IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
APPGATE, INC., *et al.*, [1]	Case No. 24-10956 (CTG)
	(Jointly Administered)
	Re: D.I. 15
Debtors.	**Hearing Date**: June 17, 2024 at 1:00 p.m.
	UST Obj. Deadline: June 12, 2024 at noon

UNITED STATES TRUSTEE'S OBJECTION TO JOINT PREPACKAGED PLAN OF REORGANIZATION OF APPGATE, INC. AND ITS DEBTOR SUBSIDIARIES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

Andrew R. Vara, the United States Trustee for Region 3 ("U. S. Trustee"), through his counsel, files this objection (the "Objection") to *Joint Prepackaged Plan of Reorganization of Appgate, Inc. and Its Debtor Subsidiaries Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan") [D.I. 15] and in support of his Objection, states:

PRELIMINARY STATEMENT[2]

1. The U.S. Trustee objects to the Plan because it imposes on equity interest holders of Appgate, Inc. ("Appgagte") the requirement to return a "Release Opt-Out Form" to avoid

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Appgate, Inc. (7231); Appgate Cybersecurity, Inc. (5215); Cryptzone Worldwide, Inc. (3539); Cryptzone International Holdings Inc. (6133); Cryptzone North America Inc. (6777); Immunity, Inc. (3955); Immunity Federal Services, LLC (9722); Immunity Products, LLC (9570); Immunity Services, LLC (9647); Easy Solutions Enterprises Corp. (1954); Catbird Networks, Inc. (6028); and Easy Solutions, Inc. (0401). The location of the Debtors' service address is: 2 Alhambra Plaza, Suite PH–1–B, Coral Gables, Florida 33134.

[2] The Debtors and the U.S. Trustee have agreed to resolutions of additional issues, subject to documentation. The U.S. Trustee reserves its right to raise these issues if agreement on documentation is not reached.

releasing their direct claims against non-debtor parties, including claims for fraud and intentional misconduct, even though the equity interest holders shall receive no distribution under the Plan. Further, with respect to beneficial holders, their time to opt out of the release is truncated. Therefore, as set forth below, the U.S. Trustee submits that the Plan should be denied.

2. The Plan contains numerous other objectionable provisions that provide a basis to deny confirmation, including the following:

a. The Plan's exculpation provisions are overbroad in terms of the temporal scope of the acts and omissions to be exculpated.

b. The Plan impermissibly seeks to treat Plan provisions, and the Plan itself, as a "settlement" subject to the standards of Federal Rule of Bankruptcy Procedure 9019.

c. The Plan seeks to require unimpaired and reinstated creditors to immediately release various third parties, which constitutes an impairment, and seeks their "consent" to do so without adequate information.

3. For these reasons, and others set forth below, the U.S. Trustee respectfully submits that the Plan should not be confirmed.

JURISDICTION, VENUE, STANDING

4. This Court has jurisdiction over the above-captioned cases pursuant to 28 U.S.C. § 1334. This Court is authorized to hear and adjudicate the Plan and the Objection pursuant to 28 U.S.C. § 157 and the amended standing order of reference issued by the United States District Court for the District of Delaware dated February 29, 2012. Venue of the cases is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

5. Pursuant to 28 U.S.C. § 586, the U. S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U. S. Trustee's overarching responsibility to enforce

the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U. S. Trustee as a "watchdog").

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

7. Pursuant to 11 U.S.C. § 307, the U. S. Trustee has standing to be heard with regard to this Objection.

FACTS

8. The above-captioned Debtors filed voluntary petitions for relief under chapter 11 in this Court on May 6, 2024 (the "Petition Date"). No official committees have been appointed or designated.

9. On the Petition Date, the Debtors filed their proposed prepackaged plan and disclosure statement at D.I. 15 and D.I. 16, respectively. Solicitation of the plan commenced prepetition, and parties' rights to object to the adequacy of the Disclosure Statement is reserved for the confirmation hearing. D.I. 64.

10. To summarize some facts pertinent to this Objection: (i) one of the Debtors—Appgate—is a publicly-traded company; (ii) there are individual equity interest holders affected by these cases; (iii) the Plan will result in the reorganization of Appgate and cancellation of all equity interest in Appgate; (iv) equity interest holders of Appgate will receive ***no*** distributions under the Plan; (v) equity interest holders will be deemed to release all Released Parties, which

include the Debtors, the Debtors' officers and directors, the DIP lenders and certain prepetition lenders, equity interest holders, and a long list of additional parties, unless they return an opt-out form; and (vi) both the debtor releases and the third-party releases do not carve out causes of action based on fraud, gross negligence or intentional misconduct and the release expressly extends to causes of action that any Releasing Party may not currently know or even suspect to exist in their favor.

11. Under the Plan, the defined term "Releasing Parties" includes numerous currently unknowable and undisclosed parties, including all holders of claims and interests who do not successfully opt out or object to the releases, and numerous related parties to such holders and other Releasing Parties.

12. Under the Plan, creditors whose claims are reinstated are "consenting" to release third parties immediately upon the Effective Date if they do not opt out. These releases constitute an impairment of their claims. Further, the import of these releases on their claims were not adequately disclosed.

Procedures Related to Third-Party Releases

13. The Debtors' solicitation procedures, approved on an interim basis by the court, provide that the Debtors will not mail the Plan or Disclosure Statement to holders of either unimpaired or fully impaired claims/equity interests, but will only provide a written copy upon request.

14. Holders of claims that are Unimpaired received the Unimpaired Notice of Non-Voting Status found at Exhibit 4A of the Order approving the Solicitation Procedures.[3] Holders of

[3] *Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Approving Related Dates, Notices, and Procedures, (III) Approving the Solicitation Procedures and Related Dates, Deadlines, and Notices, (IV) Conditionally Waiving the Requirements That (A) the U.S. Trustee Convenes a Meeting of Creditors and (B) the Debtors File Schedules and SOFAs and Rule 2015.3 Financial Reports, and (V) Granting Related Relief*, D.I. 67.

fully impaired claims and equity interests received the Impaired Notice of Non-Voting Status found at Exhibit 4B of the Order approving the Solicitation Procedures.[4] These holders of claims and equity interests did not receive copies of the Plan or Disclosure Statement, unless requested by them, but they must affirmatively opt out of or timely files an objection to the Third-Party Release in order not to be deemed to have released whatever claims they may have against the Released Parties.

Relevant Definitions

15. The Plan provides the following definition of **Released Parties**:

> collectively, and in each case in its capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) the Consenting Stakeholders; (d) the Releasing Parties; (e) the DIP Lenders; (f) the Agents/Trustees; (g) current and former Affiliates of each Entity in clause (a) through the following clause (h); and (h) each Related Party of each Entity in clause (a) through this clause (h); provided that in each case, an Entity shall not be a Released Party if it: (x) elects to opt out of the releases described in Article VIII.D hereof; or (y) timely objects to the releases contained in Article VIII.D hereof and such objection is not resolved before Confirmation.

Plan at Art. I.A.129.

