IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE MOTION OF DEBTORS FOR ORDER (A) APPROVING THE DISCLOSURE STATEMENT; (B) ESTABLISHING THE VOTING RECORD DATE, VOTING DEADLINE, AND OTHER DATES; (C) APPROVING PROCEDURES FOR SOLICITING, RECEIVING, AND TABULATING VOTES ON THE PLAN AND FOR FILING OBJECTIONS TO THE PLAN; (D) APPROVING THE MANNER AND FORMS OF NOTICE AND OTHER RELATED DOCUMENTS; AND (E) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") appointed in the chapter 11 cases of Starry Group Holdings, Inc. and its debtor affiliates (collectively, the "Debtors") hereby objects (the "Objection") to the Debtors' motion (the "Motion")[2] seeking approval of the *Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* (the "Disclosure Statement").[3] In support of the Objection, the Committee respectfully states as follows:

[1] The Debtors, along with the last four digits of each Debtor's federal tax identification number, are: Starry Group Holdings, Inc. (9355); Starry, Inc. (9616); Connect Everyone LLC (5896); Starry Installation Corp. (7000); Starry (MA), Inc. (2010); Starry Spectrum LLC (N/A); Testco LLC (5226); Starry Spectrum Holdings LLC (9444); Widmo Holdings LLC (9028); Vibrant Composites Inc. (8431); Starry Foreign Holdings Inc. (3025); and Starry PR Inc. (1214). The Debtors' address is located at 38 Chauncy Street, Suite 200, Boston, Massachusetts 02111.

[2] Docket No. 84.

[3] Docket No. 23.

PRELIMINARY STATEMENT

1. The Committee, formed just short of three weeks ago, has been working feverishly to get its arms around these cases so as to appropriately exercise its fiduciary duty and assure that maximum value for unsecured creditors is preserved. The Committee now finds itself in the midst of a disclosure statement approval process for a proposed chapter 11 plan (the "Proposed Plan")[4] that the Debtors commenced negotiating with their prepetition secured lenders (the "Prepetition Lenders") more than six months ago.[5] What is more, the Debtors are seeking approval of the Disclosure Statement less than three weeks after having filed these cases, while at the same time the Committee—a party statutorily entitled to "participate in the formulation of a plan"[6]—is not in possession of the following basic information:

- Information regarding the Debtors' assets and liabilities, as is required to be set forth in the Debtors' (i) schedules of assets and liabilities and (ii) statements of financial affairs (collectively, the "Schedules and Statements");[7]
- Information regarding the allocation of ownership of the Reorganized Debtors;
- Information regarding the identity of the DIP Lenders;
- Information regarding the identities of the Reorganized Debtors' management team;
- Results of the Debtors' described investigation to determine that the releases under the Proposed Plan are proper and that value was provided in exchange;
- The value of any proceeds of Avoidance Actions;

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4 Docket No. 22. Capitalized terms used but not defined herein have the meanings ascribed to them in the Motion or Proposed Plan, as applicable.

5 *Declaration of Chaitanya Knojia in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 41] (the "First Day Declaration") ¶¶ 11-13.

6 11 U.S.C. § 1103(c)(3).

7 The Debtors have filed a *Motion of Debtors for Entry of Order (I) Extending Time to File Schedules and Statements of Financial Affairs and (II) Granting Related Relief* [Docket No. 159] in which they seek an extension to file Schedules and Statements through and including April 3, 2023, without prejudice to the ability to request additional time.

- The value of any claims or causes of action against the Debtors' current or former directors and officers;

- The schedule listing all of the Debtors' executory contracts and unexpired leases (the "Contracts Schedule"), together with the determination of amounts necessary to cure all monetary defaults thereunder (the "Cure Amounts");[8]

- An estimate of the general unsecured claims pool, including materiality of potential rejection and other claims arising in connection with the Debtors' withdrawal from participation in the Rural Digital Opportunity Fund;[9]

- Projected recovery for holders of General Unsecured Claims;

- The amount and source(s) of committed financing the Debtors will have on emergence and how it compares to the projected additional funding need; and

- The maturity date of the Exit Facility and how the Debtors expect to be able to repay the indebtedness prior to that date, given the limited cash projected to be generated under the Debtors' business plan and the accrual of PIK interest.

2. Despite the foregoing, the Committee continues to work diligently to make informed decisions regarding the best path forward in these cases. It is the Committee's intention to, wherever possible, work with the Debtors and their lenders in good faith to resolve any issues that may arise among the parties. The Committee is, however, compelled to file this objection inasmuch as the Proposed Plan cannot be confirmed as a matter of law, and is supported by a Disclosure Statement that fails to provide voting parties with critical information. The Court should deny approval of the Motion until the defects in the Proposed Plan and Disclosure Statement are addressed.

