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

In re: Curae Health, Inc., *et al.*[1] 1721 Midpark Road, Suite B200 Knoxville, TN 37921 Debtors.	Chapter 11 Case No. 18-05665 Judge Walker Jointly Administered Hearing Date: February 28, 2019 at 9:00 a.m.(CT) Objection Deadline: February 21, 2019 Re: Docket No. 699

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO THE DISCLOSURE STATEMENT FOR DEBTORS' CHAPTER 11 PLAN OF LIQUIDATION

The Official Committee of Unsecured Creditors (the "**Committee**") appointed in the Chapter 11 Cases of the above-captioned debtors (the "**Debtors**") hereby objects (the "**Objection**") to the *Disclosure Statement for Debtors' Chapter 11 Plan of Liquidation* [Docket No. 699] (the "**Debtors' Disclosure Statement**"), and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Debtors' Plan (defined below) and the Debtors' Disclosure Statement are deeply troubling to the creditors herein and inconsistent with precedent of the United States Court of Appeals for the Sixth Circuit. As detailed in *The Official Committee of Unsecured Creditors' Motion (I) to Terminate the Debtors' Exclusivity Periods to Permit the Committee to*

[1] The Debtors in these chapter 11 cases (the "**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).

File a Plan of Liquidation, and (II) for Leave, Standing and Authority to Commence, Prosecute and, if Appropriate, Settle Certain Causes of Action on Behalf of the Debtors' Estates [Docket No. 722] (the "**Exclusivity Termination and Derivative Standing Motion**"), the Debtors essentially hijacked a joint plan that the Committee had been drafting with the Debtors, inserted broad release and exculpation provisions that solely benefit their insiders (to the detriment of creditors), and filed their plan without a word of notice to the Committee.[2]

2. Equally troubling, the Debtors granted these releases for no apparent consideration (even though the claims against such insiders could be worth millions of dollars and may be one of the only significant sources of recovery for creditors). This is especially disconcerting because it appears that the Debtors have not conducted any investigation into either the value of the claims they now seek to release, or the culpability of their insiders as the Debtors' Disclosure Statement does not discuss these issues. Moreover, the statement of financial affairs filed by Curae Health, Inc. ("**Curae**") failed to identify many of the payments sought to be released and the Debtors inexplicably took the position[3] that their manager is not an insider or affiliate in direct contravention to sections 101(2)(C) and 101(E)[4] of the Bankruptcy Code. Disclosure is obviously paramount in bankruptcy cases and the lack of disclosure on these material issues is troubling.

3. Under these circumstances – where the Debtors appear to be utilizing the chapter 11 plan process to benefit their insiders at the expense of creditors (the true stakeholders in these Chapter 11 Cases) – the Debtors' Disclosure Statement should not be approved for two reasons.

[2] Yet surprisingly, the Debtors' motion in support of the Debtors' Disclosure Statement still refers to the Debtors' Plan as a "joint" plan. This may confuse parties who are entitled to vote on the Debtors' Plan.
[3] The statement of financial affairs states "Strategic Healthcare is not an affiliate or insider of Curae Health, Inc. or any of its affiliate Debtors."
[4] Strategic (defined below) is an affiliate by operation of 101(31)(B)(iii). *See* docket no. 598 herein.

4. First, because the Debtors' Plan contains release and exculpation provisions that violate bedrock precedent established by the United States Court of Appeals for the Sixth Circuit and other applicable law, it would waste scarce estate resources to approve the Debtors' Disclosure Statement and allow the Debtors to solicit votes on a patently unconfirmable plan. See In re Mahoney Hawkes, 289 B.R. 285, 301 (Bankr. D. Mass. 2002) ("CNA has not met any of the factors necessary to warrant the issuance of a permanent injunction. Therefore, I hold that the Plan would be unconfirmable since it contains this provision.").

5. Second, the Debtors' Disclosure Statement lacks "adequate information" to enable creditors to make an informed voting decision regarding the Debtors' Plan. Most notably, the Debtors' Disclosure Statement fails to adequately disclose: (a) that the Debtors' Plan will likely provide little or no dividend to general unsecured creditors; (b) that the Debtors' estates may have valuable claims against their current and former directors, officers, trustees, and/or managers (including Strategic Healthcare Resources, LLC,[5] a management company owned by the Debtors' chief executive officer ("**Strategic**") and certain directors, trustees, and/or officers provided by Strategic) (collectively, the "**Potential Defendants**") for, among other things, breaches of fiduciary duties; (c) that the Committee requested authorization to pursue such claims (and that any recovery thereon would directly increase creditor recoveries); (d) that the Debtors' Plan seeks to eliminate the possibility of any such enhanced creditor recoveries by granting the Potential Defendants broad releases; and (e) that the Debtors appear to be granting such valuable releases for no consideration.

