American Bankruptcy Institute

Winter Leadership Conference

PLENARY SESSION

The Supreme Court Has Ruled, Twice!

John Bringardner
Debtwire | New York

Ilan D. Scharf
Pachulski Stang Ziehl & Jones | New York

Tancred Schiavoni
O'Melveny & Myers LLP | New York

Catherine L. Steege
Jenner & Block LLP | Chicago

P. Matthew Sutko
Executive Office for U.S. Trustees | Washington, D.C.

2024

American Bankruptcy Institute

Winter Leadership 2024

The Supreme Court Has Ruled, Twice!

Speakers

- **John Bringardner**

  Debtwire
- **Ilan D. Scharf**

  Pachulski Stang Ziehl & Jones
- **Tancred Schiavoni**

  O'Melveny & Myers LLP
- **Catherine L. Steege**

  Jenner & Block LLP
- **P. Matthew Sutko**

  Executive Office for U.S. Trustees

4889-7156-9146.1 68700.001

[NEXT DOCUMENT]

OPT-IN/OPT-OUT RELEASES POST-PURDUE

I. Consensual Releases Before *Purdue.*

A. Prior to the Supreme Court's decision in *Harrington v. Purdue Pharma, L.P.*, 144 S. Ct. 2071, 219 L. Ed. 2d 721 (2024), most courts held that consensual third-party releases (*i.e.*, releases of non-debtor parties obtained through consent of the releasing creditors) were permissible with the only issue generally being what form of consent was required. The rationale for allowing consensual third party releases was that a plan of reorganization was a contract and creditors and the debtor were free to include ancillary contract terms. *See In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir. 1993); *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("[c]ourts generally apply contract principles in deciding whether a creditor consents to a third-party release").

B. Plans that required an expression of affirmative consent to a release either through a vote in favor of the plan or by checking a box on the ballot indicating consent—so called "opt-in" plans were generally accepted. *See SunEdison*, 576 B.R. at 458 (collecting cases). More controversial were plans that required creditors who did not vote or who were not entitled to vote to affirmatively "opt-out" of the consensual release. These plans deemed consent to the release based on the creditors' silence or inaction and not all courts approved "opt-out" plans.

C. The rationale of courts that approved "opt-out" plans varied.

1. In *In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), the court analogized the plan's "opt-out" feature to a default judgment. Because non-consensual third parties releases were permissible in the Third Circuit, the court reasoned that the silence of a creditor who did not vote or affirmatively "opt-out" of the release was akin to a defendant that failed to respond to a complaint. Because the relief sought—an order binding that creditor to a release—was permissible relief, the court reasoned that if appropriate notice of the opt-out mechanism was provided to a creditor and the creditor chose not to respond, that creditor would have accepted the risk of having a release imposed upon it.

2. Other courts focused on the notice provided and concluded that if the creditor was given detailed instructions about what would happen if the

creditor did not opt out, the creditor's silence would be deemed consent. *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 305 (Bankr. D. Del. 2013).

3. Courts that refused to approve "opt-out" consensual releases did so on the basis that state contract law required an affirmative acceptance of an offer to form a contract, *Sun Edison*, 576 B.R. at 458, or that consent could not be inferred from silence because it was not realistic or fair to assume inactive creditors would understand that a plan could impact their rights against non-debtors, *In re Chassix Holdings, Inc.*, 533 B.R. 64, 80-81 (Bankr. S.D.N.Y. 2015).

II. Consent Following *Purdue*.

A. In *Purdue*, the Supreme Court went out of its way to state that "[n]othing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. … Nor do we have occasion today to express a view on what qualifies as a consensual release …" 144 S. Ct. at __; 219 L. Ed. 2d at 739.

B. Did the Supreme Court mean what it said? The Court held that §1123 "answer[s]" the question "whether a court in bankruptcy can effectively extend to nondebtors the benefits of a Chapter 11 discharge usually reserved for debtors." 144 S. Ct. at ___; 219 L. Ed. at 732. According to the Court, the "catchall provision" of §1123—§1123(b)(6)—must be interrupted "in light of the surrounding context" or pursuant to the *ejusdem generis* cannon. *Id.* at 733-34. That surrounding context is a list of "appropriate" plan provisions, "all of which concern the debtor—its rights and responsibilities, and its relationship with its creditors." *Id.* at 734. Because a nonconsensual third party release does not "concern" a debtor's relationship with its creditors, §1123(b)(6) does not authorize a debtor to include a nonconsensual third party release in its plan of reorganization.

1. Does the same logic be applied to consensual third party releases? Those releases concern the relationship between parties other than the debtor the same as a nonconsensual third party release.

2. Or does the concept that a plan of reorganization is a contract override this logic and allow creditors to contract with each other while adjusting the debtor-creditor relationship in a plan.

C. Briefs filed by certain amici argued that third party releases are unconstitutional. *Harrington v. Purdue Pharma L.P.*, No. 23-124, Brief for Amici Curiae Bankruptcy Law Professors Ralph Brubaker, Bruce A. Markell, and Jonathan M. Seymour In Support Of Petitioner. The Court did not have to reach this question because it was able to rule on statutory grounds. *See Clark v. Martinez*, 543 U.S. 371, 380-81(2005). However, is it possible that §524(g) could later be held to be unconstitutional.

D. Post-*Purdue* decisions on consent:

1. *In re Smallhold, Inc.*, 2024 WL 4296938 (Bankr. D. Del. 2024): Opt-out releases are no longer justified by the default judgment analogy. Because a default judgment may only grant relief that is permissible as a matter of law and non-consensual releases are no longer permissible following *Purdue*, a court cannot default a creditor for failing to opt-out of a release. The court reasoned that the risk of not paying attention to a plan is no longer that a nonconsensual release will be imposed on the creditor post-*Purdue*. Given that fact, failure to opt-out of a release can no longer be deemed consent.

    a. The *Smallhold* court concluded that creditors who did not vote or who were not solicited for a vote would not be deemed to consent to the third-party releases. It did, however, also hold that voting in favor of plan constituted consent to the third-party release without the need to affirmatively check a box accepting the release. Applying contract principles, the court compared the failure to check the opt-out box on the ballot when voting to accept the plan to a "click through" contract when making a purchase over the internet.

    b. The court also suggested, without deciding, that requiring creditors to vote no on the plan to opt out of the release would be coercive but did not conclusively address the issue because the only creditor to receive such a ballot voted for the plan. The Court also stated that it was not deciding whether "full payment" of a claim would justify a nonconsensual release (another issue explicitly left open in

Purdue) or whether including the protections of Rule 23 in the plan would allow for an opt-out provision in the plan.

2. *In re Tonawanda Coke Corp.*, 662 B.R. 220, (Bankr. W.D.N.Y. 2024): Consistent with pre-Purdue cases that did not approve "opt-out" plans, the court held that because New York law only enforced an agreement to release a claim without consideration if the agreement was in writing and signed by the party sought to be charged, only consensual plan releases where the creditor affirmatively opted-in to the release were enforceable.

3. *In re Robertshaw US Holding Corp.*, 662 B.R. 300 (Bankr. S.D. Tex. 2024): The court approved "opt-out" releases on the basis that *Purdue* did not change the law with respect to consensual releases and the ability to confirm plans with opt-out releases was settled law in the District. Further the notice of the need to opt-out was conspicuous and over 100 creditors in fact did opt-out.

E. Unreported Rulings on Consent:

1. *In re 2u Inc.*, 24-11279-mew (Bankr. S.D.N.Y.): The bankruptcy court directed the debtors to replace the opt-out procedures with an opt-in release mechanism. The court also instructed the debtors to remove the 'deemed to reject' classes from parties granting a nondebtor release.

2. *In re Acorda Therapeutics*, 24-22284-dsj (Bankr. S.D.N.Y.): The bankruptcy court confirmed the plan in August and overruled the U.S. Trustee's Office objections relating to the opt-out release, finding that "recipients of ballots were told that voting yes meant consenting to releases' and 'if they voted yes it is fair to them to [bind them] to the release."

3. *In re Bird Global Inc.,* 24-10913-KBO (Bankr. S.D. Fla.): The court overruled arguments by the tort claimants that the opt-out release was a nonconsensual discharge in violation of the Supreme Court's decision in *Purdue*. In distinguishing *Purdue*, the court reasoned that the debtors' plan provides for "full satisfaction" of all tort claims, and the channeling injunction and bar order are part of a settlement with the insurers and a Section 363 sale of the insurance policies.

4. *In re BowFlex Inc.*, Case No. 24-12364 (ABA) (Bankr. D. N.J.) – The Court overruled the U.S. Trustee's third-party release objection reasoning that

the Supreme Court did not opine on what constitutes consent, and found that "merely voting" in favor of a plan was insufficient to establish consent. The Court held that the releasing parties received notice consistent with due process and the opt-out process and consequences were "clear and conspicuous" in the notice, and therefore, the opt-out mechanism is appropriate to demonstrate consent to non-debtor plan releases.

5. *In re CalAmp Corp.*, Case No. 24-11136 (LSS) (Bankr. D. Del.) – After the U.S. Trustee and the SEC objected to the nonconsensual release of the shareholders' claims based on *Purdue Pharma*, the debtors removed the shareholder releases from the plan, which was later confirmed.

6. *In re Ebix Inc.*, Case No. 23-80004 (SWE) (Bankr. N.D. Tex.) – The Court confirmed the plan subject to the removal of the nonconsensual third-party release provision.

7. *In re Invitae Corp.*, Case No. 24-11362 (MBK) (Bankr. D. N.J.) – The Court confirmed the debtors' plan, overruling the U.S. Trustee's objection to the opt-out release for non-debtors.

8. *In re Red Lobster Management LLC*, Case No. 6:24-bk-02486-GER (Bankr. M.D. Fla.) – The Court approved the disclosure statement subject to the removal of the non-debtor opt-out release and implementation of an opt-in release. The amended plan now provides that the third-party release would be granted by creditors that vote to accept the plan, as opposed to those that did not opt out.

9. *In re Rite Aid Corp.*, Case No. 23-18993 (MBK) (Bankr. D. N.J.) – The Court confirmed the plan after the opt-out release of non-debtors was changed to an opt-in release.

EXCULPATION CLAUSES

I. Are exculpation clauses non-consensual third-party releases?

A. Exculpation clauses provide limited immunity to certain parties for conduct related to the chapter 11 case. Courts have distinguished exculpation provisions from third-party releases on the basis that they set forth a standard of liability for estate fiduciaries rather than eliminating all liability.

B. Based on this distinction, even in Circuits where nonconsensual third party releases were not allowed, the courts allowed exculpation clauses on the basis that the individuals protected by these clauses enjoyed qualified immunity for their actions taken in a bankruptcy case. *See In re Highland Capital Mgmt., L.P.,* 48 F.4th 419, 437 (5th Cir. 2022) (holding only estate fiduciaries – the debtor (including its directors) and a committee and its members – may be protected by an exculpation clause); *In re Pacific Lumber Co.*, 584 F.3d 229, 253 (5th Cir. 2009) (striking nonconsensual releases but allowing exculpation of committee members except in cases of willful misconduct or gross negligence).

C. An often cited basis for why exculpation clauses are justified is the *Barton* doctrine[1], which establishes the principle that, "without leave of the bankruptcy court, no suit may be maintained against a trustee for actions taken in the administration of the estate." 3 Collier on Bankruptcy ¶ 323.03 (16th ed. 2023); *see Lawrence v. Goldberg*, 573 F.3d 1265, 1270 (11th Cir. 2009); *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1095 (9th Cir. 2016).

II. Post-*Purdue* Case Law

A. *In re Rocking M Media, LLC*, 2024 Bankr. LEXIS 1786 (Bankr. D. Kan. Aug. 2, 2024): The bankruptcy court overruled an objection to the exculpation clause concluding that such clauses are authorized under "the general law of fiduciaries" which provides qualified immunity for acts taken in connection with the fiduciary's duties "but preserving liability for willful acts taken other than in performance of duties in the case."

B. *In re Smallhold, Inc.,* 2024 WL 4296938 (Bankr. D. Del. 2024): "There are important ways in which the bankruptcy policies in favor of finality can still be achieved after *Purdue Pharma*. That decision does not affect the practice

[1] *Barton v. Barbour*, 104 U.S. 126 (1881).

of exculpation of estate fiduciaries (which is expressly authorized by Third Circuit precedent)…."

[NEXT DOCUMENT]

Open Questions and Avenues for Insurers' Participation Post-*Purdue* and *Kaiser Gypsum*

The Issues *Purdue* Does Not Address

The Supreme Court held that the Bankruptcy Code does not authorize a release and injunction that, as part of a Chapter 11 plan of reorganization, seeks to discharge claims against a nondebtor without the consent of affected claimants; ***but***

(1) declined to decide whether plans that are substantially consummated and include existing nonconsensual third party releases must be unwound;

(2) declined to opine on how a debtor may establish "consent" to third party releases; and

(3) declined to address the impact of full payment of third party claims through a plan.

Substantially Consummated Plan

- *The Court does not answer whether this opinion will require the unwinding of already confirmed plans—this was a significant issue in the pending appeal of the Boy Scouts of America bankruptcy.*

- One of the most critical questions is what happens to those debtors who have confirmed a plan, will soon confirm a plan, or have begun carrying out a plan (subject to appeal) that involves a nonconsensual third party release.

- For those who have begun to execute a plan, a substantially consummated plan cannot be unwound and would not be required under *Purdue.*

- "Substantial consummation" means: (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan. 11 U.S.C. § 1101(2).

    - "Satisfaction of this statutory standard indicates that implementation of the plan has progressed to the point that turning back may be imprudent." *In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 578 (D. Del. 2018).

    - For example, in Boy Scouts, the Appellees emphasized that the Plan went effective in April 2023. Since going effective, billions of dollars of cash and other assets were contributed to the Settlement Trust by BSA, Local Councils, Chartered Organizations, and Settling Insurance Companies.

    - To achieve that, numerous complex transactions occurred that could not be undone—the Settling Insurers bought back their insurance policies for approximately $1.6 billion (mostly in escrow), the Reorganized Debtors sold millions of dollars worth of property, the Reorganized Debtors paid millions of dollars worth of administrative expense claims, among other transactions.

- In addition, for a substantially consummated plan, the doctrine of equitable mootness will likely prevent *Purdue Pharma* from impacting the plan whatsoever.

- The same is true for plans that qualify for statutory mootness based upon the sale of assets tied to a third party release. Even where there is confirmed a plan but the debtor has not yet begun to execute it, the Court does not answer the question of whether these plans should be unwound. Lower courts will be left on their own to make these determinations.

Consensual Third-Party Releases

- Generally speaking, courts have looked favorably on non-coerced, consensual releases,[1] and the *Purdue Pharma* opinion does not seek to disturb that consensus. Parties now have reason to dispute whether or not a given release was adequately "consensual."

- Since *Purdue*, many cases have decided (or been directed by the court) to modify the terms of the Plan with respect to releases. One of those changes have been requiring parties to opt in to the proposed releases. The cases seem to suggest a preference and move towards using an "opt in" mechanism for releases. The "opt in" mechanism would require all parties—voting and nonvoting—to check a box affirmatively agreeing to the nondebtor release. Still cases have approved releases as consensual where there was an "opt out" mechanism. With the "opt out" mechanism, unless a party affirmatively opts out of the nondebtor release, such party be deemed to have consented to releases. *See In re Acorda Therapeutics*, Case No. 24-22284 (DSJ) (Bankr. S.D.N.Y.), Dkt. No. 428; *In re BowFlex Inc.*, Case No. 24-12364 (ABA) (Bankr. D.N.J.), Dkt. No. 614; *In re Invitae Corp.*, Case No. 24-11362 (MBK) (Bankr. D.N.J.), Dkt. No. 913; *In re Bird Global Inc.*, Case No. 23-20514 (CLC) (Bankr. S.D.Fla.), Dkt No. 1205. In the *Bird Global Inc.* case, the debtor argued that the releases differed from those in *Purdue* because the plan provides for "full satisfaction" of all claims.

- Post-*Purdue* cases addressing nonconsensual releases and the "opt out" mechanism:

  - *In re 2u Inc.*, Case No. 24-11279 (MEW) (Bankr. S.D.N.Y.) – The Court directed the debtors to replace the opt-out procedures with an opt-in release mechanism. The Court also instructed the debtors to remove the "deemed to reject" classes from parties granting a non-debtor release.
  - *In re Acorda Therapeutics*, Case No. 24-22284 (DSJ) (Bankr. S.D.N.Y.) – The Court confirmed the plan and overruled the U.S. Trustee's objections relating to the opt-out release finding that "recipients of ballots were told that voting yes meant consenting to releases" and "if they voted yes it is fair to them to [bind them] to the release."

[1] *In the Matter of Specialty Equipment Companies, Inc.*, 3 F.3d 1043, 1047 ("[C]ourts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code.").

- *In re Bird Global Inc.*, Case No. 23-20514 (CLC) (Bankr. S.D.Fla.) – The Court overruled arguments by the tort claimants that the opt-out release was a nonconsensual discharge in violation of the Supreme Court's decision in *Purdue Pharma*. In distinguishing *Purdue Pharma*, the Court reasoned that the debtors' plan provides for "full satisfaction" of all tort claims, and the channeling injunction and bar order are part of a settlement with the insurers and a section 363 sale of the insurance policies.
- *In re BowFlex Inc.*, Case No. 24-12364 (ABA) (Bankr. D.N.J.) – The Court overruled the U.S. Trustee's third-party release objection reasoning that the Supreme Court did not opine on what constitutes consent, and found that "merely voting" in favor of a plan was insufficient to establish consent. The Court held that the releasing parties received notice consistent with due process and the opt-out process and consequences were "clear and conspicuous" in the notice, and therefore, the opt-out mechanism is appropriate to demonstrate consent to non-debtor plan releases.
- *In re CalAmp Corp.*, Case No. 24-11136 (LSS) (Bankr. D.Del.) – After the U.S. Trustee and the SEC objected to the nonconsensual release of the shareholders' claims based on *Purdue Pharma*, the debtors removed the shareholder releases from the plan, which was later confirmed.
- *In re Ebix Inc.*, Case No. 23-80004 (SWE) (Bankr. N.D.Tex.) – The Court confirmed the plan subject to the removal of the nonconsensual third-party release provision.
- *In re Invitae Corp.*, Case No. 24-11362 (MBK) (Bankr. D.N.J.) – The Court confirmed the debtors' plan, overruling the U.S. Trustee's objection to the opt-out release for non-debtors.
- *In re Red Lobster Management LLC*, Case No. 6:24-bk-02486-GER (Bankr. M.D.Fla.) – The Court approved the disclosure statement subject to the removal of the non-debtor opt-out release and implementation of an opt-in release. The amended plan now provides that the third-party release would be granted by creditors that vote to accept the plan, as opposed to those that did not opt out.
- *In re Rite Aid Corp.*, Case No. 23-18993 (MBK) (Bankr. D.N.J.) – The Court confirmed the plan after the opt-out release of non-debtors was changed to an opt-in release.
- *In re Robertshaw*, Case No. 23-90052 (CML) (Bankr. S.D.Tex.) – The Court confirmed the plan with an opt-out release holding that the *Purdue Pharma* decision did not alter pre-*Purdue* precedent that allowed nonconsensual third-party releases in a plan.

Full Satisfaction

- *Purdue* left open a bankruptcy court's ability to confirm a chapter 11 plan containing third-party releases without creditor consent if it provides for full satisfaction of claims against a third-party nondebtor.

- Additionally, the Court declined to address questions regarding cases where the plan arranges for the full satisfaction of claims against the released third-party nondebtor. These situations, too, may warrant injunctions protecting third parties.

- The Supreme Court's reference to "full satisfaction" invokes the bedrock common-law principle that a plaintiff is entitled to only one satisfaction for each injury. *See, e.g.*, *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 512 (1964) ("[F]ull satisfaction received from one tortfeasor prevents further recovery against another."); *Harris v. Union Elec. Co.*, 846 F.2d 482, 485 (8th Cir. 1988) ("[A]n injured party is entitled to only one satisfaction for each injury. Whether there is one tortfeasor or ten, the injured party may only recover once.").

- The "one-satisfaction rule" amply supports confirmation of BSA's plan, which fully satisfies third-party claims against nondebtors and uses third-party releases to prevent double recoveries for injuries that are indivisible from those asserted in claims against BSA. Absent clear error, the lower courts' full-payment findings should not be disturbed. *See In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 570 (D. Del. 2018), aff'd, 945 F.3d 126 (3d Cir. 2019).

- Under this rule, if a defendant fully satisfies a plaintiff's claim, plaintiff's claims against any other party for the same indivisible injury are released and barred by operation of law. *See, e.g.*, *Aro*, 377 U.S. at 501 ("By our law, judgment against one joint trespasser, without full satisfaction, is no bar to a suit against another for the same trespass"); *Occidental*, 200 F.3d at 148 ("[T]he [g]overnment agrees that it is permitted 'but one satisfaction' of a claim and that, once a claim is 'satisfied,' all other joint tortfeasors are released"); *Frank v. Volkswagenwerk, A.G. of W. Ger.*, 522 F.2d 321, 324 (3d Cir. 1975) ("[J]ust as under the common law…upon satisfaction of one judgment he may not sue or execute against another joint tortfeasor"); W. Page Keeton et al., Prosser and Keeton on Torts § 49 at 335 (5th ed. 1984) ("Where there has been such full satisfaction, or where it is agreed that the amount paid under the release is so received, no claim should remain as to any other tortfeasor"); Restatement (Third) of Torts § 25(a) (Am. L. Inst. 2000) (hereinafter, "Third Restatement") (describing rule); Restatement (Second) of Judgments § 49 cmt. a (Am. L. Inst. 1982) ("Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments").

- Contentions over whether claims against third-party nondebtors are "fully satisfied" by a plan of reorganization will likely be far more common.
  - For example, in *Boy Scouts*, the Appellees argued before the Third Circuit that the bankruptcy court's full-payment findings, as affirmed by the district court, encompassed "the entirety of recoverable damages suffered" by survivors of Scouting-related abuse for their "indivisible injur[ies]."
  - Since *Purdue*, at least one case has confirmed a plan and approved third-party releases where the bankruptcy court found payment in full. *See In re Bird Global Inc.*, Case No. 23-20514 (CLC) (Bankr. S.D.Fla.) (reasoning that the debtors' plan provides for "full satisfaction" of all tort claims, and the channeling injunction and bar order are part of a settlement with the insurers and a section 363 sale of the insurance policies).

- In *Boy Scouts*, the district court affirmed the bankruptcy court's detailed findings, based on credible and uncontroverted expert testimony, that the aggregate value of Scouting-related abuse claims against BSA and nondebtor protected parties ranged from \$2.4–\$3.6 billion. Because the value of the Trust's noncontingent assets exceeds the low end of the claims-valuation range (and far exceeds the high end when including contingent assets), the plan provides for payment in full.

With the *Truck Insurance* Opinion, Insurers Now Have Standing to Address in Details Treatment under a Chapter 11 Plan, including the *Cum Onere* Principle

- Under the *cum onere* principle, contractual rights cannot be assigned without their concomitant obligations. *See, e.g.*, *NLRB v. Buildisco & Buildisco*, 465 U.S. 513, 531 (1984) (stating that debtor must assume executory contracts "cum onere"); *In re Italian Cook Oil Corp*, 190 F.2d 994, 997 (3d Cir. 1951) (If the Trustee "receives the benefits he must adopt the burdens."); *In re Thornhill Bros. Fitness, L.L.C.*, 85 F.4th 321, 326 (5th Cir. 2023) ([A] debtor assuming an executory contract cannot separate the wheat from the chaff . . . [and] must assign the contract in whole, not in part."); *In re National Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) ("Where the debtor assumes an executory contract, it must assume the entire contract, *cum onere* - the debtor accepts both the obligations and the benefits of the executory contract.");*In re Am. Home Mortg. Holdings, Inc.*, 402 B.R. 87, 98 (Bankr. D. Del. 2009) ("the *cum onere* principle applies equally to the transfer of rights and obligations under a non-executory contract").

- This has been a significant argument in many of the recent mass tort bankruptcy cases. But, given the limit on standing for insurers prior to *Kaiser Gypsum* based on "insurance neutrality" language, insurers were often limited in their objections.

- Insurers who may be impacted by a plan are "parties in interest" under the Bankruptcy Code whose rights can be adversely affected in "myriad ways" without their consent. *See Truck Insurance*, 144 S. Ct. 1426. As such, they "are entitled to be fully heard and to have their legitimate objections addressed." *Id.*

- Purported "insurance neutrality" in a bankruptcy plan does not deprive an insurer of standing to be heard, and the concept itself is "too limited" because it ignores numerous ways in which bankruptcy plans "can alter and impose obligations on insurers." 144 S. Ct. at 1427.

- "Where a proposed plan 'allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed.'" *Id.* at 1417.

- If a plan abrogates an insurer's contractual rights or otherwise creates the potential for financial harm, the insurer has standing to object to plan confirmation, and the plan will need to be modified to be confirmed, irrespective of the label used to identify insurers' rights.

[NEXT DOCUMENT]

THE GOVERNMENT'S PATH TO SUPREME COURT PARTICIPATION IN PURDUE AND TRUCK INSURANCE

Harrington v. Purdue Pharma L.P., 603 U.S. __, 144 S. Ct. 2071 (2024)

I. Release litigation before the bankruptcy court.

A. Purdue's proposal to grant broad releases to the Sacklers and other non-debtors triggered the government's concerns. The Sixth Amended Plan would have involuntarily extinguished virtually all Purdue-related opioid claims against the Sacklers and associated nondebtors.[1] It would have released claims against perhaps as many as 1,000 largely unnamed parties and entities.[2] Claims would be released "regardless of where in the world accrued or arising."[3] In return, the Sacklers would contribute $4.325 billion over a number of years.[4]

B. The United States Trustee Program's ("USTP") Manhattan office objected to the involuntary third-party releases as unlawful.[5] The U.S. Attorney's office for the Southern District of New York ("USAO SDNY") filed a statement expressing similar concerns.[6] Several claimants also objected including 8 states and the District of Columbia. The bankruptcy court advised the parties to tighten-up the releases. From the time the Sixth Amended Plan was filed on July 14, 2021, to the day after the confirmation hearing concluded on September 1, 2021, the Plan was amended six times.

C. The Twelfth plan was confirmed. *In re Purdue Pharma L.P.,* 633 B.R. 53 (Bankr. S.D.N.Y. 2021). It involuntarily extinguished current and future direct claims against the released parties relating to opioids so long as a debtor's or the estate's conduct is the "legal cause" of the claim "or is otherwise a legally relevant factor."[7] It prohibited any payment for the

---

[1] *See* Sixth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re Purdue Pharma L.P.*, No. 19-23649, Dkt. No. 3185 at 132-34 (Bankr. S.D.N.Y.).
[2] *Id.* at 41-42.
[3] *Id.* at 132-33.
[4] *Id.* at 42; Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors ("Disclosure Statement"), *Purdue Pharma L.P.,* Dkt. 2983 at 162-163 (Bankr. S.D.N.Y.).
[5] Objection of United States Trustee to Sixth Amended Joint Chapter 11 Plan of Purdue Pharma L.P. and Its Affiliated Debtors, *Purdue Pharma, L.P.*, Dkt. No. 3256 (Bankr. S.D.N.Y.).
[6] Statement of the United States Regarding the Shareholder Release, *Purdue Pharma, L.P.*, Dkt. No. 3268 (Bankr. S.D.N.Y.).
[7] Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *Purdue Pharma L.P.* ("Twelfth Plan"), Dkt. No. 3726 at 132 (Bankr. S.D.N.Y.); *see also Purdue Pharma*, 633 B.R. at 105.

extinguished direct claims. There was no exclusion for fraud.[8] Individual tort claimants could receive as little as $3,500 less administrative expenses.[9]

II. The district court and circuit appeals.

A. The USTP and others appealed.

B. The USTP sought stays from the bankruptcy and district courts.[10] Because the bankruptcy court refused to expedite the USTP's stay motion, it was heard first in the district court. The district court denied the stay as unnecessary based on representations by Purdue that it would not argue the appeal was equitably moot.[11] The bankruptcy court ultimately denied a stay based on similar representations.[12]

C. Meanwhile, the district court heard the appeal on an expedited basis.

D. The USTP briefed and argued before the district court, contending the Code does not authorize the Sackler releases.[13]

E. The USAO SDNY filed a Statement of Interest supporting the United States Trustee.[14] It also argued before the district court.

F. The district court reversed the plan confirmation order, holding the Bankruptcy Code does not authorize nonconsensual third-party releases. *In re Purdue Pharma L.P.,* 635 B.R. 26 (S.D.N.Y. 2021).

---

[8] Twelfth Plan, Dkt. No. 3726 at 115; Findings of Fact, Conclusions of Law, and Order Confirming the Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors ("Confirmation Order"), *Purdue Pharma, L.P.*, Dkt. No. 3787 at 333 (Non-NAS PI TDP § 2(b)(ii)); *id.* at 392 (NAS PI TDP § 2(b)(ii)) (Bankr. S.D.N.Y.).

[9] Disclosure Statement, *Purdue Pharma L.P.,* Dkt. 2983 at 15; Confirmation Order, Dkt. 3787 at 360.

[10] *See, e.g.,* Memorandum of Law in Support of United States Trustee's Expedited Motion for a Stay of Confirmation Order and Related Orders Pending Appeal Pursuant to Federal Rule of Bankruptcy Procedure 8007, *Purdue Pharma L.P.,* Dkt. 3778 (Bankr. S.D.N.Y.); Memorandum in Support of Emergency Motion by Appellant William K. Harrington, United States Trustee, for a Stay Pending Appeal, *Harrington v. Purdue Pharma, L.P. (In re Purdue Pharma, L.P.),* Nos. 21-07966, Dkt. 20 (S.D.N.Y.).

[11] Memorandum and Order Denying Without Prejudice the United States Trustee's Emergency Motion for a Stay Pending Appeal, *Purdue Pharma, L.P.* No. 21-7969, Dkt. 48 (S.D.N.Y.).

[12] Order Denying Motions for Stays Pending Appeal, *Purdue Pharma L.P.,* Dkt. 4177 (Bankr. S.D.N.Y.).

[13] *E.g.,* Brief of Appellant, William K. Harrington, United States Trustee, *Purdue Pharma L.P.*, No. 21-07532, Dkt. 91 (S.D.N.Y).

[14] Statement of Interest of the United States of America Regarding the Shareholder Release, *Purdue Pharma L.P.*, No. 21-07532, Dkt. 94 (S.D.N.Y.).

G. Purdue and others appealed. While the appeals were pending, the Sacklers agreed to contribute an additional "$1.75 billion in guaranteed payments" and "up to $500 million in contingent payments" to be made incrementally through 2039.[15]

H. Before the Second Circuit, the Department of Justice's Civil Division briefed and argued that the Sackler releases were not authorized by the Bankruptcy Code.[16]

I. The Second Circuit reversed in *Purdue Pharma, L.P. v. City of Grande Prairie (In re Pharma L.P.), 69 F.4th 45 (2d. Cir. 2023)*. It held that nonconsensual third-party releases are authorized by section 1123(b)(6) and section 105 provided they satisfy a seven-factor test that the panel devised. The Second Circuit also affirmed the district court's holding that releases must be approved by district courts under *Stern v. Marshall*, 564 U.S. 462 (2011).

III. On to the Supreme Court

A. 28 U.S.C. § 518(a) governed what happened next. It provides that:

> Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court.

See also 28 C.F.R. Part D § 0.20(a) (providing that "the Solicitor General, in consultation with each agency concerned" will take the lead in "[c]onducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments").

B. Typically, when deciding whether to seek Supreme Court review, the Solicitor General weighs the views of all interested departmental components and outside agencies. That can involve coordination with as many as 40 representatives, who provide oral as well as detailed written recommendations.

---

[15] Notice of Hearing Regarding Motion of Debtors Pursuant to 11 U.S.C. § 105(a) and 363(b) for Entry of an Order Authorizing and Approving Settlement Term Sheet, *Purdue Pharma L.P.,* Dkt. 4410 (Bankr. S.D.N.Y.).

[16] *E.g.,* Final Brief for Appellee U.S. Trustee William K. Harrington, *In re Purdue Pharma L.P.*, No. 22-110, Dkt. 834 (2d Cir.).

C. As part of its consideration in *Purdue*, the Solicitor General's office, the USTP, the USAO SDNY, the Civil Division, and other governmental officials met with Purdue and its supporters, who encouraged the Solicitor General not to seek cert.

D. The Solicitor General decided to ask the Court to overturn the Second Circuit's ruling.[17]

E. Quite unusually, she filed a stay motion in the Supreme Court and suggested that the Court deem it a petition for a writ of certiorari and grant cert. The Court promptly did so.

F. The Solicitor General's office, with the active aid of the USTP, the USAO SDNY, the Civil Division, and others, prosecuted the appeal. The USTP provided material support and participated at the Solicitor General's moot courts. Other governmental components helped too.

G. The Deputy Solicitor General argued the government's case before the Court.

H. In a divided opinion, the Court reversed, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024), holding the Bankruptcy Code does not authorize nonconsensual third-party releases, unless they are based on a specific statutory authorization, *i.e.,* 11 U.S.C. § 524(g). 144 S. Ct. at 2082–88. The Court left open the question whether releases might be appropriate when there is "full satisfaction of claims against a third-party nondebtor."

IV. Observations

A. Text matters. In deciding a range of bankruptcy cases, the Court has uniformly looked to the Code's text, structure, and evident purpose, with text being the most important factor. Text prevailed here.[18]

B. The *Purdue* dissent did not claim to abandon that approach. It read the Code as authorizing nondebtor releases in "mass tort" cases—a term that appears eleven times in the dissent.

---

[17] Application for a Stay of the Mandate of the United States Court of Appeals for the Second Circuit Pending the Filing and Disposition of a Petition for a Writ of Certiorari, *Harrington v. Purdue Pharma, L.P.*, No. 23A87 (U.S. July 28, 2023).
[18] The USTP's materials include a summary of Supreme Court cases where it assisted the Office of the Solicitor General's participation as a party and as amicus.

C. In the *Purdue* appeals, as it does throughout its appellate practice, the USTP sought to achieve uniformity and consistency within the bankruptcy system. Here, the USTP helped resolve the circuits' disagreement over the question whether the Code authorizes bankruptcy judges to approve plans that involuntarily extinguish nondebtors' claims against nondebtors.

D. The USTP most commonly appeals or acts as amicus supporting reversal where, as here, there is an issue of national importance.

E. The Solicitor General exercises restraint when considering whether to seek cert. And she does so only after reaching out to the governmental units most affected and interested outside parties.

F. Post-*Purdue*, the Program has consistently opposed plans and proposed disclosure statements that would extinguish third-party claims where there has been no consent as determined by applying applicable state law.

TRUCK INS. EXCH. V. KAISER GYPSUM CO., INC., 602 U.S. 268 (2024)

I. Brief Background

A. Kaiser Gypsum manufactured products that at some point contained asbestos. It faced tens of thousands of asbestos-related lawsuits. Truck Insurance was its primary insurer. Kaiser confirmed a chapter 11 plan with a section 524(g) trust that had certain fraud prevention measures for uninsured claims but without similar measures for insured claims. Truck objected. The district court (exercising original bankruptcy jurisdiction) and the Fourth Circuit held that Truck didn't have standing because the plan was what they called "insurance neutral." They concluded this because Truck's obligations under the insurance policy remained the same as they did before the plan.

B. The case was filed in the Western District of North Carolina, one of the six districts in the country where the USTP does not operate. *Off. of United States Tr. v. John Q. Hammons Fall 2006, LLC*, 144 S. Ct. 1588, 1592 (2024).

II. The Supreme Court grants certiorari

A. On October 13, 2023, the Court granted certiorari. The question presented was whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may object to a chapter 11 plan of reorganization. The question looked at the breadth of statutory standing authorized by 11 U.S.C. § 1109(b).

B. In *Truck Insurance*, unlike a number of recent bankruptcy cases, the Court granted certiorari where the federal government was not already a party without first inviting the Solicitor General to express the views of the United States on the cert. petition. This process is commonly referred to as "Calls for the View of the Solicitor General," or CVSG.

a. *See* Patricia A. Millett, *"We're Your Government and We're Here to Help:" Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. of App. Prac. and Process 209, 212 (Spring 2009).

b. Normally at the CVSG stage the Solicitor General meets with the parties to assess their views of the case, reach its legal conclusions, and determine whether to support granting certiorari.

