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

In re:	)	Chapter 11
Curae Health, Inc., *et al*.[1]	)	Case No. 18-05665
	)	
1721 Midpark Road, Suite B200	)	Judge Walker
Knoxville, TN 37921	)	
Debtors.	)	Jointly Administered

DEBTORS' OBJECTION TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' MOTION (I) TO TERMINATE THE DEBTORS' EXCLUSIVITY PERIODS TO PERMIT THE COMMITTEE TO 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

The above-captioned debtors and debtors in possession (the "**Debtors**") hereby file this objection (this "**Objection**") in response to *The Official Committee of Unsecured Creditors' Motion (I) to Terminate the Debtors' Exclusivity Periods to Permit the Committee to 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 "**Committee Motion**") and *Medhost of Tennessee's Statement in Support of Committee's Motion to Terminate Exclusivity Periods and for Authority to Prosecute Causes of Action* [Docket No. 746] and in further support of the *Debtors' Chapter 11 Plan of Liquidation* [Docket No. 698] (as may be amended, supplemented, or otherwise modified from time to time, the "**Plan**") and the *Debtors' Disclosure Statement in Support of Debtors' Chapter 11 Plan of*

[1] The 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).

Liquidation [Docket No. 699] (as may be amended, supplemented, or otherwise modified from time to time, the "**Disclosure Statement**").[2]

PRELIMINARY STATEMENT

1. Since the beginning of these Chapter 11 Cases, Debtors' primary goals have been to keep the Hospitals operating and transition them to new operators for the benefit of their respective communities. Debtors, along with Debtors' Professionals and management, have worked diligently to achieve those goals. By the end of March, Debtors anticipate that all of the Hospitals will have transitioned to new operators. In light of the impending transitions of all the Hospitals, Debtors turned their focus to how to best maximize the assets of the Estates for the benefit of the Debtors' creditors. Initially, Debtors believed that drafting a joint plan of liquidation with the Committee was the best way forward; however, Debtors and the Committee reached an impasse over how best to maximize the value of the Debtors' assets.

2. The Debtors worked in good faith with the Committee to propose a consensual joint plan of liquidation and accompanying disclosure statement. Debtors believe that any strategy to maximize the recovery for all creditors, particularly unsecured creditors, will require the full cooperation of the Debtors' directors and officers in pursuing post-confirmation, third-party claims. For this reason, Debtors proposed that certain limited releases be included in the Plan in consideration for the cooperation of the directors and officers post-confirmation. Importantly, **the releases only release claims for mere negligence, as to which Tennessee nonprofit law already provides full immunity**. Debtors believe in their business judgment such releases are necessary for the success of the Plan and maximizing the Estates' assets, but the Committee refused to engage in negotiations with the Debtors with respect to any releases.

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

Instead, the Committee threatened the Debtors with the filing of a motion to terminate the Debtors' Exclusive Periods.

3. Faced with the possibility of a fight over exclusivity and competing plans—which the Debtors believed would be a waste of estate resources—Debtors chose to file their own Plan and Disclosure Statement, reflecting a litigation strategy that would most benefit the Estates. In fact, to avoid any waste of estate resources and minimize the issues to be negotiated and resolved during the confirmation process, Debtors filed an amended version of the draft joint plan and disclosure statement that was being negotiated between the Debtors and the Committee. As a result, the filed Plan and Disclosure Statement are largely the product of successful negotiations between the Debtors and the Committee, with the exception of the releases.

4. Instead of objecting to the Disclosure Statement or Plan on the narrow set of issues on which the Committee and Debtors disagree (i.e. the releases), the Committee chose to file the Committee Motion, seek to completely usurp the role of the Debtors in these Chapter 11 Cases, and require that the Estates re-start the plan and disclosure statement process. The Committee Motion can be summarized into one argument—the Committee believes the Plan should not contain any releases. To support that argument, the Committee alleges certain claims against the Debtors' directors and officers (the "**Alleged Committee Claims**"). In alleging these claims, the Committee completely neglected to review any Tennessee law.

5. The Alleged Committee Claims are not viable claims under Tennessee law because Tennessee law provides that officers and directors of Tennessee nonprofit corporations are immune to claims for mere negligence and must be indemnified by the nonprofit corporations as to any such claims. Bringing claims against officers and directors for mere negligence will necessarily result in no recovery for the Estates. Worse, it will create mandatory and automatic

indemnification obligations. In recognition of this basic principal of Tennessee nonprofit law, the Debtors therefore propose to release such claims in the Plan while preserving claims against officers and directors that could actually have real value.

6. The Debtor Releases only cover negligent conduct. As originally drafted, the Debtor Releases explicitly exclude "illegal conduct, gross negligence, bad faith, or fraud." Plan, at Section XI.C.[3] Thus, only a narrow set of claims against the directors and officers are actually released (the "**Released Claims**").

All Potential Claims Against Directors and Officers						
Released Claims	Claims that Are Not Released					
Negligence	Gross Negligence	Wanton	Willful	Bad Faith	Fraud	Illegal Conduct

The Debtor Releases simply mirror the protections already afforded officers and directors under Tennessee law. Tennessee law provides a myriad of protections to the directors and officers of nonprofit corporations, including: (i) statutory immunity for negligence claims, (ii) mandatory statutory indemnification for negligence claims, (iii) restrictions on damages awards for conflicted transactions, and (iv) a heightened business judgment rule. These protections embody an overall policy in Tennessee to shield directors and officers of nonprofit corporations from liability for their services in such capacities. Under Tennessee law, the Debtors' directors and officers are either immune or shielded from liability with respect to all of the Alleged Committee Claims to the extent they are based on negligence. To the extent the Committee can adequately plead a claim that has value against the directors and officers under Tennessee law, i.e. a claim

[3] The Debtors have resolved the U.S. Trustee Objection by agreeing with the U.S. Trustee to further clarify the scope of the Debtor Releases to provide that they only apply to negligence and only to the extent of immunity already provided under Tennessee nonprofit law, as set forth in the Debtors' Reply to UST Objection filed contemporaneously herewith.

based on more than mere negligence, such claims are not Released Claims and are expressly preserved by the Plan to be pursued by the Liquidating Trust.

7. In the Debtors' business judgment, the Debtor Releases are essential to the Plan. The Debtor Releases provide consideration to the officers and directors for their continued cooperation post-confirmation. As set forth in the Reply to UST Objection, the Plan contemplates that such officers and directors will enter into a formal Cooperation Agreement with the Liquidating Trustee. The Debtors' Estates have valuable claims against many third parties, and such cooperation is essential to pursuit of those claims as well as the success of the Plan. The Debtors will demonstrate at the Confirmation Hearing that the Plan is confirmable and the Debtor Releases are in the best interests of the Debtors' Estates—as contemplated by Debtors' codified right of exclusivity.

8. Debtors have attempted to be reasonable and accommodating despite the Committee's overly aggressive litigation tactics. Debtors used the joint plan drafted by the Committee instead of drafting an entirely new plan. Debtors complied with the Committee's Informal Discovery Request. Debtors consented to the Committee's proposed briefing schedule. Debtors even consented to the Committee filing its own plan and disclosure statement as an exhibit despite clear authority providing that doing so violates the Debtors' exclusivity rights and constitutes improper solicitation. Debtors have agreed to make a number of changes to the Plan and Disclosure Statement in an effort to resolve the U.S. Trustee Objection, including limiting the scope of the Third Party Releases to make them completely voluntary and optional, limiting the definition of Released Parties to exclude Strategic, and clarifying the scope of the Debtor Releases to ensure they go no further than the statutory immunity already provided by Tennessee nonprofit law. The Debtors intend to respond similarly to any reasonable objections to the

Disclosure Statement raised by the Committee. The Debtors stand firm in their belief that the Debtor Releases are essential to the effectiveness of the Plan and are in the best interests of the Debtors' Estates and creditors. If, at the Confirmation Hearing, the Debtors cannot carry their burden of establishing that the Debtor releases are appropriate under the applicable legal standard, then the releases will simply have to be removed from the Plan. The resources available to fund these cases are not unlimited, and the Debtors need to confirm a plan and bring these Chapter 11 Cases to conclusion.

