IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **LANNETT COMPANY, INC.,** *et al.,* **Debtors.** [1]	**Chapter 11** **Case No. 23-10024 (JKS)** **(Jointly Administered)** **Hearing Date: June 8, 2023 at 10:00 a.m. (ET)** **Objection Deadline: June 1, 2023 at 4:00 p.m. (ET), extended to June 4, 2023 at 12:00 pm for the U.S. Trustee** **RE: D.I. No. 16**

UNITED STATES TRUSTEE'S OBJECTION TO THE JOINT PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION OF LANNETT COMPANY, INC. AND ITS DEBTOR AFFILIATES

Andrew R. Vara, the United States Trustee for Region 3 ("U. S. Trustee"), through his counsel, files this objection (the "Objection") to the *Joint Prepackaged Chapter 11 Plan of Reorganization of Lannett Company, Inc. and its Debtor Affiliates.* ("Plan")[2] filed at D.I. 16 and in support of his Objection, states:

PRELIMINARY STATEMENT

1. There are a number of provisions of the Debtors' proposed Plan that make it unconfirmable. First, the public equity holders, and holders of claims in certain classes, are to receive no distribution under the Plan, have no right to vote on the Plan, and are deemed to reject the Plan. Despite such treatment, the Debtors seeks to deem all such equity holders and claimants to have consented to release their direct claims against non-debtor third parties unless each such

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Lannett Company, Inc. (7699); Silarx Pharmaceuticals, Inc. (1798); Cody Laboratories, Inc. (1425); and Kremers Urban Pharmaceuticals Inc. (0780). The location of the Debtors' service address is: 1150 Northbrook Drive, Suite 155, Trevose, Pennsylvania 19053.

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

equity holder or claimant returns a form opting out of such releases, and such form is received by the Debtors' claims agent by the Release Opt-Out Deadline.

2. The opt-out mechanism, which provides for negative (rather than affirmative) consent, is especially inappropriate because the "deemed to reject" classes will receive ***no consideration whatsoever*** for the releases that will be imposed on them. In addition, much of the stock of the Debtor is held in street name. Therefore, the Debtors will not be sending opt-out forms directly to most of the beneficial stockholders, but instead will sending such forms to brokers. It will be the obligation of such brokers, over whom the Debtors have no control, to timely send the opt-out form to the beneficial shareholders. Thus, there will be no assurance that each beneficial shareholder will receive the opt-out form, let alone receive it in enough time to execute it and return it to the broker, or that upon receipt, the broker will timely communicate such opt-out to the Debtors' claims agent.

3. Nor have the Debtors demonstrated any necessity for their equity or claim holders to release the non-debtor Released Parties. Among other things, all derivative claims held by all equity holders and claimants will be released through the separate releases being provided by the *Debtors* in the plan.

4. The Plan also should not be confirmed due to the overbreadth of the scope of the type of claims that will be released by way of the debtor releases and third-party releases. Those releases make no exception for known or unknown claims for fraud, willful misconduct or gross negligence, even though such releases benefit estate fiduciaries who are not entitled to exculpation for such claims under *PWS Holding Corporation*, 228 F.3d 224 (3d Cir. 2000). The third-party release also provide that the Debtors themselves will be "released and discharged" for claims that the Bankruptcy Code prohibits from being discharged under section 523(a)(2, 4, 6).

5. The U.S. Trustee further objects to the Plan because it is inconsistent in its treatment of the general unsecured creditors in Class 5, and other impaired creditors. The Plan provides that unimpaired claims, including Reinstated claims, may not be paid until after the Effective Date, and the Debtors maintain the ability to object to such claims (Plan Art. VII.A). Yet various Plan provisions, including the Plan injunction, would prevent unimpaired claimholders from pursuing their claims against the Reorganized Debtors or others immediately upon the Effective Date. Proposed language to correct this inconsistency is set forth in paragraph 49 below.

6. For these reasons, set forth in more detail below, confirmation of the Plan in its current form should be denied.[3]

JURISDICTION, VENUE AND STANDING

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

8. Pursuant to 28 U.S.C. § 586, the U. S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U. S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994)

[3] The U.S. Trustee's counsel believes she has reached an agreement with the Debtors' counsel as to modifications to be made to the Plan other than those addressed in this Objection, including but not limited to modifications relating to the exculpation provision of the Plan, and the definition of Exculpated Parties. The U.S. Trustee reserves the right to supplement this Objection, or to assert additional objections at the hearing on confirmation, if such modifications are not made. In addition, the U.S. Trustee reserves all rights to object to any amendments that may be made to the Plan after the filing of this Objection.

(noting that the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U. S. Trustee as a "watchdog").

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

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

BACKGROUND

11. On May 2, 2023, the above-captioned cases were commenced by the filing of voluntary petitions in this Court (the "Petition Date").

12. On May 19, 2023, the U.S. Trustee appointed an official committee of unsecured creditors [D.I. 92].

13. On the Petition Date, the Debtors filed the Motion of Debtors for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Approving Related Dates, Deadlines, Notices, and Procedures, (III) Approving the Solicitation Procedures and Related Dates, Deadlines and Notices, and (IV) Conditionally Waiving the Requirement that (A) the U.S. Trustee Convene a Meeting of Creditors and (B) the Debtors file Schedules of Assets and Liabilities, Statements of Financial Affairs, and Rule 2015.3 Financial Reports [D.I. 18] (the "Disclosure Statement Scheduling Motion").

14. The order approving the Disclosure Statement Scheduling Motion was entered on May 4, 2023 [D.I. 59] (the "Disclosure Statement Scheduling Order"). The Disclosure Statement

Scheduling Order contained a provision that reserved all rights of the U.S. Trustee with respect to confirmation issues. [D.I. 59 ¶ 9].

The Solicitation Procedures

15. The Plan provides for two voting classes: Class 3, consisting of First Lien Senior Secured Notes Claims, and Class 4, consisting of Second Lien Term Loan Claims. *See* Plan III A.

16. The Plan provides for the following unimpaired classes: Class 1, Other Secured Claims; Class 2, Other Priority Claims; and Class 5, General Unsecured Claims. *Id.*

17. Under the Plan, the following classes are impaired, will receive nothing under the Plan, and are deemed to reject: Class 6, consisting of Convertible Notes Claims; Class 9, consisting of holders of Section 510(b) Claims; and Class 10, consisting of holders of interests in the Debtors. *See* Plan III A, B. 6, 9, 10.

18. Two classes under the Plan, Class 7, consisting of Intercompany Claims and Class 8 consisting of Intercompany Interests, will be treated as either unimpaired and deemed to accept, or impaired and deemed to reject the Plan. *See* Plan III A.

19. The Disclosure Statement Scheduling Order identifies that Opt-Out Forms will be provided to all non-voting classes. [D.I. 59-1 (the "Opt-Out Forms")]. Consistent with requests made in connection with the U.S. Trustee Disclosure Statement Objection, but not resolving confirmation issues asserted therein, the Opt-Out Forms indicate that no distribution will be made to those in classes who are deemed to reject. *Id.* The Opt-Out Forms identify June 1, 2023 as the "Release Opt-out Deadline" for non-voting classes. *Id.*

Relevant Plan Provisions

20. The third-party release provision of the Plan (the "Third-Party Releases") provides as follows:

Releases by the Releasing Parties.

As of the Effective Date, ***each Releasing Party is deemed to have, hereby conclusively, absolutely, unconditionally, irrevocably and forever, released and discharged each Debtor, Reorganized Debtor, and Released Party*** from any and all claims and Causes of Action, in each case on behalf of themselves and their respective successors, assigns, and representatives, whether known or unknown, including any derivative claims, asserted on behalf of the Debtors, the Reorganized Debtors, or the Estates, that such Entity would have been legally entitled to assert (whether individually or collectively), ***based on or relating to or in any manner arising from, in whole or in part, the Debtors*** (including the management, ownership, or operation thereof or otherwise), the Debtors' in- or out-of-court restructuring efforts, any Avoidance Actions, intercompany transactions, the Chapter 11 Cases, the formulation, preparation, dissemination, solicitation, negotiation, entry into, or filing of the Restructuring Support Agreement, the Disclosure Statement, the Plan, the Plan Supplement, the Takeback Exit Facility, the New RCF, the New Common Stock, the New Warrants, the New Warrant Agreement, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Restructuring Support Agreement, the Disclosure Statement, the Plan, the Plan Supplement, the Takeback Exit Facility, the New RCF, the New Common Stock, the New Warrants, the New Warrant Agreement, the Chapter 11 Cases, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date.

Notwithstanding anything to the contrary in the foregoing, the Third-Party Release does not release: (a) any post-Effective Date obligations of any party or Entity under the Plan, the Confirmation Order, any Restructuring Document, or any post-Effective Date transaction contemplated by the Restructuring Transactions (including under the New RCF, as applicable), or any document, instrument, or agreement (including those set forth in the Plan Supplement and the New RCF, as applicable) executed to implement the Plan or the Restructuring Transactions; or (b) the rights of any Holder of Allowed Claims to receive distributions under the Plan.

Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the Third-Party Release, which includes by reference each of the related provisions and definitions contained in the Plan, and further, shall constitute the Bankruptcy Court's finding that the Third-Party Release is: (a) consensual; (b) essential to the Confirmation of the Plan; (c) ***given in exchange for the good and valuable consideration provided by the Released Parties***; (d) a good faith settlement and compromise of the Claims released by the Third-Party Release; (e) in the best interests of the Debtors their Estates; (f) ***fair, equitable, and reasonable;*** (g) given and made after due notice and opportunity for

a hearing; and (h) a bar to any of the Releasing Parties asserting any Claim or Cause of Action released pursuant to the Third-Party Release.

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

21. The Releasing Parties are defined under the Plan as follows:

"*Releasing Party*" means each of, and in each case in its capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) the Consenting Stakeholders; (d) the Agents; (e) all Holders of Claims that vote to accept the Plan; (f) all Holders of Claims or Interests that are presumed to accept the Plan and who do not affirmatively opt out of the releases provided by the Plan; **(g)** ***all Holders of Claims or Interests that are deemed to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan****;* (h) all Holders of Claims who abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan; (i) all Holders of Claims who vote to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan; and (k) each Related Party of each Entity in clauses (a) through (i) for which such Entity is legally entitled to bind such Related Party to the releases contained in the Plan under applicable law; provided that, for the avoidance of doubt, each Holder of Claims and/or Interests that is party to or has otherwise signed the Restructuring Support Agreement shall not opt out of the releases.

Plan at Art. I.A.112 (emphasis added).

22. The Plan defines the Released Party as follows:

"*Released Party*" means each of, and in each case in their capacity as such: (a) the Debtors; (b) the Reorganized Debtors; (c) the Consenting Stakeholders; (d) the Agents; (e) the Releasing Parties; and (f) each Related Party of each Entity in clause (a) through this clause (e); provided, that any Holder of a Claim or Interest that opts out of the releases contained in the Plan shall not be a "Released Party."

Id. at Art. I.A.111.

23. The Plan defines Related Party as follows:

"*Related Parties*" means, with respect to an Entity, collectively, (a) such Entity's current and former Affiliates and (b) such Entity's and such Entity's current and former Affiliates' directors, managers, officers, shareholders, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, participants, successors, assigns (whether by operation of law or otherwise), subsidiaries, current, former, and future associated entities, managed or advised entities, accounts or funds, partners, limited partners, general partners, principals, members, management companies, fund advisors, managers, fiduciaries, trustees, employees, agents (including any disbursing agent), advisory board members, financial advisors,

> attorneys, accountants, investment bankers, consultants, other representatives, and other professionals, representatives, advisors, predecessors, successors, and assigns, each solely in their capacities as such (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), and the respective heirs, executors, estates, servants and nominees of the foregoing.

Id. at Art. I.A.110.

24. The debtor release provision of the Plan (the "Debtor Release") provides as follows, in relevant part:

> *Releases by the Debtors.*
>
> Notwithstanding anything contained in the Plan to the contrary, pursuant to section 1123(b) of the Bankruptcy Code, for good and valuable consideration, on and after the Effective Date, ***each Released Party is deemed, hereby conclusively, absolutely, unconditionally, irrevocably and forever released and discharged by the Debtors***, ***the Reorganized Debtors, and their Estates***, in each case on behalf of themselves and their respective successors, assigns, and representatives, from any and all Claims and Causes of Action, whether known or unknown, including any derivative claims, asserted or assertable on behalf of the Debtors, that the Debtors, the Reorganized Debtors, or their Estates, including any successors to the Debtors or any Estate's representative appointed or selected pursuant to section 1123(b) of the Bankruptcy Code, 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 Interest in a Debtor or other Entity, or that any holder of any Claim against or Interest in a Debtor or other Entity could have asserted on behalf of the Debtors, based on or relating to or in any manner arising from in whole or in part, the Debtors (including the management, ownership, or operation thereof or otherwise), the Debtors' in- or out-of-court restructuring efforts, any Avoidance Actions, intercompany transactions, the Chapter 11 Cases, the formulation, preparation, dissemination, solicitation, negotiation, entry into, or filing of the Restructuring Support Agreement, the Disclosure Statement, the Plan, the Plan Supplement, the Takeback Exit Facility, the New RCF, the New Common Stock, the New Warrants, the New Warrant Agreement, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Restructuring Support Agreement, the Disclosure Statement, the Plan, the Plan Supplement, the Takeback Exit Facility, the New RCF, the New Common Stock, the New Warrants, the New Warrant Agreement, the Chapter 11 Cases, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of securities pursuant to the Plan, or the distribution of property under the Plan or any other

> related agreement, or upon any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date.

Plan, Art. VIII.C (emphasis added).

25. Neither the Third-Party Release or the Debtor Release make any exceptions for known or unknown claims of fraud, intentional misconduct, or gross negligence. Therefore, if the Plan is confirmed, all such claims held by the Debtors or any Releasing Party will be released.

ARGUMENT

A. The Plan Seeks to Impose Third-party Releases on Holders of Interests Through an "Opt-Out" Mechanism, Despite Such Interest Holders Receiving No Distribution Under the Plan.

26. Some Courts in this District have determined that third-party releases of non-debtors should be allowed only to the extent the releasing parties have given affirmative consent. *See Emerge Energy Services LP*, Case No. 19-11563, 2019 Bankr. LEXIS 3717, *52 (Bankr. D. Del, Dec. 5, 2019)(Owens, J.) (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."); *In re Washington Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) (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)."); *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 Electronics 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 Joel Patterson v. Mahwah Bergen Retail Group, Inc., Patterson v. Mahwah*, 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).

27. Other decisions from this District have not required affirmative consent for third-party releases.[4] However, such decisions are (i) distinguishable from the present case 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 Spansion, Inc.*, 426 B.R. 114 (Bankr. D. Del 2010), the Court held that affirmative consent to third-party releases was not required, but only as to releases being given by unimpaired classes who were "being paid in full." *Id.* at 144. The Court determined that non-consensual releases being deemed to be given by parties ***who were not receiving any distribution under the plan*** "does not pass muster under *Continental*." *Id.* at 145 (emphasis added), referencing *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000).

28. In *In re Indianapolis Downs, LLC*, 486 B. R. 286 (Bankr. D. Del. 2013), this Court also reached a different conclusion than that of *Emerge* and *Washington Mutual* concerning the

[4] The U.S. Trustee recognizes that, in addition to the reported cases cited above, there have been bench rulings from this Court permitting an opt-out procedure for third-party releases. However, the U.S. Trustee is not aware of any bench ruling from this Court that has permitted an opt-out procedure for classes that were to receive no distribution under a plan.

need for affirmative consent to third-party releases. 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).

29. 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 were permissible under the Third Circuit's decision in *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 and Delaware BSA, LLC*, 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 current case is not a mass tort case.

30. In contrast to the ruling in *Mallinckrodt*, in a recent ruling from the bench, in *In re Tricida, Inc*., Case No. 23-10024 (JTD), the Court sustained the objection of the U.S. Trustee to third-party releases being imposed on public shareholders who were deemed to reject the plan unless they did not return an opt-out form. *See* Transcript of Hearing May 19, 2023, a copy of which is attached as Exhibit A hereto, Tr. 143:13 – 147:18. In so doing, the Court distinguished its ruling in *Mallinckrodt,* and further explained, "I am of the view that if a non-voting class is being asked to opt out of the releases, the debtors must show that the releases are fair, equitable, necessary, and integral to the proposed plan. That is the only fair and equitable way to proceed." Tr. 145: 19-23.

31. The Debtors' imposition of a Third-Party Release on the public equity holders in Class 10, and the claim holders in Classes 6 and 9 should not be permitted because such equity

and claim holders are receiving no consideration for having their direct claims against non-debtors stripped away. Therefore, such releases are not fair or equitable. Such releases are also impermissible under *Continental*, 203 F.3d 203 (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").

32. The Third Circuit in *Continental* ultimately determined that the proposed releases in that case, which, like the releases in these cases, 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 (emphasis added). However, the Court did describe the "hallmarks of permissible non-consensual releases" to be "fairness, necessity to the reorganization, and special factual findings to support these conclusions." *Id.* at 214.

33. 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*, 140 S. Ct. 2805 (U.S. May 26, 2020), as one of the precedents, along with *In re Global Indus. Techs., 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]

34. 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 non-consenting parties are receiving reasonable consideration in exchange for the release.*** *Id.* at 608. In most instances of a release provision in a plan, this will entail examining the proposed dividend that non-consenting creditors or shareholders will receive under a plan with the releases compared to

[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 held the appeal to be equitably moot. 945 F. 3d at 144.

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).

35. 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).

36. In the present case, 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. There is no consideration, let alone "fair consideration," being provided for the Third-Party Releases being imposed on the Debtors' public equity holders and creditors in Classes 6 and 9. Those equity and claim holders are receiving no distribution under the Plan and are deemed to reject it. If, under *Genesis*, a distribution of 7.34% to certain creditors was not sufficient to meet the *Continental* criteria for fair consideration, then a recovery of zero by the Debtors' public equity holders and the creditors in Classes 6 and 9 is clearly not sufficient.

37. Nor is there any indication that Third-Party Releases from equity holders and claimants in deemed to reject classes are necessary to the Plan. This is especially true given that derivative claims held by all equity and claim holders will be released in the separate Debtor

Release provision of the Plan, without the need for the consent of any party other than the Debtors. *See* Plan, Art. VIII.C.

38. In addition, the beneficiaries of the Third-Party Releases include the Debtors' current and former officers and directors. The Third Circuit in *Continental* and this Court in *Washington Mutual* have found that the directors and the officers of the debtors in those cases did not satisfy the requirements to be entitled to third-party releases. *See Continental,* 203 F.3d at 215 ("[W]e have found no evidence that the non-debtor D & Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability"); *Washington Mut.*, 442 B.R. at 354 ("[T]here is no basis for granting third party releases of the Debtors' officers and directors, even if it is limited to their post-petition activity. The only 'contribution' made by them was in the negotiation of the Global Settlement and the Plan. Those activities are nothing more than what is required of directors and officers of debtors in possession (for which they have received compensation and will be exculpated); they are insufficient to warrant such broad releases of any claims third parties may have against them ....") .

39. The Debtors have the burden of establishing whether the *Continental/Genesis* factors have been met for each of the non-debtor released parties who are the beneficiaries of the non-consensual third-party release, including whether the third-party releases are "both necessary and given in exchange for ***fair consideration***." *Continental,* 203 F.3d at 214, n. 11 (emphasis added). The Debtors here should not be allowed the unfettered discretion to force public shareholders, and certain claimants, to release their direct claims against non-debtors for no consideration, because a permanent injunction limiting the liability of non-debtor parties is a rarity that should not be considered absent a showing of "extraordinary circumstances." *See Continental*,

203 F.3d at 212; *Tribune*, 464 B.R. at 178 (interpreting *Continental* to allow non-consensual releases only in "extraordinary cases."); *Genesis*, 266 B.R. at 608.

B. The Plan is Not Confirmable Because Neither the Third-Party Releases Nor the Debtor Releases Have Exceptions for Fraud, Willful Misconduct or Gross Negligence.

40. There is another aspect of the Third-Party Release, as well as the Debtor Release, that renders the Plan unconfirmable. Neither of these releases make an exception for known or unknown claims of actual fraud, willful misconduct, or gross negligence. This is objectionable for at least three reasons. First, the Debtors are among the beneficiaries of the Third-Party Release, through which they are to be "released and discharged" from claims that are expressly barred by the Code from discharge. *See* 11 U.S.C. § 523(a)(2, 4, 6) (barring claims of fraud and willful misconduct from discharge). In addition, non-debtor parties who are the beneficiaries of the Third-Party Release should not be released from claims as to which a debtor could not be discharged. *See In re Purdue Pharma, L.P.*, No. 21-cv-7532, 2021 WL 5979108 at *62 (S.D.N.Y. Dec. 16, 2021).

41. Second, through the Debtor Release, the Debtors are releasing, among others, all of their directors, officers and employees from all claims, whether known or unknown. If, for example, it is later learned that an officer, manager or employee of one 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. The Debtors have the burden to establish how the release of their claims against the Released Parties, including but not limited to claims for known and unknown fraud, willful misconduct, and gross negligence of its employees and the other Released Parties, meet the requirements of *In re Zenith Electronics Corp.*, 241 B.R.

