IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
AIO US, INC., *et al.*,	Case No. 24-11836 (CTG)
Debtors.[1]	Jointly Administered
	Re: Docket No. 1050
	Hearing Date: July 21, 2025 at 10:00 a.m. (ET)
	Obj. Deadline: July 1, 2025 at 5:00 p.m. (ET)

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION OF AIO US, INC. AND ITS DEBTOR AFFILIATES

Andrew R. Vara, the United States Trustee for Regions Three and Nine (the "U.S. Trustee"), through his undersigned counsel, hereby objects (this "Objection") to confirmation of the *Second Amended Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 1050] (the "Plan"),[2] and in support of this Objection respectfully states:

PRELIMINARY STATEMENT

1. The Court should deny confirmation of the Plan for the following separate and independent reasons:

(a) The Plan is not confirmable because the plan injunction is overbroad.

(b) The Plan violates applicable provisions of the Bankruptcy Code and therefore fails to satisfy section 1129(a)(1). The Plan provisions related to payment of the Unsecured 2043 Notes Fees and Expenses circumvent the procedural requirements for allowance and payment of substantial

[1] A complete list of the Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, is available at https://dm.epiq11.com/case/aiousinc/info. The Debtors' mailing and service address is 4 International Drive Suite 110, Rye Brook, New York 10573.

[2] Capitalized terms used but not otherwise defined in this objection shall have the meanings given to them in the Plan.

contribution claims. Such claims must be brought by separate motion and must satisfy separate standards for approval by the Court; they are not the province of a chapter 11 plan. Moreover, approval of such fees through the Plan arguably violates section 1123(a)(4) of the Code because it provides for disparate treatment of creditors in the same class without other unsecured creditors receiving the same opportunity to have their fees and expenses paid with administrative priority.

(c) **The Plan includes an improper gatekeeping provision.** The Court should not require third-party nondebtors prosecuting claims against other third-party nondebtors to first come to this Court to obtain a ruling that they hold "colorable" claims. Whether such claims are subject to the release or exculpation provisions of the Plan is an affirmative defense that can and should be determined by the tribunal in which such claims are filed.

2. Accordingly, and for the additional reasons set forth herein, the U.S. Trustee respectfully requests that the Court deny confirmation of the Plan.

JURISDICTION AND STANDING

3. This Court has jurisdiction to hear and determine confirmation of the Plan and this Objection pursuant to: (i) 28 U.S.C. § 1334; (ii) applicable order(s) of the United States District Court of the District of Delaware issued pursuant to 28 U.S.C. § 157(a); and (iii) 28 U.S.C. § 157(b)(2).

4. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of chapter 11 cases filed in this judicial district. The duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the Courts. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

5. The U.S. Trustee has standing to be heard on the Plan pursuant to 11 U.S.C. § 307. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest).

BACKGROUND

A. The Chapter 11 Cases

6. On August 12, 2024, four of the above-captioned debtors and debtors in possession (collectively, the "Debtors") each filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, (the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Delaware (this "Court"), thereby commencing the above-captioned chapter 11 cases.

7. On October 25, 2024, sixteen additional Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On November 14, 2024, the Court ordered the joint administration of those sixteen Debtors' cases with the cases filed on August 12 (together, the "Chapter 11 Cases"). D.I. 389.

8. The Debtors continue to manage and operate their business as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

9. On August 27, 2024, pursuant to section 1102(a)(1) of the Bankruptcy Code, the U.S. Trustee appointed an official committee of unsecured creditors (the "Committee") in the Chapter 11 Cases. D.I. 90.

10. As of the date hereof, no trustee or examiner has been requested in the Chapter 11 Cases.

B. The Plan Documents and Related Procedural History

11. On February 28, 2025, the Debtors filed their: (a) *[Proposed] Disclosure Statement for Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 813] (the "Original DS"); (b) *Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 812] (the "Original Plan"); and (c) *Motion of Debtors for Entry of an Order (I) Approving*

Proposed Disclosure Statement and the Form and Manner of Notice of Hearing Thereof, (II) Establishing Solicitation and Voting Procedures with Respect to Debtors Proposed Chapter 11 Plan, (III) Scheduling Confirmation Hearing, (IV) Establishing Notice and Objection Procedures for Confirmation of Debtors' Proposed Chapter 11 Plan, and (V) Granting Related Relief [D.I. 814] (the "DS Motion").

12. A hearing to consider the adequacy and approval of the Original DS and the relief requested in the DS Motion (the "DS Hearing") was initially scheduled for April 4, 2025. D.I. 815.

13. The Debtors subsequently filed multiple notices adjourning the DS Hearing, eventually setting the DS Hearing for May 19, 2025. D.I. 861, 969.

14. On April 28, 2025, the Debtors filed their: (a) *Disclosure Statement for Amended Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 966] (the "Amended DS"); (b) *Amended Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 965] (the "Amended Plan"); and (c) *Notice of Filing of Revised Proposed Order (I) Approving Proposed Disclosure Statement and the Form and Manner of Notice of Hearing Thereof, (II) Establishing Solicitation and Voting Procedures with Respect to Debtors' Proposed Chapter 11 Plan, (III) Scheduling Confirmation Hearing, (IV) Establishing Notice and Objection Procedures for Confirmation of Debtors' Proposed Chapter 11 Plan, and (V) Granting Related Relief* [D.I. 968] (the "Revised DS Order").

15. On May 16, 2025, the Debtors filed their *[Proposed] Disclosure Statement for Second Amended Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 1028] (the "Disclosure Statement") and the Plan. On the same day, the Debtors filed blacklines between the Disclosure Statement and the prior Amended DS, as well as between the Plan and the prior Amended Plan. D.I. 1029.

16. On May 19, 2025, the Court held the DS Hearing.

17. On May 20, 2025, the Court entered its *Order (I) Approving Proposed Disclosure Statement and the Form and Manner of Notice of Hearing Thereof, (II) Establishing Solicitation and Voting Procedures with Respect to Debtors' Proposed Chapter 11 Plan, (III) Scheduling Confirmation Hearing, (IV) Establishing Notice and Objection Procedures for Confirmation of Debtors' Proposed Chapter 11 Plan, and (V) Granting Related Relief* [D.I. 1047] (the "DS Order"). The DS Order approved the Disclosure Statement as containing adequate information in accordance with section 1125 of the Bankruptcy Code, set the Confirmation Hearing for July 21, 2025 and set the deadline to object to confirmation of the Plan for July 1, 2025. *Id.* at ¶¶ 49, 51.

18. On May 20, 2025, the Debtors filed solicitation versions of their *Second Amended Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 1048] and *Disclosure Statement for Second Amended Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 1050].

19. On June 13, 2025, the Debtors filed their *Notice of Filing of Plan Supplement in Connection with Second Amended Joint Chapter 11 Plan of Liquidation of AIO US, Inc. and Its Debtor Affiliates* [D.I. 1138] (the "Plan Supplement"). The Plan Supplement contains the "ALT Trust Agreement," the "Trust Transfer Agreement," the Form of Trust Distribution Procedures Release Agreement (the "Release Agreement"), the list of trust advisory committee members, and a schedule of assumed and assigned contracts.

