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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	**Case No. 24-80040-sgj11**
	§	**Chapter 11**
Eiger BioPharmaceuticals, Inc., *et al.*[1],	§	**(Jointly Administered)**
	§	
Debtors.	§	

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF AMENDED JOINT PLAN OF LIQUIDATION OF EIGER BIOPHARMACEUTICALS, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

TO THE HONORABLE STACEY G. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

Kevin M. Epstein, the United States Trustee for Region 6 (the "United States Trustee"), files this objection (the "Objection") to confirmation of the *Third Amended Joint Plan of Liquidation of Eiger Biopharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [ECF No. 571] (the "Third Amended Plan").

SUMMARY

This plan should be a straightforward liquidating plan. The debtor has sold most of its assets and alleges that it has enough money to pay general unsecured creditors in full. Thus, the

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are: Eiger BioPharmaceuticals, Inc. (1591); EBPI Merger Inc. (9986); EB Pharma LLC (8352); Eiger BioPharmaceuticals Europe Limited (N/A); and EigerBio Europe Limited (N/A). The Debtors' service address is 2100 Ross Avenue, Dallas, Texas 75201.

plan should simply provide for a mechanism to pay the creditors and to set up a trust for the equity holders to maximize their return from the remaining assets. Unfortunately, the plan cannot be confirmed because it includes impermissible releases, exculpations and discharges for the Debtors, their insiders, and their professionals that exceed what the Bankruptcy Code allows. The United States Trustee objects to confirmation of the Third Amended Plan for the following reasons:

- The Third Amended Plan is a liquidating plan. Because it is a liquidating plan, the debtor is not entitled to a discharge. While the Third Amended Plan states that the debtor will not receive a discharge, the Third Amended Plan further provides that creditors and equity holders are releasing the Debtors and then enjoins those same creditors from taking any action against the Debtors. That is a discharge. The Court should not approve any plan that provides a discharge, under whatever name.
- To the extent that applicable law authorizes exculpation beyond 11 U.S.C. § 1125(e), the Third Amended Plan's exculpation provision is too broad in contravention of Fifth Circuit authority.
- The Third Amended Plan imposes nonconsensual plan releases on non-debtor third parties that are not authorized under the United States Bankruptcy Code by relying on "opt-out" elections in the ballots (for voting classes) and in the notice of "non-voting status" (for non-voting classes), which are ineffective to constitute consent to the Third-Party Release.
- The Third Amended Plan imposes a sweeping injunction to enforce both the exculpation provision and the nonconsensual plan releases that is not authorized under the United States Bankruptcy Code.
- Finally, the Third Amended Plan should clarify that claims of governmental entities are not released.

FACTUAL ALLEGATIONS

The Disclosure Statement, Plan, and Solicitation

1. On July 15, 2024, the Debtors filed their initial joint plan of reorganization [ECF No. 424] and initial disclosure statement [ECF No. 425]. On July 28, 2024, the Debtor filed its Amended Plan (via a Notice, including a version redlined to the original) [ECF No. 455] and its amended disclosure statement (via a Notice, including a version redlined to the original) [ECF No. 456].

2. On July 30, 2024, the Court entered the Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing; (II) Conditionally Approving the Disclosure Statement, (III) Establishing Objection Deadlines and Related Procedures; (IV) Approving the Notice Materials; and (V) Granting Related Relief (the "Solicitation Order"). [ECF No. 473]

3. The Solicitation Order also approved the form of notice of the confirmation hearing, the forms of ballots for voting classes (the "Ballots"), the form of non-voting status notice (the "Non-Voting Notice"), all of which contain the Plan language describing the discharge, injunctions, exculpations, and releases contained in the Amended Plan (including the attempt to have creditors release third-party non-debtors). The Ballots and the Non-Voting Notice also contain opt-out provisions requiring those creditors to affirmatively "opt out" of the Plan's provisions granting the Third-Party Release or be deemed to "consent" to granting the Third-Consent Release.

4. Parties receiving the Non-Voting Notice did not receive the full solicitation package; instead, the Non-Voting Notice explained how Non-Voting Notice recipients could request and obtain copies of the solicitation package, including the Amended Plan.

5. On August 28, 2024, the Debtors filed their Third Amended Plan (ECF No. 571].[2]

<u>Certain Terms of the Third Amended Plan</u>

<u>Plan Implementation</u>

6. The Third Amended Plan is a liquidation plan, under which the Debtors will establish a liquidating trust (the "Liquidating Trust") to hold and to administer the Liquidating Trust Assets, distribute cash pursuant to the Third amended plan, and pursue Retained Causes of Action. *See* Third Amended Plan, Article IV.

<u>Classification of Claims and Interests</u>

7. Article III.A. of the Third Amended Plan provides thar Classes 1-5 (the creditor classes) are unimpaired, not entitled to vote, and deemed unimpaired and class 6 existing equity interests are impaired and entitled to vote.

<u>Governing Law</u>

8. Article XII.M. of the Third Amended Plan provides that the governing law for the Third Amended Plan, unless Federal law applies or unless otherwise specifically stated, are the laws of the State of Texas.

<u>OBJECTION</u>

<u>The Plan Discharges the Debtor in Violation of the Bankruptcy Code.</u>

9. The Third Amended Plan is inconsistent with the Bankruptcy Code because it provides a discharge to the Debtors. The Bankruptcy Code provides that "[t]he confirmation of a plan does not discharge a debtor if: (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of

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[2] Unless otherwise indicated herein, capitalized terms shall have the meaning ascribed to them in the Third Amended Plan.

the plan; and (C) the debtor would be denied a discharge under § 727(a) of this title if the case were a case under chapter 7 of this title." 11 U.S.C. § 1141(d)(3).

10. The Third Amended Plan fulfills all three criteria stated above (and indeed, is labeled a "liquidation" plan). And the Third Amended Plan states in Article IX(E) entitled "No Discharge," "Because the Debtors are liquidating and will not engage in business after consummation of the Plan, they are not entitled to a discharge of obligations pursuant to section 1141 of the Bankruptcy Code with regard to any Holders of Claims or Interests."

11. That should be the end of the story, but numerous provisions of the Plan contradict that language and impermissibly discharge and permanently enjoin the claims of creditors and equity holders in violation of 11 U.S.C. § 1141(d)(3).

12. First, Article III(B)(4) of the Plan, which details the treatment of the Class 4 general unsecured creditors, provides that claimants will receive their payments under the Plan "in full and final satisfaction, settlement, release, and discharge of such Claim."

13. Likewise, Article III(B)(6) of the Plan, which details the treatment of Class 6 existing equity interests, provides that equity interest holders will receive their pro rata share of the Existing Equity Interest Recovery Pool "in full and final satisfaction, settlement, release, and discharge of such Interest."

14. Then, the Injunction provision in Article IX(D) states:

D. Injunction

Except as otherwise provided in the Plan or the Confirmation Order, all Entities who have held, hold, or may hold Claims, Interests, Causes of Action, or liabilities that: (1) are subject to compromise and settlement pursuant to the terms of the Plan; (2) have been released pursuant to the Plan; (3) were purchased and released by a Purchaser in connection with the Sale Transactions; (4) are subject to exculpation pursuant to the Plan; or (5) are otherwise discharged, satisfied, stayed, released, or terminated pursuant to the terms of the Plan, are permanently enjoined and precluded, from and after the Effective Date, from commencing or continuing in any manner, any action or other proceeding, including on account of any

Claims, Interests, Causes of Action, or liabilities that have been compromised or settled against any of the Debtors or any Entity so released or exculpated (or the property or estate of any Entity, directly or indirectly, so released or exculpated) on account of, or in connection with or with respect to, any discharged, released, settled, compromised, or exculpated Claims, Interests, Causes of Action, or liabilities, including being permanently enjoined and precluded, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Plan Administrator, the Liquidating Trustee, the Released Parties, or Exculpated Parties (as applicable): (1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests; (3) creating, perfecting, or enforcing any lien or encumbrance of any kind against such Entities or the property or the estate of such Entities on account of or in connection with or with respect to any such Claims or Interests; (4) asserting any right of setoff or subrogation of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims or Interests unless such Entity has timely asserted such setoff right in a document filed with the Bankruptcy Court explicitly preserving such setoff, and notwithstanding an indication of a Claim or Interest or otherwise that such Entity asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such claims or Interests released or settled pursuant to the Plan.

Upon the Bankruptcy Court's entry of the Confirmation Order, all Holders of Claims and Interests and other parties in interest, along with their respective present or former employees, agents, officers, directors, or principals, shall be enjoined from taking any actions to interfere with the implementation or consummation of this Plan by the Debtors, the Plan Administrator, the Liquidating Trustee, and their respective affiliates, employees, advisors, officers and directors, or agents.

15. The injunction by its terms applies to the Class 4 creditors and the Class 6 equity holders. By permanently prohibiting any creditor or equity interest holder from seeking to recover in the future any part of their claim that was not paid through the Liquidating Plan, this provision improperly operates as what is commonly known as a "discharge injunction" in violation of 11 U.S.C. § 1141(d)(3). See 11 U.S.C. 524(a)(2) (the discharge injunction operates as an injunction against "the commencement or continuation of an action . . . to collect, recover or offset any such debt . . .").

16. The Debtors can remedy this defect by deleting the words "in full and final satisfaction, settlement, release, and discharge of such Claim [Interest]" from Articles Article III(B)(4) and (6) and deleting from the Plan the long paragraph under the Injunction heading at Article IX(D) and any other language in the Plan or its documents that supports what amounts to a discharge injunction.[3] Otherwise, the Court should deny confirmation of the Third Amended Plan.

