

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

SALEM HARBOR POWER
DEVELOPMENT LP (f/k/a Footprint Power
Salem Harbor Development LP), *et al.*,¹

Debtors.

Chapter 11

Case No. 22-10239 (MFW)

(Jointly Administered)

Ref. D.I. 129, 130, 260, 261, 262, 271 & 273

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

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby submit this omnibus reply (this “Reply”) to the objections (each, an “Objection” and together, the “Objections”)² to the *Debtors’ Motion for Entry of an Order (A) Approving the Adequacy of the Disclosure Statement; (B) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors’ Joint Chapter 11 Plan; (C) Approving the Forms of Ballots and Notices in Connection Therewith; (D) Scheduling Certain Dates with Respect Thereto; and (E) Granting Related Relief* [D.I. 130] (the “Disclosure Statement Motion”).³ In support of this Reply, and in further support of approval of the Disclosure

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Salem Harbor Power Development LP (f/k/a Footprint Power Salem Harbor Development LP) (1360); Highstar Salem Harbor Holdings GP, LLC (f/k/a Highstar Footprint Holdings GP, LLC) (2253); Highstar Salem Harbor Power Holdings L.P. (f/k/a Highstar Footprint Power Holdings L.P.) (9509); Salem Harbor Power FinCo GP, LLC (f/k/a Footprint Power Salem Harbor FinCo GP, LLC) (N/A); Salem Harbor Power FinCo, LP (f/k/a Footprint Power Salem Harbor FinCo, LP) (9219); and SH Power DevCo GP LLC (f/k/a Footprint Power SH DevCo GP LLC) (9008). The location of the Debtors’ service address is: c/o Tateswood Energy Company, LLC, 480 Wildwood Forest Drive, Suite 475, Spring, Texas 77380.

² The Objections were filed by the following parties: (a) the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”) [D.I. 260] (the “UST Objection”); and (b) Iberdrola Energy Projects, Inc. (“IEP”) [D.I. 261] (the “IEP Objection”).

³ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Disclosure Statement Motion, the Plan (as defined below), or the Disclosure Statement (as defined below), as applicable.

Statement and entry of the Proposed Order (as defined below), the Debtors respectfully represent as follows:

Preliminary Statement

1. Approval of the Disclosure Statement represents a significant step towards the Debtors' successful emergence from chapter 11 as a going-concern. On March 23, 2022, the Debtors commenced these Chapter 11 Cases to implement a value-maximizing restructuring transaction with the support of their key stakeholders. Consistent with the terms of that certain Restructuring Support Agreement, dated as of March 23, 2022 (as amended, modified, or otherwise supplemented from time to time, the "RSA"), the Debtors filed the *Joint Chapter 11 Plan of Salem Harbor Power Development LP and Its Debtor Affiliates* [D.I. 128] (as may be amended, supplemented, or otherwise modified from time to time, the "Plan") and the *Disclosure Statement for Joint Chapter 11 Plan of Salem Harbor Power Development LP and Its Debtor Affiliates* [D.I. 129] (as may be amended, supplemented, or otherwise modified from time to time, the "Disclosure Statement") on April 20, 2022. The Plan, as originally proposed, contemplated a "toggle" structure pursuant to which the Debtors would ultimately consummate either a Standalone Restructuring or a Sale Transaction, depending on which transaction the Debtors determined would maximize value for their estates.

2. Following the completion of the Court-supervised Sale Process and pursuant to the Bidding Procedures Order and the Plan, the Debtors, in consultation with the Consultation Parties, determined that the Standalone Restructuring would maximize value for the Debtors' estates and, accordingly, filed that certain *Notice of Election to Pursue Standalone Restructuring* [D.I. 263] informing the Court and parties in interest that the Debtors have determined to pursue the Standalone Restructuring. Contemporaneously herewith, the Debtors have filed a revised Plan reflecting their decision to pursue the Standalone Restructuring

[D.I. 270], a revised Disclosure Statement [D.I. 271], and a modified proposed order approving the Disclosure Statement Motion [D.I. 273] (the “Proposed Order”). In addition to removal of the toggle feature, the Plan, among other things, reflects a new voting Class—Class 4 (IEP Judicial Lien Claim)—which will exist solely to the extent that the IEP Judicial Lien (as discussed below) is valid and enforceable and is not avoided or invalidated pursuant to the IEP Lien Avoidance Action or otherwise. In connection therewith, the Disclosure Statement includes additional disclosures regarding the nature and history of the IEP Judicial Lien and IEP Mechanic’s Lien, the IEP Lien Avoidance Action, and the treatment of IEP’s claims under the Plan.