92, 110 (Bankr. D. Del. 1999), and *In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994).[6]

42. Third, the Debtor Release and Third-Party Release release claims against certain fiduciaries of the estate, such as the Debtors' directors and officers, and professionals retained by the Debtors. All such fiduciaries are entitled to an exculpation, but such exculpation must carve out claims of fraud, intentional misconduct and gross negligence, as the Exculpation provision here does. However, because the Debtor Release and Third-Party Release do not have carve-outs for fraud, intentional misconduct and gross negligence, these estate fiduciaries would obtain immunity from such claims even though such immunity is not permitted under the holding of the Third Circuit in *PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000). As recognized by this Court in *Washington Mutual*, parties who are fiduciaries of the estate are receiving exculpations, and therefore receipt by such parties of 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).

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[6] The factors set forth in *Zenith* and *Master Mortgage* are as follows:

1. identity of interests between debtor and non-debtor releasee, so that a suit against the non-debtor will deplete the estate's resources (e.g., due to a debtor's indemnification of a non-debtor);
2. substantial contribution to the plan by non-debtor;
3. necessity of release to the reorganization;
4. overwhelming acceptance of plan and release by creditors; and
5. payment of all or substantially all of the claims of the creditors and interest holders under the plan.

Washington Mutual, 442 B.R. at 346 (citing *Zenith*, 241 B.R. at 110)); *In re Tribune Company, 464 B.R. 126, 186 (Bankr. D. Del. 2011)* (citing *Washington Mutual)*. "The factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness." *Washington Mutual*, 442 B.R. at 346; *Tribune,* 464 B.R. at 186.

43. Similarly, in *In re Tribune Company, 464 B.R. 126 (Bankr. D. Del. 2011),* this Court rejected the release by the debtors of their Related Persons, which, as here, included all the debtors' "current and former officers, directors, employees, attorneys, advisors and professionals." 464 B.R. at 187. Applying the *Zenith/Master Mortgage* factors, the Court held:

> There is no basis in the record to support any finding that any "substantial contribution" has been made by the Debtors' Related Persons or that a release is necessary to the reorganization. Despite acceptance by a majority of creditors, I cannot conclude that the Plan's release of the Debtors' Related Persons, based on this record, would be fair.

Id. at 188; *accord, Genesis*, 266 B.R. at 606–07 (in rejecting a debtor's release of its directors, officers and employees, the Court held that, "the officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization.").

44. Accordingly, unless exceptions for known and unknown claims arising from fraud, intentional misconduct and gross negligence are added to the Debtor Release and Third-Party Release, the Plan should not be confirmed.

C. The Injunction, Discharge and Third-party Release Provisions Impair the General Unsecured Creditors

45. The Plan is inconsistent in its treatment of the general unsecured creditors in Class 5, and other unimpaired creditors. The General Unsecured Creditors (Class 5) are listed in the Plan as unimpaired and are to be "either (i) Reinstated or (ii) paid in full in Cash on the later of (x) the Effective Date and (y) the date on which such payment would otherwise be due in the ordinary course of business in accordance with the terms and conditions of the particular transaction giving rise to such Allowed General Unsecured Claim." Plan Art. III.B.4. Yet, there are a number of Plan provisions that effectively impair Class 5 and other holders of unimpaired claims.

46. Reinstated claims and other unimpaired claims may not be paid until some later date, and the Debtors maintain the ability to object to such claims (Plan Art. VII.A). Yet the injunction provision of the Plan becomes effective immediately upon the effective date. *See* Plan, Art. VIII.F. In addition, while the discharge provision includes a sentence at the end that "The Confirmation Order shall be a judicial determination of the discharge of all Claims (*other than the Reinstated Claims*) . . . ," the rest of the discharge provision does not include that exception.

47. Thus, any Class 5 claimants or other unimpaired claim holder who is are not paid in full as of the Effective Date, would appear to be prohibited from pursuing claims against the Reorganized Debtors if they fail or refused to pay such claim.

48. The Third-Party Releases also become effective on the Effective Date of the Plan. Therefore, if the Reorganized Debtors fail to pay an unimpaired claim for any reason, including due to their subsequent liquidation or dissolution, the unimpaired claimholder would be foreclosed from pursuing claims against any non-debtor Released Party who may also be liable on such claim. Such foreclosure would be in contravention of section 524(e) of the Code, which provides in relevant part that, "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt." Unimpaired claimholders also will be foreclosed from pursuing, against all non-debtor Released Parties, any other claim that is "relating to or in any manner arising from, in whole or in part, the Debtors."[7] *See* Plan, Art. VIII. D.

[7] While unimpaired claimholders had the ability to opt-out of giving Third-Party Releases, any decision not to opt-out likely would have been based on an understanding from the Plan and Disclosure Statement that their unimpaired claim would be paid in full. If such payment is not made, such claim holders should not be prevented from pursuing non-debtors.

49. In order to make sure that Class 5 claimants and other unimpaired creditors receive the benefits they are promised through the Plan, the U.S. Trustee would propose the addition of the following language, which has been used in other pre-packaged or pre-negotiated plans:

> **Special Provision Governing Unimpaired Claims**
>
> Notwithstanding anything to the contrary in the Plan, the Plan Supplement, or the Confirmation Order, until a prepetition Unimpaired Claim has been (1) paid in full in accordance with applicable law, or on terms agreed to between the Holder of such Claim and the Reorganized Debtors, or in accordance with the terms and conditions of the particular transaction giving rise to such Claim; or (2) otherwise satisfied or disposed of as determined by a court of competent jurisdiction (the occurrence of (1) or (2), an "Unimpaired Claim Resolution"): (a) the provisions of Article VIII.A – VIII.F of the Plan shall not apply or take effect with respect to such Claim; (b) such Claim shall not be deemed settled, satisfied, resolved, released, discharged, barred, or enjoined; (c) the property of each of the Debtors' Estates that vests in the applicable Reorganized Debtor(s) pursuant to the Plan shall not be free and clear of such Claim; and (d) any Liens of securing such Claim shall not be deemed released (subclauses (a) through (d), collectively, the "Unimpaired Claim Carve Out"). Upon the occurrence of an Unimpaired Claim Resolution with respect to a prepetition Unimpaired Claim, the Unimpaired Claim Carve Out shall cease to apply to such Claim. Except as otherwise provided in the Plan, nothing under the Plan shall affect the Debtors' or the Reorganized Debtors' rights regarding any Unimpaired Claim, including all rights regarding legal and equitable defenses and counterclaims to, or setoffs or recoupments against, an such Unimpaired Claim.
>
> Holders of Unimpaired Claims shall not be subject to any claims resolution process in Bankruptcy Court in connection with their Claims, and shall retain all their rights under applicable non-bankruptcy law to pursue their Claims against the Debtors or Reorganized Debtors or other Entity in any forum with jurisdiction over the parties. If the Debtors or the Reorganized Debtors dispute any Unimpaired Claim, such dispute shall be determined, resolved or adjudicated in the manner as if the Chapter 11 Cases had not been commenced, except with respect to Rejection Damages Claims, which shall be determined, resolved or adjudicated as set forth in Article V.B of the Plan.

RESERVATION OF RIGHTS

50. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee requests that this Court enter an order (i) denying confirmation and (ii) granting such other relief that the Court deems just and proper.

Dated: June 4, 2023
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 and 9

By: /s/ *Joseph F. Cudia*

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CERTIFICATE OF SERVICE

I, Joseph F. Cudia., hereby attest that on June 4, 2023, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF.

/s/ Joseph F. Cudia.

Joseph F. Cudia

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Chapter 11
	. Case No. 23-10024 (JTD)
TRICIDA, INC.,	.
	. Courtroom No. 5
	. 824 Market Street
Debtor.	. Wilmington, Delaware 19801
	.
	. Friday, May 19, 2023
. . . . .	. 10:00 a.m.

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

APPEARANCES:

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(Proceedings commence at 10:00 a.m.)

THE COURT: Thank you. Please be seated.

Are the debtors ready to proceed?

MR. NEWMAN: Good morning. Sam Newman with Sidley Austin, LLP, on behalf of Debtor Tricida, Inc.

THE COURT: Go ahead, whenever you're ready.

MR. NEWMAN: Your Honor, we have four matters on the calendar for today and, if it's okay with Your Honor, we'd like to take them a little bit out of order.

We have Matter Number 5, which is the 9019 reflecting the Patheon settlement. We have objections to that settlement agreement from the Securities and Exchange Commission and the United States Trustee.

The settlement, effectively, liquidates the amount of Patheon's claim and determines their vote with respect to the plan, and they voted in favor of the plan, so we want to resolve that first.

We believe that the government objections really go to the confirmation of the plan after giving effect to the settlement, and we'll describe that further when we go forward.

We'd then like to move to the proposed confirmation of the debtors' fourth amended plan, which is Number 6. We have reached -- happy to report we've reached a global settlement involving the noteholders, Patheon, and the

committee, leading to approval of the plan by 99 percent of the creditors in the case, which provides for:

A path to prompt distribution;

Provides for administration of the one-hundred-and-fifty-million-dollar earn-out payment that the debtors were able to negotiate in connection with the sale of the debtor's intellectual property assets;

And provides for the administration of certain retained causes of action for the benefit of creditors.

We understand that there are objections from four parties:

The pro se litigants, who object with respect to the value of the plan assets;

The lead plaintiffs, who object with respect to the assets -- the access to insurance proceeds after the effect of the plan;

And the SEC and the United States Trustee, who object based on the effect of confirmation with respect to certain of the releases provided for in the plan.

And then we have two matters that are going on with, we believe, limited opposition:

The Fitzgerald assumption motion, which provides for the assumption of the independent director agreement and payment of the independent director;

And the approval of the settlement with our

landlord, resulting in the capping of their claim.

We basically believe that substantially all matters in the case can be resolved with the confirmation of this plan, leaving the further administration of any assets to a liquidating trustee, who has been recently identified by the creditors.

We do note, Your Honor, that we are still in ongoing settlement conversations and have actually recently received a settlement proposal with respect to the retained causes of action, which we will continue to pursue in cooperation with the creditors and the liquidating trustee. So we may impose on Your Honor one more time before we go effective, but that remains to be seen.

If it's okay with Your Honor to proceed in that manner, I will turn to the podium over the Mr. Persons, who will argue the Patheon 9019 settlement.

THE COURT: Well, let me ask you a question first. Can I approve the Patheon settlement agreement if I conclude later that the third-party releases, particularly as the relate to Patheon, under the plan are improper?

MR. NEWMAN: I believe you can, Your Honor. I believe you may not be able to confirm the plan. But the settlement provides, principally, two major things that are related to the plan:

One is it settles the amount of the Patheon claim,

$85 million, which is in the range that we have disclosed of the Patheon claim.

And we've agreed with Patheon that they will be treated as a, quote/unquote, "settle" -- "released party," which means -- and under the ultimately confirmed plan, as such may be amended. And so, if we have to change the plan to accommodate issues with respect to plan confirmation, they'll be afforded the same treatment as all of the other released parties, and that's the agreement.

THE COURT: All right. All right. Let's go ahead.

MR. NEWMAN: Okay. Thank you, Your Honor.

I will turn the podium over to Mr. Persons.

THE COURT: Mr. Persons, I'll tell you up front that I have some serious concerns about the third-party releases for Patheon.

MR. PERSONS: I understand, Your Honor. And as you'll hear, we believe we actually have a potential compromise on that particular issue.

We do, as Mr. Newman noted, believe that the -- what essentially are 1127 issues, not really 9019 issues, are something that we should take up in the confirmation of the plan.

But we do believe -- and I'll speak about it briefly or I can go into in detail. We believe that we have

agreement among the parties to do a re-noticing of parties that have not opted out in, either Class 8 with respect to the shareholders or interest holders, as well as Classes 5 and 6.

So, Your Honor, our thought process behind this would be -- and I'll explain in some detail why we don't believe there's a necessity for a full re-solicitation, and it involves who voted and actually the nature of the votes themselves. But nonetheless, this proposed re-noticing -- which we believe Patheon is on board with, the noteholders are on board with, the U.S. Trustee is conditionally on board with, with respect to Classes 5 and 6 -- and I'll let them to speak to each other.

And we spoke with, you know, counsel for the SEC about it. Their concerns are large enough that they weren't exactly prepared to say yea or nay. But our goal would be to re-solicit, nonetheless, confirm the plan, and go effective, and allow the parties that need to opt out with respect to Patheon an opportunity to do so over the next several weeks.

THE COURT: All right. Well, let me tell you, again, up -- another issue up front is I -- I'm struggling with the third-party releases in this case --

MR. PERSONS: Understood.

THE COURT: -- overall, not just with Patheon.

MR. PERSONS: Understood.

I think we'd like, though, nonetheless, Your Honor, to start with the 9019, as Mr. Newman did. And you'll get to hear from me about the third-party releases later, as well.

THE COURT: All right.

MR. PERSONS: So all the fun things have fallen into my lap today.

Let me start with the 9019, Your Honor. At Docket Number 444, the debtors filed, on May 9th, the 9019 motion approving the settlement with Patheon. Attached to that as Exhibit B is the proffer in support of our -- Geoffrey Parker, our COO.

And Patheon's claim, Claim Number 143, had been filed for 136 million and change, Your Honor, making Patheon probably the largest single creditor, although, as a class, slightly smaller in nature than the $200 million held by the unsecured noteholders.

There were a number of disagreements about Patheon's claim, whether it was -- all of it was appropriate, some of it was appropriate. There was a lot of negotiating back and forth in an attempt to define a number.

The parties agreed to mediation in front of Judge Walrath, who I am happy to say, on April 24th, did an outstanding job of bringing the parties together to reach the settlement that you see attached to the 9019.

The settlement, as we've said, reduces the claim to $85 million of an unsecured claim. It's a fifty-one-million-dollar reduction. It reduces the claim pool overall, for all participants -- for all unsecured creditors, I should say, by approximately 15 percent.

As noted, the -- $85 million is the size of the claim. Patheon agreed to vote to accept the plan. They did not opt out of releases and generally support the amended plan.

And as you've heard, Your Honor, Section 5.5, the bright light that is being shone on it by -- the bright -- the provision that is being had a bright light shone on it by the SEC and the U.S. Trustee says that:

"Upon confirmation, Patheon is deemed a released party and a releasing party."

As you heard from Mr. Newman, the debtor believes that, despite that language, the 9019 itself can be approved by Your Honor today and we can determine whether or not confirmation needs to be dealt with subsequently.

I'd add, Your Honor, that, importantly, though they are not signatories to the settlement, the consenting noteholders were party to the mediation, as was the committee, and they have told us or informed the debtors that this settlement is consistent with the terms of the restructuring support agreement.

The objections, Your Honor, as you've -- as you are well aware, clearly have taken thinking about them -- the SEC at Docket Number 470; the U.S. Trustee at Docket Number 488 -- we think are very limited in nature. They're not actually 9019 objections. They are clearly 1127 plan objections. And we will take those up at the confirmation.

We do not think at this time it's necessary to reach a full ruling on that, Your Honor, this con -- that confirmation issue, in advance of having to go -- in advance of -- we don't think we have to get confirmation order before we get the 9019 entered. Their issue is regarding the appropriate notice and the change.

As I mentioned up front, Your Honor --

THE COURT: Let me ask you --

MR. PERSONS: Yeah.

THE COURT: -- a question real quick. I just want to make sure I'm clear on this. If I approve the 9019 motion and I later conclude that the third-party releases are not appropriate in this case -- all of them, not just --

MR. PERSONS: Right.

THE COURT: -- Patheon -- is Patheon still bound by the settlement agreement?

MR. PERSONS: We believe that they are, Your Honor. There's no termination right for that particular issue, which is why the entry of the 9019 order is important

to the debtors and the particular order that we're going at is important to the debtors.

Provision 5.5 says:

"Upon confirmation of the debtor's plan, Patheon shall be deemed to be both a released party and a releasing party."

The definition of "released" and "releasing party" is adding Patheon to that, Your Honor. It has nothing to do with whether the third-party releases end up being appropriate. Your Honor can rule that the third-party releases aren't appropriate, either with respect to all the parties, or the Class A equity holders. But nonetheless, Patheon can be deemed a released and releasing party for the parties where Your Honor believes that the debtor releases, for instance, are appropriate, assuming Your Honor believes so and any parties that have directly and clearly consented to third-party releases.

THE COURT: Okay.

MR. PERSONS: As I mentioned to you earlier, we have proposed a re-noticing prospect, though, in effort to clean up some of the 1127 issues. We have -- I have previewed this to some extent, Your Honor.

But importantly -- and we will get into this in the confirmation -- on -- upon the confirmation -- Classes 5 and 6 voted overwhelmingly to accept the plan. They also --

in the case of Class 5, every party chose to opt out. Adding Patheon as a released party will ultimately not affect the vote. No vote should need to change. We've simply added one more released party. With respect to Class 6, the majority and the statutory majority of the parties in Class 6 also vote -- who voted yes for the plan also voted to opt out. And so we do not believe that the voting would change and, thus, don't need particularly to re-solicit the entire plan with respect to this.

We do, however, appreciate that, under 1127, this is, you know, likely to be considered a material change to the plan. We -- our thought process, Your Honor, is that, by providing essentially those parties that have not chosen to opt out, but otherwise would have, a, quote, "second bite at the apple," while continuing to allow the opt-outs that have already been filed to continue to be good, ultimately, we would be able to get Patheon the benefit of the third-party releases, should Your Honor approve them.

And that's the proposal on the table. We have -- and it's, again, not quite appropriate for right now. And because of the nature of the objections and parties wanting to go forward, specifically the SEC and the U.S. Trustee wanting to go forward with their confirmation objections prior to determining whether or not they'd be willing to sort of accept this alternative settlement, we have not yet shared

what would be a -- you know, an opt-out notice.

It's very similar to the one that was provided in the disclosure statement and the first -- and approved by this Court in the first instance, but would make clear that opt out -- parties that have opted out would not need to further opt out; parties that have failed to opt out would be invited, now that Patheon has been added as a released party, to choose to opt out, but without re-soliciting the entire plan.

But again, Your Honor, that is -- we believe, is an 1127 issue; and, thus, an issue with respect to the confirmation order and not necessarily an issue that needs to be taken up at exactly this moment with respect to the settlement, given the way the language works and the settlement agreement itself works.

So -- and with -- so, therefore, with that, Your Honor, I would ask the Court to approve the 9019 motion as filed. And we will take the other issue up at confirmation.

And in addition, I would say we do ask the Court to approve the 9019 motion as filed, but without prejudice to the SEC and the U.S. Trustee's objections or abilities to argue the 1127 issues with respect to confirmation.

THE COURT: All right. Thank you.

I'd like to hear from Patheon on their view of how the third-party release would be affected if I deny

confirmation based on the third-party releases.

Do you agree that you would be bound by the settlement agreement if -- even if I ultimately determined that the third-party releases are inappropriate in this case?

MR. TAYLOR: Good morning, Your Honor. And for the record, Greg Taylor of Ashby & Geddes on behalf of the Patheon entities.

Your Honor, my co-counsel Louis Solimine from the Thompson Hine firm, who is much closer to this matter than I am, is on the Zoom call and will correct me if I'm wrong. But I do believe that that is correct, Your Honor.

THE COURT: Okay. Any -- I'm sorry. Who did you say was on the line?

MR. TAYLOR: Louis Solimine, Your Honor.

THE COURT: Mr. Solimine?

MR. SOLIMINE: Yes, Your Honor (indiscernible) that is correct.

THE COURT: All right. Thank you.

MR. TAYLOR: Thank you, Your Honor.

THE COURT: All right. Let me hear from the SEC counsel.

MR. BADDLEY: Good morning, Your Honor. David Baddley for the Securities and Exchange Commission.

There are two issues here with respect to notice:

One is notice of the settlement motion itself.

And then the other kind of notice issue is a shareholder's ability to opt out of the revised release, such that the debtor could argue it is consensual and doesn't have to meet the Continental standard.

This is a 9019 issue, it's not an 1127 issue. This settlement affects shareholders. There is a provision in the settlement that has a mechanism that releases their claims. It's a -- it's basically a bar order that is implemented through a plan third-party release.

Shareholders were not given notice of the motion, I don't think that's denied. So we didn't cite 1127. I don't think this is an 1127 issue. If Your Honor believes that shareholder interests are affected by the settlement motion, then they were entitled to notice and they clearly didn't get it. That's not going to be fixed by sending an opt-out form.

THE COURT: Well, if they -- I'm now satisfied that both the debtors and Patheon agreement that, if I approve the settlement agreement and later say the third-party releases are improper, Patheon is still bound by the settlement agreement and they don't get the third-party release.

MR. BADDLEY: Right.

And then my concern would be, if the Court doesn't hold that the third-party release is improper with respect to

shareholders, then what the debtor -- my understanding is what they're intending to do is to re-solicit opt-outs through the same process that they just did in the plan.

I think there's two reasons why the Court should wait in ruling on this until after plan confirmation:

If the Court sustains our objection on the shareholder release, I think our objection goes away.

The second issue is that I think there were significant problems with the opt-out distribution process, particularly as it was done through nominees. The Court will hear testimony from Mr. James Lee about that in connection with the confirmation hearing. I have a lot of concerns and questions that I want to inquire of Mr. Lee of -- about with respect to this.

But my understanding is that what the debtors are intending to do is to re-solicit, through the same way, this opt-out process. Ninety-nine percent of the shareholders, through this nominee process -- which I think has some problems. And we're going to be right back where we are, where there's an insufficient opt-out process. And shareholders, again, never got notice of the -- of it in the first place. And I think they're intending to -- the number I heard was $30,000 to re-solicit this opt-out to add one party to the release.