16. The Plan provides the following definition of **Releasing Parties**:

> collectively, and in each case in its capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) the Consenting Stakeholders; (d) the DIP Lenders; (e) the Agents/Trustees; (f) all Holders of Claims or Equity Interests that vote to accept this Plan; (g) all Holders of Claims or Equity Interests who are deemed to accept the Plan but who do not affirmatively opt out of the releases provided for in the Plan by checking the box on the applicable notice of non-voting status indicating that they opt not to grant the releases provided for in the Plan; (h) all Holders of Claims who abstain from voting on this Plan and who do not affirmatively opt out of the releases provided for in this Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided for in this Plan; (i) ***all Holders of Claims or Equity Interests who vote to reject this Plan or are deemed to reject this Plan*** and ***who do not affirmatively opt out of the releases*** provided for in this Plan by checking the box on the applicable ballot or notice of non-voting status indicating that they opt not to grant the releases provided for in this Plan; (j)

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[4] *Id.*

to the maximum extent permitted by Law, each current and former Affiliate of each Entity in clause (a) through the following clause (k); and (k) to the maximum extent permitted by Law, each Related Party of each Entity in clause (a) through this clause (k); provided that, in each case, an Entity shall not be a Releasing Party if it: (x) elects to opt out of the releases contained in Article VIII.D hereof; or (y) timely objects to the releases contained in Article VIII.D hereof and such objection is not resolved before Confirmation.

Plan at Art. I.A.130 (emphasis added).

17. The Plan provides the following definition of **Related Party**:

"Related Party" means, collectively, with respect to any Person or Entity, each of, and in each case in its capacity as such, such Person's or Entity's current and former directors, managers, officers, committee members, members of any governing body, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors and any such Person's or Entity's respective heirs, executors, estates, and nominees.

Plan at Art. I.A.128.

18. The Plan contains the following **Third-Party Releases**:

Notwithstanding anything contained in this Plan to the contrary, pursuant to section 1123(b) of the Bankruptcy Code, for good and valuable consideration, the adequacy of which is hereby confirmed, on and after the Effective Date, each Released Party is hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by each and all of the Releasing Parties, in each case on behalf of themselves and their respective successors, assigns, and representatives, and any and all other Entities who may purport to assert any Cause of Action, directly or derivatively, by, through, for, or because of the foregoing Entities, from any and all Causes of Action whatsoever (including any derivative Claims, asserted or assertable on behalf of any of the Debtors, the Reorganized Debtors, and their Estates), whether liquidated or unliquidated, fixed, or contingent, matured, or unmatured, known or ***unknown***, foreseen or ***unforeseen***, asserted or unasserted, accrued or ***unaccrued***, existing or ***herein after arising***, whether in Law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common Law, or any other applicable international, foreign, or domestic Law, rule, statute, regulation, treaty, right, duty, requirement, or otherwise, that such

> Holders or their Estates, Affiliates, heirs, executory, administrators, successors, assigns, managers, accountants, attorneys, representatives, consultants, agents, and any other Persons claiming in under or through them would have would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim against, or Equity Interest in, the Debtors, the Reorganized Debtors, and their Estates, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Reorganized Debtors, and their Estates (including the management, ownership, or operation thereof), the purchase, sale, or rescission of any Security of the Debtors, the Reorganized Debtors, and their Estates, the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is treated in this Plan, the business or contractual arrangements between any Debtor and any Released Party, any Securities issued by the Debtors and the ownership thereof, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions, the Chapter 11 Cases, any related adversary proceedings, the formulation, preparation, dissemination, solicitation, negotiation, entry into, or filing of the RSA, the Definitive Documents, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the RSA, the Definitive Documents, the Series A Units, Series A-1 Units, the Series B Units, the Class C Units, the DIP Facility, or the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of this Plan, including the issuance or distribution of Securities pursuant to this Plan, or the distribution of property under this Plan or any other related agreement, or upon any other act, or omission, transaction, agreement, event, or other occurrence taking place on or before, in respect of the foregoing clause the Effective Date; provided, however, that notwithstanding anything herein to the contrary, nothing in this Plan shall affect, limit, or release in any way any performance obligations of any party or Entity under this Plan or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement this Plan.

Plan at Art. VIII.D (emphasis added).

19. The Plan contains the following **Exculpation**:

> To the fullest extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party will be released and exculpated from, ***any Claim or Cause of Action arising prior to the Effective Date*** in connection with or arising out of the administration of the Chapter 11 Cases, the negotiation and pursuit of the RSA, the Restructuring Transactions, the DIP Facility, the Series A Units, the Series A-1 Units, the Series B Units, the Class C Units, the Definitive Documents, the solicitation of votes for, or Confirmation of, this Plan, the funding of this Plan, the occurrence of the Effective Date, the administration of this Plan or the property to be distributed under this Plan, the issuance of Securities under or in connection with this Plan, the purchase, sale, or rescission of the purchase or sale of any

> Security of the Debtors or the post-Effective Date Debtors, if applicable, in connection with this Plan and the Restructuring Transactions, or the transactions in furtherance of any of the foregoing, other than Claims or Causes of Action in each case arising out of or related to any act or omission of an Exculpated Party that is a criminal act or constitutes actual fraud, willful misconduct, or gross negligence as determined by a Final Order, but in all respects such Persons will be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to this Plan.

Plan at Art. VIII.E (emphasis added).

ARGUMENT

I. The Imposition of Releases on Equity Interest Holders of Appgate in Favor of Non-Debtors Conflicts with Established Law.

20. The Debtors propose an opt-out procedure to measure "consent" to the Third-Party Releases with respect to equity interest holders of Appgate that receive nothing under the Plan. Public shareholders received a notice of non-voting status and an opt-out form. However, public shareholders, who are receiving no distribution under the plan, and therefore are receiving no consideration for the allegedly consensual release, should not be required to opt out to prevent their claims against third party, non-debtors from being released.

21. Some judges of this Court have determined that third party releases of non-debtors should be allowed only to the extent the releasing parties have given ***affirmative consent***. *See In re Washington Mutual, Inc*., 442 B.R. 314 (Bankr. D. Del. 2011). In *Washington Mutual*, the Court held that "any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases." *Id*. at 355 (emphasis added). Moreover, the Court clarified that merely having an opt-out mechanism is not enough, holding that an "opt out mechanism is not sufficient to support the third party releases . . . particularly with respect to parties who do not return a ballot (or are not entitled to vote in the first place). Failing to return a ballot is not a sufficient manifestation of consent to a third party

release." *Id*. (emphasis added, citing *In re Zenith Elecs. Corp*., 241 B.R. 92, 111 (Bankr. D. Del. 1999)).

22. In *Emerge Energy Services LP*, Case No. 19-11563, 2019 WL 7634308 (Bankr. D. Del, Dec. 5, 2019), the Court ruled that consent to a third-party release "cannot be inferred by the failure of a creditor or equity holder to return a ballot or Opt-Out Form." *Id*. at *52. The Court reached this conclusion even though the Opt-Out Forms provided conspicuous notice of how to opt out and the consequences of not doing so. The Court also rejected the debtor's argument that inferring consent from "silence" should be approved as typical, customary, and routine. *Id.* The Court held that it could not, "on the record before it, find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations." *Id*. at *53; *accord In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Exide Technologies*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (identifying release provision had to be modified to permit third-party releases of non-debtors only for those creditors who voted in favor of the plan); *see also Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 688 (E.D. Va., 2022) (holding that "the Bankruptcy Court erred both factually and legally in finding the Third-Party Releases to be consensual. Failure to opt out, without more, cannot form the basis of consent to the release of a claim."); *In re SunEdison, Inc.*, 576 B.R. 453 (Bankr, S.D.N.Y. 2017) (stating under principles of New York contract law, a creditor could not be deemed to consent to third-party releases merely

by failing to object to the plan, even when the disclosure statement made it clear that such a consequence would result); *In re Chassix Holdings*, 533 B.R. 64, 79-80 (Bankr. S.D.N.Y. 2015) (limiting third-party releases to those who voted to accept the plan, or affirmatively elected to provide releases).