3. In addition to the Objections, the Debtors received informal comments to the Plan, the Disclosure Statement, and the prior iterations of the Proposed Order from the U.S. Trustee, among others. While many of the arguments raised by the U.S. Trustee in its informal comments and in the UST Objection focus on plan confirmation issues, the Debtors have made extensive efforts to address, to the extent practicable and appropriate, concerns related to the adequacy of the Disclosure Statement and the proposed solicitation materials. The Debtors, however, respectfully submit that the informal comments and UST Objection raising plan confirmation issues are premature at this time and, to the extent not resolved, should be reserved for the Confirmation Hearing, at which point the Debtors will address them. Nevertheless, the Debtors have worked diligently and constructively with the U.S. Trustee and other parties in interest to address certain of the informal comments and Objections that raise plan confirmation issues through modifications to the Plan, where appropriate. In the coming weeks, as the parties prepare for confirmation, the Debtors will continue to strive to forge consensus wherever possible to narrow or eliminate the issues that require Court intervention.

4. With respect to the IEP Objection, the Debtors have also included in the Disclosure Statement additional information regarding, among other things, (a) the Debtors' determination to pursue consummation of the Standalone Restructuring; (b) the release provisions set forth in the Plan; (c) the IEP Judicial Lien and the IEP Mechanic's Lien; (d) IEP's Rule 2004 Motion, including the requests set forth therein and the production and examinations conducted to date; (e) the Debtors' carbon emission allowances; and (f) IEP's disagreement with certain statements contained in the Disclosure Statement. The Debtors believe that the disclosures set forth in the Disclosure Statement obviate or otherwise adequately and appropriately address the disclosure concerns raised in the IEP Objection. Although IEP has refused the Debtors' repeated invitations—on no fewer than four occasions—to provide preferred disclosure language with respect to the issues raised in the IEP Objection, the Debtors have, in good faith, attempted to address IEP's disclosure concerns by supplementing the Disclosure Statement.⁴

5. Notwithstanding that the Debtors do not agree with the statements and characterizations made in the IEP Objection and believe that the IEP Objection is misleading and contains numerous material misstatements and baseless allegations, the Debtors believe that most of what is set forth in the IEP Objection is simply irrelevant to the Court's determination of whether the Disclosure Statement contains adequate information within the meaning of section 1125 of the

⁴ On the afternoon of June 27, 2022, IEP's counsel indicated to the Debtors' counsel that IEP would be willing to provide proposed language. The Debtors look forward to receiving such proposed language and will endeavor to consensually resolve the IEP Objection ahead of the hearing to approve the Disclosure Statement scheduled for June 30, 2022. In light of this afternoon's deadline, however, the Debtors have filed this Reply in response to the IEP Objection.

Bankruptcy Code. As such, the Debtors have streamlined this Reply to principally focus only on those arguments that raise *true* Disclosure Statement issues.⁵

6. IEP has pursued an aggressive litigation strategy for years against the Debtors and other parties in interest, and clearly decided, even prior to the Disclosure Statement and Plan being filed, to vote to reject the Plan. Having already decided to oppose the Plan, IEP does not need additional disclosure, and the Court should not be fooled by IEP's "altruistic" self-appointment as the guardian of the Debtors' estates. It is no coincidence that IEP has commenced a fishing expedition in these Chapter 11 Cases, under the guise of the Rule 2004 Motion, in light of its ongoing state court actions against certain of the Debtors, Oaktree and certain related parties, and the Prepetition Secured Parties.⁶ The IEP Objection has nothing to do with approval of the Disclosure Statement as having adequate information and everything to do with its entirely separate litigation agenda. Excluding IEP and the Prepetition Lenders, the Debtors estimate that there are fewer than 30 voting creditors, collectively representing less than one percent (1%) of the total amount of Allowed General Unsecured Claims (Class 5).⁷ Tellingly, no other creditors have objected to the Disclosure Statement. As such, the IEP Objection is little more than an academic exercise, at best. The Court should not permit IEP to hold the Debtors' estates

⁵ The Debtors reserve all rights with respect to the misstatements, mischaracterizations, and baseless allegations made in the IEP Objection.

⁶ As of the date of this Reply, IEP maintains pending actions against (a) DevCo in Massachusetts state court (the "Massachusetts Action"), (b) the Prepetition Secured Parties in New York state court (the "IEP/Lender Action"), and (c) TopCo and TopCo GP in New York state court, which action was dismissed as to OCM-Aggregator and certain related parties, including certain current and former Board members of the Debtors, on April 1, 2022 (the "IEP/OCM-Aggregator Action"). IEP has since sought to appeal the dismissal of the IEP/OCM-Aggregator Action as to OCM-Aggregator and related dismissed parties, as well as the dismissal of certain causes of action in the IEP/Lender Action. The Massachusetts Action and the IEP/OCM Aggregator Action with respect to Debtors TopCo and TopCo GP remain stayed as of the date hereof.

⁷ As of the date hereof, over 99% of holders of Credit Facility Secured Claims have executed the RSA and thereby agreed to vote to accept the Plan. The 1% estimate excludes any claim that the Federal Energy Regulatory Commission may assert against the Debtors.

hostage to benefit its own litigation campaign and to the ultimate detriment of the Debtors' estates and all other parties in interest.

7. A summary of the Objections and the Debtors' responses to such Objections is set forth in the chart attached hereto as **Exhibit A** (the "Objection Response Chart"), which is incorporated by reference herein.⁸ The remainder of this Reply addresses solely the material unresolved or partially resolved items in the two Objections.