I would ask that the Court wait to rule on the

9019 motion until we know whether or not it's even a ripe issue. If the third-party release goes away, I think it is a non-issue.

And I also would like the Court to be able to hear the testimony of Mr. Lee with respect to how they intend to fix what I think everyone agrees is a significant notice issue for the shareholders because they never got notice of this in the first place and their rights are directly affected by the settlement.

One other thing just --

THE COURT: Only -- they're only affected because of the third-party release, though, right?

MR. BADDLEY: That's correct.

THE COURT: Right.

MR. BADDLEY: Because they're asking -- basically, they're asking to incorporate a release and they're not even getting notice of the potential for them to have to go through this process.

One other thing -- and you know, what I would be a be a little bit concerned on approving here -- is, to the extent that the settlement is deemed to release claims by releasing parties, which includes shareholders and whatever, there are two reps and warranties in the settlement agreement that I think would be inconsistent with that.

On Paragraph 9 of the settlement agreement, Clause

6, the debtor is representing that it is the lawful owner of the claims and potential claims released in this settlement agreement.

And in Clause 7, the debtor is representing that it has full capacity and authority to settle, compromise, and release the potential claims.

You know, I think that's a matter of interpretation. But I think there could be a pretty good argument that the settlement is releasing more than just debtor claims; that, by the nature of the incorporation of the third-party release, they're releasing claims by many others. So I think that maybe that should be addressed before the debtor potentially violates some warranties right out of the -- right out of the gate.

But our main concern, as stated in the objection, was the fact that shareholders never got notice of the motion. I think the rights are affected by the motion. And then we also have real concerns with how they're going to correct the opt-out. And we would ask the Court to wait on that until -- to hear testimony. Thank you.

THE COURT: All right. Thank you.

Mr. Fox.

MR. FOX: Good morning, Your Honor. May it --

THE COURT: Oh, one second.

Mr. Baddley, did you sign in when you came in?

When you -- on the next break, if you can just --

MR. BADDLEY: I did. Thank you. On this one --

THE COURT: Oh, there's another sheet. Okay. That's -- I'll get it --

MR. BADDLEY: Would you like me to approach?

THE COURT: I'll get it later. That's fine.

MR. BADDLEY: Okay.

THE COURT: Thank you.

Go ahead, Mr. Fox.

MR. FOX: All right. Good morning, Your Honor. May it please the Court, Tim Fox on behalf of the United States Trustee.

Your Honor, as indicated in our limited objection and reservation of rights, it's really this interlocking provision with the plan that has the U.S. Trustee seriously concerned with the relief sought in the Patheon settlement.

And the issue I'd like to focus on -- and again, before today's hearing, we understood that we might be going forward with the plan before coming to the settlement. I understand the items that the debtor has concerns about, in terms of having the Patheon claim reduced to a liquidated amount and the support of the plan and all of those items.

But taking this issue in front I think creates a procedural problem and it is something that my office's objection touches on, and that's that having this relief come

through a standalone 9019 motion is an inappropriate vehicle for the relief that's being sought with respect to the plan.

As indicated in the objection, Supreme Court case law in Roblox and Law v. Siegel establishes you can't circumvent a more specific provision of a code using Section 105 and other provisions like 9019 to accomplish a goal that would have otherwise required adherence to other safeguards in the Bankruptcy Code. And I think that's especially true here, when there are disputes as to the propriety of the third-party release, which is the issue in this settlement that has drawn objections.

Had this settlement only been between the debtor and Patheon and potentially the consenting noteholders who had consultation rights, I don't think this would be an issue. But with respect to the relief that is being sought on the third-party release provision in the plan, this is not the appropriate vehicle to achieve that relief. And doing so, while it may have been pragmatic under the circumstances to get to consensual confirmation on other issues, is prejudicial to other parties-in-interest.

THE COURT: Okay. Thank you, Mr. Fox.

Anyone else wish to be heard?

(No verbal response)

THE COURT: All right. I think it does make sense for me to wait on approving the 9019 motion until I've heard

the arguments and make a ruling on whether or not I'm going to approve the plan of reorganization, particularly as it relates to the third-party releases. I think that's a core issue here.

So let's go forward with the plan confirmation and we'll go from there.

I would -- before you -- well, let me -- I'm -- let me go back first. I'd like to know -- Mr. Baddley raised an issue about the reps and warranties, and the debtor is claiming that they're the lawful owner of all the claims that are being released. Mister --

MR. NEWMAN: (Not identified) And I think that's sort of the core point of why we think this 9019 is ripe for decision now. The only claims being released under the settlement agreement are the claims of the debtor against Patheon and the claims of Patheon against the debtor, except with the exception of the eighty-five-million-dollar allowed claim.

The third-party claims, about which the Government is concerned, are not released until a confirmation order. All we've promised Patheon is that we will try to keep them treated the same as other released parties.

And to the extent that the definition of "releases" -- either -- to the extent either the confirmation order is not approved or the confirmation order modifies the

plan to exclude third-party releases, Patheon just gets what they're entitled. Those are the claims that debtor does know, and we're not repping or warranting anything about who owns those claims or where those claims are. We're just agreeing to let Patheon be treated as the rest of the released parties will be treated.

THE COURT: Well, let me ask this question. What claims does the debtor say it owns?

MR. NEWMAN: I'm sorry.

THE COURT: Do they --

MR. NEWMAN: Say again?

THE COURT: What claims does the debtor say that it owns? Do they own all derivative claims against the officers and directors of the company, for example?

MR. NEWMAN: They do. Yes, Your Honor.

THE COURT: So the shareholders would lose their right to pursue those claims if I approve the third -- if I approve the 9019 motion.

MR. NEWMAN: Oh, I think what Your Honor will find -- two things, right? Taking it within this context of the settlement agreement, right? All the settlement agreement agrees to do is release the claims that the debtor owns. If there are claims that the debtor owns against Patheon, the shareholders don't have a right to those claims. They may seek, as a procedural matter, to cause the debtor to assert

those claims through a derivative action, but they are not claims owned by the third parties. And so it's pretty foundational to the finality encompassing pretty much any bankruptcy case that the debtor can dispose of its own property.

Now, if the shareholders had wanted to or if it was appropriate, obviously, under certain cases, either the committee or other parties are given the right to pursue those claims. That hasn't happened here and there's no allegation that that should happen here.

The debtor is entitled, under Title 11, as the debtor-in-possession, to make a determination as to what to do with its own property. And it has determined, after mediation and consultation with the consultation parties and the creditors, and as supported by 99 percent of the creditors, to compromise the claims it has against Patheon, right?

Which are claims that they didn't perform, that we paid them too much, that earlier modifications were potentially invalid, in exchange for them compromising claims it has against the estate; that we didn't pay them back for the building they built, that we didn't pay them for certain of the supplies, that we didn't ultimately pay them the amounts we would pay them for property that we were unable to order in the future. That's the deal in the 9019 settlement.

They get a claim -- in liquidation of all those disputes, they get a claim for $85 million.

We think that -- regardless of what happens today and whether we proceed to other plans or have to amend this plan or make other changes or remove third-party releases, we think that's a good deal for the estate. And frankly, if you look at the declaration that was submitted, that's not -- that's uncontested. It's not contested by the Government, it's not -- it's supported by the committee, it's supported by the noteholders that the deal of -- resolving all of the claims between Patheon and the debtor in exchange for positive claim of $85 million is in the best interests. And we are able to warrant that we are only compromising claims that we own and control. And I think you heard from Mr. Solimine, he's not expecting anything else.

If the plan -- it's deemed inappropriate under the plan to allow third-party releases, then, yes, I think they would get those, as well. If it's determined they're not, then they don't get them either. But that doesn't violate any warranty that the debtors are making to Patheon.

THE COURT: Okay. I understand. Thank you.

MR. NEWMAN: All right. So, if we move on to confirmation, Your Honor -- I'll just note, before we move off of that topic, just as a procedural matter, in Number 5, we did submit a declaration.

MR. PERSONS: (Not identified) Your Honor, it's the declaration of Mr. Parker, it's Exhibit B to the motion itself, and I apologize. We would ask that that be moved into evidence.

THE COURT: Is there any objection?

(No verbal response)

THE COURT: It's admitted without objection.

(Parker Declaration received in evidence)

MR. NEWMAN: And I just want to note, in case this does drag after the -- a lot of time today, Mr. Parker is here in the courtroom for cross-examination, but may not be at a future hearing.

THE COURT: Okay.

MR. NEWMAN: So, if parties wish to examine him, we'd ask that they do it now.

THE COURT: Well, we have the rest of the day. My three o'clock was moved, so ...

MR. NEWMAN: All right. Great. Thank you, Your Honor.

All right. Going to confirmation, I would ask that we -- we have several declarants in the courtroom. We have the declaration of James Lee in support of confirmation and we have the declaration of Sean Corwen in support of confirmation and the declaration of Tom Fitzgerald in support of confirmation and Adam Gorman.

I believe -- just for procedural purposes, I believe that no one is seeking to depose -- to cross-examine Mr. Gorman, so I would ask that his declaration be admitted at this time.

THE COURT: Okay. Is there any objection?

(No verbal response)

THE COURT: Mr. Gorman's declaration is admitted without objection.

(Gorman Declaration received in evidence)

MR. NEWMAN: I also believe that Mr. Corwen's declaration is not subject to cross-examine; however, there was a last-minute change with respect to the best interests of creditors test, and I would like to put him briefly on the stand to cause his declaration to be admitted and modified slightly.

THE COURT: All right.

MR. NEWMAN: After that, Your Honor, I would propose that we proceed with the presentation of our case-in-chief. And we would reserve seeking admission the declarations of Lee and Fitzgerald, to which I do believe the SEC would like to cross-examine, until the presentation on the releases.

THE COURT: All right. Let's go ahead.

MR. NEWMAN: Thank you.

THE COURT: Mister -- do you want to call Mr.

Corwen now?

MR. NEWMAN: I think I would, if it's -- if that's okay, Your Honor.

THE COURT: All right. Mr. Corwen, do you want to come forward? Please take the stand and remain standing for the oath.

THE ECRO: Please raise your right hand. Please state your full name and spell your last name for the court record, please.

THE WITNESS: Sean Robert Corwen, C-o-r-w-e-n.

SEAN CORWEN, WITNESS FOR THE DEBTOR, AFFIRMED

THE ECRO: You may be seated.

Your Honor?

MR. NEWMAN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. NEWMAN:

Q Mr. Corwen, would you state your name for the record -- I'm sorry -- state your qualifications for the record?

A My name is Sean Corwen. I am a Director at SierraConstellation Partners. I have over eight years of financial and operational experience and have a Master's of Business Administration from Georgetown University.

THE COURT: Mr. Corwen --

Q Okay.

THE COURT: -- will you just make sure the mic --

you're closer to the mic, so we can make you -- pick you up on the recording? Thank you.

MR. NEWMAN: Thank you, Your Honor.

BY MR. NEWMAN:

Q And Mr. Corwen, did you submit a declaration, Docket 479, in support of the plan of liquidation -- I'm sorry -- in support of the confirmation of the fourth amended plan?

A I did.

Q And did you further submit -- was there further submitted a filing of a revised liquidation analysis at Docket 499?

A I did.

Q Did you prepare this analysis?

A I did.

Q All right. I'd like to provide you with two documents.

MR. NEWMAN: Your Honor, I'm going to provide the witness with Document 479 and 499.

BY MR. NEWMAN:

Q Turning to Docket 479. If you'd turn to Page 7 through 10. Can you describe what this liquidation analysis is?

A This liquidation analysis is a hypothetical analysis to show potential recoveries for creditors in both 11 and a hypothetical 7 liquidation scenario.

Q Okay. And did you determine through this analysis that recoveries in this proposed Chapter 11 plan are likely to be

greater than in a Chapter 7?

A I did.

Q And then, on doctrine -- Docket 499. And turning to Page 7. Can you describe to the Court any changes between the liquidation analysis reviewed in Docket 479 and this document?

A I can. After submitting my declaration, we received further information from the creditors with respect to the compensation for the liquidating trustee. This updated liquidation analysis includes the proposed compensation structure for that liquidating trustee. And that is the primary change to the updated liquidation analysis in the Chapter 11 scenario.

Q And does it change your conclusion that recoveries for creditors in this Chapter 11, if confirmed, would be greater than in a Chapter 7?

A It does not change my conclusions.

MR. NEWMAN: Okay. With that, Your Honor, I'd move admission of Mr. Corwen's declaration and the amended schedule at 499.

THE COURT: Any objection?

(No verbal response)

THE COURT: Okay. The document -- will we be marking the document? Is this Debtor's 1?

MR. NEWMAN: That we can mark --

THE COURT: Okay.

MR. NEWMAN: -- mark this as Debtor's 1, Your Honor.

THE COURT: Okay. The document is admitted as Debtor's 1.

(Debtor's Exhibit 1 received in evidence)

THE COURT: And the declaration is admitted without objection.

(Corwen Declaration received in evidence)

MR. NEWMAN: And I think, Your Honor, we would then mark the other declaration and just admit it as Debtor's 2, if we --

THE COURT: Okay.

(Debtor's Exhibit 2 received in evidence)

MR. NEWMAN: Thank you, Your Honor. You may step down. Thank you.

(Witness excused)

MR. NEWMAN: And with that, I will turn the podium over to Ms. Jeri Leigh Miller of the Sidley firm, who will walk through the debtor's main case on confirmation.

THE COURT: All right.

MS. MILLER: Good morning, Your Honor.

THE COURT: Good morning.

MS. MILLER: Jeri Leigh Miller with Sidley Austin, here on behalf of the debtor.

Your Honor, I'm here today to walk through the case-in-chief of a plan that enjoys the support of over 99 percent of the creditor body.

As a bit of a housekeeping matter, Your Honor, my plan is to walk through the case-in-chief of everything excepting the third-party release, which I'm going to leave to Mr. Persons to deal with that fun -- and in doing so, also address the limited objection of the securities lead plaintiff and Ms. Neilson.

THE COURT: Okay.

MS. MILLER: Your Honor, this plan complies with the requirements of Section 1129(a)(1) through (a)(16).

Starting at the beginning, Section 1129(a)(1) requires that the plan comply with all applicable provisions of the Bankruptcy Code. What this usually goes -- is meant to look at is whether the plan complies with the classification scheme set forth in 1122, and whether the contents of the plan are appropriate under Section 1123.

Looking first at the classification scheme, here, the classes were set forth, so that each class had substantially similar claims in the class.

In addition, there was a legitimate business purpose for the separate classification of the Class 3, Class 4, and Class 5 claims, and that each of those parties had different legal rights under the relevant documents, being

the Patheon agreements, the indenture note, and then the general unsecured claims.

Turning to Section 1123, which covers the contents of the plan, this plan satisfies the mandatory and discretionary requirements of Section 1123.

The mandatory requirements of Section 1123 set forth seven criteria that each plan must comply with, including:

Designation of classes;

Specification of treatment;

Adequate means for implementation;

Prohibition on issuance of non-voting equity securities.

All of these provisions are complied with in Articles 3 and 4 of the plan.

Article 3 of the plan designates the various classes and interests, specifies the treatment provided to each class and interest, and specifies whether they're impaired or unimpaired under the plan.

Article 4 provides for the means of implementation of this plan, including:

The creation of the liquidating trust;

The creation of the contingent payments holding trust;

The creation of the contingent payments trust;

And the rights and responsibilities of each of those various trusts.

Finally, there's no issuance of non-voting equity securities going on in this case, so the plan complies with 1123(a)(6).

And then apologies, Your Honor, the selection of directors and officers. Here, there are no directors and officers. This is a liquidating plan, so all of the board is being dissolved upon confirmation.

The liquidating trustee, the contingent payments holding trustee, and the contingent payments trustee have all been identified, it will be a docket entry. That's going to be Gil Nathan. And the compensation of the trustees has been identified via docket entry, as well as one of our plan supplement documents.

Moving to the discretionary provisions of the plan, this plan also satisfies the discretionary provisions and does not violate the Bankruptcy Code in any manner.

Outside of the third-party release, there are no allegations here that the plan violates any of the discretionary provisions. Notwithstanding that fact, I'll quickly run through the debtor release, the exculpation provision, the injunction provision, the retained and transferred causes of action, and then open myself for any questions Your Honor may have.

With respect to the debtor release, the debtor may release claims if the release is a valid exercise of the debtor's business judgment, fair, reasonable, and in the best interests of the creditors.

Courts in this Circuit typically look at the five factors identified in Zenith or Master Mortgage, which include:

An identity of interest between the debtor and nondebtor;

The substantial contribution to the plan by the nondebtor;

The necessity of the release;

The overwhelming acceptance of the plan and release by creditors and interest holdings;

And the payment on the claims.

Moving to the heart of the matter here, Your Honor, which is the substantial contribution to the plan by the nondebtors, we did have substantial contribution by each of the released parties. Quickly going through what that is:

With respect to the consenting noteholders, we had their assistance in negotiating the RSA and the plan, which maximized the value of the assets for the parties-in-interest in this case.

Additionally, they were critical in the sale process and in driving up value in the sale and driving up

the bids in the sale, including that contingent payments right that we did receive pursuant to the sale order.

Finally, they were instrumental in assisting with the negotiations with the committee and with Patheon in reaching this global settlement that maximizes value for the creditors and allows for distribution to holders upon the effective date of the plan.

With respect to Patheon, Patheon substantially contributed to the plan, in that they settled their claim by agreeing to reduce their claim from the 136.2 million filed amount to 85 million. That is a reduction of over 51 million or approximately 15 percent of the claims pool, which is a substantial contribution.

In addition, they agreed to support the plan and provided a mutual release to the debtor. So, in exchange for the debtor release, they, too, were released.

With respect to current and former officers, the current and former officers performed duties here well in excess of what their stated roles were. These included:

The assistance and the preparation of sale materials pre- and post-petition;

Responding to diligence requests from the committee, from interested buyers, from the professionals at all hours, day, night, and weekend;

The implementation of a successful sale on a very

abbreviated time line, which required a great deal of input from the officers beyond what they would normally be required to do in the performance of their duties;

Negotiations with the insurance broker regarding the extended runoff coverage, which ultimately saved the estate between 3.5 and 5.5 million from the original estimates;

The settlement of the Patheon claim, without which the officers' assistance would not have gotten done;

Engagement and negotiation in mediation outside their office -- stated officer roles;

And then, most importantly, Your Honor, they have for -- they have forebared [sic] from new and additional professional and financial opportunities to stay on this case and to see it through the end. In doing so, they have given up their salary, they've given up their medical benefits, they've given up their 401(k), and they've agreed to work on an hourly basis and a consulting agreement which is significantly less than the -- what they were receiving pursuant to their roles as officers.

And then, finally, Your Honor, with respect to the current and former directors, the current and former directors have substantially contributed to this case in attending and participating in weekly and sometimes biweekly board meetings, which is a drastic increase in the frequency

of the board meetings, with no commensurate increase in pay.

They have been actively engaged in all aspects of this bankruptcy process, including approval of all of the negotiations with Patheon and with the committee.

They have cooperated with the special committee process and the investigation relating thereto.

And then, with respect to Mr. Fitzgerald himself, his substantial contribution has been in the role as special committee chair and independent director, investigating the claims and working towards this consensual resolution that we've reached with the committee and with the noteholders.

With that, Your Honor, we believe that we have satisfied the Master Mortgage factors and the debtor release is appropriate in this case.

Moving on to the exculpation provision. The exculpation provision should be approved if it is fair, appropriate, and limited to fiduciaries in this case.

Following conversations with the U.S. Trustee, we have pared back our exculpation provision to make sure that it is limited to just the fiduciaries of this case and it is fair and appropriate, and that it is exculpating the parties who have been instrumental in reaching the plan resolution set forth today and releasing them from any claims or causes of action relating to that negotiation and mediation.

The injunction provisions, Your Honor, are

similarly fair. They implement the release and injunction provision -- I'm sorry -- the release and exculpation provisions and do not go beyond that scope.

And then, finally, the retained and transferred causes of action. These are Exhibits A and B to the plan and these are highly negotiated documents. These are:

The retained causes of action that are retained from the debtor release, so they are not released pursuant to the debtor release;

And then the transferred causes of action, which are causes of action against non-released nondebtor parties that are transferred to the liquidating trust, specifically for prosecution by the liquidating trustee after confirmation.

With that, Your Honor, we believe that the plan complies with all mandatory and discretionary provisions of Section 1123(a) and (b), and therefore complies with 1129(a)(1).

Moving forward through the process, 1129(a)(2) requires that the plan proponent comply with the application provisions of the Bankruptcy Code. This is often meant to mean that the debtor complies with the disclosure, solicitation, and voting requirements set forth in 1125 and 1126.

Here, if you look to the voting report which has

been submitted into evidence -- that's also known as the "Gorman declaration," Your Honor -- you see that:

Solicitation occurred pursuant to the terms of the disclosure statement order.

The solicitation packages and notices of non-voting and status packages were mailed out to all applicable parties, as set forth in the disclosure statement order.

And the parties had until May 5th to vote on the plan and, in the case of equity shareholders, until May 15th to submit their opt-out release.

With respect to voting, all the classes here did vote in favor of confirmation of the plan, and that's set forth in Exhibit A to the Gorman declaration.

Class 3, Class 4, Class 5, and Class 6, who are the four voting classes here, all did vote to accept the plan.

Class 1 and 2 are unimpaired and deemed to accept.

And then Class 7 and 8 are impaired and deemed to reject.

