IN THE UNITED STATES BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

In re:	)	
	)	Chapter 11
Curae Health, Inc., *et al.*[1]	)	Case No. 18-05665
	)	
	)	Judge Walker
Debtors.	)	Jointly Administered

Objection Deadline: February 19, 2019
Hearing: **February 21, 2019 at 9:00 AM CT** in Courtroom 2, 2nd Floor Customs House, 701 Broadway, Nashville, TN 37203

UNITED STATES TRUSTEE'S OBJECTION TO DISCLOSURE STATEMENT AND SOLICITATION

The U.S. Trustee, Region 8, hereby objects to Debtor's Disclosure Statement for Chapter 11 Plan of Liquidation ["Disclosure Statement," Docket No. 699] because the Disclosure Statement does not provide adequate information and the Chapter 11 Plan of Liquidation [Docket Entry 698] is patently unconfirmable.

A debtor's disclosure statement is required to have adequate information sufficient to inform similarly situated hypothetical investors to make an informed judgment about the corresponding plan. 11 U.S.C. § 1125(a). The amount of detail to be provided in a disclosure statement is evaluated on a sliding scale considering the size and complexities of the case, but courts in the Sixth Circuit have routinely considered the non-exhaustive list set forth in *In re Cardinal Congregate I, L.P.*, 121 B.R. 760 (Bankr. S.D. Ohio 1990), to establish the minimum types of information that will comprise "adequate information."

1 Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Curae Health, Inc. (5638); Amory Regional Medical Center, Inc. (2640); Batesville Regional Medical Center, Inc. (7929); and Clarksdale Regional Medical Center, Inc. (4755); Amory Regional Physicians, LLC (5044); Batesville Regional Physicians, LLC (4952); Clarksdale Regional Physicians, LLC (5311).

A bankruptcy court may also refuse to approve disclosure statement if plan in "patently unconfirmable. *In re American Capital Equipment, LLC*, 688 F. 3d 145 (3rd Cir. 2012). For a plan to be confirmable, a plan of reorganization must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). In this case, the proposed Plan does not comply with the Bankruptcy Code because it proposes non-consensual third party releases in favor of numerous non-debtor parties and it extends exculpation to non-estate fiduciaries. Absent additional evidence or amendments sufficient to satisfy the U.S. Trustee's objections, the Court should deny approval of the Disclosure Statement.

I. Disclosure Statement does not provide adequate information.

The Disclosure Statement does not provide adequate information about the Liquidating Trust or the claims that are being released. To determine whether these mechanisms of implementing the Plan are feasible, parties need to know whether the Liquidating Trust Agreement and the appointment of the Liquidating Trustee will be approved by the Court and if not, how the Liquidating Trustee will be chosen, the fee structure and who will represent the Liquidating Trust. *See* Article IV, Section F. The protections and the process for resolution of any complaints that arise with administration of the Liquidating Trustee should also be disclosed.

Under the Disclosure Statement's Summary of the Plan (Article IV of the Disclosure Statement), the Exculpations, Releases and Related Provisions merely contain a copy of language in the Plan. Debtors need to explain who is being released by whom, what is being released and the estimated value of those claims. Because Debtors are seeking a permanent release of claims against non-consenting non-debtor third parties, they must explain how each release meet the requirements of *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow*

Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002). Specifically, it is not clear how the Released Parties have contributed substantial assets to the Plan or why the releases and exculpations are essential to the Plan.

Similarly, since Debtors release all the Released Parties in Article XI, paragraph C, part 2, Debtors need to provide a business justification for each release, and the expected effect that these releases will have on the claims that will be transferred to the Liquidating Trustee and Debtor Representative.

II. Plan releases and exculpations make the plan patently unconformable.

Enjoining a non-consenting creditor's claim is only appropriate in "unusual circumstances." *In re Dow Corning Corp*., 280 F.3d at 658. When the following seven factors are present, the bankruptcy court may enjoin or release a non-consenting creditor's claims against a non-debtor:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Id. In this case, there do not appear to be any unusual circumstances to justify the expansive releases and exculpations provided in the Plan. Because Debtors are not reorganizing, it is also not clear that any third party releases or injunctions are appropriate. *See In re Swallen's Inc.*, 210 B.R. 123 (Bankr. S.D. Ohio 1997).