C. Specific Plan Provisions

20. The Plan includes the following provisions relevant to this Objection.

i. Plan Injunction

21. Article 10.4(i) of the Plan provides as follows:

(i) Except as otherwise provided in this Plan or in the Confirmation Order, as of the entry of the Confirmation Order but subject to the occurrence of the Effective Date, to the maximum extent permitted under applicable law, ***all Persons who have held, hold, or may hold Claims or Interests*** (whether proof of such Claims or Interests has been filed or not and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan) and other parties in interest, along with their respective present or former employees, agents, officers, directors, principals, and affiliates, ***are forever barred, estopped, and permanently enjoined after the entry of the Confirmation Order from***: (a) ***commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind*** (including any proceeding in a judicial, arbitral, administrative, or other forum) ***against or affecting, directly or indirectly***, a Debtor or an Estate or the property of any of the foregoing, ***or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing parties*** mentioned in this subsection (a) ***or any property of any such transferee or successor***; (b) ***enforcing, levying, attaching*** (including any prejudgment attachment), collecting, or ***otherwise recovering in any manner or by any means, whether directly or indirectly, any judgment, award, decree, or order*** against any of the Debtors, the Liquidating Debtors, the Estates, the Avon Liquidation Trust, or the Liquidating Trustee, as applicable, or the property of any of the Debtors, the Liquidating Debtors, the Estates, the Avon Liquidation Trust, or the Liquidating Trustee, as applicable, ***or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing parties mentioned in this subsection*** (b) ***or any property of any such transferee or successor; (c) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind*** against any of the Debtors, the Liquidating Debtors, the Estates, the Avon Liquidation Trust, the Liquidating Trustee, as applicable, or the property of any of the Debtors, the Liquidating Debtors, the Estates, the Avon Liquidation Trust, the Liquidating Trustee, as applicable, ***or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons mentioned in this subsection (c) or any property of any such transferee or successor***; (d) asserting any right of setoff, directly or indirectly, against any obligation due from any of the Debtors, the Liquidating Debtors, the Estates, the Avon Liquidation Trust, or the Liquidating Trustee, as applicable, or against the property or interests in property of any of the Debtors, the Liquidating Debtors, the Estates, the Avon Liquidation Trust, or the Liquidating Trustee, as applicable, except (1) as contemplated or Allowed by the Plan or (2) to the extent asserted in a timely filed proof of Claim or timely filed objection to the confirmation of the Plan; and (e) acting or proceeding in any manner, in any place whatsoever, that does not conform to, does not comply with, or is inconsistent with the provisions of this Plan; provided, however, that nothing contained herein shall preclude such parties who have held, hold, or may hold Claims against or Interests in a Debtor or an Estate from exercising their rights, or obtaining benefits, pursuant to, and consistent with, the terms of this Plan and the Plan Documents.

Plan, Art. 10.4(i) (emphasis added).

ii. Provisions for the Payment of the Unsecured 2043 Notes Fees and Expenses

22. Article 12.16 of the Plan provides as follows:

> (i) ***On the Effective Date***, and after the Bond Trustee's submission of reasonably detailed summary invoices to the Debtors and advisors for the Creditors' Committee at least five (5) Business Days prior to the Effective Date, ***the Debtors or the Avon Liquidation Trust, as applicable, shall pay such invoiced Unsecured 2043 Notes Fees and Expenses as previously agreed to in writing between the Debtors and the Bond Trustee, subject to review for reasonableness by the Debtors and advisors for the Creditors' Committee***.
>
> (ii) ***After the Effective Date***, and within ten (10) calendar days after the Bond Trustee's submission of reasonably detailed summary invoices to advisors for the Liquidating Trustee, ***the Avon Liquidation Trust shall pay any unpaid Unsecured 2043 Notes Fees and Expenses subject to the terms of the prior agreement between the Debtors and the Bond Trustee referenced in subsection (i) above and review for reasonableness by advisors for the Liquidating Trustee***. Such amounts shall be paid: (a) first, from such ALT Operating Reserve amounts above $15,000,000 initially funded pursuant to Section 5.10(i) of this Plan; (b) second, from the GUC Recovery Fund; and (c) third, from the ALT Operating Reserve.

Plan, Art. 12.16 (emphasis added).

23. "Unsecured 2043 Notes Fees and Expenses" means "the reasonable and documented fees, expenses, indemnities, and disbursements of the Bond Trustee (including the reasonable and documented fees, disbursements, and other charges of counsel) incurred in connection with the Unsecured 2043 Notes Documents, the Chapter 11 Cases, or the Plan." *Id.* at Art. 1.1, p. 18.

24. The "Bond Trustee" is Deutsche Bank Trust Company Americas ("Deutsche Bank"), "solely in its capacity as trustee and each other capacity for which it serves under or in connection with the Unsecured 2043 Notes Documents[.]" *Id.* at Art. 1.1, p.4.

25. The "Unsecured 2043 Notes Documents" means that certain *Indenture*, dated as of February 27, 2008 (as amended, supplemented, or otherwise modified from time to time), by and

between API, as issuer, and Deutsche Bank, as trustee (the "Unsecured 2043 Notes Indenture"), "together with all other related documents, instruments, and agreements, in each case as supplemented, amended, restated, or otherwise modified from time to time." *Id.* at Art. 1.1, p. 18.

26. The Plan treats the Unsecured 2043 Notes Fees and Expenses as separate and distinct from the Unsecured 2043 Notes Claims. *Id.* That is, the Unsecured 2043 Notes Claims: (a) include "any Claim on account of, arising under, or related to" those certain 6.950% Notes due 2043, issued by API under the Unsecured 2043 Notes Indenture (such Notes, the "Unsecured 2043 Notes"); and (b) "shall exclude the Unsecured 2043 Notes Fees and Expenses." *Id.*

27. Article 4 of the Plan provides that the Unsecured 2043 Notes Claims "shall be Allowed in the total aggregate amount of $22,653,502.40." *Id.* at Art. 4.3(i). Such claims will receive the same treatment as other general unsecured claims, subject to the DTC Election Process. *Id.* at Art. 4.3(ii).

28. By contrast, and as emphasized above, the Debtors or the Avon Liquidation Trust (as applicable) will pay all "reasonable" pre- and post-Effective-Date Unsecured 2043 Notes Fees and Expenses in full without any review by the Court, the U.S. Trustee or parties in interest (other than the Committee). *Id.* at Art. 12.16. The Plan provides that the Effective Date Allocated Cash shall be allocated to "any Unsecured 2043 Notes Fees and Expenses" prior to any allocation to the GUC Recovery Fund. *Id.* at Art. 5.10(i). Payment of the then-accrued Unsecured 2043 Notes Fees and Expenses is a condition precedent to the occurrence of the Effective Date. *Id.* at Art. 9.1(xii).

29. The Plan does not appear to provide for the payment of any other unsecured creditor's fees and expenses.

iii. The Gatekeeping Provision

30. Article 10.8 of the Plan provides as follows (the "Gatekeeping Provision"):

> To the maximum extent permitted under applicable law, no party may commence, continue, amend, pursue, join in, or otherwise support any other party commencing, continuing, amending, or pursuing, whether directly, derivatively, or otherwise, of any Claims, including Interests, Liens, charges, encumbrances, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, and liabilities, against the Debtors, the Liquidating Debtors, the Exculpated Parties, or the Released Parties that relate to, or are reasonably likely to relate to, such Claims released or exculpated in this Plan, ***without first: (i) requesting a determination from the Bankruptcy Court (which request must attach to the complaint or petition proposed to be filed by the requesting party), after notice and a hearing, that such Claim (a) represents a colorable claim against a Debtor, Liquidating Debtor, Exculpated Party, or Released Party and (b) was not released, enjoined, or otherwise prohibited under this Plan; and (ii) obtaining from the Bankruptcy Court the foregoing determination as well as specific authorization for such party to bring such Claim against any such Debtor, Liquidating Debtor, Exculpated Party, or Released Party***. For the avoidance of doubt, any party that obtains such determination and authorization and subsequently wishes to amend the authorized complaint or petition to add any Claim not explicitly included in the authorized complaint or petition must obtain authorization from the Bankruptcy Court before filing any such amendment in the court where such complaint or petition is pending. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a Claim constitutes a direct or derivative claim, is colorable and, only to the extent legally permissible, will have jurisdiction to adjudicate the underlying colorable Claim.

Id. at Art. 10.8 (emphasis added).

OBJECTION[3]

I. The Plan is Unconfirmable Because the Plan Injunction Is Overbroad.

31. The injunction provision found in Article 10.4 of the Plan bars "all Persons who have held, hold, or may hold Claims or Interests" plus those parties' "respective present or former employees, agents, officers, directors, principals, and affiliates" from suing, seeking to enforce or collect judgments, or asserting security interests against "any direct or indirect transferee of any property of, or direct or indirect successor in interest to" the Debtors and several other entities.

[3] The U.S. Trustee has provided additional informal comments to the Debtors regarding the terms and provisions of the Plan. The parties continue to discuss such comments in good faith, and the U.S. Trustee anticipates that the parties may resolve some or all of such comments prior to the Confirmation Hearing. The U.S. Trustee reserves the right to raise any and all objections at the Confirmation Hearing.