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[8] In the *Motion of Debtors for Entry of Order (I) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases, (II) Establishing Assumption Procedures, and (III) Granting Related Relief* [Docket No. 44], the proposed assumption procedures contemplated that the Debtors would file the Contracts Schedule on or before March 17 (or as soon as reasonably practicable following entry of the proposed order). The Court entered the *Order (I) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases, (II) Establishing Assumption Procedures, and (III) Granting Related Relief* [Docket No. 127] (the "Assumption Procedures Order") on March 14. The Assumption Procedures Order erroneously states in paragraph 4 that the Debtors have filed the Contracts Schedule (including Cure Amounts).

[9] *See First Day Declaration* ¶ 45.

3. The Debtors commenced these cases with a predetermined strategy for transferring the Debtors' businesses to the Prepetition Lenders. Specifically, the Debtors entered chapter 11 with a restructuring support agreement (the "RSA")[10] outlining the terms of a plan of reorganization negotiated with and for the benefit of the Prepetition Lenders, with no participation from unsecured creditors. Under this one-sided arrangement, unsecured creditors are slated to receive de minimis recoveries that are subject to accepting the Proposed Plan ***and*** granting third-party releases to the Debtors, the Prepetition Lenders, and various other related parties.

4. Despite the fundamental creditor protections mandated by Bankruptcy Code section 1125, the Disclosure Statement fails to provide critical information that unsecured creditors need to evaluate the Proposed Plan and their treatment thereunder. First, the Disclosure Statement provides no factual or legal justifications for the Proposed Plan's releases (including third-party releases), such as what consideration (if any) has been provided in exchange for the releases and what claims are being released. Second, the Disclosure Statement also remains incomplete due to the presence of placeholders in lieu of key information.

5. In addition, the Disclosure Statement should not be approved because the Proposed Plan—on its face—cannot be confirmed in its current form. First, the Proposed Plan contains overly broad and unjustifiable releases, including non-consensual third-party releases, that render the Plan unconfirmable. Second, the Proposed Plan includes a "death trap" that threatens to strip unsecured creditors of any distributions if they do not acquiesce to the Proposed Plan and agree to release their own direct claims against third parties. Third, the Proposed Plan is not feasible because, following confirmation, the Debtors' own financial projections show that

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[10] The RSA is attached to the Disclosure Statement as Exhibit B.

the Debtors' will continue to suffer from the liquidity issues that plagued them prepetition. Given the foregoing, if the Court were to permit the solicitation of the flawed Proposed Plan, its deficiencies could not be remedied prior to confirmation without requiring resolicitation. As such, the Committee submits that the Debtors should be required to amend the Proposed Plan now to correct its infirmities.

6. Finally, if the Court is inclined to allow solicitation to move forward, notwithstanding the deficiencies in the Disclosure Statement and Proposed Plan, the Committee requests that it be allowed to include a letter to unsecured creditors in the solicitation package. The letter will explain the Committee's views regarding the Proposed Plan and summarize the issues discussed herein so that creditors can make an informed vote.

BACKGROUND

I. The Chapter 11 Cases

7. The Debtors commenced these voluntary cases on February 20, 2023 (the "Petition Date"), and the cases are being jointly administered pursuant to Bankruptcy Rule 1015 and Local Rule 1015-1. The Debtors are continuing to operate their businesses and manage their properties as debtors in possession, and no trustee or examiner has been appointed.

8. On March 3, 2022, the United States Trustee appointed the Committee,[11] and on March 8, 2023, the Committee selected the law firm McDermott Will & Emery LLP as its counsel (subject to Court approval). Since being appointed, the Committee and its advisors have been working diligently to get up to speed on the Debtors' affairs, the Disclosure Statement and Proposed Plan, the proposed DIP financing, the sale process, and numerous other issues in these cases.

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[11] Docket No. 99.

II. <u>The Proposed Plan and Disclosure Statement</u>

9. The Debtors filed for chapter 11 with the RSA already in hand, and the RSA is (unsurprisingly) supported by 100% of the Prepetition Lenders. The Proposed Plan embodies the transaction outlined in the RSA. On the Petition Date, the Debtors filed the Proposed Plan and Disclosure Statement and subsequently, on March 20, 2023, the Debtors filed certain exhibits to the Disclosure Statement, including Financial Projections and a Liquidation Analysis.[12]

10. The Proposed Plan and Disclosure Statement were formulated with zero input from the Committee or the creditors that it represents; indeed, those documents were drafted and filed prior to the Committee even being appointed. As one would expect, given the lack of Committee participation, the Proposed Plan is highly prejudicial to the interests of the Committee's constituents. In broad terms, the RSA and Proposed Plan contemplate the consummation of a restructuring that will result in the Prepetition Lenders receiving all of the Debtors' reorganized equity and unsecured creditors receiving either de minimis recoveries or no recoveries whatsoever.

11. The Proposed Plan further provides for broad releases of both claims belonging to the Debtors' estates (the "<u>Debtor Releases</u>")[13] and claims belonging to third parties (the "<u>Third-Party Releases</u>" and, together with the Debtor Releases, the "<u>Releases</u>").[14] Parties benefiting

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[12] Docket. No. 175.

[13] Proposed Plan IX.B. (Releases by the Debtors).