Moving forward to plan -- 1129(a)(3). The plan has been proposed in good faith.

The plan provides for the payment of debtor's professionals and expenses in compliance with 1129(a)(4).

And the plan makes all applicable disclosures regarding directors, officers, and insiders.

And Your Honor, this is set forth in the Fitzgerald declaration and in the plan supplement document, which identifies the liquidating trustee, the contingent payments trustee, and the contingent payments holding trustee.

The plan does not require any governmental regulatory approval and it satisfies the best interests of creditors test.

Pausing for a moment on the best interests of creditors test, Your Honor. This is set forth in the Corwen declaration, which my co-counsel Mr. Newman just went over.

Looking at the liquidation analysis appended to the Corwen declaration, you can see that it -- this plan is in the best interests of creditors because, as of the effective date, creditors are set to receive more under Chapter 11 than they would receive under Chapter 7.

Moving forward further, Your Honor, while not every class accepted the plan in compliance with Section 1129(a)(8), the plan is nonetheless confirmable under the cramdown requirements of Section 1129(b).

It allows for the payment in full of all priority claims under Section 1129(a)(9).

And at least one class of impaired non-insider claims voted to accept the class [sic] in compliance with Section 1129(a)(10).

The plan is feasible, in compliance with Section 1129(a)(11), and it is reasonable -- there is a reasonable likelihood of success going forward.

All statutory fees will be paid, as is set forth in Article 2 of the plan.

And then there are no retiree benefit obligations.

And the other provisions in (a)(14), (a)(15), and (a)(16) do not apply.

So, with that, Your Honor, all of the 1129(a) requirements of this plan have been met.

Does Your Honor have any questions before we turn down -- turn to the cramdown requirements?

THE COURT: Not at this time. Thank you.

MS. MILLER: Thank you, Your Honor.

So, turning to the cramdown requirements. Under Section 1129(b), a plan should be confirmed provided it is fair and equitable and it does not unfairly discriminate against the parties it's being crammed down on.

A plan is fair and equitable with respect to an impaired class of claims or interests if it follows the absolute priority rule, meaning that no one in a class junior get -- receives anything on account of their claim unless everyone in the class senior has been paid in full.

Additionally, there is no unfair discrimination if parties within the same class are receiving the same

treatment.

Here, Your Honor, we've got a very clear waterfall. No one is receiving anything in Class 7 or Class 8 be class -- because Classes 3, 4, 5, and 6 are not being paid in full. Therefore, we comply with the absolute priority rule.

Additionally, the parties in Classes 3, 4, 5, and 6 are receiving the same treatment on account of their claims, so there is no unfair discrimination.

And that, Your Honor, leads me to the lead plaintiff objection, which is filed at Docket Number 433.

The securities lead plaintiff filed a limited objection to confirmation, not to the confirmation of the plan itself, but instead, seeking language in the confirmation order that would provide they have the right to proceed against the D&O policies on account of their claims. Your Honor, we have been unable to add that language to the confirmation order as requested as a result of this absolute priority rule and the cramdown requirements of 1129(b).

We cannot agree, absent the consent of Classes 3, 4, 5, and 6, to provide Class 7 with some sort of recovery on account of their claim, unless Classes 3, 4, 5, and 6 are being paid in full, which is just not happening under this plan.

While it is correct that Class 7 would be entitled

to Side C coverage, the way the insurance coverage works, Your Honor, is it's not split up so that 5 million is to Side A, 5 million is to Side B, 5 million is to Side C. It is a wasting policy, so any amount that goes to Side C takes away from Side A, which, therefore, takes away from the recoveries due to the general unsecured creditors pursuant to the retained causes of action list under the D&O policies. And this was that highly negotiated document where we allowed them to -- or we agreed to retain certain causes of action from the debtor release to proceed against the D&O policies.

Because granting the securities lead plaintiff the language they have requested would violate the absolute priority rule, we believe the objection should be overruled and the plan should be confirmed, notwithstanding that objection.

With respect to the Neilson objection filed at Docket Number 432, that objection takes issue with the sale price for the assets. Ms. Neilson argues that the assets here should have been sold for much higher than they were. Unfortunately, Your Honor, we did run a sale process, we got what we got for the assets, and that sale order has been entered. And the period for appealing that sale order has passed.

Because the plan does comply with Section 1129(a) and Section 1129(b) and does provide for the waterfall in

accordance with the Bankruptcy Code, there is just not any money left to distribute to interest holders. And for that reason, we believe that that objection, too, should be overruled.

THE COURT: Okay. Thank you.

MS. MILLER: With that, Your Honor, I'll go ahead and turn this over to my co-counsel Mr. Persons to discuss the third-party release issue.

THE COURT: Why don't we -- before we do that, why don't we deal with the securities lead plaintiff objection and the Neilson objection.

MS. MILLER: Of course, Your Honor.

THE COURT: Then we don't have to -- then we don't have the back-and-forth.

MS. MILLER: Of course, Your Honor.

THE COURT: Okay. Who is going to speak on behalf of the security lead plaintiffs?

MR. BEHLMANN: Good morning, Your Honor. Andrew Behlmann from Lowenstein Sandler on behalf of the securities lead plaintiff.

As noted in our limited objection and as the debtor's counsel noted, we don't oppose confirmation as a general matter. We just have two small, but important issues, one that you heard from Ms. Miller.

As we indicated in the limited objection, we

believe our claims against the debtor should be preserved to the extent of available insurance, but there's a couple of caveats around that beyond, I think, what you've heard from the debtors.

The debtors have acknowledged in their confirmation brief that the D&O policies contain priority of payments clauses, and those clauses require all Side A claims -- which are not indemnified claims against individual D's and O's -- to be paid in full or otherwise resolved before any Side C claims -- those are the claims against the company itself -- can be paid.

So we are trying to jump the line with the reservation we've requested in our limited objection. All we're asking for in that respect is to preserve claims against the debtors, such that, if, at the end of the day, after all Side A claims are resolved and there's nobody else pursuing D&O insurance coverage, not us on account of Side A, not the litigation trust on account of Side A, if there happens to be any coverage remaining under those policies, that we have the ability to seek to access it.

At that point, all Side A claims, by definition, would have been resolved. If there's nobody left pursuing claims against insurance, by definition, any covered claims that the litigation trust might have asserted must have been resolved in some way, as well as our claims against Mr.

Klaerner. So nobody's ox is gored by this provision. This is money that's only left under the insurance policies after everything else has been dealt with.

I don't think --

THE COURT: Don't you have that --

MR. BEHLMANN: -- this is --

THE COURT: Don't you have that right regardless of what's included in the plan?

MR. BEHLMANN: With respect to the debtors, I don't believe so, unless there's an express reservation of those claims. I -- you know, I would certainly love that to be the case. But I think, unless it's -- you know, the claims are expressly reserved to that extent, because of the treatment of the class that they're in under the plan, I don't think it would work that way, unfortunately.

THE COURT: Explain that to me. Why wouldn't it work?

MR. BEHLMANN: Well, the -- so the claims we have against the debtor at Class 7, Section 510(b) claims -- and those claims, currently under the plan, are being -- you know, they're receiving nothing under the plan. I'm actually looking for the exact language right now of how the plan describes their treatment, I apologize.

"-- shall be canceled, released, and extinguished and will be of no further force or effect."

So, in light of that language, absent, you know, some clarifying proviso that those claims are preserved to the extent of any available insurance coverage, I don't think that we would have the ability to pursue coverage, which is why we're asking.

THE COURT: Okay. Go ahead.

MR. BEHLMANN: And to the debtor's point, I don't think this is an absolute priority rule problem, either, because the recovery comes solely from a separate source. It comes from D&O insurance coverage that exists for a limited purpose, recovering security claims against the company under Side C.

It comes only from funds that, based on the priority of payments provision, are not otherwise, at the time they would be available, available to anybody else in the universe. So no creditor would be adversely affected by what we're asking for and nobody under -- other than the insurance carriers would benefit from the result the debtors are asking for.

And it -- if -- you know, if the solution would be, to the debtor's concerns, to simply add a caveat to our proposed language to say all Side A claims must be resolved before we can pursue coverage for claims against the debtors -- that would essentially duplicate what's in the policies already -- we'd be glad to work wit the debtors on language

on language to that respect. You know, we're not trying to jump ahead of anybody, Your Honor.

THE COURT: Did you discuss that with the debtors previously?

MR. BEHLMANN: We have not yet, and we -- after we filed our objection we actually hoped we would hear from them with a -- you know, a proposal to simply include that in the confirmation order, but we did not, unfortunately, until we saw the language in their brief a couple of days ago.

THE COURT: Well --

MS. MILLER: And Your Honor, if I may respond.

THE COURT: -- I would say you could have raised it yourself, but -- and it would be helpful if you were here because then I could send you out in the hallway to talk about it, but I can't do that.

MS. MILLER: And --

THE COURT: Go ahead.

MS. MILLER: -- if I may respond, Your Honor. Unfortunately, we still don't think that fixes the issue. And the reason is doing that would, theoretically, create the proverbial race to the courthouse that bankruptcy is meant to avoid.

So he is correct that side -- under the priority of payments provision, Side A coverage does get paid out before Side C. But at this time, there is no claim against

Side A. So, if his plaintiffs get in there and they make a claim against Side C before there's a claim against Side A, then Side C gets paid out before there's any Side A claims and there's no payment.

THE COURT: Well, the debtor has a right -- has an interest in the proceeds of the policy, but the policies don't belong to the debtor.

MS. MILLER: I --

THE COURT: So why can't they pursue their claim? Why -- they have to wait until the debtor decides what it's going to do or the liquidating trust decides what it's going to do before they can pursue their claims?

MS. MILLER: Well, Your Honor, here, they're seeking to pursue their claim against the proceeds themselves. They are seeking the proceeds of the policy, which are an asset of the estate. And in recovering an asset of the estate on account of their claims while Class 3, Class 4, Class 5, and Class 6 have not received full recovery, that would be a violation of the absolute priority rule.

I'm happy to hear otherwise. If the consenting noteholders, the committee, and the parties representing Class 4, Class 5 -- Class 3, Class 4, Class 5, and Class 6 don't object, that's great. But from our perspective, Your Honor, this does create that absolute priority issue because those -- that Side C coverage is a proceed of the insurance

policy, which is property of the estate. And therefore, property of the estate is being distributed on account of a Class 7 claim, while higher classes don't receive full recovery.

THE COURT: So how long do they have to wait to pursue their claims, years before they can pursue their claims?

MS. ROGLEN: Your Honor, pursuant to the absolute priority rule, their claims should be canceled. There's no -- there is not a universe here where Class 3, Class 4, Class 5, and Class 6 receive a hundred percent of their recovery. Even if they receive the full 35 million on account of the policy, and even if they receive the entire contingent payment rights, we just have too much debt here.

And so, even with full insurance D&O policy proceeds going to -- on account of the debtor retaining causes of action, and even with full recovery of the contingent payment rights, Classes 3, 4, 5, and 6 are still not made whole. And because they're not made whole, Class 7 has no entitlement to recovery.

THE COURT: Well, that's assuming anyone sues the D's and O's, right? If no one sues the D's and O's Class A -- or Side A is irrelevant.

MS. MILLER: Your Honor, I think we can, with good faith, make the assumption that someone is going to sue the D

and O's, just because that is one of the retained causes of action, that's several of the retained causes of action on that retained cause of action list, which is Exhibit A to the plan, which was something that was heavily negotiated with the noteholders and with the committee. They heavily negotiated to retain the right to sue the directors and officers for these certain retained causes of action, which would proceed against the same insurance policy that the securities lead plaintiff is looking to proceed against.

THE COURT: Okay.

MR. BEHLMANN: If I may respond to a couple of points quickly, Your Honor. And then I'll touch on the second issue, which I promise will take hopefully much less time.

The policies themselves are property of the estate. The proceeds of the Side A coverage are not property of the estate. We have to concede, I think, that the proceeds of Side C would potentially be property of the estate if, you know, we got to a point that there was Side C coverage available.

But the unique circumstance that applies to Side C coverage is that it only covers securities claims. Side C coverage, we get to the point that, you know, all Side A claims -- we're currently suing Mr. Klaerner in the Northern District of California, so we believe there actually are Side

A claims pending already, in addition to any claims that the litigation trust might bring that happen to fall under Side A under the same policies.

But if we get to a point that all of those Side A claims have been settled, reached a judgment, they've been resolved, whatever the case may be, and they're gone, only if we get to that point does Side C coverage ever come into play. And the only claims that Side C coverage covers, by definition, are securities claims.

So, if we can't access that on account of our claims against the debtors -- to the extent there's any such coverage even remaining at the end of the day, which is, you know, not a foregone conclusion. But if we get to the end of the day, you know, everybody has litigated their claims against the individuals, there happens to be Side C coverage remaining, if we can't access it on account of Class 7 claims against the debtors, nobody can. It's not like that money magically flows into the estate and could be distributed to Classes 3, 4, 5, and 6. It just disappears and it inures to the sole benefit of the insurance carriers.

This is -- you know, I recognize that this is, to some extent, a hypothetical scenario that could occur years down the road. And it's simply a reservation of rights that, once all Side A claims are resolved, that we might have the ability to access Side C coverage.

THE COURT: Well, again, I don't understand why you don't already have that right. Why -- I don't understand why it needs -- something needs to be in the plan in order to preserve your right. You have a right to seek the proceeds of the policy if there's -- Side C coverage is still available. That's your right to do that. Nothing in --

MR. BEHLMANN: If that is --

THE COURT: -- the plan --

MR. BEHLMANN: -- Your Honor's --

THE COURT: I don't see anything in the plan that hurts your ability to do that sometime down the road.

MR. BEHLMANN: If that is Your Honor's determination, I think we -- you know, we can live with that. I would love to see that embodied in the confirmation order in some form, you know, and would be happy to work with the folks at the Sidley firm to resolve some language that provides exactly that, but you know, obviously, with the -- you know, all the contingencies I described about Side A.

THE COURT: All right. Ms. Miller, I'll give you one last opportunity.

MS. MILLER: Your Honor, just the final point to this is, if we've got competing claims, so if we've got competing Class A claims and got competing Class C claims, it's going to create difficulty with the insurers where they're trying to withhold certain amounts for Class C,

versus Class A, and apportion out those amounts, which is going to negatively impact the ability of the liquidating trustee to settle the claims that they are trying to settle on behalf of the general unsecureds.

The -- while it may seem unfair, the general unsecureds are not being paid in full. And while they're not being paid in full, no one from a lower class should have the ability to recover or to otherwise impair the ability of the general unsecureds to go after these insurance policies for the maximum amount available.

THE COURT: All right. Well, I'm going to overrule the objection. I think whatever rights you have Mr. Behlmann, are preserved in the plan. The fact that -- if, somewhere down the road, there's a dispute over whether or not there is Side C coverage still available, that's something between the insurance company and the parties and that can be litigated at a later date, but it doesn't need to be in the plan. I think the debtors are correct that, because unsecured creditors are not being paid in full, they get the first shot. So I'll overrule that objection.

MS. MILLER: Thank you, Your Honor.

MR. BEHLMANN: Understood.

Your Honor, with respect to the second point -- and I'll just address this very quickly -- the debtors have proposed to transfer the D&O insurance policies and certain

other insurance policies to the liquidating trust through a somewhat odd mechanism. They've included them on the schedule, it's Exhibit B to the plan at Item 4, as other transferred causes of action.

That's kind of an odd mechanism since insurance policies are not causes of action. But we understand what they're trying to accomplish. If you follow the plain's definitions, its policies become liquidating trust assets and vest in the trust.

The one thing we're concerned about is that that transfer, you know, should be clarified somewhere, preferably in the confirmation order. But that transfer should be without prejudice to the existing rights of any party to seek to access coverage under the policies. So whatever the rights are today of the debtors, the individual insurers, anybody else in the rest of the universe, whatever those rights might be with respect to those policies, those rights are unaffected by the transfer to the litigation -- or the liquidating trust.

It's really the only appropriate result because the debtors can't convey rights different from what they presently have, they can't modify rights, they can't change the policies. But because of this curious mechanism of identifying insurance policies as "transferred causes of action" -- which is a defined term under the plan that's used

in about 19 other places -- we think the confirmation order needs to expressly so clarify that.

We also think, you know, given the somewhat curious mechanism of picking these policies up and putting them in the trust, that the transfers should only be effectuated to the extent permitted by applicable law, to avoid the unintended consequence -- which I think the litigation trust, frankly, would like to avoid, as well -- of potentially destroying coverage by trying to transfer policies in a manner that, you know, ends up being deemed prohibited by law down the road, so, you know, a provision that essentially snaps those back into the estate, if there's ever a successful challenge to the transfer.

THE COURT: All right. Well, you're kind of -- this is kind of the same thing. You're telling me you want something and to preserve your rights, but your rights are what they are. And the policies are being transferred, but they're being transferred pursuant to whatever your rights are under those policies. They can't affect your rights because they're transferring it to the liquidating trust. So your rights are preserved.

MR. BEHLMANN: Thank you, Your Honor.

THE COURT: Okay. Okay.

MS. MILLER: Your Honor --

THE COURT: Ms. Miller.

MS. MILLER: -- next, I think is Ms. Neilson's objection.

THE COURT: Okay.

MS. MILLER: I would turn it over to her.

THE COURT: All right. Ms. Neilson, go ahead.

MS. NEILSON: Thank you, Your Honor. And I do want to acknowledge my lay status in regards to the law. And thank you all for allowing me to speak anyways.

My (indiscernible) does come as a national account director working for corporations who (indiscernible) brand-new therapeutics into the commercial and government payer market in the United States. And as such, I did represent the asset in question that was sold to the national and regional payers in the United States, and they were ready to pay for this therapeutic, which is unheard of.

I have launched over 30 products into this environment and it has never been the case that the payers were standing up and ready to pay for a product before it was launched and before we had started contract negotiations. So that speaks directly to the safety and efficacy, which is not directly in this Court's purview. But it speaks so highly of the asset that is safe and effective for the 4.3 million CKD patients with metabolic acidosis in the United States, that there should be significantly more funds available from the sale of that asset.

I do agree with Ms. Miller that the leadership of Tricida has been impeccable and incredibly generous in everything they've done and should be allowed to exit these proceedings. But I do believe the sale of that asset should come under question and be renegotiated.

Not only does the Federal Government currently pay billions and billions of dollars more for the care of those 4.3 million patients I spoke of earlier; therefore, representing a cost offset to the Federal Government, but it also cost offsets that the commercial payers had already acknowledged would be in place when that product came to market.

So having that product available to the public would be in the best interests of all of the creditors and the equity holders in Class 7 who are, so far, losing every right, but also in the best interests of the American People and the Federal Government.

So I don't agree that the Court has zero ability to reverse that sale and ask that it be renegotiated. And I do believe a better price, more equitable of the billion dollars plus in revenue annually that that product can get -- and I know for certain will get based on my experience -- tut also that that sale will benefit everybody and all of these legal questions will be resolved because there will be sufficient funds to pay everyone.

THE COURT: Okay. Well, Ms. Neilson, the problem is -- and I appreciate your argument and I understand where you're coming from. But there's a process in a bankruptcy case, and in this case, one of those processes was to sell the assets, and that has already happened and the sale has already closed. And there was an opportunity to object to the sale at the time the sale was approved and there was not an objection and the appeal time has run. So, at this point, I cannot go back and revisit the sale process, even if I thought there was something that could have been done better.

At the time I approved the sale -- excuse me -- I was satisfied that the debtor had engaged in a fulsome sale process and had done everything they could to try to increase the amount of the sale price. And indeed, it resulted in sale that could, ultimately, due to licensing agreements, result in another $159 million coming into the estate -- or 149 million, excuse me, I think it was, $149 million. And I thought -- and I think and I still think that that was a good result, given the processes that the debtor engaged in, in order to conclude the sale in a fair and reasonable manner.

And I believe that the officers and directors did exercise their business judgment in good faith in approving that sale. And as I said, it's already been approved by me and I can't go back now and undo it, unfortunately. Okay?

MS. NEILSON: My only comment, Your Honor, if I

may, is that we were not notified with the sale and, therefore, not given ability to object; whereas, we were notified later on of things implicating us, and so there's an inconsistency there.

And secondly, on behalf of the American People and the Federal Government, I do want to say, if there is any way to stipulate that the company that purchased the asset brings it to market, if there's any way to require them to bring it to market and not to sit on it and squash it, that is in the best interests of the American People and the Federal Government.

THE COURT: Okay. Well, I can't do that. I can't compel them to do that. And I can't, at this point, say that -- you know, I don't know whether you received notice. I know notices went out. If you were on the 2002 list, you would have received a notice of the sale.

There is a process, again, for objecting if you did not receive process. And that's part of the difficulty when you don't have an attorney and you're trying to do this yourself, it makes it hard when you don't know what the procedures are. And the procedures can be -- can get pretty complicated. But there is a procedure for being able to come in and say, hey, I didn't get notice of this, it was approved, I would have objected at the time, but that is not in front of me at this point.

So, unfortunately, I have to overrule your objection, Ms. Neilson, and go from there.

MS. NEILSON: I understand and I appreciate the Court's time.

THE COURT: Okay.

MS. NEILSON: Thank you.

THE COURT: Thank you, Ms. Neilson. Okay.

MS. MILLER: Thank you, Your Honor.

With that, I will turn the final piece of the puzzle over to my co-counsel Mr. Persons.

THE COURT: Okay. Thank you.