9. Debtors have a statutory right to seek confirmation of the Plan without the threat of competing plans. As set forth more fully below, the Committee has not met its heavy burden to show cause as to why the Debtors' Exclusivity Periods should be terminated. The Committee has—at best—a confirmation objection, not a basis to terminate exclusivity. The Committee has further failed to meet its burden for derivative standing because, among other things, the Committee has failed to adequately plead any colorable claims under Tennessee law, which law the Committee clearly did not review before filing the Committee Motion. Accordingly, Debtors respectfully request that the Court deny the Committee Motion in its entirety and approve Debtors' Disclosure Statement and Procedures Motion.

BACKGROUND

10. On August 24, 2018 (the "**Petition Date**"), each of the Debtors filed a voluntary petition in this Court commencing a case for relief under chapter 11 of the Bankruptcy Code (the "**Chapter 11 Cases**"). The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail 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]

(the "**First Day Declaration**") and fully incorporated herein by reference.

11. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been requested in the Chapter 11 Cases. On September 6, 2018, the official committee of unsecured creditors was appointed (the "**Committee**").

12. As of the Petition Date, the Debtors operated three hospitals[4] in Mississippi that provide much needed inpatient and outpatient medical services to their respective communities (each a "**Hospital**", and collectively, the "**Hospitals**"). Debtors filed these Chapter 11 Cases to keep the Hospitals open for the benefit of their respective communities and transition operations of the Hospitals to new operators. Debtors have made significant progress towards achieving those objectives in the first six months of these Chapter 11 Cases.

13. On December 20, 2018, Debtors filed their *Motion for Entry of an Order Extending the Exclusivity Periods for the Filing of a Chapter 11 Plan and Solicitation of Acceptances Thereof* [Docket No. 588] (the "**Debtors' Exclusivity Motion**"), pursuant to which Debtors' requested that the Court, *inter alia*, grant the Debtors' a sixty-day extension of (i) the exclusivity period for filing a plan, and (ii) the exclusive solicitation period pursuant to Bankruptcy Code section 1121(d). No objections to the Debtors' Exclusivity Motion were filed, and on January 16, 2019, the Court entered the *Order Extending the Exclusivity Periods for the Filing of a Chapter 11 Plan and Solicitation of Acceptances Thereof* [Docket No. 667] (the "**Exclusivity Order**"). Pursuant to the Exclusivity Order, the Debtors' exclusive period for filing

[4] In addition to the three Debtor-run Hospitals, as of the Petition Date, Debtor Curae Health, Inc. was the sole member and sponsor of the non-debtor affiliate Russellville Hospital, Inc. which operated a hospital in Russellville, Alabama. On November 30, 2018, the Court entered the *Expedited Order (I) Authorizing the Debtors to Enter into the Member Substitution Agreement with Respect to the Russellville Hospital and (II) Granting Related Relief* [Docket No. 511] (the "**Russellville Order**"), pursuant to which the Court authorized the Debtors to enter into the Member Substitution Agreement with Dava Foundation, Inc and transition operations of the Russellville Hospital.

a plan was extended through and including February 20, 2019 (the "**Plan Exclusivity Period**") and the Debtors' exclusive solicitation period was extended through and including April 21, 2019 (the "**Exclusive Solicitation Period**", together with the Plan Exclusivity Period, the "**Exclusive Periods**").

14. On January 22, 2019, well within the Plan Exclusivity Period, the Debtors filed the *Debtors' Chapter 11 Plan of Liquidation* (the "**Plan**") [Docket No. 698] and the *Debtors' Disclosure Statement in Support of Debtors' Chapter 11 Plan of Liquidation* (the "**Disclosure Statement**") [Docket No. 699]. In connection with the Plan and Disclosure Statement and pursuant to Local Rule 3016-2, Debtors filed and served a Notice of Hearing on Adequacy of the Disclosure Statement (the "**Notice of Hearing**"), setting a hearing on the adequacy of the Disclosure Statement for February 21, 2019 at 9:00 a.m.

15. Also in connection with the Plan and Disclosure Statement, Debtors filed the *Debtors' Motion for an Order (I) Approving Disclosure Statement; (II) Establishing Forms and Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan; (III) Establishing Deadline and Procedures for Filing Objections to the Confirmation of the Plan; and (IV) Granting Related Relief* [Docket No. 700] (the "**Procedures Motion**"). Pursuant to the Procedures Motion, Debtors propose a confirmation process that would include a deadline for voting on the Plan to be completed by April 1, 2019 and a confirmation hearing on April 10, 2019. This schedule provides the Debtors an opportunity to confirm a plan well within the Exclusive Solicitation Period.

16. On January 25, 2019, the U.S. Trustee filed the *United States Trustee's Objection to Disclosure Statement and Solicitation* (the "**U.S. Trustee Objection**").

17. On January 28, 2019, the Committee sent an informal discovery request to the Debtors (the "**Informal Discovery Request**").

18. On January 30, 2019, instead of filing an objection to Debtors' Disclosure Statement, the Committee filed the Committee Motion. On the same date, the Committee also filed an expedited motion, requesting the Court set an expedited hearing on the Committee Motion and further requesting leave to file its own plan and disclosure statement as exhibits. Due to the expedited nature of the request, the Debtors were unable to file a substantive response to the Committee's request to file its own plan and disclosure statement. Instead of engaging in a procedural battle with the Committee, the Debtors agreed to all of the Committee's demands and even consented to allowing the Committee to violate the Debtors' rights under sections 1121 and 1125 of the Bankruptcy Code.[5]

19. The Debtors also consented to the Committee's proposed briefing schedule, delaying the hearing on the Debtors' Disclosure Statement to February 28, 2019 (the "**Disclosure Statement Hearing**").

20. On the date hereof, Debtors provided the Committee with the responsive documents and communications to the Informal Discovery Request.

21. Also on the date hereof, Debtors filed their Reply to the U.S. Trustee Objection (the "**Reply to UST Objection**"), which is fully incorporated herein by reference. The Reply to UST Objection contains certain proposed modifications to the Plan and Disclosure Statement.

[5] *See, e.g., In re Charles St. African Methodist Episcopal Church of Bos.*, 499 B.R. 126, 132 (Bankr. D. Mass. 2013) (finding that creditors who had filed and circulated a plan and disclosure statement during the exclusivity period had both violated the debtor's right of exclusivity and improperly solicited votes against the debtor's plan). "[T]he Court has a duty to safeguard the integrity of the negotiation process which is at the heart of Chapter 11. [Unsecured creditors] undermined that process by communicating to creditors information (right or wrong) which interfered with a negotiation between the Debtor and its creditors that Congress intended to be exclusive. *The Court's expression of disapproval of that behavior must be unequivocal.*" *In re Clamp-All Corp*., 233 B.R. 198, 212 (Bankr. D. Mass. 1999) (emphasis added).

Relevant to this Objection, Debtors propose to, *inter alia*: (i) limit the scope of the Third Party Releases by amending the definition of Releasing Parties to only include creditors that affirmatively opt in to the Third Party Releases; limit the definition of Released Parties by taking out certain parties, including Strategic; and clarify the scope of the Debtor Releases by providing that they shall release only such claims as to which applicable Tennessee law already provides blanket immunity. All references to provisions of the Plan and Disclosure Statement in this Objection, unless otherwise stated, include the proposed modifications in Debtors' Reply to UST Objection.