23. Some decisions of this Court have not required affirmative consent for third party releases. However, such decisions are (i) distinguishable from the present cases and/or (ii) support the view that such releases cannot be imposed on parties who will not receive any distribution under a plan. In *In re Indianapolis Downs, LLC*, 486 B. R. 286 (Bankr. D. Del. 2013), this Court reached a different conclusion than that of *Washington Mutual* and *Emerge* concerning the need for affirmative consent to third party releases and allowed for an opt-out process to be used. In so doing, however, the Court pointed out that, "the third party release provision ***does not apply to any party that is deemed to reject the Plan***." *Id.* at 305 (emphasis added).

24. In *In re Spansion, Inc.*, 426 B.R. 114 (Bankr. D. Del 2010), the Court held that affirmative consent was not required, but only as to releases being given by unimpaired classes, who were "being paid in full." *Id.* at 144. In contrast, the Court held that non-consensual releases that were being deemed to be given by parties who were not receiving any distribution under the plan did "not pass muster under *Continental*." *Id.* at 145 (emphasis added), referencing *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203 (3d Cir. 2000). The same is true here—Appgate's fully impaired equity interest holders will receive nothing under the Plan.

25. In *In re Mallinckrodt*, 639 B.R. 837 (Bankr. D. Del. 2022), this Court allowed third-party releases to be imposed on mass tort claimants without the opportunity to opt out, as well as on certain other classes of creditors and equity holders who were provided the ability to opt out, holding that the imposition of such releases was permissible under *Continental* because of the mass

tort context of the case. *See* 639 B.R. at 873, 881*; see also In re Boy Scouts of America*, 642 B.R. 504, at 674-75 (Bankr. D. Del. 2022) (approving an opt-out process for third-party releases in a mass tort case but noting that the definition of parties giving such releases did not include any "claimant who abstains from voting"). Unlike *Mallinckrodt* and *Boy Scouts*, the above-captioned cases are not mass tort cases.

26. Because Appgate's equity interest holders will receive no distribution under the Plan or any other consideration for releasing direct claims against non-debtors, imposing third-party releases on parties who did not opt out is inappropriate. *See Spansion, Inc.*, 426 B.R. at 144. The release extends to non-Debtors, including the Debtors' officers and directors, the DIP lenders, and certain other lenders and equity security holders, and releases claims based on fraud, intentional misconduct and gross negligence. However, these released parties have provided no monetary contribution to support the release, and no distributions are being made to shareholders. The Debtors' equity interest holders are not limited to a few institutions.

27. Sending opt-out forms to public shareholders, and deeming the non-return of the same to evidence of consent to give releases, would not be fair, because the non-return of an opt-out form could be caused by factors such as the opt-out notice being wrongly addressed or misdelivered, or other mail failures or delays. The risk of mail errors should be borne by the beneficiaries of the releases, not by the Debtors' public shareholders who are receiving no consideration. In addition, much of the stock of Appgate is likely held in street name, and therefore the Debtors would not be mailing out opt-out forms (or any other information) directly to most of the beneficial stockholders. Rather, the Debtors employed a process to mail these opt-out forms, which process did not ensure that all beneficial shareholders receive the opt-out form in a timely

manner, if at all. In addition, such process will truncate an already short period of time to opt out and places the responsibility to timely serve the opt outs on the nominees.

28. Where, as here, a proposed third-party release is non-consensual, the release must, at a minimum, meet the exacting "hallmarks of permissible non-consensual releases[,]" which were described as "fairness, necessity to the reorganization, and special factual findings to support these conclusions." *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000). In *Continental*, the Third Circuit surveyed cases from various circuits as to when, if ever, a non-consensual third party release is permissible. The court acknowledged that a number of circuits do not allow such non-consensual releases under any circumstances. *See id.* at 212. Other circuits, the court found, "have adopted a more flexible approach, albeit in the context of extraordinary cases." *Id.* at 212-13 (citing Second Circuit cases where releases were upheld for "widespread claims against co-liable parties" and a Fourth Circuit mass tort case). "A central focus of these three reorganizations was the global settlement of massive liabilities against the debtors and co-liable parties. ***Substantial debtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities*** and made these reorganizations feasible." *Id.* at 213 (emphasis added; *see also In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005) (noting a third party release may be granted "only in rare cases").

29. The Third Circuit in *Continental* ultimately determined that the proposed releases in that case, which, like the releases in this case, enjoined shareholder lawsuits against debtors' directors and officers, did "not pass muster under even the most flexible test for the validity of non-debtor releases." 203 F.3d at 214. Therefore, the Court determined that it "need not speculate on whether there are circumstances under which we might validate a non-consensual release that is both necessary and given in exchange for fair consideration." *Id.* at 214, n.11.

30. The Third Circuit Court of Appeals referenced *Continental* in *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019), *cert. denied sub nom. ISL Loan Tr. v. Millennium Lab Holdings*, 19-1152, 2020 WL 2621797 (May 26, 2020), as one of the precedents, along with *In re Global Industrial Technologies, Inc.*, 645 F.3d 201, 206 (3d Cir. 2011), regarding nonconsensual third-party releases. The Third Circuit indicated that these decisions "set forth ***exacting standards*** that must be satisfied if such releases and injunctions are to be permitted." 945 F.3d at 139 (emphasis added).[5]

31. In *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001), the Court held that a clause in the plan which released claims of any creditors or equity holders against the senior lenders for any act or omission in connection with the bankruptcy cases and reorganization process required factual showings under *Continental*—that the releases were necessary for the reorganization and were given in exchange for fair consideration. *Id.* at 607. The Court elaborated that "necessity" under *Continental* requires a showing: (a) that the success of the debtors' reorganization bears a relationship to the release of the non-consensual non-debtor parties and (b) that the non-debtor parties being released from liability have provided "a critical financial contribution to the debtors' plan" in exchange for the receipt of the release. *Id.* at 607. A financial contribution is considered "critical" if without the contribution, the debtors' plan would be infeasible. *Id.* Fairness of a release is determined by examining "whether nonconsenting creditors [are being] given reasonable consideration in exchange for the release." *Id.* at 608 (citing *Continental*, 203 F.3d at 215). In most instances, this will entail examining the proposed dividend that non-consenting creditors or shareholders will receive under a plan with the releases compared

[5] The Third Circuit in *Millennium Lab* ultimately did not address whether the non-consensual third-party releases in that case met the standards of *Continental* or *Global* because the Court determined that the appeal was equitably moot. 945 F.3d at 144.

to what they would receive under a plan without the releases. *See id.*; *see also In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (applying same factors).