8. For the reasons set forth in the Disclosure Statement Motion and herein, including the Objection Response Chart, the Debtors believe that the modified Disclosure Statement should be approved. To the extent that any portions of the Objections remain unresolved, the Debtors respectfully submit that they should be overruled.

Reply

I. The Disclosure Statement Meets the Applicable Standards for Approval Under Section 1125 of the Bankruptcy Code

9. Pursuant to section 1125 of the Bankruptcy Code, a plan proponent must provide voting parties with "adequate information" to develop an informed judgment as to the plan. Section 1125 of the Bankruptcy Code defines "adequate information" as:

[I]nformation 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 investor of relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the

⁸ The Objection Response Chart also notes certain informal comments received by parties in interest, but does not purport to exhaustively list each and every informal comment received by the Debtors.

case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a)(1). Courts have construed this requirement flexibly, in light of the facts and circumstances underlying each bankruptcy case, and this determination is largely within the discretion of the Court. *See, e.g., Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) (“From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case.”) (citations omitted); *In re Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) (“The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court.”).

10. Typically, courts will require disclosures regarding certain categories of material information in assessing the adequacy of the disclosures. *See, e.g., In re Phoenix Petroleum*, 278 B.R. 385, 393 n.6 (Bankr. E.D. Pa. 2001) (listing categories of information); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (S.D. Ohio 1988) (same). Because “adequate information” necessarily depends upon the facts and circumstances of each bankruptcy case, certain disclosures may prove warranted in some cases but not others. *See, e.g., In re Phoenix Petroleum Co.*, 278 B.R. at 393 (“[C]ertain categories of information which may be necessary in one case may be omitted in another; no one list of categories will apply in every case.”); *In re U.S. Brass Corp.*, 194 B.R. 420, 424–25 (Bankr. E.D. Tex. 1996).

11. The Disclosure Statement provides adequate information for the Debtors’ creditors to make an informed decision about whether to accept or reject the Plan, as required by section 1125 of the Bankruptcy Code. The Disclosure Statement provides detailed information regarding, among other things: (a) the key terms of the Plan; (b) the Debtors’ background and business operations; (c) key events leading to commencement of the Chapter 11 Cases; (d) the

Debtors' prepetition indebtedness; (e) the proposed capital structure of the Reorganized Debtors; (f) financial information and valuations that would be relevant to creditors' determination to accept or reject the Plan; (h) certain United States federal income tax consequences of the transactions contemplated by the Plan; (i) certain risk factors to be considered; (j) securities disclosures with respect to the Plan; (k) instructions for voting to accept or reject the Plan; (l) a description of confirmation procedures, including details regarding objections and the requirements for Plan confirmation; and (m) a recommendation by the Debtors that holders of Claims in the Voting Classes (Class 3, 4 (if applicable), and 5) should vote to accept the Plan.⁹ Additionally, the Disclosure Statement, as now modified, discloses the estimated recoveries to creditors under the Plan and includes a Valuation Analysis, the Financial Projections, and a Liquidation Analysis setting forth the estimated recoveries that holders of Allowed Claims would receive in a hypothetical chapter 7 liquidation. The Debtors believe that the information provided in the Disclosure Statement is sufficiently detailed and contains adequate information to allow the holders of Claims in the Voting Classes to make an informed decision regarding whether to vote to accept or reject the Plan.

A. IEP's Remaining Disclosure Objections Should Be Overruled

12. As demonstrated through the Debtors' resolution of the U.S. Trustee's and other parties in interests' informal requests to modify certain aspects of the Disclosure Statement and solicitation materials, and as set forth in more detail in the Objection Response Chart, the Debtors have worked constructively with parties in interest and included much of the requested information in the Disclosure Statement. IEP, however, decided not to respond to the Debtors'

⁹ To the extent any of the above-referenced items changes materially prior to the commencement of solicitation of the Plan, the Debtors intend to further amend the Disclosure Statement to reflect such changes.

multiple requests to address its disclosure-related concerns. Unlike other parties in interest, IEP did not extend the courtesy of raising any questions, comments, concerns, or issues related to the Disclosure Statement prior to filing the IEP Objection. Instead, IEP claimed that its rule 2004 discovery and examinations and its need to prepare the IEP Objection and a standing motion for filing prior to the now twice-extended Challenge deadline, prevented it from providing comments to the Disclosure Statement prior to the objection deadline. Somehow, however, IEP found the time to prepare a disparaging 22-page objection and accompanying declaration. Notwithstanding that IEP has not participated in the Debtors' restructuring process in a constructive manner to date, or used the two months since the initial Disclosure Statement was filed to narrow the disclosure issues in dispute, as detailed in the Objection Response Chart, the Debtors have—in good faith—endeavored to augment the Disclosure Statement in response to the IEP Objection.