<u>The Exculpation provision is too broad in contravention of Fifth Circuit authority.</u>

17. The Court also should deny confirmation because, to the extent that applicable law authorizes exculpation beyond 11 U.S.C. § 1125(e), the plan's exculpation provisions are too broad in contravention of Fifth Circuit precedent.

18. The Fifth Circuit has affirmed that, in accordance with *Bank of New York Trust Company, NA v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.)* 584 F.3d 229 (5th Cir. 2009), and section 524(e) of the Bankruptcy Code, "any exculpation in a Chapter 11 reorganization plan [must] be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties . . . ." *In re Highland Cap. Mgmt., L.P.,* 48 F.4th at 437 (5th Cir. 2022).

19. Specifically, the Fifth Circuit in *Highland Capital* analyzed whether the independent directors, who were specifically appointed to act together similar to a bankruptcy trustee, could be exculpated and concluded:

> That leaves one remaining question: whether the bankruptcy court can exculpate the Independent Directors under *Pacific Lumber*. We answer in the affirmative. As the bankruptcy court's governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together as the bankruptcy trustee for Highland Capital. Like a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee. *See* 11 U.S.C. § 1107(a); 7

[3] At most, the plan could provide a temporary injunction against interfering with the Liquidating Trustee's performance under the Plan while the Liquidating Trustee is performing under the Plan.

> COLLIER ON BANKRUPTCY ¶ 1101.01. It follows that the Independent Directors are entitled to the limited qualified immunity for any actions short of gross negligence. *See In re Hilal,* 534 F.3d at 501. Under this unique governance structure, the bankruptcy court legally exculpated the Independent Directors.

In re Highland Cap. Mgmt., L.P., 48 F.4th at 437.

20. The Fifth Circuit in *Highland Capital* then rejected any exculpation for the debtors, employees, officers, directors and professionals holding:

> As it stands, the Plan's exculpation provision extends to Highland Capital and its employees and *CEO*; Strand; the Reorganized Debtor and HCMLP GP LLC; the Independent Directors; the Committee and its members; the Claimant Trust, its trustee, and the members of its Oversight Board; the Litigation Sub-Trust and its trustee; professionals retained by the Highland Capital and the Committee in this case; and all "Related Persons." *Consistent with § 524(e), we strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors***.**

In re Highland Cap. Mgmt., L.P., 48 F.4th at 438 (emphasis added).

21. While the Third Amended Plan contains a gatekeeping provision as contemplated by *Highland*, the list of Exculpated Parties goes beyond what is permissible under the law of this Circuit, as enunciated in *Highland*. Specifically, the Third Amended Plan includes the following exculpated parties that are not allowed to be exculpated under Fifth Circuit law: the Wind-Down Debtors, Debtors' Professionals, including Sidley Austin LLP, SSG Advisors, LLC, Alvarez & Marsal North America, LLC, Neligan LLP, and Verita Global f/k/a Kurtzman Carson Consultants, LLC, the Professionals of any Statutory Committee, and any directors and officers of the Debtors as of the Petition Date *See* Third Amended Plan Article I.A. (defining "Exculpated Parties").[4]

[4] Furthermore, the Third Amended Plan's purported release and exculpation of estate professionals is unnecessary because such professionals are protected by fee review under section 330 of the Bankruptcy Code, under which the Court evaluates the reasonableness of a professional's services, including whether such services were necessary to the administration of the estate or beneficial at the time the services were rendered. The Fifth Circuit has held that a final award of professional fees is *res judicata* as to professional malpractice claims. *Osherow v. Ernst & Young (In re Intelogic Trace, Inc.),* 200 F.3d 382, 387-88 (5th Cir. 2000). Moreover, the current provision could be read to restrict the ability of parties to object to professional fees under 11 U.S.C. § 330.

22. Accordingly, the court should deny confirmation because the Exculpation does not comport with the Fifth Circuit's direction in *Highland*.

The Third Party Release

The "Third-Party Releases" are an impermissible effort by the Debtors to avoid the restrictions of section 114(d)(3) and the Fifth Circuit's opinion in Highland Capital.

23. As an initial matter, the third-party release here includes the Debtors, the Wind-Down Debtor, and each related party of those entities, which are essentially the debtor's officers, directors, and professionals. At least part of the function of these provisions appears to be another effort by the Debtors to get a discharge that the Bankruptcy Code prohibits in 11 U.S.C. § 1141(d)(3) and an exculpation for the directors, officer, and professionals prohibited by the Fifth Circuit's precedent in *Highland Capital.* This release is nonconsensual and, as applied to third parties, cannot be approved under *Purdue* and the Bankruptcy Code, but to the extent the Debtors are trying to hide a discharge for the Debtor in this provision, this attempt to contravene the prohibition on liquidating debtors being discharged should not be countenanced.

Nonconsensual plan releases of non-debtor third parties by non-debtor third parties are not authorized under the United States Bankruptcy Code.

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

25. This has long been the conclusion held by the Fifth Circuit Court of Appeals. *See Bank of N.Y. Trust Co. v. Off'l Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009) (observing that prior Fifth Circuit authority "seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions") ("*Pacific Lumber*").

26. Contract principles govern whether a release is consensual. *In re SunEdison, Inc.*, 576 B.R. 453, 458 (S.D.N.Y. Bankr. 2017) ("*SunEdison*"). This is 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*").

27. The laws of the State of Texas have long held that silence does not equal consent sufficient to support the existence of a contract, except under limited circumstances not applicable in this case.[5] *See Texas Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.*, 52 S.W.3d 128, 132-33 (Tex. 2000). Further, the Commission of Appeals of Texas stated that:

> A contract implied in fact is one in which, under the circumstances, the acts of the parties are such as to indicate according to the ordinary course of dealing and the common understanding of men a mutual intention to contract, as where one accepts the tendered service of another under circumstances justifying the inference that such other expected to be paid for such services. Of course, in implied contracts as well as express contracts there must be shown the element of mutual agreement. But the only difference is that such agreement is expressly stated, in the one instance, and is inferred from the circumstances, in the other. A contract implied from the facts and circumstances in evidence is as binding as would be an expressed one.

Marr-Piper Co. v. Bullis, 1 S.W.2d 572, 575 (Tex. Comm. App. 1928, judgment adopted).

28. Silence and inaction, however, will generally not be deemed assent to an offer because, with silence, there is generally no meeting of the minds. *Matagorda Cty.*, 52 S.W.3d at 132-33 (quoting 2 Williston on Contracts § 6:49 (4th ed. 1991)). "[A]s a matter of law, when a party is unilaterally informed of [a contract term], 'mere failure to object within a reasonable time . . ., without more, could not establish an agreement between the parties.'" *In re Couture Hotel Corporation*, 554 B.R. 369, 381 (Bankr. N.D. Tex. 2016) (quoting *Triton Oil and Gas Corp. v. Marine Contractors and Supply, Inc.*, 665 S.W. 2d 443, 445 (Tex. 1982)). "'[A] meeting of the

[5] The Third Amended Plan provides that the construction and enforcement of the Third Amended Plan is governed by the laws of the State of Texas. *See* Amended Plan, Article XII.M. That choice of law provision is not controlling for claims or settlements between non-debtors.

minds is an essential element of an implied in fact contract.'" *Id*. (quoting *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 49 (Tex. 2008)). 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 id.* A party seeking to include nondebtor 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.

<u>Opt-out provisions are insufficient to confer consent to a third-party release.</u>

29. Here, beyond the named parties, the Plan would impose the Third-Party Release on the following parties, without their affirmative consent: (i) all Holders of Claims or Interests who vote to accept the Plan and do not also opt out; (ii) Holders of Claims or Interests who vote to reject the Plan and do not also opt out of granting the Third-Party Release; (iii) Holders of Claims or Interests who do not vote and do not also opt out of granting the Third-Party Release; and (iv) the current and former Affiliates and Related Parties of entities in these groups.

30. As an initial matter, merely voting in favor of a Plan does not constitute the affirmative consent necessary to reflect acceptance of an offer to enter a contract to release claims against non-debtors. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981). Voting on a chapter 11 plan is governed by the Bankruptcy Code and a favorable vote reflects only approval of the plan's treatment of the voters' claims *against the debtor*. Those voting on the chapter 11 plan who do not also check the opt out box have not reached a "meeting of the minds" as to the release as required under Texas law. The only benefits received are through distributions from the

debtor's chapter 11 plan—there are no benefits provided from the released non-debtor to the releasing claimant. Further, 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. Voting for a plan does not reflect the unambiguous assent that should be required to find consent to a release between non-debtors. *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").

31. Nor can consent be imputed from the failure to make an opt-out election on a Plan ballot that is voted in favor of the Plan. Courts have held that affirmative agreement—something more than the failure to opt out—is required to support a consensual third-party release. *See In re* Decision and Order on Disclosure Statement, *Tonawanda Coke Corp.,* Case No. 18-12156, Dkt. 790 at 5 (Bankr. W.D.N.Y. Aug. 27, 2024); *Mahwah*, 636 B.R. at 686. 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 inaction, or 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.

32. Conspicuous warnings in the disclosure statement, on the plan ballots, or on an opt-out form that attempt to dictate that silence or inaction would constitute consent to a release are not sufficient to convert a creditor's silence into his affirmative consent to such 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 were sufficient to give rise to

a duty to speak, and, therefore, that the non-voting creditors' failure to object to the plan (or to reject the plan) should be deemed that they affirmatively consented to that 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*.

33. "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. As the *Emerge Energy Services, LP* court noted, "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).