32. The *Genesis* Court found that the senior lenders had made a financial contribution to the plan, which allowed the debtors to make the 7.34% distribution to the unsecured creditors, who otherwise would be "out of the money." *Id.* at 608. Ultimately, though, the Court found that such contribution was not enough, because "even if the threshold *Continental* criteria of fairness and necessity for approval of non-consensual third-party releases were marginally satisfied by these facts . . . . [the] financial restructuring plan under consideration here would not present the *extraordinary circumstances* required to meet even the most flexible test for third-party releases." *Id.* (emphasis added).

33. The Debtors do not comply with the holding of *Continental* or *Genesis*. In the present cases, there is nothing in the record to indicate the presence of "extraordinary circumstances," or that that the high threshold necessary for approval of non-consensual third-party releases has been met with respect to each of the non-debtor parties that would be the recipients of these non-consensual releases. The Debtors also cannot meet the second *Continental* requirement that the releases be given "in exchange for fair consideration," because the shareholders will receive no distribution under the Plan (or any other consideration) in exchange for such releases. Further, numerous Released Parties have provided no consideration for the release—for example, the Debtors' officers and directors.

34. Thus, both the "exchange for fair consideration" and "necessity to the reorganization" elements specified in *Continental* are absent here. Therefore, the Plan cannot be confirmed with the inclusion of the non-consensual third-party releases. *See Continental*, 203 F.3d at 214 and n. 11.

35. For the reasons set forth above, the equity interest holders of Appgate should be carved out of the definition of "Releasing Parties."

II. The Plan is Not Confirmable Because Neither the Third-Party Releases or the Debtor Releases Have Exceptions for Fraud, Willful Misconduct or Gross Negligence.

36. Neither the third-party nor the debtor releases make an exception for actual fraud, willful misconduct, or gross negligence. They both also release unknown claims, including unknown claims based on fraud. This is objectionable for a number of reasons. First, the Debtors are included in the definition of "Released Party," and therefore will be receiving releases under the Third-Party Release provision. Under the Bankruptcy Code, even where a debtor is entitled to a discharge, the Bankruptcy Code bars them from being discharged for claims of fraud and willful misconduct. *See* 11 U.S.C. § 523(a)(2), (4, (6). Nor should non-debtor parties be able to receive a release from claims for actual fraud and willful misconduct when the Debtors are not entitled to a discharge for such claims. This is especially true (1) when parties must "opt-out" in order to not be bound, and the notices did not highlight that claims based on fraud and intentional misconduct are included in the releases; (2) the identity of the released parties are not knowable; and (3) unknown claims are being released.

37. The Debtor Release also fails to include any exception for actual fraud, willful misconduct, or gross negligence. Through this release, and the "Related Parties" clause in the definition of Released Parties, the Debtors are releasing, among others, all of their own employees.[6] The Debtors have the burden to establish how their release of claims in favor of the Released Parties, including but not limited to claims for known and unknown fraud, willful misconduct, and gross negligence of their employees and the other Released Parties, meet the

[6] If, for example, it is later learned that an officer, manager or employee of the Debtors misappropriated Debtor funds at any time up to the Effective Date, it appears that any claim based on such misappropriation would be released under the Plan.

requirements of *Zenith,* 241 B.R. at 110, and *In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994).

38. In addition, both the Third-Party Release and the Debtor Release benefit certain fiduciaries of the estate, such as the Debtors' directors and officers, and professionals retained by the Debtors and the Committee in these cases. All such fiduciaries are entitled to an exculpation, but such exculpation must carve out claims of fraud, intentional misconduct and gross negligence, which the Exculpation provision in the Debtors' Plan does do. However, because the Third-Party Release and the Debtor Release do not have carve-outs for fraud, intentional misconduct and gross negligence, these estate fiduciaries are getting through the release provisions of the Plan what they are not entitled to receive by way of exculpation. As recognized by this Court in *Washington Mutual*, released parties who are fiduciaries of the estate are receiving exculpations, and therefore the releases are "unnecessary, duplicative and ***exceed the limits of what they are entitled to receive***" under the exculpations. *Washington Mutual,* 442 B.R. at 350 (emphasis added).

III. The Exculpation Provision Is Impermissibly Broad.

39. The period covered by the Exculpation provision is overbroad. This Court has confirmed that exculpation "only extends to conduct that occurs between the Petition Date and the effective date." *In re Mallinckrodt PLC*, 639 B.R. 837, 883 (Bankr. D. Del. 2022) (sustaining U.S. Trustee's objection to temporal scope of exculpation provision and ordering debtors to strike contrary language from same); *see also In re Washington Mut., Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) (holding that exculpations cover only "actions in the bankruptcy case"). That standard does not change in a prepackaged chapter 11 case. *See* **Exhibit A**, *In re OSG Grp. Holdings, Inc. et al.,* Conf. Hr. Tr. pg. 21 ("I'm not prepared to extend the conduct that occurred prepetition. I think the Third Circuit, constrained by what the Third Circuit has said, that exculpation applies only to estate fiduciaries. And the officers and directors of the company were

not estate fiduciaries prior to the petition date. And to hold otherwise would eviscerate the rule, basically.").

40. Applied here, the Plan provides that Exculpated Parties are released and exculpated from claims arising out of "*any*" acts or omissions "*arising prior to the Effective Date*" relating to, among other things, the RSA, the DIP Facility, the Chapter 11 Cases, the Plan, the Definitive Documents,[7] the pursuit of confirmation, the pursuit of consummation of the Plan, the issuance of Securities under or in connection with the Plan, and the administration and implementation of the Plan, including distributions. *See* Plan, Art.VIII.E. This provision improperly covers acts and omissions occurring at any time prior to the effective date related to the aforementioned categories. Because this is a prepackaged chapter 11 case, substantially all of the negotiations and work related to the RSA, the DIP Facility, the Plan, the Disclosure Statement and other Solicitation Materials occurred ***prepetition***. Indeed, the Debtors have been in negotiations regarding a restructuring process prior to the filing of the Chapter 11 cases. *See Declaration of Rene Rodriguez in Support of Chapter 11 Petitions and First Day Motions* (the "First Day Declaration"), D.I. 25, at 25. Therefore, the Exculpation Provision "exceeds the bounds of what the Code allows" because it improperly insulates the Exculpated Parties for acts and omissions that occurred prepetition.

41. Accordingly, the proposed exculpation insulates from liability acts and omissions that do not warrant this protection under the caselaw in this district. Thus, the Court should deny confirmation of the Plan.

IV. The Disclosure Statement Does Not Contain Adequate Information

A. Parties Are Unable to Ascertain Who They Are Releasing

[7] The Plan defines the "Definitive Documents" to include, the Plan, the Confirmation Order, the Disclosure Statement, the Order of the Court approving the Disclosure Statement and other Solicitation Materials, the First Day Pleadings and all accompanying orders, and "all other documents" "utilized to implement or effectuate, or that otherwise relate to" all the transactions for implementation of the Plan referred to in Plan Article IV. Plan at Art.I.A.65.

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

> Information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor **typical** of the holders of claims or interests in the case, ***that would enable such a hypothetical reasonable investor of the relevant class to make an informed judgment about the plan*** . . . .

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

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

44. The Plan term Released Parties is defined to include the Releasing Parties. Claims that are being released include claims for fraud, gross negligence and intentional misconduct. In addition, unknown claims are being released.