A. Release

At Article VIII, paragraph C of the Plan, Debtors propose third party releases. When viewed in terms of who is getting released, who is giving releases, and the scope of the claims released, the Court should determine that the provision is abusive and contrary to Sixth Circuit law.

The scope of entities to be released is unnecessarily broad. According to Article II, Section A, Definitions the Plan,

> **"Released Parties"** means, individually and collectively, in each case solely in their capacity as such, each and all of: (i) Debtors, (ii) the Committee and its members, (iii) the post-Effective Date committee to advise the Liquidating Trustee and its members, (iv) the Liquidating Trustee, (v) Strategic Healthcare Resources, LLC, (vi) GlassRatner as the Debtor Representative, and (vii) each of their respective officers, directors, attorneys, accountants, agents, and other professionals.

As indicated above, not only do the parties listed in the definition of Released Parties receive a release, all their underlying officers, directors, attorneys, accountants, agents, and other professionals are also released, resulting in an extraordinarily broad category of released persons under the Plan. Additionally, the Liquidating Trustee, the committee advising the Liquidating Trustee and the Debtor Representative have not yet done anything for which they need to be released. *In re Wash. Mut. Inc*., 442 B.R. 314, 348 (Bankr. Del. 2011). Because each Debotor is a Released Party, the Releases act as a discharge, which is not allowed under 11 U.S.C. § 1141(d)(3).

Debtors seek to compel non-Debtor third party entities to release the Released Parties, without their consent and in some instances without notice. These Releases under the Plan extend to claims that arise outside the scope of these bankruptcy cases and are beyond the jurisdiction of this Court.

The definition of "Releasing Parties" is set forth in Article II, Section A the Plan as

follows:

> **"Releasing Parties"** means, individually and collectively, (a) each Holder of a Claim or Corporate Interest that (i) votes to accept the Plan, (ii) is conclusively deemed to have accepted the Plan, (iii) abstains from voting on the Plan, (iv) votes to reject the Plan and does not opt out of the releases contained in the Plan, or (v) is conclusively deemed to have rejected the Plan and does not opt out of the releases contained in the Plan; and (b) as to each of the foregoing Entities in the foregoing clause (a), each such Entities' and their affiliates' current and former officers, directors, principals, members, partners, managers, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives and all other professionals and retained Professionals (in each case as to the foregoing Entities and their Affiliates in clause (a), solely in their capacity as such).

The Releasing Parties include all creditors for vote to accept the Plan, all creditors who reject the Plan and do not affirmatively check the box for opting out of the releases, all creditors who do not vote for the Plan, and all creditors who are not impaired by the Plan. Releasing Parties also include many people associated with those creditors, including employees, attorneys, consultants and representatives, most of which have not received notice of this bankruptcy or this Plan.

The expansive nature of the Released Parties and the Releasing Parties is exceeded only by the breadth of the obligations to be released. In short, it releases all obligations prepetition and postpetition for any act, known or unknown, related to Debtors' prepetition conduct or the bankruptcy. The Release is set forth in Article XI, paragraph C and states as follows:

> Effective as of the effective date, each of the Releasing Parties conclusively, absolutely, unconditionally, irrevocably, and forever releases (and each entity so released shall be deemed released by the Releasing Parties) each and all of the Released Parties, and their respective property from any and all claims, interests, obligations, rights, suits, damages, causes of action, remedies, and liabilities whatsoever (other than for illegal conduct, gross negligence, bad faith, or fraud), including with respect to any rights or claims that could have been asserted against any or all of the Released Parties with respect to any derivative claims, asserted or assertable on behalf of the Debtors, or the estates, as applicable, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, 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 Chapter 11 cases, the purchase, sale, transfer, or rescission of the purchase, sale, or transfer of any debt, asset, right, or interest of the 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 the Debtors and any Released Party, the restructuring or any alleged restructuring or reorganization of claims and interests prior to or in the Chapter 11 cases, the negotiation, formulation, or preparation of the plan and any other agreements or documents effectuating the plan, or related agreements, instruments, or other documents (including, for the avoidance of doubt, providing any legal opinion requested by any entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the plan or the reliance by any released party on the plan or the confirmation order in lieu of such legal opinion), and any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the effective date relating to the Debtors or the estates. . . .