34. After the Supreme Court's Decision in *Harrington v. Purdue Pharma*, *L.P.*, one Court in the Northern District of Texas has recently addressed whether the failure to exercise an "opt-outs" is effective to constitute consent to third party releases at confirmation and in the context of a motion to enforce a confirmation order.[6] In *In re Ebix, Inc.*, the Court denied the

[6] As Judge Everett noted in Ebix and 4 West Holdings, Inc., there are conflicting cases concerning the effectiveness of opt-out releases. *See* Ebix Transcript, p. 9 at 19, 4 West Transcript, p. 3 at ln. 17-19. Judge Everett further noted

effectiveness of opt-out third party releases for creditors who failed to return a ballot or, otherwise, failed to affirmatively indicate their specific consent to the plan or the third party release. In disallowing the inclusion of the third-party release in the proposed plan, the Court noted "[n]othing in the Bankruptcy Code or Bankruptcy Rules provides for such relief, and under Texas contract law, that the parties agree governs the third-party release under the Debtors' proposed plan, silence does not equal the consent of the affected claimants on this record." *See In re Ebix, Inc. et al*, Transcript of Ruling on Amended Chapter 11 Plan, before the Honorable Scott W. Everett held on August 2, 2024, Case No. 24-80004-SWE-11, United States Bankruptcy Court for the Northern District of Texas. (the "Ebix Transcript" Exhibit A). The *Ebix* ruling conforms to that Court's prior ruling on the permissibility and effectiveness of an opt-out third-party release in *In re 4 West Holdings, Inc.*, where the court found that there had not been "a determination, either in the confirmation order or since, on whether, in fact, the opt-out releases are permitted by applicable law." See *In re 4 West Holdings, Inc.*, Transcript of Proceedings before the Honorable Scott W. Everett held on October 18, 2022, on Motion to Enforce Confirmation Order and Releases and Injunctions Thereunder, Case No. 18-30777-SWE-11, United States Bankruptcy Court for the Northern District of Texas, Docket Entry No. 2086 (the "4 West Transcript, Exhibit B"). *See* 4 West Transcript, pp. 5-6 at ln.19-2. *See* also 4 West Transcript, p. 13 at ln. 22-23. Although Judge Everett found those parties who returned a ballot,-- but failed to opt-out of the third party release-- consented to that release, for the reasons discussed above, the better view requires affirmative action to knowingly release third parties.

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that while no other bankruptcy judge in the Northern District of Texas had written on the issue, the other four judges in the Northern District of Texas had approved opt-out release structures and that he, respectfully, was parting ways with his colleagues. *See* 4 West Transcript, p. 6 at ln. 14-16, Ebix Transcript, p. 5, ln. 8-11.

35. The Court noted that, as the Third Amended Plan provides in the present case, both the *Ebix* and *4 West Holdings, Inc*. plans were governed by the laws of the State of Texas. *See* Ebix Transcript p. 5, ln. 12-16, 4 West Transcript, p. 6 at ln. 21-22. The Court has determined that since "there are no Federal Bankruptcy Rules or Federal Civil Rules that govern whether or not somebody can assent through silence to a deemed release" the Court must look to state law to determine whether opt-out provisions are effective to confer consent to a third-party release. *See* 4 West Transcript, p. 7 at ln. 1-6.

36. The Court in *Ebix* looked to the laws of the State of Texas to determine whether silence in the face of an offer in contract constitutes consent. *See* Ebix Transcript, p. 16, ln. 9-25. In *Ebix*, the Court stated "[o]nce consent is viewed from a contractual perspective, though, it is exceedingly difficult to construe the failure to opt out of a third-party release as valid consent." Ebix Transcript, p. 15, ln. 18-20. The Court found that silence does not equal consent under Texas contract law and that none of the three exceptions to that principle—that assent to contract is supported by the parties' course of conduct, that assent to contract arises where the offeree accepts the benefit of the offer, and that assent to contract exists where the offeree misleads the offeror and that the offeree, by remaining silent, intends to accept the offer—apply to the opt out provisions in *Ebix*. *See* Ebix Transcript p. 16-19, *See also* 4 West Transcript, pp. 18-19 at ln. 23 to 21.

37. The Court has also rejected the notion that failing to opt-out from a third-party release is akin to a default under a complaint, failure to file a proof of claim timely, or failure to respond to a claim objection. "All of those examples involve specific Bankruptcy or Federal Civil Rules that permit affirmative relief to be taken against a party if they fail to act. Here, there are no comparable rules providing for the result of a determination of deemed assent or consent to a

contractual release through silence." *See* 4 West Transcript, pp. 20-21 at ln. 23-14. The Court also held that silence does not constitute consent to an Article I final adjudication of a matter by a bankruptcy court, because such consent is required to be "knowing and voluntary." 4 West Transcript, pp. 21-22 at ln. 25-18.

38. The failure of a party to opt out of the Third-Party Release is not consent to the Third-Party Release. As the *SunEdison* court, the *Chassix* court, the *4 West Holdings* Court and the *Ebix* Court observed, there may be myriad reasons that a party may not have checked off the box on a form and sent it back. It is not reasonable, and Texas law does not support the conclusion, that such failure to act indicates that such party has knowingly, deliberately and expressly agrees to be bound by the Third-Party Release. Construing a failure to return an opt-out form as affirmative consent cuts against Texas law of contracts.

39. Like in *Ebix*, *4 West Holdings, Inc*. and in *SunEdison* (applying the contract laws of New York, which are similar to those of Texas), none of the three exceptions substantiating implied consent, through silence, apply here. There is no course of conduct between the Debtors and their creditors that would imply consent to the Third-Party Release. And while the creditors may accept payments under the Third Amended Plan, should it be confirmed, they would receive those payments whether or not they opted out of the Third-Party Release. There is no independent consideration that such claimants are knowingly receiving that would constitute some kind of acceptance of benefit. The mere acceptance of payments to which they may be entitled under a plan is not the silent acceptance of the benefit of the "bargain" of the Third-Party Release sufficient to confer consent.

40. With regard to misleading conduct, the *SunEdison* 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 nonvoting creditors' failure to object to the plan or to reject the plan should be deemed their consent to the release. *SunEdison*, 576 B.R. at 460. The *SunEdison* 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*. As set forth *supra*, the Court came to a similar conclusion in *4 West Holdings, Inc.* and *Ebix, Inc.*

41. Importantly in this case, those receiving Non-Voting Notices did not receive the full solicitation package. While information concerning how to obtain a copy of the Amended Disclosure Statement, the Amended Plan, and the Plan Supplement was provided on the Non-Voting Status Notice, it is not disputed that those parties were not provided sufficient notice in the form of the underlying documents which would have more fully disclosed the parameters of the plan provisions and releases from which they were expected to "opt out". Any party receiving a Non-Voting Status Notice would have to take affirmative action to obtain those documents in order to review and understand fully what was being asked of them. Accordingly, the parties who received the Non-Voting Notice may not fully comprehend the extent of the third-party release due to a lack of notice. The Court in *4 West Holdings, Inc.* similarly expressed concern about lack of notice. *See* 4 West Transcript, p. 16 at ln. 2-7 (noting that there was no evidence that the debtors in that case gave notice to the creditor of the bankruptcy filing, the plan and the ballot).

42. It is equally implausible to suggest that a party returning a ballot rejecting the Plan but neglecting to opt out of the Third-Party Release, is evidencing consent to the Third-Party Release. 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. A Non-Voting party

who neglects to opt out of the Third-Party Release has also failed to evidence its affirmative consent to the Third-Party Release.

43. Moreover, the definition of Released Parties here includes "Related Parties"—a list of myriad different categories of people and entities. The Plan makes no attempt to identify any individual person or entity falling into any of these categories, meaning that the total universe of the parties being released is unknown (and likely unknowable). Unless the "Related Parties" are individually identified, there can be no plausible argument that a creditor has truly "consented" to release that party, and thus, that the third-party release here is consensual. There is a similar problem in the definition of Releasing Parties, which extends to all Affiliates and Related Parties of the entities releasing the Released Parties.

44. Accordingly, the Court should strike the Third-Party Release provisions in the Third Amended Plan.

The Third Amended Plan imposes a sweeping injunction to enforce the nonconsensual plan release and exculpation that is not authorized under the Code.

45. This Court also may not approve the injunction enforcing the Third-Party Release and exculpation because *Purdue* stands for the proposition that non-consensual third-party releases are not permitted by the Bankruptcy Code. *See Purdue Pharma*, 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 Pharma*, 144 S. Ct. at 2085 (citing 11 U.S.C. § 524(e)). Even if nondebtor releases are deemed 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 nonbankruptcy law.

<u>The Third Amended Plan should clarify whether claims of governmental entities are released.</u>

46. The "police and regulatory power" exception to the automatic stay found at 11 U.S.C. § 362(b)(4) is designed to ensure that the stay "does not impede government's ability to protect public health and safety." *In re Wyly*, 526 B.R. 194, 198 (Bankr. N.D. Tex. 2015).

47. The Debtors should modify the Third Amended Plan to clarify that no party shall be released from any causes of action or proceedings brought by any governmental entity in accordance with its regulatory functions, including but not limited to criminal and environmental matters. The United States Trustee requests that the Debtors include the following language in the Plan:

> Nothing in the Confirmation Order or the Plan shall effect a release of any claim by the United States Government or any of its agencies or any state and local authority whatsoever, including without limitation any claim arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person, nor shall anything in the Confirmation Order or the Plan enjoin the United States or any state or local authority from bringing any claim, suit, action, or other proceedings against any party or person for any liability of such persons whatever, including without limitation any claim, suit or action arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against such persons, nor shall anything in

> the Confirmation Order or the Plan exculpate any party or person from any liability to the United States Government or any of its agencies or any state and local authority whatsoever, including any liabilities arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person.