The prohibition is not qualified by any reference to actions relating only to the Debtors, the estates, or transfers of their property. In other words, creditors, as well as a multitudinous number of parties related to those creditors, cannot take any future action to enforce any claim they may have against any person or entity who received property, either directly or indirectly, from the Debtors. Under this injunction, for example, if the Debtors made a payment to Creditor A at any time, Creditor B is prohibited from taking any enforcement action against Creditor A regarding any independent claim Creditor B might have against Creditor A. The Plan's injunction is mandatory and involuntary; creditors cannot opt out of it in any way.

32. Here, parties receiving the Plan would have no reason to believe that a provision called "Plan Injunction" extinguishes their rights against third parties for claims that have no relation to the Debtors' cases. There is no disclosure, conspicuous or otherwise, of this provision's effect. And, even were such a creditor to discover the provision and believe it to be objectionable, there is no easy way for that creditor to manifest its displeasure—other than by the expensive proposition of hiring counsel and filing an objection.

II. The Court Should Deny Confirmation Because the Provisions for the Payment of the Unsecured 2043 Notes Fees and Expenses Violate Applicable Law.

A. The Plan Circumvents the Requirements of Section 503(b) of the Code.

33. Payment of the Unsecured 2043 Notes Fees and Expenses from the estates is specifically governed by section 503(b) of the Bankruptcy Code. That subsection provides in relevant part that:

> (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> […]

> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
>
> […]
>
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
>
> […]
>
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D) or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant; [and]
>
> (5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title[.]

11 U.S.C. § 503(b)(3)-(5).[4]

34. By enacting section 503(b) of the Code, Congress provided a specific procedure and standard for the allowance and approval of fees and expenses incurred by *ad hoc* committees

[4] In the Third Circuit, a creditor makes a substantial contribution if, and only if, its efforts provide an "actual and demonstrable benefit to the debtor's estate and the creditors." *Lebron v. Mechem Financial Inc.*, 27 F.3d 937, 943-44 (3d Cir. 1994) (citation omitted) (quoting *In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988)). Further, to be compensable under section 503(b)(D), the creditor's activity must have "benefit[ted] the estate as a whole." *See Lebron*, 27 F.3d at 944. Activities "which were designed primarily to serve [the applicants'] own interests" are not compensable, because they "would have been undertaken absent an expectation of reimbursement from the estate." *Id.*

and others in making a substantial contribution to a case. *See, e.g.*, 4 Collier on Bankruptcy ¶ 503.04[1] (16th ed. 2025) ("[A]dministrative expenses, except ordinary course expenses paid pursuant to sections 363 and 364 of the Code, are allowed only after notice and a hearing and are not 'deemed allowed' but rather must be actually allowed by court order."). Section 503 imposes detailed requirements that must be met before approval and payment, including: (i) the timely filing of a request for payment by the professional (*see* 11 U.S.C. § 503(a)); (ii) notice and a hearing before the Court (*see id.* at § 503(b)); (iii) a showing that such expenses were "actual" and "necessary" (*see id.* at § 503(b)(3)); (iv) a showing that the creditor, unofficial committee or indenture trustee has made a "substantial contribution" to the bankruptcy case (*see id.* at § 503(b)(3)(D)); and (v) a finding by the Court that any compensation paid to an attorney or accountant is "reasonable." *See id.* at § 503(b)(4). Moreover, a party's right to payment under section 503(b) is not automatic but "depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 535 (3d Cir. 1999).

35. That the Debtors have proposed payment of the Unsecured 2043 Notes Fees and Expenses as part of the Plan does not relieve the third-party professionals of their obligation to comply with the requirements of section 503; that section is the "sole source" of authority to pay postpetition professional fees on an administrative basis. *Davis v. Elliot Management Corp. (In re Lehman Bros. Holdings Inc.)*, 508 B.R. 283, 290 (S.D.N.Y. 2014). In *Davis*, the Southern District of New York roundly rejected an attempt by certain committee members to circumvent section 503(b)(4) by seeking payment under a "permissive" plan provision that purported to pay third-party professional fees without regard to whether they could be authorized under section 503. As the court explained, plans pay only claims and administrative expenses:

> Although the Bankruptcy Code does not explicitly forbid payments [of] professional fees that are not administrative expenses, no such explicit prohibition is necessary. Reorganization plans exist to pay claims and expenses. … Therefore, the Individual Members' professional fee expenses are either administrative expenses or not, and if the latter, they cannot be paid under a plan.

Id. at 293. Indeed, the Court recognized that any contrary result "could lead to serious mischief," since it would allow plan proponents to distribute the estate's assets without regard to the Bankruptcy Code's priority scheme. *Id.*

36. The Plan cannot be confirmed with Article 12.6 as currently drafted for several reasons, including:

a. The Bond Trustee has not yet filed any declarations or other pleadings containing evidence that would enable this Court to determine at confirmation whether the proposed payments satisfy the substantial contribution requirements of sections 503(b)(3) and (4);

b. The Plan does not contain or attach time records, expense detail, or other substantive information regarding the Unsecured 2043 Notes Fees and Expenses, including their actual current amount or estimated future amounts; and

c. The Plan does not require the Bond Trustee to provide anything other than summary invoices documenting the Unsecured 2043 Notes Fees and Expenses, rather the than detailed invoices that would satisfy the Bond Trustee's burden of proof under sections 503(b)(3) and (4).

37. Unless this provision is removed, the Plan cannot be confirmed.

B. The Plan Violates Sections 1123(a)(4) and 1129(a)(1) of the Code.

38. Section 1129(a)(1) of the Code provides that the Court shall confirm a plan only if the plan "complies with the applicable provisions" of title 11. 11 U.S.C. § 1129(a)(1).

39. Section 1123(a) of the Bankruptcy Code provides that:

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
>
> […]

> (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such a particular claim or interest[.]

11 U.S.C. § 11234(a)(4).

40. Section 1123(a)(4) "embodies the principle that all similarly situated creditors in bankruptcy are entitled to equal treatment." *Energy Future Holdings Corp. v. Delaware Trust Co.*, 648 Fed. App'x 277, 283 (3d Cir. Mar. 23, 2015), *cert. denied* 137 S. Ct. 447, 196 L.Ed. 2d 336 (2016). "[C]ourts have interpreted the same treatment requirement to mean that all claimants in a class must have the same opportunity for recovery." *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013) (cleaned up) (citing *In re Dana Corp.*, 412 B.R. 53, 62 (S.D.N.Y. 2008)).

41. While a chapter 11 plan may provide disparate treatment for claims or interests within a class if the holders of claims or interests agree to less favorable treatment, the proposed plan in such circumstances must explicitly provide that particular creditors or interest holders are being treated in this manner so as to put them on notice. *See, e.g.*, *In re AMR Corp.*, 562 B.R. 20, 33 (Bankr. S.D.N.Y. 2016) (citing *Forklift LP Corp. v. iS3C, Inc. (In re Forklift LP Corp.)*, 363 B.R. 388, 398 (Bankr. D. Del. 2007)).

42. Applied here, the Plan does not explicitly provide that the Unsecured 2043 Notes Fees and Expenses are receiving more favorable treatment than other general unsecured claims. General unsecured creditors are required to piece together numerous plan provisions to figure out that they are receiving disparate treatment; there is no summary of the 2043 Notes Fees and Expenses construct in Article IV of the Plan, which describes the treatment of classes of claims and interests. Accordingly, the Plan violates section 1123(a)(4) of the Bankruptcy Code, and the statutory exception thereto does not apply. Because the Plan does not comply with the applicable provisions of the Code, the Plan fails to satisfy section 1129(a)(1) and cannot be confirmed.

II. The Court Should Deny Confirmation Because the Plan Includes an Improper Gatekeeping Provision.

43. The Gatekeeping Provision forces non-debtors who wish to pursue claims against other non-debtors to first come to this Court—and only this Court—for a determination of whether their claim is "colorable." Thereafter, this Court would have "sole and exclusive jurisdiction to determine whether a claim constitutes a direct or derivative claim, is colorable and … will have jurisdiction to adjudicate the underlying colorable Claim." Plan, Art. 10.8. These rules would apply even after the Chapter 11 Cases have been closed, thereby requiring the non-debtor seeking to pursue a claim against another non-debtor to first move to reopen the Chapter 11 Cases.