MR. PERSONS: Thank you, Your Honor. Charles Persons, Sidley Austin, back for more fun.

Your Honor, I -- we will discuss the releases and discuss them in the context of the objections brought forth by the SEC and the United States Trustee. I would propose, Your Honor, to give legal argument with respect to that, obviously answer any questions you have, allow others to do so.

We would then intend to bring Mr. Lee, who is -- of KCC to the stand with respect to his testimony regarding the equity opt-out and the sufficiency of that process. I understand that the SEC is interested in cross-examining Mr. Lee.

And then, similarly, bring Mr. Fitzgerald to the

stand, as well, for additional direct, in addition to moving both of their declarations into evidence.

And then, following -- if Your Honor -- obviously, depending on the time and how Your Honor is feeling, allow for closing arguments from the various parties with respect to the releases.

We think this is, effectively, the only open issue with respect to the confirmation at this point.

THE COURT: All right. Shouldn't we do the evidence first and then do the argument? I think that makes more sense.

MR. PERSONS: Your Honor, I'm happy to do it that way if that's your preference.

THE COURT: And then we can put it in context with the evidence.

MR. PERSONS: Very good.

THE COURT: It makes more sense.

MR. PERSONS: All right. With that, Your Honor, then I would call to the stand Mr. James Lee of KCC.

THE COURT: Okay. Mr. Lee, please come forward. Would you take the stand and remain standing, please for the oath?

THE ECRO: Please raise your right hand. Please state your full name and spell your last name for the court record, please.

THE WITNESS: James Lee, L-e-e.

JAMES LEE, WITNESS FOR THE DEBTOR, AFFIRMED

THE ECRO: You may be seated.

Your Honor.

THE COURT: Thank you.

Mr. Persons, whenever you're ready.

DIRECT EXAMINATION

BY MR. PERSONS:

Q Mr. Lee, for the record, can you please explain to the Court how you are employed?

A I am the Vice President of Public Securities Services at KCC. We are the claims and noticing agent retained in this case.

Q And what is your role in this Chapter 11 case?

A As part of the Public Securities Services, I focus on the service of materials to publicly traded securities holders.

Q Can you tell the Court just a little bit about your professional qualifications in this area?

A Sure. I am attorney admitted to practice in the Southern District of New York and the District of New Jersey. I practiced for -- in bankruptcy matters for eight years before joining KCC over ten years ago.

Since having joined KCC, I've worked in multi-faceted cases, you know, ranging from just case management of Chapter

11 cases, as well as now focusing on public securities issues.

Q And are you aware of the declaration that you submitted on Tuesday, May 16th, at Docket Number 478?

A Yes.

Q And you had an opportunity to review that prior to it being filed?

A Yes.

Q And prior to you signing it, as well?

A Yes.

Q Have you reviewed that declaration in advance of this hearing?

A Yes.

Q And do you have a need to make any material changes to the information contained therein?

A No.

MR. PERSONS: Your Honor, in additional -- in addition to the questions that I would like to ask Mr. Lee, I would, at this time, move Document Number 478, the declaration of Mr. Lee, into evidence.

THE COURT: Any objection?

(No verbal response)

THE COURT: It's admitted without objection as Debtors' Exhibit 3, I think we're on.

MR. PERSONS: I believe 3, yes.

(Debtors' Exhibit 3 received in evidence)

MR. PERSONS: Thank you, Your Honor.

BY MR. PERSONS:

Q Mr. Lee, I want to focus on the solicitation of equity holder. That's an important point in this case regarding whether there was consent or not consent for the third-party releases.

At a high level, can you describe for the Court the process KCC undertook to formulate a list of all its Class A holders?

A Sure. We broke down the holders of Class A equity into three categories:

The first being those equity holders who filed proofs of claims with us;

The second category being those registered holders of equity who are in direct registration with the transfer agent;

And finally, the third category are those equity holders who hold through banks and brokers or what we call, you know, "in street name."

Q So, considering those three categories, do you believe there are any Class A holders that may not have been identified and fall into one of those three buckets?

A No. All Class A equity holders fall within those three categories.

Q All right. Thank you, Mr. Lee.

Let's move on to the solicitation materials themselves that KCC provided to the Class A holders and how you provided -- describe how you provided those materials.

How many Class A holders submitted proofs of claim?

A One hundred two holders of equities submitted proofs of claim.

Q And can you generally describe the solicitation materials KCC provided to those claims -- or those parties that filed claims? Excuse me.

A We served them with the confirmation hearing notice, the form of non-voting notice with the opt-out form.

Q And how did KCC transmit these materials?

A We served them these materials via first-class mail on the addresses set forth on the proof of claim forms.

Q All right. And was that -- the materials that you submitted, were they consistent with the materials approved by this Court in the disclosure statement?

A Yes.

Q Thank you.

Of that particular group, Mr. Lee, how many holders returned an opt-out instruction?

A Twenty-seven.

Q Okay. And secondly, the second bucket, your -- Mr. Lee. Once KCC identified the Class A holders that held

securities directly, what solicitation materials did KCC provide to them?

A They were served with the confirmation hearing notice, the form of non-voting notice with the opt-out form.

Q And how did KCC transmit these materials to those holders?

A They were served these materials via first-class mail on the addresses set forth on the registered holder list.

Q And how many notices were provided to holders that fell into that bucket, Mr. Lee?

A Twenty.

Q And were those materials consistent with the materials approved by this Court in the disclosure statement order?

A Yes.

Q How many holders in that particular group returned an opt-out instruction?

A Zero.

Q Okay. And the final category of Class A holders that we discussed, the nominees appearing on the security position report for DTC. What solicitation materials did KCC provide to the nominees?

A We provided them with the confirmation hearing notice, the form of non-voting notice, and the beneficial opt-out form.

Q And explain the process by which KCC identifies and

provides these materials to these particular holders.
A Once a record date is set -- which, in this case, by order of the Court on March 24th -- we reach out to the DTC, the Depository and Trust Company, to obtain a position report as of that date, which identifies all of the banks and brokers who hold position or hold -- who hold equity as of that record date. We reach out to those nominees and their agents and request from them the requisite number of copies of materials they need, you know, for them to mail out to their underlying beneficial holder clients.

You know, once we receive that number, you know, we -- we overnight the requisite number of materials to them and they, in turn, will forward it on to their clients.
Q To the extent you know, how do the nominees forward them on to their clients?
A It falls within -- it falls in two buckets, the first being first-class mail. Here, we -- I understand that there were approximately 8,500 positions reported as of the record date. Of that, about 1,500 were sent out by first-class mail.

The remaining 7,000 positions consented to be delivered materials electronically, so they were sent by email.
Q And would an equity holder, among these 85,000 [sic], expect to receive information about its interests in this manner?

A Yes.
Q And why is that?
A Can you --
Q Why --
A -- repeat --
Q Why --
A -- the question --
Q -- would it --
A -- one more time?
Q Why is it -- why would it expect this would be the manner under which it would receive notice about its interests?
A This is the standard method of delivering any communications to street holders. Because, you know, at any given time, you -- we don't know who -- the identities of the beneficial holders, we need to go through this process of working with the nominees and their agents.

So this is just the industry standard of how, you know, notices are sent out to beneficial holders.
Q And you said in that answer that -- any communications with street holders. What types of communications are we talking about that they might receive in this manner, under any circumstance?
A Well, in the Chapter 11 context, you have the -- you know, the notice of commencement, bar date notice, you know,

obviously solicitation materials, sale notice as required under the Bankruptcy Rules, and the notice of con -- notice of entry of confirmation order and effective date. Those are pretty standard milestone mailings.

Q Uh-huh. Outside of Chapter 11, what other types of communications are received this -- in this manner?

A Annual meeting, proxy statements, corporate actions, exchange offers, tender offers, rights offerings. Pretty much, you know, any noticing that needs to be served out to beneficial holders, this is the way it's typically -- typically done.

Q And remind me, Mr. Lee. You said the -- approximately 8,500 of these people -- parties received notice in this manner?

A Yes.

Q And out of those parties, how many opt-out instructions did your receive?

A Two hundred forty-two.

Q All right.

(Pause in proceedings)

Q Mr. Lee, let's spend a moment discussing some of KCC's experience in Chapter 11 cases and talk about it in reference to the opt-outs that were received in this case.

How many cases have you been involved in or has KCC been involved in and provided forms of notice regarding

releases to equity holders of public companies?
A In the last 10 years that I've been with KCC, I've worked on approximately 50 cases that involve noticing equity holders in this method.
Q And how many of these cases would you say that you've worked on, Mr. Lee, that used the similar manner of process as to what you've described here today?
A All of them.
Q And why is that, Mr. Lee?
A Again, that's just the industry standard. Nominees, banks, and brokers, they expect notices to be sent out this way.
Q Based on your experience in these situations, is there anything about this particular case that would distinguish it from the other 50 cases that you worked on where these procedures were used?
A No. This is a very standard noticing event and voting event.
Q And do you believe it's -- the materials that were approved by this Court and provided by KCC were standard materials for equity holders in this situation?
A Yes.
Q A fun topic I want to cover, Mr. Lee, is the result of the identification and solicitation process you described.
So I had you break it down into three categories. But

in total, how many opt-out instructions did KCC receive from Class A holders in this case?

A In total, we received 269 opt-out instructions.

Q Okay. And what percent of the total shares did those 269 holders hold?

A Approximately seven percent of outstanding total shares.

Q And considering the number of cases that you've worked on, Mr. Lee, how does this approximately seven percent number compare to other Chapter 11 noticing situations?

A Typically, we receive approximately one to four percent return rate of opt-outs. Here, having received seven percent is -- is pretty high.

Q And it being pretty high, does that give you comfort that the notice provision worked as it should?

A Yes.

Q Why is that?

A The fact that people -- or -- and instructions re -- were received by KCC at approximately seven percent of the outstanding share rate, it's just an -- it's just evidence that people had it, they received it, they reviewed it and were able to submit the instructions properly, so that it got to us by the -- by the deadline.

Q And how many days did the various interest holders have to return these opt-out forms?

A Forty-five days.
Q And is that true of all three of the categories we discussed?
A Yes.
Q When approximately was the date by which they had to submit this -- submit their choices as to whether or not they opted out?
A The deadline to submit the opt-out forms was May 15th.
Q Mr. Lee, do you -- are you aware that the U.S. Trustee and the SEC have objected to the form of -- or to the notice, the notice provisions, and argued that they do not believe, necessarily, the notice was sufficient?
A Yes, I'm aware.
Q And do you be -- do you agree with that assessment?
A No.
Q Why is that?
A This is -- the method that we use to serve out these forms and notices is, again, the industry standard. It's expected by the banks and brokers that this method would be used to serve their underlying clients. And the process is already in place and well known in the industry as a valid way to submit instructions back to us.
Q And is it expected -- an expected way that these communications would happen for the typical equity holder?
A Yes.

MR. PERSONS: I have nothing further, Your Honor.

THE COURT: Okay. Thank you.

Cross. Mr. Baddley.

(Pause in proceedings)

CROSS-EXAMINATION

BY MR. BADDLEY:

Q Good morning, Mr. Lee.

A Hello.

Q My name is David Baddley, I'm an attorney with the United States Securities and Exchange Commission.

Before I proceed, do you have a copy of your declaration?

A I do not.

MR. BADDLEY: Okay. Your Honor, may I approach the witness?

THE COURT: Yes.

MR. BADDLEY: Does the Court need one? I --

THE COURT: I have it.

BY MR. BADDLEY:

Q I'm also going to bring up a copy of the certificate of service that you reference in your declaration.

MR. BADDLEY: Your Honor, do you need a copy of that? It's ECF 356. I have a --

THE COURT: That I might need, yes. Thank you.

(Pause in proceedings)

BY MR. BADDLEY:

Q Mr. Lee, you spoke just a minute ago about what shareholders might expect to receive.

An investor in a public company probably does expect to receive various standard public company items, such as proxy statements, right?

A Yes.

Q And other documents that are typically served upon shareholders in any public company situation, right?

A Yes.

Q An opt-out release in a bankruptcy case is not something that is typically issued to a public shareholder, is it?

A No, unless a Chapter 11 case has been commenced. Right. But no, it's not a typical document that's sent out.

Q Now, if I could have you look at Paragraph 5 of your declaration. It's on the bottom of Page 2. You state that, on March 30th, 2023, KCC caused to be served the opt-out forms on the debtor's shareholders. Is that right?

A Yes.

Q And the item -- the document that you reference there is the certificate of service that was filed as Docket Number 356. Is that right?

A Yes.

Q Okay. I want to ask you some questions about the

certificate of service then. Do you have that in front of you now?

A Yes.

Q Okay. So, it looks like the items that were served on the three classes of shareholders that you referenced with Mr. Persons' questioning are listed on Page 3, under Paragraph 6. Is that correct?

A Yes.

Q Specifically (ii), (iii), and (iv). Is that right?

A Paragraph 6(a)(ii), (iii), (iv), and Paragraph (b).

Q Correct.

A Yes.

Q Okay.

MR. PERSONS: (Not identified) Your Honor, I would ask: Mr. Baddley, do you have an additional copy of the certificate of service with you?

MR. BADDLEY: Oh, certainly. Sorry.

MR. PERSONS: No. Thank you.

MR. BADDLEY: I'm on Page 3, Paragraph 7.

THE WITNESS: Just a point of clarification, sir, (I) was also served. That's the category of equity holders who filed proofs of claim. So that's the document that they received.

BY MR. BADDLEY:

Q Well, (i) is called the unimpaired --

A I apologize, you're right.
Q -- voting status notice.
A I apologize. I will take that back.
Q Okay. And then if we go to the next page, Paragraph 10, it says that the confirmation hearing notice and notice of opt-out form to beneficial owners was served both electronically, and overnight, and by first class mail on parties listed on Exhibits D, E, and F. Is that correct?
A Yes.
Q So, that would be Exhibit 5-A that went to those parties. That is the notice and opt-out form.
A Yes. That is correct.
Q Okay. Could you please turn to Exhibit D then.
A Yes.
Q Is Exhibit D the list of banks and brokers that you testified hold the securities in (indiscernible)?
A Yes.
Q And those banks and brokers were served by email as reflected on that document?
A Email and first-class mail.
Q Well, I will get to the first-class mail in a second. This Exhibit D is only certifying the service by email, is that correct?
A Correct.
Q And then on Exhibit E those same documents were sent by

overnight mail on the two entities listed on Exhibit E, is that correct?

A Yes.

Q Broadridge and Media?

A Yes.

Q What are Broadridge and Media?

A They are the two agent companies that the vast majority of nominees use.

Q Okay. Then if you could turn to Exhibit F, I think that this is where you were going when you were speaking about mail. These are pretty much the same banks and brokers that were on Exhibit D, I believe, but they're service by mail. Is that correct?

A Yes.

Q All right. If you could turn back to page 4 now. On Paragraph 16 this talks about the impaired non-voting status notice and confirmation hearing being served by first class mail on parties listed on Exhibits K and L. Is that correct?

A Yes.

Q And the document references there, the impaired non-voting status notice is the Exhibit 5-C to the solicitation order. Is that correct?

A Yes.

Q And that was basically the one that was intended to go directly to shareholders?

A Yes.
Q Not through nominees?
A Correct.
Q So, if we could turn to, what did I say, Exhibit K. Are you at Exhibit K?
A Yes.
Q There are three pages. My counting was the same as yours. I came up with 102. Is this the 102 shareholders that KCC mailed the opt-out forms directly to because they filed proofs of claim?
A Yes.
Q Then on Exhibit L, which is the next page, this is the list of registered holders that you testified also received direct?
A That's correct. Yes.
Q Why is the address redacted on this?
A It's something that we do typically. In our experience shareholders do not like their information made public, to the extent that we can help it. So, by default we do redact, you know, their addresses.
Q I think that some of these parties are officers or directors of the company as well or do you not know that?
A I do not know that.
Q Okay. If we could go back to your declaration, please. And if you could turn to page 10 -- I'm sorry, page 3,

Paragraph 10. Are you -- okay.

I just want to, kind of, confirm, I think this is what you were talking about with Mr. Persons, but you are talking about here the service through the nominees. Is that right?

A Yes. That is correct.

Q Shareholders through nominees were served two different ways. One by mail, correct?

A Yes.

Q And one by email or electronically?

A Yes.

Q And 1,510 shareholders were served by mail. That is Paragraph 10, correct?

A Yes. That is correct.

Q Then, I think, in the footnote is where you referenced the electronic service and estimated that at approximately 7,150. Is that right?

A Yes.

Q And, again, you used the phrase “cause to be mailed” here. There is nothing in your declaration here about when nominees did the service, is there?

A That’s correct.

Q And there is nothing in your declaration actually confirming that nominees actually did, correct?

A Correct.

Q So, just a little math here. Am I correct that if you

combine the 1,510 shareholders who assert by mail and the approximately 7,150 who were served electronically that puts us at roughly 8,660 shareholders that were served through the nominee process?

A Yes.

Q Then, again, about 102 shareholders were served directly.

A Correct. Yes.

Q If you could turn to Exhibit A of your declaration. These are the opt-outs, correct?

A Yes.

Q Am I correct that if a shareholder here is listed with an account number, then this is an opt-out that came through a nominee?

A Correct.

Q And if the shareholder does not have an account number, then it did not come through a nominee. It came directly.

A Correct.

Q Okay. Now you had testified 27 of the direct mails opted out. I had counted 29. Could it be 29 or do you --

A No. It was 27. The extra two that came in they were actually street holders, but rather then submitting it through their nominee they actually sent their beneficial opt-out from directly to KCC. So, we decided to just count those even though they did not follow the proper method of

submitting their instructions through their nominee.
Q All right. So, it would be those who received the opt-out directly that you personally, your firm personally served 27 out of 102 opted out?
A Yes.
Q And those through which you relied on the nominee process 242 out of 8,660 opted out?
A Yes.
Q Okay. The mail opt-out effective rate was roughly 28 percent, maybe 27 percent. And the return rate through the nominee process was less than 3 percent, it was 2 percent and change. Does that sound right?
A I didn't do the math. So, I can't confirm one way or the other.
Q Sounds close?
A That sounds close.
Q So, the opt-out rate of shareholders who were served directly is more than 1,000 percent higher or 10 times higher than the opt-out rate of shareholders who purportedly got notice through nominees, agreed?
A I will rely on your math and to the extent that is accurate I will agree.
Q Okay. And because 8,660 of the 8,762 shareholders were served through nominees, almost 99 percent of the shareholders were served through this, what I will call,

inferior nominees process. Is that right? You don't have to agree with my words here.

A I will agree up to that point of your use of the word "inferior".

MR. BADDLEY: I have no more questions, Your Honor. Thank you.

THE COURT: Thank you.

Mr. Fox.

MR. FOX: Good morning, Your Honor. Just a couple of questions that I would like to have additional information on.

CROSS-EXAMINATION

BY MR. FOX:

Q Mr. Lee, I am a trial attorney with the Office of the United States Trustee. And like the Securities and Exchange Commission, my office has filed an objection with respect to the opt-out relief sought against the shareholders.

In your testimony on direct you identified the May 15th deadline for return of the opt-out form. And with respect to the nominee process when were the forms from KCC disseminated to the nominees so that they could then flow down to the beneficial holders?

A We overnighted all of the materials to the nominees' agents on March 30th.

Q But the debtor does not have any information about when

the nominees would have then made subsequent service as to the beneficial holders?

A No, not exactly. Based on my experience, it typically happens within five business days.

Q And is that with respect to Chapter 11 specific mailings or is that with respect to the more regular routine corporate mailings that you mentioned in your testimony on direct earlier?

A In all mailings, whether it's Chapter 11 or not.

MR. FOX: That's all I have. Thank you.

THE COURT: Thank you.

Does anyone else wish to cross?

(No verbal response)

THE COURT: Redirect.

MR. PERSONS: One second, Your Honor.

(Pause)

MR. PERSONS: Your Honor, could Chambers share the screen, I think, with Ms. Miller.

REDIRECT EXAMINATION

BY MR. PERSONS:

Q Just a couple questions, Mr. Lee.

First and foremost, do you recognize what is on the screen in front of you?

A Yes.

Q What is that?

A That is the notice to shareholders of opt-out, of the right to opt-out of third-party releases.

Q And is this then the notice that would have been provided to the 8,600 -- I appreciate Mr. Baddley did the full math rather than the approximate 8,500, but is this what would have been provided to those parties?

A Yes.

Q And some would be provided by mail, as you have described, and some by email. Is that correct?

A Yes.

Q And this is -- this form, which is approved and is on the docket, Your Honor, at 327, Docket No. 327, this is the solicitation order and it is Exhibit 5-C and page 132 of the PDF.

This is the notice that was approved by the Court, is that correct?

A Yes.

Q And the last -- this is the first page we're looking at, is that correct?

A Yes.

Q What is the last paragraph in that box say in the underlined portion?

A "You have the right to opt-out to avoid releasing any claims against these third parties, the debtor, and its officers and directors by completing the opt-out form on

pages 5 through 6 of this notice."

Q And are you aware, Mr. Lee, how this language was determined to be, you know, used in this notice, this type of language?

A It's a fairly standard language and all of the opt-outs that we have done in the past.

Q Just a couple more questions. If we could scroll down, please, to page -- where the opt-out itself is, page 5 of that.

Do you recognize this portion of that notice, Mr. Lee?

A Yes.

Q And do you see the two boxes on that portion, on the opt-out release form, Mr. Lee?