13. IEP's assertions regarding the history and development of the Facility and the actions of the Debtors and IEP following issuance of the Arbitration Award reflect its fundamental disagreement with the Debtors' view of the world. While IEP is certainly entitled to paint its own narrative, its disagreement, on its own, does not detract from the simple fact that the Disclosure Statement contains the "adequate information" required by section 1125 of the Bankruptcy Code. To the extent practicable, the Debtors have either included IEP's proposed language (where provided), added additional disclosure to address discrete topics raised in the IEP Objection (*e.g.*, carbon emission allowances), or qualified statements in the Disclosure Statement to make IEP's position clear with references to the IEP Objection. Consistent with the Debtors' position prior to filing this Reply and the modified Disclosure Statement, the Debtors remain willing to engage with IEP to consensually resolve any remaining objections prior to the hearing on the Disclosure Statement Motion in an effort to limit unnecessary litigation.

14. To the extent that IEP continues to believe that the Disclosure Statement provides inadequate disclosure regarding potential claims and causes of action, the Debtors submit that such concerns are misplaced. Contrary to IEP's assertions, the Disclosure Statement contains ample disclosures regarding the Debtors' determination not to pursue potential claims and causes of action against insiders or other parties in interest. The Disclosure Statement also includes ample disclosures with respect to the formation of the Special Committee, as well as the Investigation. As set forth in the Disclosure Statement, prior to the Petition Date, the Special Committee undertook an in-depth investigation of potential causes of action against the Debtors' insiders. At the conclusion of the Special Committee's three-month investigation, the Special Committee, with the assistance of its counsel, determined that there was no evidence to support viable estate causes of action against insiders. In addition, in connection with the negotiation of and entry into the prepetition Forbearance Agreement, the RSA, and the Cash Collateral Orders, the Debtors' advisors reviewed and analyzed the extent, validity, and priority of the Prepetition Secured Parties' liens and claims and assessed whether the Debtors had any affirmative causes of action against the Prepetition Secured Parties. In the course of this analysis and diligence, the Debtors' advisors did not uncover any basis to argue that the Prepetition Secured Parties' liens on the Debtors' assets were invalid, subject to avoidance or subordination, or otherwise subject to any colorable challenge. The Debtors and their advisors also did not identify any basis to assert any affirmative estate causes of action against the Prepetition Secured Parties. The Disclosure Statement now notes IEP's disagreement with the Debtors' analysis by including IEP's proposed language as set forth in the IEP Objection regarding its Rule 2004 Motion and the "Potential Claims" IEP seeks to investigate.

15. As set forth in more detail in the Objection Response Chart, the Debtors

believe that they have adequately addressed each of the disclosure concerns raised in the IEP Objection. Accordingly, for the foregoing reasons, the Debtors respectfully submit that the IEP Objection should be overruled.

B. The U.S. Trustee’s Remaining Disclosure Objections Should Be Overruled

16. The UST Objection also raises certain disclosure-related matters that the Debtors believe should be overruled. Specifically, the UST Objection asserts that the Disclosure Statement does not adequately disclose the following items: (a) “who will be giving third-party releases, who will be receiving such releases, and what claims will be released”; (b) “why the Debtors will be releasing the Released Parties, the nature and value of the claims the Debtors are releasing, and what (if anything) the Debtors are receiving as consideration for such releases”; and (c) “why the Debtors are giving two sets of releases benefitting the same Released Parties, including releases under a provision titled ‘Releases by Holders of Claims and Interests’”. UST Objection at ¶ 48.

17. *First*, the Debtors believe that the Disclosure Statement and related solicitation materials clearly identify the parties that will be providing the Third-Party Releases, the parties that will be receiving such releases, and the claims that are to be released and otherwise provide ample disclosure with respect to the Third-Party Releases in the context of section 1125 of the Bankruptcy Code. *See* Disclosure Statement p. 4, Art. VI.G. Additionally, upon receiving the U.S. Trustee’s informal comments over the last month, and at the U.S. Trustee’s request, the Debtors added bolded language to the first page of the Disclosure Statement following the cover page (a) identifying the relevant sections of the Plan and Disclosure Statement discussing the Third-Party Releases and (b) encouraging parties to carefully review those sections. The Debtors also added additional disclosures to the introduction of the Disclosure Statement describing the releases set forth in the Plan and the consideration provided by parties in connection therewith.

For example, the Debtors added disclosures regarding the claims being released pursuant to the General Unsecured Claims Treatment, including pointing to detailed information regarding prepetition transfers made within the 90-day period prior to the Petition Date set forth in the Debtors' statement of financial affairs. The Debtors also included additional disclosures regarding their assessment of potential estate causes of action against, for example, the Prepetition Secured Parties. In no uncertain terms, the Debtors are doing their best to highlight material terms of the Plan both to satisfy the U.S. Trustee's concerns and to ensure that all parties receiving the Plan and related documents are receiving adequate information.

