Docket #236 Date Filed: 3/28/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	Case No. 23-10219 (KBO)
STARRY GROUP HOLDINGS, INC., *et al.*,[1]	:	(Jointly Administered)
Debtors.	:	**Re: Docket No. 84**

DEBTORS' OMNIBUS REPLY TO OBJECTIONS TO
DISCLOSURE STATEMENT AND DISCLOSURE STATEMENT MOTION

Starry Group Holdings, Inc. and its debtor affiliates, as debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**"), respectfully submit this omnibus reply (the "**Reply**") to the (i) *Objection of the Official Committee of Unsecured Creditors to the Motion of Debtors for Order (A) Approving the Disclosure Statement; (B) Establishing the Voting Record Date, Voting Deadline, and Other Dates; (C) Approving Procedures for Soliciting, Receiving, and Tabulating Votes on the Plan and for Filing Objections to the Plan; (D) Approving the Manner and Forms of Notice and Other Related Documents; and (E) Granting Related Relief* [Docket No. 197] (the "**Committee Objection**"), (ii) *Objection of the United States Trustee to the Debtor's Motion for Entry of an Order Approving a Disclosure Statement and Seeking Related Relief* [Docket No. 200] (the "**UST Objection**"), and (iii) *Limited Objection of the U.S. Securities and Exchange Commission to Approval of the Disclosure Statement and Confirmation of the Debtors' Joint Plan of Reorganization* [Docket No. 195] (the "**SEC Objection**" and, collectively

[1] The debtors in these cases, along with the last four digits of each debtor's federal tax identification number, are: Starry Group Holdings, Inc. (9355); Starry, Inc. (9616); Connect Everyone LLC (5896); Starry Installation Corp. (7000); Starry (MA), Inc. (2010); Starry Spectrum LLC (N/A); Testco LLC (5226); Starry Spectrum Holdings LLC (9444); Widmo Holdings LLC (9208); Vibrant Composites Inc. (8431); Starry Foreign Holdings Inc. (3025); and Starry PR Inc. (1214). The debtors' address is 38 Chauncy Street, Suite 200, Boston, Massachusetts 02111.

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with the Committee Objection, UST Objection, the "**Objections**"). A summary of the Objections and the Debtors' responses thereto is attached hereto as Exhibit A (the "**Objection Chart**").

PRELIMINARY STATEMENT

1. A disclosure statement's fundamental purpose is to enable holders of claims and interests entitled to vote on a chapter 11 plan to make an informed decision regarding whether to vote to accept or to reject that plan. The relevant inquiry is whether the disclosure statement contains "adequate information" within the meaning of section 1125(a) of the Bankruptcy Code. Although this determination includes considerations of accuracy and fairness, it does not include the consideration of specialized, substantive issues that certain of the debtor's stakeholders may have with the plan. The Amended Disclosure Statement[2] contains comprehensive information regarding the Debtors, their prepetition businesses, postpetition proceedings, the solicitation process, Plan treatment, risk factors related to the business and confirmation process, securities law matters, and tax implications, among other topics. The Amended Disclosure Statement now also includes additional information requested by the Committee and United States Trustee, and changes requested by the SEC (which the Debtors believe should fully resolve the SEC Objection). The Debtors believe that the Amended Disclosure Statement readily satisfies the applicable legal standard for approval and provides "adequate information."

[2] In advance of filing this Reply, the Debtors filed the *Disclosure Statement for Amended Joint Chapter 11 Plan of Reorganization for Starry Group Holdings, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* (the "**Amended Disclosure Statement**") [Docket No. 235] and the *Amended Joint Chapter 11 Plan of Reorganization for Starry Group Holdings, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* (the "**Amended Plan**") [Docket No. 234]. Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to them in the Amended Disclosure Statement, Amended Plan, or *Motion of Debtors for Order (A) Approving the Disclosure Statement; (B) Establishing the Voting Record Date, Voting Deadline, and Other Dates; (C) Approving Procedures for Soliciting, Receiving, and Tabulating Votes on the Plan and for Filing Objections to the Plan; (D) Approving the Manner and Forms of Notice and Other Related Documents; and (E) Granting Related Relief* [Docket No. 84] (the "**Disclosure Statement Motion**").

2. Although at times framed as disclosure issues, most of the issues raised by the Committee and the United States Trustee are *confirmation* issues and not ripe for the Court to consider at this stage. As discussed below, these issues are fact intensive and none renders the Amended Plan "patently unconfirmable."

3. The Amended Plan—in addition to being confirmable—results from arm's-length and good-faith negotiations between the Debtors and their Prepetition Lenders. The terms of the Amended Plan and the timeline set forth therein are *driven* by the economic realities of the Debtors' situation, and comply with the Bankruptcy Code. The Debtors' business is not yet cash flow positive, requires significant operational changes (including rejection of burdensome contracts), time, and substantial new money investment (both during and after the case to reach cash flow break-even), and—as set forth in the Amended Disclosure Statement—the Prepetition Lenders are substantially impaired on their Prepetition Term Loan Claims. Were the terms of the Amended Plan *dictated* by those economic realities, general unsecured creditors would receive nothing. Instead, unsecured creditors are being afforded an opportunity to participate in a recovery made available by the Prepetition Lenders and DIP Lenders—the same lenders that have committed substantial resources to provide a path for the Debtors' business to reorganize or complete a successful sale backstopped by a chapter 11 plan—in exchange for unsecured creditors giving a release and not voting to reject the Amended Plan.