ARGUMENT

22. First, the Committee has failed to meet its heavy burden to show cause to terminate exclusivity because, *inter alia*, the filing of an alternate plan would undermine the progress of the Chapter 11 Cases and the Committee's argument with respect to the Debtor Releases completely disregards Tennessee law. Second, the Committee's request for derivative standing is neither necessary nor beneficial to the Estates because the Alleged Committee Claims have little to no likelihood of success and would open the Estates to significant indemnification liability. Finally, the Debtors will establish at the Confirmation Hearing that the Debtor Releases are fair, reasonable, and in the best interests of the Estates. If the Debtors cannot meet their burden in doing so, the Debtor Releases will be removed from the Plan. Accordingly, Debtors submit that the Committee Motion should be denied in its entirety.

I. THE COURT SHOULD DENY THE COMMITTEE'S MOTION TO TERMINATE EXCLUSIVITY AND ALLOW THE DEBTORS A REASONABLE OPPORTUNITY TO CONFIRM THEIR PLAN

23. The Committee fails to meet its heavy burden to show "cause" to terminate the Debtors' Exclusive Periods. The entire Committee Motion relies on two arguments. First, the Committee claims that allowing the Committee to file its own plan would facilitate moving the

case forward. That is untrue—approving the Disclosure Statement and proceeding to an April Confirmation Hearing will move the case forward, and case law is clear that proposing an alternative plan does not constitute "cause" to terminate exclusivity. Second, the Committee claims that the Releases make the Debtors' Plan unconfirmable. As the Debtors explain in detail in Parts I.B, II, and III of this Objection, the Committee's argument with respect to the Debtor Releases is fatally flawed as it disregards Tennessee law. Tennessee law provides a myriad of protections to the directors and officers of non-profit corporations, (i) statutory immunity, (ii) mandatory statutory indemnification, (iii) restrictions on damages awards for conflicted transactions, and (iv) a heightened business judgment rule. These protections embody an overall policy in Tennessee to shield directors and officers of nonprofit corporations from liability for mere negligence based on their services in such capacities. The Debtor releases simply mirror and preserve these protections. In analyzing all of the costs and benefits to the Estates, Debtors believe that the Debtor Releases satisfy applicable confirmation standards as they are fair, reasonable, and in the best interests of the Debtors' Estates. Should the Court find otherwise after the presentation of evidence at the Confirmation Hearing, the releases will be removed from the Plan. Accordingly, the Committee has failed to meet its heavy burden and its request to terminate the Debtors' Exclusive Periods should be denied.

A. The Committee Has Not Met Its Heavy Burden to Show Cause to Terminate Exclusivity

24. The Committee has failed to meet its heavy burden to show cause to terminate the Debtors' Exclusive Periods. All courts recognize that terminating a debtor's exclusive periods is an extraordinary remedy and the burden of proof is a heavy one. The Committee claims that allowing the Committee to file its own plan would facilitate moving the case forward. Debtors first note that the Committee does not address any of the factors typically considered by

bankruptcy courts within the Sixth Circuit, all of which weigh against terminating exclusivity. Moreover, case law is clear that proposing an alternative plan does not constitute "cause" to terminate exclusivity. Accordingly, the Committee's arguments fail, and the Committee's request to terminate exclusivity should be denied.

25. Section 1121(d)(1) provides that "the court may for cause reduce or increase" the debtor's exclusivity periods. 11 U.S.C. § 1121(d)(1). In enacting 11 U.S.C. § 1121, Congress intended "to allow the debtor a reasonable time to obtain confirmation of a plan without the threat of a competing plan." *In re Clamp-All Corp.,* 233 B.R. 198, 207–08 (Bankr. D. Mass. 1999); *In re Energy Conversion Devices, Inc.*, 474 B.R. 503, 507 (Bankr. E.D. Mich. 2012).

26. "It was intended that at the outset of a Chapter 11 case a debtor should be given the unqualified opportunity to negotiate a settlement and propose a plan of reorganization without interference from creditors and other interests." *In re Texaco, Inc.,* 81 B.R. 806, 809 (Bankr. S.D.N.Y. 1988) (citing H.R. Rep. No. 595, 95th Cong., 2d Sess. 221–22, *as reprinted in* 1978 U.S.C.C.A.N. 5787).

27. "'[C]ause' to reduce the exclusivity period should only be found in *extraordinary circumstances*." *In re Energy Conversion Devices, Inc.*, 474 B.R. at 507–08 (emphasis added); *see also In re Fountain Powerboat Indus., Inc.*, 2009 WL 4738202, at *7 (Bankr. E.D.N.C. Dec. 4, 2009) (finding only two published cases where courts have found "cause" to reduce or terminate the exclusivity period); *see also Matter of Fansteel, Inc.*, 2017 WL 782865, at *3 (Bankr. S.D. Iowa Feb. 28, 2017) (collecting cases and "finding cause to reduce or terminate exclusivity is the exception, not the rule."). "In those cases where the exclusivity periods were reduced, factors such as gross mismanagement of the debtor's operations, or

acrimonious feuding between the debtor's principals were major obstacles to a successful reorganization." *In re Texaco Inc.*, 76 B.R. at 327 (internal citations omitted).

28. "As a general rule, the party seeking to terminate or modify a debtor's exclusivity period bears the burden of proof since it is the moving party who seeks to change the status quo . . . . [M]ost cases state that the standard of proof for such motions is a heavy one[.]" *In re Dow Corning Corp.,* 208 B.R. 661, 663 (Bankr. E.D. Mich. 1997); *see also In re Geriatrics Nursing Home, Inc.*, 187 B.R. 128, 132 (D.N.J. 1995) ("A party in interest which seeks to establish 'cause' to terminate the exclusivity period bears a heavy burden.") (internal quotation marks omitted); *In re Interco, Inc.,* 137 B.R. 999, 1000 (Bankr. E.D. Mo. 1992) ("A party requesting an immediate termination of the exclusive period as originally authorized by statute or as it may have been extended by the Court, bears a heavy burden.").

29. Bankruptcy courts within the Sixth Circuit have found that terminating exclusivity to allow another party to file an alternate plan does not constitute "cause." *See, e.g.*, *In re Energy Conversion Devices, Inc.*, 474 B.R. at 508; *In re Eagle-Picher Indus., Inc.*, 176 B.R. 143, 147 (Bankr. S.D. Ohio 1994). "Where creditors and parties in interest argue for termination of the exclusivity period on the basis that they [are] prepared to offer more favorable plans if the court were to terminate the exclusivity period, that does not constitute sufficient cause to cut short the debtor's window of opportunity opened by Congress [under] 11 U.S.C. § 1121(b) and (c)." *In re Energy Conversion Devices, Inc.*, 474 B.R. at 508 (internal quotation marks omitted); *see also In re Geriatrics Nursing Home, Inc.*, 187 B.R. at 134 ("[T]he Court cannot conclude, based on reasoning of the Bankruptcy cases treating of "cause" under 11 U.S.C. § 1121(d) . . . , that the fact that one creditor constituency is not happy with the debtor's plan constitutes cause to

undermine the debtor's chances of winning final confirmation of its plan during the exclusivity period.").

30. The Committee cites *In re Dow Corning Corp.* for the proposition that the "primary consideration" when determining whether to terminate exclusivity is whether doing so would "facilitate moving the case forward." 208 B.R. at 670. In *In re Dow Corning Corp.*, the official committee of unsecured creditors and the committee of tort claimants filed a motion to terminate exclusivity so that the committees could propose an alternate plan. *Id.* at 663. The Bankruptcy Court for the Eastern District of Michigan denied the committees' motion to terminate exclusivity and found that the "overriding factor weigh[ed] heavily against granting the [committees'] motion." *Id.* at 670.