45. Because Released Parties are defined to include Releasing Parties in the Plan, no Releasing Party will know who they are releasing until after the deadline to opt out of the releases. The Disclosure Statement does not discuss or specifically disclose that the identity of Released Parties cannot be known until after the deadline to opt out of the releases and does not contain any

discussion regarding the lack of identification of the Released Parties. There is no attempt to inform creditors and equity interest holders of the potential universe of Released Parties by, for example, referring creditors and equity interest holders to the creditor matrix.

46. Furthermore, there is no procedure for identifying Released Parties after the opt-out deadline. To the extent these releases are approved, the Debtors should be required to serve notice of (a) creditors and equity interest holders who have become Released Parties; and (b) the names of creditors and equity interest holders who have opted out of the releases and are not Released Parties.

B. *Holders of Unimpaired and Reinstated Claims Were Not Adequately Informed of the Effect of the Third-Party Release*

47. Holders of Unimpaired and Reinstated Claims were not served with copies of the Plan and Disclosure Statement, but rather only received a notice of confirmation. (D.I. 64, at Ex. 2). While this notice set forth the terms of the third-party release, there was no discussion regarding its meaning or effect.

48. A Plan must "leave[] unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest" for a claim to be unimpaired. 11 U.S.C. § 1124(1). Eliminating a parties' right to seek payment from a third party alters a claimholders' rights. If the Debtors default on their obligations, the claimholders may no longer seek recovery from potentially-liable third parties. The notice sent to the unimpaired and reinstated class(es) did not clarify, in plain English, that failing to submit an opt-out form would result in a claimholder *immediately on the Effective Date* releasing third parties. As such, these releases should not be approved.

V. The Plan Cannot be Confirmed Because it is Not a Settlement Subject to Approval Under Bankruptcy Rule 9019

49. The Plan, at Article IV.A., provides:

> To the greatest extent permissible under the Bankruptcy Code, and in consideration for the classification, distributions, releases, and other benefits provided under this Plan, upon the Effective Date, the provisions of this Plan shall constitute a good faith compromise and settlement of all Claims, Equity Interests, Causes of Action, and controversies released, settled, compromised, discharged, satisfied, or otherwise resolved pursuant to this Plan. To the greatest extent permissible under the Bankruptcy Code, this Plan shall be deemed a motion to approve the good faith compromise and settlement of all such Claims, Equity Interests, Causes of Action, and controversies pursuant to Bankruptcy Rule 9019, and the entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of such compromise and settlement, as well as a finding by the Bankruptcy Court that such settlement and compromise is fair, equitable, reasonable and in the best interests of the Debtors, their Estates, and Holders of Claims and Equity Interests. Subject to Article VI hereof, all distributions made to Holders of Allowed Claims and Allowed Equity Interests, as applicable, in any Class are intended to be, and shall be, final.

50. Code section 1123(b)(3)(A) allows a plan proponent to "provide for [] the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A) (emphasis added). Thus, section 1123(b)(3) only allows a debtor to settle claims it has against others; it does not allow a debtor to settle claims other parties may have against it. *See Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.),* 293 B.R. 409, 496 (B.A.P. 9th Cir. 2003) ("The only reference in [section 1123(b)] to adjustments of claims is the authorization for a plan to provide for 'the settlement or adjustment of any claim or interest *belonging* to the debtor or to the estate. It is significant that there is no parallel authorization regarding claims *against* the estate.") (emphasis in original) (quoting section 1123(b)(3)(A)) (internal citation omitted). The resolution of claims against the Debtors is governed by sections 1129 and 1141.

51. Section 1123(b)(3)(A) also does not authorize a plan proponent to "settle" claims that a debtor's creditors hold against it, or claims that a debtor's creditors hold against non-debtor parties.

52. In addition, while a plan may incorporate one or more negotiated settlements, a plan is not itself a settlement. Sending a plan to impaired creditors for a vote is not the same thing as parties negotiating a settlement among themselves.

53. A "settlement" is "an agreement ending a dispute or lawsuit." Black's Law Dictionary (10th ed. 2014). An "agreement" is "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons." Black's Law Dictionary (10th ed. 2014).

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

55. The decision of whether to approve a settlement under Rule 9019 is left to the sound discretion of the bankruptcy court, which "must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'" *In re Washington Mut., Inc.,* 442 B.R. 314, 338 (Bankr. D. Del. 2011) (*quoting In re Louise's, Inc.,* 211 B.R. 798, 801 (D. Del. 1997)). In contrast, plans are subject to the many requirements of Code sections 1123 and 1129.

56. What may be permissible under a negotiated settlement agreement that is considered "fair, reasonable, and in the best interest of the estate" outside of the plan context is different from what may be permissible under a plan.

57. Here, Articles IV.A. purports to make the Plan itself a general settlement under Rule 9019. In light of the foregoing, the Plan cannot be confirmed as long as it contains any language suggesting that any Plan provision, or the Plan itself, is a "settlement" for purposes of section 1123(b)(3)(A) and Rule 9019.

RESERVATION OF RIGHTS

58. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, including but not limited to arguments in the context of final approval of the Disclosure Statement and confirmation of the Plan, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection, file an appropriate motion and/or conduct any and all discovery as may be deemed necessary or as may be required, and to assert such other grounds as may become apparent upon further factual discovery.

CONCLUSION

WHEREFORE, the U.S. Trustee requests that this Court issue an order denying confirmation of the Plan and/or granting such other relief as this Court deems appropriate, fair, and just.

Dated: June 11, 2024
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE, REGION 3

By: /s/ *Linda J. Casey*

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Exhibit “A”

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	Case No. 22-10718 (JTD)
OSG GROUP HOLDINGS, INC., *et al.*,	.	
	.	Courtroom No. 5
	.	824 North Market Street
	.	Wilmington, Delaware 19801
Debtor.	.	Monday, August 29, 2022
. . . . .	.	10:00 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JOHN T. DORSEY
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:	Erin Fay, Esquire BAYARD, P.A. 600 N. King Street, Suite 400 Wilmington, Delaware 19801
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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES (CONTINUED):

For the U.S. Trustee: Rosa Sierra-Fox, Esquire
UNITED STATES DEPARTMENT OF JUSTICE
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(Proceedings commenced at 10:01 a.m.)

THE COURT: Good morning, everyone. This is Judge Dorsey.

We're on the record in OSG Group Holdings, Inc., Case No. 22-10718. I will go ahead and turn it over to debtor's counsel to run the agenda.

MS. FAY: Good morning, Your Honor. Erin Fay of Bayard, proposed co-counsel to OSG Group Holdings, Inc., and its affiliated debtors-in-possession.

Your Honor, this morning we're working off the amended agenda which was filed at Docket No. 148 and in which I believe Your Honor has a copy of.

THE COURT: I do. Thank you.

MS. FAY: Thank you. Thank you for entering all of the second day orders this morning and the stipulations related to the plan. So with that I think we're ready for confirmation and I will turn the virtual podium over to Ms. Pirro-Schwarzman.

THE COURT: Ms. Schwarzman?

MS. PIRRO-SCHWARZMAN: Thank you, Ms. Fay.

Good afternoon, Your Honor, for the record Christine Schwarzman from Ropes & Gray, proposed counsel to the debtors.