[14] Proposed Plan IX.C. (Third-Party Releases).

from the Releases include a litany of "Related Persons"—countless persons and entities affiliated with the Debtors, the Prepetition Lenders, and the other Released Parties.[15]

12. The Proposed Plan also contains a "death trap" that conditions an unsecured creditor's recovery upon the creditor accepting the Proposed Plan ***and*** agreeing to the Third-Party Release. Any unsecured creditor that votes to reject the Plan or "opts out" of the Third-Party Release is deemed a "Non-Participating GUC Holder."[16] "Each Non-Participating GUC Holder shall receive no consideration on account of its General Unsecured Claims."[17] Worse still, the recoveries to unsecured creditors who do accept the Proposed Plan and agree to the Third-Party Release (and thereby become a "Participating GUC Holder") will be reduced depending on whether or not parties simply comply with the Debtors' and Prepetition Lenders' wishes. Under the Proposed Plan, each Participating GUC Holder can potentially receive its pro rata share of $2,000,000; ***however***, this amount is a cap.[18]

13. The Committee is continuing to review and analyze the Proposed Plan and to seek information from the Debtors, formally and informally, in connection with that process. While the Committee has received certain of the information requested, the Debtors have not provided

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15 "Related Persons" means "collectively with respect to any Person, such Person's predecessors, successors, assigns and present and former Affiliates (whether by operation of law or otherwise) and subsidiaries, and each of their respective current and former officers, directors, principals, employees, shareholders, members (including ex officio members and managing members), managers, managed accounts or funds, management companies, fund advisors, advisory or subcommittee board members, partners, agents, financial advisors, attorneys, accountants, investment bankers, investment advisors, consultants, representatives, and other professionals, in each case acting in such capacity at any time on or after the date of the Restructuring Support Agreement, and any Person claiming by or through any of them, including such Related Persons' respective heirs, executors, estates, servants, and nominees; provided, however, that no Insurer of any Debtor shall constitute a Related Person." Proposed Plan I.A.131.

16 Proposed Plan I.A.102.

17 Proposed Plan III.B.4.

18 *Id.* ("Each Participating GUC Holder shall receive in full and final satisfaction of its General Unsecured Claim, its Pro Rata Share of the greater of (a) $250,000; and (b) the difference between (i) the amount of professional fees of the Debtor Professionals and Committee Professionals set forth in the Initial Budget minus (ii) the actual amount of professional fees and expenses Allowed to such Retained Professionals at any time, subject to a cap of $2,000,000.")

other information that will be necessary for the Committee to fully evaluate the restructuring being proposed by the Debtors. To the extent that the Committee does not timely receive the information necessary to properly evaluate the Proposed Plan and prepare its confirmation case, the Committee reserves the right to seek an extension of the relevant deadlines requested in the Motion.

OBJECTION

I. The Disclosure Statement Does Not Contain Adequate Information.

14. Bankruptcy Code section 1125 prohibits solicitation of votes on a chapter 11 plan prior to court approval of a written disclosure statement containing "adequate information." *See* 11 U.S.C. § 1125(b). "Adequate information" is:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable . . . a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . .

Id. § 1125(a)(1). The fundamental purpose of a disclosure statement is to provide stakeholders with sufficient information to allow them to make an informed decision on whether to vote for or against a proposed plan. *In re Indianapolis Downs, LLC*, 486 B.R. 286, 293 (Bankr. D. Del. 2013).

15. The Third Circuit has called the filing of a disclosure statement with adequate information a "pivotal concept in reorganization procedure under the Code." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988); *see also Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) ("[D]isclosure requirements are crucial to the effective functioning of the federal bankruptcy system."). "The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by

the creditors and the court." *Oneida*, 848 F.2d at 417. Given this reliance, it is impossible to "overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of 'adequate information.'" *Id.*; *see also Ryan*, 81 F.3d at 362 ("Because creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated."). In the present case, the Disclosure Statement fails to satisfy this standard and therefore cannot be approved.

A. The Disclosure Statement Lacks Information Regarding the Releases.

16. The Proposed Plan provides for both Debtor Releases and Third-Party Releases. One of the most obvious omissions in the Disclosure Statement is the absence of information regarding the nature and justification for these Releases. The Disclosure Statement must therefore be amended to include sufficient information regarding the extent of the Releases and the legal and factual bases supporting them.

17. ***First***, disclosure regarding the Releases is insufficient to allow creditors to discern the true scope of the release because the relevant definitions apply to a laundry list of unidentified "Related Persons." Consequently, even something as basic as who is receiving a release is unknown (and unknowable) because the relevant definitions are so overly broad. It is impossible to determine, for example, the identities of accountants and investment bankers of each of the Debtors' affiliates, despite such parties falling within the capacious definition of "Released Party." Unless voting parties are able to determine who, exactly, is being released under the Proposed Plan, they will not be able to make an informed decision regarding plan approval.

