UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
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In re:	Chapter 11 Cases
Red Lobster Management, LLC,	Case No. 6:24-bk-02486-GER
	Jointly Administered with
Red Lobster Restaurants, LLC,	Case No. 6:24-bk-02487-GER
RLSV, Inc.,	Case No. 6:24-bk-02488-GER
Red Lobster Canada, Inc.,	Case No. 6:24-bk-02489-GER
Red Lobster Hospitality, LLC,	Case No. 6:24-bk-02490-GER
RL Kansas, LLC,	Case No. 6:24-bk-02491-GER
Red Lobster Sourcing, LLC,	Case No. 6:24-bk-02492-GER
Red Lobster Supply, LLC,	Case No. 6:24-bk-02493-GER
RL Columbia, LLC,	Case No. 6:24-bk-02494-GER
RL of Frederick, Inc.,	Case No. 6:24-bk-02495-GER
Red Lobster of Texas, Inc.,	Case No. 6:24-bk-02496-GER
RL Maryland, Inc.,	Case No. 6:24-bk-02497-GER
Red Lobster of Bel Air, Inc.,	Case No. 6:24-bk-02498-GER
RL Salisbury, LLC,	Case No. 6:24-bk-02499-GER
Red Lobster International Holdings LLC,	Case No. 6:24-bk-02500-GER
Debtors.	

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U.S. TRUSTEE'S LIMITED OBJECTION TO DEBTORS' EXPEDITED MOTION FOR ENTRY OF AN ORDER (I) CONDITIONALLY APPROVING DISCLOSURE STATEMENT FOR THE PROPOSED JOINT CHAPTER 11 PLAN OF RED LOBSTER MANAGEMENT LLC AND ITS DEBTOR AFFILIATES, (II) APPROVING THE SOLICITATION AND VOTING PROCEDURES WITH RESPECT TO CONFIRMATION OF THE PROPOSED JOINT CHAPTER 11 PLAN OF RED LOBSTER MANAGEMENT LLC AND ITS DEBTOR AFFILIATES, AND (III) GRANTING RELATED RELIEF [DKT 634]

Mary Ida Townson, the United States Trustee for Region 21 submits this limited objection to Debtors' expedited motion for approval of the disclosure statement and the solicitation and voting procedures to the extent Debtors utilize ballots containing an "opt-out" procedure as well as votes in favor of the Plan to obtain "consent" to the third-party releases and utilize no option to

affirmatively consent to the exculpation provisions. The U.S. Trustee has not had sufficient time to fully evaluate all issues that may give rise to objections to the Disclosure Statement (and Plan), particularly as to the third-party release and exculpation provisions to which we will likely object. Therefore, the U.S. Trustee reserves all rights to raise any, and all, statutory, constitutional, and caselaw arguments with respect to approval of the Disclosure Statement and Plan confirmation.

BACKGROUND

1. On July 19, 2024, Debtors moved the Court on an expedited basis to approve the Disclosure Statement and solicitation and voting procedures (the "Motion"). [Dkt. 634]

2. The Court set a hearing on the Motion for July 26, 2024. [Dkt. 641]

3. As reflected in the Disclosure Statement and proposed ballot, the Plan includes certain injunctions arising from third-party releases (the "Releases") and exculpations ("Exculpations"). *Discl.* Sec. 5.5(a)(3)-(a)(5); *Motion* ¶32.

4. The Plan defines "Released Party" as each of: (a) the Debtors' Professionals; (b) the current officers of each of the Debtors and the Debtors' current manager and/or director, Mr. Lawrence Hirsch; (c) the DIP Lenders and the DIP Agent and their respective Related Parties; (d) the Prepetition Term Loan Parties and their respective Related Parties; (e) the Purchaser; (f) the Committee and those individual members of the Committee, solely in their capacities as such, who do not opt out of the release provided for herein; (g) the Committee's Professionals; (h) the Plan Administrator and GUC Trustee; and (i) in each case, the respective Related Persons of each of the foregoing Persons. *Plan,* p.12.