6. As examples of the potential claims against the Potential Defendants, the Committee, as an independent fiduciary, will investigate, among other things, whether the

[5] Strategic is specifically identified as a "Released Party" under the Debtors' Plan.

Potential Defendants mismanaged the Debtors' businesses, facilitated fraudulent transfers, and treated separate Debtor-entities as interchangeable piggybanks to the detriment of creditors and other stakeholders. Unfortunately, however, the Debtors' Disclosure Statement lacks any information regarding these potential claims, what investigation (if any) the Debtors undertook to evaluate the liability of the Potential Defendants, or why the Debtors now seek to release these claims for no consideration.[6]

7. Lastly, the Debtors' Disclosure Statement fails to inform creditors that the Committee does not support the Debtors' Plan and recommends that creditors vote to reject the Debtors' Plan.

8. In sum, the Debtors' attempt to gratuitously "cleanse" the conduct of their insiders to the detriment of creditors should not be countenanced by this Court (especially given the lack of adequate disclosure with respect thereto). The Debtors' Disclosure Statement should not be approved unless: (a) the Debtors' Plan is modified to address the fatal defects that will prevent its confirmation, and (b) the Debtors' Disclosure Statement is supplemented with fulsome disclosures regarding each of the issues discussed herein.

BACKGROUND

9. On August 24, 2018 (the "**Petition Date**"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy**

[6] Notably, if one failed to read the Debtors' Disclosure Statement and the Debtors' Plan extremely carefully, one could easily (and erroneously) conclude that the Debtors intend to allow claims against the Potential Defendants to proceed (such that creditor recoveries might be enhanced). In short, the Debtors' Plan defines "D&O Claims" as "any and all rights, Causes of Action and Claims arising under state and/or federal law against the Debtors' current and former directors, trustees, managers and/or officers (including Strategic and any directors, trustees, and/or officers provided by Strategic), including Claims for breach of fiduciary duty, and the proceeds of any such rights and Claims . . ." See Debtors' Plan § 1. And the Debtors' Disclosure Statement provides that "[t]he Debtor Representative shall be authorized to institute and to prosecute through final judgment or settle the D&O Claims . . . Upon entry of a final judgment or settlement, the relevant proceeds of the D&O Claims . . . shall be transferred to the Liquidating Trust for the benefit of Holders of Allowed Claims, in accordance with the provisions of the Plan." See Debtors' Disclosure Statement p. 15. However, the Debtors' description of the Debtor Representative's right to pursue D&O Claims is potentially very misleading because the proposed releases effectively neuter any such claims.

Code") with the United States Bankruptcy Court for the Middle District of Tennessee (the "**Bankruptcy Court**").

10. The general factual background regarding the Debtors, including their business operations and capital structure, and the events leading to the filing of the Chapter 11 Cases, is set forth in the *Declaration of Stephen N. Clapp, Chief Executive Officer of Curae Health, Inc., in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 49].

11. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in the Chapter 11 Cases. On September 6, 2018, the Office of the United States Trustee for the Middle District of Tennessee appointed the Committee [Docket No. 112].

12. On September 21, 2018, Curae filed its Statement of Financial Affairs [Docket No. 225]. In response to question 4 (payments to insiders), Curae lists Strategic, a management company owned by the Debtors' chief executive officer, as an insider, but fails to disclose all the payments to Strategic within 1 year of the Petition Date. Also, Curae states that Strategic "is not an affiliate or insider of Curae Health, Inc. or any of its affiliated Debtors." This assertion is directly at odds with the definition of affiliate in section 101(2)(C) of the Bankruptcy Code (entity that operates the business or substantially all of the Debtor under a lease or operating agreement) and section 101(31)(B)(iii) (person in control).[7] See *Debtors' Motion for Entry of an Order (I) Authorizing Debtors to Enter into the Sixth Amendment to Hospital Management Agreement Effective January 1, 2019, and (II) Granting Related Relief* [Docket No. 598]. However, in response to question 3 of the Statement of Financial Affairs (90 day payments),

[7] Article 1 of the parties' management agreement, dated December 31, 2014, refers to the duties as "a full range of day-to-day operational and administrative senior-level management services . . ."