18. ***Second***, releases are not appropriate for parties that "have not contributed cash or anything else of a tangible value to the Plan or to creditors nor provided an extraordinary service

that would constitute a substantial contribution to the Plan or case." *In re Wash. Mut., Inc.*, 442 B.R. 314, 348 (Bankr. D. Del. 2011). The Disclosure Statement, however, contains no information regarding any "substantial contribution" made by each Released Party. While containing predictable boilerplate language that the Releases are being given "in exchange for good and valuable consideration," the Disclosure Statement never identifies or explains what consideration was provided. Moreover, the Disclosure Statement's representation that the Releases are being provided in exchange for valuable consideration is inaccurate in that, for many if not most of the Released Parties, it is doubtful that their releases are being provided for ***any*** consideration, let alone "good and valuable consideration." To be sure, certain Released Parties may have provided "good and valuable consideration" in exchange for a release—case in point as to why the consideration being provided should be disclosed.

19. ***Third***, even assuming that each and every one of the Released Parties provided valuable consideration in exchange for a release, without an investigation into the value of the claims being released, no party can determine whether the consideration that was provided is proportional to the value that will be lost as a result of the release. The Debtors have informed the Committee of an investigation into claims against certain of the Released Parties. The Committee is not aware, however, of the progress or outcome (if any) of that investigation. The Disclosure Statement makes no mention of the investigation or the results thereof.

20. Creditors' views regarding the Releases undoubtedly will be shaped by the outcome of any investigation. Therefore, the Debtors' investigation (whether completed or currently underway) should be disclosed. To the extent that colorable causes of action are uncovered, those causes of action (if not released) may serve as a valuable source of recoveries for unsecured creditors. Accordingly, the existence of potential claims is of central importance

to unsecured creditors being asked to vote. Furthermore, to the extent such investigation remains ongoing, the Disclosure Statement should disclose who is conducting the investigation, how they can be considered independent of and not controlled by the Released Parties, when the investigation will conclude, and how and when the conclusions of the investigation will be communicated to voting parties so that they have full information before casting their ballots. Further, because it appears that the Debtors have agreed to provide the Releases prior to any investigation being conducted,[19] the Debtors also should be required to establish and disclose to voting parties that the Debtors agreed to the Releases ***prior*** to investigating possible claims, as well as all bases the Debtors claim justify the investigation as being more than an *ex post* artifice for their proposal.

21. ***Fourth***, but perhaps most critically, with respect to the Third-Party Releases, the Disclosure Statement must explain the Debtors' rationale and justification for conditioning an unsecured creditor's right to receive any recovery from the estates on such creditor's agreement to release its own direct claims against the Released Parties in exchange for no apparent consideration. It is imperative that creditors understand the foregoing before the Debtors are permitted to disseminate a Disclosure Statement encouraging them to accept the Proposed Plan.

22. Before potential claims against a myriad of parties can be released under the Proposed Plan, the Disclosure Statement must be revised to include detailed and specific information regarding the claims being released so that creditors can evaluate the Releases properly. This information should include, at a minimum: (i) each Released Party's relationship to the Debtors, including identifying any transactions between the Released Parties and the Debtors; (ii) the specific claims against the Released Parties considered and investigated by the

[19] RSA, Exhibit 3 (describing "Release and Exculpation").

Debtors; (iii) the legal and factual bases supporting the valuation of the claims; (iv) the specific form and value of the purported consideration each of the Released Parties is providing in exchange for a release; and (v) the legal and the factual bases supporting the Debtors' determination that the releases are in the best interests of the Debtors' estates, are a necessary component of the Proposed Plan, and are otherwise appropriate under applicable law.

23. In sum, these missing pieces of critical information, combined with the Debtors' apparent agreement to the Releases prior to having any information necessary to justify or support them, make it impossible for creditors to assess whether greater recoveries could be available to them if the claims are pursued and the Debtors' proposed Releases are denied as not being in the best interests of the Debtors' estates. Until the Disclosure Statement is amended to provide necessary information regarding the Releases, the Disclosure Statement does not satisfy the adequate information standard. *See, e.g.*, *In re Lower Bucks Hosp.*, 488 B.R. 303, 321 (E.D. Pa. 2013) (affirming that a disclosure statement failed the "adequate information" standard where it did not include a sufficiently detailed assessment of "the merits or value of the potential claims" against the non-debtor released parties, did not explain to stakeholders "whether the benefits of the proposed plan [outweighed] what they would give up by agreeing to the third party release," did not explain what the released parties were giving to the estates in exchange for the releases, and did not explain why the releases were necessary); *Cadle Co. II, Inc. v. PC Liquidation Corp. (In re PC Liquidation Corp.)*, 383 B.R. 856, 865 (E.D.N.Y. 2008) (explaining a disclosure statement should include "specifics" justifying releases and settlements, including "reasons" for resolution and "merits of the potential litigation").