A Yes.

Q And what are those two boxes for?

A The first box relates to Item 1 which the holder certifies that they are a Class VIII interest holder. The second box, under Item 2, is for holders that elect to not grant the third-party releases.

Q And the bold part directly below that second box, what does that say?

A The first bullet?

Q Yes.

A "If you do not wish to give the third-party release, provided in Article 9(b) of the plan, you must check the opt-

out box above and submit this ballot to KCC so it is received by the release opt-out deadline."

Q And what does the second bullet say?

A "If you do not check the opt-out box above you will be deemed to consent to giving the third-party release provided in Article 9(b) of the plan."

Q And if a party does not wish to opt-out is there a box on the opt-out release form that they would need to check?

A No.

Q And if they opt not to opt-out would there be anything that they would need to return either directly to KCC or to their nominees?

A No.

Q And is there any reason, therefore, that you would have personal insight as to why the number of parties, the discrepancy that was described on Mr. Baddley, would have taken -- would exist?

A No.

MR. PERSONS: Nothing further.

THE COURT: Mr. Lee, you may step down -- oh, we have more questions. I'm sorry.

MR. PERSONS: Next witness, Your Honor.

THE COURT: Thank you, Mr. Lee.

(Witness excused)

MR. NEIBURG: Good morning, Your Honor. Michael

Neiburg from Young Conaway on behalf of the debtor.

Your Honor, at this time the debtors will move into evidence the declaration of Thomas Fitzgerald at Docket No. 480. That will be Mr. Fitzgerald's direct testimony. We understand that counsel for the SEC intends to ask him some cross concerning the third-party releases.

THE COURT: Is there any objection?

(No verbal response)

THE COURT: The declaration is admitted without objection as Debtor's Exhibit 4.

(Declaration of Thomas G. Fitzgerald received into evidence)

MR. NEIBURG: Thank you, Your Honor.

THE CLERK: Please raise your right hand. Please state your full name and spell your last name for the Court record.

MR. FITZGERALD: Thomas Gerald Fitzgerald, last name is spelled F-I-T-Z-G-E-R-A-L-D.

THOMAS G. FITZGERALD, DEBTOR WITNESS, SWORN

THE COURT: Whenever you're ready.

MR. BADDLEY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BADDLEY:

Q Good morning, Mr. Fitzgerald.

A Good morning.

Q Do you have a copy of your declaration?
A I do not.
MR. BADDLEY: Your Honor, may I approach the witness?
THE COURT: Yes.
BY MR. BADDLEY:
Q So, Mr. Fitzgerald, I am representing the SEC at today's hearing in connection with the Commission's objection to Tricida's Chapter 11 plan. Specifically, the SEC is objecting to the portion of the plan that would release claims held by the company's public shareholders against who the plan defines as released parties. Do you understand that?
A I do.
Q So, the release to which we're objecting is commonly referred to as a third-party release because it involves the release of claims that are held by people who aren't in bankruptcy against people who aren't in bankruptcy. Do you understand that?
A I do.
Q Okay. And to be clear, the third-party release would be binding on more than just the shareholders. It's also to bind creditors and others, but the SEC's objection is limited only to the extent it would be binding upon shareholders. I wanted to make sure you knew that.

So, given, kind of, the narrow scope of the objection I really kind of just want to focus on the release and your support for the release. That will also require me to get a little bit of an understanding of your familiarity with the debtor. So, I will start with some questions about that, okay.

A Okay.

Q So, you have two titles with Tricida; independent director and sole member of the special committee. Is that correct?

A That is correct.

Q What does it mean to be an independent director? Why not just director? What is an independent director?

A I have no conflicts. I have no involvement with the company itself prior to my election to the board.

Q Are you the only independent director?

A I believe that I am.

Q When did your role as the independent director begin?

A I executed an independent director agreement on, I believe, December 23rd, but actual appointment to the board because of governance steps didn't take place till, I believe, January 10th.

Q Okay. So, you executed the agreement a little bit prior to the bankruptcy?

A There were a few steps just prior to the holidays and

so it all came together shortly thereafter.
Q And how did you get this role?
A So, I do this type of work and I'm known in the industry as someone who does this type of work. I have a relationship with Sidley and solicited by CV as a potential party for this role.
Q Can you just describe generally what your duties were?
A On the board?
Q As the independent director, yeah. Thank you for clarifying.
A My duties were the same as every other member of the board with respect to my role on the board. My duties with respect to the special committee was to conduct an investigation into conflict matters.
Q And when did that second duty with respect to being the sole member of the special committee, when did that begin?
A Immediately. I believe January 11th.
Q Okay. And I think I saw some sort of agreement where your compensation is $25,000 a month. Is that correct?
A That is correct.
Q And that is for both roles combined?
A That is for both roles combined, yes.
Q In both roles approximately how many hours per week have you worked throughout the bankruptcy if you were to average it?

A Averaging?
Q Yeah.
A 10 to 15 hours a week, I believe.
Q And have you largely performed those duties from Miami or where have you --
A Miami, remotely.
Q And you are employed by a firm called Drivetrain?
A I am, yes.
Q And according to your page on the Drivetrain website it looks like you might currently be involved in some other roles. Are you currently an independent director for STX Entertainment?
A Technically for STX's parent company, England Holdings III, Inc. STX Entertainment is the sub.
Q And have you served in that role throughout this bankruptcy?
A Yes.
Q Approximately, how many hours per week in that role?
A Some weeks none. Perhaps one on the average one to two hours a week.
Q Okay. The next one is a post-bankruptcy litigation trustee for Cyber Litigation Inc., formally NS8 Inc. Did you serve in that role throughout this bankruptcy?
A I did. I represent Drivetrain as the Court appointed post-bankruptcy trustee in that role.

Q And about how many hours per week, through the bankruptcy, have you been fulfilling that role?
A It peaks and drops, but probably two to three.
Q The next one is post-bankruptcy --

UNIDENTIFIED SPEAKER: Your Honor, I will just object. I don't see the relevance to the third-party releases proposed in the plan to this line of questioning.

MR. BADDLEY: Your Honor, I'm just trying to get a sense of how familiar Mr. Fitzgerald is with the debtor's operations and, you know, if he's working in other roles. That is, obviously, going to take away. So, I am just trying to get a sense of how familiar he is with the case in order to make the views regarding the necessity and the fairness of the releases.

THE COURT: Overruled.

BY MR. BADDLEY:
Q The next one is the post-bankruptcy liquidating trustee for Sequential Brands. Was that one that you worked on during the bankruptcy?
A I also work on that one as well as a representative of Drivetrain as the Court appointed trustee.
Q And what is the time commitment on that one throughout the bankruptcy period?
A It was heavy at the beginning. It's a year into it, so I would say during this period and my service on the Tricida

board probably three to five hours a week.
Q Next is independent director, audit committee, governance and nominating committee for Treehouse Real Estate Investment Trust. Same questions, you know, what is your time commitment on that one throughout this bankruptcy?
A Very limited. It's more of a traditional board role where I attend four in-person quarterly meetings per year and I attend, remotely, four audit committee meetings a year that occur two or three weeks prior to each board meeting. Outside of that there is really no work unless there is an emergency meeting called of some sort, which I think has only happened once in two years.
Q Okay. So, we will say that's fairly minimal then.
A Yes.
Q Post-bankruptcy trustee for the creditor recovery trust for Old Market Group Fairway Stores?
A Yes.
Q What sort of time commitment from January to present period?
A Almost none.
Q Okay. Akorn?
A I am the plan administrator for Akorn, again, representing Drivetrain who was appointed on a post-bankruptcy basis to wind entities down and administer the plan?

Q So, what has been the time commitment, roughly, on that one?

A Probably one to two hours a week. Again, two and a half years old, there is not much left. We're waiting on the IRS and others to do things to bring it to an end.

Q Right. That one said 2020 to present.

One that was in your declaration, but not on the website was independent director of England Holdings.

A I mentioned earlier England Holdings III is the parent company of STX Entertainment.

Q I see. Thank you.

And then you had mentioned a relationship with Sidley, was that the Wave Computing matter?

A Yes. That matter was in 20' and 21'.

Q I think that was a public company, correct?

A Wave Computing was not a public company.

Q Maybe that is why I didn't know much about it. Thank you.

I want to talk a little bit more about the evaluation of claims that you performed in your role as the independent director and sole member of the special committee. In your declaration you state that on January 10th the board adopted a resolution authorizing and directing you to evaluate claims and causes of action of the debtor in which a conflict exists or is reasonably likely to exist between the debtor and any

related party, defined term. Does that sound correct?
A That is correct.
Q What is your understanding of why an independent director was needed to evaluate those claims?
A Because it's independent and because I had the ability to look back with zero conflicts and evaluate events prior to my joining the board.
Q And is it because all members of the board were subject of the evaluation?
A Potentially, yes.
Q So, which related parties did you investigate?
UNIDENTIFIED SPEAKER: Your Honor, I will just -- they call for the divulging of privileged communications between counsel and the independent director.
THE COURT: I think he only asked for the (indiscernible). I don't think that reveals any -- and I think it's actually in his declaration anyway. Overruled.
BY MR. BADDLEY:
Q You can answer the question or I can restate it if you need.
A The purpose role was to evaluate whether there was specific causes of action that the debtor could retain going forward against officers and directors --
Q Okay. And I think --
A Among some other matters.

Q I'm sorry. I think the question which drew the objection was I had asked which related parties did you investigate.

A I believe the definition of related parties included the debtor, its officers and directors, shareholders, affiliates. That's the best of my recollection.

Q Did you investigate claims against all of those --

A Claims that fell within the mandate.

Q Including all shareholders?

A No, we did not investigate shareholders.

Q So officers and directors primarily?

A It was primarily officers and directors, yes.

Q Okay. And your declaration states that the special committee formally met 12 times between January 12th and February 14th, maybe you could help clarify what you meant by saying the committee met considering you were the sole member.

A So we met during that period, the meetings were designed to line up with the restructuring support agreement that we had entered into with the noteholders that put us on a pretty tight timeline. So it required quick action, a lot of work, and a lot of meetings. So we had a standing meeting every week, but we also sometimes inserted additional meetings.

Q Okay. And I guess my question, and I'm sorry if it

wasn't clear, was who's the "we"?
A Myself and counsel at Young Conaway Stargatt.
Q And did you have your own counsel or advisers?
A I did not.
Q Your mandate, as you called it, did not include evaluating whether any party other than the debtor had claims against any related party, did it?
A No, it did not.
Q All right. If you have your declaration in front of you, could you please turn to page 17?
(Pause)
Q Are you there?
A I am. I'm here.
Q Okay. And beginning on page 17 you state that the plan contains certain permissive provisions that may be incorporated into a plan. Do you see that?
A Where is that?
Q It's in paragraph 33. I'm sorry; I didn't tell you where to look. The second line, permissive permission -- provisions?
A Yes, I see it.
Q Okay. And then you start to go through the permissive provisions and, if we turn to page 20, this is where we get to the third party release. Do you see that?
A Yes.

Q And on page 20 you describe who is giving the release, right, who is a releasing party?
A Yes.
Q You mention the major consenting noteholders, right, in Clause A?
A Yes.
Q You mention the holders of claims deemed to have accepted the plan, right, Clause B?
A Yes.
Q And do you understand that a creditor who is deemed to have accepted the plan is unimpaired and does not vote?
A Yes.
Q That's why --
A I'm sorry, repeat that question?
Q That someone who is deemed to have accepted the plan is unimpaired and does not vote?
A I don't understand that question.
Q Okay. So you don't understand what it means for -- to say that someone deemed to have accepted the plan?
A Because they were unimpaired, they have deemed to have accepted the plan, yes, that's correct.
Q And then --
A I didn't hear it that way, I'm sorry.
Q Sorry. And then my -- if someone is deemed to have accepted, then they don't actually vote?

A Correct.
Q Okay.
A That is my understanding.
Q And then, in Clause C, you mention holders of claims or interests that either vote to accept or reject and do not opt out, or do not vote to accept or reject and do not opt out. Do you see that?
A Yes.
Q Now, Tricida's shareholders are deemed to reject the plan. So, when you prepared your declaration, did you view deemed-rejecting shareholders as falling within Clause C?
A Can you repeat that again?
Q When you prepared your declaration and you gave your views on the necessity and the fairness of the release, did you view Tricida's shareholders as having fallen within Clause C?
A To having rejected the plan? Yes.
Q Okay. So you viewed deemed to reject as the same as not voting to accept or reject?
A My understanding in talking to counsel is that the concept is they are deemed --
MR. NEIBURG: Objection.
THE WITNESS: I'm sorry?
MR. NEIBURG: Objection to just -- Your Honor, he should not disclose any --

MR. BADDLEY: Yeah, we don't need to --
THE WITNESS: Okay.
THE COURT: Don't --
THE WITNESS: My understanding is that --
THE COURT: -- don't say what counsel told you.
MR. BADDLEY: We can move on, we can move on.
MR. NEIBURG: Thank you.
MR. BADDLEY: I was waiting.
MR. NEIBURG: I know you were.
(Laughter)
BY MR. BADDLEY:
Q Okay. And at the top of page 21, Clause F, you include Patheon as a releasing party. Do you see that?
A Yes.
Q Now, I looked at the Fourth Amended Plan, Docket 460, which is what you referenced in paragraph 3 as what your declaration was supporting, and Patheon is not listed as a releasing party. Do you know why that's there?
And, if you don't know, that's fine.
A I don't know.
Q Okay. Before we talk about the rest of this part here where you give your views on the release, I want to ask you some questions about who the released parties are because I didn't see that you said much about who the released parties are in your declaration. Did you read the definition of

released parties in the plan at or prior to the time that you submitted this declaration?

A I did.

Q And did you see the released party includes the debtor?

A Yes.

Q And then it includes the consenting noteholder releasing parties?

A Yes.

MR. NEIBURG: Objection, Your Honor. Does Mr. Fitzgerald have a copy of whatever is being read? I just want to make sure this isn't a memory test.

MR. BADDLEY: Sure, I can -- it's just the definition of released party, so I can --

MR. NEIBURG: I can give him a copy of the plan, if that's --

MR. BADDLEY: I don't have an extra copy of the plan, but I think I can get it from one of (indiscernible) --

(Pause)

MR. NEIBURG: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. NEIBURG: I'm handing you a copy of the debtor's Fourth Amended Chapter 11, which has I think the (indiscernible) talking about, although we can find exactly where the reference is.

BY MR. BADDLEY:

Q It's in the definition, I think it's number 114.

MR. NEWMAN: It's paragraph 114 on page 14.

(Pause)

BY MR. BADDLEY:

Q Just let me know when you're there.

A So I'm there, I was just beginning to read it.

Q Okay.

A Thank you.

Q So I'll start over. Thank you, Mr. Newman.

Released party includes the debtor; correct?

A Yes.

Q And then consenting noteholder releasing parties; correct?

A Yes.

Q Okay. Now we have to flip back to number 27 to see who that is. Are you there?

A Yes.

Q Okay. And the consenting noteholder releasing parties includes the consenting noteholders, the indenture trustee, and then affiliates and related parties; is that correct?

A That's correct.

Q And then consenting noteholders is also a defined term, back to number 24, which is the convertible noteholders collectively holding two thirds of the aggregate amount of

convertible notes outstanding who have executed or otherwise joined the RSA; is that right?

A Yes.

Q And I guess we'd have to find the RSA to see who that is.

Okay. So we can go back to 114, released parties. Are you there?

A I am now, yes.

Q Okay. And now I'm at (c), which is each related party of the debtor and the consenting noteholder releasing parties; is that correct?

A Yes.

Q Before I go to related party, if you look at the -- after the notwithstanding, it specifies who is not getting a release and it mentions current or former shareholders. Do you know why shareholders are excluded?

(Pause)

MR. NEWMAN: Your Honor, I'll just --

THE WITNESS: I don't recall.

MR. NEWMAN: -- caution the witness, to the extent he has independent knowledge of why, he can answer that, but to the extent of just privileged communications with counsel, he should not divulge that.

MR. BADDLEY: I'll rephrase it.

BY MR. BADDLEY:

Q Did you know that shareholders were not getting a release when you opined on the fairness of the release?

A I don't recall.

Q Okay. So released parties includes the debtor, the consenting noteholders, and then related party. And related party also has a defined term, number 112.

And a related party includes 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, assigneds, subsidiaries, affiliates; partners, limited partners, general partners, principals, members; management companies; fund advisers or managers; employees, agents, trustees, advisory board members, financial advisers, attorneys -- there's a parenthetical -- accountants, investment bankers, consultants, respect -- representatives, and other professionals and advisers; and any such persons or entities, respective heirs, executors, estates, and nominees.

Do you understand that to be within the definition of who's getting a release here?

A I think so. I listened to you read it, so I would say yes.

Q I promise I will not repeat that.

A Okay.

Q So that's the third party release; right? It's being given by the releasing parties, which you say includes shareholders who are deemed to reject, and it protects the debtor and the consenting noteholders and that tremendously long list of parties that I just read.

So in support, looking at your declaration, on page 21, to support this enormous release, you state, "It is my belief that the releases provided by the releasing parties were instrumental in formulating and obtaining support for the plan, which is the result of, among other things, extensive arm's length and good faith negotiations and mediation. Accordingly, the releases provided by the releasing parties are fair and necessary to the implementation of the plan."

Did I read that right?

A Yes.

Q And there are no other facts or evidence in your declaration that -- insofar as why that third party release is necessary; correct?

A I agree, there's no other --

Q And there's no other facts or evidence in your declaration about why that third party release is fair; correct?

A That's correct.

Q And there's no other facts or evidence in your

declaration insofar as why this third party release is integral to Tricida's reorganization or liquidation; correct?

A In the declaration, I think that's correct.

MR. BADDLEY: I have no more questions, Your Honor. Thank you.

THE COURT: Thank you.

Redirect -- does anyone else wish to cross?

MR. NEIBURG: I've got some brief redirect, Your Honor.

THE COURT: All right. Let me just make sure no one else wants to cross.

MR. NEIBURG: Oh, sorry.

UNIDENTIFIED SPEAKER: May I confer, Your Honor?

THE COURT: Yes, go ahead.

(Pause)

UNIDENTIFIED SPEAKER: I'm sorry, Your Honor. Thank you.

MR. NEIBURG: Thank you, Your Honor. For the record, Michael Neiburg on behalf of the debtor.

REDIRECT EXAMINATION

BY MR. NEIBURG:

Q Mr. Fitzgerald, you understand that public shareholders that chose not to opt out are giving a release; correct?

A I do.

Q And you believe that's fair?

A I do.
Q Why is that?
A Because they were provided with notice and, in listening to Mr. Lee's testimony, I believe that it was done according to industry standards, and they had the opportunity to exercise their independent judgment about that and, in fact, quite a few did.
Q And, Mr. Fitzgerald, in your declaration, you also mention that -- you stated that the releases are necessary to the implementation of the plan. Do you remember that?
A Yes.
Q Why did you state that in your declaration?
A So it dates back to the restructuring support agreement with noteholders, which was entered into right around the time of filing, just prior, and it was a heavily negotiated agreement and the releases were a requirement of that agreement. And, in my view, that agreement was a foundational event, document, agreement that brought us to a settlement with Patheon and brought us to a global settlement with the committee and got us here.

And so, as a requirement under that document, I believe it's necessary.
Q It's your understanding that the economic stakeholders have voted to approve the plan, including the proposed third party releases?

A Yes.

Q And just one clarifying question. During your cross testimony, you had indicated that you were the only independent director of Tricida, but when you make that statement, independent director, you're not, you know, with reference to any SEC or Exchange rules when you say the term independent; correct?

A I use the term independent the way I know it, which is I know I'm independent, I was asked to come on to be an independent director, that's not to say that I have opined on every issue of independence of all the other directors.

MR. NEIBURG: That's it, Your Honor. Thank you.

THE COURT: Thank you.

Thank you, Mr. Fitzgerald. You may step down.

THE WITNESS: Thank you.

THE COURT: Any other evidence? All right.

Why don't we -- we've been going for almost two and a half hours, why don't we take a lunch break, and we'll come back and do argument. How much time do the parties want for lunch?

MR. NEWMAN: Your Honor, we will defer to you as to how much time you want for lunch. We'll be back promptly when you're ready.

THE COURT: Well, I want to make sure everybody has an opportunity get something to eat. So why don't we

take -- why don't we take until 1:15 -- nah, let's make -- yeah, 1:15, let's come back at 1:15 and we'll do arguments at that time.

MR. NEWMAN: Thank you, Your Honor.

THE COURT: And, of course, deal with the other issues that are still on the agenda.

MR. NEWMAN: Thank you, Your Honor.

THE COURT: Thank you. We're in recess.

(Recess taken at 12:21 p.m.; reconvened at 1:17 p.m.)

THE COURT: Thank you, everyone. Please be seated.

Mr. Newman?

MR. NEWMAN: So, Your Honor, the debtor has finished its presentation and presented its evidence. Would you like to hear our argument or let the objectors speak before we proceed?

THE COURT: No, you go ahead first. Thank you.

MR. NEWMAN: Okay, I'll cede the podium to Mr. Persons.

THE COURT: Okay.

MR. PERSONS: Thank you, Your Honor. For the record, Charles Persons of Sidley Austin on behalf of the debtor.

As Your Honor has likely recognized, there are really only a couple of issues left with respect to the

confirmation of this plan and in both cases those are the objections of the U.S. Trustee and the SEC regarding third party releases.

