IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Alto Maipo Delaware LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 21-11507 (KBO) (Jointly Administered) **Hearing Date: April 5, 2022 at 10:00 a.m.** **Obj. Deadline: March 29, 2022 at 4:00 p.m.**

UNITED STATES TRUSTEE'S OBJECTION TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER APPROVING DISCLOSURE STATEMENT, ESTABLISHING SOLICITATION AND VOTING PROCEDURES, AND GRANTING RELATED RELIEF

Andrew R. Vara, United States Trustee for Region 3 ("U.S. Trustee"), by and through his undersigned attorney, hereby files this objection to the Debtors' Motion for Entry of an Order (I) Approving the Disclosure Statement (the "Disclosure Statement")[D.I. 402]; (II) Approving Solicitation and Voting Procedures, Including (A) Fixing the Record Date, (B) Approving the Solicitation Packages and Procedures for Distribution, (C) Approving the Form of Ballots and Establishing Procedures for Voting, and (D) Approving Procedures for Vote Tabulation; (III) Scheduling a Confirmation Hearing and Establishing Notice and Objection Procedures; and (IV) Granting Related Relief (the "Motion")[D.I. 383], and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Debtors' proposed Disclosure Statement should not be approved because it does not provide adequate disclosure as to who will be giving third-party releases, who will be receiving such releases, and what claims will be released. The Plan imposes non-consensual

[1] The Debtors, along with the last four digits of each Debtor's tax identification number in the jurisdiction in which it operates, are: Alto Maipo SpA (761-2) (Chile) and Alto Maipo Delaware LLC (1916) (Delaware). The location of the corporate headquarters and the service address for Alto Maipo SpA is Los Conquistadores 1730, Piso 10, Santiago, Chile.

third-party releases on numerous non-debtor parties, and a related parties clause greatly expands the universe of those who will be forced to release their direct claims against non-debtors to at least 32 categories of persons and entities that are related in some fashion to each party deemed to give a release. Those categories include such broad and vaguely defined ones as "agents," "consultants," "representatives" and "other professionals" of releasing parties.

2. The Disclosure Statement also fails to adequately disclose, or explain why, the Debtors are giving two sets of releases benefitting the same Released Parties:[2] Article 9.3(a) of the Plan is entitled "Releases by Debtors," but Article 9.3(c), entitled "Releases by Holders of Claims and Interests," also includes releases by the Debtors. Nor is there disclosure as to why the Debtors will be releasing the DIP Lenders and Strabag, if they vote to accept the Plan, or the nature and value of the Debtors' claims against such parties that are being released, or what (if anything) the Debtors are receiving in exchange.

3. The Disclosure Statement further should not be approved because the proposed Plan is not confirmable due to the scope of the third-party releases, the Debtor Releases and the parties receiving exculpation. With respect to the third-party releases, the Plan extinguishes direct claims against non-debtor parties held by other non-debtor parties without their affirmative consent, including claims held by, (i) unimpaired creditors, (ii) creditors in voting classes who do not return a ballot, (iii) creditors who vote to reject the Plan but overlook the opt-out box on the ballot, and (iv) by parties who are merely related to Releasing Parties. Not only does the Motion fail to include any method by which the Debtors will obtain affirmative consent from such parties to give releases, but the Debtors will not even provide unimpaired creditors and related parties with a way to opt-out of such releases. In addition, most of the related parties will not

[2] Any capitalized terms not defined herein shall have the meaning ascribed to them in the Plan.

even receive notice that the Plan will strip them of their direct claims against non-debtors. This is because the vast majority of the related parties are not themselves creditors or equity holders of the Debtors. They include, by way of example, all current and former employees of all creditors who are Releasing Parties, and all current and former employees of all *affiliates* of all creditors who are Releasing Parties.

4. The Exculpation provisions of the Plan also make the Plan non-confirmable because it is overly broad in terms of the parties to be exculpated, and the temporal scope**.**

5. The U.S. Trustee further objects to certain other aspects of the Disclosure Statement as not including sufficient information with respect to how the Plan satisfies the absolute priority rule requiring that senior classes of claims be fully satisfied before distributions may be made to the junior classes or interests retained by equity holders. In particular, the Plan proposes that unsecured creditors will receive no distribution, while equity will be cancelled and reissued to AES Andes, who holds 93% of the existing equity. To the extent AES Andes is contributing "new value" in consideration of receiving the new equity, the Debtors have not adequately described how the proposed new value contribution constitutes sufficient consideration in exchange for the new equity,[3] as further detailed below.

6. For the reasons set forth below, the Disclosure Statement should not be approved, and the Motion should be denied. [4]

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[3] The Disclosure Statement indicates that AES Andes as DIP Lender shall receive the New Common Equity in consideration for, *inter alia,* certain deferrals from the Sponsor, an increase in the size of the Amended & Restated Secured Exit Financing Facility; and the impairment of the DIP Claims.

[4] The U.S. Trustee's counsel has provided comments to Debtors' counsel regarding proposed changes to the form of order approving the Disclosure Statement and the solicitation procedures and related notices, other than those addressed in this Objection, and anticipates that a resolution on those items will be reached before the hearing. The U.S. Trustee reserves the right to supplement this Objection, or to assert additional objections at the hearing on the Motion, if such modifications are not made. The U.S. Trustee also preserves, reserves and retains any and all rights, duties, obligations and

JURISDICTION

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), this Court has jurisdiction to hear and determine this Objection.