B. The Disclosure Statement Lacks Information Regarding Creditors' Claims.

24. When providing adequate information, nothing is more fundamental than "inform[ing] the average unsecured creditor [of] what it is going to get, when it is going to get it,

and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). Here, however, the Disclosure Statement lacks information regarding creditors' estimated recoveries, as significant pieces of information in the Disclosure Statement remain blank. The Disclosure Statement, for example, does not include information regarding the expected dollar amount of claims in each class nor does it state each class's projected recovery under the Proposed Plan. Instead, the Disclosure Statement has only placeholders where that information should be.[20] Until that information is provided, the Disclosure Statement is facially incomplete and cannot be approved.

II. The Disclosure Statement Describes a Patently Unconfirmable Plan.

25. Courts routinely hold that a disclosure statement describing a patently unconfirmable plan may not be approved, regardless of the amount of disclosure it contains. *See, e.g.*, *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154 (3d Cir. 2012) (explaining that "a bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage that . . . the plan described by the disclosure statement is patently unconfirmable"); *In re Main St. AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) ("It is now well accepted that a court may disapprove of a disclosure statement, even if it provides adequate information about a proposed plan, if the plan could not possibly be confirmed.") (collecting cases); *In re 266 Wash. Assocs.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992) ("A disclosure statement will not be approved where . . . it describes a plan which is fatally flawed and thus incapable of confirmation"). Because the Proposed Plan is patently unconfirmable, moving forward with solicitation would be a waste of the estate's limited resources. *See In re Moshe*, 567 B.R. 438, 447 (Bankr. E.D.N.Y. 2017) ("If a Chapter 11 plan does not comply with

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[20] *See* Disclosure Statement I.B.1.

Bankruptcy Code Section 1129, courts will not subject the estate to the expense of the vote solicitation and plan confirmation process," and it is "incumbent upon the [c]ourt to decline approval of the disclosure statement and prevent diminution of the estate." (quoting *In re Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986))). Approval of the Disclosure Statement should therefore be denied until the problems with the Proposed Plan are remedied.

A. The Releases Render the Proposed Plan Unconfirmable.

26. The previously identified problems with the Releases also render the Proposed Plan patently unconfirmable. With respect to the Debtor Release, "[c]ourts have identified five factors that are relevant in determining whether to approve a debtor's releases." *In re Hercules Offshore, Inc.*, 565 B.R. 732, 755 (Bankr. D. Del. 2016) (citing *Wash. Mut.*, 442 B.R. at 346 (Bankr. D. Del. 2011); *Zenith Elecs.*, 241 B.R. at 110; *In re Exide Techs.*, 303 B.R. 48, 71–72 (Bankr. D. Del. 2003)); *see also* 7 Collier on Bankruptcy ¶ 1123.02[3] (16th ed. 2022) (explaining that "courts have identified five factors to consider when analyzing a plan that proposes settlement of estate claims against nondebtor third parties, such as officers, directors and other insiders").

27. Although the factors "are neither exclusive nor conjunctive requirements," they "provide guidance in the Court's determination of fairness" and "form the foundation for such an analysis, with due consideration of other factors that may be relevant to [the] case." *Hercules Offshore*, 565 B.R. at 755 (quoting *Wash. Mut.*, 442 B.R. at 346–47). These factors require consideration of (1) whether there is an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources; (2) whether there is a substantial contribution to the plan by the non-debtor; (3) the necessity of the release to the reorganization; (4) whether there is an overwhelming acceptance of the plan and release by

creditors and interest holders; and (5) whether the plan provides for payment of all or substantially all of the claims of creditors and interest holders. *Id*.

28. In this case, none of the relevant factors support the Debtor Releases. For example, as discussed above, there is no indication that each and every one of the Released Parties made a substantial contribution that would justify a release. Additionally, the Disclosure Statement and Proposed Plan are silent as to the identity of interest between the Debtors and Released Parties and the necessity of the Debtor Release to the overall reorganization. And the Debtors have already determined that they will be "seeking confirmation pursuant to section 1129(b) of the Bankruptcy Code,"[21] so overwhelming acceptance of the plan and release by creditors and interest holders is evidently not anticipated. One thing is clear, however—the Proposed Plan will ***not*** provide for payment of all or substantially all of the claims of creditors and interest holders. Under these circumstances, the broad Debtor Release is legally unjustified.

29. The Third-Party Release is equally unjustifiable. Third-party releases are highly disfavored. "While the standards vary, it is striking that each circuit that has considered nondebtor releases either rejects them absolutely or approves them only reluctantly." *In re FirstEnergy Sols. Corp.*, 606 B.R. 720, 734 (Bankr. N.D. Ohio 2019). Although the Third Circuit, unlike several other courts, has not adopted a per se rule that non-consensual third-party releases are impermissible, it has made clear that such releases are proper only in "extraordinary" cases. *In re Cont'l Airlines*, 203 F.3d 203, 212 (3d Cir. 2000) (recognizing that third-party releases are valid only in "extraordinary" circumstances); *see also In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001) (interpreting *Continental*'s holding on non-debtor releases to mean that "limiting the liability of nondebtor parties is a rare thing that

[21] Disclosure Statement I.B.1.

should not be considered absent a showing of exceptional circumstances in which several key factors are present").