44. The proposed procedure is akin to the procedure described in *Barton v. Barbour*, 104 U.S. 126 (1881) prior to suing a bankruptcy trustee, and the Court should not approve it. The defense of "release" is an affirmative defense to a cause of action asserted in a court of law or other tribunal. Affirmative defenses cannot be adjudicated prior to the filing of the action to which such defense relates. Moreover, as to claims between non-debtors, there is no reason why the court in which the relevant action has been filed cannot make the determination as to whether the claim was released under the Plan.

45. Judge Owens rejected a similar provision in *In re Gulf Coast Health Care, LLC*, et al., Case No. 21-11336, wherein she noted that "the plan says what it says and other courts should be entitled to exercise their authority to interpret it." *See* Ex. A, May 4, 2022 Hearing Transcript at 30:16-23. Further, "imposing such a requirement could also impose an unnecessary administrative hurdle and cost the parties when these cases are closed." *See id.*

46. The same concerns apply in this case. There is no basis for the Gatekeeping Provision and the Court should not confirm the Plan unless the Debtors remove it.

RESERVATION OF RIGHTS

47. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, among other things: (i) complement, supplement, augment, alter or modify this Objection; (ii) assert any objection; (iii) file any appropriate motion; (iv) conduct any and all discovery as may be deemed necessary or as may be required; and (v) assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that the Court enter an order: (i) denying confirmation of the Plan; and (ii) granting such other and further relief as the Court deems just and equitable.

Dated: July 1, 2025

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

By: */s/ Hannah J. McCollum*

Hannah McCollum
Malcolm M. Bates
Trial Attorneys
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 N. King Street, Room 2207, Lockbox 35
Wilmington, DE 19801
Telephone: (302) 573-6491
Email: Hannah.McCollum@usdoj.gov
Malcolm.M.Bates@usdoj.gov

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

CRAIG T. GOLDBLATT
JUDGE

824 N. MARKET STREET
WILMINGTON, DELAWARE
(302) 252-3832

March 15, 2023

VIA CM/ECF

Re: *In re Kabbage Inc.*, No. 22-10951

Dear Counsel:

The debtors in these bankruptcy cases operated an online loan servicing business. The debtors sold most of their assets to American Express in October 2020. In these bankruptcy cases, they have largely sought to wind down their remaining assets, the largest portion of which were loans issued to small businesses under the Paycheck Protection Program.

This Court held a confirmation hearing on March 13, 2023. On account of the parties' very good work, all of the objections to confirmation filed by creditors were resolved prior to the hearing. The U.S. Trustee, however, objected to confirmation on the ground that the plan improperly granted a discharge to a liquidating debtor in violation of 11 U.S.C. § 1141(d)(3). Following a bench ruling by this Court, the debtors agreed to modify the plan so that it provides for a temporary injunction that only remains in place so long as the post-confirmation entities hold assets. Once it is clear that those entities are empty shells, the temporary injunction will terminate. Such a temporary injunction does not violate § 1141(d)(3). The parties submitted a form of plan and confirmation order that conformed to this ruling. The Court has entered that order.[1] This letter ruling is intended to supplement the reasoning set forth in the Court's bench ruling.

While the plan provides for the liquidation of the debtors, it does not create a separate post-confirmation liquidating trust that would be eligible to take free and clear title to the debtors' assets under § 1141(c). Instead, those assets remain with

[1] D.I. 680 (the "Confirmation Order").

the legal entities that consisted of the prepetition debtors, which are referred to after the effective date of the plan as the Wind Down Estates. Those entities are directed by the Wind Down Officer.

Because the legal entities that made up the prepetition debtors will not end up as corporate shells upon the effective date but will instead hold assets that are intended to be distributed to creditors under the plan, the parties had good reason to protect the debtors and the Wind Down Estates from the holders of prepetition claims who might seek to defeat the operation of the plan by taking action against the post-bankruptcy entities on account of their prepetition claims.

As originally drafted, § 10.3(b) of the plan sought to guard against that risk by providing that "all Entities who have held, hold, or may hold Claims against or Interests in the Debtors … are permanently enjoined, on and after the Effective date" from, among other things, "commencing, conducting, or continuing … any suit … of any kind … against or affecting the Debtors, the Wind Down Estates, or the Wind Down Officer, as applicable."[2] The difficulty with this language, however, is that (as § 10.3(f) acknowledged) the debtors are liquidating and thus ineligible for a discharge under § 1141(d)(3). Accordingly, the plan states that nothing therein shall "grant the Debtors a discharge pursuant to section 1141(d) of the Bankruptcy Code."[3]

The U.S. Trustee objected to confirmation, correctly pointing out that the language of the plan injunction was materially identical to the language of § 524(a)'s discharge injunction and was thus the functional equivalent of the discharge to which the debtors were not entitled.[4] In response, the debtors acknowledged that they are ineligible for a discharge under § 1141(d) but argued that the provisions of their plan, operate as an injunction rather than a discharge. As such, the debtors argued (pointing to a handful of bench rulings in prior cases), the injunction was appropriate even if it amounted to a "de facto" discharge.[5]

This Court has serious concerns about the propriety of granting relief that is the functional equivalent of a discharge to a debtor that is ineligible for a discharge on the ground that the parties affixed a different label to it. The heart of the equitable authority of bankruptcy courts, Justice Douglas taught in *Pepper v. Litton*, is "that

---

[2] D.I. 627 § 10.3(b).

[3] *Id.* § 10.3(f).

[4] D.I. 590.

[5] D.I. 637 at 74-77.

substance will not give way to form."[6] Otherwise put, bankruptcy law will treat as a duck that which quacks like a duck.

More fundamentally, though, this was a problem to which there was a ready solution that would avoid doing any violence to bankruptcy principles. *Collier*'s explains that the reason § 1141(d)(3) prohibits a liquidating debtor from receiving a discharge is that corporate debtors in chapter 7 do not receive a discharge, and § 1141(d)(3) prevents "debtors from avoiding the operation of section 727(a)(1) through the use of a liquidating plan under chapter 11 instead of a chapter 7 liquidation."[7] And the "policy behind [§ 727(a)(1)] is the prevention of trafficking in corporate shells…. A corporation may obtain relief from its debts through dissolution. But it does not need relief if it no longer has any assets."[8]

The debtors here, of course, do not need injunctive protection once they no longer have any assets. Their only concern was preventing creditors from acting against the post-effective date entities while they *do* have assets. The debtors have no interest in "trafficking in corporate shells." Once the entities have distributed their assets in accordance with the plan, and are reduced to corporate shells, there is no longer any need to protect them.

The readily available solution, therefore, is to afford those entities not *permanent* injunctive relief, but rather *temporary* injunctive relief that will remain in effect only as long as those entities hold assets. Counsel for the U.S. Trustee agreed (appropriately) that if the injunctive relief enjoyed by the debtors and the Wind Down Estates is temporary rather than permanent, it is not the functional equivalent of a discharge, and the granting of such relief would not run afoul of § 1141(d)(3) or the purposes it serves.

The plan has thus been revised to so provide that the relief afforded to the debtors and the Wind Down Estates is temporary rather than permanent. The Court is satisfied that this is precisely the type of interstitial, gap-filling authority that § 105(a) was intended to authorize. To be sure, the Supreme Court made clear in *Law v. Siegel* that § 105(a) did not grant bankruptcy courts the authority to grant relief that directly contradicted the express text of the Bankruptcy Code.[9] And the

---

[6] *Pepper v. Litton*, 308 U.S. 295, 305 (1939).

[7] 8 *Collier on Bankruptcy* ¶ 1141.05[4] (16th ed. 2022).

[8] 6 *Collier on Bankruptcy* ¶ 727.01[3] (16th ed. 2022).

[9] *Law v. Siegel*, 571 U.S. 415, 421 (2014) ("[A] bankruptcy court may not contravene specific statutory provisions. It is hornbook law that § 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code. Section 105(a) confers authority to carry out the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits.") (internal citations omitted).

import of *Jevic* is that bankruptcy courts' equitable discretion is limited not only by what the Bankruptcy Code says expressly, but also by reasonable inferences that one might draw about Congress' intent from the Bankruptcy Code's language, structure and principles.[10] But there is neither an express nor implicit prohibition on imposing a temporary injunction against actions by creditors that would undermine the operation of the plan. Because the injunction will expire once the debtors' entities are corporate shells, this injunction is not inconsistent in any way with the underlying purposes of §§ 1141(d)(3) or 727(a). The Court is thus satisfied that the revised injunction provided in § 10.3 of the plan operates to "carry out" the provisions of the Bankruptcy Code and is thus a proper exercise of the authority provided in 11 U.S.C. § 105(a). The Court has thus entered the Confirmation Order as revised.