31. Similarly, in *In re Eagle-Picher Indus., Inc.*, the Bankruptcy Court for the Southern District of Ohio was faced with a party proposing an alternate plan, and the bankruptcy court was "left entirely unpersuaded" "that the presentation of a competing plan or plans will serve to expedite a prompt resolution of the[] cases[.]" *In re Eagle-Picher Indus., Inc.*, 176 B.R. at 147. The court determined, "[a]s a matter of judgment and experience," that the filing of competing plans would, in fact, undermine the prospects for a prompt resolution of the Chapter 11 cases. *Id.* at 147–48.

32. Although Congress contemplated that the existence of multiple plans can generate discourse among debtors, creditor constituencies, and parties in interest, "early termination of the statutorily prescribed period during which the debtor has the sole right to file a plan of reorganization is not the proper manner, absent a showing of sufficient cause, to facilitate such discourse." *In re Geriatrics Nursing Home, Inc.*, 187 B.R. at 134. Instead, "the hearing on approval of the disclosure statement gives interested parties the opportunity to challenge certain

statements or information contained in the disclosure statement and an opportunity to request the inclusion of additional facts which makes apparent their objections to the debtor's plan." *In re Clamp-All Corp.*, 233 B.R. at 209; *see also In re Media Central, Inc.,* 89 B.R. 685, 690 (Bankr. E.D. Tenn. 1988).

33. The Bankruptcy Code does not define the word "cause" as used in § 1121(d)(1), but the majority of courts, including bankruptcy courts within the Sixth Circuit, apply the following nine factors to decide whether to extend or terminate a debtor's statutory period of exclusivity:

> (i) the size and complexity of the case; (ii) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information; (iii) the existence of good faith progress toward reorganization; (iv) the fact that the debtor is paying its bills as they become due; (v) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (vi) whether the debtor has made progress in negotiations with its creditors; (vii) the amount of time which has elapsed in the case; (viii) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and (ix) whether an unresolved contingency exists.

In re Dow Corning Corp., 208 B.R. at 664–65.

34. Here, although the Committee Motion cites these factors, the Committee does not even attempt to argue for termination under *any* of the factors. Instead, the Committee's argument focuses entirely on the premise that allowing the Committee to file its own plan would facilitate moving the case forward.[6] However, bankruptcy courts consistently find that the filing of competing plans does not move a case forward. *See, e.g.*, *In re Energy Conversion Devices, Inc.*, 474 B.R. at 508; *In re Eagle-Picher Indus., Inc.*, 176 B.R. at 147. Bankruptcy courts further

[6] As noted above, the Committee also relies on its argument that the releases make the Debtors' Plan unconfirmable. As discussed in detail in Parts I.B., II, and III of this Objection, the proposed releases are essential to the effectiveness of the Plan, well within the Debtors' business judgment, and comply with all applicable laws. Accordingly, the Plan is confirmable with the proposed releases, and inclusion of the releases should have no weight in determining whether to terminate exclusivity.

find that terminating a debtor's exclusive periods so that another party can file an alternate plan does not constitute "cause" under § 1121(d)(1).

35. All of the factors weigh against terminating exclusivity. Importantly, the Debtors have already filed a viable Plan well within the Exclusive Periods. As a result, factors two, three, five, and seven weigh against terminating exclusivity.

36. Factor one also weighs against terminating exclusivity. In light of the size and complexity of the Chapter 11 Cases, Debtors' spent the first four months of the Chapter 11 Cases diligently working to keep the Debtors' Hospitals open and transition them to new operators. The Debtors' Exclusivity Motion was granted, based in part, on the size and complexity of the Chapter 11 Cases and the progress made by Debtors.

37. Factor four weighs against terminating exclusivity because Debtors have been paying their bills as they come due.

38. With respect to factor six, the Debtors have made significant progress in their efforts to resolve the U.S. Trustee Objection. In addition, the filing of the Plan and Disclosure Statement has allowed the Debtors the opportunity to respond to a number of creditors' informal requests and comments. Debtors believe that they have made significant progress in negotiations with parties in interest and that factor six also weighs against terminating exclusivity.

39. Factor eight is inapplicable as the Debtors are not seeking an extension of their Exclusive Periods. Moreover, the Debtors have engaged in negotiations with many creditors and other parties in interest in an effort to address all concerns regarding the Plan and Disclosure Statement.

40. Finally, factor nine is also inapplicable as there are no external unresolved contingencies. *See In re Dow Corning Corp.*, 208 B.R. at 666 ("[T]he type of unresolved

contingency which would be relevant to a motion to extend or to terminate exclusivity is one which is external to the case itself.).

41. The Committee has completely failed to even attempt to meet its burden to show "cause" under any of the relevant factors. In addition, as discussed in Parts I.B, II, and III of this Objection, the Debtor Releases are fair, reasonable, and in the best interests of the Estates. Thus, the Committee's request to terminate exclusivity should be denied.

B. The Debtor Releases Are Fair, Reasonable, and in the Best Interests of the Estates Because They Mirror and Preserve the Protections Already Provided under Tennessee Law

42. The Committee claims that the Debtor Releases make the Debtors' Plan unconfirmable. However, the Committee's argument with respect to the Debtor Releases is fatally flawed as it disregards Tennessee law. Moreover, the Debtor Releases are essential to the effectiveness of the Plan, well within the Debtors' business judgment, and comply with all applicable laws.

43. Under Tennessee law, the Debtors' directors and officers are either immune or shielded from liability with respect to all of the Alleged Committee Claims. The Debtor Releases align with public policy in Tennessee and mirror and preserve the protections already afforded officers and directors. These protections embody an overall policy in Tennessee to encourage individuals to serve nonprofit corporations by shielding directors and officers of nonprofit corporations from liability for their services in such capacities based on mere negligence. Eliminating the Debtor Releases from the Plan would send a chilling message to individuals that serve nonprofit corporations throughout the state of Tennessee.

44. Tennessee law governs any claims brought on behalf of the Debtors against the Debtors' directors and officers.[7] The Debtors are Tennessee nonprofit corporations that are exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code. The Debtors were formed under the Tennessee Nonprofit Corporation Act, T.C.A. §§ 48–51–101 *et seq.* (the "**Nonprofit Act**").[8] "Claims that involve the internal affairs of a corporation should be resolved in accordance with the law of the state of incorporation." *In re Del-Met Corp.*, 322 B.R. 781, 801 (Bankr. M.D. Tenn. 2005) (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 621 (1983)). "The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.,* 457 U.S. 624, 645 (1982) (citing Restatement (Second) of Conflict of Laws § 302, Comment *b,* at 307–08 (1971)).

45. "Tennessee has codified the internal affairs doctrine: Tennessee corporation statutes 'do not authorize this state to regulate the organization or the internal affairs of a foreign corporation authorized to transact business in this state.'" *In re Del-Met Corp.*, 322 B.R. at 801 (quoting T.C.A. § 48–25–105(c) (2004)). In other words, Tennessee law requires a court to look to the law of the state of incorporation to determine the fiduciary duties of corporate actors. *See id.*

[7] The obvious exception being causes of action under the Bankruptcy Code. As provided in the Debtors' Reply to UST Objection, all Chapter 5 Causes of Action are excluded from the Releases.

[8] Curae Health, Inc. is a Tennessee nonprofit corporation. Curae is the sole member and sponsoring organization of Amory Regional Medical Center, Inc.; Batesville Regional Medical Center, Inc.; and Clarksdale Regional Medical Center, Inc., all of which are Tennessee nonprofit corporations. Amory, Batesville, and Clarksdale are each the sole member of a physician entity as follows: Amory is the sole member of Amory Regional Physicians, LLC; Batesville is the sole member of Batesville Regional Physicians, LLC; and Clarksdale is the sole member of Clarksdale Regional Physicians, LLC. All of the physician entities are Tennessee limited liability companies but are disregarded entities for tax purposes.