8. Pursuant to 28 U.S.C. § 586(a)(3), the U. S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U. S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (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 is charged with "monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under sections 1125 and 1128 of such title, comments with respect to such plans and disclosure statements." 28 U.S.C. § 586(a)(3)(B).

10. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the issues raised in this Objection.

FACTUAL BACKGROUND

11. On November 17, 2021 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors have continued in possession

remedies found at law, equity or otherwise to, *inter alia*, revise, augment and or modify this Objection, take discovery, and object to Plan confirmation.

of their properties and the operation of their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

12. On January 31, 2022, the U.S. Trustee appointed an official committee of unsecured creditors (the "Committee")[D.I. 231].

13. On February 28, 2022, the Debtors filed the Plan [D.I. 313] and Disclosure Statement [D.I. 314]. On March 22, 2022, the Debtors filed revised versions of the Plan [D.I. 401] and Disclosure Statement [D.I. 402].

14. On March 15, 2022, the Debtors filed the Motion to approve the Disclosure Statement and Solicitation Procedures [D.I. 369].

The Third-Party Release Provisions

15. Plan Article 9.3(c), titled "Release by Holders of Claims and Interests," provides:

> RELEASES BY HOLDERS OF CLAIMS AND INTERESTS. AS OF THE EFFECTIVE DATE, TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW, ***EACH OF THE RELEASING PARTIES (REGARDLESS OF WHETHER A RELEASING PARTY IS A RELEASED PARTY)*** SHALL BE DEEMED TO HAVE CONCLUSIVELY, ABSOLUTELY, UNCONDITIONALLY, IRREVOCABLY, AND FOREVER, ***RELEASED AND DISCHARGED EACH DEBTOR, REORGANIZED DEBTOR AND EACH OTHER RELEASED PARTY FROM ANY AND ALL CLAIMS, INTERESTS, OBLIGATIONS, RIGHTS, SUITS, DAMAGES, CAUSES OF ACTION,*** REMEDIES, AND LIABILITIES WHATSOEVER, WHETHER KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, LIQUIDATED OR UNLIQUIDATED, CONTINGENT OR FIXED, MATURED OR UNMATURED, EXISTING OR HEREINAFTER ARISING, IN LAW, AT EQUITY, OR OTHERWISE, INCLUDING ANY DERIVATIVE CLAIMS, ASSERTED OR ASSERTABLE ON BEHALF OF ANY OF THE DEBTORS, THE REORGANIZED DEBTORS, EACH OTHER RELEASING PARTY OR THEIR 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***, THE BUSINESS OPERATIONS OF THE DEBTORS, ACTIONS TAKEN BY THE DEBTORS' BOARD OF DIRECTORS, THE PURCHASE, SALE, OR RESCISSION OF THE PURCHASE OR SALE OF ANY SECURITY OF

> THE DEBTORS OR THE REORGANIZED DEBTORS, THE SUBJECT MATTER OF, OR THE TRANSACTIONS OR EVENTS GIVING RISE TO, ANY CLAIM OR INTEREST THAT IS TREATED IN THE PLAN, THE BUSINESS OR CONTRACTUAL ARRANGEMENTS BETWEEN ANY DEBTOR AND ANY RELEASED PARTY, THE DEBTORS' IN- OR OUT-OF-COURT RESTRUCTURING EFFORTS, INTERCOMPANY TRANSACTIONS, ENTRY INTO THE CHAPTER 11 CASES, THE FORMULATION, PREPARATION, DISSEMINATION, OR NEGOTIATION OF THE DISCLOSURE STATEMENT, THE PLAN, THE PLAN SUPPLEMENT, THE DIP CREDIT FACILITY DOCUMENTS, THE NEW AND A&R OBLIGATIONS DOCUMENTS, OR OTHER DOCUMENTS OR ANY OTHER ACT OR OMISSION, TRANSACTION, AGREEMENT, EVENT, OR OTHER OCCURRENCE TAKING PLACE ON OR BEFORE THE EFFECTIVE DATE, OTHER THAN CLAIMS OR LIABILITIES ARISING FROM ANY ACT OR OMISSION OF A RELEASED PARTY THAT CONSTITUTES FRAUD, WILLFUL MISCONDUCT OR GROSS NEGLIGENCE; PROVIDED THAT THE FOREGOING RELEASE SHALL NOT APPLY TO ANY EXPRESS CONTRACTUAL OR FINANCIAL OBLIGATIONS OR ANY RIGHT OR OBLIGATION ARISING UNDER OR THAT IS PART OF THE PLAN OR ANY AGREEMENTS (INCLUDING THOSE SET FORTH IN THE PLAN SUPPLEMENT) ENTERED INTO PURSUANT TO, IN CONNECTION WITH, OR CONTEMPLATED BY THE PLAN, AND ANY RIGHT TO ENFORCE THE PLAN AND CONFIRMATION ORDER IS NOT SO RELEASED.

Plan, Art. 9.3(c) (emphasis added).