Sincerely,

Craig T. Goldblatt
United States Bankruptcy Judge

[10] *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464-469 (2017).

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	Case No. 21-11336(KBO)
GULF COAST HEALTH CARE, LLC, et al,	.	
	.	824 Market Street
	.	Wilmington, Delaware 19801
Debtors.	.	
. . . . .	.	Wednesday, May 4, 2022

TRANSCRIPT OF VIDEO HEARING RE:
CONFIRMATION - COURT DECISION
BEFORE THE HONORABLE KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES VIA ZOOM:

For the Debtors:	David R. Hurst, Esq. Daniel M. Simon, Esq. Emily C. Keil, Esq. MCDERMOTT, WILL & EMERY, LLP
For the U.S. Trustee:	Joseph Cudia, Esq. Juliet Sarkessian, Esq. Richard Schepacarter, Esq. OFFICE OF THE U.S. TRUSTEE
For the Official Committee of Unsecured Creditors:	David Kurzweil, Esq. Eric Howe, Esq. Joseph Davis, Esq. Nancy Peterman, Esq. GREENBERG TRAURIG, LLP

(Appearances Continued)

Audio Operator:	Electronically Recorded by Leslie Murin, ECRO
Transcription Company:	Reliable 1007 N. Orange Street Wilmington, Delaware 19801 (302)654-8080 Email: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES VIA ZOOM: (Continued)

For Barrow Street Capital:	Alana Page, Esq. Kelly A. Cornish, Esq. Matthew Stachel, Esq. Miriam Levi, Esq. PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
For the United States:	Alexis Daniel, Esq. Augustus Curtis, Esq. U.S. DEPARTMENT OF JUSTICE
For Vista Clinical Diagnostics, LLC:	Andrew Ballentine, Esq. SHUMAKER, LOOP & KENDRICK, LLP
For the Florida Plaintiffs:	Andrew Brown, Esq. Jesse Noa, Esq. R. Stephen McNeill, Esq. POTTER, ANDERSON & CORROON, LLP Blair Mendes, Esq. MENDES, REINS & WILANDER, PLLC James Wilkes, II, Esq. WILKES & ASSOCIATES, PA
For Regions Bank:	Cory Falgowski, Esq. BURR & FORMAN, LLP
For Affiliate:	DANTE SKOURELLOS, ESQ.
For the Estates of Domenica B. Castellano, Francis I. Einstein, Robert F. Einstein, Sr., Shelley A. Tambling:	Douglas Candeub, Esq. MORRIS JAMES, LLP

(Appearances Continued)

APPEARANCES VIA ZOOM: (Continued)

For OHI Asset Funding (DE), LLC and the Omega Landlords:	Eric Schwartz, Esq. Jonathan Weyland, Esq. MORRIS, NICHOLS, ARSHT & TUNNELL, LLP Jason Hufendick, Esq. Robert Lemons, Esq. Shreya Gulati, Esq. WEIL, GOTSHAL & MANGES, LLP Leighton Aiken, Esq. FERGUSON BRASWELL FRASER KUBASTA, PC
For Omnicare, Inc. and its Affiliates:	Geoffrey Goodman, Esq. Tamar Dolcourt, Esq. FOLEY & LARDNER, LLP
For New Ark Capital, LLC:	James Muenker, Esq. Jason Hopkins, Esq. Stuart Brown, Esq. DLA PIPER, LLP (US)
For Medline Industries, Inc.:	Jordana Renert, Esq. LOWENSTEIN SANDLER, LLP
For Bradford:	KIMBERLY GIANIS, ESQ.
Patient Care Ombudsman:	MARK FISHMAN
Also Appearing:	Dara Cooley, Esq. DARA COOLEY LAW, PA Jason Gerstein Matt Shelton Scott Vogel GULF COAST HEALTH CARE Allison Axenrod CRG FINANCIAL, LLC

(Appearances Continued)

APPEARANCES VIA ZOOM: (Continued)

Also Appearing:

Ben Jones
Swapna Deshpande
ANKURA CONSULTING GROUP, LLC

Caroline Salls
NEW GENERATION RESEARCH

Clifford Zucker
Earnestiena Cheng
Narendra Ganti
FTI CONSULTING

Eric Roth
HEALTH CARE NAVIGATOR, LLC

Jeff Kaplan
"BCAS"

Lindsay Simon
"BANKRUPTCY PROF"

Ryan Martin
"CCM"

Deanne Graham, *Pro Se*

James Morrison, *Pro Se*

Julie Gutzmann, *Pro Se*

Ray Mulry, *Pro Se*

Ryan Lin, *Pro Se*

Sheryl Wolf, *Pro Se*

Becky Yerak
WALL STREET JOURNAL

Daniel Gill
BLOOMBERG LAW

Jason DiBattista
LEVFIN INSIGHTS

Jessica Steinhagen
REORG RESEARCH

(Appearances Continued)

APPEARANCES VIA ZOOM: (Continued)

Also Appearing:

Maria Chutchian
REUTERS

Richard Archer
LAW 360

Taylor Harrison
DEBTWIRE

INDEX

(Proceedings commence at 3:30 p.m.)

THE COURT: Good morning, everyone. This is Judge Owens. This is the time that we are gathered to hear the ruling in Gulf Coast.

Before I begin, I guess I ask the parties: Is there anything we need to take are of ahead of time?

THE COURT: Okay.

UNIDENTIFIED: Nothing from the debtors, Your Honor.

THE COURT: Okay. Great.

Okay. As I mentioned, we're here on the Court's ruling on confirmation of the debtors' plan, as modified, found at Docket Number 1217.

The confirmation proceedings lasted four days; and, during such time, the Court heard credible and competent testimony from Mr. Jones, the debtors' Chief Restructuring Officer, as well as Mr. Vogel, the debtor's independent manager; Mr. Chermayeff, a representative of Barrow Street Capital, and Ms. Kjontvedt, on behalf of Epiq, the debtors' administrative advisor, assisting the debtors with, among other things, tabulating the votes cast on the plan.

In addition, approximately 91 exhibits were admitted into the record by the parties and considered by the Court.

And finally, there was voluminous briefing on the

contested confirmation issues filed by interested parties and extensive argument was had.

The plan embodies a settlement between the debtors and their key stakeholders; namely, the committee, Omega, and certain affiliates and insiders known as the "contribution parties, that was reached following the parties' voluntary agreement to mediate with former Judge Peck. It provides for an aggregate guaranteed minimum recovery of at least $10 million to holders of general unsecured claims in Class 7.A and litigation claimants, mostly PLGL plaintiffs, in Class 7.B.

Following further discussions among the parties during the confirmation proceedings, the minimum guarantee was increased to 11.5 million, with the additional 11 point - excuse me -- with the additional 1.5 million earmarked for Class 7.B, to ensure equality of distribution among that subclass following the assumption of several settlement agreements.

Additional future amounts may flow to the estates for distributions for unsecured creditors following the liquidation of certain business interruption and D&O insurance policies.

Mr. Jones testified that, as a result of the guaranteed funds, claim waivers, and redirection of proceeds agreed to by Omega and the contribution parties, allowed

claims of creditors in Class 7.A are projected to receive a recovery of approximately 19 percent, with those in 7.B to receive approximately 21 percent.

Mr. Jones further explained that these projected recoveries for unsecured creditors would not be available absent the voluntary contributions of Omega and the contribution parties.

Specifically, New Ark, the service providers, and the equity sponsors, collectively known as the "contribution parties," have agreed to contribute 14.75 million in cash to fund a certain amount of allowed professional fee claims and the guaranteed minimum to unsecured creditors.

New Ark has also agreed to redirect any recoveries that it is to receive on account of its Section 507(b) priority claim arising from the debtors' use of its cash collateral during the Chapter 11 cases, as well as certain recoveries it's to receive on account of its secured pre-petition claim.