4. Unlike many recent SPAC-related bankruptcies, in which the debtors had no choice but to pursue rapid asset sales with no assurances of any recovery for unsecured creditors or a follow-on chapter 11 plan after secured lenders recovered their collateral or proceeds, the Company was able to hardwire a path to a chapter 11 plan, with a recovery for unsecured creditors in either a reorganization or sale scenario. Further, the value of the Debtors' assets is being

independently market tested through a robust postpetition marketing process (to which process the Committee ultimately agreed), and follows months of prepetition marketing. The Amended Plan will preserve jobs, result in the assumption of numerous contracts, provide for payment of administrative and priority claims, preserve a counterparty for vendors and service providers, including many members of the Committee's constituency, and mitigate other potential claims against the estates. In light of the economic realities of the Chapter 11 Cases, the Debtors submit that the Restructuring Support Agreement and Plan process represent the best option available to the Debtors and a far better one for the Committee's constituency than many others that could have resulted.

5. The Committee complains of the lack of certain "basic information" (Committee Objection ¶1), but the Debtors have promptly fulfilled all of the Committee's diligence requests to date. The Committee notes that the Debtors' schedules and statements of financial affairs have not yet been filed—these documents have now been filed. *See* [Docket Nos. 208-230] (the "**Schedules**" and "**Statements**," respectively). Ultimately, the Committee raises only a few discreet disclosure matters, and while the Debtors believe that much of this information is not relevant to unsecured creditors' voting decisions in this case,[3] the Debtors have provided appropriate supplemental disclosure in the Amended Disclosure Statement.

[3] For instance, the Committee has pointed to the identity of the DIP Lenders, the lack of information as to the post-emergence ownership or management of the Company, and the proposed identities of the Reorganized Debtors' management. *See* Committee Objection ¶1 (bullets). However, such information is not relevant to voting decisions, as the Prepetition Lenders have already agreed to vote in favor of the Plan under the Restructuring Support Agreement, and Holders of General Unsecured Claims will only receive cash under the Plan, so issues relating to the future business of the Debtors are not relevant to their voting decisions.

6. As noted above, the Committee Objection largely centers on why the Plan is allegedly unconfirmable. The Committee's goal is clear: to delay[4] and otherwise seek to derail the confirmation schedule required by the Restructuring Support Agreement in order to negotiate a larger recovery for general unsecured creditors. There is no question that maximizing its constituency's recovery is fundamental to the Committee's mandate, and the Debtors fully intend to work with the Committee to enhance the Amended Plan where possible. However, the Debtors submit that maintaining the Restructuring Support Agreement and pursuing confirmation of the Amended Plan represent the best available path to the Debtors and their estates. Approval of the Amended Disclosure Statement at this juncture is critical to maintaining the case timeline, which is a key component of the Restructuring Support Agreement and DIP Facility.

7. As illustrated in the Amended Disclosure Statement, the Debtors have already provided supplemental disclosure to address issues raised by the Committee. The Debtors have also requested (but not yet been provided with) a copy of the Committee's proposed letter to be sent to unsecured creditors. Subject to review, the Debtors are willing to include such a letter in the Solicitation Packages, albeit with perplexity, given that the "no" votes the Committee appears to recommend would deprive the Committee's constituents of the recovery they are otherwise guaranteed under the Amended Plan. The balance of the Objections (including those asserting that the Debtors' releases are improper or improperly proposed) are either moot or are Plan objections

[4] The Committee has asked for a 30-day adjournment of the Plan Milestones related to confirmation of the Debtors' Plan. *See Limited Objection Official Committee of Unsecured Creditors and in support of the Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 18] at ¶16. The timeline, while expeditious, provides sufficient time to successfully implement the Debtors' process and is an integral part of the Restructuring Support Agreement. Any extension would simply aggravate the estates' cash flow constraints to the detriment of the Debtors' restructuring efforts.

that should be addressed in connection with confirmation. Accordingly, the Debtors request that the Court approve the Disclosure Statement Motion.

REPLY TO DISCLOSURE-RELATED OBJECTIONS

8. Although the Debtors respectfully submit that the Disclosure Statement already contained more than adequate information, the Debtors have nonetheless revised both the Plan and the Disclosure Statement, both on their own initiative and in response to the Objections. The Debtors believe that, with the supplements and revisions they have made, the Amended Disclosure Statement readily satisfies the applicable legal standard for approval and provides "adequate information."

9. Pursuant to section 1125 of the Bankruptcy Code, the question at hand is whether the Amended Disclosure Statement enables a "hypothetical investor typical of the holders of claims or interest in the case" to cast an informed vote on the Amended Plan. 11 U.S.C. § 1125(a)(1). The issue before the Court is whether the information provided in the Amended Disclosure Statement is "adequate" under this standard. In this inquiry, the Bankruptcy Court is not required to consider specialized issues that a particular creditor may wish to raise with respect to a plan of reorganization, nor does this determination require a debtor to explain why its plan of reorganization is superior to other, hypothetical plans. *See* 11 U.S.C. § 1125(a)(1) ("[A]dequate information need not include such information about any other possible or proposed plan . . . ."). The Amended Disclosure Statement readily meets this standard.

10. As noted herein, the Committee's disclosure-related objections fall into two general categories. First, the Committee requests inclusion of information regarding the Debtors' investigation into claims they may hold against their current or former directors and officers and the appropriateness of granting corresponding releases. *See* Committee Objection ¶1. The Committee also takes issue with the scope of the releases and the fact that the Debtors have not

identified every single recipient proposed to receive a release because the Amended Plan includes a list of "unidentified 'Related Persons.'" *See* Committee Objection ¶¶16-17.