15. "**Released Parties**" is defined in Article 1.116 of the Plan as follows:

> "Released Parties" means, collectively, and in each case in its capacity as such: (a) ***the Company;***[5] ***(b) the Reorganized Company, and each direct or indirect subsidiary of the Company or Reorganized Company***; (c) Norgener Renovables S.p.A.; (d) AES Andes; (e) Strabag, in its capacity as shareholder and subordinated lender; (f) the DIP Agent and, if separate, the DIP Lender; (g) the Administrative Agent and the Collateral Agents (in each case, as defined in the Common Terms Agreement); (h) each Consenting Creditor; ***(i) each current and former Affiliate of each Entity in clause (a) through (h); and (j) each Related Party of each Entity in clause (a) through (i)***; ***provided that any holder of a Claim or Interest that opts out of the releases shall not be a "Released Party" and any Related Party of such person or Entity that opts out of the releases (other than the Company and the Reorganized Company)***

[5] Company is defined in Article 1.41 of the Plan as follows: **"Company"** means, together, Alto Maipo and Alto Maipo Delaware.

shall also not be a "Released Party." For the avoidance of doubt, no claims or causes of action of either of the Debtors against (x) Constructora Nuevo Maipo S.A., (y) Hochtief Solutions AG, or (z) Cooperativa Muratori & Cementisti – C.M.C. di Ravenna, nor any of the respective Affiliates of each entity listed in clauses (x) through (z), shall be released pursuant to this Plan.

Plan, Art. 1.116 (emphasis added).

16. **"Related Party"** is defined in Article 1.115 of the Plan as follows:

"Related Party" means, collectively, current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, participants, successors, assigns, subsidiaries, affiliates, managed accounts or funds, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, heirs, executors, and assigns, and other professionals, in each case solely in their capacities as such, together with their respective past and present directors, officers, shareholders, partners, members, employees, agents, attorneys, representatives, heirs, executors and assigns, in each case solely in their capacities as such.

Plan, Art. 1.115.

17. "**Releasing Parties**" is defined in Article 1.117 of the Plan as follows:

Releasing Parties" means, collectively, and in each case in its capacity as such: ***(a) the Company; (b) the Reorganized Company, and each direct or indirect subsidiary of the Company or Reorganized Company;*** (c) Norgener Renovables S.p.A.; (d) AES Andes; (e) Strabag, in its capacity as shareholder and subordinated lender; (f) the DIP Agent and each DIP Lender; (g) the Administrative Agent and the Collateral Agents (in each case as defined in the Common Terms Agreement); (h) each Consenting Creditor; (i) ***all holders of Claims or Interests*** that are eligible to vote to accept or reject the Plan ***that vote to accept for any Class, (j) all holders of Claims or Interests that are deemed to accept the Plan; (k) all holders of Claims or Interests that*** are eligible to vote to accept or reject the Plan ***that abstain from voting on the Plan*** for all Classes in which they are eligible to vote ***and who do not affirmatively opt out of the releases*** provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided in the Plan; (l) ***all holders of Claims or Interests*** that are eligible to vote to accept or reject the Plan ***that vote to reject the Plan*** for all Classes in which they are eligible to vote ***and who do not affirmatively opt out of the*** releases provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided in the Plan; (***m) each current and former Affiliate of each***

Entity in clause (a) through (l), and (n) each Related Party of each Entity in clause (a) through (m).

Plan, Art. 1.117 (emphasis added).

18. As used in this Objection, "**Related Releasing Parties**" cover all parties in subsection (m) and (n) of the definition of Releasing Parties.

19. The definition of Releasing Parties includes two levels of Related Releasing Parties:

a. all current and former affiliates of each of the Releasing Parties set forth in subsection (a) through (l) of the definition of Releasing Parties; and

b. each Related Party of each of the Releasing Parties set forth in subsection (a) through (m) of the definition of Releasing Parties, which includes the Related Parties of all current and former affiliates of each of the Releasing Parties.

The Debtor Releases

20. Plan Article 9.3(a), titled "Releases by the Debtors," provides:

> (a) RELEASES BY THE DEBTORS. PURSUANT TO SECTION 1123(B) OF THE BANKRUPTCY CODE, AND EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THE PLAN, FOR GOOD AND VALUABLE CONSIDERATION, INCLUDING THE EFFORTS OF THE RELEASED PARTIES TO FACILITATE THE EXPEDITIOUS REORGANIZATION OF THE DEBTORS AND THE IMPLEMENTATION OF THE RESTRUCTURING CONTEMPLATED BY THE PLAN, PURSUANT TO THE CONFIRMATION ORDER, THE ADEQUACY OF WHICH IS HEREBY CONFIRMED, AND ON AND AFTER THE EFFECTIVE DATE, ***EACH RELEASED PARTY SHALL BE DEEMED FOREVER RELEASED AND DISCHARGED BY EACH AND ALL OF THE DEBTORS, THE REORGANIZED DEBTORS, AND THEIR ESTATES FROM ANY AND ALL CLAIMS,*** OBLIGATIONS, RIGHTS, SUITS, DAMAGES, CAUSES OF ACTION, REMEDIES, AND LIABILITIES WHATSOEVER, ***INCLUDING ANY DERIVATIVE CLAIMS***, ASSERTED OR ASSERTABLE ON BEHALF OF ANY OF THE DEBTORS, THE REORGANIZED DEBTORS, OR THEIR ESTATES, AS APPLICABLE, WHETHER KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, LIQUIDATED OR UNLIQUIDATED, CONTINGENT OR FIXED, MATURED OR UNMATURED, EXISTING OR HEREINAFTER ARISING, IN LAW, AT EQUITY, OR OTHERWISE, WHETHER FOR