Moreover, the service providers agree to waive recoveries on account of their pre-petition claims.

Omega has agreed to 1 million for allowed professional fee claims and up to 1 million of business interruption insurance proceeds, if obtained, for the unsecured creditors. It has also agreed to waive repayment of its DIP financing claim and redirect any recoveries that

it's to receive on account of pre- and post-petition claims for the benefit of the unsecured claimants.

In toto, the debtors estimate that Omega and the contribution parties have contributed to the plan up to 16.7 million of new money, a waiver of approximately 48 million of post-petition DIP, administrative, and priority claims that arose when all the parties knew they would never be repaid, and a waiver or redirection of 124 million of pre-petition claims.

Without the agreements to redirect proceeds and waive claims, the debtors' current Class 7 unsecured creditors would be substantially diluted and would only share in approximately 31 percent of the funds available to unsecured creditors in a non-consensual Chapter 11 scenario. Under the current plan, they receive a 100 percent of the guaranteed amount.

The unrebutted evidence also indicates that the debtors have little to no available assets with which to fund a plan or a Chapter 7 liquidation, save for potential causes of action stemming from certain insider or affiliate transactions with some of the contribution parties. As a result of the limited assets and significant amount of claims projected to be allowed against the estates, Mr. Jones testified that the debtors would need to obtain somewhere north of 175 million in litigation proceeds on those causes

of action to guarantee the plan's projected minimum recovery to unsecured creditors; 75 million would need to be obtained just to permit any recovery to unsecured creditors in a Chapter 7 scenario.

The need for and benefits of the current plan settlement is explained and supported by, among other things, the hypothetical Chapter 7 waterfalls prepared by Mr. Jones and his team as material information was garnered. Those are found at Debtor Exhibits 19 and 20. The waterfall and the assumptions underlying it have not been meaningfully challenged.

In return for and as a condition to their plan contributions, Omega and the contribution parties have demanded releases for themselves and certain related parties from the debtors, as well as non-consensual releases from the litigation creditors in Class 7.B.

Also included in the plan's definition of "third-party released parties" are all the PLGL codefendants and their related parties, which would capture certain former debtor employees and current and former officers. Pursuant to the plan, creditors who vote in favor of the plan are also giving a release of third-party released parties, but that release is consensual.

The plan termsheet found at Debtors' Exhibit 17, executed by the debtors, the creditors' committee, Omega, and

the contribution parties, following their successful mediation, memorializes the parties' terms, including the demand for and requirement of the plan's non-consensual third-party releases.

The Court also heard testimony from Mr. Chermayeff as to why Barrow Street wants the releases for itself and its related parties, and why it conditions its plan contributions on their inclusion in the plan; namely, they wish to buy peace and finality, a position the debtors' representatives believe New Ark, the service providers, and all of their related parties take, as well.

In agreeing to the releases, Mr. Vogel, the debtors' independent manager, with the sole authority to pursue, settle, and release the debtors' causes of action, testified credibly that he believed that it was in the best interests of the debtors' estates, fair and reasonable to do so because the releases are a necessary inducement for the plan contributions of Omega and the contribution parties, without which the current plan could not be proposed, and without which unsecured creditors would receive no distribution.

Supporting that conclusion was Mr. Vogel's understanding of the nature and value of the debtors' assets available to fund creditor recoveries; namely, the affiliate and insider causes of action and the amount and priority of

claims, as set forth in Mr. Jones' waterfall scenarios.

To gain an understanding of the affiliate and insider causes of action, Mr. Vogel led and controlled an investigation into the estate's causes of action related to the affiliate and insider transactions. The investigation was independent, sufficient in scope, and conducted by able and experienced professionals. No real challenge has been made to these conclusions. The investigation yielded a report that concluded that, at best, the causes of action would yield approximately 64.3 million for the estates.

While the objecting parties attempted to discredit some of the conclusions in the investigation report, including the ultimate recovery conclusions, they neither shared with the Court the results of their own investigation, if one was undertaken, nor offered their own valuation conclusions and analysis.

Moreover, their targeted challenges to the report failed to seriously impact the material conclusion reached by Mr. Vogel that led to his decision to enter into the plan settlement, that the plan's guaranteed distribution to unsecured creditors resulting from the contributions of the released parties will likely yield far better recoveries to creditors than those that could be achieved absent the plan settlement.

Again, the waterfall indicates that 175 million of

litigation proceeds, approximately 2.8 times more than the debtors' high value estimate, would need to be obtained to yield the same result as the plan. And even if there was credible evidence that 175 million could be obtained in litigation, which there isn't, the Court cannot discount the risk of that litigation, the likelihood of recovery against the defendants, and the time value of money, all additional considerations of Mr. Vogel in reaching his decision to approve the plan settlement on behalf of the debtors.

Mr. Jones also offered his support for the plan for the same reasons as Mr. Vogel. Moreover, in support of the plan, the committee filed a statement, representing that it conducted its own investigation into potential estate claims and causes of action, including those that may exist against the contributing parties. Like Mr. Vogel, the committee used the results of this investigation, as well as Mr. Jones' waterfall, to negotiate with the Omega -- with Omega and the contribution parties, and agreed to the proposed plan.

For similar reasons as the debtors, the committee concluded that the settlement and its guarantee to unsecured creditors is the best possible outcome for creditors under the circumstances.

With respect to the six voting classes of impaired claims, all but Class 7.B, the litigation claimants, and those subject to the non-consensual third-party releases

voted to accept the plan.

While the debtors maintain that Class 7.B accepted the plan, I find that the second ballot cast by Millenia after the voting deadline, which tilted the subclass' vote in favor of the plan, was inappropriately accepted by the debtors, pursuant to the disclosure statement order. Millenia cast its first ballot, which rejected the plan, shortly before the voting deadline. It has been asserted, but not proven, that Millenia then realized that it submitted its ballot in error as rejecting, when it really wished to accept. Millenia then sent a second ballot, this time accepting, within two hours after the voting deadline.

The debtors agreed to, quote, "waive" the voting deadline and accept that second ballot. Ms. Kjontvedt testified that there were no defects or irregularities with respect to Millenia's first ballot, but that she accepted the late-filed second ballot after consulting the debtors and reviewing Paragraph 28 of the disclosure statement order.

Regardless of Ms. Kjontvedt's belief that accepting Millenia's ballot was appropriate, the terms of the disclosure statement order do not allow its acceptance. The parties' arguments on this topic were confined to the application of Paragraphs 22 and 28 through 30 of the disclosure statement order.

The facts of the Millenia changed vote do not fit

into the circumstances described in Paragraphs 29 or 30 of the order because Millenia's vote was not withdrawn, which is Paragraph 29, and the second ballot changing Millenia's vote was not cast before the voting deadline, and there's no evidence suggesting that the voting deadline was extended for Millenia, let alone prior to its expiration, which would cover Paragraphs 22 and 30.

Moreover, Paragraph 28 does not apply because Ms. Kjontvedt testified in her capacity as a professional, with extensive experience with vote tabulation, that the original Millenia ballot did not contain any defects or irregularities for the debtors to waive.

Accordingly, with Millenia's accepted vote removed, 54 Class 7.B creditors voted to reject the plan and 53 voted to accept, resulting in a 50.74 rejecting percentage.

Fifty-two of the fifty-four rejecting creditors filed objections to the plan that were still extant at the closing of the confirmation proceedings.

In addition, the Office of the United States Trustee objected to confirmation of the plan.

All objecting parties object to the inclusion of the non-consensual third-party releases, with the litigation creditors focusing mainly on those to be granted in favor of the insider affiliate contribution parties.

In addition, the litigation creditors object to the

debtors' release of those parties, the plan's Class 7 subclassification of unsecured creditors, the debtors' allocation of the settlement proceeds between the subclasses, the debtors' best interests test analysis, the good faith of the debtors in proposing the plan, the proposed litigation claims procedures, and the original identity of the litigation claimants trustee. Excuse me.

In addition to the inclusion of the non-consensual third-party releases, the U.S. Trustee also raised limited objections to a number of specific plan provisions. All but one of those were consensually resolved by the parties following the close of the confirmation proceedings.

After considering the evidence and legal position of the parties, I have determined that the debtors have not met their burden necessary to confirm the plan with non-consensual third-party releases. My decision was not easily reached, but it is one that the law requires.