11. In response, the Amended Disclosure Statement includes a description of the investigation process, discloses that the investigation is ongoing, and explains that the Debtors have not uncovered anything suggesting that the Company may have a colorable cause of action against its current or former directors and officers. *See* Amended Disclosure Statement Art. V.G. Such disclosure is more than "adequate." And as this Court noted in approving the disclosure statement over a similar committee objection in *Emerge*, releases are "a confirmation issue." Tr. of Hr'g held on Sep. 9, 2019 at 90, *In re Emerge Energy Servs. LP*, No. 19-11563 (KBO) (Bankr. D. Del. Sep. 9, 2019) [Docket No. 348].

12. Additionally, Related Persons may be released if they are Related Persons "solely in their capacity as such," which allows parties to assess whether they believe have a claim against such party. Therefore, contrary to the Committee's assertions, parties can readily ascertain the relevant scope of the releases. *See* Amended Plan Art. I.

13. The breadth of the Debtor Release is also typical for cases where no claims have been uncovered in the investigation, and is consistent with debtor releases regularly approved in this jurisdiction. *See, e.g., In re Clover Techs. Grp.*, LLC, No. 19-12680 (KBO) (Bankr. D. Del. Jan. 22, 2020) (approving similar debtor release provisions including, among other categories, directors, officers, direct and indirect equity holders, and professional and financial advisors); *In re PES Holdings*, LLC, No. 19-11626 (KG) (Bankr. D. Del. Feb. 13, 2020) (same); *In re Anna Holdings, Inc.*, No. 19-12551 (CSS) (Bankr. D. Del. Dec. 16, 2019) (same); *In re Blackhawk Mining LLC*, No. 19-11595 (LSS) (Bankr. D. Del. Aug. 29, 2019) (same). Indeed, directors and officers in particular often fall within the scope of debtor releases given the identity of interests a

debtor's indemnification obligations to such individuals creates. *In re Dow Corning Corp*., 86 F.3d 482, 493 (6th Cir. 1996), *as amended on denial of reh'g and reh'g en banc* (June 3, 1996) (noting release provisions against non-debtor parties are appropriate where there is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor).

14. The Committee further argues that the Disclosure Statement is lacking because the Debtors have not disclosed what contribution the Released Parties have made to justify the Debtor Release. *See* Committee Objection ¶18. Although styled as an objection to disclosure, the Committee is clearly staking out its position on a confirmation issue, which is not before the Court at this stage. The Debtors have included in the Amended Disclosure Statement additional information disclosing that, among other things, Released Parties have made a substantial contribution to the Debtors' estates, they played an integral role in the formation of the Amended Plan and the restructuring and sale processes contemplated thereby, and contributed to the Amended Plan, restructuring and sale process, devoting significant time and resources to ensure the success of the Amended Plan and transactions contemplated thereby. *See* Amended Disclosure Statement Article V. H.

15. In exchange for the Debtor Release, for example, the Prepetition Lenders agreed to execute the Restructuring Support Agreement, equitize their secured claims under the Amended Plan, provide bridge funding in advance of a filing, and provide postpetition funding for these Chapter 11 Cases. The Debtor Release is an integral component of this consideration. Further, the Debtors' directors, officers, and other agents have been instrumental in negotiating, formulating, and implementing the restructuring transactions contemplated under the Restructuring Support Agreement and the Amended Plan, and have worked tirelessly to support

the continued growth of the Debtors' businesses and leave no stone unturned as the Company explored financing and strategic options, including the proposed reorganization and sale process. *See Spansion*, 426 B.R. at 143 ("The Debtor Releasees were actively involved in negotiating and formulating the Plan. It is a valid exercise of the Debtors' business judgment to include a settlement of any claims it might own against such parties as a discretionary provision of the plan."). The information set forth in the Amended Disclosure Statement is more than adequate for purposes of approving the Amended Disclosure Statement, and the Debtors will establish at confirmation, if determined to be appropriate following their investigation, that the Debtor Release is fair, reasonable, and in the best interests of the Debtors' estates.

16. Second, the the Committee requests information regarding the quantum of General Unsecured Claims and their estimated recoveries. *See* Committee Objection ¶1. The Debtors have updated the chart in Article I.B.1 of the Amended Disclosure Statement to include the estimated amount and percentage recoveries for each Class. *See* Amended Disclosure Statement Art. I.B.1. The Debtors have also filed their Schedules and Statements. [Docket Nos. 208-230].

17. For these reasons, the Debtors believe that the Amended Disclosure Statement contains adequate information for purposes of section 1125 of the Bankruptcy Code and should therefore be approved. To the extent any aspect of the Objections remain unresolved as to adequacy of disclosure, the Debtors respectfully submit that they should be overruled.