30. The Debtors, recognizing that this case is hardly an "exceptional" one, attempt to sidestep the exacting requirements for imposing non-consensual third-party releases by giving creditors the ability to opt out of the Third-Party Release.[22] However, an opt-out mechanism cannot transform a decidedly non-consensual release into a consensual one.

31. This Court and many others have properly refused to infer consent based upon a party's failure to opt out of a third-party release. *In re Emerge Energy Servs. LP*, No. 19-11563 (KBO), 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (finding that a "party's receipt of a notice imposing an artificial opt-out requirement, the recipient's ***possible*** understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify" as consent) (emphasis in original); *see also In re Chassix Holdings, Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015) (cautioning that a "Bankruptcy Court should be wary of imposing third party releases on creditors . . . who have not affirmatively manifested their consent to them"); *Zenith Elecs.*, 241 B.R. at 111 (third-party release "cannot be accomplished without the affirmative agreement of the creditor affected"). Indeed, an "opt out" mechanism is "little more than a Court-endorsed trap for the careless or inattentive creditor." *Chassix*, 533 B.R. at 79; *Emerge Energy*, 2019 WL 7634308, at *18 (inaction should not be deemed consent because "[c]arelessness, inattentiveness, or mistake are three reasonable alternative explanations"). Thus, "implying a 'consent' to the third party releases based on the creditors' inaction, is simply not

[22] Disclosure Statement V.F. (describing the requirement for different creditor groups to "opt out" of the Third-Party Release).

realistic or fair, and would stretch the meaning of 'consent' beyond the breaking point." *Chassix*, 533 B.R. at 81.

32. Because the Third-Party Release is non-consensual (notwithstanding the opt-out), and because this case is not an "extraordinary" case that would warrant a non-consensual third-party release under *Continental*, the Third-Party Release is legally unjustified. Thus, both the Debtor Release and Third-Party Release render the Proposed Plan unconfirmable.

B. The Death Trap Renders the Proposed Plan Unconfirmable.

33. The Proposed Plan's "death trap" mechanics unfairly discriminate against similarly situated unsecured creditors, prevent creditors from asserting their legal rights, and create a Catch-22 intended to preclude the Committee from fulfilling its fiduciary duties. This attempt to buy votes, penalize creditors for exercising their rights, and prevent the Committee from meaningfully exercising its fiduciary duties further renders the Proposed Plan patently unconfirmable.

34. "There is no authority in the Bankruptcy Code for discriminating against classes who vote against a plan of reorganization." *In re MCorp Financial, Inc.*, 137 B.R. 219, 236 (Bankr. S.D. Tex. 1992) (citing *In re Allegheny Intern., Inc.*, 118 B.R. 282, 304 (Bankr. W.D. Pa. 1990)). To be sure, courts have approved death-trap provisions in plans. *In re MPM Silicones, LLC*, No. 14-22503-rdd, 2014 WL 4637175, at *9 (Bankr. S.D.N.Y. Sep. 17, 2014) ("Such fish-or-cut-bait, death-trap, or toggle provisions have long been customary in Chapter 11 plans.") (citing examples). The Proposed Plan's death trap, however, is fundamentally different from the death traps that courts customarily approve.

35. Approved death traps are based upon how the class votes as a whole (i.e., treatment of entire class is the same irrespective of whether or not the class, as a whole, accepts

or rejects the plan). Here, there is not a class-wide death trap but individual death traps that punish creditors who vote no and refuse to release their own direct claims. Such a structure is at odds with Bankruptcy Code section 1123(a)(4)'s requirement that a plan "provide the same treatment for each claim or interest of a particular class" and is a clear attempt to buy votes. *See In re Affordable Auto Repair, Inc.*, 2020 WL 6991012, at *2 (Bankr. C.D. Cal. Sept. 2, 2020) (noting that while courts have approved class-wide death traps, an individual death trap may violate the Bankruptcy Code's equal treatment requirement and constitute "a structure intended and designed to facilitate vote-buying through impermissible coercion rising to the level of bad faith on the Debtor's part"); James M. Lawniczak, 1 Collier Lending Institutions and the Bankruptcy Code ¶ 7.06[4] (2d ed. 2022) ("More troublesome, and probably a violation of the equal treatment provision of section 1123(a)(4), is the concept that individual creditors in a class who vote yes will receive more.").

36. Further, there is no legitimate justification for the Proposed Plan's retaliatory death trap. Normally, "[t]here is a clear rationale behind such [death-trap] provisions, as stated by the court in *In re Zenith Electrics Corporation*: 'If the class accepts, the plan proponent is saved the expense and uncertainty of a cramdown fight,' which is in keeping with the Bankruptcy Code's overall policy of fostering consensual plans of reorganization." *MPM Silicones*, 2014 WL 4637175, at *9 (quoting 241 B.R. 92, 105 (Bankr. D. Del. 1998)). Under the Proposed Plan, however, an ***individual creditor*** (as opposed to the ***entire class***) that accepts the Proposed Plan is rewarded with better treatment even if the class rejects the Proposed Plan. Consequently, the rationale behind a death trap no longer pertains. "Such a structure would not appear on its face to have a valid and legitimate business purpose: even though cramdown expense is not avoided because [the class] as a whole voted to reject the plan, the minority of

[class] members who voted to accept the plan nevertheless reap rewards through superior treatment of their claims." *Affordable Auto Repair*, 2020 WL 6991012, at *2.