Article XI, paragraph C, part 2 (uppercase lettering removed). The third party releases broadly cover all claims, interests, obligations, rights, suits, and damages, causes of action, remedies and liabilities with the exception of illegal conduct, gross negligence, bad faith, or fraud.

Both the Debtor Releases and the Third Party Releases constitute a Court finding that the releases are:

> (a) in exchange for the good and valuable consideration provided by the released parties; (b) a good faith settlement and compromise of the claims released by the Releasing Parties; (c) in the best interests of the Debtors, the estates and all holders of claims and interests; (d) fair, equitable and reasonable; (e) given and made after due notice and opportunity for hearing; (f) consensual; and (g) a bar to any of the Releasing Parties asserting any claim or cause of action released pursuant to the Release. . .

Article XI, paragraph C, part 2 (uppercase lettering removed). Despite imposing these finding on the Court, there is no evidence provided by Debtors to support any of the findings, particularly the findings that the releases are in exchange for the good and valuable consideration, a result of a good faith settlement of the Released Claims, or in the best interests of Debtors and all creditors.

B. Exculpation

Article XI, Section B of the Plan provides a exculpation from any claim or liability of acts or omissions (excluding willful or gross negligence) from any claim or liability for any claim related to Debtors' prepetition or postpetition liquidation efforts for (i) Debtors, (ii) the Committee and its members, (iii) the committee advising the Liquidating Trustee and its members, (iv) the Liquidating Trustee, (v) Strategic Health Resources LLC, (vi) GlassRatner as the Debtor Representative, and (vii) each of their respective officers, directors, attorneys, accountants, agents, and other professionals.

Beyond section 1125(e) of the Bankruptcy Code, exculpation is only appropriate when it is limited to fiduciaries who have served a debtor through a chapter 11 proceeding. *See In re Enron Corp*., 326 B.R. 497 (S.D.N.Y. 2005) (affirming exculpation provision for fiduciaries); *In re Washington Mutual*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) ("The exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and Debtors' directors and officers."). The practical effect of a proper exculpation provision is not to provide a release, but to raise the standard of liability of fiduciaries for their conduct during the bankruptcy case. *See In re PWS Holding Corp*., 228 F.3d 224, 247 (3rd Cir. 2000) (noting an exculpation provision "sets forth the appropriate standard of liability"); *In re Friedman's Inc*., 356 B.R. 758, 763-64 (Bankr. S.D. Ga. 2005) (explaining that exculpation provision will "affirm the scope of [the professionals'] liability or non-liability").

Here, Debtors have failed to meet their burden of proof to explain why the exculpations should extend to non-fiduciaries. *See Washington Mut*., 442 B.R. at 350-51 (exculpation clause must be limited to estate fiduciaries). Further, the claims for which these parties are being

exculpated are vague; it appears to include exculpation of fraudulent acts. To the extent Debtors are seeking a permanent release of claims against nondebtor third parties, they must meet the requirements of *Dow Corning Corp.*, 280 F.3d at 658.

WHEREFORE, the U.S. Trustee respectfully requests that the Court deny approval of Debtor's Disclosure Statement until the above specified changes are made and for such other relief as the Court deems appropriate.

Respectfully submitted,

PAUL RANDOLPH,
ACTING U.S. TRUSTEE, REGION 8

/s/ Megan Seliber
MEGAN SELIBER
Trial Attorney for the U.S. Trustee
318 Customs House, 701 Broadway
Nashville, TN 37203
(615) 695-4060; 615-736-2260 (fax)
Megan.Seliber@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that, on January 25, 2019, a copy of the foregoing document was transmitted electronically to the parties consenting to electronic service in this case through the ECF system maintained by the United States Bankruptcy Court for the Middle District of Tennessee.

/s/ Megan Seliber
Megan Seliber, Trial Attorney