REPLY TO OBJECTIONS TO CONFIRMATION

18. The majority of issues raised by the Objections, whether explicitly or implicitly, relate to confirmability of the Amended Plan and need not be decided by the Court at this time. It is well established that, unless a disclosure statement "describes a plan of reorganization which is so fatally flawed that confirmation is ***impossible***," the court should approve a disclosure statement that otherwise adequately describes the chapter 11 plan at issue. *In re Cardinal Congregate I*, 121

B.R. 760, 764 (Bankr. S.D. Ohio 1990) (emphasis added); *see also In re Unichem Corp.*, 72 B.R. 95, 98 (Bankr. N.D. Ill. 1987), *aff'd*, 80 B.R. 448 (N.D. Ill. 1987) (courts should disapprove the adequacy of a disclosure statement on confirmability grounds "where it is ***readily apparent*** that the plan accompanying the disclosure statement could ***never*** legally be confirmed") (emphasis added). "A plan is patently unconfirmable where (1) confirmation defects [cannot] be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing." *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154-55 (3d Cir. 2012) (internal quotations and citation omitted) (alteration in the original). That is not the case here.

19. The Debtors agree that the Amended Plan must comply with the confirmation requirements set forth in section 1129 of the Bankruptcy Code, and are prepared to demonstrate as much at the appropriate time—the confirmation hearing. Indeed, courts emphasize that objections related to compliance with section 1129 of the Bankruptcy Code do ***not*** rise to the level of making a plan "patently unconfirmable." *See, e.g., Cardinal Congregate I*, 121 B.R. at 763-64 (overruling objections to classification and treatment of claims, protection of security interests, and feasibility); *In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987) (holding that objections bearing on confirmability must be limited to defects that could not be overcome by creditor voting results and must also concern matters upon which all material facts are not in dispute or have been fully developed). Thus, issues bearing on feasibility, class treatment, releases, and the requirements of section 1129 noted by the Committee are not properly raised at this stage.

20. Indeed, courts routinely approve disclosure statements despite the existence of disputed issues related to confirmation, which may require an eventual evidentiary hearing. *See, e.g., In re Alto Maipo Delaware LLC., et al.,* Case No. 21-11507 (KBO) (Bankr. D. Del. April 6,

2022), Hr. Tr. at 24:24–25:8 (approving the disclosure statement over objections by the United States Trustee to the definition of releasing party, and finding it to be an issue for confirmation); *In re Emerge Energy Servs.*, Case No. 19-11563 (KBO) (Bankr. D. Del. Sep. 9, 2019), Hr. Tr. at 90:20 (noting that, "[o]n the releases, it's a confirmation issue"); *In re GT Real Estate Holdings LLC.*, Case No. 22-10505 (KBO) (Bankr. D. Del. Sep. 19, 2022), Hr. Tr. at 28:14-15 (approving disclosure statement and overruling objections in connections with the releases as confirmation issues); *In Quigley Co., Inc.*, 377 B.R. 110, 112 (Bankr. S.D.N.Y. 2007) (approving the disclosure statement while acknowledging that settlements with the debtors' non-debtor former parent "implicate several confirmation issues" regarding the rights and incentives of certain claimants under the proposed plan); *In re Hyatt*, 509 B.R. 707, 711 (Bankr. D.N.M. 2014) (approving the disclosure statement and finding that the "proposed classification scheme does not render the Plan patently unconfirmable as a matter of law"). Indeed, courts caution that "care must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing[.]" *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988); *see also In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 n.10 (Bankr. E.D. Pa. 1987) (stating that deciding confirmation issues before solicitation may have a disenfranchising effect because the disclosure statement itself is not mailed to all creditors until after court approval is obtained).

21. All parties in interest will have the opportunity to prosecute any confirmation objections at the appropriate time, if they so choose, and the Debtors are in no way looking to limit their ability to do so. Although the Debtors submit that the following confirmation objections are premature, the Debtors briefly address each below.[5]

[5] The Debtors reserve the right to respond to any and all objections asserted in the Disclosure Statement Objections in connection with confirmation of the Plan and otherwise.

A. The Debtor Release is Reasonable and Appropriate

22. As noted above, the Committee objects to the propriety of the Amended Plan's proposed Debtor Release. *See* Committee Objection ¶¶16-18, 26-28. "[T]he debtor should be given considerable latitude in addressing" whether to release claims as part of its plan. *In re Zenith Electronics Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999). As discussed above, although their investigation is ongoing, the Debtors have not uncovered anything suggesting that the Company may have colorable causes of action against its current or former directors and officers. *See* Amended Disclosure Statement Art. V.G. *See also In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) (noting that "the record does not reflect that there is any pending litigation in [that] case that would be discontinued by such a release" and citing *In re DBSD North America, Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009), which "approv[ed] a debtor's release of third parties when the debtor testified that it was unaware of any significant potential claims that were being released," *aff'd in part*, 627 F.3d 496 (2d Cir. 2010)); *In re AAI Pharma*, No. 05-11341(PJW) (Bankr. D. Del. Feb. 22, 2006) [Docket No. 893], Hr. Tr. at 44 (noting that there was "nothing in this case that would suggest that there is any serious cause of action out there that the debtor is giving up").

23. At confirmation, the Debtors will establish an appropriate basis for the Debtors' releases under the Amended Plan. It bears noting that these Chapter 11 Cases do not involve a situation where any major prepetition restructurings or large insider transactions took place, or where a mature and profitable company unexpectedly took a turn for the worse. Instead, these cases were filed by an early-stage growth company that, despite diligent efforts by the Company and its directors and officers, was not able to obtain sufficient capital to become a sustainable, cash flow positive business in light of changing markets and the availability of funding for growth

companies. Although the Company's investigation is ongoing, there is nothing to suggest there are colorable causes of action that the Debtors are giving up.