46. Accordingly, Tennessee law applies to all potential claims and causes of action that could be brought on behalf of the Debtors against the directors and officers, including the Alleged Committee Claims.

47. This Section discusses four of the protections afforded to directors and officers of Tennessee nonprofit corporations:[9] (i) statutory immunity, (ii) mandatory statutory indemnification, (iii) restrictions on damages awards for conflicted transactions, and (iv) a heightened business judgment rule.

i. Statutory Immunity

48. The Nonprofit Act grants the Debtors' directors and officers immunity from suit arising from the conduct of the affairs of the Debtors unless their conduct amounts to willful, wanton, or gross negligence. The Debtor Releases mirror and preserve this codified immunity of nonprofit directors and officers.

49. Section 601 of the Nonprofit Act, entitled *Limitation of Actions and Immunity - Breach of Fiduciary Duty*, sets forth the public policy and rationale underlying the grant of immunity:

> The general assembly finds and declares that the services of nonprofit boards are critical to the efficient conduct and management of the public and charitable affairs of the citizens of this state. Members of such nonprofit boards must be permitted to operate without concern for the possibility of litigation arising from the discharge of their duties as policy makers.

[9] In addition to the protections discussed in detail in this Objection, in accordance with § 102(b)(3)(A) of the Nonprofit Act, Debtors' charters provide that "no director shall be personally liable to the Corporation for monetary damages for breach of fiduciary duty as a director . . . ." Section 102(b)(3)(A) of the Nonprofit Act provides, in relevant part, that a nonprofit corporation's "charter may set forth [a] provision eliminating or limiting the personal liability of a director to the corporation or its members for monetary damages for breach of fiduciary duty as a director; provided, that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its members; (ii) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (iii) Under § 48-58-302." T.C.A. § 48-52-102(b)(3)(A).

T.C.A. § 48-58-601(b); *Urbanavage v. Capital Bank*, No., 2018 WL 3203100, at *7 (Tenn. Ct. App. June 29, 2018). Section 601 of the Nonprofit Act became law in 1986. *See State By & Through Pierotti ex rel. Boone v. Sundquist*, 884 S.W.2d 438, 444 (Tenn. 1994).

50. Section 601(c) of the Nonprofit Act provides the grant of immunity:

> All directors, trustees or members of the governing bodies of nonprofit cooperatives, corporations, clubs, associations and organizations described in subsection (d), whether compensated or not, shall be immune from suit arising from the conduct of the affairs of such cooperatives, corporations, clubs, associations or organizations. Such immunity from suit shall be removed when such conduct amounts to willful, wanton or gross negligence . . . .

T.C.A. § 48-58-601(c).[10]

51. The Supreme Court of Tennessee has interpreted section 601 of the Nonprofit Act as granting "immunity to directors and officers of nonprofit corporations, except when their 'conduct amounts to willful, wanton or gross negligence.'" *State By & Through Pierotti ex rel. Boone v. Sundquist*, 884 S.W.2d at 444 (quoting § 601 of the Nonprofit Act). In *State By & Through Pierotti ex rel. Boone v. Sundquist*, the Supreme Court of Tennessee interpreted section 601 of the Nonprofit Act in connection with Tennessee's *quo warranto* statutes. *Id.* On appeal, the defendants contended that the plaintiffs could not use the *quo warranto* statutes to bring a suit in contravention of section 601 of the Nonprofit Act. *Id.* In its analysis, the Supreme Court of Tennessee noted that § 601 of the Nonprofit Act "grants immunity to directors and officers of nonprofit corporations, except when their 'conduct amounts to willful, wanton or gross negligence.'" *Id* (quoting § 601 of the Nonprofit Act); *see also* 1997 WL 277999, at *5 (Tenn. Ct. App.) (Section 601 grants "immunity . . . to directors and officers of non-profit corporations for decisions made which are not willful, wanton, or gross negligence."). The Supreme Court of

[10] Subsection (d) of section 601 includes "[n]onprofit corporations, associations and organizations which are exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code of 1986, codified in 26 U.S.C. § 501(c)(3), as amended."

Tennessee concluded that a *quo warranto* action, alleging misconduct amounting to willful, wanton or gross negligence, for which § 601 of the Nonprofit Act provides no immunity, may be brought pursuant to T.C.A. § 29–35–102. *State By & Through Pierotti ex rel. Boone v. Sundquist*, 884 S.W.2d at 444.

52. Courts in Tennessee consistently uphold the grant of immunity for mere negligence in favor of directors and officers. *See, e.g.*, *State By & Through Pierotti ex rel. Boone v. Sundquist*, 884 S.W.2d at 444; *Urbanavage v. Capital Bank*, 2018 WL 3203100, at *7 (Tenn. Ct. App. June 29, 2018); *Burke v. Tennessee Walking Horse Breeders' & Exhibitors' Assoc.*, 1997 WL 277999, at *6 (Tenn. Ct. App. May 28, 1997). In *Burke v. Tennessee Walking Horse Breeders' & Exhibitors' Assoc.*, plaintiffs brought suit against the executive director[11] and members of the executive committee of a nonprofit association. 1997 WL 277999, at *6. The trial court found that the immunity provided by § 601(c) applied to the executive director and members of the executive committee because there was no "willful, wanton, or gross negligence." *Id* (quoting the trial court's memorandum opinion). On appeal, the Tennessee Court of Appeals found that "[t]he complaint fail[ed] to allege any action by any of the individuals which would amount to willful, wanton, or gross negligence." *Id.* at *10. And the "[p]laintiffs conceded that the individual defendants [were] immunized by T.C.A. § 48-58-601 against all conduct except that which is willful, wanton or gross negligence." *Id.*

53. Here, the Debtors' directors and officers are immune from suit based on conduct that is not willful, wanton, or gross negligence. In other words, the Committee cannot plead colorable claims against the Debtors' directors and officers as a matter of law unless their conduct amounts to willful, wanton, or gross negligence. *See Urbanavage v. Capital Bank*, 2018 WL 3203100, at *7 (finding that a nonprofit association's directors were "immune from suit as a

[11] The chief executive officer of a nonprofit corporation may be sometimes referred to as the executive director.

matter of law unless [p]laintiffs put forth evidence establishing a material question of fact as to whether the members' conduct of the Association's affairs amounted to willful, wanton, or gross negligence" and affirming grant of summary judgment in favor of defendants on plaintiffs' breach of fiduciary duty claims). The Committee has not alleged any claims based on conduct that rises to the level of willful, wanton, or gross negligence. If the Committee could allege claims based on such conduct, such claims are clearly not subject to the Debtor Releases and will be expressly preserved and assigned to the Liquidating Trust pursuant to the Debtors' Plan. Due to the mandatory indemnification provisions discussed below, pursuit of any of the Released Claims would, in fact, harm the Estates.

ii. Mandatory Indemnification

54. In addition to granting immunity to directors and officers, the Nonprofit Act also provides for mandatory indemnification. If directors and officers are successful in defending against a claim or cause of action brought by or in the right of the Debtors, the Debtors will be required to indemnify the directors and officers for their reasonable expenses. In light of all the statutory protections, claims and causes of action against the directors and officers based on mere negligence have no likelihood of success. The mandatory indemnification provisions of the Nonprofit Act increase the risks to the Debtors Estates' as they would have to pay the professionals' fees on both sides of any unsuccessful litigation against the directors and officers.

55. Pursuant to the Nonprofit Act, a nonprofit corporation must indemnify a director or officer that is successful in the defense of any proceeding to which the director or officer is a defendant because he or she was a director or officer of the nonprofit corporation for reasonable expenses incurred in connection with the proceeding. Section 503 of the Nonprofit Act provides the mandatory indemnification provision for directors:

> Unless limited by its charter, a corporation shall indemnify a director to the extent the director was successful, on the merits or otherwise, or who is immune from suit under § 48-58-601, in the defense of any proceeding to which the director was a party because the director is or was a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding.