C. Because the Court granted certiorari outright, the Solicitor General's office met with the parties two weeks later. As usual, other components in the department, including the USTP, were invited to participate at this meeting.

D. Given the question presented, the Solicitor General's office also invited other government entities with similar statutory standing provisions in the Bankruptcy Code to see whether they had a view or interest in the case:

- the Securities and Exchange Commission (11 U.S.C. § 1109(a));
- the Commodities and Futures Trading Commission (11 U.S.C. § 762(b);
- the Federal Reserve Board (11 U.S.C. § 784); and
- the Surface Transportation Board and Department of Transportation (11 U.S.C. § 1164).

E. After the USTP and others gave their recommendations, the Solicitor General determined that the United States would act as amicus in support of the petitioner.

F. But the Solicitor General's office did not adopt the same legal arguments as the petitioner and instead forged its own approach to resolve the issue.

a. That the Solicitor General's office would take an independent approach is not uncommon. *See* Millett at 226-27.

b. The Solicitor General's office reasoned the petitioner was a party in interest under section 1109(b) because it was a party to an executory contract with the debtor that may be affected by the chapter 11 case.[19]

G. The USTP and other components participated in the moot courts and provided feedback and used our subject matter expertise to answer questions the Solicitor General's office had before oral argument.

H. Ultimately the Court ruled in Truck's favor, broadly interpreting "party in interest" in section 1109(a), eliminating the notion of insurance-neutral

[19] Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 602 U.S. 268 (2024), 2023 WL 8690785 at 21.

plans, and promoting broader participation in chapter 11 cases to ensure a fair and equitable reorganization process.

POST-*PURDUE* RELEASE DEVELOPMENTS IN SMALL AND MID-SIZE CASES

A. Since *Purdue* (through October 15, 2024), the USTP has filed over 40 objections to proposed third-party releases (not including objections relating solely to exculpation). And in a number of other cases, the USTP has negotiated satisfactory changes without the need to file an objection. Third-party releases also have appeared in proposed settlements, and even first day motions. Those are monitored too.

B. The USTP's objections have arisen in a few mega-cases, like *FTX*. But the USTP also has objected in subchapter V cases, smaller chapter 11s, and mid-sized cases. Less than a handful involve mass tort.

C. The bulk of the USTP's objections addressed some common themes. Here are two examples:

   i. The USTP has objected in smaller cases where debtors sought to impose on creditors some type of release for a principal or guarantor; some of these omitted even a mention of consent, much less suggesting that consent had been given.
   ii. The USTP has objected where debtors sought to deem consent to a third-party release in a variety of ways, such as deeming those creditors who vote for a plan to have consented, deeming any creditors who don't opt out of a release in connection with solicitation to have consented, or deeming any creditors who don't object to a plan to have consented.

D. CASE EXAMPLE: *In re Windsor Terrace Healthcare, LLC*, Case No. 1:23-bk-11200-VK (C.D. Cal.). There, the debtors were primarily engaged in owning and operating skilled nursing facilities throughout California, one assisted living facility, one home health care center, and one hospice care center. The debtors sought a release for guarantors—with no attempt to obtain claimants' consent—and without paying the claimants' obligations in full. The USTP's objection argued this was a clear violation of *Purdue*. (D.I. 1390). The debtors argued that *Purdue* was only applicable to mass torts! (D.I. 1400). The court issued a tentative ruling prior to confirmation indicating its intention to deny confirmation because the release violated *Purdue*. Ultimately, the debtors agreed to remove the release provision, and the court confirmed the plan.

E. CASE EXAMPLE: *In re Smallhold, Inc.,* Case No. 24-10267 (Bankr. D. Del.). The debtor is a specialty mushroom farming company that elected to proceed under subchapter V of the Bankruptcy Code. The debtor's plan included a third-party release in favor of a number of released parties, including among others: the debtor, the debtor's prepetition attorneys and professionals; the debtor's professionals retained in the case; the debtor in possession's lender and its attorneys; and all "Representatives" of these, including "any existing or former affiliate, subsidiary, member, officer, director, partner, stockholder, trustee, member, representative, employee, agent, attorney, business advisor, financial advisor, accountant, other Professional, their successors or assigns, or any Person who is or was in control of any of the foregoing." Plan §§ 6.10, 9.10. The debtor sought to impose the non-consensual release on (i) all parties who vote to accept the Plan, (ii) those who vote to reject the Plan, unless they check an opt-out box, (iii) unimpaired claimants or holders of interests, and (iv) all creditors in voting classes who do not vote on the Plan. *Id.* The USTP objected that the release was nonconsensual. Docket No. 236. The court issued a decision, *In re Smallhold, Inc.,* 2024 Bankr. LEXIS 2332 (Bankr. D. Del. Sept. 25, 2024), in which the court overruled a previous decision on "opt outs" as consent, *In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 Bankr. LEXIS 752 (Bankr. D. Del. Mar. 27, 2023), and held that opt outs can only serve as consent for those voting on a plan. Although the USTP does not agree fully with the decision—opt outs are never sufficient for consent—the USTP prevailed on its argument that non-voting creditors cannot be deemed to consent to release simply by a failure to opt out.

[NEXT DOCUMENT]

Program Involvement in Supreme Court Merits Cases (as of July 2024)

The Executive Office for United States Trustees has been listed as counsel on the brief in fifteen of the government's recent Supreme Court bankruptcy cases:

- *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024): The Supreme Court agreed with the position of the United States Trustee and held that the Bankruptcy Code does not authorize a bankruptcy court to extinguish without their consent claims held by nondebtors against other nondebtors.

- *Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC*, 144 S. Ct. 1588 (2024): The Supreme Court agreed with the position of the United States Trustee and held that prospective parity is the appropriate remedy for the short-lived and small disparity created by the fee statute held unconstitutional in *Siegel v. Fitzgerald*.

- *Siegel v. Fitzgerald*, 596 U. S. 464 (2022): The Supreme Court disagreed with the position of the United States Trustee and held the temporary increase in quarterly fees payable to the United States Trustee System Fund, which became effective for disbursements made in chapter 11 cases beginning on January 1, 2018, violates the Uniformity Clause of the Constitution applicable to bankruptcy, because the six judicial districts that are overseen by Judicial Branch bankruptcy administrators (rather than by U.S. Trustee Program) delayed charging the increased fee.

- *Midland Funding, LLC v. Johnson*, 581 U.S. 224 (2017): The Supreme Court disagreed with the position of the United States and held that a creditor does not violate the Fair Debt Collection Practices Act by filing an accurate proof of claim in a bankruptcy proceeding for an unextinguished, time-barred debt that the creditor knows to be judicially unenforceable.

- *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017): The Supreme Court agreed with the position of the United States and held the Bankruptcy Code precludes a bankruptcy court from authorizing the final distribution through a structured dismissal of the proceeds of a settlement of an estate claim in a manner that violates the Bankruptcy Code's statutory priority scheme.

- *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015): The Supreme Court disagreed with the position of the United States, participating as *amicus curiae*, and held that section 330(a) does not authorize a court to approve the fees a law firm expended by litigating its fee application.

- *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015): The Supreme Court disagreed with the position of the United States, participating as *amicus curiae*, and held that that an order denying plan confirmation is not a final order, because such an order does not "alter[] the status quo and fix[] the rights and obligations of the parties."

- *Law v. Siegel*, 571 U.S. 415 (2014): The Supreme Court disagreed with the position of the United States, participating as *amicus curiae*, and held that a bankruptcy court could not impose an equitable surcharge on a chapter 7 debtor's homestead exemption to compensate the chapter 7 trustee for the costs incurred in defending against the debtor's frivolous lawsuits.

- *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that an above median income debtor may not reduce income by claiming a vehicle ownership expense unless the debtor has a loan or lease payment on the vehicle.

- *Hamilton v. Lanning*, 560 U.S. 505 (2010): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that a bankruptcy court, in calculating a chapter 13 debtor's projected disposable income, "may account for changes in the debtor's income and expenses that are known or virtually certain at the time of confirmation."

- *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010): The Supreme Court agreed with the United States, as respondent, and upheld the debt relief agency provisions of BAPCPA that prohibit attorneys from advising clients "to incur more debt in contemplation" of filing bankruptcy.

- *Schwab v. Reilly*, 560 U.S. 770 (2010): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that a chapter 7 trustee does not give up an interest in exempt property if the debtor claims the exemption in a stated amount that is within the exemption limits and the value of the property exceeds those limits.

- *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that a debtor's bad-faith conduct may result in forfeiture of the right to convert a chapter 7 case into a chapter 13 case.

- *Lamie v. U. S. Trustee*, 540 U.S. 526 (2004): The Supreme Court agreed with the position of the United States, as respondent, and held that a professional may not be compensated by the bankruptcy estate unless the professional is employed by the trustee and approved by the bankruptcy court.

- *Kontrick v. Ryan*, 540 U.S. 443 (2004): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that the time limit for filing objections to discharge are not jurisdictional and may be forfeited if the debtor does not raise the time limit as a defense to an objection.

The Executive Office actively assisted with the briefing of twenty-three additional Supreme Court cases:

- *United States v. v. Miller, No. 23-824:* The United States, acting as petitioner, contends a bankruptcy trustee may not avoid a debtor's tax payment to the United States under 11 U.S.C. § 544(b) when no actual creditor could have obtained relief under the applicable state fraudulent-transfer law outside of bankruptcy.

- *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 144 S. Ct. 1414 (2024): The Supreme Court agreed with the United States, acting as amicus, that an insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may object to a plan of reorganization under Chapter 11 of the Bankruptcy Code.

- *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023): The Supreme Court agreed with the United States acting as amicus argued that section 106(a) of the Bankruptcy Code abrogates the sovereign immunity of a federally recognized Indian tribe.

- *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023): The Supreme Court agreed with the position of the United States, acting as amicus, that Bankruptcy Code Section 363(m) does not limit appellate courts' jurisdiction to review sale orders.

- *Bartenwerfer v. Buckley*, 598 U.S. 69 (2023): The Supreme Court agreed with the position of the United States, acting as amicus, that section 523(a)(2)(A) bars the discharge in bankruptcy of an individual debtor's debt for money obtained by the actual fraud of her business partner, in the absence of a finding that the debtor personally committed the fraud or intended or knew of its occurrence.

- *Chicago v. Fulton*, 592 U.S. 154 (2021): The Supreme Court agreed with the position of the United States as amicus, and unanimously held that "mere retention" of property of the estate by a creditor does not violate 11 U.S.C. § 362(a)(3).

- *Roman Catholic Archdiocese of San Juan v. Feliciano*, 589 U.S. __, 140 S. Ct. 696 (2020): In a *per curiam* opinion, the Supreme Court ruled it need not address the United States' First Amendment arguments as stated in its response to the Court's call for the views of the Solicitor General, because the state court lacked jurisdiction to impose the relief it granted because a notice of removal had been filed. The Court also ruled that courts may issue *nunc pro tunc* orders only to "reflect[ ] the reality" of what has already occurred.

- *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 589 U.S. __, 140 S. Ct. 582 (2020): The Supreme Court agreed with the position of the United States, participating as amicus curiae, that an order denying a motion to modify the automatic stay is a final, appealable order "when the bankruptcy court unreservedly grants or denies relief."

- *Taggart v. Lorenzen*, 587 U.S. __, 139 S. Ct. 1795 (2019): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that a creditor is subject to civil-contempt sanctions for its violation of the debtor's discharge when there is no objectively reasonable ground for concluding the creditor's claim was not subject to the discharge injunction.

- *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. __, 139 S. Ct. 1652 (2019): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that 11 U.S.C. 365 permits a trademark licensee to keep using the mark after the debtor rejected its contract with the licensee.

- *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709 (2018): The Court agreed with the position of the United States, participating as *amicus curiae*, that a "statement about a single asset can be a 'statement respecting the debtor's financial condition'" under 11 U.S.C. § 523(a)(2).

- *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. __, 138 S. Ct. 960 (2018): The Court agreed with the position of the United States, participating as *amicus curiae*, that a bankruptcy court's determination under 11 U.S.C. § 1129(a)(10) of insider status with respect to a particular claimholder is reviewed for clear error.

- *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 882 (2016): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that the "actual fraud" bar to discharge under section 523(a)(2)(A) of the Bankruptcy Code encompasses fraudulent conveyance schemes, even when those schemes do not involve a false representation.

- *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that "Article III is not violated when the parties knowingly and voluntarily consent to adjudication [of a *Stern* claim] by a bankruptcy judge." The Court further held that the necessary consent may be implied, but whether express or implied it "must still be knowing and voluntary."

- *Exec. Benefits Ins. Agcy. v. Arkison*, 573 U.S. 25 (2014): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that when a bankruptcy court cannot render final judgment on a "core" matter for constitutional reasons, it may proceed as if the matter was "non-core" and that *de novo* review by the district court may cure potential error in a bankruptcy court's entry of judgment.

- *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013): The Supreme Court disagreed with the position of the United States, participating as *amicus curiae*, and held that a party seeking to except a debt from discharge for defalcation requires proof of the debtor's wrongful intent with respect to "the improper nature of the relevant fiduciary behavior."

- *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that a chapter 11 reorganization plan cannot propose to sell secured property free and clear at an auction without allowing the secured creditor to exercise its statutory right to "credit bid" the value of its security interest at the auction.

- *Hall v. United States*, 566 U.S. 506 (2012): The Supreme Court agreed with the position of the United States, as respondent, and held that in chapter 12 bankruptcy cases, post-petition federal income tax liability is incurred by individual debtors, not the bankruptcy estate, and thus cannot be collected or discharged in a chapter 12 repayment plan.

- *Stern v. Marshall*, 564 U.S. 462 (2011): The Supreme Court disagreed with the position of the United States, participating as *amicus curiae*, and held that a bankruptcy court does not have Article III authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.

- *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010): The Supreme Court disagreed with the position of the United States, participating as *amicus curiae*, and held that a bankruptcy court's legal error in discharging student loan debt without first finding an undue hardship does not render its judgment void.

- *Marshall v. Marshall*, 547 U.S. 293 (2006): The Supreme Court agreed with the position of the United States, participating as *amicus curiae*, and held that the probate exception to federal jurisdiction does not deprive a bankruptcy court from adjudicating rights in probate property.

- *Rousey v. Jacoway*, 544 U.S. 320 (2005): The Supreme Court disagreed with the United States, participating as *amicus curiae*, and held that a debtor may exempt assets in an IRA from the bankruptcy estate.

- *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004): The Supreme Court agreed with the United States, participating as *amicus curiae*, and held that the current prime interest rate plus a risk adjustment is the correct method for determining an "adequate rate of interest" on a secured debt that is subject to "cram down" under a chapter 13 repayment plan.

The Executive Office has also actively assisted in the litigation of four non-bankruptcy cases:

- *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117 (2024): The Supreme Court disagreed with the United States and held that when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial.

- *City of San Antonio, Texas v. Hotels.com, L.P.*, 593 U.S. 330 (2021): The Supreme Court disagreed with the United States, acting as amicus that a district court possesses discretion to deny or reduce "costs on appeal" that under Federal Rule of Appellate Procedure 39(e) "are taxable in the district court for the benefit of the party entitled to costs under [Rule 39]."

- *Hawkins v. Cmty. Bank of Raymore*, 577 U.S. 495, 136 S. Ct. 1072 (2016): An equally divided Court affirmed (without analysis) the ruling of the United States Court of Appeals for the Eighth Circuit that spousal guarantors of their spouses' debt are not applicants who receive protection under the Equal Credit Opportunity Act.

- *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016): The Court held that Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

[NEXT DOCUMENT]

Open Questions and Avenues for Insurers' Participation Post-*Purdue* and *Kaiser Gypsum*

Other Issues *Purdue* Does Not Address

The Supreme Court held that the Bankruptcy Code does not authorize a release and injunction that, as part of a Chapter 11 plan of reorganization, seeks to discharge claims against a nondebtor without the consent of affected claimants; ***but***

(1) declined to decide whether plans that are substantially consummated and include existing nonconsensual third party releases must be unwound; and

(2) declined to address the impact of full payment of third party claims through a plan.

Substantially Consummated Plan

- *The Court does not answer whether this opinion will require the unwinding of already confirmed plans—this was a significant issue in the pending appeal of the Boy Scouts of America bankruptcy.*

- One of the most critical questions is what happens to those debtors who have confirmed a plan, will soon confirm a plan, or have begun carrying out a plan (subject to appeal) that involves a nonconsensual third party release.

- For those who have begun to execute a plan, a substantially consummated plan cannot be unwound and would not be required under *Purdue.*

- "Substantial consummation" means: (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan. 11 U.S.C. § 1101(2).
    - "Satisfaction of this statutory standard indicates that implementation of the plan has progressed to the point that turning back may be imprudent." *In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 578 (D. Del. 2018).
    - For example, in Boy Scouts, the Appellees emphasized that the Plan went effective in April 2023. Since going effective, billions of dollars of cash and other assets were contributed to the Settlement Trust by BSA, Local Councils, Chartered Organizations, and Settling Insurance Companies.
    - To achieve that, numerous complex transactions occurred that could not be undone—the Settling Insurers bought back their insurance policies for approximately $1.6 billion (mostly in escrow), the Reorganized Debtors sold millions of dollars worth of property, the Reorganized Debtors paid millions of dollars worth of administrative expense claims, among other transactions.

  - In addition, for a substantially consummated plan, the doctrine of equitable mootness will likely prevent *Purdue Pharma* from impacting the plan whatsoever.

- The same is true for plans that qualify for statutory mootness based upon the sale of assets tied to a third party release. Even where there is confirmed a plan but the debtor has not yet begun to execute it, the Court does not answer the question of whether these plans should be unwound. Lower courts will be left on their own to make these determinations.

Full Satisfaction

- *Purdue* left open a bankruptcy court's ability to confirm a chapter 11 plan containing third-party releases without creditor consent if it provides for full satisfaction of claims against a third-party nondebtor.

- Additionally, the Court declined to address questions regarding cases where the plan arranges for the full satisfaction of claims against the released third-party nondebtor. These situations, too, may warrant injunctions protecting third parties.

- The Supreme Court's reference to "full satisfaction" invokes the bedrock common-law principle that a plaintiff is entitled to only one satisfaction for each injury. *See, e.g.*, *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 512 (1964) ("[F]ull satisfaction received from one tortfeasor prevents further recovery against another."); *Harris v. Union Elec. Co.*, 846 F.2d 482, 485 (8th Cir. 1988) ("[A]n injured party is entitled to only one satisfaction for each injury. Whether there is one tortfeasor or ten, the injured party may only recover once.").

- The "one-satisfaction rule" amply supports confirmation of BSA's plan, which fully satisfies third-party claims against nondebtors and uses third-party releases to prevent double recoveries for injuries that are indivisible from those asserted in claims against BSA. Absent clear error, the lower courts' full-payment findings should not be disturbed. *See In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 570 (D. Del. 2018), aff'd, 945 F.3d 126 (3d Cir. 2019).

- Under this rule, if a defendant fully satisfies a plaintiff's claim, plaintiff's claims against any other party for the same indivisible injury are released and barred by operation of law. *See, e.g.*, *Aro*, 377 U.S. at 501 ("By our law, judgment against one joint trespasser, without full satisfaction, is no bar to a suit against another for the same trespass"); *Occidental*, 200 F.3d at 148 ("[T]he [g]overnment agrees that it is permitted 'but one satisfaction' of a claim and that, once a claim is 'satisfied,' all other joint tortfeasors are released"); *Frank v. Volkswagenwerk, A.G. of W. Ger.*, 522 F.2d 321, 324 (3d Cir. 1975) ("[J]ust as under the common law…upon satisfaction of one judgment he may not sue or execute against another joint tortfeasor"); W. Page Keeton et al., Prosser and Keeton on Torts § 49 at 335 (5th ed. 1984) ("Where there has been such full satisfaction, or where it is agreed that the amount paid under the release is so received, no claim should remain as to any other tortfeasor"); Restatement (Third) of Torts § 25(a) (Am. L. Inst. 2000) (hereinafter, "Third Restatement") (describing rule); Restatement (Second) of Judgments § 49 cmt. a (Am. L. Inst. 1982)

("Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments").

- Contentions over whether claims against third-party nondebtors are "fully satisfied" by a plan of reorganization will likely be far more common.
    - For example, in *Boy Scouts*, the Appellees argued before the Third Circuit that the bankruptcy court's full-payment findings, as affirmed by the district court, encompassed "the entirety of recoverable damages suffered" by survivors of Scouting-related abuse for their "indivisible injur[ies]."
    - Since *Purdue*, at least one case has confirmed a plan and approved third-party releases where the bankruptcy court found payment in full. *See In re Bird Global Inc.*, Case No. 23-20514 (CLC) (Bankr. S.D.Fla.) (reasoning that the debtors' plan provides for "full satisfaction" of all tort claims, and the channeling injunction and bar order are part of a settlement with the insurers and a section 363 sale of the insurance policies).
- In *Boy Scouts*, the district court affirmed the bankruptcy court's detailed findings, based on credible and uncontroverted expert testimony, that the aggregate value of Scouting-related abuse claims against BSA and nondebtor protected parties ranged from \$2.4–\$3.6 billion. Because the value of the Trust's noncontingent assets exceeds the low end of the claims-valuation range (and far exceeds the high end when including contingent assets), the plan provides for payment in full.

With the *Truck Insurance* Opinion, Insurers Now Have Standing to Address in Details Treatment under a Chapter 11 Plan, including the *Cum Onere* Principle

- Under the *cum onere* principle, contractual rights cannot be assigned without their concomitant obligations. *See, e.g.*, *NLRB v. Buildisco & Buildisco*, 465 U.S. 513, 531 (1984) (stating that debtor must assume executory contracts "cum onere"); *In re Italian Cook Oil Corp*, 190 F.2d 994, 997 (3d Cir. 1951) (If the Trustee "receives the benefits he must adopt the burdens."); *In re Thornhill Bros. Fitness, L.L.C.*, 85 F.4th 321, 326 (5th Cir. 2023) ([A] debtor assuming an executory contract cannot separate the wheat from the chaff . . . [and] must assign the contract in whole, not in part."); *In re National Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) ("Where the debtor assumes an executory contract, it must assume the entire contract, *cum onere* - the debtor accepts both the obligations and the benefits of the executory contract.");*In re Am. Home Mortg. Holdings, Inc.*, 402 B.R. 87, 98 (Bankr. D. Del. 2009) ("the *cum onere* principle applies equally to the transfer of rights and obligations under a non-executory contract").

- This has been a significant argument in many of the recent mass tort bankruptcy cases. But, given the limit on standing for insurers prior to *Kaiser Gypsum* based on "insurance neutrality" language, insurers were often limited in their objections.

- Insurers who may be impacted by a plan are "parties in interest" under the Bankruptcy Code whose rights can be adversely affected in "myriad ways" without their consent. *See Truck Insurance*, 144 S. Ct. 1426. As such, they "are entitled to be fully heard and to have their legitimate objections addressed." *Id.*

- Purported "insurance neutrality" in a bankruptcy plan does not deprive an insurer of standing to be heard, and the concept itself is "too limited" because it ignores numerous ways in which bankruptcy plans "can alter and impose obligations on insurers." 144 S. Ct. at 1427.

- "Where a proposed plan 'allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed.'" *Id.* at 1417.

- If a plan abrogates an insurer's contractual rights or otherwise creates the potential for financial harm, the insurer has standing to object to plan confirmation, and the plan will need to be modified to be confirmed, irrespective of the label used to identify insurers' rights.

[NEXT DOCUMENT]

PETER C. ANDERSON
UNITED STATES TRUSTEE
Eryk R. Escobar, Bar No. 281904
Assistant United States Trustee
Katherine C. Bunker, Bar No. 240593
Trial Attorney
OFFICE OF THE UNITED STATES TRUSTEE
915 Wilshire Blvd., Ste. 1850
Los Angeles, CA 90017
Telephone: (213) 894-3326
Facsimile: (213) 894-0276
E-mail: kate.bunker@usdoj.gov

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re

Windsor Terrace Healthcare, LLC, *et al.*,

Debtor.

■ Affects All Debtors
☐ Affects S&F Home Health Opco I, LLC
☐ Affects S&F Hospice Opco I, LLC
☐ Affects S&F Market Street Healthcare, LLC
☐ Affects Windsor Care Center National City, LLC
☐ Affects Windsor Cheviot Hills, LLC
☐ Affects Windsor Country Drive Care Center, LLC
☐ Affects Windsor Court Assisted Living, LLC
☐ Affects Windsor Cypress Gardens Healthcare, LLC
☐ Affects Windsor El Camino Care Center, LLC
☐ Affects Windsor Elk Grove and Rehabilitation, LLC
☐ Affects Windsor Elmhaven Care Center, LLC
☐ Affects Windsor Gardens Convalescent Hospital, Inc.
☐ Affects Windsor Hampton Care Center, LLC
☐ Affects Windsor Hayward Estates, LLC
☐ Affects Windsor Monterey Care Center, LLC
☐ Affects Windsor Rosewood Care Center, LLC
☐ Affects Windsor Sacramento Estates, LLC
☐ Affects Windsor Skyline Care Center, LLC
☐ Affects Windsor Terrace Healthcare, LLC
☐ Affects Windsor The Ridge Rehabilitation Center, LLC
☐ Affects Windsor Vallejo Care Center, LLC

Lead Case No. 1:23-bk-11200-VK

Joint administration with Case Nos.
1:23-bk-11201-VK; 1:23-bk-11212-VK;
1:23-bk-11202-VK; 1:23-bk-11213-VK;
1:23-bk-11203-VK; 1:23-bk-11214-VK;
1:23-bk-11204-VK; 1:23-bk-11215-VK;
1:23-bk-11206-VK; 1:23-bk-11216-VK;
1:23-bk-11207-VK; 1:23-bk-11217-VK;
1:23-bk-11208-VK; 1:23-bk-11218-VK;
1:23-bk-11209-VK; 1:23-bk-11219-VK;
1:23-bk-11210-VK; 1:23-bk-11220-VK;
1:23-bk-11401-VK; 1:23-bk-11402-VK

Chapter 11 Cases

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' PLAN OF REORGANIZATION (DATED JUNE 11, 2024); DECLARATION OF ALFRED COOPER III IN SUPPORT THEREOF

Date: August 22, 2024
Time: 1:30 p.m.
Place: Courtroom 301
21041 Burbank Blvd.
Woodland Hills, CA 91367
(and via ZoomGov)

TO THE HONORABLE VICTORIA KAUFMAN, UNITED STATES BANKRUPTCY JUDGE, DEBTORS AND THEIR COUNSEL OF RECORD, AND ALL PARTIES-IN-INTEREST:

Peter C. Anderson, the United States Trustee for Region 16 (the "U.S. Trustee"), objects to the confirmation of the Debtors' Plan of Reorganization (Dated June 11, 2024) [Docket No. 1077] (the "Plan") because the Plan contains inappropriate nondebtor releases that are not allowed based on the Supreme Court of the United States' recent decision in *Harrington v. Purdue Pharma L.P. (In re Purdue Pharma)*, No. 23-124, 603 U.S. ___ (2024)[1] and controlling Ninth Circuit authority. For the reasons that follow, and absent necessary amendments, the Court should deny confirmation of the Plan.

DATED: August 5, 2024

UNITED STATES TRUSTEE

By: /s/ *Katherine C. Bunker*
Katherine C. Bunker
Trial Attorney

[1] A copy of the decision is attached hereto as Exhibit A to the Declaration of Alfred Cooper III.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Plan is not confirmable as it fails to meet the requirements of 11 U.S.C. §§ 1129(a) and 1191[2]. The Plan includes a release and injunction that would effectively discharge claims against nondebtors without the consent of affected claimants in contravention of the Bankruptcy Code and controlling case law. Therefore, unless the Plan is amended to remove these third-party releases, confirmation of the Plan must be denied.

II. PLAN CONFIRMATION REQUIREMENTS

Section 1191 of the Bankruptcy Code provides that "[t]he court shall confirm a plan . . . only if all of the requirements of section 1129(a), other than paragraph (15) . . . are met." Section 1129 of the Bankruptcy Code enumerates the requirements that a plan must satisfy before a court can confirm it. Specifically, the § 1129(a) requirements include the following:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law. . . .

The debtor bears the burden of proving that each requirement in § 1129(a) has been met. *See Liberty Nat'l Enters. v. Ambanc La Mesa L.P. (In re Ambanc La Mesa, L.P.)*, 115 F.3d 650, 653 (9th Cir. 1997).

III. BACKGROUND FACTS AND PROCEDURAL SUMMARY

1. On August 23, 2023, Windsor Terrace Healthcare, LLC, along with 18 affiliated entities, filed voluntary 11 petitions in the United States Bankruptcy Court for the Central District of California.[3]

---

[2] Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

[3] The 18 affiliated entities include: S&F Home Health Opco I, LLC, S&F Hospice Opco I, LLC, S&F Market Street Healthcare, LLC, Windsor Care Center National City, LLC, Windsor Cheviot Hills, LLC, Windsor Country Drive Care Center, LLC, Windsor Court Assisted Living, LLC, Windsor Cypress Gardens Healthcare, LLC, Windsor El Camino Care Center, LLC, Windsor Elk Grove and Rehabilitation Center, LLC, Windsor Elmhaven Care Center, LLC, Windsor Gardens Convalescent Hospital, Inc., Windsor Hampton Care Center, LLC, Windsor Monterey Care Center, LLC, Windsor Rosewood Care Center, LLC, Windsor Terrace Healthcare, LLC, Windsor the Ridge Rehabilitation Center, LLC, and Windsor Vallejo Care Center, LLC.

See Disclosure Statement Describing Debtors' Plan of Reorganization (Dated June 11, 2024)[4] ("Disclosure Statement") [Docket No. 1079] at 18.[5]

2. On September 29, 2023, Windsor Sacramento Estates, LLC and Windsor Hayward Estates, LLC, also affiliated entities of Windsor Terrace Healthcare, LLC, filed voluntary petitions under Chapter 11 in the United States Bankruptcy Court for the Central District of California.[6] *Id.*

3. The Debtors' cases are being jointly administered. *Id.* at 19.

4. The Debtors are primarily engaged in the business of owning and operating skilled nursing facilities throughout the state of California and own and operate one assisted living facility, one home health care center, and one hospice care center. *Id.*

5. Bankruptcy relief was sought by the Debtors after their new owners, Avrohom Tress ("Tress") and Aaron Robin ("Robin"), and their administrative services company NewGen Administrative Services, LLC ("NewGen"),[7] concluded that the Debtors had no economic ability to pay their prepetition debt and to absorb the costs of defending against numerous outstanding prepetition personal injury lawsuits. *Id.* at 21.

6. On June 11, 2024, the Debtors filed the Plan. *See* Docket No. 1077.

7. The Plan is to be funded by the Debtors' cash and operating profit, with NewGen, Antelope[8], Tress, and Robin (collectively, the "Guarantors") to fund any shortfalls. *Id.* at 24-25.

---

[4] The U.S. Trustee respectfully requests that this Court take judicial notice of the documents in the Court's file pursuant to Federal Rule of Evidence 201, applicable to bankruptcy proceedings by Federal Rule Bankruptcy Procedure 9017.

[5] The page numbers are in reference to those inserted by ECF upon the filing of the document on the top of the page.

[6] Windsor Terrace Healthcare, LLC and the 20 affiliated entities will be collectively referred to as the Debtors.

[7] NewGen assumed control over the administrative services of the Debtors' facilities on or around March 1, 2023. Disclosure Statement at 21. The Debtors' owners acquired ownership of the Debtors on or around July 1, 2023. *Id.*

[8] Antelope is defined in the Plan as collectively meaning Antelope Holdings I, LLC, Antelope Holdings II, LLC, and Antelope Holdings III, LLC. Plan at 6. These LLCs are the direct owners of the Debtors. Omnibus Declaration of Tianxiang "Shawn" Zhou in Support of Emergency First Day Motions [Docket No. 14] at 67. Robin and Tress are the ultimate owners of Antelope. *Id.*

Specifically, NewGen and Antelope have agreed to guaranty timely and full payment of the Plan's treatment to all Class 3 (HCSG Note) and Class 4 (general unsecured creditors). *Id.* at 24. In addition, Robin and Tess have agreed to guaranty timely and full payment of the Plan's treatment of all Class 3 and Class 4 obligations up to $10,000,000. *Id.* at 24-25.

8. Under the Plan, Class 4 claims are provided the following treatment:

> **Class 4 – General Unsecured Claims**. Each holder of an Allowed Class 4 General Unsecured Claim will have the option (which option will be included in their Plan ballot) of selecting between the following two treatments under this Plan, which (except as set forth immediately below) will be in full settlement and satisfaction of their Allowed General Unsecured Claim against both the Debtors and the Guarantors but not against any other third parties. Each Claimant with a Personal Injury Claim who does not accept the Debtors' proposed settlement amount and who is otherwise not able to reach agreement with the Debtors on a different mutually agreeable Claim settlement amount prior to the date of Plan confirmation (each, a "Non-Settling Personal Injury Claimant") shall be permitted to proceed with the liquidation of their disputed Personal Injury Claim against the Debtors and any third parties (including the Guarantors) in the manner set forth in Section IV(D)(7) below. Only Non-Settling Personal Injury Claimants shall be exempt from the releases of the Guarantors as set forth in Section IV(D)(7) below. All other Class 4 Claimants shall remain bound by such releases, regardless of whether they vote in favor of or against this Plan. The Committee presently takes no position with respect to such releases.

Plan at 14. *See also id.* at 21-23. To be a Non-Settling Personal Injury Claimant, the claimant would need to hold an unliquidated Personal Injury Claim, reject the Debtors' proposed claim settlement amount, be unable to reach agreement on a different mutually agreeable claim settlement amount with the Debtors prior to the date of Plan confirmation, and participate in a Court-ordered mediation. Plan at 33. Only after completion of the mandatory mediation process would the claimant be able to proceed with the liquidation of their disputed Personal Injury Claim against the Debtors and any third parties including the Guarantors. *Id.*

9. Plan treatment option 1 provides for "six payments made over five years with the total payments equal to 32% of the amount of their Allowed General Unsecured Claim" and potentially "additional distributions to the extent there are net recoveries from certain Assigned Litigation Claims[.]" *Id.* at 21-22. "The treatment of Class 4 Claim holders who timely elect Plan treatment Option 1 under this Plan will be in full settlement and satisfaction of such Allowed General Unsecured Claims (against both the Debtors and the Guarantors.)" *Id.* at 22-23.

10. Plan treatment option 2 provides for "a single payment equal to 10% of the amount of the holder's Allowed General Unsecured Claim made within 15 days of the later of the Effective Date or the date of Allowance of such Claim, which payment will be in full settlement and satisfaction of such Allowed General Unsecured Claims (against both the Debtors and the Guarantors)." *Id.* at 23.

11. Class 4 is comprised of approximately $75,692,295.76 non-litigation general unsecured claims and approximately $702,996,323.61 litigation general unsecured claims. Disclosure Statement at 45-46. The litigation claims are the Employment and Personal Injury Claims[9] being asserted against the Debtors. *See* Plan at 9.

12. The Plan provides that

> **ALL HOLDERS OF CLASS 4 ALLOWED CLAIMS WHO FAIL TO TIMELY VOTE ON THIS PLAN OR WHO TIMELY VOTE ON THIS PLAN (FOR OR AGAINST) BUT FAIL TO ELECT PLAN TREATMENT OPTION 1 OR PLAN TREATMENT OPTION 2 WILL BE AUTOMATICALLY DEEMED TO HAVE SELECTED PLAN TREATMENT OPTION 2.**
>
> **ALL CLASS 4 CLAIMANTS, OTHER THAN NON-SETTLING PERSONAL INJURY CLAIMANTS, SHALL BE DEEMED TO HAVE RELEASED ALL CLAIMS AGAINST THE GUARANTORS WITH RESPECT TO THEIR CLASS 4 CLAIMS, REGARDLESS OF WHETHER THEY VOTE IN FAVOR OF OR AGAINST THIS PLAN AND IRRESPECTIVE OF WHETHER THEY CHOSE PLAN TREATMENT OPTION 1 OR PLAN TREATMENT OPTION 2.**

(the "Guarantor Discharge") *Id.* at 23.