I'll start with the U.S. Trustee's objection, which speaks to the Class 8 third party releases, but we'll get to that in a moment. The U.S. Trustee also objects to the concept of the opt-out being used in Classes 5 and 6 with respect to general unsecured creditors and the de minimis unsecured creditors.

As Your Honor noted in your Mallinckrodt decision, the use of the opt-out mechanism as a valid means of obtaining consent is not without controversy, but, nonetheless, as we've cited in our confirmation brief, there are many cases that come before Courts in this jurisdiction and in this courtroom whereby an opt-out procedure was approved with respect to creditors who received an opportunity to vote and were receiving some recovery under the plan.

We believe this issue is well settled before Your Honor and should be noncontroversial.

With that, I would turn to the issue at hand, which is the release of third -- the proposed third party releases to Class 8.

The question for Your Honor today with respect to the proposed third party releases, in the debtor's opinion,

is really a question of consent. The U.S. Trustee and SEC, as the only opponents of the proposed releases, have asserted the plan construct requiring creditors and interest holders to effectively, affirmatively opt out of third party releases renders those releases nonconsensual. And, from there, they launch into depth about the argument is primarily focused on the Continental factors and various other cases where nonconsensual releases have been proposed.

The debtors do not believe that this is the case in this particular instance.

As Your Honor heard in the testimony of Mr. Lee today, notice was provided to the Class 8 participants, and we'll get to specifically what Mr. Lee spoke to. That question of whether or not notice -- proper notice and the ability and opportunity to object is really what's at the heart of whether or not this is a consensual. We really -- we believe, Your Honor, and argue that the uncontested evidence supports that these consensual releases are appropriate under the circumstances and we do, respectfully, request the Court approve them in these limited circumstances.

As Judge Goldblatt recently wrote in his March 27th, 2023 opinion, In re Arsenal Intermediate Holdings, Case 23-10097, "The obvious implication of the Continental court's discussion around nonconsensual releases is that consensual

third party releases ought to be noncontroversial," and the debtor agrees.

Judge Goldblatt also recognized that no Circuit-level guidance yet exists on what it means for a release to be, quote, "consensual." Stating, quote, "Absent a statutory definition of the term or appellate authority directed to this issue, Bankruptcy Judges have taken divergent approaches."

In considering the question at length with respect to the appropriateness of opt-outs, Judge Goldblatt opined that in a jurisdiction like the District of Delaware, a third party release should be considered like any other plan provision, likening the opt-out concept to the general concept in the bankruptcy system that requires parties who oppose certain relief in a plan or any or any other provision to actively object to that relief; those with notice who fail to object are deemed to consent.

As he noted, quote, "That happens in Bankruptcy Court every day and there's nothing controversial about it."

The question of whether a release is consensual then has nothing to do with the necessary-and-fair standard being brought forth by the SEC and the United States Trustee, it is instead a question answered primarily by two simple questions: Did the party receive sufficient notice of the release provisions and did that party have ample opportunity

to manifest consent to the release.

In the case, in this case, and as demonstrated in the pleadings and supported further by the testimony of Mr. Lee, the answer to that is clearly yes.

As you heard from Mr. Lee, Your Honor, the noticing process for Class 8 holders that was used here was, quote, "the industry standard," not simply for Chapter 11 noticing, but for general noticing of shareholders in a variety of different matters.

Mr. Lee testified that this process has been used many, many times before, not only with respect to releases in Chapter 11, but throughout this case and other cases to notice shareholders when appropriate. Indeed, in this case, Your Honor, the same procedure was used to provide notice to the shareholders on the notice of commencement, the bar date, the solicitation, the sale notice, the notice of the effective date -- or, ultimately, we hope, the notice of the effective date.

Shareholders expect to receive notices that may affect their rights as shareholders in the manner described and in the manner used by KCC. Mr. Lee spoke competently and in great detail about the process. One, he believes that the process used by KCC was customary, appropriate, and, more importantly, why it worked in this case. That testimony is uncontroverted.

Indeed, Your Honor, if this notice is actually inadequate as to interest holders, then there are likely substantial noticing issues to interest holders in all public Chapter 11 cases, public equity Chapter 11 cases, and we have a much bigger process that we have to sort out right now. We use this and rely on this process, Your Honor, every single day as debtors.

Moreover, Mr. Baddley did not provide testimony from a single shareholder that alleged it had failed to receive notice of the opt-out form pursuant to this process. Presumably, the SEC would have access to and the ability to speak to various shareholders, none has come forward. Therefore, the only evidence Mr. Baddley could point to that the notice was somehow insufficient was circumstantial that the lower response rate for beneficial holders than the holders who had filed proof of claim was somehow evidence that the notice hadn't worked.

There are plenty potential reasons why that could be true, Your Honor. I don't have to go into all of them with the Court. The fact that the parties that received direct notice had already filed proofs of claim probably gives certainty to the concept that they are active shareholders. They're more likely, perhaps, to check their mail. They might be more likely to be represented by counsel, especially since they did file a proof of claim.

The fact that they received direct notice and the beneficial noteholders received notice through an intermediary had nothing to do with whether or not that notice is appropriate.

Ultimately, Your Honor, we don't know why one group, one set responded more than any other set. As noted in the redirect of Mr. Lee, there is nothing that requires a shareholder to affirmatively send back the opt-out notice saying, I don't want to opt out, only that they do want to opt out. And 269 equity holders did so, including 240-plus of those that are part of the larger process. That represents 7 percent of the total equity here, Your Honor, that opted out here. This number is testified to by Mr. Lee as actually a larger return rate than typically expected for something of this type. We believe that, therefore, Your Honor, the uncontroverted evidence demonstrates that the noteholders -- excuse me -- that the shareholders did receive notice here. Their choice to opt out or not opt out is entirely their own.

But not only was that notice, Your Honor, that we pulled up on the screen, provided to Class 8 shareholders sufficient, Your Honor might remember it was the product of discussions between the Court, the SEC, and United States, certainly reserved their right to object to what that -- what the ultimate outcome of the opt-outs were, but that notice was shortened. The amount of time that the holders were

permitted to respond was extended to 45 days at the request of the SEC. The debtors complied with everything that we could to do the best that we could to provide notice to all these parties. We believe that effort worked and that effort has resulted in the 269 opt-outs.

But it is also affirmative in our mind, it has been consensually agreed to by those parties that did not respond. The notice was clear: you have a right to opt out to avoid releasing any claims against these third parties, the debtor, its officers, the director, its directors, by completing the opt-out form on pages 5 to 6 of this notice. Simple box to check. Simple instructions. KCC website and the notice provides a variety of different phone numbers, addresses, and other ways to reach out if parties are confused.

Parties -- sophisticated shareholders like these, Your Honor, received notices about their shares in companies like in all the time. Their choice to act or not act is their own. This is not the instance where we are dealing with some sort of tort claimant who perhaps isn't sophisticated, has no counsel. These are shareholders in a company that, frankly, Your Honor, is publicly traded, was not operating, and is extremely sophisticated.

And while we certainly can't opine exactly on what kind of person invested in this particular company, it

doesn't -- it wouldn't be so far-fetched to consider that this is the kind of party that is used to the way that noticing works in that particular situation, not this Chapter 11.

THE COURT: Well, I can't speculate about that.

MR. PERSONS: That's fair.

THE COURT: I mean, we have over 8600 shareholders. I don't know whether they're sophisticated or not.

MR. PERSONS: That's fair, Your Honor.

But nonetheless, this type of notice is the industry standard. It is the way that these parties expect to receive notice about all sorts of things, not just Chapter 11. It's not the first time they've received notice in these cases.

You can also note, Your Honor, that, yes, it's interesting that 102 parties filed proofs of claim. That means they received the bar date notice and knew about that. The fact that only 20 of those decided to fill out an opt-out form, frankly, demonstrates that the notice process, which was the same throughout this case was working and parties chose to respond to certain motions and other things that they received and others, they did not.

In addition to that notice, Your Honor, it should be noted, although, not directly as important, considerable

notice about these Chapter 11 cases has already been provided throughout by the debtor in the form of 18 total 8-Ks that have been filed since the failure of the Veverimer drug. Parties have had plenty of notice about this. The fact that Tricida may not have the largest name -- and I know this is a factor is notoriety of the particular case -- this is a public company nonetheless, Your Honor, and I the notoriety of this case with appropriate 8-K filings, a variety of SEC filings that are necessary throughout, continued contact with shareholders as much as possible, demonstrates that once again, this is the correct procedure by which we should be noticing shareholders and that they have received notice.

Despite this, Your Honor, the SEC and the U.S. Trustee want to argue that equity holders in this type of sophisticated investment should be permitted to stick their heads in the sand, ignore their mail and email about an investment they are aware is going through a Chapter 11 liquidation, but nonetheless, benefit by being permitted to continue to potentially threaten direct claims against the debtor's directors and officers until the end of time.

Turn, Your Honor, to, also, the issue with respect to the constitutionality or the ability of this Court to enter a final order. Your Honor, as you heard from the testimony of Mr. Fitzgerald, despite the fact that we believe this is a question of consensual releases, these releases,

the third-party releases, we believe are fair and necessary for this case. This plan represents to a very large extent, a settlement among parties who are insisting on that language. It is supported by 99.1 percent of the creditors.

No equity holder objected to the potential Stern issue. We believe that the releases are consensual and, thus, Stern is not applicable in the first place. Further, Your Honor, and as the SEC notes in its own objection, if Your Honor finds that these releases are integral to the plan, it does not -- the question of constitutionality is no longer at issue.

Your Honor, the uncontroverted testimony from Mr. Fitzgerald is that, indeed, these releases were integral to the plan. They were necessary through a part of, not only the restructuring support agreement that Mr. Fitzgerald described as foundational to this particular case, but, ultimately, they were part of what allowed the debtors to craft a global compromise among, essentially, all major constituents here. That should not be lost on the Court, how far this case has managed to come from where we were when we filed. Those releases were integral to that process and that progress.

They're integral, also, to this plan because of the way the insurance works, Your Honor. Insurance is a potential source of recovery, of course, and it is the reason

that we have the remaining retained causes of action that are limited to the insurance proceeds, the D&O insurance of the debtors. Every potential equity claim that remains outstanding where the opt-out is not -- where that party has not opted out -- where that party has opted out, excuse me, makes it more difficult for the insurance companies to consider whether or not they are willing or would be willing to bring additional dollars to bear s.

As Your Honor has heard from Mr. Newman at the beginning of this case, which we hope to achieve here very shortly, the difference between settling with a few hundred parties that have opted out and the different between settling with eight or 9,000 parties that could potentially bring claims for the rest of time, may make that settlement more difficult, ultimately hurting the creditors in this case, who are the real parties in interest, given where we are with respect to the amount of the value of the assets.

THE COURT: Not the rest of time. There are statute of limitations.

MR. PERSONS: That's true. Until the statutes of limitations have run, Your Honor. This is true.

This structure, this plan, the restructuring support agreement were all created to minimize the leftovers for the liquidating trust assets so the maximum amount could be distributed to creditors as soon as possible. That

particular piece, that ability to obtain certainty was important to the noteholders. It was ultimately important to Patheon and led to their 9019 settlement.

THE COURT: How do I know that?

MR. PERSONS: Sorry?

THE COURT: How do I know that? I didn't hear from Patheon. I didn't hear from the noteholders.

MR. PERSONS: I would argue -- well, I would argue, Your Honor, that with respect to the noteholders, the issue is in the restructuring support agreement and in one of the terms under the restructuring support agreement is that their money is distributed as quickly as possible and that failure to confirm a plan on the important terms, material terms of the restructuring support agreement would allow for the noteholders to walk away from this plan.

You're right, Your Honor, we did not have an opportunity, thankfully, to force them to find out whether or not they would walk away. We don't want one here.

And with respect to Patheon, Your Honor, the settlement is rather clear. I won't put words in their mouth as to what exactly was their thinking, but it is clear that one of the very important provisions or one of the few provisions that actually is in the Patheon settlement is that Patheon's claims will be allowed and it will receive distributions as close to the effective date as possible.

Those revisions are also part of the fourth amended plan, Your Honor.

Ultimately, we understand that this is a difficult issue and it is a dicey issue. It will continue to be until, probably, we get some kind of precedent that allows courts to be slightly more unified. I understand, and it's easy to read from your opinions in Mallinckrodt, Judge Goldblatt's opinions, Judge Gross' opinions, that the concept that releases are different among judges, even within their own jurisdiction is a situation that is uncomfortable; nonetheless, we do believe that this is the kind of situation, Your Honor, where we have created the record. There is no controverting record with respect to the notice that was given, that the notice is appropriate, that the releases are consensual, that they're integral to the plan, and that the notices were received and a number of parties opted out, a larger number than typically do.

Parties were paying attention. Parties opted out. Parties had an opportunity to opt out, and, thus, as consensual releases, we believe Your Honor should approve the third-party releases, as requested by the debtor.

THE COURT: Okay. Thank you, Mr. Persons.

Mr. Fox?

MR. FOX: Good afternoon, Your Honor. May I please the Court? Tim Fox, on behalf of the United States

Trustee.

Mr. Baddley and I discussed earlier and decided I should go first and let the SEC bat cleanup here, so I hope that's acceptable to Your Honor?

THE COURT: That's fine with me, whichever way you want to go.

MR. FOX: Thank you.

So, Your Honor, I want to start here with what is always important with respect to any contested matter and that's where the burden lies. And the debtor and the plan proponent bears the burden of establishing that the plan is appropriate and that the evidence proffered to Your Honor in support of the plan is sufficient for the purposes of the relief sought.

The debtor's documents throughout the case and debtor's counsel's statement at the podium here today, indicate that the shareholders in Class 8 will receive no distribution under the terms of the plan. Further, with respect to the shareholders, Your Honor, at the disclosure statement stage where my Office and the SEC previewed our objections to this prong of the plan, identified to the debtor that the beneficiaries of this third-party release have to do more than just their jobs.

The evidence adduced today did not establish anything other than the directors and officers that are going

to be beneficiaries of the third-party release having acted in a capacity that you would expect any fiduciary of a debtor in a Chapter 11 proceeding to maximize value for stakeholders. There was nothing extraordinary that they did to achieve the result that they are identifying as supporting the third-party release here; rather, they engaged in negotiations and settlement discussions, got resolutions with parties, to the extent they could, and are now seeking a third-party release, with respect to the shareholders, against a group that is not receiving any distribution under the plan.

To the extent Your Honor delves into the Master Mortgage factors or the Zenith factors, the only factor that the debtors can point to as being satisfied in that test is the "identity of interests" prong. There's not a substantial contribution coming from the beneficiaries of the third-party release, as they were just doing their jobs. The negotiations with the other parties, again, are consistent with the duties you would expect of a fiduciary of a Chapter 11 debtor. And as a result, it creates the clear contrast here, where unlike many other Chapter 11 plans that my Office evaluates and that Your Honor has to consider, there is the extraordinary request to bind by silence, a group of stakeholders that have no reason to appear and try to receive anything under the plan because they've been told time and,

again, that there's no money for them, they're not entitled to anything.

To impose the affirmative duty on those parties to send in an opt-out when they're not receiving anything in exchange for their granting of the release is a problem, especially when there isn't consideration on the beneficiary's side to support the release and to establish that it is proper under applicable claw.

Now, I understand the debtor is taking the position that an opt out here results in the release being consensual, especially as it relates to the shareholders who, again, are the key focus here. I think with respect to the Class 5 and 6 creditors, the voting results largely reduced some of the arguments my Office made in its papers as it applies to those classes, but with respect to the shareholders, the opt-out process, again, imposes an affirm obligation on those parties to refrain from having someone else impair their rights and isn't a manifestation of consent that should support determining that the release is consensual, with respect to that group.

In my Office's papers, we cite to concepts found within Indy Downs and Spansion that clearly distinguish situations where you have parties that are not entitled to any distribution under the plan as either being proactively carved out from application of the third-party release or, as

finding that the release is inappropriate as to those parties.

And, Your Honor, the U.S. Trustee would contend, consistent with what we've put forth throughout the case that in seeking to bind the shareholders to a third-party release, again, it goes beyond what is customary and accepted practice in this district to send out an opt-out form to a host of parties that, otherwise, would not have their rights impaired as part of the plan beyond any direct claim to the debtor and extinguishment of their interest. We're not yet discussing some of the ramifications of the Patheon settlement. Mr. Persons did identify some of the linkages there, but I think that helps drew Draw an important line on just what is at stake for the shareholders in the opt-out posture of this third-party release.

If any of those shareholders have a direct claim against Patheon, then potentially, the terms of the third-party release create the result where that claim against Patheon has been released by the provisions of this bankruptcy plan. Now, there may be qualifications and caveats that the parties could present in future litigation in front of another Court, however, they would not have the same level of knowledge as to the contours of the bankruptcy plan and this puts the issue of parties exercising their own rights with respect to nondebtor parties in a posture that

prejudices those third parties with respect to the relief sought by the debtors here today.

Your Honor, I won't get into some of the issues that I understand the SEC will present with respect to the mechanics of the notice and the like, but would incorporate by reference any discussion that happens with respect to that process. And, Your Honor, again, I think in summation, the key distinguishing factor here is that it is very rare for a debtor to seek to bind parties that are fully impaired under the plan and doing so with an opt-out is not sufficient to establish is that the release is consensual as to those parties.

This is not a mass-tort case. This is not Mallinckrodt. And I would point Your Honor to Judge Silverstein's ruling in Boy Scouts, which identified that the release would not be applied to anyone who abstained from voting in that case. And when you have that kind of approach in a mass-tort case where getting to finality on claims is even more important than when dealing with shareholder actions against officers and directors, I think that reasoning should apply here and, you know, be clear that a party that's fully impaired should not be bound by the third-party release when they have not engaged with the process, other than having received a copy of the opt-out.

I did say, "in summation," but one last point is,

you know, Mr. Persons alluded to it, but the discussion as to the plain language of the opt-out form, I strongly believe should not be viewed as prejudicial to my office and the SEC, with respect to this exercise. As Your Honor knows, we didn't think that solicitation should be approved in this form to create this problem and Your Honor should be prepared to address that issue as the SEC and the U.S. Trustee, as well as the Court, trying to ensure that parties received the clearest information possible, but not necessarily establishing that they are foregoing any rights by failing to return that opt-out.

THE COURT: Just so I'm clear --

MR. FOX: Yes?

THE COURT: -- did you say that your issues with regard to the opt-outs, as it relates to Class 5 and 6 are resolved or are you still pressing that objection?

MR. FOX: So, mechanically, the issue is not as stark as it is with respect to the shareholders. I would note that as it relates to those parties, the evidentiary burden may still not be established based on the information provided by Mr. Fitzgerald to support the breadth of the third-party release, however, I would further note that with respect to those parties, there is an Official Committee of Unsecured Creditors that reached a settlement and to the extent the Committee is supportive of a plan and the smaller

pool of affected parties had an opportunity to consult with other stakeholders representing their views, I would be less inclined to say that they should be entirely carved out from application of the release. But again, it remains the debtor's burden to establish the propriety of the third-party release and there are circumstances here that suggest that that burden may not be satisfied.

THE COURT: Okay. Thank you.

MR. FOX: Thank you, Your Honor.

THE COURT: Mr. Baddley?

MR. BADDLEY: Thank you, Your Honor. Again, David Baddley for the SEC.

So, I just want to address kind of these points in no particular order. I'm going to start with the phrase that I have heard a lot, not just in this case, but elsewhere, which is "shareholders have an obligation to read their mail." People have an obligation to read their mail. And I'm not quibbling with that.

I think the question is, what should appropriately be mailed to shareholders? So in a bankruptcy case, I would assume there's a limit on what could be sent that is a solicitation to shareholders. Clearly, notice of a motion to which they are entitled, notice of a bar date, all those sorts of things, yeah, you've got to read it. It's important. It's necessary to the bankruptcy process to work.

A notice that said, Hey, the plan provides any shareholder who doesn't opt out has to donate a hundred dollars to pick a charity, that makes no sense. Why would that be in there?

These releases are much more own that side of the level of necessity and appropriateness than they are a notice of a bar date. The opt-out here is, let's call it what it is, it's a gift. You release your claims against these people who are giving you nothing, in exchange for nothing. That's a gift, okay.

And I feel fairly confident that if that offer were solicited, eye to eye in that direct of a manner, you would have a lot more than 2 percent saying, No, you guys take the release. It's not necessary for the bankruptcy process and they know it. The third-party release standard applies. They say, you know, it needs to be necessary and fair when it's nonconsensual.

So the game now is, well, how do we not make it nonconsensual so we don't have to meet that burden? Okay. We're going to create consent.

If they're that confident that their notice was pristine and that the intention was there, these would be opt-in releases and you would not be getting 97 percent opt-ins. There's evidence on some of this and some of this just requires common sense and I don't think we have to check

common sense at the door. I think we can apply it at real life situations when we're all guessing what happens in this process, but in scenarios like this in which Mr. Fox is describing where it's a deemed rejecting class, where's the common sense conclusion that so many shareholders wanted to just give this away for nothing? That's not a reasonable conclusion to make.

And that kind of ties in with the adequacy of the notice. I am not criticizing -- I mean, the way that things go through nominees is the process for public companies with respect to a lot of corporate actions. It's atypical for something like this, but that's what the process is.