TORT, CONTRACT, VIOLATIONS OF FEDERAL OR STATE SECURITIES LAWS, OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, THOSE THAT ANY OF THE DEBTORS, THE REORGANIZED DEBTORS, THE ESTATES OR THEIR AFFILIATES 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***, ***BASED ON OR RELATING TO, OR IN ANY MANNER ARISING FROM, IN WHOLE OR IN PART, THE DEBTORS,*** THE BUSINESS OPERATIONS OF THE DEBTORS, ACTIONS TAKEN BY THE DEBTORS' BOARD OF DIRECTORS, THE PURCHASE, SALE, OR RESCISSION OF THE PURCHASE OR SALE OF ANY SECURITY OF THE DEBTORS OR THE REORGANIZED DEBTORS, THE SUBJECT MATTER OF, OR THE TRANSACTIONS OR EVENTS GIVING RISE TO, ANY CLAIM OR INTEREST THAT IS TREATED IN THE PLAN, THE BUSINESS OR CONTRACTUAL ARRANGEMENTS BETWEEN ANY DEBTOR AND ANY RELEASED PARTY, THE DEBTORS' IN- OR OUT-OF-COURT RESTRUCTURING EFFORTS, INTERCOMPANY TRANSACTIONS (OTHER THAN ANY INTERCOMPANY CLAIMS THAT HAVE BEEN REINSTATED AS CONTEMPLATED ABOVE), THE RESTRUCTURING, THE CHAPTER 11 CASES, THE FORMULATION, PREPARATION, DISSEMINATION, OR NEGOTIATION 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, THE PLAN SUPPLEMENT, THE DISCLOSURE STATEMENT, THE DIP CREDIT FACILITY DOCUMENTS, OR THE NEW AND A&R OBLIGATIONS DOCUMENTS, OTHER THAN CLAIMS OR LIABILITIES ARISING FROM ANY ACT OR OMISSION OF A RELEASED PARTY THAT CONSTITUTES FRAUD, WILLFUL MISCONDUCT OR GROSS NEGLIGENCE; PROVIDED THAT THE FOREGOING RELEASE SHALL NOT APPLY TO ANY EXPRESS CONTRACTUAL OR FINANCIAL OBLIGATIONS OR ANY RIGHT OR OBLIGATION ARISING UNDER OR THAT IS PART OF THE PLAN OR ANY AGREEMENTS (INCLUDING THOSE SET FORTH IN THE PLAN SUPPLEMENT) ENTERED INTO PURSUANT TO, IN CONNECTION WITH, OR CONTEMPLATED BY THE PLAN, AND ANY RIGHT TO ENFORCE THE PLAN AND CONFIRMATION ORDER IS NOT SO RELEASED. FOR THE AVOIDANCE OF DOUBT, NO CLAIMS OR CAUSES OF ACTION BASED ON, OR ARISING FROM, ANY RETAINED CAUSES OF ACTION (AS SET FORTH IN SECTION 4.18 HEREIN) SHALL BE RELEASED PURSUANT TO THIS PLAN, INCLUDING, WITHOUT LIMITATION, ACTIONS BASED ON, OR ARISING FROM, THE CNM ARBITRATION.

Plan, Art. 9.3 (a) (emphasis added)

The Exculpation Provisions

21. Plan Article 9.4, titled "Exculpation and Limitation of Liability" provides:

> (a) UPON AND EFFECTIVE AS OF THE EFFECTIVE DATE, THE DEBTORS AND THEIR DIRECTORS, OFFICERS, EMPLOYEES, ATTORNEYS, INVESTMENT BANKERS, FINANCIAL ADVISORS, RESTRUCTURING CONSULTANTS AND OTHER PROFESSIONAL ADVISORS AND AGENTS SHALL BE DEEMED TO HAVE SOLICITED ACCEPTANCES OF THE PLAN IN GOOD FAITH AND IN COMPLIANCE WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE, INCLUDING SECTION 1125(E) OF THE BANKRUPTCY CODE.
>
> (b) EXCEPT WITH RESPECT TO ANY ACTS OR OMISSIONS EXPRESSLY SET FORTH IN AND PRESERVED BY THE PLAN, THE PLAN SUPPLEMENT, OR RELATED DOCUMENTS, ***THE EXCULPATED PARTIES SHALL NEITHER HAVE, NOR INCUR ANY LIABILITY TO ANY ENTITY FOR ANY CLAIMS OR CAUSES OF ACTION ARISING ON OR AFTER THE PETITION DATE AND PRIOR TO OR ON THE EFFECTIVE DATE FOR ANY ACT TAKEN OR OMITTED TO BE TAKEN*** IN CONNECTION WITH, OR RELATED TO FORMULATING, NEGOTIATING, PREPARING, DISSEMINATING, IMPLEMENTING, ADMINISTERING, CONFIRMING, OR EFFECTING THE PLAN OR ANY CONTRACT, INSTRUMENT, RELEASE OR OTHER AGREEMENT OR DOCUMENT CREATED OR ENTERED INTO IN CONNECTION WITH THE PLAN OR ANY OTHER ACT TAKEN OR OMITTED TO BE TAKEN IN CONNECTION WITH OR IN CONTEMPLATION OF THE RESTRUCTURING OF THE DEBTORS; PROVIDED THAT THE FOREGOING "EXCULPATION" SHALL HAVE NO EFFECT ON THE LIABILITY OF ANY ENTITY THAT RESULTS FROM ANY SUCH ACT OR OMISSION THAT IS DETERMINED IN A FINAL ORDER TO HAVE CONSTITUTED FRAUD, GROSS NEGLIGENCE, OR WILLFUL MISCONDUCT; PROVIDED FURTHER THAT TO THE EXTENT PERMITTED BY APPLICABLE LAW EACH EXCULPATED PARTY SHALL BE ENTITLED TO RELY UPON THE ADVICE OF COUNSEL CONCERNING HIS, HER OR ITS DUTIES PURSUANT TO, OR IN CONNECTION WITH, THE PLAN OR ANY OTHER RELATED DOCUMENT, INSTRUMENT, OR AGREEMENT; PROVIDED FURTHER THAT THE FOREGOING SHALL NOT APPLY TO ANY EXPRESS CONTRACTUAL OR FINANCIAL OBLIGATIONS OR ANY RIGHT OR OBLIGATION ARISING UNDER OR THAT IS PART OF THE PLAN OR ANY AGREEMENTS (INCLUDING THOSE SET FORTH IN THE PLAN SUPPLEMENT) ENTERED INTO PURSUANT TO, IN CONNECTION WITH, OR CONTEMPLATED BY THE PLAN, OR TO ANY RIGHT TO ENFORCE THE PLAN AND CONFIRMATION ORDER.