24. Moreover, the releases here are customary. Theories based on claims for willful misconduct, fraud, or gross negligence are not subject to the Debtor Release. Further, the breadth of the Debtor Release is consistent with debtor releases regularly approved in this jurisdiction. *See, e.g.*, *In re VER Techs. HoldCo LLC*, No. 18-10834 (KG) (Bankr. D. Del. July 26, 2018) (approving release provisions including directors, officers, direct and indirect equity holders, and professional and financial advisors); *In re Clover Techs. Grp*., LLC, No. 19-12680 (KBO) (Bankr. D. Del. Jan. 22, 2020) (approving similar debtor and third-party release provisions including, among other categories, directors, officers, direct and indirect equity holders, and professional and financial advisors).

25. The proposed Debtor Release is also part of the terms of the restructuring contemplated in the Restructuring Support Agreement, which was negotiated in good faith and at arm's-length. Absent the Debtor Release, it is highly unlikely the Prepetition Lenders would have agreed to support the Amended Plan and the Restructuring contemplated therein. *See In re AAI Pharma*, No. 05-11341(Bankr. D. Del. Feb. 22, 2006) [Docket No. 893], Hr. Tr. at 44-45 (recognizing that a plan's debtor releases are in the best interests of creditors when the releases are the result of good-faith negotiations among the various plan constituencies). In the absence of the Prepetition Lenders' support, the Debtors would not be in a position to confirm any plan. The Debtor Releases are thus essential to the Debtors' reorganization, and the Debtors believe that the record of these Chapter 11 Cases will fully support the same. Given the fact-driven nature of this issue, the Debtor Release hardly renders the Amended Plan "patently unconfirmable" and should be addressed at confirmation.

B. The Third-Party Release is Consensual and Permissible

26. The Third-Party Release is consensual and the opt-out mechanism is in accordance with applicable law. Although the Committee and United States Trustee argue that the opt-out mechanism renders the Third-Party Release non-consensual as a matter of law, courts in this jurisdiction routinely approve ***as consensual*** third party releases obtained through an opt-out mechanism if notice is sufficient. *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 305-06 (Bankr. D. Del. 2013) (approving ballots that had an opt-out mechanism); *Spansion*, 426 B.R. at 144 (Bankr. D. Del. 2010) (same); *In re Mallinckrodt*, 639 B.R. 837, 879 (Bankr. D. Del. 2022) (same); *see also In re Kabbage, Inc*., Case No. 22-10951 (CTG) (Bankr. D. Del. Jan. 19, 2023) [Docket No. 680] (approved plan containing third-party releases with opt-out mechanism); *In re True Religion Apparel, Inc.*, Case No. 20-10941 (CSS) (Bankr. D. Del. Oct. 6, 2020) [Docket No. 586]; *see also In re Blackhawk Mining LLC, et al.*, Case No. 19-11595 (LSS) (Bankr. D. Del. Oct. 2, 2019) [Docket No. 278] (same); *In re Arsenal Resources Dev't LLC, et al.*, Case No. 19-12347 (BLS) (Bankr. D. Del. Dec. 19, 2019) [Docket No. 216] (same); *In re Dixie Elec.*, Case No. 18-12477 (KG) (Bankr. D. Del. Dec. 13, 2018) [Docket No. 145] (same). Recently, in *Arsenal Intermediate Holdings,* Judge Craig T. Goldblatt approved an opt-out structure and overruled an objection from the United States Trustee arguing that the circumstances of that case counseled in favor of an opt-in structure. *In re Arsenal Intermediate Holdings, LLC, et al.*, Case No. 23-10097 (CTG) (Bankr. D. Del. March 27, 2023) [Docket No. 176].

27. As an initial matter, parties that vote to accept or reject the Amended Plan have taken an affirmative act in these Chapter 11 Cases, and by failing to opt-out of the Third-Party Release after casting their vote, there is and should be no question that their release is consensual. *See In re Emerge Energy Servs.*, 2019 WL 7634308 at *18 (Bankr. D. Del. Dec. 5, 2019) (striking down third party release only as to those who took no affirmative act); *In re Bluestem Brands Inc.*,

Case No. 20-10566 (MFW) at 25:13-26:9 (finding returning of a ballot without checking the opt-out does constitute consent to the releases where the ballot and notice was clear). Any argument to the contrary can and should be addressed at confirmation—inclusion of such a provision hardly renders the Amended Plan "patently unconfirmable."

28. Further, this Court's decision in *Emerge* sets forth a disjunctive test through which third party releases can be shown to be consensual, even when obtained in an opt-out process. *In re Emerge Energy Servs.*, 2019 WL 7634308 at *18 (holding that consent could be demonstrated from parties who do not respond affirmatively if "(1) the creditors and equity holders accepted a benefit knowing that the Debtors, as offerors, expected compensation; (2) the Debtors gave the creditors and equity holders reason to understand that assent may be manifested by silence or inaction, and the creditors and equity holders remained silent and inactive intending to accept the offer; or (3) acceptance by the creditors and equity holders can be presumed due to previous dealings between the parties"). After considering all the facts and circumstances, the Debtors, in consultation with the Prepetition Lenders, have determined not to pursue an opt-out structure for fully impaired stakeholders, and the Amended Plan now provides that Holders of Claims and Interests deemed to reject the Amended Plan fall outside the definition of Non-Debtor Releasing Parties.

