. The Court should thus deny their request to waive Rule 3020(e)'s stay.

x. Debtors may not use the opt-out mechanism and a “temporary injunction” to obtain a discharge they would otherwise be unable to obtain under the Bankruptcy Code.

Section 10.02 of the Supplemented Plan recognizes that Debtors are not entitled to a discharge under § 1141(d)(3), as they will be liquidating substantially all of the property of the estate and will not be engaging in business after the consummation of the Plan.

Despite the above, the Supplemented Plan still purports to include Debtors as Released Parties. Consequently, Debtors will be receiving a Third-Party Release under Section 10.05 of the Plan, at least as to those creditors who vote to accept the Plan, and those who vote to reject, or abstain from voting, on the Plan, without opting out. The effect of the Release on the creditors rights against Debtors cannot be understated. In a nutshell, the Release under Section 10.05 discharges and releases all claims and causes of action held by the Releasing Parties against Debtors that: (1) arose before the Effective Date; (2) are in any way related to the Debtors, their estates, the chapter 11 cases, or the transactions giving rise to the creditors' claims against the Debtors that are treated under the Plan; and (3) are not based on willful misconduct or intentional fraud. Thus, even though the Plan disclaims that Debtors will be receiving a discharge under § 1141(d), the Release provisions of Section 10.05 effectively grant Debtors a *de facto* discharge, particularly as to the vast majority of creditors who are expected to abstain from voting and filling out the opt out forms, and those other creditors who will vote to accept the Plan with no option to opt out.

The United States Trustee had previously also objected to the Temporary Injunction under Section 10.07. The United States Trustee recognizes that the court in *In re Kabbage*, 2023 Bankr. Lexis

671 (Bankr. D. Del. March 15, 2023) approved the use of a temporary injunction in a chapter 11 liquidating plan to protect the debtor's assets during the liquidation process. The United States Trustee only noted that because nothing in the Plan appears to bind the "Liquidating Debtor" to liquidate any potential remaining assets within a fixed time period, the "Temporary Injunction" described above may become a permanent one, in violation of § 1141(d)(3). The Disclosure Statement and Plan should thus provide for the Temporary Injunction to expire after a certain period, without prejudice to the Liquidating Debtor seeking an extension of time, with notice, if it has not been able to fully distribute all of the liquidating trust assets.

The United States Trustee also previously objected to the provision in Section 10.07(b), which states that, "by accepting distributions pursuant to the plan, each holder of an Allowed Claim or Interest extinguished, discharged, or released pursuant to the Plan will be deemed to have affirmatively and specifically consented to be bound by the Plan, including, without limitation, the injunctions set forth in this Section." This language must be stricken from the Plan. Merely receiving a distribution under the Plan—to which claim and interest holders have a statutory right—cannot reasonably be understood as manifesting consent to an injunction, and here, the Debtors are not entitled to a discharge injunction because they are not entitled to a discharge.

C. The Court should also reject the Amended Disclosure Statement because the Exculpation provisions are overly broad in contravention of First Circuit precedent.³¹

The United States Trustee previously objected to the Amended Plan's overly broad Exculpation provisions. First, the United States Trustee noted that the First Circuit has ruled that trustees may be sued for simple negligence if certain conditions are met. *See In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 7-8 (1st Cir. 1999).

³¹ The U.S. Trustee reserves her right to make additional objections to the exculpation provision at confirmation.

To the extent that applicable law authorizes exculpations beyond 11 U.S.C. § 1125(e), the United States Trustee then argued that Exculpation provisions should only be permissible when they are limited to the actions of estate fiduciaries during the pendency of the case. The provisions should also be limited to exclude gross negligence and willful misconduct. *See, e.g., Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 437 (5th Cir. 2022) (limiting exculpation to a debtor, a creditors' committee and its members, and trustees); *In re Pac. Lumber Co.*, 584 F.3d 229, 252–53 (5th Cir. 2009) (striking provisions exculpating non-debtors and their personnel from liability); *In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (approving exculpation for a creditors' committee and its professionals acting within the scope of their duties); *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 702 (E.D. Va. 2022) (among other things, limiting exculpation to actual estate fiduciaries and excluding pre-petition claims); *In re Washington Mutual, Inc.*, 442 B.R. 314, 350–51 (Bankr. D. Del. 2011) (limiting exculpation to estate fiduciaries and expressly excluding, among others, their current and former officers, directors, partners, and shareholders); *In re PTL Holdings LLC*, 2011 WL 5509031 (Bankr. D. Del. Nov. 10, 2011) (same); *see also Blixseth*, 961 F.3d at 1082 (extending beyond fiduciaries but limiting to essential participants in the plan process).

Despite the Debtors' citation of the case, *PWS Holding Corp.* has been consistently held to be limited to exculpation for estate fiduciaries during the period of the case, and the provision the Third Circuit approved was limited to exclude gross negligence and willful misconduct. *See, e.g., 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); *accord In re Tribune Company*, 464 B.R. 126, 189 (holding that exculpation clause "must exclude non-fiduciaries"); *In re PTC Holdings LLC*, 55 Bankr. Ct. Dec 206, 2011 Bankr. LEXIS 4436, *38 (Bankr. D. Del. Nov. 10, 2011) (sustaining

U.S. Trustee objection to the exculpation clause, stating that “the exculpation clause here must be reeled into include only those parties who have acted as estate fiduciaries and their professionals”).