> (c) THE EXCULPATED PARTIES HAVE, AND UPON CONFIRMATION SHALL BE DEEMED TO HAVE, PARTICIPATED IN GOOD FAITH AND IN COMPLIANCE WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE, INCLUDING WITH REGARD TO THE DISTRIBUTIONS OF NEW COMMON EQUITY PURSUANT TO THE PLAN AND, THEREFORE, ARE NOT AND SHALL NOT BE LIABLE AT ANY TIME FOR THE VIOLATIONS OF ANY APPLICABLE LAW, RULE, OR REGULATION GOVERNING THE SOLICITATION OF ACCEPTANCES OR REJECTIONS OF THE PLAN OR SUCH DISTRIBUTIONS MADE PURSUANT TO THE PLAN.

Plan Art. 9.4 (emphasis added).

22. "**Exculpated Parties**" is defined in section 1.74 of the Plan as follows:

> Exculpated Parties" means, collectively, the Debtors, ***all Related Parties of the Debtors***, and the Committee.

Plan Art. 1.74 (emphasis added).

ARGUMENT

A. The Disclosure Statement Lacks Adequate Information Regarding Third-Party Releases and Debtor Releases.

23. The disclosure statement requirement of section 1125 is "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank* (*In re Oneida Motor Freight, Inc.*), 848 F.2d 414 (3d Cir. 1988)). "Adequate information" under section 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with Debtors over the plan. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94 (3d Cir. 1988). Section 1129(a)(2) conditions confirmation upon compliance with applicable Code provisions. The disclosure requirement of section 1125 is one of those provisions. *See* 11 U.S.C. 1129(a)(2); *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000).

24. The Bankruptcy Code defines "adequate information" as:

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

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

25. To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. *See In re McLean Indus.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) ("substantial financial information with respect to the ramifications of any proposed plan will have to be provided to, and digested by, the creditors and other parties in interest in order to arrive at an informed decision concerning the acceptance or rejection of a proposed plan"). Although the adequacy of the disclosure is determined on a case-by-case basis, the disclosure must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy Code] alternatives ...." *In re Copy Crafters Quickprint, Inc.,* 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988).

26. Section 1125 of the Bankruptcy Code is geared towards more disclosure rather than less. *See In re Crowthers McCall Pattern, Inc.,* 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990). The "adequate information" requirement merely establishes a floor, and not a ceiling for disclosure to voting creditors. *See In re Adelphia Commc'ns Corp.,* 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006) (citing *Century Glove* 860 F.2d at 100).

27. Once the "adequate disclosure" floor is satisfied, additional information can go into a disclosure statement too, at least so long as the additional information is accurate and its inclusion is not misleading. *See Adelphia*, 352 B.R. at 596. The purpose of the disclosure statement is to give creditors enough information so that they can make an informed choice of whether to approve or reject the debtor's plan. *See In re Duratech Indus.,* 241 B.R. 291, 298 (Bankr. E.D.N.Y.), *aff'd*, 241 B.R. 283 (E.D.N.Y. 1999). The disclosure statement must inform the average creditor what it is going to get and when, and what contingencies there are that might intervene. *See In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

28. The Disclosure Statement does not provide sufficient information to enable a hypothetical investor in the relevant classes to make an informed judgment about the Plan. The Disclosure Statement fails to identify the thousands of Related Releasing Parties from whom third-party releases are being extracted. As noted above, there are two levels, and more than 32 categories, of Related Releasing Parties for each Releasing Party, some categories as broad and ill-defined as "agents," "consultants," "representatives," and "other professionals."

29. Nor does the Disclosure Statement identify all parties who will be the *recipients* of third-party releases, or of the Debtor releases, because the definition of "Released Parties" also includes the same 32 broad categories of related parties for each Released Party.