Wherefore, the United States Trustee respectfully requests that the Court deny confirmation of the Third amended plan and grant to the United States Trustee such other and further relief as is just and proper.

DATED: August 30, 2024

Respectfully submitted,

KEVIN M. EPSTEIN
UNITED STATES TRUSTEE

/s/ Elizabeth Ziegler Young
with permission Lisa L. Lambert
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Certificate of Service

The undersigned counsel certifies that copies of the foregoing document were served on August 30, 2024 via ECF to those parties requesting service via ECF in this case.

/s/ Elizabeth Ziegler Young
Elizabeth Ziegler Young

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	)	**Case No. 23-80004-swe11**
EBIX, INC., et al.,	)	Dallas, Texas August 2, 2024 3:30 p.m. Docket
Debtors.	)	RULING - AMENDED CHAPTER 11 PLAN (816)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SCOTT W. EVERETT,
UNITED STATES BANKRUPTCY JUDGE.

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

DALLAS, TEXAS - AUGUST 2, 2024 - 3:33 P.M.

THE COURT: Please be seated. Good afternoon. I'm here on our 3:30 docket. We have one matter in the Ebix case, Case No. 23-80004. I'll go ahead and take appearances.

MR. CALIFANO: Good afternoon, Your Honor. Tom Califano, Sidley Austin, on behalf of the Debtors. With me are my colleagues Ameneh Bordi, Francesca Sadler, and I believe that's it. And also with us we have the company's CFO, Amit Garg.

THE COURT: Good afternoon.

MS. PATEL: Your Honor, Rakhee Patel is here, too. Sorry, I know I'm probably down the list.

THE COURT: All right. Thank you, Ms. Patel.

MR. KANE: Your Honor, John Kane on behalf of the Agent, with Brian Trust, Sean Scott, and Dabin Chung of Mayer Brown.

THE COURT: Good afternoon.

MS. YOUNG: Your Honor, Liz Ziegler Young for the U.S. Trustee's Office.

THE COURT: Good afternoon.

MR. KOTLIAR: Good afternoon, Your Honor. Bryan Kotliar of Togut, Segal & Segal, counsel for the Plan Sponsor.

THE COURT: Welcome back.

MR. KOTLIAR: Thank you.

THE COURT: Do we have anybody from the Committee?

MR. WILLIAMS: Your Honor, this is Grayson Williams. I think my colleague Marcus Helt is having some audio issues. But he's with me, along with my colleague Luke Barrett.

THE COURT: All right. Thank you.

All right. Any other appearances? All right. I'm not hearing any.

This is the Court's ruling on confirmation of the Debtors' plan of reorganization in the Ebix case. The Court held a hearing on confirmation on July 30, 2024, at which all but one of the objections to confirmation were either resolved or overruled. The sole remaining issue for the Court to address is whether the third-party releases in the plan are permissible. For the reasons I'm about to discuss, I find that they are not.

Based on the modifications to the Debtors' plan of reorganization and the proposed confirmation order announced at the confirmation hearing earlier this week, the Court finds that the plan is confirmable in all other respects, subject to the striking of the nonconsensual third-party releases.

The Supreme Court recently held that the Bankruptcy Code does not authorize a release and injunction that, as part of a Chapter 11 plan of reorganization, effectively seeks to discharge claims against a nondebtor without the consent of the affected claimants. May a debtor obtain that required consent by mailing notice to claimants that they will be deemed to grant such a third-party release if they do not return to the debtor a form expressly indicating their election to opt out of giving the release?

That issue, left unresolved by the Supreme Court, has split not only different bankruptcy courts across the country, but also different bankruptcy judges within various districts, such as Delaware and the Southern District of New York.

The four other judges in the Dallas and Fort Worth Divisions of the Northern District of Texas have all approved opt-out release structures in various unpublished rulings. I respectfully part ways with my colleagues.

Nothing in the Bankruptcy Code or Bankruptcy Rules provides for such relief, and under Texas contract law that the parties agree governs the third-party release under the Debtors' proposed plan, silence does not equal the consent of the affected claimants on this record.

The Debtors filed for bankruptcy in December 2023. Five months into the bankruptcy case, the Debtors were able to sell a significant portion of their assets and use the proceeds from that sale to pay down some of their secured debt of roughly $617 million. Since then, the Debtors have been working to maximize the value of their remaining assets by concurrently exploring a sale or a reorganization.

These efforts led to the solicitation in late June and early July 2024 of a proposed plan of reorganization at Docket

No. 693, which I'll refer to in my ruling as the "Solicited Plan," contemplating the sale of the Debtors to a consortium of three Indian companies, one of which is headed by Robin Raina, Ebix, Inc.'s current Chairman of the Board, President, and CEO. At all relevant times, Mr. Raina recused himself from any decision-making on behalf of the Debtors with respect to the proposed transaction.

The Solicited Plan provided varying treatment to eight different classes of creditors and equity-interest holders. For example, equity-interest holders in the Debtors, Class 7, were to have their interests extinguished without any distribution or compensation, and general unsecured creditors, including secured lender deficiency claims, Class 4, were to receive cash from the sale of unencumbered assets, if any, and fractional interests in a potential litigation trust.

Some classes, such as Class 4 general unsecured creditors, were entitled to vote on the plan, while others were not entitled to vote, either because they would receive nothing and were thus deemed to reject the plan, or because they were unimpaired and thus were conclusively presumed to accept the plan. 11 U.S.C. Section 1126(f) and (g).

Holders of claims in classes that were entitled to vote were sent a ballot that included a section describing the releases in the Plan and providing a checkbox with which the claimants could opt out of the releases.

Holders of claims or interests that were not entitled to vote were sent a Notice of Non-Voting Status and an opt-out election form that described the releases in the Plan and provided a checkbox with which the claimants and interest holders could opt out of the releases. The election forms and ballots are found at Docket No. 696.

Several parties filed objections to the Solicited Plan, but prior to confirmation the Debtors were able to resolve the objections of all parties except for the United States Trustee. The U.S. Trustee raised several objections to confirmation of the Solicited Plan, most notably that the plan contains impermissible third-party releases. Docket Nos. 641 and 795. The Debtors filed a response to the United States Trustee's objection at Docket No. 822.

Two days prior to the July 30, 2024 confirmation hearing, the Debtors filed an updated plan at Docket No. 816-1, which I'll refer to in my ruling as the "Modified Plan." The Modified Plan, among other things, (a) called for an additional $3-1/2 million payment by the Plan Sponsor to Class 4 general Unsecured Creditors, excluding lenders with deficiency claims, and (b) granted a mutual release to any creditor or equity-interest holder who provided a release or deemed release under the Plan, as I'm about to discuss.

Section C(2) in both the Solicited Plan and the Modified Plan contains a lengthy provision that, in very general terms, deems the Releasing Parties to have provided a full discharge, waiver, and release to each of the Released Parties for any and all claims generally related to the Debtors or the Debtors' bankruptcy cases, with some caveats. I'll refer to that as the "Third-Party Releases."

Released Parties is defined elsewhere in the Plan to include, among other parties, and subject to caveats contained elsewhere in the Plan, the Non-Debtor Guarantors, the Post-Effective-Date Debtors, the DIP Secured Parties, the Prepetition Secured Lender Parties, the Creditors' Committee and each of its members, the Plan Sponsor and its members, and, in the Modified Plan, each Releasing Party, all as defined elsewhere in the Plan.

Releasing Parties is defined in the Plan to include several enumerated parties, but also, as relevant to the issue before the Court, parties that grant the Third-Party Releases to the Released Parties solely based on their silence. In that definition, I'm specifically referring to (h) all Holders of Claims or Interests that are deemed to accept the Plan and who do not affirmatively opt out of the releases provided in the Plan; (i) all Holders of Claims or Interests that vote to reject the Plan or are deemed to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan; and (j) all Holders of Claims or Interests whose vote to accept or reject the Plan is solicited but who do not vote either to accept or to reject the Plan and do not affirmatively opt out of the releases provided in the Plan. It is these Releasing Parties who are Releasing Parties and therefore deemed to grant the Third-Party Releases to the Released Parties based solely on their failure to affirmatively opt out of the release provisions in the Plan that the Court is concerned about.

In *Harrington v. Purdue Pharma,* 144 S. Ct. 2071 (2024), the Supreme Court held 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 the affected claimants. *Purdue* was careful to note 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," but stopped short of expressing a view on what qualifies as a consensual release.

Because of the split in case law before *Purdue*, the issue of what constitutes consent in the context of a third-party release has already been explored in case law. The framework was well explained in *In re Arsenal Intermediate Holdings,* 2023 Bankr. LEXIS 752, at Page 8-12. That's a Bankruptcy decision out of the District of Delaware from March 2023 by Judge Goldblatt.

"In particular, when a plan of reorganization contains a third-party release, is it sufficient to treat it as 'consensual' if creditors had the opportunity to opt out of the release and did not exercise it? Or is it necessary for the creditor to provide some affirmative expression of consent, such as voting in favor of the plan or checking a box on a form? Absent a statutory definition of the term or appellate authority directed to these questions, bankruptcy judges have taken divergent approaches.

"At one end of the spectrum, some cases view the model for finding a third-party release to be consensual as being based in principles of contract law, in which case some affirmative expression of consent is required before one would find that an offer has been accepted and a binding contract thus formed. The argument is that 'consent' to grant a third-party release should be treated the same way as consent to relinquish any other legal entitlement.