18. *Second*, and as discussed more fully below, the Debtors respectfully submit that the appropriate time to address the basis for granting such releases is in connection with Plan confirmation and not at this stage of the Debtors' Plan process. Again, the Debtors believe the Disclosure Statement clearly identifies who is providing releases, who is receiving such releases, and the nature of the claims being released, and the Debtors have augmented such disclosures by including additional information regarding the claims being released as detailed in the Objection Response Chart and as reflected in the Disclosure Statement. As discussed more fully below, the Debtors will be prepared to address the basis for the Third-Party Releases and the Debtor Release (defined below) in connection with Plan confirmation. The Debtors respectfully submit, however, that the U.S. Trustee's request for inclusion of confirmation-related briefing in the Disclosure Statement is misguided. For purposes of what is before the Court today, however, the Debtors respectfully submit that the Disclosure Statement as modified includes ample disclosure with respect to the Plan's release provisions and satisfies the requirements of section 1125 of the Bankruptcy Code.

19. *Finally*, the U.S. Trustee’s assertion that the proposed solicitation procedures do not provide notice to numerous non-parties regarding the releases set forth in the Plan is untrue. While the Debtors previously proposed to serve the Confirmation Notice on all known holders of Claims and Interests and the Rule 2002 List, regardless of whether such parties are entitled to vote on the Plan, the Debtors have modified the Proposed Order to reflect that they will serve the Confirmation Hearing Notice on the entire creditor matrix. Also, as detailed in the Objection Response Chart, the Debtors have modified the Confirmation Hearing Notice to include a conspicuous discussion of the Third-Party Releases. The Confirmation Hearing Notice also sets forth the release and exculpation provisions of the Plan, in their respective entirety, as well as the definitions of “Released Parties” and “Releasing Parties.” In addition, the Proposed Order specifically contemplates publication of the Confirmation Hearing Notice in the national edition of one of the following newspapers: *The Wall Street Journal*, *The New York Times*, or *USA Today*, and in *The Boston Globe* by no later than the date that is seven business days from entry of the Proposed Order. The Debtors respectfully submit that publication of the Confirmation Hearing Notice as contemplated under the Proposed Order will enable the Debtors to reach the widest audience possible and provide sufficient notice of, among other things, the Third-Party Releases to parties that are not otherwise directly served with the Confirmation Hearing Notice. The Debtors submit that their proposed publication notice is consistent with what is customarily approved by the Court and is an appropriate means of providing notice to parties that do not otherwise receive the Confirmation Hearing Notice by mail.

20. For the foregoing reasons, the Debtors respectfully submit that the Disclosure Statement contains “adequate information” within the meaning of section 1125 of the Bankruptcy Code and that the Objections should accordingly be overruled.

II. The Plan is Confirmable, and the UST's Premature Confirmation Objections Should be Considered at the Confirmation Hearing

21. The issues raised in the UST Objection largely do not pertain to the adequacy of the information provided in the Disclosure Statement. Rather, they are objections to confirmation of the Plan that have been prematurely raised now and should not be considered in connection with (and should not preclude) approval of the Disclosure Statement. It is well settled that objections to confirmation are properly considered only at confirmation after votes are solicited. *See, e.g., In re Am. Capital Equip., LLC*, 688 F.3d 145, 153–54 (3d Cir. 2012) (“Ordinarily, confirmation issues are reserved for the confirmation hearing, and not addressed at the disclosure statement stage.”); *In re Quigley Co., Inc.*, 377 B.R. 110, 112 (Bankr. S.D.N.Y. 2007) (approving the disclosure statement while acknowledging that settlements with the debtors’ non-debtor former parent “implicate several confirmation issues” regarding the rights and incentives of certain claimants under the proposed plan); *In re Phoenix Petroleum Co.*, 278 B.R. at 394 (“The question whether a plan meets requirements for confirmation is usually answered at confirmation hearings.”) (citations omitted). Courts have cautioned that “care must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing.” *See In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988); *see also In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987) (noting that decisions on confirmation issues before solicitation may effectively disenfranchise certain creditors because the disclosure statement will not be mailed to all creditors until after court approval is obtained).

22. Accordingly, disputes over threshold confirmation issues should not impede approval of the Disclosure Statement unless it is established that the underlying plan is “so fatally flawed that confirmation is impossible.” *See In re Cardinal Congregate I*, 121 B.R. 760, 764

(Bankr. S.D. Ohio 1990). “A plan is patently unconfirmable where (1) confirmation defects [cannot] be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.” *In re Am. Capital Equip., LLC*, 688 F.3d at 154–55 (internal quotation marks and citations omitted). The UST Objection fails to carry this burden. The U.S. Trustee will—in due course—have ample opportunity to prosecute such objections in the context of confirmation of the Plan. At this juncture, however, such objections are premature and do not demonstrate that the Plan is patently unconfirmable. Therefore, the confirmation objections raised by the U.S. Trustee should be deferred until the Debtors present their case in chief in support of confirmation.