37. In addition to effectively preventing unsecured creditors from exercising their right to vote on the Proposed Plan as they see fit, the mechanics governing distributions to unsecured creditors were devised to deter the Committee from fulfilling its duties. An official creditors committee is a statutory fiduciary for all of a debtor's unsecured creditors. *In re HH Liquidation*, LLC, 571 B.R. 97, 102 (Bankr. D. Del. 2017) (noting that "actions by the Committee are taken as a fiduciary and representative for the creditor body" (quoting *In re Big M, Inc.*, No. 13-10233 DHS, 2013 WL 1681489, at *1 (Bankr. D.N.J. Apr. 17, 2013))). By directly reducing unsecured creditor recoveries based upon the fees incurred by the Committee's and Debtors' professionals, the Proposed Plan plainly aims to hamstring the Committee in its efforts to carry out the duties with which it is charged. If the Committee opposes the Proposed Plan or any other relief the Debtors are seeking, unsecured creditor recoveries are necessarily reduced. If the Committee does not object, it risks violating its fiduciary obligations to creditors. Either way, unsecured creditors will be adversely affected.

38. In *In re American Capital Equipment, LLC*, 688 F.3d 145 (3d Cir. 2012), the Third Circuit affirmed a decision finding a plan patently unconfirmable where it contained what the court described as an "inherent conflict of interest under circumstances that [were] especially concerning." *Id.* at 158 (citation omitted). The plan in that case purported to resolve a debtor's historic asbestos liability through a claims resolution process funded by a twenty percent surcharge on those asbestos claimants who opted in to the plan's claim process. *Id.* at 151. The surcharge served as the sole source of funding under the plan. *Id*. Thus, the debtor could pay creditors under the plan only if asbestos claimants entered into settlements against the estate and

paid the surcharge. On the other hand, under its prepetition insurance contracts, the debtor was obligated to cooperate in defending against the asbestos claims (thereby minimizing the amount of allowed claims as well as the surcharge). *Id.* at 149. The Third Circuit agreed with the bankruptcy court's conclusion that the plan established a system under which the debtor would be "financially incentivized to sabotage its own defense" and concluded that the plan was proposed in bad faith. *Id*. at 158–61.

39. As described, similar to the plan in *American Capital*, the Proposed Plan financially incentivizes creditors to sabotage their own defense and creates an inherent conflict. Thus, it necessarily was not proposed in good faith, inasmuch as the unsecured recovery mechanism here is plainly inconsistent with the provisions of Bankruptcy Code sections 1102 and 1103. The Court should not countenance such an abuse of the plan process.

40. The Proposed Plan unfairly discriminates against creditors in the same class, interferes with those creditors' freedom to choose how to vote, and subjugates the Committee's exercise of its fiduciary duties. In addition to violating Bankruptcy Code section 1123(a)(4)'s equal treatment requirement, the Proposed Plan's coerciveness epitomizes bad faith, which further precludes confirmation of the Proposed Plan. 11 U.S.C. § 1129(a)(3) (requiring a plan to be "proposed in good faith").

C. The Proposed Plan Is Not Feasible.

41. A plan proponent must demonstrate that confirmation of the plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan." 11 U.S.C. § 1129(a)(11). As the Third Circuit explained, to satisfy this requirement, the plan must propose "a realistic and workable framework" and must be "reasonably likely to succeed on its own terms without a need for

further reorganization on the debtor's part." *Am. Capital Equip.*, 688 F.3d at 156 (affirming at the disclosure stage that the plan was "not reasonably likely to succeed" and that "the feasibility issue render[ed] the [p]lan to be patently unconfirmable pursuant to § 1129(a)(11)").

42. The Debtors have been hemorrhaging money for several years, having lost $166.5 million in 2021 and $215 million in 2022.[23] Notwithstanding these tremendous historical losses, the Debtors assert in a single, conclusory sentence that "the projected level of Cash flow is sufficient to satisfy the Debtors' obligations under the Plan, to satisfy all of the Reorganized Debtors' future debt and debt related interest cost, research and development, capital expenditure and other obligations during this period."[24] Yet, the Financial Projections, which are supposed to corroborate this view, instead call this conclusion into question. The Financial Projections reveal that the Reorganized Debtors' expenses will continue to far outpace their revenue for the foreseeable future, with adjusted EBITDA of negative $7.9 million in 2023 immediately following emergence and negative $2.7 million the following year. The Reorganized Debtors expect to be cash flow negative through the third fiscal quarter of 2025, burning $8.6 million of cash in 2024 and $1.9 million in 2025.[25]

43. Moreover, the Debtors' go-forward projections themselves raise significant questions. Specifically, the Debtors state that interest expense, which will be paid in kind, is based upon a pro forma $99.3 million Exit Term Loan Facility, with $80.3 million expected to be drawn at emergence and $19 million reserved as a delayed draw facility. Notably, the Financial Projections appear to anticipate a need for that entire $19 million of availability. However, there is no indication that there is an agreement by the DIP Lenders to provide that level of

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[23] *See* Disclosure Statement, Article III.