"At the other end of the spectrum, there are cases, particularly in a jurisdiction like this one" -- and he's referring to the Third Circuit -- "in which even non-consensual third-party releases may be appropriate based on the facts and circumstances of the case -- that view a third-party release just like any other plan provision. Under *Continental Airlines*, the permissibility of a third-party release, even without consent, depends on the facts and circumstances as they are established at the confirmation hearing."

And, again, that was Judge Goldblatt's opinion, at least prior to *Purdue*.

In *Arsenal*, the Court favored the later approach and found that releases contained in a plan that permit creditors to opt out may be deemed consensual as to those creditors who do not exercise that option. This Court respectfully disagrees with that approach.

Arsenal points out that it is not uncommon to grant relief on an unopposed motion filed in a bankruptcy case because it is incumbent on parties who have been properly served with pleadings to protect their own rights. That's *Arsenal* at Page 9. *Arsenal* makes this same observation in the context of a plan of reorganization: "As a practical matter, the functioning of the bankruptcy system generally depends on requiring parties that object to the relief proposed in a plan to come into court to raise their objection." That's *Arsenal* at Page 13.

But the relief that can be obtained through a motion or a plan of reorganization is not unlimited. Courts following the *Arsenal* approach give examples of relief that can be obtained in bankruptcy courts even when there is no response and no manifestation of consent. But in those examples, there is consistently a basis in either the Bankruptcy Code or the

Federal Rules of Bankruptcy Procedure or other substantive law contemplating and authorizing that relief. This makes sense because the bankruptcy court must have the power to grant the relief requested, and that power must have a source somewhere in the law.

For instance, a debtor may serve a list of proposed cure amounts on contract counterparties, and if there is no objection to the proposed cure amounts, they are presumed correct. This relief is commonly granted *en masse* without affirmative participation by the contract counterparties, but it is contemplated and authorized in Section 365(b)(1)(A) of the Bankruptcy Code. It is well within the power of the bankruptcy court to adjudicate cure amounts, and the bankruptcy court must do so even if contract counterparties do not actively participate.

Parties are also expected to object to common plan provisions regarding the structure of a plan, the classification of their claims against the debtor, or the treatment of their claim against the debtor. If they do not respond, their rights may be affected, but adjudication of these rights by a bankruptcy court is specifically contemplated and authorized in Section 1129.

The same is true of the failure to file a proof of claim or the failure to respond to a claim objection. Creditors' rights may be affected, but adjudication of these rights by a bankruptcy court is specifically contemplated and authorized in Sections 501 and 502 of the Bankruptcy Code.

Federal Rule of Civil Procedure 55 provides that a judgment may be entered by default against a party that fails to respond to a pleading seeking affirmative relief. Similarly, local rules permit courts to grant relief based on negative notice if no response is filed. But procedural rules alone cannot abridge, enlarge, or modify any substantive right. See the Rules Enabling Act, 28 U.S.C. Sections 2072, 2075. There must be a statute or common law or other form of law that authorizes the underlying relief that is being granted by default.

Class actions often utilize an opt-out mechanism that can bind parties that do not respond, but that process carries additional procedural safeguards and is specifically contemplated and authorized in Federal Rule of Bankruptcy Procedure 7023 and Federal Rule of Civil Procedure 23. The process contemplated by Rule 23 is nothing like what is happening here. Under Rule 23, if a claimant does not opt out, the claimant's rights are being protected and potentially settled by a class representative that a court determines is representing the rights of the claimants with claims sharing common questions of fact or law.

Here, in contrast, no class representative is looking out for the interests of all the deemed-releasing parties, the claims are identified only very generally, and the underlying claims are being extinguished based on a failure to respond, without court adjudication of whether the deemed release is fair and reasonable, considering the potentially unique claims being released. In fact, the Court cannot even determine whether it would have jurisdiction over those thousands of claims, and if so, whether the Court could finally dispose of them.

In the case of third-party releases, the bankruptcy court steps out of its traditional role of applying provisions of the Bankruptcy Code or adjudicating claims and causes of action and instead attempts to broker a transaction between non-debtor parties. The bankruptcy court is not being asked to adjudicate the underlying causes of action subject to the releases.

Rather, the bankruptcy court is being asked to approve an exchange between non-debtor parties. The exchange may be very important to the success of the bankruptcy case, but that alone does not allow the bankruptcy court to create an agreement where one does not exist. The Court cannot ascertain any source of power to compel non-debtors to enter into a contract via a deemed release; a contract must be formed consistent with the principles of contract law.

And finally, before I turn to that contract law, as *Purdue* recognized, Section 1123(b)(6) is not unlimited with respect to what you can insert in a plan.

In short, nothing in the Bankruptcy Code or Rules contemplates or authorizes the deemed release of a non-debtor's claims against another non-debtor, so the matter is more accurately construed as one of contract between those non-debtor parties. *See, for example*, *In re Wool Growers Central Storage*, 371 B.R. 768 at 775 (Bankr. N.D. Tex. 2007), noting that "The validity of a consensual release is primarily a question of contract law because releases are no different from any other settlement or contract." In *In re SunEdison*, 576 B.R. 453 (Bankr. S.D.N.Y. 2017), evaluating consent to third-party releases under principles of contract law.

Perhaps out of deference to this Court's prior ruling in *4 West Holdings*, the Debtors in this case have generally acknowledged this view and argued their case accordingly. I'd just refer to the Debtors' memorandum of law in support of confirmation at Docket 822.

Once consent is viewed from a contractual perspective, though, it is exceedingly difficult to construe the failure to opt out of a third-party release as valid consent. I think Judge Goldblatt in *Arsenal* recognized this point: 2023 Bankr. LEXIS 752, at Pages 15–16, where he noted that courts following the *Arsenal* approach "do not take issue with the contention that this form of 'consent' would be inadequate to form an enforceable contract. There is no serious way to disagree with the point made in the cases described above that a party's failure to respond to an offer is an insufficient basis on which to find that the offer was accepted."

There are plenty of likely reasons for individuals to fail to opt out of releases, including mistake, inadvertence, carelessness, or simply not understanding what was being asked of them.

Nevertheless, consent may be manifested by a failure to act in some situations, as recognized in Texas law in the Restatement (Second) of Contracts, Section 69. Those exceptions according to the parties are governed by Texas law in this instance. I'll refer the parties to Plan Section XII(L), "Governing Law": Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only: (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation; (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer; and (c) Where, because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

That's quoting the Restatement (Second) of Contracts, Section 69. *See also Texas Association Government Risk Management Pool v. Matagorda County.* 52 S.W.3d 128 (Tex. 2000) and *Advantage Physical Therapy v. Cruse*, 165 S.W.3d 21 (Tex. App. 2005), both of which apply the Restatement of Contracts, Section 69.

Taken in reverse order, the third exception does not apply here because there is no evidence of any ongoing course of conduct by the hundreds or thousands of affected claimants that would be applicable here and give rise to a duty to notify the offeror that an offer is not accepted.

The second exception under Restatement Section 69 generally applies when silence is misleading and there is some element of deception or dishonesty. *See SunEdison*, 576 B.R. at 459. The Debtors sent the parties warnings about the failure to opt out of the Third-Party Releases in the Plan, the ballots, and the other notice materials, but that did not create a duty to speak. There is simply no evidence that all parties even knew about the bankruptcy, the Plan, the ballot, or the other notice materials. Even if they had seen them, there are plenty of other plausible reasons for a failure to opt out, such as mistake, inadvertence, carelessness, or simply not understanding what was being asked.

Judge Wiles made exactly this point in the *Chassix* case out of the Southern District of New York. "[M]any creditors may simply have assumed that a package that related to the Debtors' bankruptcy case must have related only to their dealings with the Debtors and would not affect their claims against other parties. 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*, 533 B.R. 64, Pages 80-81 (Bankr. S.D.N.Y. 2015).

The first exception under Section 69 of the Restatement is the one that the Debtors rely on, but it does not apply because there is no evidence that the offerees have accepted any benefits with reason to know that benefits were being offered with the expectation of compensation. The reason they would not expect to be required to provide compensation is because they are not required to provide any compensation. Under the Solicited Plan, the treatment afforded to the various claimants and equity-interest holders does not vary based on whether or not they opt out of the release.

After solicitation was complete, under the Modified Plan, the Debtors offered to provide the Releasing Parties with a mutual release if they did not opt out, but these alleged benefits could not have been known to the Releasing Parties because they were only added after the original Plan was solicited.

Just as important, even if the Modified Plan with the mutual releases were resolicited, there simply is no way of telling whether any of the parties intended to accept this mutual-release benefit because we have no idea if they are paying any attention at all to this bankruptcy case and because it is, frankly, difficult to discern exactly when and how one accepts this kind of deemed release.

So, in conclusion, for purposes of the Third-Party Releases, the Court finds that they must be consensual, and consent in this context is defined by applicable state law governing contract formation.

Because the Debtors have not satisfied their burden of showing that the parties specified in Subsections (h), (i), and (j) of the definition of Releasing Parties have consented to the Third-Party Releases by virtue of their silence, the Plan cannot be confirmed as is.

But the Plan is, in all other respects, confirmable. If the Debtors are able and willing to remove Subsections (h), (i), and (j) from the definition of Releasing Parties and make the other revisions that were discussed at the hearing on confirmation of the Plan, the Court stands ready to promptly confirm the Plan without the need for further notice or a hearing. If not, an order will be entered denying confirmation.

That concludes the Court's ruling.

Mr. Califano, is there anything else before the Court recesses?

MR. CALIFANO: No. I was going to say we will make the modifications, Your Honor, and submit the confirmation order as modified, hopefully before the end of today.