23. With respect to the third-party releases contemplated by Article VIII.E of the Plan (the “Third-Party Releases”) and the U.S. Trustee’s assertion that they are non-consensual and do not conform to applicable law, although the Debtors firmly believe that these arguments are routinely and properly addressed at confirmation, the Debtors have nonetheless significantly narrowed the scope of the Third-Party Releases to provide that **only** parties who affirmatively agreed to grant the releases in connection with the RSA (*i.e.*, the Consenting Stakeholders) and creditors in the Voting Classes that take affirmative action to vote on the Plan may grant the Third-Party Releases. *See* Plan Art. VIII.E. Specifically, the Debtors have modified the Plan to remove the following parties from the definition of “Releasing Parties”: (i) all holders of Claims that are Unimpaired under the Plan and (ii) all holders of Claims that are entitled to vote under the Plan but that (a) do not vote to accept or reject the Plan and (b) do not opt out of granting the Third-Party Releases. The Debtors have also revised the “Releasing Parties” definition to limit that term to apply only with respect to related parties of stakeholders that are party to the RSA, *i.e.*, parties

that have agreed to provide mutual releases pursuant to the RSA and represented that they have the ability to do so.¹⁰ The Debtors believe that the modified Third-Party Releases are in line with similar release provisions approved by the Court, as will be demonstrated at confirmation.

24. Courts in this district routinely grant far broader third-party releases. *See, e.g., In re Pace Indus., LLC*, Case No. 20-10927 (MFW) (Bankr. D. Del. May 29, 2020) [D.I. 215] (approving plan releases and finding them consensual where creditors were required to file objections to the releases to opt out); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 304–05 (Bankr. D. Del. 2013) (approving third-party release that applied to unimpaired holders of claims deemed to accept the plan as consensual); *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (same).

25. Moreover, the Debtors have reviewed recent decisions by the Court at which similar disputed issues were presented, and have conformed the Plan to reflect the Court’s

¹⁰ Indeed, in several of the cases cited in the UST Objection, the court confirmed a plan that included third-party release provisions involving parties similar to the Related Releasing Parties (as defined in the UST Objection), either as the parties providing the release, receiving the release, or both. *See, e.g., In re Wash. Mut, Inc.*, Case No. 08-12229 (MFW) (Bankr. D. Del. Feb. 24, 2012) [D.I. 9759-1] (Section 1.184 of the confirmed Plan defines “Released Parties” to include the “Related Persons of each of the JPMC Entities, FDIC Corporate and the FDIC Receiver.”); *In re Chassix Holdings, Inc.*, Case No. 15-10578 (MEW) (Bankr. S.D.N.Y. July 9, 2015) [D.I. 627-1] (Section 1.100 of the confirmed Plan defines “Released Parties” to include—with respect to each specified entity—that entity’s “predecessors, successors and assigns, subsidiaries, affiliates, managed accounts or funds, current and former officers and directors, principals, shareholders, members, partners, employees, subcontractors, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors and other professionals, and such persons’ respective heirs, executors, estates, servants and nominees . . .”); *In re SunEdison, Inc.*, Case No. 16-10992 (SMB) (Bankr. S.D.N.Y. July 28, 2017) [D.I. 3735-1] (Section 1.195 of the confirmed Plan defines “Released Parties” to include—with respect to each specified entity—that entity’s “current and former affiliates, subsidiaries, advisors, principals, partners, managers, members, employees, officers, directors, representatives, financial advisors, attorneys, accountants, investment bankers, consultants, agents, and other representatives and professionals . . .” and Section 1.196 of the confirmed Plan defines “Releasing Parties” to include—with respect to each specified entity—such entity’s “current and former affiliates, subsidiaries, managed accounts or funds, officers, directors, partners, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors and other professionals, and officers, directors, partners, principals, employees and agents thereof . . .”); *In re Retail Grp. Inc.*, Case No. 20-33113 (KRH) (Bankr. E.D. Va. Feb. 24, 2021) [D.I. 1794, 2611] (Section 1.128 of the confirmed Plan, as modified, defines “Released Party” to include “each Related Party of each Entity in the foregoing . . .” and Section 1.129 of the confirmed Plan, as modified, defines “Releasing Party” to include “each Related Party of each Entity in the foregoing . . .”).

rulings delivered over objections from, among others, the U.S. Trustee. Indeed, in those decisions, the Court previously deemed third-party releases granted by creditors who submit a ballot and do not elect to opt out of the Third-Party Releases as consensual and consistent with applicable law. *See, e.g., In re Hertz Corp.*, Case No. 20–11218 (MFW) (Bankr. D. Del. Apr. 16, 2021) Hr’g Tr. 59:12–60:25 (clarifying that an opt-out mechanic was appropriate for parties who affirmatively vote on the plan, but an opt-in mechanic was needed “for only those entitled to vote and who do not vote”); *In re Bluestem Brands, Inc.*, Case No. 20–10566 (MFW) (Bankr. D. Del. Aug. 21, 2020) [D.I. 752] Hr’g Tr. 26:6–8 (“So, I do think that by returning a ballot, rejecting the plan, but failing to opt out, they have evinced their consent to the releases provided in the plan.”); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 3555 (Bankr. D. Del 2011) (concluding that “any third[-]party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of a the third[-]party releases”). The Debtors understand and appreciate that the Court would prefer that the “opt-out/opt-in” decision be reached before the Plan is solicited, as clarified in *Hertz*, and have ensured that the Third-Party Releases fit within the parameters previously established by the Court in similar circumstances.