Curae lists aggregate transfers of $490,978.58 to Strategic (although the specific transfers and dates are not listed).

13. On January 22, 2019, the Debtors filed the Debtors' Disclosure Statement and the *Debtors' Chapter 11 Plan of Liquidation* (the "**Debtors' Plan**") [Docket No. 698], which includes broad releases for the benefit of the Debtors' insiders.[8]

OBJECTION

14. Before a debtor can solicit acceptances of a plan, it must obtain approval from the bankruptcy court of a disclosure statement containing "adequate information" – *i.e.*, information upon which creditors can make an informed judgment regarding the plan. See 11 U.S.C. § 1125(b). Here, the Debtors' Disclosure Statement should not be approved because: (i) the Debtors' Plan, which contains release and exculpation provisions that violate applicable law, is patently unconfirmable, and (ii) the Debtors' Disclosure Statement lacks the statutorily required "adequate information."

I. The Debtors' Disclosure Statement Should Not Be Approved Because the Debtors' Plan is Patently Unconfirmable

15. Approval of a disclosure statement should be denied if it describes a plan that is not confirmable. In re American Capital Equip., LLC, 688 F.3d 145, 154 (3rd Cir. 2012) (a bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage that a later confirmation hearing would be futile because the plan described by the disclosure statement is patently unconfirmable. 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."); see also In re E. Me. Elec. Coop., 125 B.R. 329, 333 (Bankr.

[8] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Debtors' Plan.

D. Me. 1991); In re Phx. Petroleum Co., 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001). Thus, even if a disclosure statement properly summarizes and provides adequate information about the proposed plan – though, as discussed herein, the Debtors' Disclosure Statement does not – it should not be approved if the plan is not confirmable. See In re Monroe Well Serv., 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987). Denying approval of a disclosure statement concerning a plan that cannot be confirmed prevents the diminution in the value of the estate that would result from soliciting votes and seeking confirmation of a plan that is not confirmable. See Phx. Petroleum, 278 B.R. at 394; In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986).

16. One Court recently discussed the benefits of addressing "plan-killer issues" at the disclosure statement stage rather than waiting to address those issues at confirmation:

> The Debtor suggested that the principal combatants simply allow the disclosure statements to be approved, leaving to the contested confirmation trial their legal arguments concerning the confirmability (or facial unconfirmability) of each other's proposed plan. Because the legal issues raised by the plan proponents in their objections go to the very heart of confirmability, the Court declines to take a wait-and-see approach. If the answer to any one of the confirmation objections could render either or both proposed plans facially unconfirmable, it is a better use of both judicial and Estate resources to deal with those issues now. Here, it is appropriate to deal with potential plan-killer issues in connection with the hearing on the adequacy of the disclosure statements, to avoid the costs associated with circulating disclosure statements and soliciting ballots for potentially unconfirmable Chapter 11 plans.

In re Flour City Bagels, LLC, 2017 Bankr. LEXIS 288, *4-5 (Bankr. W.D.N.Y February 2, 2017).

17. Here, because the Debtors' Plan contains release and exculpation provisions that violate applicable law, the Debtors' Plan is patently unconfirmable and the Debtors' Disclosure Statement should not be approved. See In re Mahoney Hawkes, 289 B.R. at 301 ("CNA has not met any of the factors necessary to warrant the issuance of a permanent injunction. Therefore, I

hold that the Plan would be unconfirmable since it contains this provision."). These cases are unable to sustain a "wait and see" approach to the injunction and release issues raised by the Debtors herein.

18. As to creditor releases of non-Debtor parties, Article XI.C.1 of the Debtors' Plan provides as follows:

> **1. Third Party Release**
>
> 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,[9] 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

[9] The Debtors' Plan defines "Released Parties" as: "(i) the Debtors, (ii) the Committee and its members, (iii) the POC and its members, (iv) the Liquidating Trustee, (v) Strategic, (vi) the Debtor Representative, and (vii) each of their respective officers, directors, attorneys, accountants, agents, and other professionals." See Debtors' Plan Article II.

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.