13. On July 29, 2024, the Debtors filed their plan confirmation brief (the "Brief") [Docket No. 1359]. Despite the recent Supreme Court decision in *Harrington v. Purdue Pharma L.P. (In re Purdue Pharma)*, No. 23-124, 603 U.S. ___ (2024), the Debtors contend that the Guarantor Discharge is permissible under § 1123(b)(6) because 1) the *Purdue* decision is inapplicable to the case as this case is factually different and the *Purdue* decision is limited to bankruptcy cases involving mass-tort victims

[9] An Employment Claim is defined as "a General Unsecured Claim that has been scheduled by the Debtors or asserted by a claimant in a timely filed proof of claim for damages related to the employment with the Debtors." Plan at 8.

A Personal Injury Claim is defined as "a General Unsecured Claim that has been scheduled by the Debtors or asserted by a claimant in a timely filed proof of claim for damages for personal injury, wrongful death or related claims." *Id.* at 10.

and 2) the releases are "narrow in scope and time" and therefore allowable based on the Ninth Circuit decision in *Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020).[10] Both arguments fail.

IV. <u>DISCUSSION</u>

A. *The Bankruptcy Code Does Not Authorize a Plan Provision that Provides for the Nonconsensual Discharge of Nondebtors.*

The Guarantor Discharge contravenes the United States Supreme Court's recent decision in *Harrington v. Purdue Pharma L.P. (In re Purdue Pharma)*, No. 23-124, 603 U.S. ___ (2024). The Supreme Court held in that case that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants." *Purdue Pharma*, No. 23-124 slip op. at 19. The Guarantor Discharge does exactly that, preventing confirmation of the Plan.

In the *Purdue Pharma* case, Purdue filed for bankruptcy relief in response to a litany of litigation relating to its role in the opioid epidemic and its products including OxyContin. *Id.* at 3. Purdue's long-time owners, members of the Sackler family, also were subject to a growing number of OxyContin-related lawsuits. *Id.* Rather than file for bankruptcy relief and "place[] virtually all their assets on the table for distribution to creditors," the Sacklers chose a different path. *Id.* at 1. Specifically, the Sacklers proposed to return approximately $4.3 billion[11] of the $11 billion they had withdrawn from Purdue in recent years in exchange for a release and injunction as to 1) any claims the bankruptcy estate might have against them, including fraudulently transferring funds from Purdue in the years preceding its bankruptcy, and 2) current and future opioid-related claims against the family, including those for fraud and willful misconduct, without the consent of the opioid victims who brought them (the "Sackler Discharge"). *Id.* at 3-4. Purdue agreed to the Sacklers' proposal and incorporated the Sackler Discharge in its plan of reorganization. *Id.*

---

[10] The Brief uses *In re Yellowstone Mountain Club, LLC* as the case name. Brief at 17.

[11] Over the course of the case, this amount increased to approximately $6 billion. *Purdue Pharma*, No. 23-124, slip op. at 6.

Under that plan, billions were to be paid for opioid abatement and education programs, but individual victims of OxyContin would receive between $3,500 and $48,000 before the deduction of attorney's fees and other expenses. *Id.* at 4-5. For victims who received more than the $3,500 base amount, payments were to be made in installments over a 10-year period. *Id.* at 5.

The United States Trustee and others objected to the inclusion of the Sackler Discharge arguing that it violated the Bankruptcy Code as it discharged nondebtors' claims without consent. *Id.* The bankruptcy court overruled the United States Trustee's objection and entered an order approving Purdue's plan with the Sackler Discharge, which the United States Trustee and others appealed. *Id.* at 5-6.

"Generally . . . a discharge operates only for the benefit of the debtor against its creditors and 'does not affect the liability of any other entity.'" *Id.* at 7 (citing 11 U.S.C. § 524(e)); *see also Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995) (holding that the Ninth Circuit has repeatedly declined to recognize exceptions to § 524(e)). For years, however, there has been a circuit split as to whether "a court in bankruptcy may effectively extend to *nondebtors* the benefits of a Chapter 11 discharge usually reserved for *debtors*."[12] *Id.* at 8. The *Purdue* opinion resolves this split in authority and eliminates nondebtors' ability to obtain the benefits of a Chapter 11 discharge as to nonconsenting claimants.

---

[12] Prior to *Purdue,* in the Ninth Circuit, a Chapter 11 plan that contains third party releases from liability was unconfirmable as the Ninth Circuit has held that § 524(e) precludes bankruptcy courts from discharging the liabilities of nondebtors. *Lowenschuss*, 67 F.3d at 1401.

In reaching this conclusion, the Supreme Court examined § 1123(b)[13], specifically the catchall provision of § 1123(b)(6),[14] and § 105(a). *See id.* at 8-13. The Court held that, when paragraph (6) of § 1123(b) is viewed in relationship to paragraphs (1) through (5), "all of which concern the debtor . . . and [the debtor's] relationship with creditors," paragraph (6) "cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor without the consent of affected claimants." *Id.* at 11. The Court further held that § 105(a) could not provide the authority for the Sackler Discharge as § 105(a) only allows a bankruptcy court the power to "carry out" other provisions of the Bankruptcy Code and there was no Code section that authorized nonconsensual releases. *Id.* at 9 n.2.

In addition, the Court held that the Code's statutory scheme further foreclosed the Sackler Discharge. The Bankruptcy Code awards a debtor a discharge if the debtor "proceeds with honesty" and "come[s] forward with virtually all its assets." *Id.* at 1 & 14. The Court noted that the Sacklers had not

---

[13] Section 1123(b) states,

Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such action;
(3) provide for—
(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
(5) modify the rights of the holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and
(6) include any other provision not inconsistent with the applicable provisions of this title.

[14] Section 1123(b)(6) is what the Second Circuit primarily relied on in upholding the Sackler Discharge. *Purdue Pharma*, No. 23-124, slip op. at 9.

put "anything close to all their assets on the table", *id.* at 16, yet they sought "a judicial order that would extinguish virtually all claims against them for fraud, willful injury, and even wrongful death, all without the consent of those who have brought and seek to bring such claims." *Id.* at 14-15. Essentially, they sought "to pay less than the code ordinarily requires and receive more than it normally permits." *Id.* at 15. Whether branded as a release or discharge, "nothing in the bankruptcy code contemplates (much less authorizes)" the relief the Sacklers sought. *Id.* at 16.

Like the Sackler Discharge, the Guarantor Discharge releases, ***without claimants' consent***, the Guarantors from liability of Class 4 claimants, except for Non-Settling Personal Injury Claimants, without claimants' obligations being paid in full. The Guarantors have not personally subjected themselves to the bankruptcy process, but now want to use the Debtors bankruptcy to escape any liability owed to these claimants and others. As the Supreme Court noted in *Purdue,* whether the Guarantors call the relief they seek to obtain a "release" rather than a "discharge", there is no provision in the Code that authorizes the relief the Guarantors want to obtain through the Plan even if they are proposing to pay a substantial contribution into the Plan. *See id.* at 8-19.

The Debtors do not argue here that the release is consensual—indeed, they cannot, because the Debtors have not asked any of the Class 4 Claimants for their consent—and instead, relying solely on a single statement in the dissent,[15] the Debtors mistakenly argue that *Purdue* is inapplicable to the Plan because they erroneously claim it is limited to cases involving mass-tort victims. Brief at 19. The *Purdue* decision is not limited to mass-tort victim cases. *See Purdue* Pharma, No. 23-124, slip op. at 19 (there is no limiting language in the Court's holding which states "that the 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 consent of the affected claimants"). As the dissent itself recognizes, the majority's decision holds that nonconsensual "non-debtor releases are never allowed as a matter of law[,]" regardless of the facts of the specific case. *See Purdue Pharma,* No. 23-124*,* Kavanaugh, J. dissenting at 31-32. Here, Class 4 claimants have not consented to the Guarantor

[15] The sentence Debtors cite is the dissent's statement that "[t]he Court's decision rewrites the text of the U.S. Bankruptcy Code and restricts the long-established authority of the bankruptcy courts to fashion fair and equitable relief for mass-tort victims." *See Purdue Pharma,* No. 23-124*,* Kavanaugh, J. dissenting at 1.

Discharge; instead, they are told that unless they are Non-Settling Personal Injury Claimants, they are deemed to release all claims against the Guarantors simply by virtue of being Class 4 Claimants, regardless of whether the claimant votes to accept the Plan, votes against the Plan, or fails to vote at all.

Accordingly, the Guarantor Discharge is a nonconsensual nondebtor release in violation of *Purdue* and the Plan cannot be confirmed until the Guarantor Discharge is removed.

B. *Blixseth Does Not Support Approval of the Guarantor Discharge Even If It Were To be Found Narrow in Scope and Time.*

The Debtors also mistakenly contend that the Guarantor Discharge is permissible because it is "narrow in scope and time" under the Ninth Circuit's decision in *Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020), but *Blixseth* has no bearing on this case. Brief at 14. The question before the Ninth Circuit in *Blixseth* was whether the bankruptcy court could release a creditor from liability for certain potential claims against it by approving an exculpation clause that released parties from liability for "any act or omission in connection with, relating to or arising out of the Chapter 11 cases" or bankruptcy filing. 961 F.3d at 1081. But the Guarantor Discharge would release the Guarantors from prepetition obligations held by creditors—not postpetition actions relating to the formation of the Plan.

The Debtors' reliance on *Blixseth* for approval of the Guarantor Discharge is therefore misplaced.

V. <u>CONCLUSION</u>

The Guarantor Discharge renders the Plan unconfirmable under the Bankruptcy Code and controlling Supreme Court authority. Therefore, the U.S. Trustee respectfully requests that, absent necessary amendments, confirmation of the Plan be denied as it fails to meet all the requirements of § 1129(a).

DATED: August 5, 2024

PETER C. ANDERSON
United States Trustee

By: */s/ Katherine C. Bunker*
Katherine C. Bunker
Trial Attorney

DECLARATION OF ALFRED COOPER III

I, Alfred Cooper III, declare

1. I am an individual above the age of eighteen years of age and am a Paralegal Specialist with the Woodland Hills, California office of the United States Trustee ("U.S. Trustee"). I have personal knowledge of all the facts set forth in this Declaration, and I could and would competently testify thereto if so called as a witness.

2. Attached hereto as Exhibit A is a true copy of the United States Supreme Court's recent decision in *Harrington v. Purdue Pharma L.P. (In re Purdue Pharma)*, No. 23-124, 603 U.S. ___ (2024), which was obtained from the United States Supreme Court's website at supremecourt.gov/opinions/slipopinion/23.

I declare under penalty of perjury that the foregoing facts are true and correct. Executed on August 5, 2024, in Los Angeles, California.

Alfred Cooper III
____
Alfred Cooper III

Exhibit A

SUPREME COURT OF THE UNITED STATES

No. 23–124

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2, PETITIONER *v.* PURDUE PHARMA L. P., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 27, 2024]

JUSTICE GORSUCH delivered the opinion of the Court.

The bankruptcy code contains hundreds of interlocking rules about "'the relations between'" a "'debtor and [its] creditors.'" *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 513–514 (1938). But beneath that complexity lies a simple bargain: A debtor can win a discharge of its debts if it proceeds with honesty and places virtually all its assets on the table for its creditors. The debtor in this case, Purdue Pharma L. P., filed for bankruptcy after facing a wave of litigation for its role in the opioid epidemic. Purdue's long-time owners, members of the Sackler family, confronted a growing number of suits too. But instead of declaring bankruptcy, they chose a different path. From the court overseeing Purdue's bankruptcy, they sought and won an order extinguishing vast numbers of existing and potential claims against them. They obtained all this without securing the consent of those affected or placing anything approaching their total assets on the table for their creditors. The question we face is whether the bankruptcy code authorizes a court to issue an order like that.

I

A

The opioid epidemic represents "one of the largest public health crises in this nation's history." *In re Purdue Pharma L. P.*, 69 F. 4th 45, 56 (CA2 2023). Between 1999 and 2019, approximately 247,000 people in the United States died from prescription-opioid overdoses. *In re Purdue Pharma L. P.*, 635 B. R. 26, 44 (SDNY 2021). The U. S. Department of Health and Human Services estimates that the opioid epidemic has cost the country between $53 and $72 billion annually. *Ibid.*

Purdue sits at the center of these events. In the mid-1990s, it began marketing OxyContin, an opioid prescription pain reliever. 69 F. 4th, at 56. Because of the addictive quality of opioids, doctors had traditionally reserved their use for cancer patients and those "with chronic diseases." 635 B. R., at 42. But OxyContin, Purdue claimed, had a novel "time-release" formula that greatly diminished the threat of addiction. *Ibid.* On that basis, Purdue marketed OxyContin for use in "'a much broader range'" of applications, including as a "'first-line therapy for the treatment of arthritis.'" *Ibid.*

Purdue was a "'family company,'" owned and controlled by the Sacklers. *Id.*, at 40. Members of the Sackler family served as president and chief executive officer; they dominated the board of directors; and they "were heavily involved" in the firm's marketing strategies. 69 F. 4th, at 86 (Wesley, J., concurring in judgment). They "pushed sales targets," too, and "accompanied sales representatives on 'ride along' visits to health care providers" in an effort to maximize OxyContin sales. 635 B. R., at 50.

Quickly, OxyContin became "'the most prescribed brand-name narcotic medication'" in the United States. *Id.*, at 43. Between 1996 and 2019, "Purdue generated approximately $34 billion in revenue . . . , most of which came from OxyContin sales." *Id.*, at 39. The company's success propelled the Sacklers onto lists "of the top twenty wealthiest families in America," with an estimated net worth of $14 billion. *Id.*, at 40.

Eventually, however, the firm came under scrutiny. In 2007, a Purdue affiliate pleaded guilty to a federal felony for misbranding OxyContin as "'less addictive'" and "'less subject to abuse . . . than other pain medications.'" *Id.*, at 48. Thousands of civil lawsuits followed as individuals, families, and governments within and outside the United States sought damages from Purdue and the Sacklers for injuries allegedly caused by their deceptive marketing practices. 69 F. 4th, at 60.

Appreciating this litigation "would eventually impact them directly," *id.*, at 59, the Sacklers began what one family member described as a "'milking' program," 635 B. R., at 57. In the years before the 2007 plea agreement, Purdue's distributions to the Sacklers represented less than 15% of its annual revenue. *Ibid.* After the plea agreement, the Sacklers began taking as much as 70% of the company's revenue each year. *Ibid.* Between 2008 and 2016, the family's distributions totaled approximately $11 billion, draining Purdue's total assets by 75% and leaving it in "a significantly weakened financial" state. 69 F. 4th, at 59. The Sacklers diverted much of that money to overseas trusts and family-owned companies. 635 B. R., at 71.

B

In 2019, Purdue filed for Chapter 11 bankruptcy. Members of the Sackler family saw in that development an opportunity "to get [their own] goals accomplished." *In re Purdue Pharma L. P.*, No. 19–23649 (Bkrtcy. Ct. SDNY, Aug. 18, 2021), ECF Doc. 3599, p. 35 (testimony of David Sackler). They proposed to return to Purdue's bankruptcy estate $4.325 billion of the $11 billion they had withdrawn from the company in recent years. 69 F. 4th, at 61. But they offered to do so only through payments spread out over a decade. *Id.*, at 60. And, in return, they sought the estate's agreement on, and a judicial order addressing, two matters. First, the Sacklers wanted to extinguish any claims the estate might have against family members, including for fraudulently transferring funds from Purdue in the years preceding its bankruptcy. *In re Purdue Pharma L. P.*, 633 B. R. 53, 83–84 (Bkrtcy. Ct. SDNY 2021). Second, the Sacklers wanted to end the growing number of lawsuits against them brought by opioid victims (the Sackler discharge). *Ibid.*

The Sackler discharge they proposed comprised a release and an injunction. The release sought to void not just current opioid-related claims against the family, but future ones as well. It sought to ban not just claims by creditors participating in the bankruptcy proceeding, but claims by anyone who might otherwise sue Purdue. It sought to extinguish not only claims for negligence, but also claims for fraud and willful misconduct. 1 App. 193. And it proposed to end all these lawsuits without the consent of the opioid victims who brought them. To enforce this release, the Sacklers sought an injunction "forever stay[ing], restrain[ing,] and enjoin[ing]" claims against them. *Id.*, at 279. That injunction would not just prevent suits against the company's officers and directors but would run in favor of hundreds, if not thousands, of Sackler family members and entities under their control. *Id.*, at 117–190.

Purdue agreed to these terms and included them in the reorganization plan it presented to the bankruptcy court for approval. In that plan, Purdue further proposed to reorganize as a "public benefit" company dedicated primarily to opioid education and abatement efforts. 633 B. R., at 74. As for individual victims harmed by the company's products, Purdue offered, with help from the Sacklers' anticipated contribution, to provide payments from a base amount of $3,500 up to a ceiling of $48,000 (for the most dire cases, and all before deductions for attorney's fees and other expenses). See 1 App. 557–559, 573–585; 6 App. in No. 22–110 etc. (CA2), p. 1697. For those receiving more than the base amount, payments would come in installments spread over as many as 10 years. 7 *id.*, at 1805, 1812.

Creditors were polled on the proposed plan. Though most who returned ballots supported it, fewer than 20% of eligible creditors participated. 21 *id.*, at 6253, 6258. Thousands of opioid victims voted against the plan too, and many pleaded with the bankruptcy court not to wipe out their claims against the Sacklers without their consent. 635 B. R., at 35. "Our system of justice," they wrote, "demands that the allegations against the Sackler family be fully and fairly litigated in a public and open trial, that they be judged by an impartial jury, and that they be held accountable to those they have harmed." *In re Purdue Pharma L. P.*, No. 7:21–cv–07532 (SDNY, Oct. 25, 2021), ECF Doc. 94, p. 21 (internal quotation marks omitted). The U. S. Trustee, charged with promoting the integrity of the bankruptcy system for all stakeholders, joined in these objections. So did eight States, the District of Columbia, the city of Seattle, and various Canadian municipalities and Tribes, each of which sought to pursue its own claims against the Sacklers. 635 B. R., at 35.

C

The bankruptcy court rejected the objectors' arguments and entered an order confirming the plan, including its provisions related to the Sackler discharge. 633 B. R., at 95–115. Soon, however, the district court vacated that decision. Nothing in the law, that court held, authorized the bankruptcy court to extinguish claims against the Sacklers without the consent of the opioid victims who brought them. 635 B. R., at 115.

After that setback, plan proponents, including Purdue, members of the Sackler family, and various creditors, appealed to the Second Circuit. While their appeal was pending, they also floated a new proposal. Now, they said, the Sacklers were willing to contribute an additional $1.175 to $1.675 billion to Purdue's estate if the eight objecting States and the District of Columbia would withdraw their objections to the firm's reorganization plan. 69 F. 4th, at 67. The Sacklers' proposed contribution still fell well short of the $11 billion they received from the company between 2008 and 2016. Nor did it begin to reflect the earnings the Sacklers have enjoyed from that sum over time. And the proposed contribution would still come in installments spread over many years. But the new proposal was enough to persuade the States and the District of Columbia to drop their objections to the plan, even as a number of individual victims, the Canadian creditors, and the U. S. Trustee persisted in theirs.

Ultimately, a divided panel of the Second Circuit reversed the district court and revived the bankruptcy court's order approving the estate's (now-modified) reorganization plan. Writing separately, Judge Wesley acknowledged that a bankruptcy court enjoys broad authority to modify debtor-creditor relations. But, he argued, nothing in the bankruptcy code grants a bankruptcy court the "extraordinary" power to release and enjoin claims against a third party without the consent of the affected claimants. *Id.*, at 89 (opinion concurring in judgment). The majority's contrary view, he added, "pin[ned the Second] Circuit firmly on one side of a weighty issue that, for too long, has split the courts of appeals." *Id.*, at 90.

After the Second Circuit ruled, the U. S. Trustee filed an application with this Court to stay its decision. We granted the application and, treating it as a petition for a writ of certiorari, agreed to take this case to resolve the circuit split Judge Wesley highlighted. 600 U. S. ___ (2023).[1]

---

[1] For examples of decisions on both sides of the split, compare *In re*

II

The plan proponents and U. S. Trustee agree on certain foundational points. When a debtor files for bankruptcy, it "creates an estate" that includes virtually all the debtor's assets. 11 U. S. C. §541(a). Under Chapter 11, the debtor can work with its creditors to develop a reorganization plan governing the distribution of the estate's assets; it must then present that plan to the bankruptcy court and win its approval. §§1121, 1123, 1129, 1141. Once the bankruptcy court issues an order confirming the plan, that document binds the debtor and its creditors going forward—even those who did not assent to the plan. §1141(a).

Most relevant here, a bankruptcy court's order confirming a plan "discharges the debtor from any debt that arose before the date of such confirmation," except as provided in the plan, the confirmation order, or the code. §1141(d)(1)(A). That discharge not only releases or "void[s] any past or future judgments on the" discharged debt; it also "operat[es] as an injunction . . . prohibit[ing] creditors from attempting to collect or to recover the debt." *Tennessee Student Assistance Corporation* v. *Hood*, 541 U. S. 440, 447 (2004) (citing §§524(a)(1), (2)). Generally, however, a discharge operates only for the benefit of the debtor against its creditors and "does not affect the liability of any other entity." §524(e).

The Sacklers have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a

---

Pacific Lumber Co., 584 F. 3d 229 (CA5 2009); *In re Lowenschuss*, 67 F. 3d 1394 (CA9 1995); *In re Western Real Estate Fund, Inc.*, 922 F. 2d 592 (CA10 1990), with *In re Millennium Lab Holdings II, LLC*, 945 F. 3d 126 (CA3 2019); *In re Seaside Engineering & Surveying, Inc.*, 780 F. 3d 1070 (CA11 2015); *In re Airadigm Communications, Inc.*, 519 F. 3d 640 (CA7 2008); *In re Dow Corning Corp.*, 280 F. 3d 648 (CA6 2002); *In re A. H. Robins Co.*, 880 F. 2d 694 (CA4 1989).

discharge. They hope to win a judicial order releasing pending claims against them brought by opioid victims. They seek an injunction "permanently and forever" foreclosing similar suits in the future. 1 App. 279. And they seek all this without the consent of those affected. The question we face thus boils down to whether a court in bankruptcy may effectively extend to *nondebtors* the benefits of a Chapter 11 discharge usually reserved for *debtors*.

A

For an answer, we turn to §1123. It addresses the "[c]ontents"—or terms—of the bankruptcy reorganization plan a debtor presents and a court approves in Chapter 11 proceedings. Some plan terms are mandatory, §1123(a); others are optional, §1123(b). No one suggests that anything like the Sackler discharge *must* be included in a debtor's reorganization plan. Instead, plan proponents contend, it is a provision a debtor *may* include and a court *may* approve in a reorganization plan.

Section 1123(b) governs that question. It directs that a plan "may":

> "(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> "(2) . . . provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under [§365];
>
> "(3) provide for—
>
> "(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> "(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
>
> "(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

"(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

"(6) include any other appropriate provision not inconsistent with the applicable provisions of this title."

We can easily rule out the first five of these paragraphs as potential sources of legal authority for the Sackler discharge. They permit a plan to address claims and property belonging to a debtor or its estate. §§1123(b)(2), (3), (4). They permit a plan to modify the rights of creditors who hold claims against the debtor or its estate. §§1123(b)(1), (5). But nothing in those paragraphs authorizes a plan to extinguish claims against third parties, like the Sacklers, without the consent of the affected claimants, like the opioid victims. If authority for the Sackler discharge can be found anywhere, it must be found in paragraph (6). That is the paragraph on which the Second Circuit primarily rested its decision below, and it is the one on which plan proponents pin their case here.[2]

As the plan proponents see it, paragraph (6) allows a

[2] The Sacklers suggest that, if 11 U. S. C. §1123(b) does not permit a bankruptcy court to release and enjoin claims against a nondebtor without the affected claimants' consent, §105(a) does. See Brief for Mortimer-Side Initial Covered Respondents 19 (Brief for Sackler Family). That provision allows a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the bankruptcy code. §105(a). As the Second Circuit recognized, however, "§105(a) alone cannot justify" the imposition of nonconsensual third-party releases because it serves only to "'carry out'" authorities expressly conferred elsewhere in the code. 69 F. 4th 45, 73 (2023) (quoting §105(a)); see also 2 R. Levin & H. Sommer, Collier on Bankruptcy ¶105.01[1], p. 105–6 (16th ed. 2023). Purdue concedes this point, Brief for Debtor Respondents 19, n. 5 (Brief for Purdue), as do several other plan proponents, see, *e.g.*, Brief for Respondent Ad Hoc Committee 29. Necessarily, then, our focus trains on §1123(b)(6).

debtor to include in its plan, and a court to order, *any* term not "expressly forbid[den]" by the bankruptcy code as long as a bankruptcy judge deems it "appropriate" and consistent with the broad "purpose[s]" of bankruptcy. 69 F. 4th, at 73–74; *post*, at 41–42 (KAVANAUGH, J., dissenting). And because the code does not expressly forbid a nonconsensual nondebtor discharge, the reasoning goes, the bankruptcy court was free to authorize one here after finding it an "appropriate" provision. See Brief for Sackler Family 19–21; Brief for Purdue 20; *post*, at 13–15.

This understanding of the statute faces an immediate obstacle. Paragraph (6) is a catchall phrase tacked on at the end of a long and detailed list of specific directions. When faced with a catchall phrase like that, courts do not necessarily afford it the broadest possible construction it can bear. *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 512 (2018). Instead, we generally appreciate that the catchall must be interpreted in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it. *Ibid.* (internal quotation marks omitted). So, for example, when a statute sets out a list discussing "cars, trucks, motorcycles, or any other vehicles," we appreciate that the catchall phrase may reach similar landbound vehicles (perhaps including buses and camper vans), but it does not reach dissimilar "vehicles" (such as airplanes and submarines). See *McBoyle* v. *United States*, 283 U. S. 25, 26–27 (1931). This ancient interpretive principle, sometimes called the *ejusdem generis* canon, seeks to afford a statute the scope a reasonable reader would attribute to it.

Viewed with that much in mind, we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose. In some circumstances, it may be difficult to discern what a statute's specific listed items share in common. See A. Scalia & B. Garner, Reading Law 207–

208 (2012). But here an obvious link exists: When Congress authorized "appropriate" plan provisions in paragraph (6), it did so only after enumerating five specific sorts of provisions, all of which concern *the debtor*—its rights and responsibilities, and its relationship with its creditors. Doubtless, paragraph (6) operates to confer additional authorities on a bankruptcy court. See *United States* v. *Energy Resources Co.*, 495 U. S. 545, 549 (1990). But the catchall cannot be fairly read to endow a bankruptcy court with the "radically different" power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants. *Epic Systems Corp.*, 584 U. S., at 513; see also *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 645–647 (2012).

The catchall's text underscores the point. Congress could have said in paragraph (6) that "everything not expressly prohibited is permitted." But it didn't. Instead, Congress set out a detailed list of powers, followed by a catchall that it qualified with the term "appropriate." That quintessentially "context dependent" term often draws its meaning from surrounding provisions. *Sossamon* v. *Texas*, 563 U. S. 277, 286 (2011). And we know to look to the statute's preceding specific paragraphs as the relevant "context" here because paragraph (6) tells us so. It permits "any *other* appropriate provision"—that is, "other" than the provisions already discussed in paragraphs (1) through (5). (Emphasis added.) Each of those "other" paragraphs authorizes a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor. From this, it follows naturally that an "appropriate provision" adopted pursuant to the catchall that purports to extinguish claims without consent should be similarly constrained. See, *e.g.*, *Epic Systems Corp.*, 584 U. S., at 512–513.

For its part, the dissent does not dispute that the *ejusdem generis* canon applies to §1123(b)(6). *Post*, at 33–34; see also Brief for Sackler Family 44; Brief for Purdue 23. But it disagrees with our application of the canon for two reasons. First, the dissent claims, it "is factually incorrect" to suggest that all the provisions of §1123(b) concern the debtor's rights and responsibilities. *Post*, at 35. The dissent points out that a bankruptcy estate may settle creditors' "derivative claims" against nondebtors under paragraph (3). *Post*, at 36. And this "indisputable point," the dissent declares, "defeats the Court's conclusion that §1123(b)'s provisions relate only to the debtor and do not allow releases of claims that victims and creditors hold against nondebtors." *Post*, at 37; see Brief for Purdue 24–25.

But that argument contains a glaring flaw. The dissent neglects *why* a bankruptcy court may resolve derivative claims under paragraph (3): It may because those claims belong to the debtor's estate. See, *e.g.*, *In re Ontos, Inc.*, 478 F. 3d 427, 433 (CA1 2007). In a derivative action, the named plaintiff "is only a nominal plaintiff. The substantive claim belongs to the corporation." 2 J. Macey, Corporation Laws §13.20[D], p. 13–140 (2020–4 Supp.). And no one questions that Purdue may address in its own bankruptcy plan claims "wherever located and by whomever held," §541(a)—including those claims derivatively asserted by another on its behalf, see §1123(b)(3). The problem is, the Sackler discharge is nothing like that. Rather than seek to resolve claims that substantively belong to Purdue, it seeks to extinguish claims against the Sacklers that belong to their victims. And precisely 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.[3]

[3] In an effort to blur this distinction, the dissent points out that the Sackler discharge covers claims for which Purdue's conduct is a "legally relevant factor." *Post*, at 34–35 (quoting 69 F. 4th, at 80). But that does not alter the fact that the Sackler discharge would extinguish *the victims*' claims against *the Sacklers*. Those claims neither belong to Purdue nor are they asserted against Purdue or its estate. The dissent disregards

Having come up short on the text of §1123(b), the dissent pivots to the statute's purpose. *Post*, at 35. As the dissent sees it, our application of the *ejusdem generis* canon should focus less on the provisions preceding the catchall and more on the overall "purpose of bankruptcy law" in solving "collective-action problem[s]." *Post*, at 5, 35–36; see also Brief for Purdue 21. But there is an obvious difficulty with this approach, too. As this Court has long recognized, "[n]o statute pursues a single policy at all costs." *Bartenwerfer* v. *Buckley*, 598 U. S. 69, 81 (2023). Always, the question we face is *how far* Congress has gone in pursuing one policy or another. See *ibid.* So, yes, bankruptcy law may serve to address some collective-action problems, but no one (save perhaps the dissent) thinks it provides a bankruptcy court with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms (legislation, class actions, multi-district litigation, consensual settlements, among others) play in addressing them. And here, the five paragraphs that precede the catchall tell us that bankruptcy courts may have many powers, including the power to address certain collective-action problems when they implicate the debtor's rights and responsibilities. But those directions also indicate that a bankruptcy court's powers are not limitless and do not endow it with the power to extinguish without their consent claims held by nondebtors (here, the opioid victims) against other nondebtors (here, the Sacklers).[4]

---

these elemental distinctions. See, *e.g.*, *post*, at 49 (conflating the estate's power to settle its own fraudulent transfer claims against the Sacklers with the power to extinguish those of the victims against the Sacklers).

[4] The dissent characterizes our analysis of paragraph (6) as "breez[y]," as if the analysis would be correct if only it were belabored. *Post*, at 34. And yet it is the dissent that relegates the text of the relevant statute, §1123(b), to a pair of footnotes bookending a 25-page exposition on collective-action problems and public policy, one that precedes any effort to engage with our statutory analysis. See *post*, at 7, n. 1, 32, n. 5.

B

When resolving a dispute about a statute's meaning, we sometimes look for guidance not just in its immediate terms but in related provisions as well. See, *e.g.*, *Turkiye Halk Bankasi A. S.* v. *United States*, 598 U. S. 264, 275 (2023). Paragraph (6) itself alludes to this fact by instructing that any plan term adopted under its auspices must not be "inconsistent with the applicable provisions of" the bankruptcy code. Following that direction and looking to Chapter 11 more broadly, we find at least three further reasons why §1123(b)(6) cannot bear the interpretation the plan proponents and the dissent would have us give it.

First, consider what is and who can earn a discharge. As we have seen, a discharge releases the debtor from its debts and enjoins future efforts to collect them—even by those who do not assent to the debtor's reorganization plan. §§524(a)(1)–(2), 1129(b)(1), 1141(a). Generally, too, the bankruptcy code reserves this benefit to "the debtor"—the entity that files for bankruptcy. §1141(d)(1)(A); accord, §524(e); see also §§727(a)–(b). The plan proponents and the dissent's reading of §1123(b)(6) would defy these rules by effectively affording to a nondebtor a discharge usually reserved for the debtor alone.

Second, notice how the code constrains the debtor. To win a discharge, again as we have seen, the code generally requires the debtor to come forward with virtually all its assets. §§541(a)(1), 548. Nor is the discharge a debtor receives unbounded. It does not reach claims based on "fraud" or those alleging "willful and malicious injury." §§523(a)(2), (4), (6). And it cannot "affect any right to trial by jury" a creditor may have "with regard to a personal injury or wrongful death tort claim." 28 U. S. C. §1411(a). The plan proponents and the dissent's reading of §1123(b)(6) transgresses all these limits too. The Sacklers have not agreed to place anything approaching their full assets on the table for opioid victims. Yet they seek a judicial order that would extinguish virtually all claims against them for fraud, willful injury, and even wrongful death, all without the consent of those who have brought and seek to bring such claims. In each of these ways, the Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits.

Finally, there is a notable exception to the code's general rules. For asbestos-related bankruptcies—and only for such bankruptcies—Congress has provided that, "[n]otwithstanding" the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt, §524(e), courts may issue "an injunction . . . bar[ring] any action directed against a third party" under certain statutorily specified circumstances. §524(g)(4)(A)(ii). That the code *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context, makes it all the more unlikely that §1123(b)(6) is best read to afford courts that same authority in *every* context. See, *e.g.*, *Bittner* v. *United States*, 598 U. S. 85, 94 (2023); *AMG Capital Management, LLC* v. *FTC*, 593 U. S. 67, 77 (2021).[5]

How do the plan proponents and the dissent reply to all this? Essentially, they ask us to look the other way. Whatever limits the code imposes on debtors and discharges mean nothing, they say, because the Sacklers seek a "release," not a "discharge." See, *e.g.*, *post*, at 46–48. But word

[5] The dissent claims that, in making this observation, we defy §524(g)'s directive that "[n]othing in [it], or in the amendments made by [its addition to the bankruptcy code], shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." 108 Stat. 4117, note following 11 U. S. C. §524; see *post*, at 44–45. That charge misunderstands the point. We do not read §524(g) to "impair" or "modify" authority previously available to courts in bankruptcy. To the contrary, we simply understand §524(g) to illustrate how Congress might proceed if it intended to confer upon bankruptcy courts a novel and extraordinary power to extinguish claims against third parties without claimants' consent. See *Czyzewski* v. *Jevic Holding Corp.*, 580 U. S. 451, 465 (2017).

games cannot obscure the underlying reality. Once more, the Sacklers seek greater relief than a bankruptcy discharge normally affords, for they hope to extinguish even claims for wrongful death and fraud, and they seek to do so without putting anything close to all their assets on the table. Nor is what the Sacklers seek a traditional release, for they hope to have a court extinguish claims of opioid victims without their consent. See, *e.g.*, J. Macey, Corporate Governance: Promises Kept, Promises Broken 152 (2008) ("settlements are, by definition, consensual"); accord, *Firefighters* v. *Cleveland*, 478 U. S. 501, 529 (1986). Describe the relief the Sacklers seek how you will, nothing in the bankruptcy code contemplates (much less authorizes) it.

C

If text and context supply two strikes against the plan proponents and the dissent's construction of §1123(b)(6), history offers a third. When Congress enacted the present bankruptcy code in 1978, it did "not write 'on a clean slate.'" *Hall* v. *United States*, 566 U. S. 506, 523 (2012) (quoting *Dewsnup* v. *Timm*, 502 U. S. 410, 419 (1992)). Recognizing as much, this Court has said that pre-code practice may sometimes inform our interpretation of the code's more "ambiguous" provisions. *RadLAX Gateway Hotel*, 566 U. S., at 649.