T.C.A. § 48-58-503.[12]

56. Section 507 of the Nonprofit Act provides the same mandatory indemnification for officers. *See* T.C.A. § 48-58-507 ("An officer of the corporation who is not a director is entitled to mandatory indemnification under § 48-58-503 . . . .").

57. Here, the mandatory indemnification provisions of the Nonprofit Act make pursuit of the Alleged Committee Claims very high risk and a waste of estate resources. In light of all of the protections afforded to nonprofit directors and officers in Tennessee, the Estates have little to no likelihood of success in any suit against the Debtors' directors and officers. Even without the mandatory indemnification provisions, pursuit of the Alleged Committee Claims would likely result in a huge waste of estate resources. The mandatory indemnification provisions of the Nonprofit Act make pursuit of the Released Claims illogical. The directors and officers would prevail with respect to any lawsuit brought against them based on mere negligence, and the Estates would be liable for professionals' fees and expenses on both sides of the litigation. Not only would pursuit of the Released Claims result in unnecessary professionals' fees, but bringing frivolous lawsuits against the directors and officers will harm all other litigation efforts that require the cooperation of the Debtors' directors and officers.

iii. Restrictions on Equitable Relief and Damages

58. The Nonprofit Act also limits liability of the Debtors' directors and officers for conflicting interest transactions.

[12] The Debtors' charters and bylaws explicitly incorporate the provisions of the Nonprofit Act that provide for indemnification and immunity.

59. Under the Nonprofit Act, if a conflicting interest transaction is not a director's or officer's, a proceeding on behalf of the nonprofit corporation against the director or officer may not give rise to an award of damages or other sanctions against the director or officer. Section 702(a) of the Nonprofit Act provides that:

> A transaction effected or proposed to be effected by the corporation (or by an entity controlled by the corporation) *may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against a director or officer of the corporation*, in a proceeding by a member or by or in the right of the corporation, on the ground that the director or officer has an interest respecting the transaction, *if it is not a director's or officer's conflicting interest transaction*.

T.C.A. § 48-58-702 (emphasis added).

60. Moreover, even if a director or officer is conflicted, a proceeding against that director or officer on behalf of the nonprofit corporation cannot give rise to an award of damages or sanctions against the director or officer if, *inter alia*, the directors' action respecting the transaction was taken in compliance with section 703 of the Nonprofit Act. *See* T.C.A. § 48-58-702(b)(1). Section 702(b)(1) of the Nonprofit Act provides, in relevant part:

> A director's or officers conflicting interest transaction may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against a director or officer of the corporation, in a proceeding by a member or by or in the right of the corporation, on the ground that the director or officer has an interest respecting the transaction, if . . . Directors' action respecting the transaction was taken in compliance with § 48-58-703 at any time.

T.C.A. § 48-58-702(b)(1).

61. Pursuant to section 703 of the Nonprofit Act, a director's or officer's conflicting interest transaction is effective under section 702 if the conflicted officer or director discloses the required information and the transaction was authorized by the vote of a majority of qualified directors. Section 703 of the Nonprofit Act provides, in relevant part:

> Directors' action respecting a director's or officer's conflicting interest transaction is effective for purposes of § 48-58-702 if the transaction has been

> authorized by the affirmative vote of a majority (but no fewer than two (2)) of the qualified directors who voted on the transaction, after required disclosure by the conflicted director or officer of information not already known by such qualified directors, . . . provided, that . . . [t]he qualified directors have deliberated and voted without the participation by any other director.

T.C.A. § 48-58-703.

62. Here, section 702 of the Nonprofit Act precludes awards of damages against the Debtors' directors and officers for conflicted interest transactions that complied with section 703. The Committee alleges that conduct relating to the Debtors' Hospital Management Agreement with Strategic (the "**Management Agreement**") gives rise to a colorable cause of action.[13] However, all transactions of the Debtors' involving Strategic complied with section 703, and the directors and officers are shielded from damages awards by the protections of section 702. Pursuit of any cause of action against the directors and officers based on a conflicting interest transaction would provide no value to the Estates.

63. No conflicted directors voted to approve the Management Agreement and all amendments thereto with Strategic Healthcare. Board minutes of the Debtors demonstrate that the directors carefully considered all transactions relating to the Management Agreement. Directors were fully informed regarding Mr. Clapp's connections to Strategic. The Directors unanimously voted to commission a third party valuation company, Pershing Yoakley and Associates ("**PYA**"), to conduct a fair market valuation of the Management Agreement. After completing the valuation, PYA presented the findings of the fair market valuation to the directors. The valuation included findings that the services provided under the Management Agreement were reasonable and necessary and the management fee was within the range of fair

[13] The Committee also alleges certain inconsistencies with respect to Debtors' disclosures of their relationship with Strategic. On the date hereof, Debtors filed an amended Statement of Financial Affairs for Debtor Curae Health, Inc. to clarify any alleged inconsistencies. Debtors have been transparent regarding all transactions and dealings of the Debtors and will continue to do so.

market values for similar hospital companies.[14] All transactions relating to the Management Agreement were authorized by a majority of qualified directors. Accordingly, the transactions complied with section 703, and the protections of section 702 apply. Thus, pursuit of any conflicted interest transaction claims against any of the directors or officers of the Debtors may not give rise to an award of damages or sanctions, and bringing such an action would be detrimental to the Estates.

iv. Business Judgment Rule

64. In addition to the protections granted nonprofit directors and officers in the Nonprofit Act, Tennessee's business judgment rule provides further protection to the Debtors' directors and officers. "There is a policy against substituting the judgment of a court for the judgment of a corporate board or employee." *Burke v. Tennessee Walking Horse Breeders' & Exhibitors' Assoc.*, 1997 WL 277999, at *5 (Tenn. Ct. App. May 28, 1997) (quoting the trial court's opinion). "This policy is reflected both in the business judgment rule and also in the immunity granted to directors and officers of non-profit corporations for decisions made which are not willful, wanton, or gross negligence." *Id.*

65. "Tennessee's courts have consistently followed a noninterventionist policy with regard to internal corporate matters. They have recognized that directors have broad discretion . . . . These decisions squarely align Tennessee with the jurisdictions recognizing and following the 'business judgment rule.'" *Hall v. Tennessee Dressed Beef Co.*, 1996 WL 355074, at *7 (Tenn. Ct. App. June 28, 1996), *aff'd in part, rev'd in part,* 957 S.W.2d 536 (Tenn. 1997); *Lewis v. Boyd,* 838 S.W.2d 215, 220 (Tenn. Ct. App. 1992).

[14] All documents referenced in this Objection have been provided to the Committee throughout these Chapter 11 Cases and in connection with the Informal Discovery Request. Debtors are prepared to present all such documents as exhibits at the hearing on the Committee Motion and will provide them to any other party upon request.

66. In Tennessee, Plaintiffs have "a *heavy burden* to overcome [the business judgment rule] to succeed on the merits." *In re Pacer Int'l, Inc.*, 2017 WL 2829856, at *7 (Tenn. Ct. App. June 30, 2017) (emphasis added). "Tennessee courts are loathe to substitute their judgment for that of a corporation's board of directors." *Id.* Tennessee courts "presume that a corporation's directors, when making a business decision, acted on an informed basis, in good faith, and with the honest belief that their decision was in the corporation's best interests." *Id*; *see also Franklin Capital Assocs., L.P. v. Almost Family, Inc.*, 194 S.W.3d 392, 399–400 (Tenn. Ct. App. 2005), *abrogated by Keller v. Estate of McRedmond*, 495 S.W.3d 852 (Tenn. 2016). "[A] plaintiff must show that the majority of the board acted in a manner that rise[s] to the level of gross negligence before a court may second guess its business judgment." *Campbell v. Potash Corp. of Saskatchewan*, 238 F.3d 792, 800 (6th Cir. 2001), *as amended on denial of reh'g* (Oct. 31, 2001) (applying Delaware's business judgment rule) (citations omitted).