ENTRY OF THE CONFIRMATION ORDER SHALL CONSTITUTE THE BANKRUPTCY COURT'S APPROVAL, PURSUANT TO BANKRUPTCY RULE 9019, OF THE THIRD PARTY RELEASE, WHICH INCLUDES BY REFERENCE EACH OF THE RELATED PROVISIONS AND DEFINITIONS CONTAINED HEREIN, AND, FURTHER, SHALL CONSTITUTE THE BANKRUPTCY COURT'S FINDING THAT THE THIRD PARTY 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 THIRD PARTY RELEASE.

19. Similarly, as to releases by the Debtors of non-Debtor parties, Article XI.C.2 of the Debtors' Plan provides as follows:

2. Debtor Releases

PURSUANT TO BANKRUPTCY CODE SECTION 1123(B), AND NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THE PLAN OR THE CONFIRMATION ORDER, ON AND AFTER THE EFFECTIVE DATE, FOR GOOD AND VALUABLE CONSIDERATION, THE ADEQUACY OF WHICH IS HEREBY CONFIRMED, THE RELEASED PARTIES SHALL BE DEEMED RELEASED BY THE DEBTORS AND THE ESTATES FROM ANY AND ALL CLAIMS, OBLIGATIONS, DEBTS, RIGHTS, SUITS, DAMAGES, CAUSES OF ACTION, REMEDIES, AND LIABILITIES WHATSOEVER (OTHER THAN FOR ILLEGAL CONDUCT, GROSS NEGLIGENCE, BAD FAITH, OR FRAUD), INCLUDING 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 ANY OF THE DEBTORS OR THE ESTATES, AS APPLICABLE, WOULD HAVE BEEN LEGALLY ENTITLED TO ASSERT IN ITS OWN RIGHT, OR ON BEHALF OF THE HOLDER OF ANY CLAIM OR INTEREST OR OTHER ENTITY, 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, CORPORATE INTEREST, ASSET, RIGHT, OR INTEREST OF THE DEBTORS, THE SUBJECT MATTER OF, OR THE TRANSACTIONS OR EVENTS GIVING RISE TO, ANY CLAIM OR CORPORATE INTEREST THAT IS TREATED IN PLAN, THE BUSINESS OR CONTRACTUAL ARRANGEMENTS BETWEEN THE DEBTORS AND ANY RELEASED PARTY, THE RESTRUCTURING 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, 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. FOR PURPOSES OF THE RELEASES CONTAINED IN THE PLAN, THE LIQUIDATING TRUSTEE IS DEEMED TO BE A SUCCESSOR TO THE ESTATES AND, THEREFORE, IS BOUND BY THE RELEASES CONTAINED IN THE PLAN.

ENTRY OF THE CONFIRMATION ORDER SHALL CONSTITUTE THE BANKRUPTCY COURT'S APPROVAL, PURSUANT TO BANKRUPTCY RULE 9019, OF THE RELEASE OF THE RELEASED PARTIES BY THE DEBTORS AND THE ESTATES, WHICH INCLUDES BY REFERENCE EACH OF THE RELATED PROVISIONS AND DEFINITIONS CONTAINED HEREIN, AND FURTHER, SHALL CONSTITUTE THE BANKRUPTCY COURT'S FINDING THAT THE RELEASE OF THE RELEASED PARTIES BY THE DEBTORS AND THE ESTATES IS: (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 DEBTORS OR THE ESTATES; (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; AND (F) A BAR TO THE DEBTORS OR THE ESTATES ASSERTING ANY CLAIM OR CAUSE OF ACTION RELEASED PURSUANT TO THE RELEASE BY THE DEBTORS OR THE ESTATES.

20. In addition, Article XI.B of the Debtors' Plan contains the following exculpation provision:

> Except as otherwise specifically provided in the Plan, none of the Exculpated Parties[10] shall have or incur any liability to any holder of a Claim or Corporate Interest (including Estate Claims) for any act or omission in connection with, related to, or arising out of the Chapter 11 Cases, the Plan, the Disclosure Statement, the pursuit of Confirmation, the consummation of the Plan, the administration of the Plan, the property to be liquidated and/or distributed under the Plan or any prepetition or postpetition act taken or omitted to be taken in connection with or in contemplation of the liquidation of the Debtors, except for their willful or gross negligence as determined by a Final Order of a court of competent jurisdiction, and in all respects shall be entitled to rely reasonably upon the advice of counsel with respect to their duties and responsibilities under the Plan.