While we discern no ambiguity in §1123(b)(6) for the reasons explored above, historical practice confirms the lesson we take from it. Every bankruptcy law the parties and their *amici* have pointed us to, from 1800 until 1978, generally reserved the benefits of discharge to the debtor who offered a "fair and full surrender of [its] property." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 176 (1819); accord, *Central Va. Community College* v. *Katz*, 546 U. S. 356, 363–364 (2006); see, *e.g.*, Bankruptcy Act of 1800, §5, 2 Stat. 23 (repealed 1803); Act of Aug. 19, 1841, §3, 5 Stat. 442–443 (repealed 1843); Act of Mar. 2, 1867, §§11, 29, 14 Stat. 521, 531–532 (repealed 1878); Bankruptcy Act of 1898, §§7, 14, 30 Stat. 548, 550 (repealed 1978). No one has directed us to a statute or case suggesting American courts in the past enjoyed the power in bankruptcy to discharge claims brought by nondebtors against other nondebtors, all without the consent of those affected. Surely, if Congress had meant to reshape traditional practice so profoundly in the present bankruptcy code, extending to courts the capacious new power the plan proponents claim, one might have expected it to say so expressly "somewhere in the [c]ode itself." *Dewsnup*, 502 U. S., at 420.[6]

III

Faced with so many marks against its interpretation of the law, plan proponents and the dissent resort to a policy argument. The Sacklers, they remind us, have signaled that they will not return any funds to Purdue's estate unless the bankruptcy court grants them the sweeping nonconsensual release and injunction they seek. Absent these concessions, plan proponents and the dissent emphatically predict, "there will be no viable path" for victims to recover even $3,500 each. Tr. of Oral Arg. 100; Brief for Sackler Family 27; see Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 45–46; *post*, at 4, 21–28, 52–54.

The U. S. Trustee disputes that assessment. Yes, he says, reversing the Second Circuit may cause Purdue's current reorganization plan to unravel. But that would also

[6] The dissent declares pre-code practice irrelevant to the task at hand and insists the power to order nonconsensual releases has been settled by "decades" of bankruptcy court practice. *Post*, at 3, 5, 8, 11, 50–51. But in resisting the notion that pre-code practice may inform our work, the dissent defies our precedents. And in appealing to "decades" of lower court practice, the dissent seems to forget why we took this case in the first place: to resolve a longstanding and deeply entrenched disagreement between lower courts over the legality of nonconsensual third-party releases. See n. 1, *supra*.

mean the Sacklers would face lawsuits by individual victims, States, other governmental entities, and perhaps even fraudulent-transfer claims from the bankruptcy estate. So much legal exposure, the Trustee asserts, may induce the Sacklers to negotiate *consensual* releases on terms more favorable to opioid victims. Brief for Petitioner 47–48. The Sacklers may "want global peace," the Trustee acknowledges, but that doesn't "mea[n] that they wouldn't pay a lot for 97.5 percent peace." Tr. of Oral Arg. 26. After all, the Trustee reminds us, during the appeal in this very case, the Sacklers agreed to increase their contribution by more than $1 billion in order to secure the consent of the eight objecting States. If past is prologue, the Trustee says, there may be a better deal on the horizon.[7]

Even putting that aside, the Trustee urges us to consider the ramifications of this case for others. Nonconsensual third-party releases, he observes, allow tortfeasors to win immunity from the claims of their victims, including for claims (like wrongful death and fraud) they could not discharge in bankruptcy, and do so without placing anything approaching all of their assets on the table. Endorsing that maneuver, the Trustee says, would provide a "roadmap for corporations and wealthy individuals to misuse the bankruptcy system" in future cases "to avoid mass-tort liability." Brief for Petitioner 44–45.

Both sides of this policy debate may have their points.

[7] The parties likewise spar over whether, absent the Sacklers' discharge, the family could deplete the estate by asserting indemnification claims against the company. Plan proponents and the dissent point to a 2004 agreement that commits Purdue to cover certain liability and legal expenses the Sacklers incur. Brief for Purdue 10; *post*, at 21–24. But here again, the Trustee sees things differently. He underscores the plan proponents' concession that the 2004 agreement "does not apply if a court determines the Sacklers 'did not act in good faith.'" Reply Brief 16. And, he adds, bankruptcy courts have a variety of statutory tools at their disposal to disallow or equitably subordinate any potential indemnification claims the Sacklers might pursue. *Ibid.* (citing §§502(e)(1)(B), 510(c)(1)).

But, in the end, we are the wrong audience for them. As the people's elected representatives, Members of Congress enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge. Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so. Either way, if a policy decision like that is to be made, it is for Congress to make. Despite the misimpression left by today's dissent, our only proper task is to interpret and apply the law as we find it; and nothing in present law authorizes the Sackler discharge.

IV

As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. See, *e.g.*, *In re Specialty Equipment Cos.*, 3 F. 3d 1043, 1047 (CA7 1993). Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated. Confining ourselves to the question presented, we hold only that the 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. Because the Second Circuit ruled otherwise, its judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 23–124

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2, PETITIONER *v.* PURDUE PHARMA L.P., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 27, 2024]

JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

Today's decision is wrong on the law and devastating for more than 100,000 opioid victims and their families. The Court's decision rewrites the text of the U. S. Bankruptcy Code and restricts the long-established authority of bankruptcy courts to fashion fair and equitable relief for mass-tort victims. As a result, opioid victims are now deprived of the substantial monetary recovery that they long fought for and finally secured after years of litigation.

Bankruptcy seeks to solve a collective-action problem and prevent a race to the courthouse by individual creditors who, if successful, could obtain all of a company's assets, leaving nothing for all the other creditors. The bankruptcy system works to preserve a bankrupt company's limited assets and to then fairly and equitably distribute those assets among the creditors—and in mass-tort bankruptcies, among the victims. To do so, the Bankruptcy Code vests bankruptcy courts with broad discretion to approve "appropriate" plan provisions. 11 U. S. C. §1123(b)(6).

In this mass-tort bankruptcy case, the Bankruptcy Court exercised that discretion appropriately—indeed, admirably. It approved a bankruptcy reorganization plan for Purdue Pharma that built up the estate to approximately $7 billion by securing a $5.5 to $6 billion settlement payment from the Sacklers, who were officers and directors of Purdue. The plan then guaranteed substantial and equitable compensation to Purdue's many victims and creditors, including more than 100,000 individual opioid victims. The plan also provided significant funding for thousands of state and local governments to prevent and treat opioid addiction.

The plan was a shining example of the bankruptcy system at work. Not surprisingly, therefore, virtually all of the opioid victims and creditors in this case fervently support approval of Purdue's bankruptcy reorganization plan. And all 50 state Attorneys General have signed on to the plan—a rare consensus. The only relevant exceptions to the nearly universal desire for plan approval are a small group of Canadian creditors and one lone individual.

But the Court now throws out the plan—and in doing so, categorically prohibits non-debtor releases, which have long been a critical tool for bankruptcy courts to manage mass-tort bankruptcies like this one. The Court's decision finds no mooring in the Bankruptcy Code. Under the Code, all agree that a bankruptcy plan can nonconsensually release victims' and creditors' claims *against a bankrupt company*—here, against Purdue. Yet the Court today says that a plan can *never* release victims' and creditors' claims *against non-debtor officers and directors of the company*—here, against the Sacklers.

That is true, the Court says, even when (as here) those non-debtor releases are necessary to facilitate a fair settlement with the officers and directors and produce a significantly larger bankruptcy estate that can be fairly and equitably distributed among the victims and creditors. And that is true, the Court also says, even when (as here) those officers and directors are indemnified by the company. When officers and directors are indemnified by the company, a victim's or creditor's claim against the non-debtors "is, in essence, a suit against the debtor" that could "deplete the assets of the estate" for the benefit of only a few, just like a claim against the company itself. *In re Purdue Pharma L. P.*, 69 F. 4th 45, 78 (CA2 2023) (quotation marks omitted).

It therefore makes little legal, practical, or economic sense to say, as the Court does, that the victims' and creditors' claims against the debtor can be released, but that it would be categorically "inappropriate" to release their identical claims against non-debtors even when they are indemnified or when the release generates a significant settlement payment by the non-debtor to the estate.

For decades, bankruptcy courts and courts of appeals have determined that non-debtor releases can be appropriate and essential in mass-tort cases like this one. Non-debtor releases have enabled substantial and equitable relief to victims in cases ranging from asbestos, Dalkon Shield, and Dow Corning silicone breast implants to the Catholic Church and the Boy Scouts. As leading scholars on bankruptcy explain, "the bankruptcy community has recognized the resolution of mass tort claims as a widely accepted core function of bankruptcy courts for decades"—and they emphasize that a "key feature in every mass tort bankruptcy" has been the non-debtor release. A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 974, 977 (2023).

No longer.

Given the broad statutory text—"appropriate"—and the history of bankruptcy practice approving non-debtor releases in mass-tort bankruptcies, there is no good reason for the debilitating effects that the decision today imposes on the opioid victims in this case and on the bankruptcy system at large. To be sure, many Americans have deep hostility toward the Sacklers. But allowing that animosity to infect this bankruptcy case is entirely misdirected and counterproductive, and just piles even more injury onto the opioid victims. And no one can have more hostility toward the Sacklers and a greater desire to go after the Sacklers' assets than the opioid victims themselves. Yet the victims unequivocally seek approval *of this plan*.

With the current plan now gone and non-debtor releases categorically prohibited, the consequences will be severe, as the victims and creditors forcefully explained. Without releases, there will be no $5.5 to $6 billion settlement payment to the estate, and "there will be no viable path to any victim recovery." Tr. of Oral Arg. 100. And without the plan's substantial funding to prevent and treat opioid addiction, the victims and creditors bluntly described further repercussions: "more people will die without this Plan." Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 55.

In short: Despite the broad term "appropriate" in the statutory text, despite the longstanding precedents approving mass-tort bankruptcy plans with non-debtor releases like these, despite 50 state Attorneys General signing on, and despite the pleas of the opioid victims, today's decision creates a new atextual restriction on the authority of bankruptcy courts to approve appropriate plan provisions. The opioid victims and their families are deprived of their hard-won relief. And the communities devastated by the opioid crisis are deprived of the funding needed to help prevent and treat opioid addiction. As a result of the Court's decision, each victim and creditor receives the essential equivalent of a lottery ticket for a possible future recovery for (at most) a few of them. And as the Bankruptcy Court explained, without the non-debtor releases, there is no good reason to believe that any of the victims or state or local governments will ever recover anything. I respectfully but emphatically dissent.

I

To map out this dissent for the reader: Part I (pages 5 to 18) discusses why non-debtor releases are often appropriate and essential, particularly in mass-tort bankruptcies. Part II (pages 18 to 31) explains why non-debtor releases were appropriate and essential in the Purdue bankruptcy. Part III (pages 31 to 52) engages the Court's contrary arguments and why I respectfully disagree with those arguments. Part IV (pages 52 to 54) sums up.

Throughout this opinion, keep in mind the goal of bankruptcy. The bankruptcy system is designed to preserve the debtor's estate so as to ensure fair and equitable recovery for creditors. Bankruptcy courts achieve that overarching objective by, among other things, releasing claims that otherwise could deplete the estate for the benefit of only a few and leave all the other creditors with nothing. And as courts have recognized for decades, especially in mass-tort cases, non-debtor releases are not merely "appropriate," but can be absolutely critical to achieving the goal of bankruptcy—fair and equitable recovery for victims and creditors.

A

Article I, §8, of the Constitution affords Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States" and to "make all Laws which shall be necessary and proper for carrying into Execution" that power.

Early in the Nation's history, Congress established the bankruptcy system. In 1978, Congress significantly revamped and reenacted the Bankruptcy Code in its current form. Bankruptcy Code of 1978, 92 Stat. 2549.

The purpose of bankruptcy law is to address the collective-action problem that a bankruptcy poses. T. Jackson, The Logic and Limits of Bankruptcy Law 12–13 (1986). When a company's liabilities exceed its ability to pay creditors, every creditor has an incentive to maximize its own recovery before other creditors deplete the pot. Without a mandatory collective system, the creditors would race to the courthouse to recover first. One or a few successful creditors could then recover substantial funds, deplete the assets, and drive the company under—leaving other creditors with nothing. See *id.*, at 7–19; D. Baird, A World Without Bankruptcy, 50 Law & Contemp. Prob. 173, 183–184 (1987); T. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L. J. 857, 860–868 (1982).

Bankruptcy creates a way for creditors to "act as one, by imposing a *collective* and *compulsory* proceeding on them." Jackson, Logic and Limits of Bankruptcy Law, at 13. One of the goals of Chapter 11 of the Bankruptcy Code in particular is to fairly distribute estate assets among creditors "in order to prevent a race to the courthouse to dismember the debtor." 7 Collier on Bankruptcy ¶1100.01, p. 1100–3 (R. Levin & H. Sommer eds., 16th ed. 2023). Chapter 11 is aimed at preserving an estate's value for distribution to creditors in the face of that collective-action problem.

The basic Chapter 11 case runs as follows. After the debtor files for bankruptcy under Chapter 11, the debtor's property becomes property of the bankruptcy estate. 11 U. S. C. §541. Any litigation that might interfere with the property of the estate is subject to an automatic stay, thus preventing creditors from skipping the line by litigating in a separate forum against the debtor while the bankruptcy is ongoing. §362.

With litigation paused, the parties craft a plan of reorganization for the debtor. The Code grants the bankruptcy court sweeping powers to reorganize the debtor company and ensure fair and equitable recovery for the creditors. For example, the plan may authorize selling or retaining the company's property; merging or consolidating the company; or amending the company's charter. §1123(a)(5). The subsection at issue here, §1123(b), also authorizes many other kinds of provisions that bankruptcy plans may include.[1] Most relevant for this case, as I will explain, the reorganization plan may impair and release "any class of claims" that creditors hold against the debtor. §1123(b)(1). The plan may also settle and release "any claim or interest" that the debtor company holds against non-debtors. §1123(b)(3). And the plan may include "any other appropriate provision not inconsistent with the applicable provisions" of the Bankruptcy Code. §1123(b)(6).

To address any collective-action or holdout problem, the bankruptcy court has the power to approve a reorganization plan even without the consent of every creditor. If creditors holding more than one-half in number (and at least two-thirds in amount) of the claims in every class accept the plan, the court can confirm the plan. §§1126(c), 1129(a)(8)(A). A plan is "said to be confirmed consensually

---

[1] The full text of §1123(b) provides that "a plan may—

"(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

"(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

"(3) provide for—

"(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

"(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

"(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

"(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

"(6) include any other appropriate provision not inconsistent with the applicable provisions of this title."

if all classes of creditors vote in favor, even if some classes have dissenting creditors." 7 Collier, Bankruptcy ¶1129.01, at 1129–13. That the bankruptcy system considers a plan with majority (even if not unanimous) support to be "consensual" underscores that the bankruptcy system is designed to benefit creditors collectively and prevent holdout problems.

Confirmation of the plan "generally discharges the debtor from all debts that arose before confirmation." *Id.*, ¶1100.09[2][f], at 1100–42 (citing §1141(d)). And all creditors are bound by the plan's distribution, even if some creditors are not happy and oppose the plan. *Ibid.*

B

This is a mass-tort bankruptcy case. Mass-tort cases present the same collective-action problem that bankruptcy was designed to address. "Without a mandatory rule that consolidates claims in a single tribunal, tort claimants would rationally enter a race to the courthouse." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 997 (2023). And the "plaintiffs who bring successful suits earlier are likely to drain the firm's resources, while inconsistent judgments could result in inequitable payouts even among plaintiffs who ultimately do collect." *Id.*, at 994.

For many decades now, bankruptcy law has stepped in as a coordinating tribunal in significant mass-tort cases. When a company that is liable for mass torts files for bankruptcy, the bankruptcy system enables (and requires) the mass-tort victims who are seeking relief from the bankrupt company to work together to reach a fair and equitable distribution of the company's assets.

In many cases, there is no workable alternative other than bankruptcy for achieving fair and equitable recovery for mass-tort victims. "Outside of bankruptcy," victims face "significant administrative costs" of multi-district litigation, "which has limited coordination mechanisms and no tools for binding future claimants." *Id.*, at 1005. And multi-district litigation cannot "solve the collective action problem because dissenting claimants can opt out of settlements even when super majorities favor them." *Ibid.*

Bankruptcy, on the other hand, reduces administrative costs and allows all of the affected parties to come together, pause litigation elsewhere, invoke procedural safeguards including discovery, and reach a collective resolution that considers both current and future victims. Cf. Federal Judicial Center, E. Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations 6 (2000) ("bankruptcy reorganizations provide an inherently fairer method of resolving mass tort claims" than alternative of class-action settlements).

In some cases—including mass-tort cases—it is not only the debtor company, but rather another closely related person or entity such as officers and directors (non-debtors), who may hold valuable assets and also be potentially liable for the company's wrongdoing.

But it may be uncertain whether the victims can recover in tort suits against the non-debtors due to legal hurdles or difficulty reaching the non-debtors' assets. In those cases, a settlement may be reached: In exchange for being released from potential liability for any wrongdoing, the non-debtor must make substantial payments to the company's bankruptcy estate in order to compensate victims. As long as the settlement is fair, the non-debtor's settlement payment will benefit victims "by enlarging the pie of recoverable funds" in the bankruptcy estate. Casey & Macey, 90 U. Chi. L. Rev., at 1001. And it will reduce administrative costs, because the victims' claims against both the debtor and the non-debtor may be resolved "at the same time and in the same tribunal." *Id.*, at 1002.

The non-debtor's settlement payment into the estate can also solve a collective-action problem. Bringing the non-debtor's assets into the bankruptcy estate enables those assets to be distributed fairly and equitably among victims, rather than swallowed up by the first victim to successfully sue the non-debtor. *Id.*, at 1002–1003.

A separate collective-action problem can arise when the insolvent company's officers and directors are indemnified by the company for liability arising out of their job duties. In such cases, "a suit against the non-debtor is, in essence, a suit against the debtor." *In re Purdue Pharma L. P.*, 69 F. 4th 45, 78 (CA2 2023) (quotation marks omitted). If not barred from doing so, the creditors could race to the courthouse against the indemnified officers and directors for basically the same claims that they hold against the debtor company. If successful, such suits would deplete the company's assets because a judgment against the indemnified officers and directors would likely come out of the debtor company's assets.

Another similar collective-action problem can involve liability insurance, a kind of indemnification relationship where the insurer is on the hook for tort victims' claims against the debtor company. See B. Zaretsky, Insurance Proceeds in Bankruptcy, 55 Brooklyn L. Rev. 373, 375–376 (1989). The insurance assets—meaning assets to the limits of the debtor's insurance coverage—are usually a key asset for the bankruptcy estate to compensate victims. But tort victims also "may have direct action rights against the insurance carrier, even, in some cases, bypassing the debtor-insured." 5 Collier, Bankruptcy ¶541.10[3], at 541–60. If victims brought their claims directly against the insurer for the same claims that they hold against the estate, one group of victims could obtain from the insurer the full amount of the debtor's coverage. That would obviously prevent the insurance money from being used as part of the bankruptcy estate. See Zaretsky, 55 Brooklyn L. Rev., at 376–377, 394–395.

To address those various collective-action problems, bankruptcy courts have long found non-debtor releases to be appropriate in certain complex bankruptcy cases, especially in mass-tort bankruptcies. Indeed, that is precisely why non-debtor releases emerged in asbestos mass-tort bankruptcies in the 1980s. See *id.*, at 405–414; Casey & Macey, 90 U. Chi. L. Rev., at 998–999; see, *e.g.*, *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F. 2d 89 (CA2 1988). And that is precisely why non-debtor releases have become such a well-established tool in mass-tort bankruptcies in the decades since.

For example, after A. H. Robins declared bankruptcy in 1985 in the face of massive tort liability for injuries from its defective intrauterine device, the Dalkon Shield, nearly 200,000 victims filed proof of claims. *In re A. H. Robins Co.*, 88 B. R. 742, 743–744, 747 (ED Va. 1988), aff'd, 880 F. 2d 694 (CA4 1989). A plan provision releasing the company's directors and insurance company ensured that the estate would not be depleted through indemnity or contribution claims, or claims brought directly against the directors or insurer. 88 B. R., at 751; 880 F. 2d, at 700–702. Preventing the victims from engaging in "piecemeal litigation" against the non-debtor directors and insurance company was the only way to ensure "equality of treatment of similarly situated creditors." 88 B. R., at 751. Therefore, the Bankruptcy Court found (and the Fourth Circuit agreed) that the release was "necessary and essential" to the bankruptcy's success. *Ibid.*; see 880 F. 2d, at 701–702. The plan ultimately provided for the victims to recover in full, and they overwhelmingly approved the plan. *Id.*, at 700–701.

A non-debtor release provision was similarly essential to resolve hundreds of thousands of victims' tort claims against Dow Corning Corporation, which declared bankruptcy in 1995 in the face of liability for its defective silicone breast implants. See *In re Dow Corning Corp.*, 287

B. R. 396, 397 (ED Mich. 2002). The non-debtor release provision prevented the victims from suing Dow Corning's insurers and shareholders for their tort claims—which would have depleted Dow Corning's shared insurance assets and other estate assets. *Id.*, at 402–403, 406–408. The non-debtor release provision was "essential" to the bankruptcy reorganization because the reorganization hinged "on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor." *In re Dow Corning Corp.*, 280 F. 3d 648, 658 (CA6 2002); 287 B. R., at 410–413.

The need for such a tool to deal with complex bankruptcy cases has not gone away. Far from it. Indeed, without the option of bankruptcy with non-debtor releases, "tort victims in several recent high-profile cases would have received less compensation; the compensation would have been unfairly distributed; and the administrative costs of resolving their claims would have been higher." Casey & Macey, 90 U. Chi. L. Rev., at 979; see also Brief for Law Professors in Support of Respondents as *Amici Curiae* 21–25; Brief for Certain Former Commissioners of the American Bankruptcy Institute's Commission To Study the Reform of Chapter 11 as *Amici Curiae* 9–11; Brief for Association of the Bar of the City of New York as *Amicus Curiae* 9, 11–15.

Consider two recent examples that ensured recovery for the victims of torts committed by the Boy Scouts of America and by several dioceses of the Catholic Church. In both cases, a national or regional organization was the debtor in the bankruptcy. But that organization shared its liability and its insurance policy with numerous other legally separate and autonomous local entities. Without a coordinating mechanism, a victim's (or group of victims') recovery against one local entity could have eaten up all of the shared insurance assets, leaving all of the other victims with nothing. Brief for Boy Scouts of America as *Amicus*

Curiae 9–14, 17–19; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 9–22.

Bankruptcy provided a forum to coordinate liability and insurance assets. A non-debtor release provision prevented victims from litigating outside of the bankruptcy plan's procedures. And the provision therefore prevented one victim or group of victims from obtaining all of the insurance funds before other victims recovered. As a result, in each case, the local entities were able to pool their resources to create a substantial fund in a single bankruptcy estate to compensate victims substantially and fairly. Brief for Boy Scouts of America as *Amicus Curiae* 11–12, 20–21; Brief for Ad Hoc Group of Local Councils of the Boy Scouts of America as *Amicus Curiae* 5–6; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 15–16.

As those examples show, in some cases where various closely related but distinct parties share liability or share assets (or both), bankruptcy "provides the *only* forum in the U. S. legal system where a unified and complete resolution of mass-tort cases can reliably occur in a manner that results in a fair recovery and distribution for all claimants." Brief for Association of the Bar of the City of New York as *Amicus Curiae* 15. And the bankruptcy system could not do so without non-debtor releases.

C

The Bankruptcy Code gives bankruptcy courts authority to approve non-debtor releases to solve the complex collective-action problems that such cases present. As noted above, a Chapter 11 reorganization plan may release creditor claims against debtors. §1123(b)(1). And a plan may settle and release debtor claims against non-debtors. §1123(b)(3).

In addition, the plan may also include "any other appropriate provision not inconsistent with the applicable provisions of" the Code. §1123(b)(6). Section 1123(b)(6) provides ample flexibility for the reorganization plan to settle and release creditor claims against non-debtors who are closely related to the debtor. For example, officers and directors may be indemnified by the debtor company; in those cases, creditor claims against indemnified non-debtors are essentially the same as creditor claims against the debtor business itself. Or the non-debtors may reach a settlement with the victims and creditors where the non-debtors pay a settlement amount to the estate, which in some cases may be the only way to ensure fair and equitable recovery for the victims and creditors. The non-debtor releases—just like debtor releases under §1123(b)(1) and non-debtor releases under §1123(b)(3)—can be essential to preserve and increase the estate's assets and can be essential to ensure fair and equitable victim and creditor recovery.

The key statutory term in §1123(b)(6) is "appropriate." As this Court has often said, "appropriate" is a "broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan* v. *EPA*, 576 U. S. 743, 752 (2015) (quotation marks omitted). Because determining propriety requires exercising judgment, the inquiry must include a degree of "flexibility." *Ibid.* The Court has explained on numerous occasions that the "ordinary meaning" of a statute authorizing appropriate relief "confers broad discretion" on a court. *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359, 369 (1985); see also, *e.g.*, *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 446 (1986) (plurality opinion) (Title VII "vest[s] district courts with broad discretion to award 'appropriate' equitable relief"); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 400 (1990) ("In directing the district court to impose an 'appropriate' sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion"). Because the "language is open-ended on its face," whether a provision is "appropriate is inherently context dependent." *Tanzin* v. *Tanvir*, 592 U. S. 43, 49 (2020) (quotation marks omitted).

By allowing "any other appropriate provision," §1123(b)(6) empowers a bankruptcy court to exercise reasonable discretion. That §1123 confers broad discretion makes eminent sense, given "the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code." *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 525 (1984). Such flexibility is important to achieve Chapter 11's ever-elusive goal of ensuring fair and equitable recovery to creditors. See §§1129(a)(7), (b)(1).

The catchall authority in Chapter 11 therefore empowers a bankruptcy court to exercise its discretion to deal with complex scenarios, like the collective-action problems that plague mass-tort bankruptcies. Non-debtor releases are often appropriate—indeed are essential—in such circumstances.

And courts have therefore long found non-debtor releases to be appropriate in certain narrow circumstances under §1123(b)(6). Indeed, courts have been approving such non-debtor releases almost as long as the current Bankruptcy Code has existed since its enactment in 1978. See, *e.g.*, *In re Johns-Manville Corp.*, 68 B. R. 618, 624–626 (Bkrtcy. Ct. SDNY 1986), aff'd, 837 F. 2d, at 90; *A. H. Robins Co.*, 88 B. R., at 751, aff'd, 880 F. 2d, at 696. Historical and contemporary practice demonstrate that non-debtor releases are especially appropriate when (as here) non-debtor releases and corresponding settlement payments preserve and increase the debtor's estate and thereby ensure fair and equitable recovery for creditors.

Over those decades of practice, courts have developed and applied numerous factors for determining whether a non-debtor release is "appropriate" in a given case. §1123(b)(6); see H. Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 771–773 (1982) (noting the common-law-like process by which factors important to a discretionary decision develop over time). Those factors reflect the fact that determining whether a non-debtor release is "appropriate" is a holistic inquiry that depends on the precise facts and circumstances of each case. And the factors have served to confine the use of non-debtor releases to well-defined and narrow circumstances—precisely those circumstances where the collective-action problems arise.

For instance, since the 1980s, the Second Circuit has been a leader on the non-debtor release issue. See, *e.g.*, *Johns-Manville Corp.*, 837 F. 2d 89 (1988); *In re Drexel Burnham Lambert Group, Inc.*, 960 F. 2d 285 (1992); *In re Metromedia Fiber Network, Inc.*, 416 F. 3d 136 (2005). Over time, the Second Circuit has developed a non-exhaustive list of factors for determining whether a non-debtor release is appropriately employed and appropriately tailored in a given case.

First, and critically, the court must determine whether the released party is closely related to the debtor—for example, through an indemnification agreement—where "a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." 69 F. 4th, at 78 (quotation marks omitted). Second, the court must determine if the claims against the non-debtor are "factually and legally intertwined" with claims against the debtor. *Ibid.* Third, the court must ensure that the "scope of the releases" is tailored to only the claims that must be released to protect the plan. *Ibid.* Fourth, even then, the court should approve the release only if it is truly "essential" to the plan's success and the reorganization would fail without it. *Ibid.* Fifth, the court must consider whether, as part of the settlement, the non-debtor party has paid "substantial assets" to the estate. *Ibid.* Sixth, the court should determine if the plan provides "fair payment" to creditors for their released claims. *Id.*, at 79. Seventh, the court must ensure that the creditors "overwhelmingly" approve of the release, which the Second Circuit defined as a 75 percent "bare minimum." *Id.*, at 78–79 (quotation marks omitted).[2]

Factors one through four ensure that the releases are necessary to solve collective-action problems that threaten the bankruptcy and prevent fair and equitable recovery for the victims and creditors. Factor five makes sure that the releases are not a free ride for the non-debtor. Factor six ensures that the victims and creditors receive fair compensation. Together, factors five and six assess whether there has been a fair settlement given the probability of victims' and creditors' recovery from the non-debtor and the likely amount of any such recovery. And factor seven ensures that the vast majority of victims and creditors approve, meaning that the release is solving a holdout problem.

As the Courts of Appeals' comprehensive factors illustrate, §1123(b)(6) limits a bankruptcy court's authority in important respects. A non-debtor release must be "appropriate" given all of the facts and circumstances of the case. And as the history of non-debtor releases illustrates, the appropriateness requirement confines the use of non-debtor releases to narrow and relatively rare circumstances where the releases are necessary to help victims and creditors achieve fair and equitable recovery.

As long as every class of victims and creditors supports the plan by a majority vote in number and at least a two-thirds vote in amount, the plan is "said to be confirmed consensually," "even if some classes have dissenting creditors." 7 Collier, Bankruptcy ¶1129.01, at 1129–13. And the Courts of Appeals have allowed non-debtor

[2] Other Courts of Appeals have used similar factors for evaluating non-debtor releases. See, *e.g.*, *In re Seaside Engineering & Surveying, Inc.*, 780 F. 3d 1070, 1079–1081 (CA11 2015); *National Heritage Foundation, Inc.* v. *Highbourne Foundation*, 760 F. 3d 344, 347–351 (CA4 2014); *In re Dow Corning Corp.*, 280 F. 3d 648, 658–661 (CA6 2002).

releases only when there is an even higher level of supermajority victim and creditor approval. In the mass-tort bankruptcy cases, most plans have easily cleared that bar and received close to 100 percent approval. *E.g.*, *Johns-Manville Corp.*, 68 B. R., at 631 (95 percent approval); *A. H. Robins Co.*, 880 F. 2d, at 700 (over 94 percent approval); *Dow Corning*, 287 B. R., at 413 (over 94 percent approval); 69 F. 4th, at 82 (over 95 percent approval here). So in reality, as opposed to rhetoric, the non-debtor releases in mass-tort bankruptcy plans, including this one, have been approved by all but a comparatively small group of victims and creditors.

In every bankruptcy of this kind, moreover, the plan nonconsensually releases victims' and creditors' claims *against the debtor*. The only difference with non-debtor releases is that they release victims' and creditors' claims not against the debtor but rather against non-debtors who are closely related to the debtor, such as indemnified officers and directors.

II

In this case, as in many past mass-tort bankruptcies, the non-debtor releases were appropriate and therefore authorized by 11 U. S. C. §1123(b)(6) of the Code. The non-debtor releases were needed to ensure meaningful victim and creditor recovery in the face of multiple collective-action problems.

A

Purdue Pharma was a pharmaceutical company owned and directed by the extended Sackler family. Brothers Arthur, Mortimer, and Raymond Sackler purchased the company in 1952. Since then, Purdue has been wholly owned by entities and trusts established for the benefit of Mortimer Sackler's and Raymond Sackler's families and descendants, and those families also closely controlled Purdue's operations.

In the 1990s, Purdue developed the drug OxyContin, a powerful and addictive opioid painkiller. Purdue aggressively marketed that drug and downplayed or hid its addictive qualities. OxyContin helped people to manage pain. But the drug's addictive qualities led to its widespread abuse. OxyContin played a central role in the opioid-abuse crisis from which millions of Americans and their families continue to suffer.

Starting in the early 2000s, governments and individual plaintiffs began to sue Purdue for the harm caused by OxyContin. In 2007, Purdue settled large swaths of those claims and pled guilty to felony misbranding of OxyContin.

But within the next decade, victims of the opioid crisis and their families, along with state and local governments fighting the crisis, began filing a new wave of lawsuits, this time also naming members of the Sackler family as defendants. Today, those claims amount to more than $40 *trillion* worth of alleged damages against Purdue and the Sacklers. (For perspective, $40 trillion is about seven times the total annual spending of the U. S. Government.)

As the litigation by victims and state and local governments mounted, the U. S. Government then brought federal criminal and civil charges against Purdue. The U. S. Government has not brought criminal charges against any of the Sacklers individually. Nor have any States brought criminal charges against any of the Sacklers individually.

As to the criminal charges against Purdue, the company pled guilty to conspiracy to defraud the United States, to violate the Food, Drug, and Cosmetic Act, and to violate the federal anti-kickback statute. As part of the global resolution of the charges, Purdue agreed to a $2 billion judgment to the U. S. Government that would be "deemed to have the status of an allowed superpriority" claim in bankruptcy. 17 App. in No. 22–110 etc. (CA2), p. 4804. The U. S. Government agreed not to "initiate any further criminal charges against Purdue." 16 *id.,* at 4798.

Unable to pay its colossal potential liabilities, Purdue filed for bankruptcy under Chapter 11 of the Bankruptcy Code. The ensuing case exemplified the flexibility and common sense of the bankruptcy system at work.

The proceedings were extraordinarily complex. The case involved "likely the largest creditor body ever," and the number of claims filed—totaling more than 600,000—was likely "a record." *In re Purdue Pharma L. P.*, 633 B. R. 53, 58 (Bkrtcy. Ct. SDNY 2021). Further complicating matters was the need to allocate funds between, on the one hand, individual victims and the hospitals that urgently needed relief and, on the other hand, government entities at all levels that urgently needed funds for opioid crisis prevention and treatment efforts. *Id.*, at 83.

Aided by perhaps "the most extensive discovery process" that "any court in bankruptcy has ever seen," the parties engaged in prolonged arms-length negotiations. *Id.*, at 85–86. They ultimately agreed on a multi-faceted compensation plan for the victims and creditors and reorganization plan for Purdue. Under that plan, Purdue would cease to exist and would be replaced with a new company that would manufacture opioid-abatement medications. And approximately $7 billion would be distributed among nine trusts to compensate victims and creditors and to fund efforts to abate the opioid crisis by preventing and treating addiction.

To determine how to allocate the $7 billion, the victims and creditors then engaged in a series of "heavily negotiated and intricately woven compromises" and devised a "complex allocation" of the funds to different classes of victims and creditors. *Id.*, at 83, 90. In the end, more than 95 percent of voting victims and creditors approved of the distribution scheme.

That plan would distribute billions of dollars to communities to use exclusively for prevention and treatment programs. And $700 to $750 million was set aside to compensate individual tort victims and their families. 1 App. 561. Opioid victims and their families would each receive somewhere between $3,500 and $48,000 depending on the category of claim and level of harm. *Id.*, at 573–584; 6 App. in No. 22–110 etc. (CA2), at 1695.

B

Under the reorganization plan, victims' and creditors' claims *against Purdue Pharma* were released (even if some victims and creditors did not consent). As in other mass-tort bankruptcies described above, a related and equally essential facet of the Purdue plan was the non-debtor release provision. Under that provision, the victims' and creditors' claims *against the Sacklers* were also released. As a result, Purdue's victims and creditors could not later sue either Purdue Pharma or members of the Sackler family (the officers and directors of Purdue Pharma) for Purdue's and the Sacklers' opioid-related activities.

The non-debtor release provision prevented a race to the courthouse against the Sacklers. As a result, the non-debtor release provision solved two separate collective-action problems that dogged Purdue's mass-tort bankruptcy: (i) It protected Purdue's estate from the risk of being depleted by indemnification claims, and (ii) it operated as a settlement of potential claims against the Sacklers and thus enabled the Sacklers' large settlement payment to the estate. That settlement payment in turn quadrupled the amount in the Purdue estate and enabled substantially greater recovery for the victims.

I will now explain both of those important points in some detail.

First, and critical to a proper understanding of this case, the non-debtor release provision was essential to *preserve*

Purdue's existing assets. By preserving the estate, the non-debtor release provision ensured that the assets could be fairly and equitably apportioned among all victims and creditors rather than devoured by one group of potential plaintiffs.

How? Pursuant to a 2004 indemnification agreement, Purdue had agreed to pay for liability and legal expenses that officers and directors of Purdue faced for decisions related to Purdue, including opioid-related decisions. See *In re Purdue Pharma L. P.*, 69 F. 4th 45, 58–59 (CA2 2023). That indemnification agreement covered judgments against the Sacklers and related legal expenses.