30. The Disclosure Statement also fails to disclose that the Debtors are giving two sets of releases benefitting the same Released Parties, one under Article 9.3 (a) of the Plan, entitled "Releases by the Debtors,"[6] and the other under Article 9.3(c) which sets forth the third-

[6] In addition, the Debtor release provision in Article 9.3(a) of the Plan is overly broad in that it purports to release claims of the Debtors and its estates, but also those that the Debtors would be entitled to assert "on behalf of the holder of any claim against, or interest in, a Debtor or other entity." *See* Plan, Art. 9.3(c). This language is in addition to the release of any derivative claims. This issue may be corrected by adding language providing that nothing in Article 9.3(a) should be interpreted to release any direct claims of any party other that the Debtors and their estates.

party release and is titled "Releases by Holders of Claims and Interests," even though it also includes releases by the Debtors. The Debtors are included in the definition of "Releasing Parties," which are the parties who are giving third-party releases under Article 9.3(c). *See* Plan, Art. 9.3(c). The Disclosure Statement fails to disclose this, or to explain which of the two releases will control if there is a conflict.

31. Nor does the Disclosure Statement adequately disclose why the Debtors will be releasing the DIP Lenders and Strabag, if they vote to accept the Plan, or the nature and value of the claims the Debtors are releasing, or what (if anything) the Debtors are receiving as consideration for such releases.

32. In sum, the Disclosure Statement fails to provide adequate information as to who will give third-party releases, who will receive third-party releases, who will receive Debtor releases, and what claims are being released.

B. The Proposed Solicitation Procedures Do Not Provide Notice to Numerous Non-Party Entities That Their Claims Against Non-Debtors Will Be Released Under the Plan.

33. The Solicitation Package that is proposed to be sent to creditors in voting classes includes a recitation of the third-party release in the Plan and Disclosure Statement and Confirmation Hearing Notice. The Confirmation Hearing Notice and Notice of Non-Voting Status will be served on creditors in unimpaired classes as well. The Debtors do not, however, propose to serve any part of the Solicitation Package, or the Confirmation Hearing Notice, on the numerous Related Releasing Parties, such as the employees of creditors who vote to accept the Plan, even though the Plan will strip such Related Releasing Parties of their right to pursue their direct claims against a large number of non-debtor entities (as well as against the Debtors) for no

consideration. [7] Nor will the Related Releasing Parties be served with any other document that would provide them with such notification. Moreover, it likely would be nearly impossible for the Debtors to arrange to provide such notice, because the identity of the vast majority of Related Releasing Parties likely is not known to the Debtors.

34. In *Folger Adam Security, Inc. v. DeMatteis/MacGregor*, 209 F.3d 252 (3d Cir. 2000), the Third Circuit ruled that, "Due process requires 'notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 265 (citations omitted).

35. The Debtors' proposed solicitation procedures will not provide notice to the Related Releasing Parties that is "reasonably calculated, under all the circumstances, to apprize [them] of the pendency of the action and afford them an opportunity to present their objections" to having third-party releases extracted from them. *Id.*[8] The Motion must be denied unless the Plan is modified so that no Related Releasing Parties are deemed to give releases.

C. The Disclosure Statement Lacks Adequate Information Regarding How the Debtors Intend to Satisfy the Absolute Priority Rule

36. Section 1129(b)(2) of the Bankruptcy Code provides that, "the condition that a plan be fair and equitable with respect to a class includes the following requirements: … (B) With respect to a class of unsecured claims – (i) the plan provides that each holder of a claim of such

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[7] The Related Releasing Parties also include the Debtors' own current and former employees, and the current and former employees of all of the Debtors' affiliates. This is because the Debtors and their affiliates are included in the definition of "Releasing Parties," even though such definition identifies the parties who are providing releases in Article 9.3(c) of the Plan, which is titled "Releases by Holders of Claims and Interests."

[8] In vacating the Bankruptcy Court's order confirming the plan in *Joel Patterson v. Mahwah Bergen Retail Group, Inc.*, No. 3:21CV167 (DJN), 2022 WL 135398 (E.D. Va. Jan. 13, 2022), the District Court for the Eastern District of Virginia noted, "[t]he Bankruptcy Court did not order that any notice or opt-out forms be sent to all of the Releasing Parties, including the current and former employees, consultants, accountants or attorneys of Debtors, their affiliates, lenders, creditors or interest holders." *Id.* at *7.

class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or ((ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property. . ."

37. The absolute priority rule, that senior classes of claims be fully satisfied before distributions may be made to the junior classes or interests retained by equity holders, is at the heart of the Chapter 11 process. Ensuring and maintaining the integrity of the absolute priority rule is required for a court to make a good faith finding or to find that a transaction is fair and equitable. *See In re Armstrong World Industries, Inc*., 432 F.3d 507 (3d Cir. 2005)).

38. Here, the Plan proposes that unsecured creditors will receive no distribution, while equity will be cancelled and reissued to AES Andes, who holds 93% of the existing equity. The Disclosure Statement provides that "AES Andes as DIP Lender shall receive the New Common Equity in consideration for, *inter alia,* certain deferrals from the Sponsor, an increase in the size of the Amended & Restated Secured Exit Financing Facility; and the impairment of the DIP Claims." *See* Disclosure Statement, p. 37. To the extent AES Andes is contributing "new value" in consideration of receiving the new equity, the Debtors have not adequately described how the proposed new value contribution constitutes sufficient consideration in exchange for the new equity.

D. The Plan is Not Confirmable Due to the Inclusion of Non-Consensual Third-Party Releases.

39. If a plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied. *See In re Quigley Co.,* 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007) *(citing In re Beyond.com Corp*., 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003) (collecting cases); *In re 266 Washington Assocs*., 141 B.R. 275, 288 (Bankr. E.D.N.Y.) *aff'd*, 147 B.R. 827

(E.D.N.Y. 1992); *In re Filex, Inc.*, 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990)). As demonstrated below, the Plan is patently unconfirmable, and therefore the Disclosure Statement cannot be approved.

i. The Proposed Procedure Will Not Result in Consensual Releases.