67. "The foregoing rules for ordinary corporations *apply with even greater effect in regard to not-for-profit corporations* in which there are no stockholders holding a property interest to suffer loss as a result of corporate action." *Burke v. Tennessee Walking Horse Breeders' & Exhibitors' Assoc.*, 1997 WL 277999, at *9 (finding that "the action of the executive committee has the benefit of presumed good faith and reasonable grounds") (emphasis added).

68. Here, to the extent there are any Released Claims that are not covered by the statutory protections of the Nonprofit Act, Tennessee's business judgment rule provides another significant hurdle to success in a suit against the Debtors' directors and officers. To overcome Tennessee's business judgment rule, the Committee would have to plead at least gross negligence. *See Campbell v. Potash Corp. of Saskatchewan*, 238 F.3d at 800. Although Debtors

firmly believe that no such claims exist, any potential claims based on conduct that rises to the level of gross negligence are not covered by the Debtor Releases and will be assigned to the Liquidating Trust. The Debtor Releases only cover claims as to which there is little to no likelihood of success and would be detrimental to the Estates if pursued.

69. The Committee's request to terminate exclusivity relies entirely on an uninformed assessment of the Debtor Releases. The Debtor Releases simply mirror and preserve the extensive protections already provided by Tennessee law while also preventing the Estates from engaging in wasteful litigation. Allowing the Committee to pursue such claims would countenance the wastefulness endemic in the Committee's litigation strategy. Any claims that could potentially provide value to the Estates are not being released under the Plan. Moreover, the Debtor Releases provide consideration to the directors and officers for their continued cooperation post-confirmation.

70. As provided in the Debtors' Plan and Disclosure Statement and throughout these Chapter 11 Cases, Debtors believe that the valuable causes of action of the Estates are not against the Debtors directors and officers, but against other third parties. The Liquidating Trustee will need the cooperation of Debtors' officers and directors to pursue such causes of action. In light of all the protections already afforded to the Debtors' directors and officers and weighing all of the costs and benefits of the Debtor Releases, Debtors firmly believe that the Debtor Releases are fair, reasonable, and in the best interests of the Debtors' Estate and creditors. To the extent the Court finds otherwise after the presentation of evidence at the Confirmation Hearing, the Debtor Releases will have to be removed from the Plan. Accordingly, Debtors believe that the Committee Motion utterly fails to meet its burden to terminate exclusivity, and the Committee's request should be denied.

II. THE COURT SHOULD DENY THE COMMITTEE'S REQUEST FOR DERIVATIVE STANDING

71. The Committee has failed to adequately plead any colorable claims against the Debtors' directors and officers. To begin, Debtors reiterate that the Debtor Releases simply mirror and preserve the protections provided by Tennessee law. All Released Claims have no likelihood of success and, if pursued, would provide no benefit to the Estates. Moreover, pursuit of any Released Claims would open up the Estates to significant indemnification liability. Any potential claims against the directors and officers that could provide value to the Estates will be assigned to the Liquidating Trust. Accordingly, no reason exists to grant derivative standing to the Committee, and the Court should deny the Committee Motion.

72. The Committee has not met any of the required elements for derivate standing. First, the Committee never requested that the Debtors initiate or prosecute any of the Alleged Committee Claims. Second, because the Committee never made a request, the Debtors have not refused. Third, the Committee has failed to make a *prima facie* demonstration that any colorable claims exist that could benefit the Estates. Finally, even if the Committee's actions could be construed as a request, Debtors' refusal to pursue the Alleged Committee Claims is justified. Debtors' cost benefit analysis of the Alleged Committee Claims demonstrates that pursuing such claims would provide little to no benefit to the Estates. Pursuit of the claims would also open the Estates to significant indemnification liability. The Debtors are assigning all claims that could potentially benefit the Estates to the Liquidating Trustee.

73. The Sixth Circuit has found that a creditor's committee may have derivative standing to bring a derivative action if the committee can show **all** of the following:

> 1) that the creditor's committee has made a request of the debtor-in-possession regarding the initiation or prosecution of an action which will benefit the estate, 2) that the request has been refused, 3) a *prima facie* demonstration that a colorable claim exists which, if successful, would benefit the estate, and, 4) the creditor's

committee's grounds for contending that the debtor-in-possession's inactivity on the claim is unjustifiable or abusive of their discretion.

In re Gibson Group, 66 F.3d 1436, 1446 (6th Cir. 1995); *see also In re LTV Steel Co., Inc.*, 333 B.R. 397, 406 (Bankr. N.D. Ohio 2005).

74. A colorable claim is defined as one which is plausible or "not without merit." *Jensen v. Schweiker,* 709 F.2d 1227, 1230 (8th Cir. 1983); *In re Colfor, Inc.,* 1998 WL 70718, *2 (Bankr. N.D. Ohio 1998). "This definition requires that the Court look beyond the complaint itself to at least some minimal evidentiary basis for the allegations, particularly, with respect to allegations of fraud." *In re LTV Steel Co., Inc.*, 333 B.R. at 406; *Official Committee of Unsecured Creditors of Grand Eagle Companies, Inc.* (*In re Grand Eagle Companies, Inc.)*, 310 B.R. 79 (Bankr. N.D. Ohio 2004). "The 'colorable claim' requirement is met if the committee has asserted claims for relief that on appropriate proof *would allow a recovery*." *In re LTV Steel Co., Inc.*, 333 B.R. at 406 (emphasis added).

75. "In order to decide whether the debtor unjustifiably failed to bring suit so as to give the creditors' committee standing to bring an action, the court must also examine, on affidavit and other submission, by evidentiary hearing or otherwise, whether an action asserting such claim(s) is likely to benefit the reorganization estate." *In re STN Enterprises*, 779 F.2d 901, 905 (2d Cir. 1985); *see also Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 253 (5th Cir. 1988) ("[T]he unjustified refusal calculus will generally amount to little more than a cost-benefit analysis.").

76. In addition to determining the likelihood of success, courts also consider "the attendant fees and expenses involved." *In re STN Enterprises*, 779 F.2d at 905–06. "Bankruptcy Courts should also consider whether suit by the Creditors' Committee (rather than the

Liquidators) is 'necessary and beneficial' to the fair and efficient resolution of the debtor's liquidation." *In re Commodore Int'l Ltd.*, 262 F.3d 96, 100 (2d Cir. 2001) (citations omitted).

77. Here, the Committee should not be granted derivate standing to pursue the Alleged Committee Claims because doing so is neither necessary nor beneficial to the Estates. To the extent the Committee's actions can be construed as a request to bring any of the Alleged Committee Claims, the Debtors are justified in their refusal. A cost benefit analysis weighs heavily against pursuit of any of the Alleged Committee Claims. In light of the protections granted directors and officers under Tennessee law, the Alleged Committee Claims would not provide any value if pursued.[15] Moreover, allowing the Committee to pursue the Alleged Committee Claims would open the Estates to significant indemnification liability and would countenance the wastefulness endemic in the Committee's litigation strategy.