As explained above, the Sacklers wholly owned and controlled Purdue, a closely held corporation. The Sacklers "took a major role" in running Purdue, including making decisions about "Purdue's practices regarding its opioid products." 633 B. R., at 93. In short, the Sacklers potentially shared much of the liability that Purdue faced for Purdue's opioid practices. See *In re Purdue Pharma, L. P.*, 635 B. R. 26, 87 (SDNY 2021) (claims against the Sacklers are "deeply connected with, if not entirely identical to," claims against Purdue (quotation marks omitted)); see also 633 B. R., at 108.

But due to the indemnification agreement, if victims and creditors were to sue the Sacklers directly for claims related to Purdue or opioids, the Sacklers would have a reasonable basis to seek reimbursement from Purdue for liability and litigation costs. So Purdue could potentially be on the hook for a substantial amount of the Sacklers' liability and litigation costs. In such indemnification relationships, "a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." 69 F. 4th, at 78 (quotation marks omitted).

As a real-world matter, therefore, opioid-related claims *against the Sacklers* could come out of the same pot of Purdue money as opioid-related claims *against Purdue*. So releasing claims against the Sacklers is not meaningfully different from releasing claims against Purdue itself, which the bankruptcy plan here of course also mandated. Both sets of releases were necessary to preserve Purdue's estate so that it was available for all victims and creditors to recover fairly and equitably. Otherwise, the estate could be zeroed out: A few victims or creditors could race to the courthouse and obtain recovery from Purdue or the Sacklers (ultimately the same pot of money) and thereby deplete the assets of the company and leave nothing for everyone else.

To fully understand why both sets of releases were necessary—against Purdue and against the Sacklers—suppose that the plan did *not* release the Sacklers from opioid- and Purdue-related liability. Victims' and creditors' opioid-related claims *against Purdue* would be discharged in Purdue's bankruptcy (even without their consent). But any victims or creditors could still sue *the Sacklers* for essentially the same claims.

Suppose that a State or a group of victims sued the Sacklers and received a large reward. The Sacklers "would have a reasonable basis to seek indemnification" from Purdue for judgments and legal expenses. *Id.*, at 72. Therefore, any liability judgments and litigation costs for certain plaintiffs in their suits *against the Sacklers* could "deplete the *res*" of *Purdue's* bankruptcy—meaning that there might well be nothing left for all of the other victims and creditors. *Id.*, at 80. Even if the Sacklers' indemnification claims against Purdue were unsuccessful, Purdue would "be required to litigate" those claims, which would likely diminish the *res*, "no matter the ultimate outcome of those claims." *Ibid.*

Every victim and creditor knows that a single judgment by someone else against the Sacklers could deplete the Purdue estate and leave nothing for anyone else. So every victim and creditor would have an incentive to race to the courthouse to sue the Sacklers. A classic collective-action problem.

The non-debtor releases of claims against the Sacklers prevented that collective-action problem in the same way that the releases of claims against Purdue itself prevented the identical collective-action problem. Both protected Purdue's assets from being consumed by the first to sue successfully. And the non-debtor releases were narrowly tailored to the problem. The non-debtor releases enjoined victims and creditors from bringing claims against the Sacklers only in cases where Purdue's conduct, or the victims' or creditors' claims asserted against Purdue, was a legal cause or a legally relevant factor to the cause of action against the Sacklers. 633 B. R., at 97–98 (defining the release to encompass only claims that "directly affect the *res* of the Debtors' estates," such as claims that would trigger the Sacklers' "rights to indemnification and contribution"); see also *id.*, at 105. In other words, the releases applied only to claims for which the Sacklers had a reasonable basis to seek coverage or reimbursement from Purdue.

The non-debtor release provision therefore released claims against the Sacklers that are essentially the same as claims against Purdue. Doing so preserved Purdue's bankruptcy estate so that it could be fairly apportioned among the victims and creditors.

Second, the non-debtor releases not only *preserved* the existing Purdue estate; those non-debtor releases also greatly *increased* the funds in the Purdue estate so that the victims and creditors could receive greater compensation.

Standing alone, Purdue's estate is estimated to be worth approximately $1.8 billion—a small fraction of the sizable claims against Purdue. *Id.*, at 90; 22 App. in No. 22–110 etc. (CA2), at 6507. If that were all the money on the table, the Bankruptcy Court found, the victims and creditors "would probably recover nothing" from Purdue's estate. 633

B. R., at 109. That is because the United States holds a $2 billion "superpriority" claim, meaning that the United States would be first in line to recover ahead of all of the victims and other creditors. The United States' claim would wipe out Purdue's entire $1.8 billion value. "As a result, many victims of the opioid crisis would go without any assistance." 69 F. 4th, at 80.

So for the victims and other creditors to have any hope of meaningful recovery, Purdue's bankruptcy estate needed more funds.

Where to find those funds? The Sacklers' assets were the answer. After vigorous negotiations, a settlement was reached: In exchange for the releases, the Sacklers ultimately agreed to make significant payments to Purdue's estate—between $5.5 and $6 billion. Adding that substantial amount to Purdue's comparatively smaller bankruptcy estate enabled Purdue's reorganization plan to distribute an estimated $7 billion or more to the victims and creditors—thereby quadrupling the size of the estate available for distribution. With that enhanced estate, the plan garnered 95 percent support from the voting victims and creditors. That high level of support tends to show that this was a very good plan for the victims and creditors. Because it led to that high level of support, the Sacklers' multi-billion-dollar payment was critical to creating a successful reorganization plan.

That payment was made possible by heavily negotiated settlements among Purdue, the victims and creditors, and the Sacklers. Most relevant here, in exchange for the Sacklers agreeing to pay billions of dollars to the bankruptcy estate, the victims and creditors agreed to release their claims against the Sacklers. The settlement—exchanging releases for the Sacklers' $5.5 to $6 billion payment—enabled the victims and creditors to avoid "the significant risk, cost and delay (potentially years) that would result from pursuing the Sacklers and related parties through litigation." 1 App. 31.

Indeed, after a 6-day trial involving 41 witnesses, the Bankruptcy Court found that the settlement provided the best chance for the victims and creditors to ever see any money from the Sacklers. See 633 B. R., at 85, 90. (That is a critical point that the Court today whiffs on.) Indeed, the Bankruptcy Court found that the victims and creditors would be unlikely to recover from the Sacklers by suing the Sacklers directly due to numerous potential weaknesses in and defenses to the victims' and creditors' legal theories. See *id.*, at 90–93, 108. Even if the suits were successful, the Bankruptcy Court expressed "significant concern" about the ability to collect any judgments from the Sacklers due to the difficulty of reaching their assets in foreign countries and in spendthrift trusts. *Id.*, at 89; see also *id.*, at 108–109.

For those reasons, the Bankruptcy Court concluded that the $5.5 to $6 billion settlement payment and the releases were fair and equitable and in the victims' and creditors' best interest. *Id.*, at 107–109, 112. The settlement amount of $5.5 to $6 billion was "properly negotiated" and "reflects the underlying strengths and weaknesses of the opposing parties' legal positions and issues of collection." *Id.*, at 93.[3]

From the victims' and creditors' perspective, "suing the Sacklers would have been a costly endeavor with a small chance of success. From the Sacklers' perspective, defending those suits would have been a costly endeavor

[3] The Court implies that some victims could recover from the Sacklers in tort litigation up to the total of their combined assets, and that the Sacklers are somehow getting off easy by paying only $5.5 to $6 billion. But the Court's belief is not rooted in reality given the Bankruptcy Court's undisputed factual findings to the contrary: Large tort recoveries against any of the Sacklers were (and remain) far from certain—and in any event would produce recoveries for only a few and leave other victims with nothing.

with a very small chance of a large liability." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 1004 (2023). So as in many litigation settlements, the parties agreed to the $5.5 to $6 billion settlement in light of that "very small chance of a large liability." *Ibid.*

Importantly, the victims and creditors—who obviously have no love for the Sacklers—insisted on the releases of their claims against the Sacklers. Tr. of Oral Arg. 61, 93; Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 10. Why did the releases make sense for the victims and creditors?

For starters, the releases were part of the settlement and enabled the Sacklers' $5.5 to $6 billion settlement payment. Moreover, without the releases, some of Purdue's victims and creditors—maybe a State, maybe some opioid victims—would sue the Sacklers directly for claims "deeply connected with, if not entirely identical to," claims that the victims and creditors held against Purdue. 635 B. R., at 87 (quotation marks omitted). To be sure, the Bankruptcy Court found that those suits would face significant challenges. But the victims and creditors were understandably worried, as they explained during the Bankruptcy Court proceedings, that the Sacklers would "exhaust their collectible assets fighting and/or paying ONLY the claims of certain creditors with the best ability to pursue the Sacklers in court." 1 App. 76. And if even a *single* direct suit against the Sacklers succeeded, the suit could potentially wipe out much if not all of the Sacklers' assets in one fell swoop—making those assets unavailable for the Purdue estate and therefore unavailable for all of the other the victims and creditors.

In sum, if there were no releases, and victims and creditors were therefore free to sue the Sacklers directly, one of three things would likely happen. One possibility is that no lawsuits against the Sacklers would succeed, and no victim or creditor would recover any money from them. And without the $5.5 to $6 billion settlement payment, there would be no recovery from Purdue either. Another possibility is that a large claim or claims would succeed, and the Sacklers would be indemnified by Purdue—thereby wiping out Purdue's estate for all of the other victims and creditors. Last, suppose that a large claim succeeded and that the Sacklers were not indemnified for that liability. Even in that case, only a few victims or creditors would be able to recover from the Sacklers at the expense of fair and equitable distribution to the rest of the victims and creditors.

As the Second Circuit stated, without the releases, the victims and creditors "would go without any assistance and face an uphill battle of litigation (in which a single claimant might disproportionately recover) without fair distribution." 69 F. 4th, at 80. Another classic collective-action problem.

In short, without the releases and the significant settlement payment, two separate collective-action problems stood in the way of fair and equitable recovery for the victims and creditors: (1) the Purdue estate would not be preserved for the victims and creditors to obtain recovery, and (2) the Purdue estate would be much smaller than it would be with the Sacklers' settlement payment. The releases and settlement payment solved those problems and ensured fair and equitable recovery for the opioid victims.

C

For those reasons, the Bankruptcy Court found that without the releases and settlement payment, the reorganization plan would "unravel." 633 B. R., at 107, 109. All of the "heavily negotiated and intricately woven compromises in the plan" that won the victims' and creditors' approval, *id.*, at 90, would "fall apart for lack of funding and the inevitable fighting over a far smaller and less certain recovery with its renewed focus on pursuing individual claims and races to collection." *Id.*, at 84. There simply would not be enough money to support a reorganization plan that the victims and creditors would approve.

Absent the releases and settlement payment, the Bankruptcy Court found, the "most likely result" would be liquidation of a much smaller $1.8 billion estate. *Id.*, at 90. In a liquidation, the United States would recover first with its $2 billion superpriority claim, taking for itself the whole pie. And the victims and other creditors "would probably recover nothing." *Id.*, at 109.

Given that alternative, it is hardly surprising that the opioid victims and creditors almost universally support Purdue's Chapter 11 reorganization plan and the non-debtor releases. That plan promised to obtain significant assets from the Sacklers, to preserve those assets from being depleted by litigation for a few, and to distribute those much-needed funds fairly and equitably.

As a result, the opioid victims' and creditors' support for the reorganization plan was *overwhelming*. Every victim and creditor had a chance to vote on the plan during the bankruptcy proceedings. And of those who voted, more than 95 percent approved of the plan. *Id.*, at 107.

Since then, even more victims and creditors have gotten on board. Now, all 50 States have signed on to the plan. The lineup before this Court is telling. On one side of the case: the tens of thousands of opioid victims and their families; more than 4,000 state, city, county, tribal, and local government entities; and more than 40,000 hospitals and healthcare organizations. They all urge the Court to uphold the plan.

At this point, on the other side of this case stand only a sole individual and a small group of Canadian creditors.[4]

Given all of the extraordinary circumstances, the Bankruptcy Court and Second Circuit concluded that the non-debtor releases here not only were appropriate, but were essential to the success of the plan. The Bankruptcy Court and Second Circuit thoroughly analyzed each of the relevant factors before reaching that conclusion: First, the released non-debtors (the Sacklers) closely controlled and were indemnified by the company. 69 F. 4th, at 79. Second, the claims against the Sacklers were based on essentially the same facts and legal theories as the claims against Purdue. *Id.*, at 80. Third, the releases were essential for the reorganization to succeed, because the releases protected the Purdue estate from indemnification claims and expanded the Purdue estate to enable victim and creditor recovery. *Id.*, at 80–81. Fourth, the releases were narrowly tailored to protect the estate from indemnification claims. *Ibid.* Fifth, the releases secured a substantial settlement payment to significantly increase the funds in the estate. *Id.*, at 81. Sixth, that enhanced estate allowed the plan to distribute "fair and equitable" payments to the victims and creditors. *Id.*, at 82 (quotation marks omitted). And seventh, for all those reasons, the victims and creditors do not just urgently and overwhelmingly approve of the releases, they all but demanded the releases. *Ibid.*

Congress invited bankruptcy courts to consider exactly those kinds of extraordinary circumstances when it

[4] The regional United States Trustee for three States, a Government bankruptcy watchdog appointed to oversee bankruptcy cases in those States, also opposes the plan for reasons that remain mystifying. The U. S. Trustee purports to look out for victims and creditors, but here the victims and creditors made emphatically clear that the "U. S. Trustee does not speak for the victims of the opioid crisis" and is indeed thwarting the opioid victims' efforts at fair and equitable recovery. Tr. of Oral Arg. 93.

authorized bankruptcy plans to include "any other appropriate provision" that is "not inconsistent" with the Code. §1123(b)(6).

III

The Court decides today to reject the plan by holding that non-debtor releases are categorically impermissible as a matter of law. That decision contravenes the Bankruptcy Code. It is regrettable for the opioid victims and creditors, and for the heavily negotiated equitable distribution of assets that they overwhelmingly support. And it will harm victims in pending and future mass-tort bankruptcies. The Court's decision deprives the bankruptcy system of a longstanding and critical tool that has been used repeatedly to ensure fair and sizable recovery for victims—to repeat, recovery for *victims*—in mass torts ranging from Dalkon Shield to the Boy Scouts.

On the law, the Court's decision to reject the plan flatly contradicts the Bankruptcy Code. The Code explicitly grants broad discretion and flexibility for bankruptcy courts to handle bankruptcies of extraordinary complexity like this one. For several decades, bankruptcy courts have been employing non-debtor releases to facilitate fair and equitable recovery for victims in mass-tort bankruptcies. In this case, too, the Bankruptcy Court prudently and appropriately employed its discretion to fairly resolve a mass-tort bankruptcy.

At times, the Court seems to view the Sacklers' settlement payment into Purdue's bankruptcy estate as insufficient and the plan as therefore unfair to victims and creditors. If that were true, one might expect the fight in this case to be over whether the non-debtor releases and settlement amount were "appropriate" given the facts and circumstances of this case. 11 U. S. C. §1123(b)(6).

Yet that is not the path the Court takes. The Court does not contest the Bankruptcy Court's and Second Circuit's conclusion that a non-debtor release was necessary and appropriate for the settlement and the success of Purdue's reorganization—the best, and perhaps the only, chance for victims and creditors to receive fair and equitable compensation. Indeed, no party has challenged the Bankruptcy Court's factual findings or made an argument that non-debtor releases were used inappropriately in this specific case.

Instead, the Court categorically decides that non-debtor releases are *never* allowed as a matter of law. The text of the Bankruptcy Code does not remotely support that categorical prohibition.[5]

As explained, §1123(b)(6)'s catchall authority affords bankruptcy courts broad discretion to approve "any other appropriate provision not inconsistent with the applicable provisions" of the Bankruptcy Code. Recall that §1123(b)(1) expressly authorizes releases of victims' and creditors' claims against the debtor company—here, against Purdue.

---

[5] To remind the reader of §1123(b)'s lengthy text: A "plan may—

"(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

"(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

"(3) provide for—

"(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

"(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

"(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

"(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

"(6) include any other appropriate provision not inconsistent with the applicable provisions of this title."

And recall that §1123(b)(3) expressly authorizes settlements and releases of the debtor company's claims against non-debtors—here, against the Sacklers. Section 1123(b)(6)'s catchall authority is easily broad enough to allow settlements and releases of the same victims' and creditors' claims against the same non-debtors (the Sacklers), who are indemnified by the debtor and who made a large settlement payment to the debtor's estate. After all, the Second Circuit stated that in indemnification relationships "a suit against the non-debtor is, in essence, a suit against the debtor." *In re Purdue Pharma L. P.*, 69 F. 4th 45, 78 (2023) (quotation marks omitted). And even when the officers and directors are not indemnified, the releases may enable a settlement where the non-debtor makes a sizable payment to the estate that can be fairly and equitably distributed to the victims and creditors, rather than being zeroed out by the first successful suit.

A

So how does the Court reach its atextual and ahistorical conclusion? The Court primarily seizes on the canon of *ejusdem generis*, an interpretive principle that "limits general terms that follow specific ones to matters similar to those specified." *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 294 (2011) (quotation marks and alteration omitted). But the Court's use of that canon here is entirely misguided.

The *ejusdem generis* canon "applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs, cats, horses, cattle, and other animals*." A. Scalia & B. Garner, Reading Law 199 (2012); see also *id.*, at 200–208 ("trays, glasses, dishes, or other tableware"; "gravel, sand, earth or other material"; and numerous other similar lists (quotation marks omitted)); W. Eskridge, Interpreting Law 77 (2016) ("automobiles, motorcycles, and other mechanisms for conveying persons or things" (quotation marks omitted)).

As a general matter, as Justice Scalia explained for the Court, a catchall at the end of the list should be construed to cover "matters not specifically contemplated—known unknowns." *Republic of Iraq* v. *Beaty*, 556 U. S. 848, 860 (2009). That is the "whole value of a generally phrased residual clause." *Ibid*. Or stated otherwise, the fact that "a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) (quotation marks omitted).

The *ejusdem generis* canon can operate to narrow a broad catchall term in certain circumstances. The canon "parallels common usage," reflecting the assumption that when "the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage." Scalia & Garner, Reading Law, at 199. The canon in essence "implies the addition" of the term "similar" in the catchall so that the catchall does not extend so broadly as to defy common sense. *Ibid*. Rather, the catchall extends to similar things or actions that serve the same statutory "purpose." *Id*., at 208.

Here, the Court applies the canon to breezily conclude that there is an "obvious link" through §§1123(b)(1)–(5) that precludes a non-debtor release provision being approved under §1123(b)(6). *Ante,* at 11. The obvious link, according to the Court, is that plan provisions must "concern *the debtor*—its rights and responsibilities, and its relationship with its creditors." *Ibid*.

As an initial matter, the Court does not explain why its supposed common thread excludes the non-debtor releases at issue here. Those releases obviously "concern" the debtor in multiple overlapping respects. *Ibid*. As explained, Purdue's bankruptcy plan released the Sacklers only for claims based on *the debtor's* (Purdue's) misconduct. See 69 F. 4th, at 80 (releasing only claims to which Purdue's conduct was "a legal cause or a legally relevant factor to the cause of action" (quotation marks omitted)). The releases therefore applied only to claims held by *the debtor's* victims and creditors. And the releases protected *the debtor* from indemnification claims. So the non-debtor releases here did not just "concern" the debtor, they were critical to the debtor's reorganization.

So the Court's purported "link" manages the rare feat of being so vague ("concerns the debtor"?) as to be almost meaningless—and if not meaningless, so broad as to plainly cover non-debtor releases. It is hard to conjure up a weaker *ejusdem generis* argument than the one put forth by the Court today.

In any event, even on its own terms, the Court's *ejusdem generis* argument is dead wrong for two independent reasons. First, the Court's purported common thread is factually incorrect as a description of (b)(1) to (b)(5). Second, and independent of the first point, black-letter law says that the *ejusdem generis* canon requires looking at the "evident purpose" of the statute in order to discern a common thread. Scalia & Garner, Reading Law, at 208; see Eskridge, Interpreting Law, at 78. And here, the Court's purported common thread ignores (and indeed guts) the evident purpose of §1123(b).

First, the Court's purported common thread is factually incorrect. The Court says that the "obvious link" through paragraphs (b)(1) to (b)(5) is that all are limited to "*the debtor*—its rights and responsibilities, and its relationship with its creditors." *Ante,* at 11. But in multiple respects, that assertion is not accurate.

For one thing, paragraph (b)(3) allows a bankruptcy court to modify the rights of debtors with respect to *non-debtors*. Under (b)(3), a bankruptcy court may approve a reorganization plan that settles, adjusts, or enforces "any claim" that the debtor holds against non-debtor third parties. That provision allows the debtor's estate to enter into a settlement agreement with a third party, where the estate agrees to release its claims against the third party in exchange for a settlement payment to the bankruptcy estate. And the bankruptcy court has the power to approve such a settlement if it finds the settlement fair and in the best interests of the estate. The bankruptcy court may later enforce that settlement. See generally 7 Collier on Bankruptcy ¶1123.02[3] (R. Levin & H. Sommer eds., 16th ed. 2023).

Importantly, in some cases, including this one, the debtor's creditors may hold derivative claims against that same non-debtor third party for the same "harm done to the estate." 69 F. 4th, at 70 (quotation marks omitted). So when the debtor settles with the non-debtor third party, that settlement also extinguishes the creditors' derivative claims against the non-debtor. And the creditors' consent is not necessary to do so.

To connect the dots: A plan provision settling the debtor's claims against non-debtors under (b)(3) therefore *nonconsensually extinguishes creditors' derivative claims against those non-debtors*. That fact alone defeats the Court's conclusion that §§1123(b)(1)–(5) deal only with relations between the debtor and creditors. If a plan provision under (b)(3) can nonconsensually release some of the creditors' derivative claims against a non-debtor, a plan provision under the catchall in (b)(6) that nonconsensually releases some of the creditors' direct claims against those same non-debtors is easily of a piece—basically the same thing.

This case illustrates the point. Some of the more substantial assets of Purdue's estate are fraudulent transfer claims worth $11 billion that Purdue holds against the non-debtor Sacklers. *In re Purdue Pharma L. P.*, 633

B. R. 53, 87 (Bkrtcy. Ct. SDNY 2021). Under (b)(3), as part of its reorganization plan, Purdue settled the fraudulent transfer claims with the non-debtor Sacklers. The Bankruptcy Court approved that settlement as fair and equitable. *Id.*, at 83–95. That settlement resolved the claims that likely would have had "the best chance of material success among all of the claims against" the Sacklers. *Id.*, at 109; see also *id.*, at 83.

Notably, the result of that settlement was to also *nonconsensually* extinguish the victims' and creditors' derivative fraudulent transfer claims against the Sacklers. In the absence of the bankruptcy proceeding, victims and creditors could have litigated the fraudulent transfer claims themselves as derivative claims. But because Purdue settled the claims under §1123(b)(3), the victims and creditors could no longer do so.

Moreover, not all victims and creditors consented to the release of those derivative claims. But no one disputes that the Bankruptcy Code authorized that nonconsensual non-debtor release of derivative claims. See 69 F. 4th, at 70 (that conclusion is "well-settled").

The plan therefore released both the estate's claims against the Sacklers *and* highly valuable derivative claims that the victims and creditors held against the Sacklers. Paragraph (b)(3) therefore demonstrates that §1123(b) reaches beyond just creditor-debtor relationships, particularly when the relationship between creditors and other non-debtors can affect the estate. That indisputable point alone defeats the Court's conclusion that §1123(b)'s provisions relate only to the debtor and do not allow releases of claims that victims and creditors hold against non-debtors.

The Court tries to sidestep that conclusion by distinguishing derivative claims from direct claims. Releases of derivative claims, the Court says, are authorized by paragraph (b)(3) "because those claims belong to the debtor's estate." *Ante,* at 12. No doubt. But the question then becomes whether releases of direct claims under (b)(6)'s catchall are relevantly similar to releases of derivative claims that all agree are authorized under (b)(3). The answer in this case is yes. Here, both the derivative and direct claims against the Sacklers are held by the same victims and creditors, and both the derivative and direct claims against the Sacklers could deplete Purdue's estate.

The Court's purported common thread is further contradicted by several other kinds of non-debtor releases that "are commonplace, important to the bankruptcy system, and broadly accepted by the courts and practitioners as necessary and proper" plan provisions under §1123(b)(6). Brief for American College of Bankruptcy as *Amicus Curiae* 3.

Three examples illustrate the point: consensual non-debtor releases, full-satisfaction non-debtor releases, and exculpation clauses.

Consensual non-debtor releases are routinely included in bankruptcy plans even though those releases apply to claims by victims or creditors against non-debtors—just like the claims here. And it is "well-settled that a bankruptcy court may approve" such consensual releases. 69 F. 4th, at 70; see also Brief for American College of Bankruptcy as *Amicus Curiae* 5–7.

Consensual releases are uncontroversial, but they are not expressly authorized by the Bankruptcy Code. So the only provision that could possibly supply authority to include those releases in the bankruptcy plan is the catchall in §1123(b)(6).

The Court today does not deny that consensual releases are routine in the bankruptcy context and that courts have long approved them. See *ante*, at 18–19. But where, on the Court's reading of the Bankruptcy Code, would the bankruptcy court obtain the authority to enter and later enforce that consensual release?

One suggestion is that the authority comes from the parties' consent and is akin to a "contractual agreement." Tr. of Oral Arg. 33. But that theory does not explain what provision of the Bankruptcy Code authorizes consensual releases *in bankruptcy plans*. After all, contracts are enforceable under state law, ordinarily in state courts. But in bankruptcy, consensual releases are routinely part of a reorganization plan with voting overseen by the bankruptcy court and conditions enforceable by the bankruptcy court. See Brief for American College of Bankruptcy as *Amicus Curiae* 4–7.

To reiterate, the only provision that could provide such authority is §1123(b)(6). So if the Court thinks that a consensual release can be part of the plan, even the Court must acknowledge that §1123(b)(6) can reach creditors' claims against non-debtors.

The Court's purported common thread is still further contradicted by yet another regular bankruptcy practice: full-satisfaction releases. Full-satisfaction releases provide full payment for creditors' claims against non-debtors and then release those claims. When a full-satisfaction release is included in a reorganization plan, the bankruptcy court exercises control over creditors' claims against non-debtors.

Again, the only provision that could possibly supply authority to include those full-satisfaction releases in a bankruptcy plan is the catchall in §1123(b)(6). Any contract-law theory would not work for full-satisfaction releases, given that holdout creditors often refuse to consent to full-satisfaction releases. See, *e.g.*, *In re A. H. Robins Co.*, 880 F. 2d 694, 696, 700, 702 (CA4 1989); *In re Boy Scouts of Am. and Del. BSA, LLC*, 650 B. R. 87, 115–116, 141 (Del. 2023). So if full-satisfaction releases are to be allowed, §1123(b)(6) must be read to reach creditor claims against non-debtors, even without consent.

The Court does not deny that consensual non-debtor releases and full-satisfaction releases might be permissible under §1123(b)(6). *Ante*, at 19. If they are permissible, then the Court's purported *ejusdem generis* common thread is thoroughly eviscerated because those releases involve claims by victims or creditors against non-debtors, just like here. (And if the Court instead means to hold open the possibility that consensual and full-satisfaction releases are actually impermissible, then its holding today is even more extreme than it appears.)

Exculpation clauses are yet another example. Exculpation clauses shield the estate's fiduciaries and other professionals (non-debtors) from liability for their work on the reorganization plan. See Brief for American College of Bankruptcy as *Amicus Curiae* 9. Without such exculpation clauses, "competent professionals would be deterred from engaging in the bankruptcy process, which would undermine the main purpose of chapter 11—achieving a successful restructuring." *Id.*, at 11; see also Brief for Highland Capital Management, L. P. as *Amicus Curiae* 3–5. For that reason, bankruptcy courts routinely approve exculpation clauses under §1123(b)(6). For exculpation clauses to be allowed, however, §1123(b)(6) must be read to reach creditor claims against non-debtors. So exculpation clauses further refute the Court's purported common thread.

The fact that plan provisions under §1123(b)(6) can reach non-debtors finds still more support in this Court's only case to analyze the catchall authority in §1123(b)(6), *United States* v. *Energy Resources Co.* The plan provision in *Energy Resources* ordered the IRS, a creditor, to apply the debtor's tax payments to trust-fund tax liability before other kinds of tax liability. *United States* v. *Energy Resources Co.*, 495 U. S. 545, 547 (1990). Importantly, if the debtor did not pay the trust-fund tax liability, then non-debtor officers of the company would be on the hook. *Ibid.* So the plan provision served to protect the company's non-debtor officers from "personal liability" for those taxes.

In re Energy Resources Co., 59 B. R. 702, 704 (Bkrtcy. Ct. Mass. 1986). In exchange for that protection, a non-debtor officer contributed funds to the bankruptcy plan. *Ibid.*

Echoing the Court today, the IRS objected to that plan, arguing that the bankruptcy court exceeded its authority under (b)(6) in part because there was no provision in the Code that expressly supported the plan provision. *Energy Resources*, 495 U. S., at 549–550. But this Court disagreed with the IRS and approved the plan based on the "residual authority" in (b)(6). *Id.*, at 549.

The plan provision in *Energy Resources* operated akin to a non-debtor release: It reduced the potential liability of a non-debtor (the non-debtor's officers) to another non-debtor (the IRS). *Energy Resources* therefore further demonstrates that plan provisions under §1123(b)(6) can affect creditor–non-debtor relationships.

In sum, the Court's statement that §1123(b) reaches only "*the debtor*—its rights and responsibilities, and its relationship with its creditors," *ante,* at 11, is factually incorrect several times over. Paragraphs 1123(b)(3) and (b)(6) already allow plans to affect creditor claims against non-debtors, such as through releases of creditors' derivative claims, consensual releases, full-satisfaction releases, and exculpation clauses. And this Court's precedent in *Energy Resources* confirms the point. The Court's *ejusdem generis* argument rests on quicksand.

Second, independent of those many flaws, the Court's entire approach to *ejusdem generis* is wrong from the get-go. When courts face a statute with a catchall, it is black-letter law that courts must try to discern the common thread by examining the "evident purpose" of the statute. Scalia & Garner, Reading Law, at 208; see also *Begay* v. *United States*, 553 U. S. 137, 146 (2008) (defining common thread "in terms of the Act's basic purposes"); Eskridge, Interpreting Law, at 78 ("statutory purpose" helps identify the common thread in *ejusdem generis* cases).[6]

Importantly, this Court has already explained that the purpose of §1123(b) is to grant bankruptcy courts "broad power" to approve plan provisions "necessary for a reorganization's success." *Energy Resources*, 495 U. S., at 551. *Energy Resources* demonstrates that the common thread of §1123(b) is bankruptcy court action to preserve the estate and ensure fair and equitable recovery for creditors. See, *e.g.*, *Pioneer Investment Services Co.* v. *Brunswick Associates L. P.*, 507 U. S. 380, 389 (1993); *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 528 (1984); J. Feeney & M. Stepan, 2 Bankruptcy Law Manual §11:1 (5th ed. 2023).

As explained at length above, to maximize recovery, the Court must solve complex collective-action problems. And for a bankruptcy court to solve all of the relevant collective-action problems, §§1123(b)(1)–(5) give the bankruptcy court broad power to modify parties' rights without their consent—most notably, to release creditors' claims against the debtor. §1123(b)(1). Under that provision, the Purdue plan released the victims' and creditors' claims *against Purdue* in order to prevent a collective-action problem in distributing Purdue's assets—and thereby to preserve the estate and ensure fair and equitable recovery for victims and creditors.

[6] The Court protests that we are looking to the "purpose" of the statute. But in *ejusdem generis* cases, courts are *required* to look at "purpose" in order to determine the common link, as Scalia and Garner and Eskridge all say, and as *Begay* indicated. That is longstanding black-letter law. And even outside the *ejusdem generis* context, the Court's allergy to the word "purpose" is strange. After all, "words are given meaning by their context, and context includes the purpose of the text. The difference between textualist interpretation" and "purposive interpretation is not that the former never considers purpose. It almost always does," but "the purpose must be derived from the text." A. Scalia & B. Garner, Reading Law 56 (2012).

The non-debtor release provision approved under §1123(b)(6) does the same thing and serves that same statutory purpose. As discussed above, the victims' and creditors' claims against the non-debtor Purdue officers and directors (the Sacklers) are essentially the same as their claims against Purdue. The claims against the Sacklers rest on the same legal theories and facts as the claims against Purdue, largely the Sacklers' opioid-related decisions in running Purdue. And the Sacklers are indemnified by Purdue's estate for their liability. So any liability could potentially come out of the Purdue estate just like the claims against Purdue itself.

Therefore, the nonconsensual releases against the Sacklers are not only of a similar genus, but in effect *the same thing* as the nonconsensual releases against Purdue that everyone agrees §1123(b)(1) already authorizes. Both were necessary to preserve the estate and prevent collective-action problems that could drain Purdue's estate, and thus both were necessary to enable Purdue's reorganization plan to succeed and to equitably distribute assets. And without the releases, there would be no settlement, meaning no $5.5 to $6 billion payment by the Sacklers to Purdue's estate. That would mean either that no victim or creditor could recover anything from the Sacklers (or indeed from Purdue), or that only a few victims or creditors could recover from the Sacklers at the expense of fair and equitable distribution to everyone else.

The statute's evident purpose therefore easily answers the *ejusdem generis* inquiry here. Absent other limitations and restrictions in the Code, §1123(b)(6) authorizes a bankruptcy court to modify parties' claims that could otherwise threaten to deplete the bankruptcy estate when doing so is necessary to preserve the estate and provide fair and equitable recovery for creditors.

In light of the "evident purpose" of §1123(b) to preserve the estate and ensure fair and equitable recovery for creditors in the face of collective-action problems, Scalia & Garner, Reading Law, at 208; see Eskridge, Interpreting Law, at 78, the Court's *ejusdem generis* theory simply falls apart.

In sum, for each of two independent reasons, the Court's *ejusdem generis* argument fails. First, its common thread is factually wrong. And second, its purported common thread disregards the evident purpose of §1123(b).

B

Despite the fact that non-debtor releases address the very collective-action problem that the bankruptcy system was designed to solve, the Court next trots out a few minimally explained arguments that non-debtor release provisions are "inconsistent with" various provisions of the Bankruptcy Code, including: (i) §524(g)'s authorization of non-debtor releases in asbestos cases; (ii) §524(e)'s statement that debtors' discharges do not automatically affect others' liabilities; and (iii) the Code's various restrictions on bankruptcy discharges. None of those arguments is persuasive.

First, the Court cites §524(g), which was enacted in 1994 to expressly authorize non-debtor releases in a specific context: cases involving mass harm "caused by the presence of, or exposure to, asbestos or asbestos-containing products." §524(g)(2)(B)(i)(I). From the fact that §524(g) allows non-debtor releases in the asbestos context, the Court infers that non-debtor releases are prohibited in other contexts. *Ante,* at 15.

But the very text of §524(g) *expressly precludes* the Court's inference. The statute says: "Nothing in [§524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." 108 Stat. 4117, note following 11 U. S. C. §524. Congress expressly authorized non-debtor releases in one specific context that was critically urgent in 1994 when it was enacted. But Congress also enacted the corresponding rule of construction into binding statutory text to "make clear" that §524(g) did not "alter" the bankruptcy courts' ability to use non-debtor release mechanisms as appropriate in other cases. 140 Cong. Rec. 27692 (1994).

Keep in mind that Congress enacted §524(g) in the early days of non-debtor releases, soon after bankruptcy courts began approving non-debtor releases in asbestos cases. See, *e.g.*, *In re Johns-Manville Corp.*, 68 B. R. 618, 621–622 (Bkrtcy. Ct. SDNY 1986), aff'd, 837 F. 2d 89, 90 (CA2 1988); *UNARCO Bloomington Factory Workers* v. *UNR Industries, Inc.*, 124 B. R. 268, 272, 278–279 (ND Ill. 1990). Section 524(g) set forth a detailed scheme sensitive to the specific needs of asbestos mass-tort litigation that was then engulfing and overwhelming American courts. For example, because asbestos injuries often have a long latency period, asbestos mass-tort bankruptcies needed to account for unknown claimants who could come out of the woodwork in the future. See Bankruptcy Reform Act of 1994, 108 Stat. 4114–4116; *In re Johns-Manville Corp.*, 68 B. R., at 627–629.