29. The United States Trustee also objects to the Third-Party Release for parties deemed to accept the plan without an opportunity to opt out, and all parties who reject the plan but do not opt out of the Third Party Release. *See* UST Objection ¶18. In response, the Debtor's Plan, Disclosure Statement, and solicitation materials have been revised in two respects. First, they now provide that Holders of Unimpaired Claims and Unclassified Claims will also have the opportunity to opt out by objecting to the Third-Party Release in connection with confirmation. This approach

is consistent with decisions in this district. *See, e.g., In re Paddock Enters.*, Case No. 20-10028 (LSS) (approving disclosure statement where holders of unimpaired and unclassified claims were able to opt out of the plan's third-party release via an objection); *In re Boy Scouts of Am.*, Case No. 20-10343 (LSS) (approving disclosure statement where parties in interest were able to opt out of the plan's third-party release via a ballot and/or objection); *In re Arsenal Intermediate Holdings, LLC, et al.*, Case No. 23-10097 (CTG) (Bankr. D. Del. March 27, 2023) [Docket No. 176] (approving opt-out construct and holding "in the typical case, so long as the disclosure is prominent and conspicuous, and impaired creditors are given the ability to opt out simply by marking their ballot or by some other comparable device, it is appropriate to infer consent from a creditor's failure to opt out"). Second, as noted above, parties who are deemed to reject the Amended Plan are no longer Non-Debtor Releasing Parties.[6]

30. Ultimately, the inclusion of opt-out releases is a matter to be addressed at confirmation—inclusion of such releases does not render the Amended Plan "patently unconfirmable." *In re Emerge Energy Servs.*, Case No. 19-11563 (KBO) (Bankr. D. Del. Sep. 9, 2019), Hr. Tr. at 90-91. At confirmation, the Debtors are and will be prepared to support that inclusion.

C. The "Death Trap" Provision in the Amended Plan Does Not Unfairly Discriminate Against Similarly Situated Creditors, Does not Illustrate Bad Faith, and is Permissible

31. Contrary to the Committee's and the United States Trustee's assertions, placing conditions on distributions to Holders of Class 4 Claims is not an impermissible "death trap" that

[6] The United States Trustee also takes issue with the definition of Non-Debtor Releasing Parties and its interaction with the definition of Related Person, and argues that this makes Related Persons Releasing Parties without their consent. *See* UST Objection 12 fn. 3. However, Related Persons are Releasing Parties "solely in their capacity as such to the extent such Debtor Releasing Party and Non-Debtor Releasing Party is legally entitled to bind such Related Person." *See* Amended Plan Art. I. Given this limitation, inclusion is appropriate.

renders the Amended Plan patently unconfirmable. As a preliminary matter, there is no violation of Bankruptcy Code section 1123(a)(4) in permitting different creditors in the same class to obtain a different recovery based on their participation in the activities required for that recovery. As Judge Gross rightly concluded in *Emerald Oil*, section 1123(a)(4) merely requires all creditors in a class to have the same *opportunity* for recovery. *In re Emerald Oil, Inc.*, No. 16-10704-KG [Docket No. 1112] para. 13 (Mar. 17, 2017) (approving plan providing distributions to class 4 general unsecured claimholders who vote to accept the plan and no distribution to those who vote to reject, or abstain from voting, on the plan). Indeed, such provisions are not unfairly discriminatory as a matter of law and are routinely approved by courts in this jurisdiction and others. *See id.; see also In re Wash. Mutual, Inc.*, 442 B.R. 314, 355-56 (Bankr. D. Del. 2011) ("Providing different treatment to a creditor who agrees to settle instead of litigating is permitted by section 1123(a)(4) ... [w]hat is important is that each claimant within a class have the same opportunity to receive equal treatment"); *In re Dana Corp.*, 12 B.R. 53, 62 (Bankr. S.D.N.Y. 2008) ("The key inquiry under § 1123(a)(4) is not whether all of the claimants in a class obtain the same thing, but whether they have the same opportunity[.]"); *In re Dow Corning Corp.*, 255 B.R. 445, 532 (E.D. Mich. 2000) ("there is no violation of § 1123(a)(4) by restricting the settlement option to those [claimants] who agree to give up all of their claims"); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 275-76 (Bankr. S.D.N.Y. 2007) (requiring "equity holders to vote in favor of the Plan or forfeit their distributions under it" where the plan gave equity holders "more than their legal entitlement"). Here, the proposed treatment is more generous to unsecured creditors than provisions requiring a class-wide vote—creditors can control whether they receive a recovery by not opting out of the Third-Party Release and not voting against the Amended Plan. In a class-wide vote, individual claimants may agree to releases while their ultimate recoveries are subject

to the vagaries of their fellow creditors. And despite the assertion in ¶35 of the UST Objection, creditors do not forfeit their distribution if they fail to send in a ballot; that only occurs if they affirmatively vote to reject the Amended Plan or return a ballot opting out of the Third-Party Release.

32. At bottom, the Committee and United States Trustee's objections ignore the economic realities of these Chapter 11 Cases. Absent a sale to a third party that clears the DIP Facility Claims and Prepetition Term Loan Claims, unsecured creditors are not entitled to any recovery (and in the event of a highly successful sale, the Amended Plan provides unsecured creditors with a recovery from net proceeds in accordance with the Bankruptcy Code priority scheme). Here, the Prepetition Lenders have offered what amounts to a gift. Although this guaranteed recovery comes with strings attached, that is not bad faith, and courts in this jurisdiction and others have consistently approved similar treatment where such provisions are intended to encourage consensus and where creditors are not otherwise entitled to a recovery. *See In re Emerge Energy Servs.*, 2019 WL 7634308 at *16 (finding that, "while the failed Class 6 deathtrap may have seemed unsavory to those creditors who stood only to receive pennies on the dollar if they accepted, the offer was intended to encourage consensus and presented an opportunity to which the claimholders were not otherwise entitled. Under such circumstances, the Court does not find the deathtrap impermissible or indicative of a lack of good faith"); *see also In re Adelphia Comm's Corp.*, 368 B.R. at 275 (approving death trap where class subject to death trap provision was out of the money).