21. Lastly, Article XI.E of the Debtors' Plan contains the following injunction:

> FROM AND AFTER THE EFFECTIVE DATE, TO THE EXTENT OF THE EXCULPATIONS, LIMITATIONS OF LIABILITY, AND RELEASES GRANTED IN THIS PLAN, ALL PARTIES SHALL BE PERMANENTLY ENJOINED FROM COMMENCING OR CONTINUING IN ANY MANNER AGAINST THE EXCULPATED PARTIES, THE RELEASED PARTIES, OR PARTIES WHOSE LIABILITY IS LIMITED (COLLECTIVELY, THE **"PROTECTED PARTIES"**), AND THEIR RESPECTIVE ASSETS AND PROPERTIES, AS THE CASE MAY BE, ANY SUIT, ACTION, OR OTHER PROCEEDING ON ACCOUNT OF OR RESPECTING ANY CLAIM, DEMAND, LIABILITY, OBLIGATION, DEBT, RIGHT, CAUSE OF ACTION, INTEREST, OR REMEDY WITH RESPECT TO WHICH SUCH PROTECTED PARTIES ARE EXCULPATED OR RELEASED OR WITH RESPECT TO WHICH SUCH PROTECTED PARTIES' LIABILITY IS OTHERWISE LIMITED.

22. The Bankruptcy Code prohibits the release and permanent injunction of claims against non-debtors in most circumstances. See 11 U.S.C. § 524(e) ("Except as provided in subsection (a)(3) . . . discharge of a debt of a debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."). While the Sixth Circuit has not

[10] The Debtors' Plan defines "Exculpated Parties" as: "(i) the Debtors, (ii) the Committee and its members, (iii) the POC and its members, (iv) the Liquidating Trustee, (v) Strategic, (vi) the Debtor Representative, and (vii) each of their respective officers, directors, attorneys, accountants, agents, and other professionals." See Debtors' Plan Article II.

categorically barred third party releases, it recognizes that they are only appropriate in rare circumstances. See Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002) ("Because such an injunction is a dramatic measure to be used cautiously, we follow those circuits that have held that enjoining a non-consenting creditor's claim is only appropriate in '***unusual circumstances***'") (citation omitted; emphasis added).

23. In particular, under Sixth Circuit precedent, a "bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor" only "when the following seven factors are present:"

> (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 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. (citations omitted).

24. Similarly, releases of a debtor's claims against non-debtor third parties are appropriate only in "rare" and "exceptional circumstances." See In re Master Mortgage Inv.

Fund, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994). In general, courts consider the following five factors when determining whether such "exceptional circumstances" exist:

> (1) There is an identity of interest 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. Without . . . it, there is little likelihood of success.
>
> (4) A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has "overwhelmingly" voted to accept the proposed plan treatment.
>
> (5) The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

See, e.g., id. at 935; In re Swallen's, 210 B.R. 123, 126-27 (Bankr. S.D. Ohio 1997) (citation omitted); see also In re Richard Potasky Jeweler, 222 B.R. 816, 826 (S.D. Ohio 1998); In re Wash. Mut., 442 B.R. 314, 349 (Bankr. D. Del. 2011) ("the Court finds that there is no basis whatsoever for the Debtors to grant a release to directors and officers or any professionals of the Debtors, current or former. The Debtors may argue that there is an identity of interest between them and the directors and officers who served pre-petition because their charter (or by laws) provide that those parties will be indemnified by the Debtors for certain claims that may be brought against them by creditors or shareholders . . . [but] this alone is insufficient to justify the releases.").

25. Here, as detailed in the charts below, the Debtors' Disclosure Statement should not be approved because: (a) it does not satisfy the requirements for third party releases and debtor releases set forth in Dow Corning and Master Mortgage and their progeny, and (b) it is simply not possible for the Debtors to satisfy these requirements.