40. The third-party releases in the Plan, which release the direct claims of non-debtor parties against other non-debtor parties, will be given not only by those creditors who vote to accept the Plan, but additionally will be imposed upon (i) members of deemed accepting classes who are releasing claims that are far broader in scope than (and distinct from) their claims against the Debtors' estates, without their affirmative consent or even an ability to opt out; (ii) creditors who vote to reject the Plan but overlooked the opt-out box; and (iii) creditors in in voting classes from whom no ballot was received by the voting deadline.

41. The third-party releases will also be imposed on all persons and entities covered by the 32 categories of Related Releasing Parties, without their consent, or ability to opt out, and in most or all instances without their receipt of notice. Thus, there will be no affirmative consent to third-party releases given by numerous persons and entities on whom such releases will be imposed. [9]

42. To the extent releases are being forced on parties without their affirmative consent, they are non-consensual.[10] *See Emerge Energy Services LP*, Case No. 19-11563, 2019

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[9] The definition of Releasing Parties also include Norgener Renovables S.p.A, AES Andes, Strabag, in its capacity as shareholder and subordinated lender, the DIP Agent and DIP Lender, the Administrative Agent and Collateral Agents and each Consenting Creditor**.** The U.S. Trustee assumes that these parties have affirmatively consented to provide such releases, but the Debtors will need to establish such consent at confirmation.

[10] Not all reported decisions from this District have required affirmative consent. *See In re Mallinckrodt PLC,* No. 20-12522 (JTD), 2022 WL 404323, at *25 (Bankr. D. Del. Feb. 8, 2022); *In*

Bankr. LEXIS 3717, *52. (Bankr. D. Del, Dec. 5, 2019) (consent to give third-party releases cannot be inferred "by the failure of a creditor or equity holder to return a ballot or Opt-Out Form"); [11] *In re Washington Mutual, 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*)."")(emphasis added); *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) (release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan); *see also Joel Patterson v. Mahwah Bergen Retail Group, Inc.*, No. 3:21CV167 (DJN), 2022 WL 135398, *31 (E.D. Va. Jan. 13, 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) (under principles of New York contract law, a creditor could not be deemed to consent to third-party releases merely by

re Indianapolis Downs, LLC, 486 B. R. 286, 304-05 (Bankr. D. Del. 2013); *U.S. Bank N.A. v. Wilmington Tr. Co. (In re Spansion, Inc.)*, 426 B.R. 114, 144 (Bankr. D. Del 2010).

[11] Although not a reported decision, this Court's recent ruling in *In re Kettner Investments, LLC*, Case No. 20-12366 (KBO), on February 15, 2022 [transcript – D.I. 298], specifically addressed the need for affirmative consent to third-party releases from creditors in unimpaired classes, and from parties who are related to releasing parties.

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; consent would not be deemed from creditors who failed to return a ballot, or from unimpaired creditors).

43. Under the holding of *Emerge Energy*, *Washington Mutual*, and the other cases cited above, the Debtors' third-party releases render the Plan unconfirmable. The Plan releases claims against non-debtor parties held by parties who do not return a ballot or are not entitled to vote, namely creditors whose ballots are not received by the Voting Deadline, unimpaired classes and the Related Releasing Parties. These releases are not consensual and should not be allowed.

ii. The Plan Does Not Meet the Requirements for Non-Consensual Releases.

44. In *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), 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 several 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," such as mass tort cases. *See id.* at 212 (citing *Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.*), 843 F.2d 636, 640, 649 (2d Cir. 1988)); *see also In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 141 (2d Cir. 2005) (third-party release may be granted "only in rare cases").

45. The Third Circuit in *Continental Airlines* ultimately determined that the proposed releases in that case, which 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." *Continental*, 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.

46. The Third Circuit Court of Appeals recently referenced *Continental* in *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019), *cert. denied sub nom. ISL Loan Tr. v. Millennium Lab Holdings*, 19-1152, 2020 WL 2621797 (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).[12]

47. 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.

[12] Although not directly addressed by the Third Circuit in *Continental*, *Millennium Lab,* or *Global Industrial Technologies*, the issue of whether the bankruptcy court has statutory authority to confirm a plan that includes non-consensual releases between non-debtors was recently addressed by the United States District Court for the Southern District of New York in *In re Purdue Pharma, L.P.*, No. 21 CV 7532 (CM), 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021). That court held that no such statutory authority existed. 2021 WL 5979108 at * 69-70.

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

48. 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).

49. In the current case, there is nothing in the record to indicate the presence of "extraordinary circumstances," or that the high threshold necessary for approval of non-consensual third-party releases has been met with respect to each of the non-debtor parties that would be the recipients of these non-consensual releases. It is unclear what "critical financial

contribution" to the Plan was made by many of the Released Parties (and especially by the related parties to the Released Parties), yet all of them are the recipients of non-consensual third-party releases. Moreover, the releases being imposed on the Related Releasing Parties do not meet the fairness requirement of *Continental* because the Related Releasing Parties will receive no distribution under the Plan, or any other consideration in exchange for such releases.