Here, the proposed Exculpation in the Supplemented Plan continues to provide an almost blanket immunity for all claims that are not based on fraud or willful misconduct but does not carve out claims based on gross negligence. Such claims must be carved out from the exculpation. *See, e.g., Nexpoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 437 (5th Cir. 2022) (comparing as similar authority for exculpation of non-debtors and the “limited qualified immunity” for “bankruptcy trustees unless they act with gross negligence”); *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020) (noting in approving the exculpation clause before it that it did not release parties from willful misconduct or gross negligence); *Pac. Lumber*, 584 F.3d at 253 (“The scope of protection, which does not insulate them from willfulness and gross negligence, is adequate.”); *PWS Holding Corp.*, 228 F.3d at 246 (noting in approving the exculpation clause before it that it did not release parties from willful misconduct or gross negligence); *Patterson*, 636 B.R. at 702 (exculpation must include a carve out for gross negligence, actual fraud or willful misconduct).

The proposed Exculpation continues to go far beyond shielding the Debtors (acting as trustees) or case fiduciaries such as the Committee and its members or estate-paid professionals for acts specifically approved by the court; but also shields: (1) the Prepetition First Lien Secured Parties; (2) the Prepetition Second Lien Secured Parties; (3) the DIP Agent; (4) the DIP Lender; (5) the Liquidating Trustee; and (6) many of these parties’ insiders, affiliates, and other related parties. It is the fact that they are court-supervised fiduciaries that courts have found justifies their receipt the of the exculpatory protections. *See In re Washington Mutual, Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011); *see also, Midway Gold*, 575 B.R. 475, 512-13 (Bankr. D. Colo. 2017) (finding the Debtor’s attempts to exculpate non-estate fiduciaries – secured parties and their representatives – as impermissible.); *Patterson*, 636 B.R. at 702 (Exculpation could not be approved because “it extends beyond fiduciaries who have performed

necessary and valuable duties. Instead, the “Exculpated Parties” include all current and former employees, attorneys, accountants, managers, financial advisors and consultants of every party being exculpated.”).

Moreover, the proposed Exculpation extends to claims arising out of the “administration of the Plan or the property to be distributed under the Plan; or the transactions in furtherance of any of the foregoing” as well as the “the distributions or actions to be taken by the Liquidating Trustee and the Liquidating Debtors in consummation of the Plan,”³² which could reach post-Effective Date acts. But exculpation “only extends to conduct that occurs between the Petition Date and the effective date.” *In re Mallinckrodt PLC*, 639 B.R. 837 (Bank. D. Del. 2022). The United States Trustee argued the provision must be limited to acts during the bankruptcy case itself, solely from the Petition Date to the Effective Date. *See, e.g., In re Midway Gold US, Inc.*, 575 B.R. at 512 (rejecting exculpation provision that would exculpate “conduct and omissions arising after the confirmation date and after the Chapter 11 Cases have concluded, including, but not limited to, administration and implementation of the Plan itself.”); *In re Washington Mut., Inc.*, 442 B.R. at 350-51 (exculpation is to cover only “actions in the bankruptcy case”) *citing In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000).

The Debtors, in their Response, argue that similar provisions have been approved in the PROMESA cases, specifically the HTA and COFINA cases. Specifically, in the HTA case, the Court found the Exculpation provisions in the Modified Fifth Amended Title III Plan of Adjustment to be necessary to protect the exculpated parties, given that they “played key roles in the negotiation of the HTA Plan...”³³ The Exculpation provisions in that case went beyond estate fiduciaries to include parties such as “HTA/CCDA PSA Creditors,” DRA Parties and Monolines.

³² Supplemented Plan, § 10.06

³³ ECF No. 1191, p. 19.

However, it seems the Exculpation provisions protecting most of the Exculpated Parties in the HTA Plan only covered conduct “up to and including the HTA Effective Date.”³⁴ For example, as to the HTA/CCDA PSA Creditors, the Plan stated:

Each of the HTA/CCDA PSA Creditors solely in its capacity as a party to HTA/CCDA Plan Support Agreement and a Creditor and/or insurer, as applicable, *from the HTA Petition Date up to and including the HTA Effective Date* and each of their respective Related Persons shall not have or incur any liability to any Entity for any act taken or omitted to be taken in connection with the Title III Case. . .³⁵

Thus, the HTA case does not support the Debtors’ conclusion that Exculpation provisions may cover conduct extending beyond the Effective Date.

As a result, the Court should not approve the Exculpation provisions in the Supplemented Plan, as they are overly broad, do not except gross negligence, extend beyond estate fiduciaries to cover non-estate actors, and potentially encompass conduct beyond the Effective Date.

CONCLUSION

The Supplemented Disclosure Statement, including its provisions to deem a vote in favor and the failure to opt-out as sufficient manifestations of consent should be rejected. Consent from **all** creditors should be demonstrated through an unequivocal **opt-in** procedure under which no party would be deemed to have granted a third-party release unless the party affirmatively opted to do so in a way that was separate from the party’s vote with respect to the Plan. The Exculpation provision likewise should not be approved as currently drafted.

WHEREFORE, the United States Trustee respectfully requests that the Honorable Court deny approval of the Supplemented DS because it describes a Plan that is unconfirmable and issue any further relief as it may deem appropriate.

³⁴ See Case No. 17-03567, ECF No. 1404, Modified Plan, pp. 96-98.

³⁵ *Id.*, p. 97, § 41.7(b)

Certificate Of Service

I DO HEREBY CERTIFY that on this day I electronically filed a true and exact copy of the foregoing with the clerk of the court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

Dated: May 27, 2025

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