Third-Party Release Factors (Dow Corning)	**Addressed in the Debtors' Disclosure Statement?**	**Could the Defect Be Remedied?**
Identity of interests between the debtor and the third party	No	No
Non-debtor contributed substantial assets to the reorganization	No	No
Injunction is essential to reorganization	No	No
Impacted class, or classes, has overwhelmingly voted to accept the plan	No	Possibly
The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction	No	No
The plan provides an opportunity for those claimants who choose not to settle to recover in full	No	No
The bankruptcy court made a record of specific factual findings that support its conclusions	No	Possibly

Debtor Release Factors (Master Mortgage)	**Addressed in the Debtors' Disclosure Statement?**	**Could the Defect Be Remedied?**
Identity of interests between the debtor and the third party	No	No
Non-debtor contributed substantial assets to the reorganization	No	No
Injunction is essential to reorganization	No	No
Impacted class, or classes, has overwhelmingly voted to accept the plan	No	Possibly

The plan provides a mechanism to pay for all, or substantially all, of the claims of the class or classes affected by the injunction	No	No

26. As the foregoing demonstrates, the Debtors fall woefully short of satisfying the requirements of Dow Corning and Master Mortgage. Most glaringly, the Debtors are liquidating, not reorganizing, so the proposed debtor and third-party releases are inherently ***not*** necessary for the Debtors' reorganization; the proposed beneficiaries of the releases are providing ***no*** consideration in exchange for the releases; and many creditors affected by the proposed releases are expected to receive ***no*** recovery. See Debtors' Disclosure Statement p. 27 ("There will likely be no distribution on account of any Allowed Claims in Class 5 (General Unsecured Claims)"). Moreover, many of the proposed released parties are the exact parties whose prepetition conduct the Committee is investigating. Accordingly, the proposed releases render the Debtors' Plan unconfirmable and the Disclosure Statement should not be approved. See In re Mahoney Hawkes, 289 B.R. at 302-03 ("Because the partners have not resoundingly demonstrated that they have met the Master Mortgage tests, there is insufficient evidence to warrant [the requested releases] . . . Therefore, I cannot approve a plan with such provisions . . .").

27. In addition, the exculpation provision in the Debtors' Plan exceed the parameters of section 1125(e) of the Bankruptcy Code, which provides as follows:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

11 U.S.C. § 1125(e).

28. The exculpation provision in the Debtors' Plan exceeds the parameters of section 1125(e) of the Bankruptcy Code because it: (i) includes parties other than estate fiduciaries, and (ii) provides exculpation for liability in connection with a wide variety of transactions and events not provided for in section 1125(e), including illegal and/or fraudulent conduct, and actions undertaken in bad faith.

29. The Debtors' Plan is patently unconfirmable unless the exculpation provision is revised consistent with the parameters of section 1125(e) of the Bankruptcy Code and existing case law. See In re Wash. Mutual, 442 B.R. at 350-51 ("The exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committee and their members, and the Debtors' directors and officers.")

30. For the foregoing reasons, the Committee respectfully requests that the Bankruptcy Court deny approval of the Debtors' Disclosure Statement.

II. The Disclosure Statement Lacks Adequate Information

31. For a disclosure statement to be approved under section 1125 of the Bankruptcy Code, it must include "adequate information." Section 1125(a)(1) defines "adequate information" as information "of a kind, and in sufficient detail . . . [to enable] a hypothetical investor typical of holders of claims or interests . . . of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1). The Debtors, as the proponents of the Debtors' Disclosure Statement, bear the burden of demonstrating that the disclosure statement contains "adequate information." Official Comm. of Unsecured Creditors v. Michelson, 141 B.R. 715, 719-20 (Bankr. E.D. Cal. 1992).

32. The Bankruptcy Code requires disclosure statements to contain sufficient and accurate information since the disclosure statement is intended to be the primary source of

information upon which creditors and shareholders make an informed judgment about a plan. See, e.g., In re Jeppson, 66 B.R. 269, 291 (Bankr. D. Utah 1986); In re Rock Broad. of Idaho, 154 B.R. 970, 976 (Bankr. D. Idaho 1993); In re Monnier Bros., 755 F.2d 1336, 1342 (8th Cir. 1985). Mere statements of opinion or belief, without accompanying factual support, are inadequate to support a disclosure statement. See In re Beltrami Enters., 191 B.R. 303, 304 (Bankr. M.D. Pa. 1995) ("Conclusory allegations or opinions without supporting facts are generally not acceptable") (citations omitted).