THE COURT: All right. Well, I will stay here as long as necessary to sign that. I really do want to see this case confirmed. The parties have done a marvelous job. I do appreciate and respect the fact that when I kind of flagged this issue for the parties prior to plan solicitation, it appears that the provisions in the Modified Plan such as the mutual releases were intended to address my concerns. Even though that didn't get you over the goal line, I do appreciate and respect very much that you heard my concerns and attempted to address them.

And with that said, I'll be happy to confirm the plan when that modified -- well, when you upload that confirmation order acknowledging those changes.

MR. CALIFANO: All right. Thank you, Your Honor.

MS. BORDI: Thank you, Your Honor. This is Ameneh Bordi on behalf of the Debtors. We will just need to make some corresponding changes to the confirmation order as well to remove findings of fact with respect to the opt-outs. And we have one or two other clean-up comments to conform the confirmation order to the plan in a few places that did not make it into the version that was filed. So we're happy to submit that along with a redline to Your Honor, if that works for you.

THE COURT: That's fine. Do you have an estimate? Do you think I will get that this afternoon, or is it going to be over the weekend or on Monday? Do you know? Because I'm happy --

MS. BORDI: No, Your Honor, we'll -- we have it ready to go. We just need to reflect Your Honor's opinion. We didn't want to presume what the opinion would be. So if you'd give us an hour -- max, two -- it will be in your -- we will file it and submit it.

THE COURT: All right. I will try to round up somebody here to be available. Sometimes the folks in the Clerk's Office leave at 5:00. I will do my best to find somebody that, even if they go home, is able to enter it tonight. If I think there's going to be a problem with that, my courtroom deputy will notify you by email. But I'll do my best to try and find somebody to enter it after it's uploaded. If you would, --

MS. BORDI: And we will do our best to try to get it uploaded in the next half-hour. We'll work very quickly.

THE COURT: All right. And if you could, --

MS. YOUNG: And Your Honor?

THE COURT: Well, one more thing.

MS. YOUNG: Oh, I'm sorry, Your Honor.

THE COURT: That's all right. And Ms. Bordi, when it is uploaded, if you could please email my courtroom deputy at the settings email. That way we know it's there, to go get it.

All right. Ms. Young?

MS. BORDI: Absolutely, Your Honor.

THE COURT: Go ahead, Ms. Young.

MS. YOUNG: Thank you, Your Honor. And if I could just get one last look at that version of that confirmation order before it's uploaded, I would appreciate that as well.

THE COURT: All right. I assume that Ms. Bordi won't have any problems sending it to you as well.

MS. BORDI: Absolutely.

THE COURT: All right. Anything else before we recess?

MS. BORDI: So, it may take us just a -- it may take us just a little bit longer, then, to circulate it among the parties and get final sign-off, Your Honor. We will send it as soon as we can. And I think if it is entered tonight or on Monday, that would be very good for us.

THE COURT: All right. Ms. Young, it's 4:10. How late are you going to be available once you receive the document?

MS. YOUNG: Your Honor, I can make myself -- I can make myself available for the rest of the afternoon. So as soon as I get it, I will turn comments immediately back to the Debtors, hopefully with -- hopefully not too -- too soon after I get it, I can get that back to them, over to them.

THE COURT: All right. Very good.

All right. Anything else, Mr. Califano or Ms. Bordi?

MR. CALIFANO: No, Your Honor. Thank you very much for your patience and for your time.

THE COURT: All right. Thank you all. We'll be in recess.

THE CLERK: All rise.

(Proceedings concluded at 4:10 p.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **08/05/2024**

______________________________________ ________________

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	**Case No. 18-30777-swe-11**
4 WEST HOLDINGS, INC.,	Dallas, Texas October 18, 2022 1:30 p.m.
Debtor.	MOTION TO ENFORCE CONFIRMATION ORDER AND RELEASES AND INJUNCTIONS THEREUNDER (2077)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SCOTT W. EVERETT,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For OHI Asset (SC) Orangeburg, LLC:	Rachael L. Smiley FERGUSON BRASWELL FRASER KUBASTA, P.C. 2500 Dallas Parkway, Suite 600 Plano, TX 75093 (972) 826-4457
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

UST Exhibit B

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

DALLAS, TEXAS - OCTOBER 18, 2022 - 1:31 P.M.

THE COURT: Good afternoon. We're here in the 4 West Holdings case, Case No. 18-30777. I'll take appearances, please. Ms. Smiley, I think you're on mute.

MS. SMILEY: Apologies, Your Honor. Good afternoon. You would think I would understand the mute function by this point in the pandemic. Rachel Smiley on behalf of OHI Asset (SC) Orangeburg, LLC.

THE COURT: Good afternoon. So, we have just one motion on the docket. It's Docket No. 2077. It's a Motion to Enforce. I didn't see any response filed. Has this been resolved?

MS. SMILEY: Your Honor, no response has ever been filed. Despite attempts to reach out to counsel for the claimants, we have not received any kind of a formal response. I can represent to the Court that I did speak to counsel's assistant earlier on in the process and explained that we would be filing a motion to reopen the case and the basis for it, and tried to explain how the confirmation order worked, the basis for the motion. I got a little where with her that it was, you know, she was not a lawyer so I was really just attempting to get her to have her boss call me back.

I did receive one email in response from counsel basically stating that she needed some kind of an order that she could file with the court in South Carolina, and I tried to explain, well, that would be the confirmation order, but that's what we're trying to enforce here, please let's discuss, and just didn't receive a response back.

So we've noticed this hearing and served them with all the papers. We've got certificates of service on file. We've served them by email as well as by mail with everything. And we have just not gotten a response.

THE COURT: Okay. Well, this makes it a little bit awkward, because I do have some concerns about the motion. So I'll let you -- I don't know if you want to make a presentation first, or if you want me to give you a heads up on what my concerns are.

MS. SMILEY: How ever Your Honor prefers. If you want to go ahead and give me your concerns, that would be fine, if that reduces, you know, the length or the breadth of what I was going to present to the Court.

THE COURT: Sure. So, you're probably aware, there are kind of conflicting cases out there on this issue of opt-out releases. And so that I guess I have kind of three fundamental concerns.

The first one is whether the Debtor provided notice, the Debtors or anybody else provided Ms. Frazier -- or her estate after she died -- of notice of the bankruptcy, and in particular, notice of the plan and the ballot. There's nothing in the motion that I can see that addresses whether or not the Debtors even provided notice of the bankruptcy or the plan or the ballot to either Ms. Frazier or whoever represents her estate, because I understand she passed away. According to the state court complaint that was attached to your motion, she left the facility July 25, 2018 and died just a few days later, which was after the petition date but before the confirmation order.

So the first issue I have is, was there even notice given to the Debtor -- not the Debtor -- to Ms. Frazier or to her estate of the bankruptcy, and then, in particular, of the plan and the ballot?

MS. SMILEY: So, Your Honor, I was not counsel to the Debtor, so I'm going to have to give my answer based on my own knowledge and as counsel that was not involved in the 4 West case when it was actually presiding in front of Judge Hale. So, my understanding, given what I can understand from the docket, what I understand from my client, and giving opposing party the benefit of the doubt here because they say they did not have notice of the bankruptcy, my understanding is that residents were probably not noticed with the bankruptcy. There were 42 facilities with how many hundreds of residents each, many of whom were not creditors, or at least were not known to be creditors at that time.

So my assumption would be probably -- I'm not -- I don't want to make an assumption, but I would, if the Court's question is did they have notice, I don't know. But if they didn't have notice, the plan at Article 10(b) does release the released parties, of which OHI is one, from all claims and liabilities, whether known or unknown, arising from or related in any way to the business or contractual arrangements between any Debtor and a released party.

So that language seems to foresee that there may be some unknown claims out there. But in any case, the confirmation order and the plan do release them with respect to the released parties.

THE COURT: So I guess that kind of ties in to some of my other thoughts and questions. Under the release provision, this is in Section -- or, Article 10, Section B(2), which appears to be the primary section that you're relying on -- I know there's related injunctions in the plan that enforce the release -- but the Article 10, Section B(2) appears to be the operative release provision, and the one thing that jumped out when I first read it is the clause at the beginning of that paragraph which says that, effective as of the effective date, to the fullest extent permitted by applicable law, and then it goes on to say that the releases were deemed to have been given.

So my take on that is, to the fullest extent permitted by applicable law, there does not appear to have been a determination, either in the confirmation order or since, on whether in fact the opt-out releases are permitted by applicable law. So I think I have today to decide whether or not the releases are permitted under applicable law. So I guess that was one of my next questions.

MS. SMILEY: And Your Honor, to that, I can say the applicable law, as I understand it, would be the Fifth Circuit has ruled on the appropriateness of third-party nondebtor releases. And when parties are given the ability to formally opt out of such releases and those parties have that option, that the Court can then confirm enforceable third-party releases, which is why this confirmation order containing these third-party releases was entered.

THE COURT: All right. So I've read a lot of cases just to get ready for the hearing. I haven't seen any cases in the Northern District where any of our local judges have actually written on this issue of the opt-out releases. I have seen -- there are several opinions out there in New York and Delaware, Southern District of Texas. Some approve opt-out releases and some do not. I guess I will have some thoughts on that, but I guess one way I'm looking at this is the plan provides, towards the end, it's in the Jurisdiction section, that it's governed by Texas law. So I think it says to the extent, unless otherwise governed by the Federal Bankruptcy Rules or Federal Civil Rules or the Code, the plan is governed by Texas law. And I guess the way I'm looking at

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this is that there are no Federal Bankruptcy Rules or Federal Civil Rules that govern whether or not somebody can assent through silence to a deemed release like this. So I think that's the way I have to look at this, is under Texas law, because I'm not aware of any federal law or code section or rule that specifically governs deemed releases through silence like this. So that's one concern that I have.