33. The Committee also argues that, by directly reducing the "ceiling"[7] for unsecured creditor recoveries based upon the fees incurred by the Committee's and Debtors' professionals, the Plain is designed to "hamstring the Committee" in its efforts to carry out its duties. *See* Committee Objection ¶37. The Debtors are confident that the Committee will satisfy its fiduciary duties; however, this provision, which was negotiated by the Prepetition Lenders and DIP Lenders, is designed to align incentives in order to prevent unnecessary administrative expenses and provide an incentive for all estate professionals to work towards consensus rather than promote litigation. Such an approach benefits the estates in light of the finite resources available from the Prepetition Lenders and DIP Lenders to support the Company in its efforts to reorganize.

34. In sum, the Prepetition Lenders are offering unsecured creditors a guaranteed recovery to which they are not entitled in exchange for releases and generalized support of the Plan.[8] Such structure is required by the Restructuring Support Agreement in order for the Prepetition Lenders to support the Amended Plan. *See* Restructuring Support Agreement Exhibit A. Although the Committee and United States Trustee may not like certain elements of the Plan, the Plan comports with the requirements of the Bankruptcy Code and represents a package deal, negotiated at arm's-length and in good faith.

D. Feasibility under Section 1129(a)(11)

35. The Committee finally argues that the Plan is not feasible and thus patently unconfirmable. *See* Committee Objection ¶¶41-44. Feasibility is highly fact-driven, and the Debtors will be prepared to demonstrate that the Amended Plan is feasible at confirmation.

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[7] The Amended Plan provides, in the event of a Restructuring, a "floor" of $250,000 for Class 4 Claims to share *pro rata* and a "ceiling" based on the amount by which estate professionals can "beat the budget." *See* Amended Plan Art. III.B.4.c.i.

[8] To the extent one or more bidders emerge during the Debtors' concurrent sale process that result in a successful 363 Sale, the Plan contemplates that the gift afforded to general unsecured creditors in a Restructuring is only a floor to what they could potentially recover in such 363 Sale.

36. In brief, for a plan to satisfy the feasibility standard under section 1129(a)(11), the evidence presented must show that the proposed plan offers a "reasonable assurance of success." *See In re Indianapolis Downs,* 486 B.R. 286, 298 (Bankr. D. Del. 2013). "This is a low threshold." *In re Emerge Energy Servs.*, 2019 WL 7634308 at *15. A court may find that a plan is feasible if "the information in the [d]isclosure [s]tatement, the [s]upporting [d]eclaration, and the evidence proffered or adduced ***at the Confirmation Hearing*** (i) is persuasive and credible, (ii) has not be controverted by other evidence, and (iii) establishes that the…[p]lan is feasible and that there is a reasonable prospect of the [r]eorganized [d]ebtors" being able to meet their financial obligations. *In re Elec. Components Int'l*, No. 10-11054, 2010 WL 3350305, at *9 (Bankr. D. Del. May 11, 2010) (emphasis added). Given the fact-intensive nature of the inquiry, concerns regarding feasibility are no basis to deny approval of a disclosure statement.

37. Even if the Debtors' projections called into question feasibility of the Amended Plan (they do not), the Committee again ignores the facts and circumstances here. Under a Restructuring scenario, the Prepetition Lenders and DIP Lenders (who are also providing the Exit Facility) will be the owners of and lenders to the Reorganized Debtors and will have every incentive to ensure the Company succeeds. Additionally, the Debtors have been implementing and are continuing an operational pivot toward a business plan that is less dependent on growing into new markets and more focused on building out their core markets. This pivot is designed to place the Company on stable footing and position itself to become cash-flow positive and achieve more organic growth in the future. The Financial Projections,[9] as well as the Exit Facility, provide

[9] The Debtors have included amended Financial Projections in the Amended Disclosure Statement, which make clear that of the total $101.3 million principal amount of the Exit Facility, the Debtors expect to draw $99.3 million over the projection period, with $91.3 million expected to be drawn at the time of emergence and $8 million reserved as a delayed draw facility. *See* Amended Disclosure Statement Exhibit D. In other words, the Debtors project $2 million of unused capacity in their Exit Facility over the first five (5) years post-emergence.

a workable path in these circumstances that satisfies the feasibility threshold of section 1129(a)(11).

38. Even if viewed as an objection to disclosure, the Committee's feasibility-based objections are unnecessary to inform the decision of a relevant "hypothetical investor" here. The Prepetition Lenders have already agreed to vote in favor of the Amended Plan under the Restructuring Support Agreement and Holders of General Unsecured Claims will only receive cash under the Amended Plan, so issues relating to the future business of the Debtors can and should have no impact on their vote. *See Emerge Energy Servs.*, Case No. 19-11563 (KBO) (Bankr. D. Del. Sep. 9, 2019), Hr. Tr. at 89:3-5 (advising the parties "to be careful to not bog down the disclosure statement in highly technical points that are really confirmation issues").