33. Although the term "adequate information" is not susceptible to a precise definition, case law under section 1125 of the Bankruptcy Code has produced a list of factors, disclosure of which may be mandatory under the facts and circumstances of a particular case, to meet the statutory requirement of adequate information. In re Feretti, 128 B.R. 16, 18-19 (Bankr. D.N.H. 1991); In re Microwave Prods. of Am., 100 B.R. 376, 378 (Bankr. W.D. Tenn. 1989). Such factors that may be required to be disclosed include:

(1) The circumstances that gave rise to the filing of the bankruptcy petition;

(2) A complete description of the available assets and their value;

(3) The anticipated future of the debtor, with accompanying financial projections;

(4) The source of the information provided in the disclosure statement;

(5) The condition and performance of the debtor while in chapter 11;

(6) Information regarding claims against the estate, including those allowed, disputed, and estimated;

(7) A liquidation analysis setting forth the estimated return that creditors would receive under chapter 7;

(8) The accounting and valuation methods used to produce the financial information in the disclosure statement;

(9) Information regarding the future management of the debtor, including the amount of compensation to be paid to any insiders, directors, and/or officers of the debtor;

(10) A summary of the plan;

(11) An estimate of all administrative expenses, including attorneys' fees and accountants' fees;

(12) The collectability of any accounts receivable;

(13) Any financial information, valuations or pro forma projections that would be relevant to creditors' determinations of whether to accept or reject the plan;

(14) Information relevant to the risks being taken by the creditors and interest holders;

(15) The actual or projected value that can be obtained from avoidable transfers;

(16) The existence, likelihood and possible success of nonbankruptcy litigation;

(17) The tax consequences of the plan; and

(18) The relationship of the debtor with affiliates.

Feretti, 128 B.R. at 18-19.

34. The following is a summary of the various aspects of the Debtors' Disclosure Statement that lack adequate information:

a) The Debtors' Disclosure Statement Lacks Adequate Information Regarding the Proposed Release and Exculpation Provisions

35. The release and exculpation provisions proposed in the Debtors' Plan apply to a broad range of parties, including, the Debtors, the Committee and its members, the POC and its members, the Liquidating Trustee, Strategic (a management company owned by the Debtors' chief executive officer), the Debtor Representative, and each of their respective officers, directors, attorneys, accountants, agents and other professionals. See Debtors' Plan Article II. However, the Debtors' Disclosure Statement lacks adequate information regarding these release and exculpation provisions. For instance, there is no description of: (a) the claims that would be released if the Debtors' Plan is approved, (b) what consideration (if any) is being given by the released parties in exchange for the releases, or (c) how such provisions are in any way

consistent with applicable Sixth Circuit precedent and applicable law.[11]

36. The Debtors' Disclosure Statement simply cuts and pastes the relevant release and exculpation provisions from the Debtors' Plan verbatim (*i.e.*, without any explanatory information), and baldly asserts (again, without any explanation or evidence) that the releases are "in exchange for good and valuable consideration", and "in the best interests of the debtors, the estates, and all holders of claims and interests." See Debtors' Disclosure Statement p. 44.

37. This is simply not enough to enable voters to make an informed voting decision and the Debtors' Disclosure Statement thus should not be approved. See, e.g., Behrmann v. Nat'l Heritage Found., 663 F.3d 704, 713 (4th Cir. 2011) (simply listing the factors for releases is "meaningless in the absence of specific factual findings explaining why this is so.").

b) The Debtors' Disclosure Statement Lacks Adequate Information Regarding: (i) What Investigation, If Any, the Debtors Undertook in Connection with Estate Claims and Causes of Action Against the Released Parties, and (ii) the Committee's Request to Pursue Such Claims to Enhance Creditor Recoveries

38. As detailed in the Exclusivity Termination and Derivative Standing Motion, the Committee has identified numerous potential causes of action by the Debtors' estates against some of the very parties the Debtors seek to release under their plan. The Debtors' Disclosure Statement fails to inform parties-in-interest that the Committee requested authorization to pursue such claims, that any recovery thereon would directly enhance creditor recoveries, and that the Debtors' proposed releases would eliminate the possibility of such improved recoveries.

[11] And, as discussed above, the Debtors' Disclosure Statement is potentially misleading by stating that the Debtor Representative has authority to prosecute claims against the Debtors' current and former directors, including Strategic, because it fails to clarify that this authority is completely gutted by the release provisions. See Debtors' Disclosure Statement p. 15 ("The Debtor Representative shall be authorized to institute and to prosecute through final judgment or settle the D&O Claims . . . Upon entry of a final judgment or settlement, the relevant proceeds of the D&O Claims . . . shall be transferred to the Liquidating Trust for the benefit of Holders of Allowed Claims, in accordance with the provisions of the Plan").