Although -- we appreciate that Your Honor has entered those orders that were filed under COC. I think that

that just leaves the final order on the DIP in terms of first day relief other than confirmation. So I would still like to, if it pleases the court, move into evidence all declarations at this time.

THE COURT: Okay.

MS. PIRRO-SCHWARZMAN: The first is the declaration -- the first day declaration of Robert Del Genio that is Docket No. 26, and also the declaration of Robert Del Genio in support of confirmation which is Docket No. 124. Mr. Del Genio is the senior managing director at FTI Consulting and he is on the zoom today and available for questions or cross should the court or any party in interest have.

THE COURT: Is there any objection?

(No verbal response)

THE COURT: The declarations are admitted without objection.

(Del Genio declarations received into evidence)

THE COURT: Does anyone wish to cross Mr. Del Genio?

(No verbal response)

THE COURT: Go ahead.

MS. PIRRO-SCHWARZMAN: Thank you, Your Honor.

Second, the declaration of Mr. Berube who is the senior managing director in the restructuring and debt

advisory group at Evercore Group, proposed investment banker. His declaration in support of the DIP was docketed at 25. He too is available for cross should anyone desire to do so.

THE COURT: Is there any objection?

(No verbal response)

THE COURT: It's admitted without objection.

(Berube declaration received into evidence)

THE COURT: Does anyone wish to cross?

(No verbal response)

THE COURT: Good to go.

MS. PIRRO-SCHWARZMAN: Thank you.

Finally, the last one is the declaration so Angela Tsai on behalf of Stretto regarding the solicitation of votes and tabulation of ballots accepting or rejecting the plan. That is docketed at 17. She too is on the zoom and available for cross.

THE COURT: Any objection?

(No verbal response)

THE COURT: It's admitted without objection.

(Tsai declaration received into evidence)

THE COURT: Any cross?

(No verbal response)

THE COURT: All right, we're good to go. Thank you.

MS. PIRRO-SCHWARZMAN: Thank you, Your Honor.

So with respect to the DIP we ended up incorporating the DIP order into the confirmation order to save time and, quite frankly, money for the estate. All parties didn't have an issue with that. No one filed objections. We are going to offer up an opportunity to go through the confirmation order later so to the extent there are questions on the DIP I propose doing that at that time.

THE COURT: That's fine.

MS. PIRRO-SCHWARZMAN: Thank you, Your Honor.

Instead, moving ahead to the disclosure statement and plan. So as Your Honor knows, we spent quite a bit of time at the first day hearing describing the plan, solicitation of the plan we discussed the fact that the prepack took months to negotiate and is supported by all voting classes, mainly over 98 percent in amount of holders of claims in Class 1 to the first lien claims, 100 percent of claims in Class 2 which are the second lien claims, and 100 percent of the claims in Class 6, i.e. over $820 million of indebtedness voted in favor.

The rest of the capital structure, except for equity, is unimpaired. And in short, we discussed the plan would deleverage the debtor's capital structure by approximately $134 million provided $70 million of new money, including committed exit financing, pay all unsecured creditors in full in the ordinary course of business, save

thousands of jobs, and allow the company to continue to service its customers.

On the first day hearing we also heard from our lenders regarding their support for the plan. Those lenders are here today and at least as of 8 a.m. this morning were chomping at the bit to speak to their support, should Your Honor wish to hear from them again. In the interest of time we propose moving forward, resting on the declarations that have been submitted, our brief in support, and moving straight to the objections.

I am prepared to go through each of the factors in support of the disclosure statement and plan should Your Honor like something else to supplement the record before the court.

THE COURT: No, that's fine. We can go right to the objections.

MS. PIRRO-SCHWARZMAN: Excellent. Thank you.

So with respect to the objections we did receive four informal objections. Those are from the Texas Controller of Public Accounts -- excuse me, Comptroller of Public Accounts, the United States, Chubb and Aetna. Those were resolved in the confirmation order in Paragraphs 75 through 79. Mr. Liang is prepared to go through the confirmation order a little bit later.

In terms of formal objections there was one filed

by Zoo New England at Docket No. 129. We did resolve that objection with the confirmation order at Paragraph 80.

We resolved an objection from Change Healthcare Technologies via stipulation.

Just to take a step back, Your Honor, all of the stipulations were reviewed and approved by the Office of the United States Trustee which I believe we represented when we filed them.

The other objection that we were able to resolve that was formally filed is from Black Knight Financial Services. It is resolved instead of through language in the confirmation order we have agreed to read the following on the record. I believe counsel is here as well, but we made the following representation:

"Upon assumption, Black Knight Financial Services shall (I) have all rights and remedies under their contracts with respect to the respective reorganized debtor assuming those contracts, including all protections as to any intellectual property subject to those contracts and; (II) Black Knight reserves all rights with respect to the cure amounts necessary to assume those contracts."

I don't know if counsel is on and would like to add anything, but my understanding is that that resolves that objection.

THE COURT: Does anyone wish to speak on behalf of

Black Knight?

(No verbal response)

THE COURT: Thank you.

MS. PIRRO-SCHWARZMAN: Thank you, Your Honor.

At this time I am going to turn it over to Mr. Galardi to handle the main item on the agenda which is the contested objection from the United States Trustee.

THE COURT: Go ahead, Mr. Galardi.

MR. GALARDI: Thank you, Your Honor.

First, Your Honor, I wanted to thank the Office of the United States Trustee. That we are down to one simple legal issue on an exculpation is the result of a lot of work from the Office of the United States Trustee. Ms. Sierra Fox has been through many, many version of the plan, many, many versions of the confirmation order and I wanted to start there.

No fault of hers, we did want to leave one issue open for Your Honor today which I would explain as the open issue. We have even resolved the issue with respect to the exculpation language as to the scope of it so we are really down to one narrow issue which is whether exculpation can be granted on account of certain pre-bankruptcy activity.

What I would ask is if Your Honor maybe makes it very simple I would like to have share screening where we put up the language of the exculpation order and explain what we

are trying to do with respect to prepetition conduct with respect to estate fiduciaries because I do think this is a unique matter because it is a prepack, it does not involve what Your Honor ruled with, with respect to a committee which could not even be formed until the bankruptcy. I would like to make an argument as to why I think the very narrow definition of estate fiduciaries or fiduciaries would be entitled to exculpation with respect to very limited activity taken pre-bankruptcy.

I would ask you to give screen sharing to Ms. Nova Alindogan for the purpose of me walking through the language and what we have tried to do.

THE COURT: If she can raise her hand so we can find her more easily on the zoom call. There we go.

(Pause)

THE COURT: All set.

MR. GALARDI: So, Your Honor, on the screen is the 9.4 exculpation. As you will see in green on my screen as you go through (b) those are changes that we worked with, with the U.S. Trustee to make clear that we are talking about all activity taken in connection with the bankruptcy cases, but you will see the roman numeral (i) speaks to arising on or after the petition date and the effective date.

So the very first thing is we wanted to make clear that exculpation applies only from petition date to the

effective date, but as we move down, and I think the open issue with respect to the U.S. Trustee as we go down we will find roman numeral (ii). In that context, Your Honor, we have sought to also receive exculpation for actions before the petition date with respect to any claim or cause of action relating to any action taken in connection with commencing the bankruptcy cases and then it goes onto the plan and disclosure statement.