The contributions of Omega and the contribution parties, either on behalf of themselves or other related release parties, are substantial, and have enabled a recovery to unsecured creditors when one otherwise would not exist, and those enabling contributions are conditioned on the grant of releases embodied in the plan.

The evidence presented was also sufficient to show that the settlement embodied in the plan was achieved during

arm's length, good faith negotiations among the debtors, the committee, Omega, and the contribution parties, and that the debtors' decision to enter into the settlement was the result of reasonable and appropriate business judgment, based on an independent, full and fair investigation into the settled debtor claims and appropriate waterfall analysis, which was updated regularly as material information came to light, and the consideration of other relevant facts and circumstances that support a firm settlement with the litigation targets today.

However, while those conclusions lend support for the Court's approval of the debtors' releases of their claims against the nondebtors, they cannot, by themselves, support approval of the non-consensual third-party releases.

These types of releases are not broadly sanctioned. They require satisfaction of, quote, "exacting standards" set forth by the Third Circuit in Continental. Those standards require that the Court conclude, based on specific supportive factual findings, that the non-consensual third-party releases are not only necessary to the success of the debtors' reorganization, but also fair to the releasing creditors and given to them in exchange for reasonable consideration. Here, critical factors that courts in this circuit traditionally rely on to conclude that a plan's inclusion of non-consensual third-party releases is

appropriate are missing.

At the outset, I'll note that, while the parties did not focus their presentations on the propriety of the third-party releases granted to Omega, the D&Os, and the employees, many or all of the factors that I will discuss with respect to the contribution parties are also missing with respect to the other released parties.

For instance, Omega is making a substantial contribution to the plan, but nothing else in the record supports the receipt of non-consensual third-party releases. There is no record supporting the third-party release of the debtors' former employees. And debtors admit that all parties are willing to remove them and continue with the proposed plan. While the D&Os may meet some of the criteria necessary to justify their inclusion as non-consensual released parties, such as identity of interest, no evidence was introduced in support.

So, with respect to the contribution parties, first, the debtors do not share an indication of interest with the released parties.

Moreover, the debtors did not file these cases due to the PLGL litigation sought to be permanently enjoined. There is no evidence suggesting that the PLGL codefendants and any other relevant released party will be unable to defend themselves in that litigation, unable to satisfy

judgments against them if obtained, or could look to the debtors' estates for indemnification, contribution, or the like. The only justification for the release is the desire by the contribution parties to achieve peace and finality in exchange for their contributions to the plan. While I appreciate and understand that desire, it is not a sufficient basis to justify a release of the third-party claims, given the totality of the circumstances.

Moreover, while the debtors cite to cases for the proposition that parties may share an indication of interest simply by possessing a common goal of confirming a plan and consummating the transactions embodied therein, those cases are a slim minority and I disagree with them. If that were the indication of interest test, every plan in which a debtor advocates for the inclusion of non-consensual releases on behalf of a third party could satisfy the test. Moreover, I'm puzzled as to the relevancy of a shared common goal to Continental's required questions of necessity and fairness.

Additionally, and perhaps more critically, the affected PLGL plaintiffs in Class 7.B have not overwhelming voted to accept the settlement and release of their claims as embodied in the plan. As courts have acknowledged, this is often the best evidence of fairness of a plan's third-party release to releasing parties.

Support is commonly garnered through negotiation

with the affected creditors or a representative body. But here, the litigation creditors had no voice in the plan settlement process or the allocation of the contributed funds, either directly or through a seat on the committee.

Moreover, while their projected recovery under the plan is more than what they would be entitled to a Chapter 7, the releasing creditors are receiving nowhere close to payment in full. And at worst, the evidence suggests that Class B -- 7.B creditors are not receiving anything on account of the released claims against the third parties by the released parties. Rather, the evidence suggests that the contributions made by the contribution parties were made on account of the estate's viable causes of action against them.

Indeed, no separate analysis was performed by the debtors or the committee as to the value of the third-party released claims at the time the settlement was achieved. And as will be explained, the debtors, with the support of the all trade committee, worked to allocate the guaranteed amount, so that creditors in Class 7.A, with likely no pending third-party claims, and those in in 7.B with third-party claims, would receive the same or close to the same pro rata distribution of the plan's guaranteed funds. No other evidence has been provided by the debtors to suggest a valuation of the third-party PLGL claims or to explain how any of the guaranteed amount to be distributed under the plan

is on account of those claims.

The debtors argue that the third-party claims against the contribution parties are derivative in nature and, thus, are to be released under the release the estates are granting to the contributing parties. As such, they argue that the third-party claims have *de minimis* value and should not be entitled to disturb plan settlement.

The direct derivative issue is complex, not appropriately and fully briefed, and concurrent -- and currently is undecided. The creditors vigorously dispute the debtors' positions from a legal standpoint and also highlight the debtors' own earlier attempt during these cases to extend the stay to the PLGL lawsuits as not estate claims and the debtors' pre-petition history of sharing the defense of the PLGL lawsuits in State Court with the relevant contribution party codefendants. These facts certainly confuse the issue even further.

As made clear by the Circuit in Continental, third-party releasing creditors must receive consideration on account of the third-party released claims they are forced to give up under a debtor's plan, and it is insufficient for them to receive as consideration only a distribution on account of their claims against the debtor.

It is the debtors' burden to establish necessity and fairness, and they have not done so here. As explained

by the Third Circuit in its Millennium Lab decision, in rendering a decision on a request to include non-consensual third-party releases in a plan, I must exercise caution and diligence and am obligated to approach their inclusion with the utmost care. I have done so, and I am unable to conclude that there is sufficient justification for the non-consensual third-party releases proposed in the plan. Excuse me.

While the debtors believe that the plan as proposed cannot go forward without the non-consensual third-party releases, I'll briefly address the remaining issues.

The litigation claimants object to the debtors' release of, among others, the contribution parties. As explained by Judge Carey in his 2010 Spansion decision, courts may approve such releases after considering the facts and equities of each case.

Section 1123(b)(3)(A) permits debtors to release estate claims against nondebtor third parties if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interest of the estate. While a court can use the five Master Mortgage factors as a guidepost to make that determination, all need not be present for a court to approve a proposed release, and they are not the exclusive set of factors a court may consider in reaching a decision.

For the reasons already described, the debtors'

agreement to release the nondebtor parties outlined in the plan is fair, reasonable, and in the best interest of the estates and is a valid exercise of their business judgment.

Moreover, the committee, serving as estate fiduciary, supports the releases, and five of the six voting classes voted overwhelmingly in favor of the plan, including the debtors' releases contained therein. That is unsurprising, since the plan as proposed is the only pathway for a recovery to unsecured creditors and provides a home run, value-maximizing transaction on account of the debtors' assets in exchange for the releases, thus achieving recoveries for unsecured creditors beyond what they could expect in both a Chapter 7 liquidation and a non-consensual Chapter 11 plan scenario.

The litigation creditors assert that the debtors have not sufficiently satisfied the best interests test of Section 1129(a)(7) because the analysis excludes the value of third-party claims proposed to be non-consensually released under the plan. The Court is not approving those releases. But even if it was, I disagree that a valuation of released third-party claims asserted against nondebtors is required under the best interests test.

Persuasive case law, including Judge Drain's decision in Purdue Pharma, explains why the plain language of the Code does not require it. The Code mandates a comparison

between the amount objecting creditors would receive under the plan on account of their claims against the debtors and what they would receive on account of such claims if the debtor were liquidated in a Chapter 7. That conclusion is also supported by the Delaware District Court in its 2012 W.R. Grace decision.

The litigation creditors argue that the plan improperly separates the Class 7 unsecured claims into two subclasses. Classification of similar claims or interests must be reasonable to satisfy Sections 1129(a)(1) and 1122. The evidence shows that the debtors separately classified the Class 7.A and 7.B claims to enable quicker distributions to those creditors in Class 7.A who have mostly asserted liquidated, undisputed claims, unlike a sizeable portion of the litigation claimants in Class 7.B. The 7.B claims would complicate and delay distributions to Class 7.A claimants if the classes were combined because 7.B claims will need to be reconciled and may be estimated.