But as explained above, throughout the history of the Code and at the time §524(g) was enacted, bankruptcy courts were also issuing non-debtor releases in other contexts as well, such as in the Dalkon Shield mass-tort bankruptcy case. *A. H. Robins Co.*, 880 F. 2d, at 700–702; see also, *e.g.*, *In re Drexel Burnham Lambert Group, Inc.*, 960 F. 2d 285, 293 (CA2 1992) (securities litigation context). Congress therefore made clear that enacting §524(g) for the urgent asbestos cases did not disturb bankruptcy courts' preexisting authority to issue such releases in other cases.

Bottom line: The Court's reliance on §524(g) directly contravenes the actual statutory text.

Second, the Court cites §524(e), which states that a plan's discharge of the debtor "does not affect the liability of any other entity on . . . such debt." By its terms, §524(e) does not purport to preclude releases of creditors' claims against non-debtors. (And were the rule otherwise, even consensual releases would be prohibited as well.)

Notably, Congress changed §524(e) to its current wording in 1979. Before 1979, the statute arguably did preclude releases of claims against non-debtors who were co-debtors with a bankrupt company. See 11 U. S. C. §34 (1976 ed.) (repealed Oct. 1, 1979) ("The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall not* be altered by the discharge of such bankrupt" (emphasis added)). But Congress then changed the law. And the text now means only that the discharge of the debtor does not *itself* automatically wipe away the liability of a non-debtor. Section 524(e) does not speak to the issue of non-debtor releases or other steps that a plan may take regarding the liability of a non-debtor for the same debt. As the American College of Bankruptcy says, "Section 524(e) is agnostic as to third-party releases." Brief for American College of Bankruptcy as *Amicus Curiae* 6, n. 3; see also *In re Airadigm Communications, Inc.*, 519 F. 3d 640, 656 (CA7 2008).

Third, citing §§523(a), 524(a), and 541(a), the Court says that the plan improperly grants a "discharge" to the Sacklers. *Ante,* at 4, 14–15. And the Court suggests that giving the Sacklers a "discharge" in Purdue's bankruptcy plan in exchange for \$5.5 to \$6 billion allows the Sacklers to get away too easy—without filing for bankruptcy themselves, without having to comply with the Code's various restrictions, and without paying enough. See *ante,* at 14–15. That point also fails.

To begin, the premise is incorrect. The Sacklers did not receive a bankruptcy discharge in this case. Discharge is a term of art in the Bankruptcy Code. *Wainer* v. *A. J. Equities, Ltd.*, 984 F. 2d 679, 684 (CA5 1993); J. Silverstein, Hiding in Plain View: A Neglected Supreme Court Decision

Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations, 23 Emory Bkrtcy. Developments J. 13, 130 (2006). When a debtor in bankruptcy receives a discharge, most (if not all) of their pre-petition debts are released, giving the debtor a fresh start. See §1141(d)(1) (Chapter 11 discharge relieves the debtor "from any debt that arose before the date of" plan confirmation, with narrow exceptions); *Taggart* v. *Lorenzen*, 587 U. S. 554, 556, 558 (2019). The Sacklers did not receive such a discharge.

As courts have always recognized, non-debtor releases are different. Non-debtor releases "do not offer the umbrella protection of a discharge in bankruptcy." *Johns-Manville Corp.*, 837 F. 2d, at 91. Rather, non-debtor releases are accompanied by settlement payments to the estate by the non-debtor. So non-debtor releases are simply one part of a settlement of pending or potential claims against the non-debtor that arise out of some torts committed by the debtor. They are in essence a traditional litigation settlement. They are not a blanket discharge for the non-debtor.

Here, therefore, the releases apply only to certain claims against the Sacklers—namely, those "that arise out of or relate to" Purdue's bankruptcy. *Ibid.*; see 69 F. 4th, at 80 (releasing the Sacklers only for claims to which Purdue's conduct was "a legal cause or a legally relevant factor to the cause of action" (quotation marks omitted)). And the non-debtor releases were negotiated in exchange for a significant settlement payment that enabled *Purdue's* bankruptcy reorganization to succeed.

In short, the releases do not grant discharges to non-debtors and cannot be disallowed on that basis.

Next, the Court suggests that the Sacklers must file for bankruptcy themselves in order to be released from liability. That, too, is incorrect. Nowhere does the Code say that a non-debtor may be released from liability only by filing for bankruptcy. On the contrary, §1123(b)(3) of the Code already expressly allows a bankruptcy plan to release a non-debtor from liability to the debtor.

The Court's suggestion that a non-debtor must file for bankruptcy in order to be released from liability not only is directly at odds with the text of the Code, but also is at odds with reality. Non-debtor releases are often used in situations where it is not possible or practicable for the non-debtors to simply file for individual bankruptcies. This case is just one example. The "Sacklers are not a simple group of a few defendants" that could simply have declared one bankruptcy. 633 B. R., at 88. They are "a large family divided into two sides, Side A and Side B, with eight pods or groups of family members within those divisions," many of whom live abroad (beyond bankruptcy jurisdiction). *Ibid.* And their assets are spread across trusts that are likely beyond the jurisdiction of U. S. courts as well. *Ibid.*; see also *id.*, at 109.

Likewise, in many other mass-tort bankruptcy cases, released non-parties could not simply declare their own bankruptcies either. Insurers, for example, cannot declare bankruptcy just because a policy limit is reached. B. Zaretsky, Insurance Proceeds in Bankruptcy, 55 Brooklyn L. Rev. 373, 394–395, and n. 60 (1989). And in cases involving hundreds of affiliated entities who share liability and share insurance, such as the Boy Scouts and the Catholic Church, it would be almost impossible to coordinate assets and ensure equitable victim recovery across hundreds of distinct bankruptcies. Section §1123(b)(6) provides bankruptcy courts with flexibility to deal with such situations by approving appropriate non-debtor releases. See Brief for Boy Scouts of America as *Amicus Curiae* 18–20; Brief for Ad Hoc Group of Local Councils of the Boy Scouts of America as *Amicus Curiae* 6; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 3–4, 17–22.

The Court next says that the non-debtor release allowed the Sacklers to bypass certain restrictions on discharges—for example, that individual debtors are generally not discharged for fraud claims, §523(a). That argument fails for the same reason. Non-debtor releases are part of a negotiated settlement of potential tort claims. They are not a discharge. And nothing in §523(a) prohibits a debtor's reorganization plan from *releasing* non-debtors for fraud claims. Indeed, it is undisputed that Purdue's bankruptcy could release the Sacklers from at least some fraud claims—namely, the fraudulent transfer claims—under §1123(b)(3). No provision in the Code forbids releasing other fraud claims against the Sacklers, too. The Court's concern that the releases apply to claims for "fraud," *ante,* at 15, therefore falls flat.

In all of those scattershot arguments, the Court seems concerned that the Sacklers' $5.5 to $6 billion settlement payment was not enough. To begin with, even if that were true, it would not be a reason to *categorically* disallow non-debtor releases as a matter of law, as the Court does today. In any event, that concern is unsupported by the record and contradicted by the Bankruptcy Court's undisputed findings of fact. The Bankruptcy Court found that the creditors' and victims' ability to recover directly from any of the Sacklers in tort litigation was far from certain. So as in other tort settlements, the settlement amount here reflected the parties' assessments of their probabilities of success and the likely amount of possible recovery. The Court today has no good basis for its subtle second-guessing of the settlement amount.

And lest we miss the forest for the trees, keep in mind that the victims and creditors have no incentive to short their own recoveries or to let the Sacklers off easy. They despise the Sacklers. Yet they strongly support the plan. They call the settlement a "remarkable achievement." Brief for Respondent Ad Hoc Group of Individual Victims of

Purdue Pharma, L. P. et al. 2. And given the high level of victim and creditor support, the Bankruptcy Court emphasized: "[T]his is *not* the Sacklers' plan," and "anyone who contends to the contrary" is "simply misleading the public." 633 B. R., at 82.

The Court today unfortunately falls into that trap. And it is rather paternalistic for the Court to tell the victims that they should have done better—and then to turn around and leave them with potentially nothing.

C

Finally, the Court suggests that non-debtor releases are not "appropriate" because they are inconsistent with history and practice. That, too, is seriously mistaken.

Importantly, Congress did not enact the current Bankruptcy Code—and with it, §1123(b)(6)—until 1978. Bankruptcy Code of 1978, 92 Stat. 2549. For nearly the entire life of the Code, courts have approved non-debtor release provisions like this one. So for decades, Chapter 11 of the Code has been understood to grant authority for such releases when appropriate and necessary to the success of the reorganization.[7]

The Court's citations to pre-Bankruptcy Code cases are an off-point deflection and do not account for important and relevant changes made in the current Bankruptcy Code.

[7] See, *e.g.*, *In re Johns-Manville Corp.*, 68 B. R. 618, 624–626 (Bkrtcy. Ct. SDNY 1986), aff'd, 837 F. 2d 89, 90, 93–94 (CA2 1988); *In re A. H. Robins Co.*, 88 B. R. 742, 751 (ED Va. 1988), aff'd, 880 F. 2d 694, 700–702 (CA4 1989); *UNARCO Bloomington Factory Workers* v. *UNR Industries, Inc.*, 124 B. R. 268, 272, 278–279 (ND Ill. 1990); *In re Drexel Burnham Lambert Group, Inc.*, 960 F. 2d 285, 293 (CA2 1992); *In re Master Mortgage Inv. Fund, Inc.*, 168 B. R. 930, 938 (Bkrtcy. Ct. WD Mo. 1994); *In re Dow Corning Corp.*, 280 F. 3d 648, 653 (CA6); *In re Airadigm Communications, Inc.*, 519 F. 3d 640, 655–658 (CA7 2008); *In re Seaside Engineering & Surveying, Inc.*, 780 F. 3d 1070, 1081 (CA11 2015); *In re Boy Scouts of Am. and Del. BSA, LLC*, 650 B. R. 87, 112, 135–143 (Del. 2023). I could add dozens more citations to this footnote. But the point is clear.

For example, unlike the former Bankruptcy Act of 1898, the modern Bankruptcy Code grants courts jurisdiction over "suits between third parties which have an effect on the bankruptcy estate." *Celotex Corp.* v. *Edwards*, 514 U. S. 300, 307, n. 5 (1995); see 28 U. S. C. §§157(a), 1334(b) (giving bankruptcy courts jurisdiction over any litigation "related to" the bankruptcy).

Under the current Bankruptcy Code, it is well settled that Chapter 11 bankruptcies can and do affect relationships between creditors and non-debtors who are intimately related to the bankruptcy. For example, under the modern Bankruptcy Code, bankruptcy courts routinely use their broad jurisdiction and equitable powers to stay any litigation—even litigation entirely between third parties—that would affect the bankruptcy estate. *Celotex*, 514 U. S., at 308–310.

The longstanding practice of staying litigation that could affect the bankruptcy estate is similar in important respects to non-debtor releases. In each situation, a provision of the Code provides an explicit authority: to stay litigation involving the debtor, §362, and to release claims involving the debtor, §§1123(b)(1), (3). And in each, the bankruptcy court invokes its broad jurisdiction and equitable power to "augment" that authority, extending it to litigation and claims against non-debtors that might have a "direct and substantial adverse effect" on the bankruptcy estate. *Celotex*, 514 U. S., at 303, 310.

In short, the common and long-accepted practice of staying litigation that could affect the bankruptcy estate shows that under the modern Code, bankruptcy courts can and do exercise control over relationships between creditors and non-debtors. The Court's reliance on pre-Code practice is misplaced.[8]

IV

As I see it, today's decision makes little sense legally, practically, or economically. It upends the carefully negotiated Purdue bankruptcy plan and the prompt and substantial recovery guaranteed to opioid victims and creditors. Now the opioid victims and creditors are left holding the bag, with no clear path forward. To reiterate the words of the victims: "Without the release, the plan will unravel," and "there will be no viable path to any victim recovery." Tr. of Oral Arg. 100.

The Court does not say what should happen next. The Court seems to hope that a new deal is possible, with the Sacklers buying off the last holdouts.

But even if it were true that the parties could eventually reach a new deal, that outcome would likely come at a cost. Future negotiations and litigation would mean additional litigation expense that eats away at the recovery that the opioid victims and creditors have already negotiated, as well as years of additional delay even though victims and family members want and need relief *now*.

And more to the point, without non-debtor releases, a new deal will be very difficult to achieve. By eliminating nonconsensual non-debtor releases, today's decision gives every victim and every creditor an absolute right to sue the Sacklers. Some may hold out from any potential future settlement and instead sue because they want to have their day in court to hold the defendants accountable, or because they want to try to hit the jackpot of a large recovery that they can keep all to themselves. Moreover, because every

[8] The Court insists that pre-Code practice "may inform our work." *Ante*, at 17, n. 6. But pre-Code practice certainly does not play a role when that practice has been superseded by an express provision of the modern Bankruptcy Code.

victim and creditor knows that the Sacklers' resources are limited, they will now have an incentive to promptly sue the Sacklers before others sue. To be sure, the victims and creditors would face an uphill climb in any such litigation, the Bankruptcy Court found, so it may be that no one will succeed in tort litigation against the Sacklers, meaning that no one will get anything. But even if just one of the victims or creditors—say, a State or a group of victims—is successful in a suit against the Sacklers, its judgment "could wipe out all of the collectible Sackler assets," which in turn could also deplete Purdue's estate and leave nothing for any other victim or creditor. *Id.*, at 103. That reality means that everyone has an incentive to race to the courthouse to sue the Sacklers pronto—the classic collective-action problem.

Because some victims or creditors may hold out from any potential future settlement for any one of those reasons and instead still sue, the Sacklers are less likely to settle with anyone in the first place. Maybe the clouds will part. But in a world where nonconsensual non-debtor releases are categorically impermissible, any hope for a new deal seems questionable—indeed, the parties to the bankruptcy label it "pure fantasy." Brief for Debtor Respondents 4.

The bankruptcy system was designed to prevent that exact sort of collective-action problem. Non-debtor releases have been indispensable to solving that problem and ensuring fair and equitable *victim recovery* in multiple bankruptcy proceedings of extraordinary scale—not only opioids, but also many other mass-tort cases involving asbestos, the Boy Scouts, the Catholic Church, silicone breast implants, the Dalkon Shield, and others.

The Court's apparent concern that the Sacklers' settlement payment of $5.5 to $6 billion was not enough should have led at most to a remand on whether the releases were "appropriate" under 11 U. S. C. §1123(b)(6) (if anyone had raised that argument here, which they have not). But instead the Court responds with the dramatic step of repudiating the plan and eliminating non-debtor releases altogether.

The Court's decision today jettisons a carefully circumscribed and critically important tool that bankruptcy courts have long used and continue to need to handle mass-tort bankruptcies going forward. The text of the Bankruptcy Code does not come close to requiring such a ruinous result. Nor does its structure, context, or history. Nor does hostility to the Sacklers—no matter how deep: "Nothing is more antithetical to the purpose of bankruptcy than destroying estate value to punish someone." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 1017 (2023). Gutting this longstanding bankruptcy court practice is entirely counterproductive, and simply inflicts still more injury on the opioid victims.

Opioid victims and other future victims of mass torts will suffer greatly in the wake of today's unfortunate and destabilizing decision. Only Congress can fix the chaos that will now ensue. The Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue. I respectfully dissent.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

915 Wilshire Blvd., Ste. 1850
Los Angeles, CA 90017

A true and correct copy of the foregoing document entitled (*specify*): United States Trustee's Objection to Debtors' Plan of Reorganization (Dated June 11, 2024); Declaration of Alfred Cooper III In Support Thereof

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 8/5/24, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☑ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) 8/5/24, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☑ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 8/5/24, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

8/5/24	Veronica Hernandez	/s/ Veronica Hernandez
Date	*Printed Name*	*Signature*

BY NOTICE OF ELECTRONIC FILING

- **Katalina Baumann** Katalina.Baumann@troutman.com, evelyn.duarte@troutman.com,LitigationDocketRequests@troutman.com,elizabeth.streible@troutman.com,Hilary.Barton@Troutman.com,OCCcourtnotices@troutman.com,Susan.Henry@Troutman.com
- **Christopher Dale Beatty** chris.beatty@katten.com, marsha.davis@katten.com,courtalertlax@katten.com
- **Reem J Bello** rbello@goeforlaw.com, kmurphy@goeforlaw.com
- **Ron Bender** rb@lnbyg.com
- **Katherine Bunker** kate.bunker@usdoj.gov
- **Joseph E Caceres** jec@locs.com, generalbox@locs.com
- **Robert Carrasco** rmc@lnbyg.com, rmc@lnbyg.com
- **Louis J. Cisz** lcisz@nixonpeabody.com, jzic@nixonpeabody.com
- **Andrew Michael Cummings** andrew.cummings@hklaw.com, philip.dobbs@hklaw.com;hapi@hklaw.com;reena.kaur@hklaw.com
- **Eryk R Escobar** eryk.r.escobar@usdoj.gov
- **M Douglas Flahaut** flahaut.douglas@arentfox.com
- **Eric J Fromme** eric.fromme@afslaw.com, yvonne.li@afslaw.com;kevin.chen@afslaw.com
- **Jeffrey Garfinkle** jgarfinkle@buchalter.com, docket@buchalter.com;lverstegen@buchalter.com
- **Robert P Goe** kmurphy@goeforlaw.com, rgoe@goeforlaw.com;goeforecf@gmail.com;Goe.RobertP.R@notify.bestcase.com;ajohnston@goeforlaw.com
- **Vanessa M Haberbush** vhaberbush@lbinsolvency.com, dhaberbush@lbinsolvency.com,ahaberbush@lbinsolvency.com,abostic@lbinsolvency.com,haberbush.assistant@gmail.com,jborin@lbinsolvency.com,lbogard@lbinsolvency.com
- **Mark S Horoupian** mark.horoupian@gmlaw.com, mhoroupian@ecf.courtdrive.com;cheryl.caldwell@gmlaw.com;karen.files@gmlaw.com
- **Brandon J. Iskander** biskander@goeforlaw.com, kmurphy@goeforlaw.com
- **Eric P Israel** eisrael@danninggill.com, danninggill@gmail.com;eisrael@ecf.inforuptcy.com
- **Robbin L. Itkin** ritkin@sklarkirsh.com, mduran@sklarkirsh.com;KFRAZIER@SKLARKIRSH.COM
- **Lior Katz** lior@katzlaw.com
- **Christian T Kim** ckim@dumas-law.com, ckim@ecf.inforuptcy.com
- **Monica Y Kim** myk@lnbyg.com, myk@ecf.inforuptcy.com
- **Daniel Klein** dklein@newgenhcg.com

- **Robert S Marticello** rmarticello@raineslaw.com, bclark@raineslaw.com;jfisher@raineslaw.com
- **Kevin J McEleney** kmceleney@uks.com, kgauthier@uks.com
- **Thomas Glenn Crooks Mclaughlin** tgm@lrplaw.net, patricia@lrplaw.net
- **David M Medby** dmedby@lawgarcia.com, jmobley@lawgarcia.com
- **Nicholas Miller** nick.miller@hklaw.com, annmarie.jezisek@hklaw.com
- **Roksana D. Moradi-Brovia** Roksana@rhmfirm.com, matt@rhmfirm.com;rosario@rhmfirm.com;sloan@rhmfirm.com;priscilla@rhmfirm.com;rebeca@rhmfirm.com;david@rhmfirm.com;susie@rhmfirm.com;max@rhmfirm.com;russ@rhmfirm.com
- **Jeff David Neiderman** jneiderman@jayrothmanlaw.com
- **Juliet Y. Oh** jyo@lnbyg.com, jyo@lnbyb.com
- **Aron M Oliner** roliner@duanemorris.com
- **Robert J Pfister** rpfister@pslawllp.com
- **Julie H Rome-Banks** julie@bindermalter.com
- **Mary H Rose** mrose@buchalter.com, marias@buchalter.com;docket@buchalter.com
- **Terrel Ross** tross@trcmllc.com
- **Joseph A Sakay** jsakay@buchalter.com, kcb@hcmp.com;kim.mckenzie@hcmp.com
- **Gregory M Salvato** gsalvato@salvatoboufadel.com, calendar@salvatolawoffices.com;jboufadel@salvatoboufadel.com;gsalvato@ecf.inforuptcy.com
- **Lovee D Sarenas** lovee.sarenas@dinsmore.com, michael.kerr@dinsmore.com
- **Paul Anthony Saso** psaso@pslawllp.com
- **Daren M Schlecter** daren@schlecterlaw.com, assistant@schlecterlaw.com
- **Lindsey L Smith** lls@lnbyg.com, lls@ecf.inforuptcy.com
- **Derrick Talerico** dtalerico@wztslaw.com, maraki@wztslaw.com,sfritz@wztslaw.com
- **United States Trustee (SV)** ustpregion16.wh.ecf@usdoj.gov
- **Kenneth K Wang** Kenneth.Wang@doj.ca.gov, Anthony.Conklin@doj.ca.gov
- **Beth Ann R. Young** bry@lnbyg.com, bry@lnbyb.com
- **Joshua del Castillo** jdelcastillo@allenmatkins.com, mdiaz@allenmatkins.com

SERVED BY U.S. MAIL

Honorable Victoria Kaufman
21041 Burbank Blvd.
Woodland Hills, CA 91367

Valentina Ambarchyan
Ambarchyan Law, APC
535 North Brand Boulevard
Suite 500
Glendale, CA 91203

Cynthia Batac
5758 Halbrent Ave
Sherman Oaks, CA 91411

Joyce Johnson
P.O. Box 341
Stockton, CA 95201

Vick Petrosian
Eisenberg Law Group PC
23801 Calabasas Rd, Ste. 2030
Calabasas, CA 91302

Wells Fargo Vendor Financial Services LLC
C/O A Ricoh USA Program
Bankruptcy Administration
P.O. Box 13708
Macon, GA 31208-3708

Windsor Terrace Healthcare, LLC
7447 Sepulveda Blvd.
Van Nuys, CA 91405

[NEXT DOCUMENT]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SMALLHOLD, INC.,[1]	(Subchapter V)
Debtor.	Case No. 24-10267 (CTG)
	Re: D.I. 228 **Obj. Deadline: August 13, 2024 @ 4 pm ET (for UST and Subchapter V Trustee)** **Hearing Date: August 22, 2024 @ 3:30 pm ET**

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF THE SUBCHAPTER V DEBTOR'S SECOND AMENDED PLAN OF REORGANIZATION

Andrew R. Vara, the United States Trustee for Region 3 ("U.S. Trustee"), by and through his undersigned counsel, hereby files this objection ("Objection") to confirmation of the *Subchapter V Debtor's Second Amended Plan of Reorganization* (the "Plan"), and in support of this Objection states:

PRELIMINARY STATEMENT

1. The Debtor's Plan should not be confirmed in its present form because it (1) extracts non-consensual third-party releases from holders of claims or interests that (a) vote to accept the Plan or are presumed to have accepted the Plan, (b) who voted to reject the Plan unless they also check an opt-out box, and (c) holders of claims or interests that are entitled to vote and do not cast a ballot, including those who may not have received the solicitation materials, and (2) proposes to treat the whole Plan as a settlement, where it is not one.

[1] The last four digits of the Debtor's federal tax identification number are 8880. The Debtor's mailing is 285 Nostrand Avenue #1066, Brooklyn, NY 11216.

2. First, acceptance of the Plan by voting, or presumed acceptance of the Plan under section 1126 of the Code, does not equate to consent to a release of direct claims held by non-debtors against non-debtors. Treatment of a claim under the Plan and agreement to release non-debtors are two separate and distinct concepts.

3. Even as to creditors in voting classes who vote to reject the Plan, the opt-out process does not reflect consent to the third-party release. The Supreme Court in *Purdue Pharma* did not "express a view on what qualifies as a consensual release." *Harrington v. Purdue Pharma L.P.*, 603 U.S. ___, 144 S. Ct. 2071, 2088 (2024). But from the Supreme Court's pronouncement that non-consensual releases of non-debtors by non-debtors are not authorized under the Bankruptcy Code, it follows that proposed "consensual" releases must be heavily scrutinized as to whether they are indeed consensual. Here, the Plan's third-party release provisions must be stricken because they would allow such releases, even where a so-called "Releasing Party" has not affirmatively agreed to them.

4. This Court has previously found that "the 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) (Walrath, J.). This Court has also rejected the debtors' argument that deeming consent from silence "should be approved as typical, customary, and routine." *Emerge Energy Services LP*, No. 19-11563 (KBO), 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (Owens, J.). In *Emerge*, this Court held that "[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" to treat "a party's silence or inaction" as the necessary "affirmative consent." *Id.*

5. Second, the Plan contains an impermissible provision whereby the Plan as a whole is proposed to be treated as a settlement. This Plan is not a settlement; the Plan is governed by the applicable confirmation standards under the Code. *See* Plan § 6.9.

6. For the reasons below, confirmation of the Debtor's Plan should be denied.

JURISDICTION, VENUE AND STANDING

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

8. Pursuant to 28 U.S.C. § 586, the U. S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This 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 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 the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *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").

9. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment on such plans and disclosure statements.

10. The U.S. Trustee has standing to be heard on Plan confirmation pursuant to 11 U.S.C. § 307.

BACKGROUND

11. This case was filed on February 18, 2024. The Debtor elected to proceed under subchapter V of chapter 11 of the Bankruptcy Code.

12. On February 20, 2024, the U.S. Trustee appointed Jami Nimeroff to serve as the subchapter V trustee.

13. On May 20, 2024, the Debtor filed the *Subchapter V Debtor's Plan of Reorganization*. [D.I. 162].

14. On June 3, 2024, the Debtor filed the *Subchapter V Debtor's First Amended Plan of Reorganization.* [D.I. 179].

15. On June 4, 2024, the Debtor filed the *Notice of Hearing to Consider Confirmation of the Plan and the Objection Deadline Related Thereto* [D.I. 183].

16. On June 26, 2024, the Debtor filed the *Plan Supplement/Notice of Filing Plan Supplement* [D.I. 201].

17. On July 25, 2024, the Debtor filed the *Subchapter V Debtor's Second Amended Plan of Reorganization.* [D.I. 228].

Relevant Plan Provisions

18. Section 6.9 of the Plan contains the following provision casting the provisions of the Plan as a settlement:

> **Compromise and Settlement of Claims and Controversies**
>
> Pursuant to sections 363 and 1123(b) of the Bankruptcy Code and in consideration for the Distributions and other benefits provided pursuant to this Plan, the provisions of this Plan shall constitute a good faith compromise of all Claims and controversies relating to the contractual, legal and subordination rights that a Holder of a Claim or Equity Interest may have with respect to any Allowed Claim or Equity Interest, or any Distribution to be made on account of such Allowed Claim or Equity Interest. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all such Claims and controversies, as well as a finding by the Bankruptcy Court that such

compromise or settlement is in the best interests of the Debtor, its Estate and Holders of Claims and Equity Interests and is fair, equitable and reasonable.

Plan § 6.9

19. Section 6.10 of the Plan details the Releases by the Debtor (the "Debtor Release"):

Releases by the Debtor

Pursuant to section 1123(b) of the Bankruptcy Code and except as otherwise specifically provided in this Plan or the Plan Supplement, for good and valuable consideration, including the service of the Released Parties to facilitate the expeditious liquidation of the Debtor and the consummation of the transactions contemplated by this Plan, on the Effective Date, the Released Parties are deemed forever released by the Debtor and its Estate, and each of their successors and assigns, from any and all claims, obligations, rights, suits, damages, Causes of Action, remedies and liabilities whatsoever, including any derivative claims asserted or assertable on behalf of the Debtor or the Estate, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity or otherwise, that the Debtor or its Estate would have been legally entitled to assert in its own right (whether individually or collectively) based on or relating to, or in any manner arising from, in whole or in part, the Chapter 11 Case, the DIP Loan, the DIP Loan Documents, the business or contractual arrangements between the Debtor and any of the Released Parties, the negotiation, formulation or preparation of this Plan, any Plan Supplement or related agreements, instruments or other documents (collectively, the "Debtor Released Claims"), other than Debtor Released Claims against a Released Party arising out of the gross negligence, willful misconduct, intentional fraud, or criminal liability of any such person or entity.

Plan § 6.10.

20. Section 6.11 of the Plan provides for Releases by Holders of Claims and Equity Interests (the "Third Party Releases"):

Releases by Holders of Claims and Equity Interests

On the Effective Date, except as otherwise provided herein and except for the right to enforce this Plan, **all persons (i) who voted to accept this Plan or who are presumed to have voted to accept this Plan and (ii) who voted to reject this Plan but did not affirmatively mark the box on the ballot to opt out of granting the releases provided under this Plan,** under section 1126(f) of the Bankruptcy Code shall, to the fullest extent permitted by applicable law, **be deemed to forever release, and waive the Released Parties of and from all liens, claims, causes of action, liabilities, encumbrances, security interests, interests or charges of any nature or description whatsoever based or relating to, or in any manner arising from, in whole or in part, the Chapter 11 Case or affecting property of the Estate, whether known or unknown, suspected or unsuspected, scheduled**

or unscheduled, contingent or not contingent, unliquidated or fixed, admitted or disputed, matured or unmatured, senior or subordinated, whether assertable directly or derivatively by, through, or related to any of the Released Parties and their successors and assigns whether at law, in equity or otherwise, based upon any condition, event, act, omission occurrence, transaction or other activity, inactivity, instrument or other agreement of any kind or nature occurring, arising or existing prior to the Effective Date in any way relating to or arising out of, in whole or in part, the Debtor, the Debtor's prepetition operations, governance, financing, or fundraising, the purchase or sale of the Debtor's securities, the Chapter 11 Case, the pursuit of Confirmation of this Plan, the consummation of this Plan or the administration of this Plan, including without limitation, the negotiation and solicitation of this Plan, the DIP Loan, and the DIP Loan Documents, all regardless of whether (a) a Proof of Claim or Equity Interest has been filed or is deemed to have been filed, (b) such Claim or Equity Interest is allowed, or (c) the Holder of such Claim or Equity Interest has voted to accept or reject this Plan, except for willful misconduct, gross negligence, fraud or criminal misconduct; *provided*, *however*, that the Debtor shall not be a Released Party until the Last Distribution Date if the Plan is confirmed under section 1191(b) of the Bankruptcy Code. Nothing contained herein shall impact the right of any Holder of an Allowed Claim or Interest to receive a Distribution on account of its Allowed Claim or Allowed Interest in accordance with this Plan.

Plan § 6.11. (emphasis altered).

21. Section 9.88 of the Plan lists the definition of "Released Party":

"Released Party" means each of the following: (a) the Debtor (but only if the Plan is confirmed under section 1191(a) of the Bankruptcy Code); (b) the Debtor's prepetition attorneys and professionals; (d) the Debtor's Professionals; (e) the DIP Lender; (f) the DIP Lender's attorneys; and (g) the Representatives of (a) through (f) hereof. If the Plan is confirmed under section 1191(b), the Debtor shall be a Released Party only on the Last Distribution Date.

Plan § 9.88.

22. Section 9.89 of the Plan lists the definition of "Representatives":

"Representatives" means, without limitation, any existing or former affiliate, subsidiary, member, officer, director, partner, stockholder, trustee, member, representative, employee, agent, attorney, business advisor, financial advisor, accountant, other Professional, their successors or assigns, or any Person who is or was in control of any of the foregoing.

23. Section 6.13 of the Plan, titled "Injunction Related to Third Parties," provides:

From and after the Effective Date, all persons who have held, hold or may hold Claims against or Equity Interests in the Debtor are permanently enjoined from

> commencing or continuing in any manner, any Cause of Action released, to be released or discharged pursuant to this Plan, or the Confirmation Order, from and after the Effective Date, to the extent of the releases, exculpation, and discharge granted in this Plan, all Holders of Claims or Equity Interests shall be permanently enjoined from commencing or continuing in any manner against the Released Parties and the Exculpated Parties and their assets and properties, as the case may be, any suit, action or other proceeding, on account of or respecting any claim, demand, liability, obligation, debt, right, cause of action, interest or remedy released or to be released pursuant to this Plan. except as otherwise expressly provided in this Plan, the Plan Supplement or related documents, or for obligations issued pursuant to this Plan, all persons who have held, hold or may hold Claims or Equity Interests that have been released, discharged, or are subject to exculpation, are permanently enjoined, from and after the Effective Date, from taking any of the following actions: (a) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Equity Interests; (b) enforcing, attaching, collecting or recovering by any manner or means any judgment, award, decree or order against such persons on account of or in connection with or with respect to any such Claims or Equity Interests; (c) creating, perfecting or enforcing any encumbrance of any kind against such persons or the property or estates of such persons on account of or in connection with or with respect to any such Claims or Equity Interests; and (d) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Equity Interests released, settled or discharged pursuant to this Plan.

ARGUMENT

I. The Plan is Not Confirmable as Proposed

Presumed Acceptance of the Plan, Voting to Accept the Plan, and the Opt-Out Procedure Will Result in Non-Consensual Third-Party Releases Which Are Not Authorized Under the Bankruptcy Code.

24. Non-consensual third-party releases are not authorized under the United States Bankruptcy Code. *In re Harrington v. Purdue Pharma, L.P.,* 144 S.Ct. 2071, 2082-88 (2024).

25. Contract principles govern whether a release is consensual. *In re SunEdison, Inc.,* 576 B.R. 453, 458 (S.D.N.Y. Bankr. 2017) ("SunEdison"). Contract principles govern because a third-party release is essentially a settlement between a non-debtor claimant and another non-debtor. The "general rule of contracts is that silence cannot manifest consent." *Patterson et al. v. Mahwah Bergen Retail Grp., Inc.,* 636 B.R. 641, 686 (E.D. Va. 2022) ("Mahwah"). "Most courts allow consensual nondebtor releases to be included in a plan. . . that are specific in language,

integral to the plan, a condition of the settlement, and given for consideration." *In re Wool Growers Cent. Storage Co*., 371 B.R. 768, 775-76 (Bankr. N.D. Tex. 2007).

26. Under contract law, silence does not equal consent except under limited circumstances not applicable here. *See, e.g., Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 991 (Del. Super. Ct. 2000) (writing under Delaware law, "Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only: [w]here an offeree takes the benefit of offered services with a reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.").

27. As a general rule of contract construction:

> Acceptance by silence is exceptional. Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance. See Comment b to § 53. The usual requirement of notification is stated in § 54 on acceptance by performance and § 56 on acceptance by promise. The 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. The 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. See Chapter 5.

RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

28. Silence and inaction, however, will generally not be deemed assent to an offer because Delaware follows the "mirror image" rule, requiring the acceptance to be identical to the offer. *See Urban Green Techs., LLC v. Sustainable Strategies* 2050 LLC, No. N136-12-115, 2017 WL 527565, at *3 (Del. Super. Ct. Feb. 8, 2017); *see also Patterson et al. v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 686 (E.D. Va. 2022) (contract law does not support consent by failure to opt out).

29. The Third-Party Releases in the Plan, which benefit numerous non-debtors that are Released Parties and their Representatives, will be given by a variety of non-debtor parties, all without their affirmative consent: (i) all parties who vote to accept the Plan, (ii) those who vote to reject the Plan, unless they check an opt-out box, (iii) unimpaired claimants or holders of interests, and (iv) all creditors in voting classes who do not vote on the Plan. Because the Plan forces third-party releases on these parties without their affirmative consent, the releases are non-consensual and cannot be approved under *Purdue Pharma*.

30. Here, the Debtors have structured a voting procedure that attempts to equate a vote to accept the creditor's treatment under the Plan with the creditor's agreement to release its claims against non-Debtors who are not the subject of this bankruptcy case. The voting materials present the decision to accept the Plan (and thereby grant a release of non-Debtor third parties) as irrevocable.

31. As an initial matter, voting for a plan does not reflect the unambiguous assent that should be required to find consent to a release. *See, e.g., In re Congoleum Corp.*, 362 B.R. 167, 194 (Bankr. D.N.J. 2007) ("[A] consensual release cannot be based solely on a vote in favor of a plan."); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (holding that, because consensual releases are premised on the party's agreement to the release, "it is not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan").

32. First, imputing consent from a vote in favor of a plan assumes that the creditor understands the plan's non-debtor release, which is a questionable assumption for the reasons discussed below. Thus, voting for a plan does not necessarily 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.

33. Second, a plan is presented as a package deal—a person votes yes or no on the entire plan, not particular aspects of it—and a person should not be compelled to accept a non-debtor release as a condition of receiving the benefits of a plan. That is not true consent. In addition, the Bankruptcy Code guarantees that a creditor may not be required to accept in a chapter 11 plan less than it would receive in a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7)(A). But a chapter 7 liquidation could not require a release of non-debtors as a condition of receiving a distribution (because it does not involve a plan). Requiring a non-debtor release as a condition of receiving a distribution under a chapter 11 plan, absent the individual creditor's consent, is thus inconsistent with § 1129(a)(7)(A).