26. The Debtors will be prepared to demonstrate at the Confirmation Hearing that the Third-Party Releases satisfy the requisite standards under applicable law; however, such issues are not before the Court today. Accordingly, particularly given the modifications described herein with respect to the scope of the Third-Party Releases and related mechanics and disclosures, the Debtors submit that the Court should overrule the UST Objection as to the Third-Party Releases.

Conclusion

27. For the foregoing reasons, the Debtors respectfully submit that the Disclosure Statement satisfies the requirements of section 1125 of the Bankruptcy Code and

request entry of the Proposed Order, as it seeks relief that is fair, appropriate, and in the best interests of their estates.

[Remainder of Page Intentionally Left Blank]

Dated: June 27, 2022

Respectfully submitted,

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EXHIBIT A

Objection Response Chart¹

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Reply, the Objections, the Disclosure Statement Motion, the Plan, or the Disclosure Statement, as applicable.

I. Filed Objections

Objections		
Objecting Party	Summary of Objection	Debtors' Response
U.S. Trustee [D.I. 260]	<p>Location: Paragraphs 18–28</p> <ul style="list-style-type: none"> The Disclosure Statement does not provide adequate information regarding the Third-Party Releases and the Debtor Release, including (a) the identity of the Related Releasing Parties included in the definition of “Releasing Parties” and “Released Parties,” (b) the justification for the Debtor Release, and (c) why the Debtors are providing both the Debtor Release and the Third-Party Release. 	<ul style="list-style-type: none"> The Debtors added bolded language to the first page of the Disclosure Statement following the cover page (a) identifying the relevant sections of the Plan and Disclosure Statement discussing the Third-Party Releases and (b) encouraging parties to carefully review those sections. The Debtors added bolded language to the introduction of the Disclosure Statement indicating that parties who agree to grant the Third-Party Releases will be unable to pursue or recover on claims directly against the Released Parties that are within the scope of and released pursuant to the Third-Party Releases set forth in the Plan. The Debtors added additional disclosures to the introduction section and elsewhere in the Disclosure Statement describing, among other things, the releases set forth in the Plan, the parties being released, the nature of claims being released, and the Debtors' assessment of potential estate causes of action and clarifying that the Debtors will be prepared to demonstrate the basis for such releases in connection with Plan confirmation. The Debtors respectfully submit that adequate disclosure has been provided in accordance with the requirements of section 1125 of the Bankruptcy Code and any remaining.

U.S. Trustee [D.I. 260]	<p>Location: Paragraphs 29–31</p> <ul style="list-style-type: none"> The proposed Solicitation Procedures do not provide notice of the Third-Party Releases to the Related Releasing Parties. 	<ul style="list-style-type: none"> The Debtors have modified the Proposed Order to provide that the Debtors will serve the Confirmation Hearing Notice on the entire creditor matrix. The Debtors also intend to publish the Confirmation Hearing Notice in the national edition of one of the following newspapers: <i>The Wall Street Journal</i>, <i>The New York Times</i>, or <i>USA Today</i>, <u>and</u> in <i>The Boston Globe</i>. The Debtors believe this publication notice will provide sufficient notice of, among other things, the Third-Party Releases to parties that did not receive notice thereof by mail. The Debtors added various disclosures to the Solicitation Materials (including ballots and notices) addressing the Third-Party Releases, including clarifying which parties will be subject to such Third-Party Releases pursuant to the Plan. The Debtors added a bolded disclosure on the first page of the Confirmation Hearing Notice and Ballots advising parties of the release, exculpation, and injunction provisions contained in the Plan, including the Third-Party Releases. The disclosure encourages parties to carefully review and consider the Plan, including such provisions, and identifies the section of the Plan where such provisions are set forth. The Debtors added bolded language with respect to the Third-Party Releases on the first page of each ballot and revised the opt-out portion of the ballot to make the opt-out election more conspicuous.
U.S. Trustee [D.I. 260]	<p>Location: Paragraphs 32–47</p> <ul style="list-style-type: none"> The Plan is patently unconfirmable because the Third-Party Releases are non- 	<ul style="list-style-type: none"> This is a confirmation objection that should be addressed at the Confirmation Hearing. The Debtors will be prepared to address the Third-Party Releases during the plan

Objections		
Objecting Party	Summary of Objection	Debtors' Response
	consensual and do not meet the requirements for approval of non-consensual third-party releases recognized in the Third Circuit.	<p>confirmation process to the extent necessary to meet their burden.</p> <ul style="list-style-type: none"> • Nevertheless, in response to the U.S. Trustee's informal comments, the Debtors revised the definition of "Releasing Parties" in the Plan to omit (a) all holders of Claims that are Unimpaired under the Plan that do not elect to opt out of granting the Third-Party Releases and (b) all holders of Claims that are entitled to vote under the Plan but that (1) do not vote to accept or reject the Plan and (2) do not opt out of granting the Third-Party Releases. • The Debtors also revised the definition of "Releasing Parties" to make clear that the only related parties included in the definition of "Releasing Parties" are parties that are related to an Entity that is a party to the RSA, <i>i.e.</i>, parties that have agreed to provide mutual releases pursuant to the RSA and represented that they have the ability to do so.
IEP [D.I. 261]	<p>Location: Pages 7–9</p> <ul style="list-style-type: none"> • The Disclosure Statement does not provide adequate information regarding the history and development of the Facility. 	<p>The Disclosure Statement provides adequate information regarding the history and development of the Facility, including in Article II.H ("History and Development of the Facility").</p> <p>The Debtors have also added footnotes to certain statements in the Disclosure Statement to reflect that IEP disagrees with such statements with specific citations to the IEP Objection.</p>