[24] Disclosure Statement, VII.B.1.c.

[25] According to the Financial Projections, cash flow comprises cash from operations less capital expenditures.

incremental funding at exit. Relatedly, the Financial Projections and other available information fail to show how the Debtors, with projected adjusted EBITDA of $29.7 million at the end of 2028, will ever satisfy a $100 million exit financing facility when it matures (at which point, given the PIK interest, the indebtedness under the facility will far exceed the initial $100 million amount).

44. In short, the Financial Projections point towards the Reorganized Debtors continuing to suffer from limited liquidity following emergence from chapter 11, which will undoubtedly threaten their ability to sustain their operations. Under these circumstances, it is impossible to conclude that confirmation of the Proposed Plan "is not likely to be followed by the liquidation, or the need for further financial reorganization," making the Proposed Plan unconfirmable.

III. A Letter From the Committee Should Be Included in the Solicitation Package.

45. If the Court determines the Disclosure Statement should be approved (despite the issues discussed above), the Committee also requests that it be permitted to include a letter (the "Committee Letter") in the Debtors' solicitation materials. The Committee Letter would contain a recommendation that voting parties vote to reject the Proposed Plan and a more fulsome (and plain English) explanation of the Releases (which the Committee objects to in their current form). The inclusion of the Committee Letter is consistent with the Bankruptcy Code's expectation that a committee will "advise those represented by such committee of such committee's determinations as to any plan formulated." 11 U.S.C. § 1103(c)(3). Keeping with this provision, courts have frequently authorized committees to include such letters in solicitation materials. *See, e.g.*, *In re Motor Coach Indus., Inc.*, No. 08-12136 (Bankr. D. Del. 2008) (allowing creditors' committee to include in solicitation package a letter outlining the committee's issues with the proposed plan); *Cent. Transp., Inc. v. Roberto (In re Tucker Freight*

Lines, Inc.), 62 B.R. 213, 216 n.1 (Bankr. W.D. Mich. 1986) (noting it is "traditionally allowed" for a creditors' committee opposed to a disclosure statement to include in the solicitation package a letter recommending that creditors vote against acceptance of the proposed plan).

46. The Committee respectfully requests that the Court authorize and direct the Debtors to include the Committee Letter in the solicitation materials so that it is visible to and easily accessible to voting parties. In addition, the Committee hopes to engage in further discussions with the Debtors regarding the Proposed Plan and, as such, the Committee's views on the Proposed Plan may change prior to the voting deadline. The Committee therefore respectfully requests that the Court authorize and direct the Debtors to post a copy of the Committee Letter and any update(s) thereto on its website at https://www.kccllc.net/Starry.

RESERVATION OF RIGHTS

47. The Committee continues to review the Disclosure Statement and Proposed Plan and to conduct diligence regarding all matters pertaining to them. The Committee reserves the right to amend, modify, or supplement the Objection for any reason and raise additional objections at any hearing (and at any subsequent hearing). The Committee also reserves all of its rights to object to confirmation of the Proposed Plan, and approval of any transaction on any grounds.

CONCLUSION

WHEREFORE, for the reasons stated, the Committee respectfully requests that the Court: (i) deny approval of the Disclosure Statement at this time; or, alternatively, (ii) to the extent the Court determines approval of the Disclosure Statement is warranted, (x) condition such approval on, and delay solicitation of the Proposed Plan pending, the filing of the Schedules and Statements and the revision of the Disclosure Statement and Proposed Plan as described in the Objection, and (y) direct the Debtors to include the Committee Letter in the solicitation package so that it is visible to and easily accessible by voting creditors; and (iii) grant the Committee such other and further relief as the Court deems just and proper.

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Dated: March 23, 2023
Wilmington, Delaware

MCDERMOTT WILL & EMERY LLP

/s/ David R. Hurst

David R. Hurst (I.D. No. 3743)
The Nemours Building
1007 North Orange Street, 10th Floor
Wilmington, DE 19801
Telephone: (302) 485-3900
Fax: (302) 351-8711
E-mail: dhurst@mwe.com

- *and* -

Darren Azman (admitted *pro hac vice*)
Kristin Going (admitted *pro hac vice*)
Stacy A. Lutkus (admitted *pro hac vice*)
Natalie Rowles (admitted *pro hac vice*)
One Vanderbilt Avenue
New York, NY 10017-3852
Telephone: (212) 547-5400
Fax: (212) 547-5444
E-mail: dazman@mwe.com
kgoing@mwe.com
salutkus@mwe.com
rowles@mwe.com

Proposed Counsel to the Official Committee of Unsecured Creditors