34. As to the Plan provisions that those who vote to reject must also check an opt-out box to avoid being deemed to consent to give Third Party Releases, the Bankruptcy Court for the Southern District of New York, in *In re Chassix Holdings*, 533 B.R. 64 (Bankr. S.D.N.Y. 2015), made the following observation:

> If (as prior cases have held) a creditor who votes in favor of a plan have implicitly endorsed and 'consented' to third party releases that are contained in that plan, then by that same logic a creditor who votes to reject a plan should also be presumed to have rejected the proposed third-party releases that are set forth in the plan. ***The additional 'opt out' requirement, in the context of this case, would have been little more than a Court-endorsed trap for the careless or inattentive creditor.***

Id. at 79 (emphasis added). Similarly, the *Mahwah* court, in applying black letter contract principles to opt-out releases in a chapter 11 plan, found that contract law does not support consent by failure to opt-out. *Mahwah*, 636 B.R. at 686. "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." *Id*. at 688.

35. As this Court noted in *Emerge*, "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 waiver through a party's

silence or inaction. *In re Emerge Energy Servs. LP*, No. 19-11563 (KBO), 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019).

36. This Court in *Emerge* indicated that it "has concluded that a waiver cannot be discerned through a party's silence or inaction unless specific circumstances are present." *Id*. at *54-55; the Court stated that "[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 such circumstances. *Id*. at *55. The Court's statements in *Emerge* apply irrespective of whether a creditor or shareholder is to receive a distribution under a plan or not.

37. The Debtors may try to distinguish this case from *Emerge* based on the argument that *Emerge* dealt with creditors and shareholders who were receiving no distribution under the plan. However, the Court's decision in *Emerge* was not expressly limited to such a factual situation. To the contrary, the Court's recognition that failure to return a notice can be due to "carelessness, inattentiveness, or mistake," rather than constituting the manifestation of an intent to agree to a third party release, would be applicable regardless of whether a creditor or interest holder was to receive a distribution under a plan. Furthermore, here, the General Unsecured Claimants are projected to get some recovery, but it is virtually nothing as claimants asserting \$10,133,500.10 in claims will divide a meager \$70,000.00 (a recovery of less than 1%) and are not projected to receive any distribution until year 5 of the Plan. Plan, § 2.1; Ex. B (financial projections).

38. The non-consensual Third-Party Release will also be imposed on unimpaired claimants or holders of interests who receive a notice informing them that, unless they go to a hyperlink taking them to the claims agent's website and affirmatively opt out of giving third-party releases, they will be deemed to have consented to same. For the same reasons discussed in

Chassix and *Emerge*, such "deemed consent" does not constitute the affirmative consent required to support a consensual release.

39. The unimpaired claimants on whom Third Party Releases will be imposed appear to include holders of administrative claims and priority tax claims. The claims to be released include direct claims that unimpaired parties hold against numerous non-debtors. While unimpaired creditors will be eventually paid in full on the claims they hold against the Debtor, the scope of the release of their direct claims against non-debtors is far broader than the claims upon which they will be paid. The release covers any claims against non-debtors Released Parties that are:

> "of any nature or description whatsoever based or relating to, or in any manner arising from, in whole or in part, the Chapter 11 Case or affecting property of the Estate, whether known or unknown, suspected or unsuspected, scheduled or unscheduled, contingent or not contingent, unliquidated or fixed, admitted or disputed, matured or unmatured, senior or subordinated, whether assertable directly or derivatively by, through, or related to any of the Released Parties and their successors and assigns whether at law, in equity or otherwise, based upon any condition, event, act, omission occurrence, transaction or other activity, inactivity, instrument or other agreement of any kind or nature occurring, arising or existing prior to the Effective Date in any way relating to or arising out of, in whole or in part, the Debtor, the Debtor's prepetition operations, governance, financing, or fundraising, the purchase or sale of the Debtor's securities, the Chapter 11 Case, the pursuit of Confirmation of this Plan, the consummation of this Plan or the administration of this Plan, including without limitation, the negotiation and solicitation of this Plan, the DIP Loan, and the DIP Loan Documents . . ."

Plan § 6.11 (in pertinent part).

40. So, for example, a taxing authority whose priority claim against the Debtor will be paid in full under the Plan (as required by the Code) could later be subject to an argument by a Released Party that it has no obligation to pay taxes in connection with revenue received from transactions with the Debtors because, under the Plan, the taxing authority has been deemed to release the Released Party for all claims related in any manner to the Debtor.

41. Creditors in voting classes who do not vote on the Plan shall also be stripped of their direct claims against non-debtors, regardless of the reason they did not vote. Those reasons may include that such creditors (a) never received the solicitation package, or received it late, due to mail errors or delays, or (b) received it timely, and completed it and returned it to the balloting agent, but through no fault of their own, the ballot never reached the balloting agent, or was received late. Other creditors in voting classes may receive the solicitation package, but not understand it, and may not have the time or financial resources to engage counsel and would never imagine that their rights against non-debtors could be extinguished through the bankruptcy of this Debtor.

42. Conspicuous warnings in the disclosure statement, on the plan ballots, or on an opt-out form that silence or inaction will constitute consent to a release are not sufficient to convert a creditor's silence into consent to the release. *SunEdison*, 576 B.R. at 458-61. In *SunEdison*, the debtors argued that the warning in the disclosure statement and on the ballots regarding the potential effect of silence gave rise to a duty to speak, and the non-voting creditors' failure to object to the plan or to reject the plan should be deemed their consent to the release. *Id.* at 460. The court rejected this argument because the debtors failed to show that the nonvoting creditors' silence was misleading or that the nonvoting creditors' silence signified their intention to consent to the release (finding that silence could easily be attributable to other causes). *Id.* The debtors did not contend that an ongoing course of conduct between themselves and the nonvoting creditors gave rise to a duty to speak. *Id.*

43. "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." *In re Chassix Holdings, Inc*., 533 B.R. 64, 88 (Bankr. S.D.N.Y. 2015).

Moreover, the court in *SunEdison* observed that parties who are solicited, but do not vote, may have failed to vote for reasons other than an intention to assent to the releases. *SunEdison*, 576 B.R. at 461.[2]

44. In sum, there will be no affirmative consent to Third-Party Releases given by numerous persons and entities on whom such releases will be imposed. Such releases are therefore non-consensual. [3]

45. This Court may not approve the injunction enforcing the "opt out" release by parties in interest against non-debtors because *Purdue* clearly stands for the proposition that non-consensual third-party releases are not permitted by the Bankruptcy Code. *See Purdue Pharma*, 603 U.S. at _____, 144 S.Ct. at 2088. As the *Purdue* court noted, the Bankruptcy Code allows courts to issue an injunction in support of a non-consensual, third-party release in exactly one context: asbestos-related bankruptcies, and this case is not asbestos-related. *See Purdue*, 144 S.Ct. at 2085 (citing 11 U.S.C. § 524(e)). Additionally, if the plan contained a consensual third-party release, there would be no need for an injunction to support same, as an injunction in support of a purely consensual release is, by definition, not necessary to prevent "immediate and irreparable harm" to either the estate or the released parties. The consensual releases may serve as an affirmative defense in any ensuing, post-effective date litigation between the third party releasees and releasors, and there is no reason for this Court to be involved with the post-effective date enforcement of those releases.

---

[2] Not all decisions from this District have required affirmative consent for third party releases. In *In re Indianapolis Downs, LLC*, 486 B.R. 286 (Bankr. D. Del. 2013), this Court reached a different conclusion than that of *Emerge* and the other cases cited above concerning the need for affirmative consent to third party releases.

[3] The U.S. Trustee argues that the entire third-party release should be removed from this Plan as non-consensual. If this Court determines to allow the third-party release, the definition of Released Party should be significantly pared down to remove "Representatives," as those parties have provided no consideration to justify a release and only have an attenuated connection to the case. The U.S. Trustee has raised this issue with respect to the Debtor Release as well and remains in discussions with the Debtor as to a resolution. The U.S. Trustee reserves all rights with respect to same.

II. Plan Impermissibly Deemed to Be a Settlement

46. Section 6.9 of the Plan provides:

Compromise and Settlement of Claims and Controversies

> Pursuant to sections 363 and 1123(b) of the Bankruptcy Code and in consideration for the Distributions and other benefits provided pursuant to this Plan, the provisions of this Plan shall constitute a good faith compromise of all Claims and controversies relating to the contractual, legal and subordination rights that a Holder of a Claim or Equity Interest may have with respect to any Allowed Claim or Equity Interest, or any Distribution to be made on account of such Allowed Claim or Equity Interest. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all such Claims and controversies, as well as a finding by the Bankruptcy Court that such compromise or settlement is in the best interests of the Debtor, its Estate and Holders of Claims and Equity Interests and is fair, equitable and reasonable.

Plan § 6.9

47. Section 1123(b)(3)(A) of the Bankruptcy Code allows a plan proponent to "provide for [] 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).

48. Section 1123(b)(3) only allows a debtor to settle claims it has against others; it does not allow a debtor to settle claims that creditors and interest holders may have against it, which is what Plan § 6.9 seeks to do. *See Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 496 (B.A.P. 9th Cir. 2003) ("The only reference in [section 1123(b)] to adjustments of claims is the authorization for a plan to provide for 'the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.' . . . It is significant that there is no parallel authorization regarding claims against the estate.") (quoting section 1123(b)(3)(A)) (internal citation omitted).

49. The resolution of claims against the Debtors is governed by sections 1129 and 1141.

50. A plan may incorporate one or more negotiated settlements, but a plan is not itself a settlement. Sending a plan to impaired creditors for a vote is not equivalent to parties negotiating

a settlement among themselves. A "settlement" is "an agreement ending a dispute or lawsuit." BLACK'S LAW DICTIONARY (10th ed. 2014). An "agreement" is "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." *Id.*

51. Approval of settlements is governed by Federal Rule of Bankruptcy Procedure 9019, which provides that, "[o]n motion by the trustee [or chapter 11 debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement." But, because a "settlement" requires an agreement between the settling parties, Rule 9019 governs only parties that have entered into an express settlement agreement; it is not a blanket provision allowing general "settlements" to be unilaterally imposed upon broad swaths of claimants that have no formal agreement with any party to "settle" their claims.

52. The decision whether to approve a settlement under Rule 9019 is left to the sound discretion of the bankruptcy court, which "must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" *Wash. Mut., Inc.*, 442 B.R. at 338 (quoting *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). In contrast, chapter 11 plans are subject to the requirements of Bankruptcy Code sections 1123 and 1129. What may be permissible under a negotiated settlement agreement that is considered "fair, reasonable, and in the best interest of the estate" outside of the plan context is different from what may be permissible under a plan.

53. Here, Plan § 6.9 purports to treat the Plan itself as if it were a Rule 9019 "settlement." Further, it appears § 6.9 is not limited to settling claims belonging to the Debtor or the estate. Thus, § 6.9 exceeds the scope of what can be settled under section 1123(b)(3)(A). Unless § 6.9 is narrowed so that (i) it pertains only to claims the Debtors are settling against others and (ii) the Plan itself is not a settlement, the Plan does not comply with section 1123(b)(3)(A) and does not satisfy section 1129(a)(1).

CONCLUSION

In conclusion, for the reasons specified above, the U.S. Trustee requests that confirmation of the Plan be denied, or in the alternative, the Court direct that the Plan be modified to address his concerns listed above.

Dated: August 13, 2024

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

By: /s/ *Joseph F. Cudia*
Joseph F. Cudia
Trial Attorney
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: 202-934-4051
E-Mail joseph.cudia@usdoj.gov

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SMALLHOLD, INC.,[1]	(Subchapter V)
Debtor.	Case No. 24-10267 (CTG)

CERTIFICATE OF SERVICE

I, Joseph F. Cudia, hereby attest that on August 13, 2024, 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 upon the following parties via email::

Joseph Charles Barsalona II
Pashman Stein Walder Hayden, P.C.
1007 North Orange Street
4th Floor #183
Wilmington, DE 19801
302-592-6496
Email: jbarsalona@pashmanstein.com

Amy M. Oden
PASHMAN STEIN WALDER HAYDEN, P.C
233 Broadway
Suite 820
New York, NY 10279
201-373-2060
Email: aoden@pashmanstein.com

Subchapter V Trustee
Jami B Nimeroff
Brown McGarry Nimeroff LLC
919 N. Market Street
Suite 420
Wilmington, DE 19801
302-428-8142
Email: jnimeroff@bmnlawyers.com

[1] The last four digits of the Debtor's federal tax identification number are 8880. The Debtor's mailing is 285 Nostrand Avenue #1066, Brooklyn, NY 11216.

Dated: August 13, 2024

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

By: /s/ *Joseph F. Cudia*
Joseph F. Cudia
Trial Attorney
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: 202-934-4051
E-Mail joseph.cudia@usdoj.gov

[NEXT DOCUMENT]

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: TAKEOFF TECHNOLOGIES, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 24-11106 (CTG) (Jointly Administered) **Hearing Date: Oct. 23, 2024, at 3:30 p.m. (ET)** **Objection Deadline: Oct. 16, 2024, at 4:00 p.m. (ET)** **(extended for U.S. Trustee by agreement)** **RE: D.I. No. 417**

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE COMBINED DISCLOSURE STATEMENT AND PLAN ON AN INTERIM BASIS FOR SOLICITATION PURPOSES ONLY; (II) ESTABLISHING SOLICITATION AND TABULATION PROCEDURES; (III) APPROVING THE FORM OF BALLOT AND SOLICITATION MATERIALS; (IV) ESTABLISHING THE VOTING RECORD DATE; (V) FIXING THE DATE, TIME, AND PLACE FOR THE COMBINED HEARING AND THE DEADLINE FOR FILING OBJECTIONS THERETO; (VI) ESTABLISHING BAR DATE FOR FILING REQUESTS FOR ALLOWANCE OF INITIAL ADMINISTRATIVE CLAIMS; AND (VII) GRANTING RELATED RELIEF

Andrew R. Vara, the United States Trustee for Region 3 ("U.S. Trustee"), through his counsel, files this objection (the "Objection") to *Debtors' Motion for Entry of an Order (I) Approving the Combined Disclosure Statement and Plan on an Interim Basis for Solicitation Purposes Only; (II) Establishing Solicitation and Tabulation Procedures; (III) Approving the Form of Ballot and Solicitation Materials; (IV) Establishing the Voting Record Date; (V) Fixing the Date, Time, and Place for the Combined Hearing and the Deadline for Filing Objections Thereto; (VI) Establishing Bar Date for Filing Requests for Allowance of Initial Administrative Claims; and (VII) Granting Related Relief* ("Disclosure Statement Motion") filed at D.I. 417, and

[1] The Debtors in these chapter 11 cases, along with the last four digits of the Debtors federal tax identification numbers, as applicable, are: Takeoff Technologies, Inc. (0552); Takeoff Technologies Canada, Inc.; Takeoff Technologies Australia Pty Ltd. (ACN 639 288 958); Takeoff Technologies FZE; Takeoff International Subco India Private Limited; and Takeoff International Subco, LLC. The location of the Debtors' principal place of business and the Debtors' service address in these chapter 11 cases is 203 Crescent Street, Suite 203, Waltham, Massachusetts 02453.

in support of his Objection states:

PRELIMINARY STATEMENT

1. First, the Debtors' proposed Disclosure Statement[2] should not be approved because it fails to provide adequate information. In the Disclosure Statement, the Debtors do not provide a liquidation analysis, nor do the Debtors identify the Debtor-owners of estate assets and the value of those assets. Moreover, although Related Parties (i) will be stripped of certain claims against non-debtors through the third-party release provisions and (ii) are proposed to receive releases under the Plan, the Debtors fail to define which entities are included in that term. Further, the Debtors do not provide any information regarding the nature and/or value of claims that they propose to release under the Plan.

2. Second, the Debtors cannot provide adequate notice of the Plan's provisions affecting the rights of Related Parties because the Debtors do not define who these parties are and, by extension, cannot solicit the consent of all Related Parties to a third-party release even if they wanted to—and they do not, in fact, plan on soliciting any such consent from Related Parties.[3]

3. Third, the Disclosure Statement should not be approved because the non-consensual third-party releases render the proposed Plan unconfirmable. The Plan extinguishes a broad range of direct claims against non-debtor parties held by other non-debtor parties without their affirmative consent, including claims held by: (i) all parties in the lone voting class that cast a vote in favor of the Plan, (ii) all parties who vote to reject the Plan and who do not "opt out" of the third-party releases; and (iii) the seventeen (17) categories of Related Parties.

---

[2] All capitalized terms not defined herein have the definitions set forth in the Combined Disclosure Statement and Joint Chapter 11 Plan, as applicable.

[3] The proposed Class 3 Ballot does not contain the definition of Related Parties, which is critical to understanding the scope of the Plan's Third-Party Release provision.

4. As the discussion below demonstrates, neither the Disclosure Statement nor the Debtors' proposed solicitation procedures should be approved, and the Disclosure Statement Motion should be denied.[4]

JURISDICTION AND STANDING

5. Under (i) 28 U.S.C. § 1334; (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a); and (iii) 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and determine this Objection.

6. Pursuant to 28 U.S.C. § 586, the U. S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This 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").

7. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment on such plans and disclosure statements.

8. The U.S. Trustee has standing to be heard on the Disclosure Statement and the Disclosure Statement Motion 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 the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere

[4] In addition to the points raised in this Objection, the U.S. Trustee's counsel has provided additional comments to Debtors' counsel to the Disclosure Statement, the form of order approving the Disclosure Statement, the solicitation procedures and related notices which counsel expects will be resolved by agreement. To the extent such comments are not resolved, the U.S. Trustee reserves the right to supplement this Objection or to assert additional objections at the hearing on the Motion.

pecuniary interest).

BACKGROUND

9. On May 30, 2024, the above-captioned cases were commenced by the filing of voluntary petitions in this Court.

10. On June 12, 2024, the U.S. Trustee appointed an official committee of unsecured creditors [D.I. 61]. On July 2, 2024, the U.S. Trustee filed an *Amended Notice of Appointment of Committee of Unsecured Creditors* [D.I. 165].

11. On September 27, 2024, the Debtors filed the Disclosure Statement Motion [D.I. 417], which seeks interim approval of (i) the Combined Disclosure Statement and Joint Chapter 11 Plan [D.I. 416] and (ii) certain procedures concerning the solicitation of votes on the Joint Plan.

The Solicitation Procedures

12. The Disclosure Statement Motion requests approval of the form of ballot for use in soliciting votes from Class 3A, 3B, 3C, 3D, 3E, and 3F, the general unsecured creditors of the six Debtors. Disclosure Stmt. Mot. Ex. 1 (Form Class 3 Ballot). The proposed ballot confirms, consistent with the Plan (discussed below), that (i) creditors voting in favor of the Plan will be deemed to agree to the Third-Party Release (defined below) and (ii) creditors voting to reject the Plan must "opt out" of providing the Third-Party Release in accordance with the Plan's terms.

Relevant Plan Provisions

13. The third-party release provision in the Plan (the "Third-Party Release[s]") states in relevant part:

> **Consensual Party Releases by Certain Parties.** As of the Effective Date, each Releasing Party is deemed to have released and discharged each Debtor and Released Party from any and all Causes of Action, whether known or unknown, including any derivative claims asserted on behalf of the Debtors, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Debtors' in- or out-of-court restructuring efforts, intercompany

> transactions between or among the Debtors, the Chapter 11 Cases, the historical relationship between the Debtors and the DIP Lenders, the Sale, any other matters addressed in the Global Settlement, and the formulation, preparation, dissemination, negotiation, or filing of the Final DIP Order, the Sale, the Global Settlement, the Disclosure Statement, the Plan, or any contract, instrument, release, or other agreement or document created or entered into in connection with the Final DIP Order, the Sale, the Global Settlement, the Disclosure Statement, or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of consummation, the administration and implementation of the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date. Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not release any post-Effective Date obligations, or any document, instrument, or agreement (including those set forth in the Final DIP Order and the Sale Order) executed to implement the Plan.

Plan Art. 14.1(c).

14. The Plan provides the following with respect to the release of claims by the Debtors (the "<u>Debtor Release[s]</u>"):

> **Releases by the Debtors.** Except as otherwise expressly provided in the Plan or the Confirmation Order, on the Effective Date, for good and valuable consideration, each of the Debtors, on their own behalf and as a representative of their respective Estates, shall, and shall be deemed to, completely and forever release, waive, void, extinguish and discharge unconditionally, each and all of the Released Parties of and from any and all Claims, Causes of Action, obligations, suits, judgments, damages, debts, rights, remedies and liabilities of any nature whatsoever, whether liquidated or unliquidated, fixed or Contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise, that are or may be based in whole or part on any act, omission, transaction, event or other circumstance taking place or existing on or prior to the Effective Date (including prior to the Petition Date) in connection with or related to any of the Debtors, their respective Assets, the Estates, the Chapter 11 Cases, any of the Debtors' in- or out-of-court restructuring efforts, or the combined Plan and Disclosure Statement, that may be asserted by or on behalf of any of the Debtors or their respective Estates, against any of the Released Parties.

Plan Art. 14.1(b).

15. In the Plan, the "Releasing Parties" are defined as follows:

> "*Releasing Parties*" shall mean, in their capacities as such: (a) the Committee and its members, (b) all Holders of General Unsecured Claims who either (i) vote to

> accept the Plan; or (ii) vote to reject the Plan, but do not "opt out" of the releases set forth in Article XIV(c) of the Plan, (c) the DIP Lenders, and (d) with respect to each of the foregoing, their Related Parties, *provided, however,* that Releasing Parties shall exclude any of the foregoing parties that makes a Release Opt-Out Election, unless otherwise ordered by the Bankruptcy Court.

Plan Art. 1.87

16. The "Released Parties" under the Plan

> mean, in their capacities as such, (a) the Debtors and the Estates, (b) the Committee and its members, (c) the DIP Lenders, and (d) with respect to each of the foregoing, their Related Parties, provided, however, that Released Parties shall exclude any of the foregoing parties that makes a Release Opt-Out Election, unless otherwise ordered by the Bankruptcy Court.

Plan Art. 1.85

17. The Plan term "Related Party" means:

> in their capacities as such, an Entity's officers and directors, and the agents, attorneys, advisors, employees, professionals, shareholders, partners (general or limited), Affiliates, members, managers, equity holders, trustees, executors, predecessors in interest, or successors or assigns of any such Entity.

Plan Art. 1.84.

18. The term "Release Opt-Out Election" is defined in the Plan as:

> the timely election to "opt out" of being a Releasing Party by (a) submitting a Ballot by the Voting Deadline that (i) does not vote to accept the Plan and (ii) selecting the option set forth on the Ballot to not grant the releases set forth in Section 14.1(c) of this Plan, or (b) Filing a written objection to the releases set forth in Section 14.1(c) of this Plan by the objection deadline established by the Solicitation Procedures Order, unless otherwise ordered by the Bankruptcy Court.

Plan Art. 1.86.

19. Additionally, the Plan contains an injunction enforcing, *inter alia*, the release provisions:

> **Non-Discharge of the Debtors; Injunction**. In accordance with Bankruptcy Code section 1141(d)(3), the Plan does not discharge the Debtors. Bankruptcy Code section 1141(c) nevertheless provides, among other things, that the property dealt with by the Plan is free and clear of all Claims and Interests against the Debtors. As such, no Entity holding a Claim against the Debtors may receive any payment from,

> or seek recourse against, any assets that are to be distributed under the Plan other than assets required to be distributed to that Entity under the Plan. All parties are precluded from asserting against any property to be distributed under the Plan any Claims, rights, Causes of Action, liabilities, or Interests based upon any act, omission, transaction, or other activity that occurred before the Effective Date except as expressly provided in the Plan or the Confirmation Order.
>
> Except as otherwise expressly provided for in the Plan or in obligations issued pursuant to the Plan, all Entities are permanently enjoined, on and after the Effective Date, on account of any Claim or Interest, from:
>
> (1) commencing or continuing in any manner any action or other proceeding of any kind against any of the Estates, the Plan Administrator, their successors and assigns, and any of their assets and properties;
>
> (2) enforcing, attaching, collecting or recovering by any manner or means any judgment, award, decree or order against any Estate, the Plan Administrator, their successors and assigns, and any of their assets and properties;
>
> (3) creating, perfecting or enforcing any encumbrance of any kind against any Estate, the Plan Administrator, their successors and assigns, and any of their assets and properties;
>
> (4) asserting any right of setoff or subrogation of any kind against any obligation due from any Estate, the Plan Administrator or their successors and assigns, or against any of their assets and properties, except to the extent a right to setoff or subrogation is asserted with respect to a timely filed proof of Claim; or
>
> (5) commencing or continuing in any manner any action or other proceeding of any kind in respect of any Claim or Interest or Cause of Action released under Article XIV of the Plan.
>
> Any Entity injured by any willful violation of such injunction may seek actual damages and, in appropriate circumstances, may seek punitive damages from the willful violator.

Plan Art. 14.1(d).

ARGUMENT

I. The Disclosure Statement Does Not Contain Adequate Information.

20. Section 1125 of the Bankruptcy Code provides that a disclosure statement must contain "adequate information" describing a confirmable plan. 11 U.S.C. § 1125; *see In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007). The Bankruptcy Code defines "adequate

information" as:

> [i]nformation 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, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, ***that would enable such a hypothetical reasonable investor of the relevant class to make an informed judgment about the plan*** . . . .

11 U.S.C. § 1125(a)(1) (emphasis added); *see Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994); *Kunica v. St. Jean Fin., Inc*., 233 B.R. 46, 54 (S.D.N.Y. 1999).

21. The disclosure statement requirement of section 1125 of the Bankruptcy Code is "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.*), 848 F.2d 414 (3d Cir. 1988)).

22. The "adequate information" requirement is designed to help creditors in their negotiations with debtors over the plan. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94 (3d Cir. 1988). Section 1129(a)(2) conditions confirmation upon compliance with applicable Code provisions. The disclosure requirement of section 1125 is one of those provisions. *See* 11 U.S.C. 1129(a)(2); *In re PWS Holding Corp*., 228 F.3d 224, 248 (3d Cir. 2000).

23. To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. *See In re Duratech Indus.*, 241 B.R. 291, 298 (Bankr. E.D.N.Y.), *aff'd*, 241 B.R. 283 (E.D.N.Y. 1999) (the purpose of the disclosure statement is to give creditors enough information so that they can make an informed choice of whether to approve or reject the debtor's plan); *In re McLean Indus.*, 87 B.R.

830, 834 (Bankr. S.D.N.Y. 1987) ("substantial financial information with respect to the ramifications of any proposed plan will have to be provided to, and digested by, the creditors and other parties in interest in order to arrive at an informed decision concerning the acceptance or rejection of a proposed plan").

24. Section 1125 of the Bankruptcy Code is geared towards more disclosure rather than less. *See In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990). The "adequate information" requirement merely establishes a floor, and not a ceiling for disclosure to voting creditors. *See In re Adelphia Commc'ns Corp.*, 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006) (citing *Century Glove, Inc. v. First Am. Bank of New York*, 860 F.2d 94, at 100 (3d Cir. 1988).

25. "Adequate information" under section 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)).

26. A disclosure statement must inform the average creditor what it is going to get and when, and what contingencies there are that might intervene. *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). Although the adequacy of the disclosure is determined on a case-by-case basis, the disclosure must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy Code] alternatives . . . ." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988).

27. Here, the Disclosure Statement does not include certain information that is necessary to creditors deciding how to vote on the Plan:

a. The Disclosure Statement does not include a liquidation analysis, which creditors need to determine whether they will receive more under the Plan than in a hypothetical chapter 7 liquidation.

b. The Disclosure Statement does not identify the Debtor-owners of estate assets and the value of those assets. The cases are not substantively consolidated, so creditors of each Debtor should be informed as to which assets will satisfy their claims.

28. The Disclosure Statement also fails to provide certain information relating to releases:

a. The Disclosure Statement does not identify the innumerable Related Parties from whom Third-Party Releases are being extracted without their consent and/or, in most cases, knowledge. As noted above, the Related Parties consist of at least seventeen (17) categories of parties related to each of the Released Parties, with some categories as broad and ill-defined as "agents," "advisors," "managers," "members", and "professionals."

b. The Disclosure Statement does not identify all parties who will be the *recipients* of Third-Party Releases or Debtor releases, because the definition of "Released Parties" also includes the same broad seventeen (17) categories of Related Parties for each Released Party.

c. Moreover, in connection with the Debtor Release, the disclosure statement does not adequately disclose: (a) why the Debtors will be releasing the Released Parties; (b) the nature and value of the claims the Debtors are releasing (e.g., are there any potential claims against current/former insiders, and are any claims subject to liens held by the Debtors' secured creditors); or (c) what (if anything) the Debtors are receiving as consideration for such releases.

29. Because the Disclosure Statement fails to provide adequate information as to the above-referenced items, it should not be approved by the Court.

II. The Proposed Solicitation Procedures Do Not Provide Notice to Numerous Persons That Their Claims Against Non-Debtors Will Be Released Under the Plan.

30. The Plan and Disclosure Statement include a recitation of the Third-Party Release, and the Plan includes the relevant definitions. However, the Debtors do not propose to serve the Solicitation Package, the Confirmation Hearing Notice, or any other document on the numerous Related Parties that would notify them that the Plan will strip them of their right to pursue their direct claims against a large number of non-debtor entities. Moreover, it likely would be impossible for the Debtors to arrange to provide such notice, because the identity of many of the Related Parties—such as their "agents"—cannot be known by the Debtors.

31. In *Folger Adam Security, Inc. v. DeMatteis/MacGregor*, 209 F.3d 252 (3d Cir. 2000), the Third Circuit ruled that "[d]ue process requires 'notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 265 (citations omitted).

32. The Debtors' proposed solicitation procedures will not provide notice to the Related Parties that is "reasonably calculated, under all the circumstances, to apprize [them] of the pendency of the action and afford them an opportunity to present their objections" to having Third-Party Releases extracted from them. *Id.* In fact, most, if not all, of the Related Parties will receive no notice at all, because they are not themselves creditors or interest holders of the Debtors. Therefore, the Disclosure Statement Motion must be denied unless the Plan is modified so that no Related Parties are deemed to give releases to non-debtors. *See In re Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343 (LSS), 2022 WL 3030138, at * 128 (Bankr. D. Del. July 29, 2022) (Court was unable to find that the twenty-two (22) categories of "Related Releasing Parties" received notice, and because Court had concluded that "a request for opt-out consent must

be grounded in adequate notice, it is inconsistent to permit releases from persons who do not receive notice by virtue of creditor (or shareholder) status."); *see also Patterson v. Mahwah Bergen Ret. Grp., Inc.*, No. 3:21CV167 (DJN), 2022 WL 135398, at *7 (E.D. Va. Jan. 13, 2022) (in vacating the Bankruptcy Court's order confirming the plan, the District Court noted that "[t]he Bankruptcy Court did not order that any notice or opt-out forms be sent to all of the Releasing Parties, including the current and former employees, consultants, accountants or attorneys of Debtors, their affiliates, lenders, creditors or interest holders.").

III. The Disclosure Statement Should Not Be Approved Because the Plan Is Not Confirmable.

33. The Plan is unconfirmable for two separate and independent reasons. *First*, the Plan proposes non-consensual Third-Party Releases that are not authorized under the Bankruptcy Code. *Second*, the Releases do not have exceptions for fraud, willful misconduct or gross negligence as to Debtor parties and estate fiduciaries, thus providing them exculpation by another name beyond what this Circuit allows.

A. *The Plan Proposes Unauthorized, Non-Consensual Third-Party Releases*

34. If a plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied. *See In re Quigley Co.,* 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007) (citing *In re Beyond.com Corp*., 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003)); *In re 266 Washington Assocs*., 141 B.R. 275, 288 (Bankr. E.D.N.Y.) *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992); *In re Filex, Inc.*, 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990)).

35. Non-consensual third-party releases are not authorized under the Bankruptcy Code. *Harrington v. Purdue Pharma L.P.*, 603 U.S. __, 144 S. Ct. 2071, 2082-88 (2024).

36. Contract principles govern whether a release is consensual. *See Smallhold, Inc.*, No. 14-10267, 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024); *In re SunEdison, Inc.,* 576

B.R. 453, 458 (Bankr. S.D.N.Y. 2017). That is because a third-party release is essentially a settlement between a non-debtor claimant and another non-debtor.

37. Whether parties have reached an agreement — including an agreement not to sue — is governed by state law. The only exception is if there is federal law that preempts applicable state contract law. *See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (plurality) ("For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law must govern because there can be no other law.'") (quoting *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)).

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

39. Indeed, even as to a debtor, it is well settled that whether parties have entered a valid settlement agreement is governed by state law. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) ("Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law."); *De La Fuente v. Wells Fargo Bank, N.A.*

(In re De La Fuente), 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009) ("Where the United States is not a party, it is well established that settlement agreements in pending bankruptcy cases are considered contract matters governed by state law."); *see also Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) ("[T]he basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law.") (quotation marks omitted); *Butner v. United States*, 440 U.S. 48 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").

40. Because the Bankruptcy Code does not govern relationships between claim holders and non-debtor third-parties, state contract principles are the source of authority when considering whether a release is consensual. *See, e.g.*, *Patterson v. Mahwah Bergen Ret. 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.*, No. 24-10267, 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024) (requiring "some sort of affirmative expression of consent that would be sufficient as a matter of contract law"); *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third-party release."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 506 (Bankr. D.N.J. 1997) (holding that a third-party release "is no different from any other settlement or contract"); *id*. at 507 (holding that "the validity of the release … hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order") (internal quotation marks omitted) (alterations in original). As one court recently held, because "nothing in the bankruptcy

code contemplates (much less authorizes it)' … any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent." *In re Tonawanda Coke Corp*., No. BK 18-12156 CLB, 2024 WL 4024385, at *2 (Bankr. W.D.N.Y. Aug. 27, 2024) (quoting *Purdue*, 144 S. Ct. at 2086). Accordingly, "any such consensual agreement would be governed by state law." *Id.*

41. Here, the Debtors do not meet the state-law burden of establishing that the Releasing Parties will expressly consent to release their property rights or to have that release memorialized in the Plan.

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

43. "[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).

44. Thus, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981); *see Patterson*, 636 B.R. at 686 (discussing how contract law does not support consent by failure to opt out). Further, "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." RESTATEMENT (SECOND) OF CONTRACTS § 69, cmt. c (1981); *see Reichert v. Rapid*

Invs., Inc., 56 F.4th 1220, 1227-28 (9th Cir. 2022) ("[E]ven though the offer states that silence will be taken as consent, silence on the part of the offeree cannot turn the offer into an agreement, as the offerer cannot prescribe conditions so as to turn silence into acceptance.") (quotation marks omitted).

45. Using Delaware common law as a point of reference, silence does not equal consent except under limited circumstances not applicable here. *See, e.g., Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 991 (Del. Super. Ct. 2000) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981)). Delaware follows the "mirror image" rule, requiring the acceptance to be identical to the offer. *See Urban Green Techs., LLC v. Sustainable Strategies 2050 LLC*, No. N136-12-115, 2017 WL 527565, at *3 (Del. Super. Ct. Feb. 8, 2017); *see also Patterson*, 636 B.R. at 686 (contract law does not support consent by failure to opt out).

46. Applicable state contract law cannot be disregarded on a default theory, applied by some courts, that creditors who remain silent forfeit their rights against non-debtors because they received notice of the non-debtor release, just as they would forfeit their right to object to a plan if they failed timely to do so. *See, e.g., In re Arsenal Intermediate Holdings, LLC*, No. 23-10097, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), *abrogated by In re Smallhold, Inc.*, 2024 WL 4296938, at *8-*11. As explained by this Court in *Smallhold*, the Supreme Court's *Purdue* decision undermined the fundamental premise of such a 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. *In re Smallhold, Inc.*, 2024 WL 4296938, at *1-*2; *see also id*. at *10 ("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."). Under the default theory, because pre-*Purdue* a chapter 11 plan (under certain

circumstances, under certain circuit-level decisions) could permissibly include nonconsensual, non-debtor releases, non-debtor releases were no different from any other plan provision to which creditors had to object or risk forfeiture of their rights. *See id*. at *10. A failure to opt out under the default theory is not truly consent, but rather "an administrative shortcut to relieve those creditors of the burden of having to file a formal plan objection." *See id*. at *2; *see also id*. at *9 ("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.").