Objections		
Objecting Party	Summary of Objection	Debtors' Response
IEP [D.I. 261]	<p>Location: Pages 9–12</p> <ul style="list-style-type: none"> The Disclosure Statement does not provide adequate information regarding the actions of the Debtors and IEP following issuance of the Arbitration Award. 	<p>The Disclosure Statement provides adequate information regarding the actions of the Debtors and IEP following issuance of the Arbitration Award, including in Article II.H (“IEP Arbitration and Related Litigation”), Article III.A (“The October 22 Notice of Default and Acceleration”), Article III.E (“Prepetition Engagement with IEP”), and Article III.F (“Negotiations Regarding RSA and Use of Cash Collateral”).</p> <p>The Debtors have also added footnotes to certain statements in the Disclosure Statement to reflect that IEP disagrees with such statements and included specific citations to the IEP Objection.</p>
IEP [D.I. 261]	<p>Location: Pages 12–13</p> <ul style="list-style-type: none"> The Disclosure Statement does not provide adequate information regarding potential causes of action including, among other things, the claims investigated and the conclusions reached by the Special Committee. 	<p>The Disclosure Statement provides adequate information regarding the Special Committee’s investigation and its conclusions. <i>See</i> Disclosure Statement, Art. III.C and D.</p> <p>The Debtors have also included IEP’s proposed language regarding IEP’s rule 2004 examinations, which includes discussion of “Potential Claims.”</p>
IEP [D.I. 261]	<p>Location: Pages 14–15</p> <ul style="list-style-type: none"> IEP proposes that the Debtors add the language set forth on page 15 of the IEP Objection. The Disclosure Statement does not provide adequate information regarding the examinations conducted by IEP pursuant to Bankruptcy Rule 2004. 	<p>IEP’s proposed language is included in Article IV.I of the Disclosure Statement.</p> <p>In addition to inclusion of IEP’s proposed language, the Disclosure Statement includes additional disclosures regarding the examinations conducted by IEP pursuant to Bankruptcy Rule 2004.</p>

Objections		
Objecting Party	Summary of Objection	Debtors' Response
IEP [D.I. 261]	Location: Pages 15–17 <ul style="list-style-type: none"> The Disclosure Statement does not provide adequate information regarding IEP's judicial lien and mechanics lien. 	The Disclosure Statement provides adequate information regarding IEP's judicial lien and mechanics' lien. <i>See</i> Disclosure Statement, Art. I, II.G–H, III.E–F.
IEP [D.I. 261]	Location: Page 17 <ul style="list-style-type: none"> The Disclosure Statement does not provide adequate information regarding pollution or carbon credits that the Debtors may hold. 	The Disclosure Statement provides adequate information regarding pollution and carbon credits held by the Debtors. <i>See</i> Disclosure Statement, Art. II.K.
IEP [D.I. 261]	Location: Pages 17–18 <ul style="list-style-type: none"> The Disclosure Statement does not provide adequate information regarding equity contributions. 	The Disclosure Statement provides adequate information regarding equity contributions. <i>See</i> Disclosure Statement, Art. II.E, III.A.
IEP [D.I. 261]	Location: Pages 18–19 <ul style="list-style-type: none"> The Disclosure Statement does not provide adequate information regarding the Transaction Election and the justification for that election. 	The Disclosure Statement provides adequate information regarding the Transaction Election. <i>See</i> Disclosure Statement, Art. I, III.G.

II. Informal Comments¹

Informal Comments		
Commenting Party	Summary of Comment	Debtors' Response
City of Salem, Massachusetts	The City of Salem, Massachusetts requested that certain disclosures related to the PILOT Agreement and Community Benefits Agreement that Debtor DevCo is party to be included in the Disclosure Statement.	<ul style="list-style-type: none"> The Debtors revised the Disclosure Statement to include agreed-upon language as requested by the City of Salem, Massachusetts. <i>See</i> Disclosure Statement, Art. II.J.
Massachusetts Department of Environmental Protection	The Massachusetts Department of Environmental Protection requested that certain disclosures related to the Facility's Chapter 91 Waterways License and Operating Permit be included in the Disclosure Statement.	<ul style="list-style-type: none"> The Debtors revised the Disclosure Statement to include agreed-upon language as requested by the Massachusetts Department of Environmental Protection. <i>See</i> Disclosure Statement, Art. II.I.

¹ The table below does not purport to exhaustively list each and every informal comment received by the Debtors from parties in interest in connection with approval of the Disclosure Statement and entry of the Proposed Order. In particular, the table does not include informal comments received from the U.S. Trustee.