So we restricted the activity to what we believe is actions taken in connection with the bankruptcy cases and made clear that that was plan and negotiations. So let me explain the reasoning why we think that language is appropriate.

As Your Honor well knows, releases are distinct from exculpation. Releases, especially in a plan like this, require various consents and consideration. Exculpation, as Your Honor is aware, is not something the same as a release; it actually allows Your Honor to say that estate fiduciaries, and there is no issue here about the estate fiduciaries, we worked with the U.S. Trustees Office to narrow them and we did not have a committee. So we are really talking very simply about directors and officers of the debtors.

What we focused on was exculpation which is not a release and as Your Honor knows, for example, we don’t have releases from various shareholders if they don’t opt-in. So

what we wanted to do was to follow-up on exculpation. And Your Honor is well-aware of Delaware law. Some of these are Delaware, some of these New Jersey of the debtors that generally Inc., will have exculpation in its bylaws and LLC's will have members that various creditors may or may not, depending upon the LLC agreement, have fiduciary duties. Under, for example, Delaware law creditors may not be able to bring actions under governing law to even pursue anybody acting in the manager capacity.

Your Honor is also aware, I'm sure, of cases in Delaware and other jurisdictions that say when you file a bankruptcy, you know, maybe those kinds of activities or some of those protections are waived. What we wanted to do was to make sure that those estate fiduciaries, again directors and officers who have taken actions to commence the bankruptcy cases, to solicit the plan and disclosure statement, and to draft the disclosure statement, still receive the protection of exculpation notwithstanding not obtaining releases for activities taken to commence these cases.

We don't believe that there is anything in the bankruptcy code that precludes Your Honor from granting that relief. I hate to use Your Honor's words from the first day hearing, but with respect to conduct that you are being asked to bless in connection with the filing even if it occurred prepetition. We do believe Your Honor has jurisdiction to

grant the exculpation as long as that exculpation is narrowly tailored to the bankruptcy cases.

So with respect to that, Your Honor, the entering into, and I will give some examples, the entering into, for example, the RSA and the prosecution, the entering into as you heard the first day, the first financing which got rolled up. The extent to which those estate fiduciaries, again directors and officers, took those steps in good faith, not gross negligence, willful misconduct, and prosecuted that over the course of those months we believe that they should be entitled to exculpation and the reason that we have sought to have that approved is we didn't want any ambiguity that the governing documents, whether they be Inc., bylaws, or anything else, articles of incorporation, deprive them of those rights.

We thought it easier and better to make it clear that, at least, with respect to those narrow actions to commence a case, solicit a plan, prepare a plan, disseminate a plan, and a disclosure statement that those fiduciaries could, in fact, be exculpated. We would ask that they would, in fact, be exculpated. The only entity that has an objection to that is the U.S. Trustee and their objection is -- Your Honor, I will let her speak for herself, but should not give any exculpation for any fiduciary prior to the bankruptcy case commencing.

I will turn it over to the U.S. Trustees Office.

THE COURT: All right.

MS. SIERRA-FOX: Good morning, Your Honor, Rosa Sierra-Fox on behalf of the U.S. Trustee.

Can you hear me?

THE COURT: I can. Thank you.

MS. SIERRA-FOX: Great. Your Honor, the U.S. Trustees objection simple, but it's an important one. Our position is that based on the case law of the Third Circuit, as interpreted by the Courts of this district exculpation cannot extend to actions or omissions taking place before the petition date. It only provides protection based on the case law for actions or omissions taken in connection with the Chapter 11 cases from the petition date through the effective date.

The reason for that is the underpinning and the rationale of the Third Circuit's decision in PWS Holdings. In that case the Court articulated what is the standard of liability under the Code for estate fiduciaries in the context of a plan when discussing whether exculpation violated Section 524(e) due to its inclusion of a committee, a non-debtor.

Your Honor, debtor's counsel spoke about your decision in In Re Mallinckrodt not being applicable because it discusses exculpation for a committee such that a

committee doesn't exist until after the petition date, so that is why they would only have exculpation from the petition date through the effective date of the plan. But the U.S. Trustee reads your decision, Your Honor, a little bit different and in line with In Re PWS Holdings, and Judge Walrath's decision in Washington Mutual, and other cases in this district that have interpreted PWS Holdings in saying that the basis for exculpation, and the underpinning, and the rationale for having exculpation in a Chapter 11 plan arises due to this -- arises due to entities position as an estate fiduciary. That is where the discussion of committee comes in.

So the U.S. Trustees argument is that because there was no estate and there were no estate fiduciaries in February of 2022 or at any point before August 6th, 2022 when this case was filed, regardless of whether this case is a prepack or a two year bankruptcy case, the rational of In Re PWS Holdings and the cases interpreting that holding is that because exculpation only extends to estate fiduciaries by consequence it can only extend to protections for actions or omissions taken in connection with the Chapter 11 case from the petition date through the effective date, Your Honor.

To hold otherwise, just because this is a prepack as debtor's counsel argues and because it's in a unique situation as debtor's counsel argues, would undercut the

holding and the rationale of those cases, Your Honor.

I'd like also to point, Your Honor, although the debtor's counsel raises that a release is not the same as exculpation, exculpation nonetheless still precludes the assertion of certain causes of action and claims. A lot of the conduct that debtor's counsel wishes to get protection for, for directors and officers of the debtors would get picked up by the debtor release. So they are getting potentially that scope of conduct protected in that way.

Your Honor, also there is the protections of 1125(e) of the Code that are incorporated into the plan, and in the confirmation order that might also pick-up the limited set of protection that debtor's counsel wishes to have for the debtor's directors and officers.

Your Honor, we understand that a lot of work took place prepetition to get the case to where it is today and that is commendable and we're happy to be at confirmation with only one outstanding issue today, Your Honor. But that doesn't change the body of law and the rationale for exculpation in this district, and that is because exculpation is the standard of liability for estate fiduciaries, and there is no estate until there is a petition filed, then by consequence, Your Honor, exculpation cannot protect actions or omissions taken by the debtor's representatives before the petition date.

Your Honor, to hold otherwise could potentially present issues of not having really a limiting principal to that effect. As the record and as the U.S. Trustee, we argue in our objection, and as was established at the first day hearing, the parties have been in negotiations since February of 2022 and I'm sure a lot of hard work took place during that time period, but the simple fact is that there was no estate, there was no Court oversight, there was no Court sanctioning of the actions, and oversight of whatever actions, and contracts, and occurrences were happening at that point.

The next prepackaged case might have had people working for a year prior to the bankruptcy case. So there is really not a limiting principal in the debtor's -- you know, if we were to accept the debtor's position there is a limited principal and a clear cut one if we interpret as this Court and other Judges in this district have the Third Circuit's decision in In Re PWS Holdings. For that reason, Your Honor, we would ask that confirmation be denied until we can narrow the scope of the exculpation provision as the U.S. Trustee argues.

Thank you.

THE COURT: Mr. Galardi? Let me ask you a question, Mr. Galardi, and maybe you can answer this one.

MR. GALARDI: Sure.

THE COURT: You said this is unusual, but it's not that unusual. There's a lot of cases that are filed as prepacks with an RSA in place. Can you cite to me any case where a Court has granted exculpation to the officers and directors of the company in connection with a prepack?