47. But entering relief against a party who defaulted by not responding is, "[u]nder established principles" permissible "only after satisfying themselves that the relief the plaintiff seeks is relief that is at least potentially available to the plaintiff in 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. [After *Purdue*], that is no longer the case in the context of a third-party release."). After *Purdue*, however, it is now clear in all circuits that imposition of a non-debtor release is not available relief through a debtor's chapter 11 plan. *See id*. at *2 ("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."); *see also id*. at *10. Thus, *Smallhold* held that "it is no longer appropriate to require creditors to object or else be subject to (or be deemed to 'consent' to) such a third-party release." *Id*. at *10.

48. The *Smallhold* court provided an illustration that makes obvious why notice-plus-failure-to-opt-out is not consent:

> Consider, for example, a plan of reorganization that provided that each creditor who failed to check an "opt out" box on a ballot was required to make a $100 contribution to the college education fund for the children of the CEO of the debtor. Just as in the case of Party

> A's letter to Party B, no court would find that in these circumstances, a creditor that never returned a ballot could properly be subject to a legally enforceable obligation to make the $100 contribution.

Id. at *2 (footnote omitted). Cases that impose a non-debtor release based merely on the failure to opt out fail to "provide[] any limiting principle that would distinguish the third-party release from the college education fund plan. And after *Purdue Pharma*, there is none." *Id*. Thus, "ordinary contract principles" apply to determine whether there is consent to a non-debtor release. *Id*. at *3.

49. Just like it is legal error to define consent in a manner inconsistent with state law, it is error to presume it exists. As discussed above, consent arises when two sets of parties affirmatively assent to something. *See* 1 VOSS ON DELAWARE CONTRACT LAW § 2.05 (citing *Loveman v. The NuSmile, Inc.*, C.A. No. 08C-08-223 MJB, memo. op. at *7 (Del. Super. Ct. Mar. 31, 2009) (Brady, J.)). A party seeking to include non-debtor releases in a bankruptcy plan must show that they are consensual. To do so, state law requires that mutually agreeing third parties must come forward, state their consent affirmatively, and ask the court to memorialize their consent in a plan. Nothing in the Code authorizes bankruptcy courts to extinguish claims by inferring consent outside the bounds of state law.

50. But an affirmative agreement — something more than the failure to opt out — is required to support a consensual third-party release. *See In re Smallhold, Inc.*, 2024 WL 4296938, at *3 ("[A] creditor cannot be deemed to consent to a third-party release without some affirmative expression of the creditor's consent."); *see also id*. at *8; *In re Tonawanda Coke Corp.,* 2024 WL 4024385, at *2; *Patterson*, 636 B.R. at 686. Failing to "opt out" of an offer is not a manifestation of consent unless one of the exceptions to the rule that silence is not consent applies, such as conduct by the offeree that manifests an intention that silence means acceptance or taking the offered benefits. For example, the *Patterson* court, in applying black-letter contract principles to opt-out releases in a chapter 11 plan, found that contract law does not support consent by failure

to opt-out. *Patterson*, 636 B.R. at 686. "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." *Id.* at 688. Because the Plan forces third-party releases on these parties without their affirmative consent, the releases are non-consensual and cannot be approved under *Purdue*.

51. The Ninth Circuit's decision in *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279 (9th Cir. 2017), cited with approval by the Third Circuit in *Noble v. Samsung Elec. Am., Inc.*, 682 F. App'x 113, 117-18 (3d Cir. 2017), illustrates the point. In *Norcia*, a consumer bought a Samsung phone from a Verizon Wireless store and signed the Verizon Wireless Customer Agreement. *Norcia*, 845 F.3d at 1282. Among the contents of the phone's box was a Samsung "Product Safety & Warranty Information" brochure that contained an arbitration provision, which "stated that purchasers could opt out of the arbitration agreement by providing notice to Samsung within 30 calendar days of purchase, either through email or by calling a toll-free telephone number." *Id*. It also stated that opting out would not affect the warranty coverage. *See id*. The customer did not take any steps to opt out. *See id*. When the customer later sued Samsung, Samsung argued that the arbitration provision applied. *See id*. at 1282-83.

52. As an initial matter, the *Norcia* court rejected the argument that the customer agreed to the arbitration provision by signing his contract with Verizon: "The Customer Agreement is an agreement between Verizon Wireless and its customer. Samsung is not a signatory." 845 F.3d at 1290. That is even more true in the context of a chapter 11 plan. Not only are the non-debtor Released Parties not signatories to it, a chapter 11 plan is a creature of the Bankruptcy Code specifically for determining how the debtor will pay its creditors, not for resolving claims between non-debtors. As the Ninth Circuit has explained, "[w]hen a bankruptcy court discharges the debtor, it does so by operation of the bankruptcy laws, not by consent of the creditors. … [T]he payment

which effects a discharge is not consideration for any promise by the creditors, much less for one to release non-party obligators." *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020) (quotation marks omitted).

53. The Ninth Circuit in *Norcia* further held that the customer's failure to opt out did not constitute consent to arbitrate. Unsurprisingly — because there was no applicable federal law — the court applied the "general rule," applicable under California law, that "silence or inaction does not constitute acceptance of an offer." 845 F.3d at 1284 (quotation marks omitted); *accord Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 456 P.2d 975, 978 (Cal. 1969). 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).

54. The Ninth Circuit explained that exceptions to this rule exist when the offeree has a duty to respond or when the offeree retains the offered benefits but held neither exception applied. *See 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. *See id*. at 1286.

55. Here, too, the debtors' creditors have not signed an agreement to release the non-debtor releasees. Nor may consent be inferred from their silence because they have no duty to respond to the offer of a non-debtor release and they have not retained any benefits offered in exchange for it.

56. The Debtors propose that the Third-Party Releases in the Plan, which benefit numerous non-debtors that are Released Parties, bind: (a) all parties who vote to accept the Plan; (b) those who vote to reject the Plan, unless they check an opt-out box on the returned ballot; and (c) as discussed in Argument section II, *supra*, the numerous Related Parties of the foregoing. There is also a catch-all provision providing that the release will not apply to any party who elects to opt out of the releases or timely objects to the releases, but this provision does not appear to apply to those who vote in favor, as the ballot provides that such entities are not entitled to opt out of the release. Plan Art. 1.86 (definition of "Release Opt-Out Election").

57. *First*, the Debtors propose that the non-debtor releases in the Plan bind all parties who vote to accept the Plan. Because the Plan forces non-debtor releases on these parties without their affirmative consent, the releases are non-consensual and cannot be approved under *Purdue*.

58. The Plan's conflation of voting for the Plan with acceptance of the Third-Party Release is inconsistent with state law. Voting for a plan does not reflect the unambiguous assent necessary to find consent to a release. *See, e.g., In re Congoleum Corp.*, 362 B.R. 167, 194 (Bankr. D.N.J. 2007) ("[A] consensual release cannot be based solely on a vote in favor of a plan."); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (holding that, because consensual releases are premised on the party's agreement to the release, "it is not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan").

59. Voting on a chapter 11 plan is governed by the Bankruptcy Code, and voter support only reflects approval of the plan's treatment of the voters' claims *against the debtor*. Because impaired creditors have a federal right under the Bankruptcy Code to vote on a chapter 11 plan, *see* 11 U.S.C. § 1126(a), merely exercising that right does not manifest consent to release claims against non-debtors. People voting on the chapter 11 plan have not "manifest[ed] [an] intention that silence may operate as acceptance" of an offer to release claims against non-debtors. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a. Nor are they "silently tak[ing] offered benefits" from the released non-debtors, such that consent may be inferred. *Id.* And because the plan's distributions are not contingent on agreeing to the non-debtor release, one cannot infer consent from the acceptance of those distributions. *See Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1286 (9th Cir. 2017) (holding customer did not retain any benefits such that a failure to opt out of arbitration indicated consent when the warranty applied regardless of the failure to opt out). Further, acceptance of a "benefit" — distributions under the plan — that the offeror had no right to refuse the offeree does not manifest acceptance of the offer. *See Railroad Mgmt. Co., L.L.C. v. CFS La. Midstream Co*., 428 F.3d 214, 223 (5th Cir. 2005) ("In the absence of any evidence that Strong had the right to exclude CFS from the property in question or that CFS accepted any service or thing of value from Strong, no reasonable jury could conclude that CFS's failure to remove its pipeline upon Strong's demand constituted consent to a contract.").

60. As explained in *Arrowmill*, a voluntary release arises only "because the *creditor agrees*" to it. 211 B.R. at 507 (emphasis in original). Because "a creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings," "it is not enough for a creditor . . . to simply vote 'yes' as to a plan." *Id*. (quotation marks omitted); *accord Congoleum Corp.*, 362 B.R. at 194; *In re Digital Impact, Inc*., 223 B.R. 1,

14 (Bankr. N.D. Okla. 1998). Rather, a creditor must "unambiguously manifest[] assent to the release of the nondebtor from liability on its debt." *Arrowmill*, 211 B.R. at 507.

61. Further, a plan is presented as a package deal—a person votes yes or no on the entire plan, not particular aspects of it—and a person should not be compelled to accept a non-debtor release as a condition of receiving the benefits of a plan. That is not true consent. For those who believe the plan is the best way to maximize the return of their money from the debtor, requiring them to vote "no" on the Plan—thus raising the possibility that the Plan may not be able to be confirmed and they thus cannot receive the economic benefit under the Plan—to reject the nondebtor release would be penalizing them for exercising their right to vote in favor of the Plan. That an offeree is penalized unless an "offer" is accepted "preclude[es] an inference of assent." *Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1230-31 (9th Cir. 2022).

62. In addition, the Bankruptcy Code guarantees that a creditor may not be required to accept in a chapter 11 plan less than it would receive in a chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7)(A). But a chapter 7 liquidation could not require a release of non-debtors as a condition of receiving a distribution (because it does not involve a plan). Requiring a non-debtor release as a condition of receiving a distribution under a chapter 11 plan, absent the individual creditor's consent, is thus inconsistent with Bankruptcy Code section 1129(a)(7)(A).

63. Hence, voting for a plan 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.

64. *Second*, the plan imposes non-debtor releases on those who vote to reject the Plan, unless they check an opt-out box on the returned ballot. But it is even more obvious that those who vote to reject a plan are not consenting merely through silence by failing to opt out of the nondebtor

release. *See In re Chassix Holdings, Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015). Not only is there no "mutual agreement" as to the Plan, much less the Third-Party Release, the creditor has actually expressly stated its rejection of the Plan. As the court in *Chassix* said, "a creditor who votes to reject a plan should also be presumed to have rejected the proposed third-party releases that are set forth in the plan. ***The additional 'opt out' requirement, in the context of this case, would have been little more than a Court-endorsed trap for the careless or inattentive creditor.***" *Id.* (emphasis added).

65. Whether or not a creditor votes to accept or reject the Plan, such creditors may not have understood the solicitation package and may not have possessed the time or financial resources to engage counsel, never imagining that their rights against non-debtors could be extinguished through the bankruptcy of these Debtors. "[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).

66. This Court correctly held in *Smallhold* that "ordinary contract principles" apply to determine whether there is consent to a non-debtor release. *In re Smallhold, Inc.*, 2024 WL 4296938, at *3. However, the U.S. Trustee respectfully submits that, in finding that voting to reject a plan without opting out constitutes "an affirmative step" necessary to infer consent (*id*. at *14), the Court erred by failing to consider whether any of the exceptions to the state-law rule that silence is not consent apply in this context.[5] They do not. As discussed above, merely voting for a plan

[5] The Ninth and Second Circuit cases cited by this Court in *Smallhold* do not support the conclusion that the act of voting on a chapter 11 plan while remaining silent regarding the non-debtor release constitutes consent. *Smallhold,* 2024 WL 4296938, at *14 n.60 (citing *Berman v. Freedom Financial Network*, 30 F.4th 849, 856 (9th Cir. 2022); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017)). Those cases emphasize the importance of notice as a prerequisite to consent and explain the requirements for when

is not an expression of consent to a non-debtor release. Voting against a plan plus a failure to opt out is still nothing more than silence with respect to the offer to release claims against non-debtors.

67. Thus, while voting on a plan is an affirmative act, it is not a "*manifestation of intention* that silence may operate as acceptance" of an offer to release claims against non-debtors. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) (emphasis added). Creditors have no 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); *In re SunEdison, Inc.*, 576 B.R. at 460–61 (holding creditors have no duty to speak regarding a plan that would allow a court to infer consent from silence). And 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. Rather, voting on a chapter 11 plan is governed by the Bankruptcy Code, and even a favorable vote reflects only approval of the plan's treatment of the voters' claims *against the debtor*. State law affords no basis to conclude that consent to release *third-party* claims can properly be inferred from nothing more than a mere failure to check an opt-out box on a ballot rejecting the proposed treatment of its claims against the *debtor*.

68. Notably, the proposed form of ballot does not contain any language advising creditors that, if they vote to reject and elect to opt out of the release, they are not jeopardizing

someone can be deemed on "inquiry notice" of terms they did not read. *See Berman*, 30 F.4th at 856; *Meyer*, 868 F.3d at 75. But whether there is sufficient notice is a distinct question from whether there has been a manifestation of an intent to accept an offer. *See, e.g., Meyer*, 868 F.3d at 74 ("[A]n offeree, *regardless of apparent manifestation of his consent*, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.") (internal quotation marks omitted; emphasis added); RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) ("The 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.").

their entitlement to a distribution from the Debtors' estates under the Plan. Discl. Stmt. Mot. Ex. 1 (Form of Class 3 Ballot).

69. This Court (and other courts) have raised the issue of whether opt outs could constitute consent because, under Federal Rule of Civil Procedure 23, a court-approved class action settlement may bind class members who do not opt out of the class action. They cannot. The analogy to class-action procedure is inapt.

70. First, Rule 23 of course does not apply by its own terms here. This is not a federal class action settlement between the non-debtor releasees and non-debtor releasors. Nor is there any provision in the Code that would authorize treatment of creditors' claims against non-debtors as a class action. Accordingly, federal class action law does not apply and cannot preempt state contract law, which (as discussed above) requires affirmative consent.

71. Second, the "opt out" procedure of Rule 23(b)(3) cannot properly be transplanted by a court to other legal contexts, absent statutory authority to do so. Class actions are fundamentally different. Class actions are congressionally created and entail procedural protections that do not exist in bankruptcy with respect to claims between non-debtors.[6] "[P]eople who fail to respond to class action notices are bound because that is the legal consequence that the Rule specifies, and not on the theory that their inaction is the equivalent of an affirmative joinder in an action." *In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). By contrast, in the context of non-debtor releases imposed via a chapter 11 plan, "[t]here is no rule that specifies an 'opt out' mechanism or a 'deemed consent' mechanism." *Id.*

[6] Further, "in the class action context there is a public policy that favors the consolidation of similar cases and that justifies the imposition of a rule that binds class members who have not affirmatively opted out." *In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). By contrast, in the context of non-debtor releases imposed via a chapter 11 plan, there is no "general 'public policy' in favor of making third party releases applicable to as many creditors as possible." *Id.*

72. Indeed, as the court found in *Patterson*, "the comparison to class action litigation highlights the impropriety of finding releases consensual based merely on a failure to opt out" because in class actions, unlike chapter 11 plan confirmations, "courts must ensure that the class action complies with the unique requirements of Rule 23 of the Federal Rules of Civil Procedure." 636 B.R. at 686.

73. Federal class actions may proceed only after a court certifies that the class meets a series of rigorous procedural requirements designed to ensure the appropriateness and fairness of class-wide litigation. For any class to be certified, Rule 23(a) requires a court to find: (1) commonality ("questions of law or fact common to the class"); (2) typicality (named parties' claims or defenses "are typical . . . of the class"); and (3) adequacy of representation (representatives "will fairly and adequately protect the interests of the class"). *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting Fed. R. Civ. P. 23); *see id.* at 621 (noting that these standards protect against the variability of equitable justice).

74. Once those threshold showings are made, Rule 23(b) then requires that one of three further predicates satisfied. Speaking generally, Rule 23(b)(1) authorizes class treatment where "individual adjudications would be impossible or unworkable," while Rule 23(b)(2) authorizes class actions where "the relief sought must perforce affect the entire class at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). Rule 23(b)(3), in turn, authorizes class treatment only where a court finds both that "the questions of law or fact common to class members predominate over any questions affecting only individual members" and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). (Notably, it is only class actions under Rule 23(b)(3)—and not those under

Rule 23(b)(1) and 23(b)(2)—that permit class members to opt out. *See Wal-Mart Stores*, 564 U.S. at 362 (explaining that "unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory").)

75. Congressionally approved class action procedures also entail additional procedural safeguards. A class must be specifically defined to identify the class members and the class claims. Fed. R. Civ. P. 23(c)(1)(B). Moreover, the court must appoint class counsel that can best "represent the interests of the class." Fed. R. Civ. P. 23(g). In other words, the Federal Rules of Civil Procedure set objective procedural protections before a class can be certified and potential members bound.

76. Further, "any class settlement that would bind absent class members requires court approval." *Patterson*, 636 B.R. at 686 (citing Fed. R. Civ. P. 23(e)). And approval may only be granted if, after a hearing, the court finds the settlement is "'fair, reasonable, and adequate' taking into account whether '(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate; and (D) the proposal treats class members equitably relative to each other.'" *Id*. at 687 (quoting Fed. R. Civ. P. 23(e)(2)). "The inquiry appropriate under Rule 23(e) . . . protects unnamed class members from unjust or unfair settlements affecting their rights." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

77. "None of these protections exist in the context of a non-debtor release in a bankruptcy action." *Patterson*, 636 B.R. at 686. "[N]o party litigates on behalf of the absent releasing party." *Id*.; *see also In re Smallhold, Inc.*, No. 14-10267, 2024 WL 4296938, at *12 n.53 (Sept. 25, 2024) ("[I]n the class action context, a class is only certified after a court makes a factual finding that the named representative is an appropriate representative of the unnamed class members. In the plan context, there is no named plaintiff, found by the court to be an adequate

representative, whose actions may presumptively bind others.”). And “[n]o party with a typical claim has a duty to ensure that he fairly and adequately represents the best interests of the absent releasing party.” *Patterson*, 636 B.R. at 686. “Moreover, the absent releasing party does not enjoy counsel that will represent his best interests in his stead.”[7] *Id.*

78. Finally, in a class action, members that fail to opt out have claims litigated on their behalf, and they may receive whatever proceeds are won in that litigation. Under a chapter 11 plan with non-debtor releases, although the releasing creditors may receive a distribution under the plan for their claims against a debtor, they lose their claims against the released non-debtors and any corresponding compensation forever if they (1) are unaware of the release and (2) fail to take affirmative action to opt out or object. Indeed, if a mere failure to opt out constitutes consent to a non-debtor release in bankruptcy, “then no court carries an obligation to ensure the fairness, reasonableness and adequacy of the relief afforded the absent releasing parties.” *Patterson*, 636 B.R. at 687.

79. Notably, state law also provides class-action procedures, with similar procedural protections to federal class actions, in which unnamed class members are bound by a court-approved class settlement unless they opt out. *See, e.g.,* Del. Super. Ct. R. Civ. P. 23. But outside of that class-action context, ordinary contract principles apply as discussed above, and a person cannot force a contract on someone else by deeming silence, such as a failure to “opt out,” to be consent, except in narrow circumstances inapplicable here. ¶¶ 41-45, *supra*.

---

[7] Although the official committee of unsecured creditors owes a fiduciary duty to the creditor body as a whole, it does not owe a duty to any individual creditor or any specific group of creditors, and the diverse body of creditors to whom it owes duties often has conflicting interests. *See In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992) (fiduciary duty of individual members of an official committee “extends to the class as a whole, not to its individual members”). Further, the committee’s duties relate only to claims against the debtor, not claims against non-debtors.

80. In sum, there will be no affirmative consent to Third-Party Releases given by the numerous persons and entities on whom such releases will be imposed. Such releases are therefore non-consensual.

81. This Court also may not approve the injunction enforcing the release by parties in interest against non-debtors because *Purdue* clearly stands for the proposition that non-consensual third-party releases and injunctions are not permitted by the Bankruptcy Code. *See Purdue*, 144 S.Ct. at 2088. As the *Purdue* court noted, the Bankruptcy Code allows courts to issue an injunction in support of a non-consensual, third-party release in exactly one context: asbestos-related bankruptcies, and these cases are not asbestos-related. *See Purdue*, 144 S. Ct. at 2085 (citing 11 U.S.C. § 524(e)). Even if non-debtor releases are consensual, there is no Code provision that authorizes chapter 11 plans or confirmation orders to include injunctions to enforce them. Further, such an injunction is not warranted by the traditional factors that support injunctive relief because, if the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent "immediate and irreparable harm" to either the estates or the released parties. A consensual release may serve as an affirmative defense in any ensuing, post-effective date litigation between the third party releasees and releasors, but there is no reason for this Court to be involved with the post-effective date enforcement of those releases. Moreover, this injunction essentially precludes any party deemed to consent to this release from raising any issue with respect to the effectiveness or enforceability of the release (such as mistake or lack of capacity) under applicable non-bankruptcy law.

B. *The Plan is Not Confirmable Because the Releases Do Not Have Exceptions for Fraud, Willful Misconduct or Gross Negligence as to Debtor Parties or Estate Fiduciaries*

82. The Plan is not confirmable as drafted because the Third-Party Release and the Debtor Release do not make an exception for actual fraud, willful misconduct, or gross negligence.

This is objectionable for several reasons. First, the Debtors are included in the definition of "Released Parties," and therefore will be receiving releases under the Third-Party Release provision. Under the Bankruptcy Code, even if the Debtors were entitled to a discharge, the Bankruptcy Code bars them from being discharged for claims of fraud and willful misconduct. *See* 11 U.S.C. § 523(a)(2, 4, 6).

83. The releases to be given by the Debtors under the Debtor Release also fail to include any exception for actual fraud, willful misconduct, or gross negligence. Through this release, and the "Related Parties" clause in the definition of Released Parties, the Debtors are releasing, among others, all of their employees.

84. The Debtors have the burden to establish how their release of claims in favor of the Released Parties, including but not limited to claims for known and unknown fraud, willful misconduct, and gross negligence of their employees and the other Released Parties, meet the requirements of *In re Zenith Electronics Corp.,* 241 B.R. 92, 110 (Bankr. D. Del. 1999) and *In re Master Mortgage Inv. Fund, Inc*., 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994). In *Zenith*, the bankruptcy court noted that a plan, notwithstanding section 524(e), may provide for releases by the debtor of claims against third parties under certain limited circumstances. The bankruptcy court in *Zenith* adopted a five-part test enunciated in *Master Mortgage Investment Fund, Inc*., 168 B.R. 930 (Bankr. W.D. Mo. 1994) to determine whether a release by a debtor of a third party as part of a plan is permissible. These factors are:

(1) an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;
(2) substantial contribution by the non-debtor of assets to the reorganization;
(3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;

(4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes 'overwhelmingly' votes to accept the plan; and
(5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

Zenith, 241 B.R. at 111. The *Master Mortgage/Zenith* factors must be separately applied to each of the entities. Absent such a showing, and appropriate findings by the Court, the plan is unconfirmable.

85. In addition, both the Third-Party Release and the Debtor Release benefit certain fiduciaries of the estate, such as the Debtors' directors and officers, and professionals retained by the Debtors in these cases. Under Circuit precedent, any exculpation of fiduciaries must carve out claims of fraud, intentional misconduct and gross negligence, which the Exculpation provision in the Debtors' Plan does. *See In re PWS Holding Corp.,* 228 F.3d 224, 246 (3d Cir. 2000). However, because the Third-Party Release and the Debtor Release do not have carve-outs for fraud, intentional misconduct and gross negligence, these estate fiduciaries are getting through the release provisions of the Plan what they are not entitled to receive by way of exculpation. As recognized by this Court in *Washington Mutual,* released parties who are fiduciaries of the estate are receiving exculpations, and therefore the releases are "unnecessary, duplicative and ***exceed the limits of what they are entitled to receive***" under the exculpations. *In re Washington Mut.*, *Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011) (emphasis added).

B. Plan Impermissibly Deemed to Be a Settlement

86. Article 14.3 of the Plan provides:

> **Comprehensive Settlement of Claims and Controversies**. Pursuant to Bankruptcy Rule 9019, and in consideration for the classification, Distribution and other benefits provided under the Plan, the provisions of the Plan shall constitute a good faith compromise and settlement of all Claims and controversies resolved pursuant to the Plan, including all claims arising prior to the Petition Date, whether known or unknown, foreseen or unforeseen, asserted or unasserted, by or against

> any Released Party, or holders of Claims, arising out of, relating to or in connection with the business or affairs of or transactions with the Debtors, as well as the compromises and arrangements provided for in the Global Settlement. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of each of the foregoing compromises or settlements, and all other compromises and settlements provided for in the Plan, and the Bankruptcy Court's findings shall constitute its determination that such compromises and settlements are in the best interests of the Debtors, the Estates, creditors and other parties in interest, and are fair, equitable and within the range of reasonableness. The provisions of the Plan, including its release, injunction, exculpation and compromise provisions, are mutually dependent and non-severable.

Plan Art. 14.3.

87. Section 1123(b)(3)(A) of the Bankruptcy Code allows a plan proponent to "provide for [] 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).

88. Section 1123(b)(3) only allows a debtor to settle claims it has against others; it does not allow a debtor to settle claims that creditors and interest holders may have against it, which is what Plan § 6.9 seeks to do. *See Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 496 (B.A.P. 9th Cir. 2003) ("The only reference in [section 1123(b)] to adjustments of claims is the authorization for a plan to provide for 'the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.' . . . It is significant that there is no parallel authorization regarding claims against the estate.") (quoting section 1123(b)(3)(A)) (internal citation omitted).

89. The resolution of claims against the Debtors is governed by sections 1129 and 1141.

90. A plan may incorporate one or more negotiated settlements, but a plan is not itself a settlement. Sending a plan to impaired creditors for a vote is not equivalent to parties negotiating a settlement among themselves. A "settlement" is "an agreement ending a dispute or lawsuit." BLACK'S LAW DICTIONARY (10th ed. 2014). An "agreement" is "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." *Id.*

91. Approval of settlements is governed by Federal Rule of Bankruptcy Procedure 9019, which provides that, "[o]n motion by the trustee [or chapter 11 debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement." But, because a "settlement" requires an agreement between the settling parties, Rule 9019 governs only parties that have entered into an express settlement agreement; it is not a blanket provision allowing general "settlements" to be unilaterally imposed upon broad swaths of claimants that have no formal agreement with any party to "settle" their claims.

92. The decision whether to approve a settlement under Rule 9019 is left to the sound discretion of the bankruptcy court, which "must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" *Washington Mut.*, 442 B.R. at 338 (quoting *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). In contrast, chapter 11 plans are subject to the requirements of Bankruptcy Code sections 1123 and 1129. What may be permissible under a negotiated settlement agreement that is considered "fair, reasonable, and in the best interest of the estate" outside of the plan context is different from what may be permissible under a plan.

93. Here, Article 14.3 of the Plan purports to treat the Plan itself as if it were a Rule 9019 "settlement." Further, it appears Article 14.3 is not limited to settling claims belonging to the Debtor or the estate. Thus, Article 14.3 exceeds the scope of what can be settled under section 1123(b)(3)(A). Unless Article 14.3 is narrowed so that (i) it pertains only to claims the Debtors are settling against others and (ii) the Plan itself is not a settlement, the Plan does not comply with section 1123(b)(3)(A) and does not satisfy section 1129(a)(1).

CONCLUSION

94. For the reasons set forth above, the Disclosure Statement should not be approved, and the Disclosure Statement Motion should be denied.

RESERVATION OF RIGHTS

95. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery. The U.S. Trustee also reserves all rights with respect to plan confirmation issues until the relevant objection deadline.

WHEREFORE, the U.S. Trustee requests that this Court enter an order (i) denying approval of the Disclosure Statement and the Disclosure Statement Motion and (ii) granting such other relief that the Court deems just and proper.

Dated: October 16, 2024
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGION 3

By: /s/ *Jonathan W. Lipshie*

Jonathan W. Lipshie
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, Delaware 19801
Phone: (202) 567-1124
Fax: (302) 573-6497
Email: jon.lipshie@usdoj.gov

CERTIFICATE OF SERVICE

I, Jonathan W. Lipshie, hereby attest that on October 16, 2024, 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 upon the following parties via electronic mail:

Counsel to the Debtors Sheppard, Mullin, Richter & Hampton LLP Justin R. Bernbrock 321 North Clark Street, 32nd Floor Chicago, IL 60654 jbernbrock@sheppardmullin.com	Counsel to the Debtors Young Conaway Stargatt & Taylor, LLP Joseph M. Mulvihill Rodney Square, 1000 North King Street Wilmington, DE 19801 mulvihill@ycst.com
Counsel to the DIP Lenders Jones Day Joshua M. Mester Kathryn Sutherland-Smith 555 South Flower Street, 50th Floor Los Angeles, CA 90071 jmester@jonesday.com ksutherlandsmith@jonesday.com	Counsel to the DIP Lenders Epstein Becker & Green, P.C. Wendy G. Marcari 875 Third Avenue New York, NY 10022 wmarcari@ebglaw.com
Counsel to the DIP Lenders Ballard Spahr LLP Tobey M. Daluz Nicholas J. Brannick 919 N. Market Street, 11th Floor Wilmington, DE 19801 daluzt@ballardspahr.com brannickn@ballardspahr.com	Counsel to the Committee Ashby & Geddes, P.A. Ricardo Palacio Gregory A. Taylor Destiny A. Kosloske 500 Delaware Avenue, 8th Floor Wilmington, DE 19899-1150 RPalacio@ashbygeddes.com GTaylor@ashbygeddes.com DKosloske@ashbygeddes.com
Counsel to the Committee Eversheds Sutherland (US) LLP Todd C. Meyers Danielle Barav-Johnson 999 Peachtree Street NE, Suite 2300 Atlanta, Georgia 30309-4528 toddmeyers@eversheds-sutherland.com dahnibarav-johnson@evershedssutherland.com	

/s/Jonathan W. Lipshie
Jonathan W. Lipshie

Faculty

John Bringardner is executive editor of Leveraged Capital Markets at ION Analytics in New York, where he oversees a global team of nearly 200 journalists and analysts across Debtwire, Xtract and Creditflux. He previously served as Debtwire's managing editor for Emerging Markets, global legal editor and courts editor, for which he provided breaking news and analysis on everything fixed income, from primary issuance to distressed debt, restructuring and bankruptcy. Over the past two decades, Mr. Bringardner's reporting on a wide range of legal and financial news has appeared in many outlets, including *Forbes*, *The New Yorker*, *The New York Times*, *WIRED*, *LCD News*, *Law.com* and *The American Lawyer*. He received his B.A. in history and philosophy in 2002 from the University of Texas at Austin and his M.A. in French studies from New York University in 2003.

Ilan D. Scharf is an attorney with Pachulski Stang Ziehl & Jones in New York, where he specializes in financial restructuring and bankruptcy litigation with a particular focus on representing creditors' committees of religious institutions and nonprofit entities. His practice focuses on representing tort claimant and creditors' committees in chapter 11 cases. He also has represented debtors, equity-holders, asset-purchasers, trade creditors, chapter 11 trustees, and other parties in business reorganizations and related litigation. Mr. Scharf has appeared before bankruptcy courts across the U.S., including New York, Delaware, New Jersey, New Mexico, California, Missouri, Montana, Texas and Pennsylvania. In 2012, he was named a "Rising Star" by *Super Lawyers* magazine and has been selected as a Super Lawyer every year since. Prior to joining PSZJ in 2003, Mr. Scharf clerked for Hon. Robert E. Gerber of the U.S. Bankruptcy Court for the Southern District of New York and was an associate at a multinational law firm. He received his undergraduate degree from Yeshiva University and his J.D. from the University of Pennsylvania.

Tancred Schiavoni is a partner with O'Melveny & Myers LLP in New York and co-chairs the firm's Insurance Practice, representing insurance and reinsurance companies in a variety of disputes, including bad faith claims and environmental coverage litigation. He has represented carriers in cases in a number of states, including New Jersey, New York and New Hampshire. Mr. Schiavoni also has conducted and assisted in mediations and provided coverage advice to clients to assist them in avoiding disputes without the need for litigation. He participated at trial in the defense of a major environmental coverage action involving multiple parties and claims for coverage exceeding US$500 million. He also was involved in the trial of another major multiparty coverage dispute involving coverage claims in a dozen states and Canada. Mr. Schiavoni has been recognized as a Local Litigation Star and National Practice Area Star for Insurance by *Benchmark Litigation* (2020-24), ranked by *Chambers USA* in the New York and Nationwide "Insurance: Dispute Resolution: Insurer" categories (2012, 2014-23), listed in *The Legal 500 US* as a Leading Lawyer (2013-19) and Hall of Fame (2018, 2020-23) for Insurance, named National Litigation Star in *Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms and Attorneys* (2013), and named Client Choice 2013 in the New York Insurance & Reinsurance category by *International Law Office* and *Lexology*. In addition, he is rated AV-Preeminent by Martindale-Hubbell and received *Law360*'s 2012 MVP award in Insurance honoring achievements in major litigation that have set a new standard for accomplishment. Mr. Schiavoni is admitted to practice before the U.S. District Courts for the District of Connecticut and the Eastern, Northern and Southern Districts of New York; the U.S. Courts of Appeals for the Second, Third, Ninth and Federal Circuits, and the U.S. Supreme Court. He received his B.S. in 1984 and his J.D. in 1988 from Georgetown University, where he was a member of the Georgetown Journal of Legal Ethics.

Catherine L. Steege is a partner with Jenner & Block LLP in Chicago and co-chairs the firm's Bankruptcy and Restructuring practice group. She recently represented USA Gymnastics in its chapter 11 case and represented McKesson and an ad hoc group of other major distributors, pharmacies and manufacturers in Purdue Pharma's and Endo's chapter 11 cases. In addition to a traditional bankruptcy practice, Ms. Steege has represented numerous retiree committees, including those in the Puerto Rico, Armstrong Flooring, Budd Company, Walter Energy, American Airlines, United Airlines and Northwest Airlines chapter 11 cases, and she has represented numerous parties in complex bankruptcy litigation matters, including her representation of the Zell defendants in the Tribune fraudulent conveyance litigation, the Sentinel Management Group Litigation Trustee, the Magnatrax Litigation Trust, the NKK Litigation Trust, and the Trustees of Emerald Casino Inc. and Consolidated Industries Corp. Ms. Steege has an active appellate practice and argued in the U.S. Supreme Court on behalf of Wellness International Network in the case of *Wellness International Network v. Sharif.* She also represented the petitioner in *Law v. Siegel* and the respondent in *City of Chicago v. Fulton*, as well as the examiners in the Lehman Brothers and Celsius Network chapter 11 cases, and she authored the sections of the Lehman Brothers Examiner's Report that considered potential avoidance actions against various financial institutions. Ms. Steege was listed in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, Litigation and Bankruptcy from 2007-21 and for 2024, in *Chambers USA* for Bankruptcy/Restructuring from 2008-23, and in *Illinois Super Lawyers* from 2005-24. She is a Fellow of the American College of Bankruptcy and a conferee of the National Bankruptcy Conference. Ms. Steege received her B.S.J. in 1978 from Northwestern University and her J.D. in 1982 with honors from DePaul University.

P. Matthew Sutko serves as the U.S. Trustee Program's Associate General Counsel for Appellate Practice in Washington, D.C. He has supervised or litigated over 1,500 appeals during his career and has argued cases before eight of the U.S. courts of appeals. Mr. Sutko also has assisted the Solicitor General, acting as petitioner, respondent and *amicus*, in 37 bankruptcy cases at the merits stage before the Supreme Court, including *Harrington v. Purdue Pharma L.P.*, *Czyzewski v. Jevic Holding Corp.*, *Midland Funding, LLC v. Johnson* and *Stern v. Marshall*. He has received the Attorney General's Distinguished Service Award (the Justice Department's second-highest honor) and the Director's Award for Excellence in Appellate Law. He also served a three-year term on the American Bar Association's Standing Committee on the Law Library of Congress. Mr. Sutko received his undergraduate degree from Marietta College, and his graduate degree and J.D. from the University of Virginia.