50. Thus, both the "fairness" and "necessity" elements specified in *Continental* are absent here.

51. The Third Circuit Court of Appeals and this Court have already determined that the Debtors' directors and officers, who are among the beneficiaries of third-party releases, are not entitled to such releases. *See PWS Holding,* 228 F.3d at 245-46 ("§ 524(e) makes clear that a discharge in bankruptcy does not extinguish claims by third parties against guarantors or directors and officers of the debtor for the debt discharged in bankruptcy."); *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 Mutual*, 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. . . .").

52. The third-party releases in these cases also release all current and former non-debtor affiliates of the Debtors and the Reorganized Debtors[13] (and each direct or indirect subsidiary of each), Norgener Renovables S.p.A, AES Andes, Strabag, in its capacity as shareholder and subordinated lender, the DIP Agent and DIP Lender, the Administrative Agent and Collateral Agents and each Consenting Creditor. *See* Plan, Art. 1.116 (definition of "Released Parties"). The Court in *Washington Mutual* disallowed releases in favor of non-debtor affiliates because no evidence had been offered as to who the affiliates were, or why they should get a discharge without filing their own bankruptcy cases. 442 B.R. at 354. The same is true here.

53. 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 releases, including whether the third-party releases are "both necessary and given in exchange for fair consideration." *Continental,* 203 F.3d at 214, n. 11. The Debtors here should not be allowed the unfettered discretion to force to release non-debtors from liability, 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.

54. For the reasons set forth above, the Disclosure Statement should not be approved, and the Motion should be denied, unless the procedures and the Plan are modified (i) to require that affirmative consent be obtained from each party proposed to grant a release and (ii) to omit clause (n) from the definition of Releasing Parties, which covers the Related Releasing Parties.

[13] The inclusion of the Reorganized Company as a Released Party is inappropriate as that entity is not yet in existence.

F. The Plan is Not Confirmable Due to Impermissibly Broad Exculpation Provision

55. The U.S. Trustee objects to the Plan's Exculpation provision because it is overly broad in terms of the parties to receive exculpation, as well as the temporal scope of the acts and omissions to be exculpated.[14]

56. The Plan's definition of Exculpated Parties is inconsistent with controlling case law because it is not limited to estate fiduciaries. In *In re PWS Holding Corp*., the Third Circuit considered whether an official committee of unsecured creditors could be exculpated and held that 11 U.S.C. § 1103(c) implies both a fiduciary duty and a limited grant of immunity to members of the unsecured creditors' committee. 228 F.3d 224, 246 (3d Cir. 2000). This Court has repeatedly interpreted *PWS* as requiring a party's exculpation to be based upon its status as an estate fiduciary. *See In re Mallinckrodt PLC,* No. 20-12522 (JTD), 2022 WL 404323, at *11 (Bankr. D. Del. Feb. 8, 2022); *In re Indianapolis Downs*, *LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013); *Tribune*, 464 B.R. at 189; *Wash. Mut.*, 442 B.R. at 350-51; *In re PTL Holdings LLC*, No. 11-12676 (BLS), 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011).

57. Contrary to the limitation set forth in *PWS* and cases interpreting it, the Debtors' Plan includes as "Exculpated Parties" entities that are not estate fiduciaries, namely, all Related Parties of the Debtors. Merely being related to an estate fiduciary does not make a person or entity themselves an estate fiduciary.

58. The Plan cannot be confirmed unless its definition of Exculpated Parties is limited to: (i) the Debtors; (ii) the directors and officers of the Debtors who served during any portion of the cases; (iii) the Committee; (iv) the members of the Committee in their capacity as such; and

[14] The U.S. Trustee also objects to the inclusion of subparts (a) and (c) of the Exculpation provision set forth in Article 9.4 of the Plan. These sections seek deemed good faith findings of certain parties' conduct in connection with the case. These provisions constitute findings of fact that are not appropriate to include in the Plan, but may be appropriate to include in a proposed confirmation order.

(v) the professionals retained in these cases by the Debtors and the Committee. *See Wash. Mut.*, 442 B.R. at 350-51 ("[An] exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers.").

59. The temporal scope of the Exculpation provision is also overly broad. Exculpation is permitted for acts and omissions occurring during the period which the estate is in existence, i.e., between the petition date and the effective date of a plan. *See Washington Mutual,* 442 B.R. at 350 (exculpation is to cover only "actions in the bankruptcy case"), *citing In re PWS Holding Corp*., 228 F.3d 224, 246 (3d Cir. 2000). Here, the Exculpation provision is worded to cover "claims or causes of action arising on or after the Petition Date and prior to or on the Effective Date." Such language could be read to cover acts or omissions that occurred prior to the Petition Date, if causes of action related thereto arose after the Petition Date. This issue may be corrected by modifying the wording of the provision so that it reads, ". . . the Exculpated Parties shall neither have, nor incur, any liability for any act taken or omitted to be taken on or after the Petition Date and prior to or on the Effective Date, in connection with, or related to, formulating, negotiating, . . ."

60. The Disclosure Statement should not be approved unless the Exculpation provisions in the Plan are amended to exculpate only fiduciaries of the Debtors' estates, and only for any act taken or omitted to be taken on or after the Petition Date and prior to or on the Effective Date.

CONCLUSION

WHEREFORE the U.S. Trustee requests that this Court enter an order (i) denying approval of the Disclosure Statement and the Motion, and (ii) granting such other relief that the

Court deems just and proper.

Dated: March 29, 2022
Wilmington, Delaware

Respectfully submitted,

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REGIONS 3 and 9

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