The third major concern that I have is another paragraph in the release provision. And it's in the bottom half of that Paragraph 2. After releases are given, there's a pretty significant proviso. It says, "Provided, however, that the foregoing provisions in this third-party release shall not operate to waive, release, or otherwise impair," and then there's a list. Number one on the list is any causes of action arising from willful misconduct, actual fraud, or gross negligence of such applicable released party. And when I go to the copy of the complaint that's attached to your motion that was filed by Ms. Frazier's representative, it has a handful of causes of action. The first one -- I'm scrolling down -- is for negligence/gross negligence. And then the language of the paragraph uses language -- uses both of those phrases, including gross negligence. And gross negligence is one of the specific carve-outs to the release.

The second cause of action is negligence per se. I don't know what the elements of negligence per se are under North

Carolina law or South Carolina law. But, again, in Paragraph 54, it relies on phrases regarding recklessness, willfulness, and wantonness.

The third cause of action is for unfair trade practices under the South Carolina Unfair Trade Practices Act, and it references various conduct that is unfair and deceptive and knowing. And I guess I think a fair reading of that was that that would be covered by -- arguably would be covered by the willful misconduct carve-out from the release.

The fourth cause of action is for fraud, fraud and misrepresentation, which, again, is one of the express carve-outs to the release.

The fifth cause of action is for negligence/survivorship. I don't know the specifics of that cause of action, but at least in Paragraph 76 it relies on allegations of negligence, recklessness, willfulness, carelessness, negligence per se, and gross negligence. So all those are kind of thrown in together for that fifth cause of action.

The sixth cause of action is for negligence/wrongful death. And, again, it uses all the -- well, the same phrases: negligence, carelessness, gross negligence, recklessness.

And then the seventh cause of action is for punitive damages based on reckless, willful, and wanton conduct.

So help me with this one. It appears that several of the counts in that complaint would be expressly carved out from

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the release in the plan.

MS. SMILEY: Your Honor, whether or not South Carolina law would hold the landlord in this situation, which is all OHI is -- it is the entity that owns the building; it does not operate the rehabilitation center where Ms. Frazier was living until the time of her death -- so I don't know under South Carolina law, I cannot represent to you that I know whether or not someone purely sitting as the owner of the building can be held liable for gross conduct, fraud, or any of these other sorts of intentional conduct under any of these theories.

But I would support and would submit to the Court that it was the intention of the parties at the time that this language was drafted that the landlords should be released from tortious conduct, because torts are specifically released under the language of the release paragraph. Let's see, this is in 10(b). It does list claims, causes of action. It does list torts in here. I'm trying to find where that language is.

But all this is to say the parties contemplated that the landlords should not -- should have a release from any torts and all other claims arising from the leases that they had with the Debtors. And whether there are any sorts of conduct that a landlord could be liable for under South Carolina, you know, I don't know the answer to that question. But I can say that it was -- it was, based on this language, the intent of the parties that the landlords -- you know, and that's the position that OHI is in; it just owned the building -- should have a full release from torts, from tortious claims.

THE COURT: So, first, my comments should not be taken as any kind of a comment on the actual merits of the complaint. So I understand your client's position that they're merely the landlord; they were not operating. But that issue is really not for me.

But just looking at this plan language, there's general release language and then there's a specific carve-out. The general release language does say it releases all these claims, whether for tort, contract, and other things. Tort is a pretty broad category. That would include negligence, for example, which would not be covered by the more specific carve-out. And the carve-out is pretty specific that it carves out willful misconduct, actual fraud, and gross negligence of the applicable released parties.

So I guess, as I'm sitting here, it appears that the more specific carve-out would govern over the more general release. So that's probably the third fundamental concern that I have with the motion. So I'll open up the floor. So those are my concerns, and I'll kind of open up the floor to you to address anything else you'd like or to make any other arguments that you may have.

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MS. SMILEY: Thank you, Your Honor. And I do have a short presentation, I'll try and get through it fairly quickly, just to substantiate why, in this situation, with the opposing party not being here, OHI is really just asking the Court to simply clarify that a previous order that it entered, which is the 4 West confirmation order, it just simply means what it says it means, and acknowledging that OHI has attempted on many occasions to communicate with the claimant, which is Ms. Frazier as the representative of her mother's estate, and explain that the confirmation order and the plan that the Court confirmed releases OHI from the claims and that OHI -- and explain to the claimant that they brought this lawsuit in South Carolina that we have not responded to on this basis, but they haven't responded. We're the only one who has -- who has sought affirmative relief in this Court to confirm -- to enforce the terms of this confirmation order. And we've made them aware that we're here, and they simply haven't responded.

So we feel like we can cleanly ask the Court to simply enforce the terms of the confirmation order as it's written. I understand that the Court has concerns and is reluctant in a number of ways, and appreciate those concerns, but we're -- we're simply asking the Court to enforce the confirmation order language as it's written. And as the other side, Ms. Frazier's representative, has not come forward with any kind of a response, we're not sure how, you know, we stand with respect to the lawsuit that they're continuing to prosecute on the other side.

Our position is that we have releases under a plan. If the releases in the confirmation order are not enforced, then we have to go answer a lawsuit in South Carolina that, as we understand, is for claims that we're no longer or can't be liable for because they are released and enjoined by this Court's order.

So it makes our status a little bit unclear as well if we don't simply have an order from this Court enforcing the confirmation order as it's written.

THE COURT: All right. Thank you, Ms. Smiley. Do you have anything else before I -- I'm going to take a short recess, and then I'm planning to come back and rule. Anything else you'd like to add?

MS. SMILEY: I don't think so, Your Honor. I think, Your Honor, you know, I could present -- I could walk through the language and how all the releases work, but I think Your Honor has clearly prepared for that and understands the releases, so I don't see any reason to take the Court's time with that.

If Your Honor had any additional questions or any other items that I can at least provide, you know, to my understanding of the situation or my understanding of the law or of the confirmation order, I'm happy to do that before the Court goes into recess.

THE COURT: I don't think so. I mean, I think I've tipped you off to three of the concerns that I had. But before I rule, I just want to take a couple minutes, and then I'll come back out and rule. So we'll take a brief maybe five-minute recess.

(A recess ensued from 1:50 p.m. until 1:59 p.m.)

THE COURT: Okay. We're back on the docket in the 4 West Holdings case. So, I've considered the Motion to Enforce at Docket #2077. I have considered the motion, all of the attachments to that motion, and I've considered the arguments of counsel.

This is a little bit strange, given that there's a lack of response by the opposing counsel. But in this specific case, I will look to the *SunEdison* case out of the Southern District for guidance there. Judge Bernstein, even though no party -- that Court addressed this issue at the confirmation stage, and he raised *sua sponte* whether he should approve an opt-out release under those circumstances. Here, we're way past the confirmation stage. But as I'll explain in my ruling, that issue, I think, has been reserved. I don't think it has been ruled on. So I do think, given the serious nature of the sanctions that are being requested, I don't think I could just -- can or should enter a default based on the lack of a response. Given that this is a sanctions hearing, I have to be comfortable that it is appropriate to award sanctions and to interpret the Court's prior orders in that context.

So I'll start with the *Pacific Lumber* case, which is the Fifth Circuit case from 2009. That's at 584 F.3d 229. And there have been other Fifth Circuit cases since then that have made clear that, at least in the Fifth Circuit, nonconsensual releases and related injunctions are not permitted. So that's kind of the baseline. Nonconsensual releases are not permitted.

There does appear to be wiggle room in that case and other cases that provide -- that would allow for consensual releases under appropriate circumstances. And so I have to determine today whether or not this is a consensual release, and if so, whether it's effective.

So, the plan, at Article 12(l), provides that -- and I'll pull up the exact language. This is the Governing Law provision of the plan, and it's Article 12(l), styled, Governing Law. It provides, "Except to the extent that the Bankruptcy Code, the Bankruptcy Rules, or other federal law is applicable, or to the extent that a restructuring document or an exhibit or schedule to this plan provides otherwise, the rights and obligations under this plan shall be governed by and construed and enforced in accordance with the laws of Texas, without giving effect to the principles of conflicts of law of such jurisdiction."

Here, there really is no Bankruptcy Code section that governs consensual releases. We know, according to the Fifth Circuit, there are Code provisions governing nonconsensual releases, but there's no Code section, there's no Bankruptcy Rule, there's no Federal Civil Rule that governs whether or not silence can be deemed assent or consent to a release under a plan like this. So I think this issue today is resolved by Texas law.

The only other potential federal law that would apply would be the law of due process under the Constitution, and there are some issues that are implicated there, as I'll address in just a few minutes.

So, the Movant relies primarily on Plan Article 10, Section B(2), which is the general provision regarding the releases at issue here. And as I mentioned during my comments, the Court only approved the releases "to the fullest extent permitted by applicable law." And, again, applicable law here would be Texas law, and there does not appear to have been any prior court determination of whether or not the deemed releases are permitted by applicable law.

So, the way I'm looking at this is the plan is a contract, and the Movant, I think, is effectively arguing that Ms. Frazier or her estate somehow consented to the release by not opting out. So there are three fundamental problems with this argument.

Number one, did the Debtors or anybody else send notice of the offer -- that is, the plan -- to Ms. Frazier or her estate? And there is no evidence that the Debtors gave notice to Ms. Frazier of the bankruptcy filing or gave notice of the plan and the ballot to either Ms. Frazier or her estate after she died.

I understand, Ms. Smiley, you indicated that she may be an unknown claimant. There's just no evidence that she's an unknown claimant. At the end of the day, even if she was an unknown claimant, for the reasons I'll explain, I don't think that matters.