But the proof is in the results that, I don't think you could have such a wide disparity in response, other than maybe drawing the reasonable conclusion that maybe not as many people got it that way. I mean, we're not talking 100 to 150 responses difference, we're talking a factor of 10. That is -- I'm not a statistician, but that is a meaningful difference. That's not just a slight difference where maybe you could argue things. That is no wildly different that I think the only logical conclusion is that something happened with this nominee process where we just weren't getting so many.

But getting back to my first point, it really shouldn't matter because I still don't understand what these

releases are for and if they are as necessary as what I'm hearing and they are as fair as I'm hearing, then get them approved under Continental. And that's what they would have to do -- what is interesting to me is if they did this as a nonconsensual release and they sent notice and no one objected, the Court would still need to consider Continental. The Court has an independent obligation to make sure that a plan and all of its provisions are confirmable. There's nothing in the law that says, Well, no one objected, so I don't have to -- you know, the Third Circuit says we don't even have to pass Continental.

The Court and the debtors have their obligation to satisfy 1129 regardless if anyone objects, so it seems to me that not objecting and not returning an opt-out are the same silence and it doesn't give them a pass from having to meet Continental where, really, when we're in this world here when we're talking about trying to create consent, let's be honest, we're talking, by definition, a release that is not necessary and it's not fair.

And I think that addresses some of what Mr. Persons was saying about Judge Goldblatt's comments in, I think, the Arsenal case. He said, you know, it's like any other plan provision. Well, again, any other plan provision, if there's no objection, it still has to meet 1129. So, I think that was missed there, that not objecting to a plan

provision doesn't automatically grant it, you know, the Court has a role and the debtors have a burden.

The number of 7 percent that was thrown out as a response, I just want to clarify or make sure it's clear that that is the number based on the volume of shares. It's not based on the number, but again, the actual number of shareholders who responded was less than 3 percent, which again, we are supposed to interpret, flipped the other way, that 97 percent of Tricida's shareholders are feeling very generous and just want to give away a gift for nothing.

I want to go through some points in our objections, some of the legal points. And I know Your Honor gets this opting-out consent or, you know, is not opting out consent of silenced consent? This nothing new. I think Your Honor, you know, the difference, I think in Mallinckrodt actually kind of did draw a distinction. It said, Hey, you know, maybe not in every case, but in this case, it seems pretty necessary. There's a reason, you know, this isn't just the, you're donating a hundred dollars to charity. There was a reason why that needed to be solicited in the Court's view and it made findings specific to that in order to allow that debtor -- I wasn't involved in it, but I read the opinion and it seems like there was a lot going on -- was necessary to get a very complex case to a finish line that benefited a lot of people.

That's not here. That's -- this case is so far from that.

One reason why, and I think the debtor admits this, you know, another thing that's talked about sometimes with consent is in this realm of contracts, right, is, is it enough consent to do a binding contract? I think the debtor, in their response, or their supporting memo of law, kind of acknowledged that they're not trying to form a contract under state law, you know, showing offer and acceptance and consideration, which would be lacking. I don't think they can do that.

So, what they're relying upon is binding the shareholders to the plan provision that enjoins their claim and that is why that provision needs to be confirmable. It needs to satisfy 1129, which is incorporating 105 and the standard under Continental. They're asking this Court to issue a permanent injunction under 105 through, by consent, basically, because they didn't return a form.

And I think, you know, there still has to be a basis for getting that sort of relief and it hasn't been articulated. It just seems to be, Well, they didn't read their mail.

One reason, again, that this is not necessary is I think it sort of should be inherent in the structure, if it was necessary, there wouldn't be an opt-out. Every single

shareholder and creditor could have opted out and made this disappear, this release disappear and the plan would still go forward and the liquidation would still happen under the plan, as is.

The reason that they did it this way is because I think they knew that not every shareholder and creditor was going to opt out. Mr. Lee's testimony actually backs that up, that more than 90 percent of them don't opt out, so it's a pretty good guess, pretty good way to go about it when you know kind of what the result is going to be and it relieves you of having to meet what the Third Circuit has said is a very high bar that should only be approved in appropriate circumstances.

But the other reason, the other relevancy of the lack of necessity and it not being integral is assuming that the Court does think that this permanent injunction should be entered and enforced post-confirmation, if necessary, it's not integral to what their plan is and, first of all, I don't think there's been any analysis or evidence to show that the Court actually has jurisdiction over all of these claims that would be part of the injunction. I mean, you heard me read the list of who would be covered by this and there's really very fair enough claims that are carved out. I mean it's a huge number that the Court would have to have jurisdiction over.

And then assuming that the Court has jurisdiction, if it's not integral to the plan, then that is non-core insured or at least under Stern as part of this, and Millennium Lab, as part of this confirmation hearing, you have to independently assess and it's still going to be the types of claims that the Court can only issue proposed findings of fact and conclusions of law and the District Court needs to enter the final injunction on that because they're Article III claims. And, again, how can it be integral if it's optional? That doesn't make any sense.

So, I think from a practical standpoint on what we're really trying to do here, what the debtor is really trying to do here, it does seem pretty clear that it's just to escape a burden of proof through this manufactured concept of consent and putting this burden on shareholders to read an unnecessary piece of mail that does nothing to actually, you know, move the case forward, save a company, save jobs, it's just a solicitation for a gift and it shouldn't be approved, certainly in these circumstances.

But if the Court were to go there, I think the record is pretty clear that there is some pretty serious jurisdictional issues, as well as, you know, what type of order could be entered.

I don't want to dwell on it, but, you know, there was an issue about consenting to the non-core. I think we

hit that in our brief, citing Supreme Court authority, that makes it clear that the consent in the Article I context is pretty -- I think the case law is more developed than that and it does not allow consent by silence. In fact, there's an opinion from the Bankruptcy Court here in Delaware where it kind of went that way and said, you know, failure to object to an exclusive jurisdiction provision in a plan is not the same as consenting to Article I adjudication in the Bankruptcy Court. So, I think that trying to say that failing to opt out is the same as consenting to Article I jurisdiction, I don't think that falls in line with the case law that we cited.

So that's my presentation, and thank you.

THE COURT: Thank you.

Mr. Persons?

MR. PERSONS: Your Honor, I don't think we have any further argument with respect to, you know, specifically, the releases. I did, just because Mr. Fox brought it up, want to talk once again, sort of about the re-noticing thing. And I spoke to it this morning, but the concept is that the debtors will re-notice those parties that have not opted out in Classes 4 -- excuse me -- 5, 6, and 8, in order to add Patheon as a released party.

You did hear the assertion that it's a cost of about $30,000 to the estate, but the parties seem to have

consented to make that happen. We think that's important. We think it's understandable, the argument that Mr. Fox has made and the SEC has made, as well.

And in order to get Patheon their releases against third parties, no matter how Your Honor argues or -- excuse me -- rules, no matter how Your Honor rules with respect to third-party releases today, we would propose to go back to the parties that haven't opted out and make sure that they understand that Patheon is opting out and give them Patheon is now a released party and if they need to opt out.

So a second bite at the apple would be coming to all parties at this point. With that, Your Honor, the debtors rest and ask that you enter the confirmation order -- excuse me, I take that back, Your Honor.

This particular procedure, with respect to the re-noticing, would need to be added to the confirmation order. We have some proposed language. Again, given the nature of what was happening today, we wanted to give Your Honor a chance to rule on things before we went to that. So the confirmation order would need to be updated with that.

We would also expect to work with the SEC, work with the U.S. Trustee's Office with respect to the nature of the notices that we would provide there, and then provide those to the Court when the negotiations on that are done.

So we, conditionally, would like to have the

confirmation entered today, but we do understand that that's an issue and we would work quickly to get that done.

THE COURT: Okay. All right. Thank you.

I'm going to take a recess to get my thoughts together. I'll come back and let you know where I am on all of this. I don't know, hopefully, it won't take too long, but I'm not going to give you a time, so just kind of stay close and I'll let you know when I'm ready. Thank you.

COUNSEL: Thank you, Your Honor.

(Recess taken at 2:04 p.m.)

(Proceedings resumed at 2:34 p.m.)

THE CLERK: Please rise.

THE COURT: Thank you, everybody. You can be seated.

Every time I have to deal with third-party releases or read an opinion from some other judge who's had to deal with third-party release, the issue becomes more and more complicated. I think everybody recognizes that the issue here is a difficult one, but in this case, I'll tell you, broadly speaking, there's two types of releases. There's nonconsensual releases and there's consensual releases.

In the Third Circuit, nonconsensual releases are subject to the requirements set up in Continental and Millennium Holdings. The releases must be fair, reasonable,

necessary, and integral to the proposed plan, which is what I did in the Mallinckrodt case.

Consensual releases, there are different schools of thought. Some courts have held that only an opt-in process is appropriate for approving consensual third-party release, that is, notice has to be sent. The parties being requested have to opt in to the releases, rather than opt out.

I have, in other cases, and some of my colleagues on the bench here, have said that in the appropriate circumstances, an opt-out procedure is also an appropriate way to obtain third-party releases. Most notably, in Mallinckrodt, I held that in the circumstances of that case, opt-out releases were appropriate because of a number of factors that are not present in this case.

So the question is then, what are appropriate circumstances? That can include things like the form of the notice that's sent, the process for sending that notice, and whether the parties solicited were given a full and fair opportunity to respond.

In this case, the notices and the process, I find, were adequate to give an opportunity to respond. Another factor, however, includes who's being asked to give the release through the opt-out process. Generally, where the general unsecured creditors are being asked, the potential

for unfairness is ameliorated because they participate more fully in the case and the process and their interests are represent by an Unsecured Creditors Committee, and that's what happened in this case. And, indeed, the Unsecured Creditors Committee was able to negotiate a settlement with the debtors and other interested parties and are not objecting to the opt-out process, as it relates to their constituency.

The more difficult situation arises when we're talking about the "out of the money" creditors or interest holders who are not entitled to vote on the plan and are told they can't vote and will recover nothing. Common sense would seems to dictate that in that situation, those creditors and interest holders will lose interest in the case.

Indeed, in at least two cases in this court, Indianapolis Downs and Spansion, the Court recognized that in that situation where you have parties who are not entitled to vote, an opt-out process is not a fair and equitable way to proceed. I am of the view that if a non-voting class is being asked to opt out of the releases, the debtors must show that the releases are fair, equitable, necessary, and integral to the proposed plan. That is the only fair and equitable way to proceed.

The debtors here have not met that burden and the only evidence presented on this issue was Mr. Fitzgerald's

testimony through his declaration in which he said, and I'll quote:

"It is my belief that the releases provided by the releasing parties were instrumental in formulating and obtaining support for the plan, which is the result of, among other things, extensive arm's-length negotiation and good faith negotiations and mediation."

That is a self-serving and conclusory statement that tells me nothing. Basically, the debtors are saying the releases are necessary because these third parties asked for them and that, simply, is not enough. I have no evidence that any third party would pull its support from the plan; nobody testified to that effect. I highly doubt they would.

And the plan releases -- so the plan releases, as they relate to Class 6 shareholders' claimants, simply cannot be approved. Simply put, the debtors have not met their burden on this important issue.

And I realize I'm doing something I've never done before in a case, because this is the first time I've been presented with this particular issue on non-voting class members, so be that as it may.

I'm satisfied, however, that the releases provided by the Class 5 and Class 6 creditors are appropriate since they were allowed to vote on the plan. They were represented by the UCC, who's not objecting, and they appear fair and

reasonable, as evidenced by the fact that the UCC has agreed to them.

The debtors have met their requirement under Master Mortgage to prove that those releases were appropriate and, therefore, I will approve the releases, as they relate to Class 5 and 6.

That raises the question about the Patheon release, which was not solicited from anybody. So there will need to be a process to re-solicit that opt-out process, as it relates to Patheon, because that raises a very serious due process issue. And I can't say on the record before me that the unsecured creditors were given an opportunity to make a decision on whether or not they would agree by an opt-out process to those releases for Patheon.

So, at this point, I'm going to deny confirmation of the plan, subject to the parties conferring and maybe coming to a resolution on appropriate language to remove the third-party releases, *vis-a-vis*, Class 8, okay.

Mr. Detweiler?

MR. DETWEILER: May I please the Court? Donald Detweiler of Womble Bond Dickinson on behalf of the Official Committee of Unsecured Creditors.

Thank you, Your Honor, for your time, and also thank you to Judge Walrath for her time.

I only rise just to make a point that based on the

liquidation analysis that was presented today, we need to stop the burn. We need to stop the burn and the issues need to be resolved so that we can get an order to Your Honor to get this plan to go effective and move forward. So I'll just rely upon the liquidation analysis at this point, which suggests that there's only about a hundred-thousand-dollar difference, a hundred-and-fifty-thousand-dollar difference or so between 11 and a 7. We need to stop the burn. We need do get things done, get this plan to go effective, and then allow the creditors to pursue what claims and causes of action they were able to retain through the process.

THE COURT: Well, let me ask, if we're going to re-solicit as to Patheon, the question is, do we need -- the fact that I'm saying I'm not going to approve the releases for Class 8, I don't think requires a re-solicitation of the entire plan.

MR. DETWEILER: Good. I think that's correct.

THE COURT: So all we need to do, and I think the debtors have indicated that it's about $30,000 to re-solicit for Patheon if they choose to do that. They may decide they don't want to, but that's up to them.

MR. DETWEILER: That's right, Your Honor.

And I just rose to make the point that I don't think the re-solicitation is needed, but we need to be efficient in getting these issues resolved, getting this plan

confirmed, and then moving forward with the balance of the case. That's the point. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Persons?

MR. PERSONS: Again, Your Honor, just to follow-up on what Mr. Detweiler said, I would think in the situation where we don't have an opt-out for Class 8, there's no need to re-solicit or re-notice those parties, as we've talked about. That's the significant bulk of the $30,000. There's, you know, a few dozen creditors within Class 5 and 6 who did not choose to opt out, so I don't -- in speaking with the U.S. Trustee yesterday, you know, we had talked about, preliminarily, a timeline whereby the parties would have two to three weeks. We need to work with KCC to just make sure we're giving those people a sufficient amount of time, but theoretically, June 9th -- an opportunity to opt out by June 9th.

In the meantime, Your Honor, we do -- we would like, in light of your comments, I think, likely proceed, if we can get things done to go effective -- excuse me -- to confirm the plan. And then there's a number of other issues that need to be resolved with respect to the liquidating trustee before we can go effective, but I think that's probably the debtor's goal at this point. But the cost to re-solicit in 5 and 6 is relatively minimal. It's a small

number.

THE COURT: Okay. Good deal.

All right. That brings us to -- I guess we've got to go back now to the settlement agreement, the 9019 motion.

Is there anything further I need to --

UNIDENTIFIED SPEAKER: Yes, Your Honor. Just to be clear, so, because I want to make sure we -- the next steps on this is appropriate, if we can propose and obtain consent of the parties appearing to a confirmation order that includes the noticing provisions that Mr. Persons has described, with respect to re-noticing Classes 4 and 5 for the Patheon settlement --

THE COURT: 5 and 6, you mean. Is it 5 and 6?

MR. PERSONS: 5 and 6.

UNIDENTIFIED SPEAKER: Then we'll submit that confirmation order, otherwise, in the form it's been submitted under certification of counsel and that can be entered when the Court gets a chance to review it.

Is that --

THE COURT: That's fine with me, as long as there's no objection from the parties.

UNIDENTIFIED SPEAKER: That'll keep things moving forward and we'll get that done as quickly as possible.

And then the question is, yes, turning to the Patheon settlement, which we would argue, should be approved,

I think Patheon has no objection we've heard to being, you know, included in the release, subject to this noticing and not receiving the opt-out releases from shareholders in Class 8.

THE COURT: All right. Does anyone else wish to be heard on the settlement agreement?

Mr. Fox?

MR. FOX: Good afternoon. May I please the Court? Tim Fox, on behalf of the United States Trustee.

I just want to reserve the rights to review the process that Mr. Persons has articulated in full and get client approval with respect to that. I do appreciate the debtor's representation that they view it as a material issue that needs further process. I just want to make sure I have full client authority before I consent to whatever is later proposed. So I just wanted that clear on the record.

THE COURT: You're talking about the plan, right?

MR. FOX: What was that?

THE COURT: You're talking about the plan, right, the re-solicitation plan?

MR. FOX: The piece of the plan that will address the issue on the Patheon settlement, as it relates to the plan definition of releasing or released party.

THE COURT: Okay.

MR. FOX: And then while I'm at the podium, Your

Honor, I just wanted to thank you for your consideration of the issues and if there's anything further that the parties need with respect to the definition of releasing parties to implement that ruling, to just offer prompt conversation on that front.

THE COURT: All right. Any -- do you have anything with the 9019 motion?

MR. FOX: So, because the issue seems to be inextricably linked, again, I don't -- the U.S. Trustee's objection was not to the settlement, at large. It was to the specific release provision being adopted through a deemed modification to the plan.

If the form of order on the plan provides that there will be additional process and an opportunity for parties to exercise their opt-out rights, consistent -- in Classes 5 and 6, consistent with what was provided during the initial solicitation, in principle, I think that's satisfactory. But again, given the circumstances here, I need to have a further discussion with my client on what that looks like.

THE COURT: We'll I'm not sure there's an issue with my approving the settlement agreement and how that relates to the 9019 motion. I mean, there's still -- there's going to be a re-solicitation for Classes 5 and 6.

UNIDENTIFIED SPEAKER: Re-noticing.

THE COURT: Re-noticing -- sorry -- re-noticing for 5 and 6 and they'll have an opportunity to opt out if they don't want to give their release to Patheon. So I don't see how those two are linked.

MR. FOX: So, I just want to identify that to the extent the settlement is seeking relief that modifies the plan --

THE COURT: Well, I think it does. I think the settlement says we get whatever releases are approved in the plan --

MR. FOX: Right.

THE COURT: -- and that's it.

MR. FOX: Correct.

THE COURT: So, under that circumstance, I don't think there's any connection between approval of the settlement agreement and the re-noticing of the plan.

UNIDENTIFIED SPEAKER: If I may? And I think we can clarify that in the order approving the settlement agreement, which Mr. Fox can look at --

MR. FOX: Okay.

UNIDENTIFIED SPEAKER: -- that just makes clear that they're not asking for releases that are not being approved under the plan.

MR. FOX: Okay. I think that works. Thank you, Your Honor.

THE COURT: All right. So, were you going to submit, then, the 9019 motion under certification?

UNIDENTIFIED SPEAKER: (Indiscernible), yes.

THE COURT: Okay.

MR. BADDLEY: And, Your Honor, David Baddley for the SEC.

Once we modify the plan definition of "releasing parties" I think that will resolve our objection to the 9019 and we'll be able to put something in the order that it's either resolved or denied as moot or something that (indiscernible).

THE COURT: Okay. Great. Thank you.

MR. FOX: Thank you, Your Honor.

UNIDENTIFIED SPEAKER: So with that, we'd ask Your Honor to approve the settlement agreement, pursuant to an agreed order.

THE COURT: I'll approve the settlement agreement, subject to resubmission under certification of counsel.

UNIDENTIFIED SPEAKER: And then that leaves us with two remaining items, one being the assumption of the independent directors agreement, which just provides for his payment through the end of the case and his employment, which I believe Mr. Detweiler filed a reservation of rights asking to make clear that Mr. Fitzgerald will make himself reasonably available, notwithstanding the end of his service

as director to the liquidating trustee. And to at extent he's requested to be made available, that he would not request additional compensation through the end of the time for which he's being paid, which is, I guess, June 23rd, and that is acceptable to Mr. Fitzgerald.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: So with that, I think there is no objection to the assumption.

UNIDENTIFIED SPEAKER: That's acceptable, Your Honor. Thank you.

THE COURT: Okay. I will enter that order. Thank you.

UNIDENTIFIED SPEAKER: And then the last piece we have is the landlord. I think the only reason that that was put on the docket, unless Your Honor has further questions, is because we weren't able to confirm that all parties had signed off on the form of order. Just given the many moving parts, we hadn't heard back from everybody at the time we wanted to put it on file.

We now believe there are no objections to that and would ask Your Honor to approve --

THE COURT: Well, I had a more fundamental question about that one. Isn't that stipulation really a settlement agreement?

UNIDENTIFIED SPEAKER: It is.

THE COURT: And doesn't have a settlement have to be approved under 9019?

UNIDENTIFIED SPEAKER: We believe that that was a resolution of their claim and, therefore, a stipulation was appropriate.

THE COURT: Okay. Anyone have any objection?

(No verbal response)

THE COURT: Then I'm satisfied -- you said you now have sign-off from everybody?

UNIDENTIFIED SPEAKER: I don't believe there are any objections.

THE COURT: Then I will go ahead and enter that order.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

THE COURT: All right. Anything further for today?

(No verbal response)

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

THE COURT: Thank you all very much. I appreciate it. It was interesting issues and the briefing was very good. I appreciate the briefing.

And as I said, every time these third-party releases come up, it's always different, so it's a complicated issue, but thank you all very much for a great job.

We're adjourned.

(Proceedings concluded at 2:51 p.m.)

CERTIFICATION

We 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 our knowledge and ability.

/s/ William J. Garling May 22, 2023
William J. Garling, CET-543
Certified Court Transcriptionist
For Reliable

/s/ Tracey J. Williams May 22, 2023
Tracey J. Williams, CET-914
Certified Court Transcriptionist
For Reliable

/s/ Mary Zajaczkowski May 22, 2023
Mary Zajaczkowski, CET-531
Certified Court Transcriptionist
For Reliable

/s/ Coleen Rand May 22, 2023
Coleen Rand, CET-341
Certified Court Transcriptionist
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