CONCLUSION

39. For the foregoing reasons, the Debtors respectfully submit that the Amended Disclosure Statement should be approved because it clearly satisfies the requirements of section 1125 of the Bankruptcy Code and because the relief provided in the Disclosure Statement Order is fair, appropriate, and in the best interests of their chapter 11 estates. The Debtors respectfully request that the Court overrule the Objections to the extent not already resolved and enter the Disclosure Statement Order.

[*Remainder of page intentionally left blank.*]

Dated: March 28, 2023
Wilmington, Delaware

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Exhibit A

TABLE SUMMARIZING DEBTORS' RESPONSES TO OBJECTIONS TO DISCLOSURE STATEMENT[1]

Objecting Party	Objection	Response	Plan/DS Location[2]
Committee	1. The Committee Objects to approval of the Disclosure Statement and Disclosure Statement Motion because the Disclosure Statement and Solicitation Procedures do not provide creditors with sufficient information to aide them in their decision to accept or reject the Plan. *See* Committee Objection ¶¶ 14-24.	1. As set forth in the Reply, the Debtors have revised the Disclosure Statement, Ballots, and Disclosure Statement Order to provide additional information to aid creditors in their decision to vote to accept or reject the Plan. *See* Reply ¶¶ 12-18. The Debtors submit that the Amended Plan and Amended Disclosure Statement provide adequate information within the meaning of Bankruptcy Code section 1125.	
	2. The Committee argues that the Debtor Releases in the Plan are overly broad and that the identities of who is getting released is unknown. *See* Committee Objection ¶ 17.	2. This is a confirmation issue. Further, as set forth in the Reply, the release provisions are appropriate and consistent with those regularly approved in this jurisdiction. *See* Reply ¶¶ 23-26.	Disclosure Statement Article V.G Plan Article I.A
	3. The Committee argues that the Disclosure Statement does not contain information showing parties made a substantial contribution warranting the releases. *See* Committee Objection ¶ 18.	3. This is a confirmation issue. Further, the Reply includes additional disclosure with respect to the appropriateness of the releases. *See* Reply ¶¶ 23-26.	Disclosure Statement Article V.G Plan Article I.A
	4. The Committee notes that the Disclosure Statement does not disclose the efforts by the Debtors to investigate claims they propose to release, or the value of any estate claims being released. *See* Committee Objection ¶¶19-20.	4. The Debtors have supplemented the disclosures to the Disclosure Statement describing the investigation conducted by their counsel, Young Conaway Stargatt & Taylor LLP, which underlies the release provisions in the Plan. The Debtors do not currently believe there are any colorable claims being released.	Disclosure Statement Art. V.G

[1] Capitalized terms used and not otherwise defined herein shall have the meaning ascribed in the applicable Objection or Reply, as applicable. For the avoidance of doubt, the Debtors reserve the right to respond to any and all objections asserted in the Objections in connection with confirmation of the Plan and otherwise.

[2] References to the Disclosure Statement and Plan are references to such documents as amended.

Objecting Party	Objection	Response	Plan/DS Location[2]
	5. The Committee alleges that the release provisions in the Plan make the Plan patently unconfirmable. *See* Committee Objection ¶¶ 26-32.	5. This is a confirmation issue. Further, as set forth more fully in the Reply, the release provisions are consistent with this Court's opinion in *In re Emerge Energy Services* and the Debtors are prepared to defend the releases at confirmation.	Disclosure Statement Article V.G Plan Article I.A
	6. The Committee objects to the Plan's death trap, arguing that the Debtors should provide a rationale for the provision, and that it unfairly discriminates against similarly situated creditors. *See* Committee Objection ¶¶ 21, 33-40	6. This is a confirmation issue. As set forth more fully in ¶¶ 32-25 of the Reply, the treatment proposed in the Plan is not discriminatory, and is designed to foster consensus and align incentives in these Chapter 11 Cases, consistent with other similar provisions approved in this jurisdiction and others.	Plan Article III.B
	7. The Committee objects to approval of the Disclosure Statement because Article I.B.1. of the Disclosure Statement contains placeholders for estimated recoveries. *See* Committee Objection ¶ 24.	7. The chart in Article I.B.1 of the Disclosure Statement has been updated to include estimated recoveries for each class.	Disclosure Statement Article I.B.1
SEC	8. The SEC objects to the releases in the Plan requiring Holders of Claims and Interests that are deemed to reject the Plan to opt-out of the Third Party Release. *See* SEC Objection P.3.	8. The Debtors have resolved this objection. The Amended Plan provides that Holders of Claims and Interests deemed to reject the Plan are no longer Releasing Parties.	Disclosure Statement Article V.G Plan Article I.A
	9. The SEC requested a carve-out so it may enforce its police and regulatory powers and pursue causes of actions against non-Debtors.	9. Article V.F of the Disclosure Statement and Article IX of the Plan now contain the requested SEC carve-out.	Disclosure Statement Article V. F Plan Article IX P.52
United States Trustee	10. The United States Trustee argues that the opt-out mechanism renders the Third-Party Release non-consensual as a matter of law. UST Objection ¶¶18-34	10. This is a confirmation issue. Further, the Reply sets forth the appropriateness of the releases. *See* Reply ¶¶ 23-26.	Disclosure Statement Article V.G Plan Article I.A
	11. The United States Trustee objects to the Plan's death trap, arguing that it should be narrowed. *See* UST Objection ¶35.	11. This is a confirmation issue. As set forth more fully in ¶¶ 29-31 of the Reply, the proposed treatment is consistent with similar provisions approved in this jurisdiction and others.	Plan Article III.B