But to the extent the Movant is relying on kind of a contract analysis for a deemed release, there's no evidence that the other party got the offer of the release. And so there is also a federal due process concern or violation if there is an argument that somehow Ms. Frazier or her estate are deemed to have consented to the release when the Debtors didn't provide her or her estate notice of the offer or of the plan.

And I understand there are cases in different contexts that provide for what type of notice you have to provide to known creditors and what you have to do when there are unknown creditors. I don't know, sitting here today, if she was an unknown creditor or not. But I think the rest of my ruling will make clear, I'm not sure that that really matters in this specific case.

So, number two, even if the Debtors had provided notice to Ms. Frazier or her estate, the second fundamental problem I have is did Ms. Frazier or her estate consent or assent to the release by virtue of not opting out? And as I mentioned earlier, there are a growing a number of opinions on this issue of the opt-out releases, none that I'm aware of in the Northern District of Texas. The one that I've found that to me is the most persuasive is the *SunEdison* case. That's 576 B.R. 453. That's an opinion from the Bankruptcy Court from the Southern District of New York, 2017. That Court applied New York law to determine the effectiveness of an opt-out release. And, again, in that case, Judge Bernstein raised the issue *sua sponte* at the plan confirmation stage. And here, I am raising the issue *sua sponte* even though we're past the plan confirmation stage because, given the language of the release that provides that it's only permitted to the extent permitted by applicable law, I am now making that determination.

So, Judge Bernstein looked to New York law to determine the effectiveness of the opt-out release in that case, and the Court relied on the *Restatement of Contracts* and also a contract treatise by Calamari, a fairly well-known contract treatise. And there are, likewise, Texas cases that follow the *Restatement of Contracts* and other contract treatises like *Williston on Contracts* on this exact point -- that is, whether assent through silence [Court correction] is appropriate. And I'll just cite to you the *Texas Association* case, 52 S.W.3d 128, 132. That's a Texas Supreme Court case from 2000. Also, the *Advantage Physical Therapy* case, 165 S.W.3d 21, 26. That's a Texas Appellate Court case from 2005.

Those cases, like the authorities in Judge Bernstein's opinion, note that, absent a duty to speak, silence does not constitute consent. An example that -- a variation of the example that Judge Bernstein gave in his case is you can't send a letter to somebody saying, I offer to buy your dog for $25 and if you fail to respond by next Friday you are deemed to have consented to the sale of your dog. So, he gave a slightly different example, but that's basically the general rule, I think, which is that, unless there's an exception, silence -- or, unless there's a duty to speak, silence does not constitute consent.

Courts have recognized three exceptions to that general rule. Judge Bernstein noted them, and the Texas authorities likewise following the *Restatement of Contracts* note those same three exceptions.

First, assent by silence will arise where, number one, it is supported by the parties' ongoing course of conduct. And as to that specific example or exception, there's no evidence here that there was any ongoing course of conduct that would be applicable here that would give rise to an assent.

Number two, assent by silence will arise where the offeree accepts the benefits of the offer, despite a reasonable opportunity to reject them, and understands that the offeror expects compensation. The facts here simply don't support that second exception to the general rule. There's no evidence that Ms. Frazier or her estate accepted the benefits of the offer or the plan, despite an opportunity to reject them, and there's no evidence that she understood that the offeror, which here would be the Movant, expects compensation.

Number three, the offeror -- this is the third exception to assent by silence, which is where the offeror has given the offeree reason to understand that silence will constitute acceptance, and the offeree, in remaining silent, intends to accept the offer. And under that last exception, Judge Bernstein noted that silence operates as an assent because the assent is misleading, and the exception does not apply absent some element of deception or dishonesty.

And the facts here do not support assent by silence under either one of those three exceptions to the general rule.

So the Movant appears to argue that the warning in the plan and the ballot regarding the potential effect of silence gave rise to a duty to speak, and that Ms. Frazier's failure to object to the plan or to opt out should be treated as deemed consent to the release. So, Ms. Smiley, you didn't make that exact argument, but I'm kind of constructing the only argument that I think could be made to support a deemed release. And here, there is simply no evidence that Ms. Frazier even knew about the bankruptcy or that her estate representative ever saw the plan and the ballot. So I don't know how they could have deemed consent through silence when they never saw the plan or there's no evidence that they saw the plan or the ballot.

And even if the estate representative had seen the plan or the ballot, given Ms. Frazier's passing away by plan confirmation, there are other plausible inferences for the failure to opt out, such as inadvertence. We don't even know if anybody saw the plan, saw the ballot, or cared one way or the other. There's simply no evidence that silence here was misleading or that it signified consent or assent to release.

There are some cases in other jurisdictions that permit opt-out releases under certain circumstances, but the rationale of those cases to me is not persuasive. Probably the best representative example would be the *Mallinckrodt* case. That's M-A-L-L-I-N-C-K-R-O-D-T. That's 639 B.R. 837. That's an opinion from the Delaware Bankruptcy Court in 2022. One of the rationales that the Court gives for this idea of assent through silence is that, in the judicial sphere, there are examples where somebody's assent can lead to action being taken against them. For example, and these are the examples that were given by the *Mallinckrodt* court, if somebody files a complaint against an individual and there's no answer, a judgment can be taken against the defendant. The other example is the failure to file a proof of claim despite the bar date notice. A third example is the failure to respond to a claim objection -- you know, if a claim is filed, the failure to respond to the claim objection can lead [Court correction] to the disallowance of that claim.

All of those examples involve specific Bankruptcy or Federal Civil Rules that permit affirmative relief to be taken against a party if they fail to act. Here, there are no comparable rules allowing a deemed assent or consent to a contractual release through silence. So I don't find the rationale of those cases to be persuasive.

And there are -- even in Delaware, there's a split on this issue. Other Delaware courts have followed *SunEdison*, including the *Emerge Energy* case, which is 2019 WL 7634308, out of Bankruptcy Court for Delaware in 2019.

So, the only other rationale that kind of jumped out at me as we were getting ready for hearing was a case out of the Southern District of Texas [Court correction], and there might be one other, where they analogize to the *Wellness* Supreme Court opinion for the proposition that silence can lead to consent. And in that context, the consent would be consent to

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Article I final adjudication of a matter. And I just don't think that's a very persuasive analogy because the Supreme Court in *Wellness* made clear that consent to Bankruptcy Court final adjudications, even if they can be implied, and they can be implied, must be knowing and voluntary. So, for example, if you continue -- you don't have to say, I consent to Bankruptcy Court final adjudication, but if you're there litigating in front of the Bankruptcy Court and you don't say anything, you are still taking action by your conduct.

So that analysis just doesn't work for me here because, here, Ms. Frazier or her estate are not in a comparable position. They're not doing anything affirmative. It's kind of the converse, where she's doing nothing, and I'm being asked to infer from doing nothing that she has voluntarily consented or assented to a release.

So I just don't think that there's a knowing and voluntary consent or assent to the extent *Wellness* is an appropriate analogy.

And then the third and final problem that I had with the motion is the issue of the carve-out. And I mentioned earlier that there is broad language in the release, the releases in Plan Article 10, Section B(2), where the non-releasing -- I'm sorry, the nondebtor releasing parties are deemed to have provided this release from any and all claims, and there is "whether for tort, contract" or other items. So there is a general release for torts. But there is a more specific provision in this release paragraph that walks back that broad release for torts, and it walks it back for intentional torts. And that language is, "Provided, however, that the foregoing provisions of this third-party release shall not operate to waive, release, or otherwise impair," number one or Romanette (i), "any causes of action arising from willful misconduct, actual fraud, or gross negligence of such applicable released party."

And, again, going to the complaint, several of the causes of action appear to be covered under that carve-out. For example, the first cause of action is negligence/gross negligence, which is expressly carved out from the general tort release. At least, the gross negligence part of that count would be carved out. The third cause of action for Unfair Trade Practices Act violations to me appeared to be -- that cause of action appears to contemplate knowing violations, or knowing and willful misconduct, which would be another carve-out from the release.

The fourth cause of action is for fraud and misrepresentation. I think that again would be expressly carved out from the general release.

And some of the other causes of action kind of flow back and forth between negligence and gross negligence and recklessness. So to the extent those causes of action likewise would include elements of gross negligence or willful misconduct or fraud, those likewise would be carved out of the release.

So, for all of those reasons, given the serious nature of the request, which is significant sanctions against the alleged violating party, I can't just grant a default judgment against them based on their failure to respond. I had to become comfortable that it would be appropriate for me to grant sanctions. In order for me to do that, I have to interpret the Court's own order. And as I interpret the order and the applicable governing law, which is Texas law, I find that at least under the unique circumstances of this case, maybe not in all cases but at least in this case, I don't find that the opt-out release provisions were effective as against Ms. Frazier or her estate.

So, Ms. Smiley, unless you have any questions or clarifications, I'm going to have to ask you to prepare an order -- well, don't worry about that. We will handle the order denying the motion. The order will simply state that I'm denying it for the reasons stated on the record. I don't intend to write a ruling, a written opinion on this. So the order will simply reflect or incorporate the Court's findings of fact and conclusions of law on the record.

So, do you have any questions or clarifications about my ruling?

MS. SMILEY: No, Your Honor.

THE COURT: All right. Well, I appreciate your time. I do think it's unfortunate that the other side -- I do appreciate the efforts that your firm made to bring the alleged violations to the attention of the Frazier estate. It's unfortunate that they elected not to respond to your -- but, given the consequences here, I'm going to deny the motion for the reasons I've stated. So, with that said, we will be in recess. Thank you.

MS. SMILEY: Thank you, Your Honor.

(Proceedings concluded at 2:22 p.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **10/31/2022**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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