Moreover, the record reflects that the claimants placed in 7.B are those with third-party claims subject to the proposed non-consensual releases. Placing them in a subclass made it easier to narrow and identify the affected creditors and I think, most importantly to the classification analysis, gave them a voice in the proceeding.

If Class 7.B claimants were lumped with Class 7.A

creditors into one divided Class 7, it is undisputed that the litigation creditors rejecting the plan would be diluted by a large number of accepting voters that would carry the undivided class. As such, it was reasonable and appropriate for the debtors to place the 7.B claimants into their own class and give them a separate voice in these proceedings.

Several objecting parties point out a *de minimis* number of creditors who may have been misclassified between Classes 7.A and 7.B. But any misclassification did not cause any harm because the Class 7.B creditors rejected the plan.

Class 7.B has voted to reject the plan. Accordingly, Section 1129(a)(8) has not been satisfied and the debtors must show that the plan does not unfairly discriminate and it's fair and equitable with respect to Class 7.B.

The litigation creditors argue that the plan unfairly discriminates between them and the equal priority creditors of Class 7.A because the allocation of the guaranteed funds for distribution to unsecured creditors was done incorrectly and will result in Class 7.B receiving a lower percentage recovery from the estates on account of their allowed claims than those similarly situated in Class 7.A.

Moreover, they argue that creditors in Class 7.A were given the opportunity to avoid the third-party releases,

whereas they were not. The latter point is moot given my ruling today on the releases.

Mr. Jones' testimony reflects that, after the settlement was reached and the guaranteed minimum was earmarked for unsecured creditors, the debtors undertook a process of reconciling the asserted unsecured claims to determine a projected aggregate of likely allowed claims in each Class 7 subclass to divide sufficient funds between the subclasses, so that each Class 7 creditor would receive the same pro rata recovery. Debtors' Exhibit 21 reflects the ultimate result of that exercise with 63 percent of the guaranteed minimum allocated to Class 7.A and the remaining 37 percent to Class B.

With respect to litigation claims in 7.B that are disputed and unliquidated, Mr. Jones and his team, with the assistance of personnel from HCN who have historically overseen the debtors' claim and litigation matters, and thus possess relevant knowledge regarding the subject claims, analyzed the historical five-year settlement history and other various factors they determined to be key markers of settlement value to determine ranges of likely claim recoveries. Prior judgment amounts were unavailable to consider because none exist.

The desire and approach taken by the debtors to divide the funds to ensure an equal pro rata recovery to all

unsecured creditors is commendable. However, for reasons explored by the litigation creditors during the confirmation proceedings, there is a likely chance that the debtors' estimates of the total claims pool of Class 7.B will be incorrect and that the percentage recoveries to allowed claimants in that class will be lower than 7.A.

The magnitude of any such disparity, however, is unknown. The estimate of aggregate 7.B claim amounts ranges from the debtors' high estimate of 24.1 million to approximately forty-eight -- 488.7 million, representing the aggregate of scheduled claims and asserted proofs of claim that have not been objected to or estimated.

Nonetheless, even if the magnitude was sufficient shown to be material, the discrimination would not rise to a level -- to an unfair level. The recoveries to creditors in this case result from contributions of third parties. Absent the contributions of Omega and the contribution parties, Class 7.B creditors would receive no recoveries on account of their claims. Accordingly, as explained by the Exide, Nuverra, and Genesis Health decisions, any presumption of unfairness as a result of possible material unequal recoveries between creditors in Class 7.A and 7.B would be rebutted.

In determining when a plan is proposed in good faith, courts consider the totality of circumstances,

focusing more on the process of plan development than to the context of the plan. Good faith is shown when the plan has been proposed for the purpose of reorganizing the debtor, preserving the value of the estate, and delivering that value to creditors.

On the other hand, good faith has been found to be lacking if the plan is proposed with ulterior motives. While some of the objecting litigation creditors have argued that the debtors lacked good faith in proposing the plan, that objection is not sustainable given the facts adduced at trial underlying the process undertaken to value estate causes of action, analyze possible pathways to creditor recovery, engage in substantive negotiations with key stakeholders regarding a plan settlement with the assistance of an experienced judicial mediator, all while facing extreme liquidity constraints, and continuing to refine the settlement and augment recoveries to unsecured creditors embodied in the plan throughout the confirmation proceedings.

Circumstantial evidence relied upon by the objecting parties to support an argument of bad faith, including possible problems with the subclassification of certain Class 7 claims, the Class 7.B vote tabulation, and the assumption of certain 7.B settlements, is not sufficiently persuasive to contradict the Court's conclusion that the debtors acted in good faith when proposing the plan.

As related by the parties yesterday via joint email to the Court, all but one of the remaining objections raised by the U.S. Trustee in its formal objection had been resolved.

The open objection relates to the debtors' request in Article X(5) -- or excuse me -- 10(f) to serve as the exclusive gatekeeper post-confirmation with respect to released claims. In particular, the debtors had requested that I retain sole and exclusive authority to determine whether a claim or cause of action against a released party arises from or is related to a debtor-released claim or a third-party released claim and, in doing so, authorize such party to bring the claim against the relevant release party.

I will sustain the U.S. Trustee's objection on this point. I see no reason to retain exclusive jurisdiction for a determination that has been requested of me. The confirmation order says what it says, and the other courts should be entitled to -- or excuse me -- the plan says what it says, and other courts should be entitled to exercise their authority to interpret it.

Imposing such a requirement could also impose an unnecessary administrative hurdle and cost the parties when these cases are closed.

That takes us to the last objection regarding the trust procedures and trustee identification. The litigation

creditors objected to the debtors' litigation claims procedures and the identity of the litigation clams trustee, as set forth in the plan supplement. The debtors wish to resolve the objections with the litigation claimants.

Given that it's unclear whether the plan will move forward in these cases; and, if so, what form it will take, I will not address these issues as they are not ripe.

For similar reasons, the Court -- myself -- has not reviewed the debtors' revised proposed confirmation order, but will do so, if appropriate, at a future time.

To the extent that the parties raise other objections to confirmation of the plan that I have not specifically addressed, they are overruled.

The plan, the evidence adduced in favor of confirmation and the legal briefing support the conclusion that the debtors have met all other confirmation requirements of the Code, including those of Section 1122, 1123, and 1129, and would be entitled to approval of their plan absent the non-consensual third-party releases.

Thank you for enduring that lengthy oral ruling. I know that this is a lot of information for the parties to process, and you may not have an understanding of how you wish to move forward. I guess I would suggest to the parties, if they would like it, I'm happy to put a date on the calendar in the near future for a status conference, or

you could reach out to my chambers and let me know whether that would be something that the parties are interested in doing.

MR. SIMON: Thank you, Your Honor.

THE COURT: Mr. Simon.

MR. SIMON: Thank you, Your Honor. Obviously it's a lot to digest. So perhaps we should convene with the parties and come back to you as -- in connection with next steps, and we'll reach out accordingly.

THE COURT: Okay. I have some time next week, so, if you want to save any of that time or reserve any of that time --

MR. SIMON: Sure.

THE COURT: -- just email Ms. Lopez and she will get it on the calendar.

MR. SIMON: Okay.

THE COURT: Okay.

MR. SIMON: Thank you, Your Honor. We appreciate that.

THE COURT: All right. Thank you all very much. And I apologize, for some reason, my throat was acting up the moment I took the bench today. So, hopefully, you were able to hear and understand that ruling.

And unless there's anything further, we will adjourn for the day.

Mr. McNeill, I see that you're on the line. Is there anything that we need to talk about?

MR. MCNEILL: No, Your Honor. I just was putting my face on the screen to thank Your Honor for your ruling.

THE COURT: Okay. Thank you, all, very much. I look forward to hearing from you all in the near future. We can consider this hearing adjourned. Take care. Have a good night.

COUNSEL: Thank you, Your Honor. Thank you.

(Proceedings concluded at 4:04 p.m.)

*****

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

May 4, 2022

Coleen Rand, AAERT Cert. No. 341

Certified Court Transcriptionist

For Reliable

CERTIFICATE OF SERVICE

I, Hannah McCollum, hereby certify that on July 1, 2025, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and courtesy copies were sent via email to parties in interest.

Dated: July 1, 2025

/s/ Hannah McCollum
Hannah McCollum