MR. GALARDI: Your Honor, Ms. Fay can certainly, because we looked at precedent, but I'm not going to tell Your Honor that it was argued. So it may just be one of those things where it's in the order. I cannot cite you a case where it was argued, but I do know that there are orders which have it. Ms. Fay has it within the district of Delaware.

Again, I don't think it's been argued, which is partially why we are arguing it. To your question, which I think is the most important, yes, there are prepacks, Your Honor. The question is whether the rules should be for prepacks -- look, it is very simple and I am not going to disagree with Ms. Sierra-Fox that it is very simple for the Court to make a pronouncement today that the only time exculpation will be granted is for the period petition date to the effective date.

Not sure there is anything in any of the cases that says that on those stark terms, black letter law. It does say in connection with the bankruptcy cases. And, Your Honor, the question is -- and she's also right that 1125(e)

gives you certain protections, but with the world in which consensual releases are given and not non-consensual releases we do believe that there is a basis to say in connection with the bankruptcy cases under the law the spirit of that is the conduct should be narrow and it should be in connection with the commencement of the bankruptcy cases, and that will not be the one year period, but if there was ever a factual dispute of what is in connection with the bankruptcy cases then we can come back to the court if there such a dispute.

I don't think this case is exceptional in the sense that there are plenty of prepacks. I think one of the questions we are posing to Your Honor is with respect to the debtor's fiduciaries, should they get exculpation for their conduct in the formulation prosecution of the plan. Those are the only parties we are speaking about. It's the debtor's fiduciaries. An ad hoc committee has its interests. There is no creditor's committee.

My concern is more with the changing of the law with respect to what happens to bylaws, certificates of incorporations upon the filing, and the expectation of debtor's officers and directors to continue to receive the benefits of exculpation, but then to do it in the context of what will be a federal bankruptcy case where the law has changed and to exculpate them with respect to those steps which are outside the ordinary course, bankruptcy, and whit

respect to the prosecution of a plan or disclosure statement, and the commencement of the cases.

So, again, Your Honor, you can draw the line at the petition date or we can say that it can be fact specific to a bankruptcy case. If you have a standard bankruptcy case that is not a prepack then I understand the petition date to the effective date, but in a prepack we think the circumstances are appropriate for exculpation for the debtor's officers and directors pre-bankruptcy.

THE COURT: All right. Well here is what I'm going to do: I'm not prepared to extend the conduct that occurred prepetition. I think the Third Circuit, constrained by what the Third Circuit has said, that exculpation applies only to estate fiduciaries. And the officers and directors of the company were not estate fiduciaries prior to the petition date. And to hold otherwise would eviscerate the rule, basically.

I think it's implicate in the Third Circuit's opinion of PWS Holdings that what they were saying was its only conduct that occurs post-petition. My ruling in Mallinckrodt is not any different from that. I don't believe that was limited to just a committee. I think there was language in the exculpation that extended exculpation to prepetition conduct which I said was not appropriate.

So to the extent the language is as it is I cannot

approve that language and it will have to be revised.

MR. GALARDI: Your Honor, so let me strike this because I think it will be very easy. I think the U.S. Trustees Office -- what we would do is, therefore, strike the clause two that we have added from the word -- strike the or, take out the one, thereto, and then end the sentence at thereto, and pick-up withstanding.

I think Ms. Sierra-Fox, that is all the language that you have already approved. So we will just take out the prepetition conduct.

THE COURT: This is when I wish we were in court so that you could just step-out in the hallway during a break and get this resolved.

MR. GALARDI: If we put it up on the screen I think she will know exactly what I'm doing because everything else was agreed to.

THE COURT: Go ahead.

MS. SIERRA-FOX: Your Honor, Rosa Sierra-Fox on behalf of the U.S. Trustee.

I am looking at the language and I would just appreciate 10 minutes, 20 minutes after the confirmation hearing to just make sure we're on the same page. I do think that there is a part that I might have a small disagreement with, but generally I think it's not -- we will be able to get there ourselves without needing much more time.

THE COURT: Well why don't we do this so that we can get this resolved and then we can get through the rest of the hearing: so why don't we take a break now and then maybe you and Mr. Galardi can speak offline and get this resolved.

MS. SIERRA-FOX: Okay.

THE COURT: How much time do you think you need, Ms. Fox?

MS. SIERRA-FOX: Its 10:28, if we can 10:45. Is that fine?

THE COURT: That's fine. We will stand in recess till 10:45.

MS. SIERRA-FOX: Thank you.

THE COURT: Thank you.

(Recess taken at 10:29 a.m.)

(Proceedings resumed at 10:46 a.m.)

THE COURT: We're back on the record.

Mr. Galardi and Ms. Sierra-Fox, did you get things resolved?

MR. GALARDI: Yes, we did, Your Honor. There will be modifications to reflect one note post-bankruptcy petition date conduct and then a clarification about certain language that I had not understood, but that makes it all clear that the matters all relate to the bankruptcy cases and any actions taken after the petition date and before the effective date.

So we have handed back and forth language. We have one more little nuance I just sent to Ms. Sierra-Fox. I assume that is going to be okay and then we will incorporate it in the plan.

THE COURT: All right.

MS. SIERRA-FOX: Your Honor, Rosa Sierra-Fox for the U.S. Trustee.

Yes, we -- I think we're there and I approve the final language. I think just to make the record clear what we wanted to capture is that actions may arise on or after the petition date through the effective date, but still relate to prepetition conduct. So we're just trying to narrow in that its action arising on or after the petition date related to bankruptcy actions or omissions taken from the petition date through the effective date.

THE COURT: So are we going to submit the final version under COC? Is that the plan?

MR. GALARDI: Your Honor, we will do that. If Your Honor wants to go through any of the other changes I think nothing else has changed since the version we had. Mr. Liang can certainly address issues. I don't know if Your Honor has any questions about the form of the confirmation order which also includes the approval of the final DIP. We could -- if you don't then we can submit it all under COC.

THE COURT: Okay. I did not have -- I did review

the blackline and I'm satisfied with the changes. So I don't have any questions myself, but let me just open it up and see if anybody else has any questions, comments, objections?

(No verbal response)

THE COURT: Okay. We don't have anything.

MR. GALARDI: So, Your Honor, with that we would ask Your Honor to confirm the plan and affirm the disclosure statement. We will file on the docket a proposed order under COC.

THE COURT: All right, subject to the final order being submitted under COC I will approve the plan, disclosure statement, and the DIP financing motion.

MR. GALARDI: Thank you, Your Honor. That concludes the matters for us today and I do appreciate the U.S. Trustee working with us, as well as the lenders, and as well as Your Honor scheduling the time. Hopefully we will be effective by August 31st.

THE COURT: Thank you all very much. I appreciate moving this along quickly. Everyone have a good week.

MR. GALARDI: Thank you.

THE COURT: Thank you. We're adjourned.

(Proceedings concluded at 10:49 a.m.)

CERTIFICATION

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

/s/ Mary Zajaczkowski August 29, 2022

Mary Zajaczkowski, CET-531

Certified Court Transcriptionist

For Reliable

CERTIFICATE OF SERVICE

I, Linda J. Casey, hereby attest that on June 12, 2024, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and courtesy copies upon the following parties via email:

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