39. The Debtors' Disclosure Statement likewise lacks any discussion of: (a) what, if any, investigation the Debtors undertook with respect to the value of such claims or the culpability of their insiders,[12] or (b) the fact that the Debtors are apparently receiving no consideration in exchange for such releases.

40. Creditors cannot possibly make an informed voting decision regarding the Debtors' Plan without understanding why the Debtors would voluntarily relinquish valuable claims for no consideration and without conducting even a rudimentary investigation. See, e.g., In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988) (an acceptable disclosure statement must contain "simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and possible . . . alternatives so that [creditors] can intelligently accept or reject the Plan.").

c) The Debtors' Disclosure Statement Lacks Adequate Information Regarding Expected Creditor Recoveries and Related Contingencies and Conflicts of Interest Embedded in the Debtors' Plan

41. A disclosure statement "must clearly and succinctly inform the average . . . creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." Feretti, 128 B.R. at 19. Here, in three sentences, the Debtors' Disclosure Statement essentially informs holders of claims in Class 5 (General Unsecured Claim), Class 6 (Deficiency Claim of ServisFirst), and Class 7 (Deficiency Claim of CHS) that they are unlikely to receive a distribution unless a favorable result is obtained in litigation to disallow the secured claims of ServisFirst and CHS. See Debtors' Disclosure Statement p. 27. The Debtors' Disclosure Statement fails, however, to provide any meaningful description of the litigation against ServisFirst and CHS (or the potential claims against the Debtors' insiders,

[12] Based on the Committee's review of the Debtors' professionals fee applications, it appears that no investigation has been conducted.

which also could augment creditor recoveries).

42. Likewise absent from the Debtors' Disclosure Statement is a description of the conflicts of interest embedded in the Debtors' Plan with respect to such litigation. For instance, the Debtors fail to adequately describe that ServisFirst will be appointed to the POC (which will replace the Committee upon the effective date of the Debtors' Plan) and authorized to advise the Liquidating Trustee (one of the Debtors' retained professionals) regarding the prosecution of estate claims and causes of action (including causes of action against *itself*). The Debtor Representative (also one of the Debtors' retained professionals) is likewise authorized under the Debtors' Plan to exercise oversight regarding the prosecution of estate claims and causes of action (including D&O Claims). Given that the litigation against ServisFirst and the Debtors' insiders are two of the key potential drivers of creditor recoveries, it would be inappropriate for ServisFirst or the Debtors' retained professionals to exercise such significant authority over such litigation. The Committee – as an independent fiduciary and the representative of the true economic stakeholders in these Chapter 11 Cases – is far better positioned to select the parties who will oversee these critical litigations.

d) The Debtors' Disclosure Statement Lacks Adequate Information Regarding Transfers to Strategic

43. A "disclosure statement must describe fully, completely, and in detail all transactions with insiders." See In re Malek, 35 B.R. 443, 444 (Bankr. E.D. Mich. 1983). As detailed above, the Debtors' Statement of Financial Affairs failed to provide adequate information regarding payments made to Strategic within the one-year period immediately preceding the Petition Date. Such information is highly relevant to voting creditors because, among other things, the Debtors' Plan would absolve Strategic from any potential liability with respect to such transfers. Because the Debtors' Disclosure Statement does not contain *any*

information regarding transfers made to Strategic (or other insiders) – let alone *adequate* information – the Debtors' Disclosure Statement should not be approved.

RESERVATION OF RIGHTS

44. The Committee reserves all of its rights in connection with the approval of the Debtors' Disclosure Statement and the confirmation of the Debtors' Plan, including its right to take discovery and present evidence at any relevant hearings. This Objection is submitted without prejudice to, and with a full reservation of, the Committee's right to supplement or amend this Objection in advance of, or in connection with, the hearing to approve the Debtors' Disclosure Statement and confirmation of the Debtors' Plan. Nothing herein is intended to be a waiver by the Committee of any right, objection, argument, claim or defense with respect to any matter, including matters involving the Debtors' Disclosure Statement and the Debtors' Plan, all of which are expressly reserved.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Bankruptcy Court deny approval of the Debtors' Disclosure Statement and grant the Committee such other relief as is just and proper.

Dated: February 21, 2019

/s/ Michael E. Collins

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2019, a copy of the foregoing was sent via ECF to all parties registered to receive electronic notice in the case and via U.S. mail, postage prepaid, to the parties listed on the mailing matrix attached as Exhibit A.

/s/ Michael E. Collins
Michael E. Collins