78. The Committee has not pled and cannot plead any beneficial causes of action against the directors and officers that fall within the scope of the Debtor Releases. Any colorable claims that could potentially provide value to the Estates are not being released, and the Liquidating Trustee can determine whether such claims should be pursued. Thus, the

[15] The Committee also alleges certain causes of action that are not viable causes of action under the Bankruptcy Code or Tennessee law. For example, aiding and abetting a fraudulent conveyance is not a viable cause of action under the Bankruptcy Code. *See, e.g.*, *In re Ernie Haire Ford, Inc.*, 459 B.R. 824, 839 (Bankr. M.D. Fla. 2011); *In re Fedders N. Am., Inc.*, 405 B.R. 527, 549 (Bankr. D. Del. 2009); *In re McCook Metals LLC*, 319 B.R. 570, 591 (Bankr. N.D. Ill. 2005); *In re Ampat Southern Corp.*, 128 B.R. 405, 410-11 (Bankr. D. Md. 1991). Aiding and abetting a fraudulent transfer is also arguably not a viable cause of action in Tennessee, which has adopted the Uniform Fraudulent Transfer Act. *See* T.C.A. 66-3-308 (providing remedies against the asset transferred or other property of the transferee) and 66-3-309(b) (providing that a judgment on the basis of a fraudulent conveyance may only be entered against the first transferee); *see also Freeman v. First Union Nat. Bank*, 865 So. 2d 1272, 1277 (Fla. 2004) (concluding that Florida's Uniform Fraudulent Transfer Act cannot form the basis for a cause of action for a non-transferee party's alleged aiding-abetting of a fraudulent transfer); *cf. Nippert v. Jackson*, 860 F. Supp. 2d 554, 568 (M.D. Tenn. 2012) (concluding that a constructive fraudulent transfer under Tennessee's Uniform Fraudulent Transfer Act cannot form the underlying basis a civil conspiracy claim). In fact, few jurisdictions recognize aiding and abetting fraudulent conveyances as a viable cause of action. *See, e.g.*, *GATX Corp. v. Addington*, 879 F. Supp. 2d 633, 644 (E.D. Ky. 2012) ("[I]t is clearly the majority approach that liability cannot be imposed on non-transferees under an aiding and abetting theory.") (internal quotation marks omitted). New Jersey is one notable exception. *See id.* at 648 ("Arizona, Illinois, New Jersey, and Wisconsin are among the other states that allow claims for conspiring to effect fraudulent conveyance against those that neither received nor benefitted from the fraudulent conveyance.").

Committee's request for derivative standing should be denied, and the Committee Motion should be denied in its entirety.

III. THE DEBTOR RELEASES COMPLY WITH ALL APPLICABLE LAW AND ARE FAIR, REASONABLE, AND IN THE BEST INTERESTS OF THE ESTATES

79. The Committee Motion is, in fact, an objection to confirmation. All of the issues raised by the Committee with respect to the Debtor Releases are confirmation issues. The Committee's litigation tactics have essentially converted the Debtors' Disclosure Statement Hearing into a confirmation hearing in violation of the Debtors' rights under the Bankruptcy Code. *See, e.g.*, *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) (Courts should be careful "so as not to convert the disclosure statement hearing into a confirmation hearing, and to insure that due process concerns are protected."). Although the Committee has prematurely raised these issues, this Part sets forth Debtors' argument in support of the Debtor Releases under the appropriate standards for confirmation. However, Debtors reserve all rights with respect to all confirmation issues.

80. Debtor releases are explicitly allowed under the Bankruptcy Code. Pursuant to Bankruptcy Code section 1123(b)(3)(A), debtors may release claims "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable and in the best interests of the estate." *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *accord In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009), *aff'd*, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part*, 627 F.3d 496 (2d Cir. 2010) (finding that the "releases and discharges of claims and causes of action by the Debtors, pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, represent a valid exercise of the Debtors' business judgment, and are fair, reasonable and in the best interests of

the estate"); *see also In re Midway Gold US, Inc.*, 575 B.R. 475, 509 (Bankr. D. Colo. 2017); *In re Pac. Gas & Elec. Co.*, 304 B.R. 395, 416 (Bankr. N.D. Cal. 2004).

81. "The decision of whether to approve a particular compromise lies within the discretion of the Bankruptcy judge and pursuant to Bankruptcy Rule 9019(a)." *In re Texaco Inc.*, 84 B.R. 893, 901 (Bankr. S.D.N.Y. 1988). "Whether the compromise is effected separately or in the body of a reorganization plan will not affect the approval analysis required of the bankruptcy court." *In re Dow Corning Corp.*, 192 B.R. 415, 421 (Bankr. E.D. Mich. 1996) (citing *In re Texaco Inc.*, 84 B.R. at 901 ("Compromises may be effected separately during reorganization proceedings or in the body of the reorganization plan itself.")).

82. "A proposed settlement should only be approved by the bankruptcy judge upon a determination that the settlement is 'fair and equitable.'" *In re Dow Corning Corp.*, 192 B.R. at 421 (citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)). "[T]he court need not conduct a mini-trial on the merits of the settlement." *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991); *In re Energy Co-op., Inc.*, 886 F.2d 921, 927 n.6 (7th Cir. 1989). Instead, the obligation of the court is to "canvass the issues and see whether the settlement 'falls below the lowest point in the range of reasonableness.'" *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 497 (Bankr. S.D.N.Y. 1991) (quoting *In re W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied, Cosoff v. Rodman,* 464 U.S. 822 (1983)); *see also In re Dow Corning Corp.*, 192 B.R. at 421.

83. "Any factor 'relevant to a full and fair assessment of the wisdom of [a] proposed compromise' should be considered by the bankruptcy court." *In re Dow Corning Corp.*, 198 B.R. 214, 222 (Bankr. E.D. Mich. 1996) (quoting *TMT Trailer,* 390 U.S. at 424). "However, in

determining whether a proposed settlement agreement is fair and equitable, courts have found the following factors to be the most pertinent:

> The balance between the likelihood of the plaintiff's or defendant's success should the case go to trial compared to the present and future benefits offered by the settlement; the prospect of complex, costly and protracted litigation if settlement is not approved; the proportion of class members who do not object or who affirmatively support the proposed settlement; the competency and experience of counsel who support the settlement; the relative benefits to be received by individuals or groups within the class; the nature and breadth of releases to be obtained by officers and directors; and the extent to which the settlement is the product of arm's length bargaining.

In re Dow Corning Corp., 198 B.R. at 222–23 (citing *In re Texaco Inc.,* 84 B.R. at 902).

84. With respect to release of causes of action against a debtor's directors and officers, Courts also consider the effect of indemnification provisions. In *In re Texaco Inc.*, the Bankruptcy Court for the Southern District of New York found that "[t]he value of the derivative actions against Texaco's own officers and directors [was] further diminished by the fact that under Texaco's By-laws, its officers and directors [were] indemnified for liabilities incurred while acting on behalf of Texaco." 84 B.R. at 904. Because "the claims asserted by the derivative plaintiffs would be offset pursuant to the By-law indemnifications[,]" the court found that "[t]he issuance of releases and indemnifications under the Plan to Texaco's officers and directors would represent no additional relinquishment of causes of action by Texaco." *In re Texaco Inc.*, 84 B.R. at 904–05 (holding that the debtor's plan satisfied all requirements to confirmation).

85. Here, as discussed in Parts I.B and II, the Debtor Releases are fair, reasonable, and in the best interests of the Debtors' Estates. The Debtor Releases simply mirror and preserve the extensive protections already provided by Tennessee law while also preventing the Estates from engaging in wasteful litigation. Any claims that could potentially provide value to the Estates are not being released under the Plan, which preserves all causes of action against

officers and directors as to which they are not immune. Moreover, the Debtor Releases provide consideration to the directors and officers for their continued cooperation post-confirmation. The Liquidating Trustee will need the cooperation of Debtors' officers and directors to pursue valuable causes of action. Weighing all of the costs and benefits of the Debtor Releases, Debtors firmly believe that the Debtor Releases are fair, reasonable, and in the best interests of the Debtors' Estates and creditors.

CONCLUSION

86. In light of the foregoing, Debtors submit that the Committee Motion should be denied in its entirety, and the Court should approve the Disclosure Statement and Procedures Motion.

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Nashville, Tennessee

Respectfully submitted,

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