5. The Plan defines Releasing Party as each of: (a) the officers of each of the Debtors, the members of any board of managers of each Debtor and the managing members (or comparable governing bodies or Persons) of any Debtor; (b) the DIP Lenders and the DIP Agent; (c) the

Prepetition Term Loan Parties; **(d) all holders of Claims that (A) vote to accept the Plan, (B) vote to reject the Plan and do not elect to opt out of the releases contained in Article VIII of the Plan, or (C) do not vote on the Plan and do not elect to opt out of the releases contained in Article VIII of the Plan**; (e) the Purchaser; (f) the Committee and those individual members of the Committee, solely in their capacities as such, who do not opt out of the release provided for herein; and (g) the Plan Administrator and GUC Trustee. *Plan*, pp.12-13(emphasis added).

6. The Plan defines Exculpated Parties as: (a) the directors and officers of each of the Debtors and the members of any board of managers or directors of each Debtor, and in each case, who served the Debtors in such capacities at any time between the Petition Date and the Plan Effective Date; (b) all Professionals and agents retained by the Debtors in the Debtors' Chapter 11 Cases; (c) the Committee and those individual members of the Committee who do not opt out of the release provided for herein; (d) all Professionals and agents retained by the Committee in the Debtors' Chapter 11 Cases; (e) the Plan Administrator and GUC Trustee; and (f) in each case, the respective Related Persons of each of the foregoing Persons. *Plan*, p.6.

7. The Plan has two classes of creditors deemed unimpaired and therefore not entitled to vote: Class 1- miscellaneous secured claims, and Class 2- other priority claims. *Plan*, pp. 22-23; *Motion*, p. 6.

8. The Debtors have over 100,000 parties listed on their noticing matrix. These parties include current and former employees, vendors, landlords, certain customers, litigation claimants, interest holders, taxing authorities, insurers, and other similar parties in interest. *Motion*, ¶14. This includes the tens of thousands of past and current employees with only General Unsecured Claims arising from their deferred compensation retirement accounts.

9. Under the Plan, General Unsecured Creditors are treated as follows:

> On the Plan Effective Date, each holder of an Allowed Class 4 General Unsecured Claim (except for deficiency Claims held by a holder of a Prepetition Term Loan Claim) shall receive, in accordance with the GUC Trust Documents, its Pro Rata Share of the beneficial interests in the GUC Trust and the right to receive its respective Pro Rata Share of any available GUC Litigation Proceeds or other GUC Trust Assets, if any. Holders of Allowed General Unsecured Claims against more than one Debtor shall be treated as having a single Allowed General Unsecured Claim solely for purposes of any Distribution. The treatment set forth herein with respect to the holders of Allowed Class 4 Claims (except for deficiency Claims held by a holder of a Prepetition Term Loan Claim) shall be in full and final satisfaction of the Allowed Class 4 Claims. Notwithstanding anything to the contrary contained in this Plan, no Distribution shall be made to Prepetition Term Loan Lenders on account of Allowed Class 4 Claims and the Prepetition Term Loan Lenders shall not be beneficiaries of the GUC Trust.

Plan, p. 24; *Motion*, p. 5.

Accordingly, General Unsecured Creditors will likely only recover if the GUC Litigation Trust is successful in pursuing claims against the direct and indirect equity holders and/or prior management. If the GUC Litigation Trust is unsuccessful pursuing or collecting on such claims, the General Unsecured Creditors may receive nothing.

10. The Debtors propose to obtain "consent" to the third-party Releases by utilizing an opt-out procedure. *Discl.* p.69. The Debtors provide no procedure for opting in or opting out of the Exculpations. *Discl.* pp.69-70.

11. Debtors seek Court approval to deem the following to have consented to the releases: all holders of Claims who

> (a) vote to accept the Plan;
>
> (b) vote to reject the Plan but do not check a box on page twelve of the ballot indicating the election **not** to grant the releases;
>
> (c) abstain by returning their ballot without indicating acceptance or rejection of the Plan and do not check the opt out box; and
>
> (d) fail to return the ballot and fail to check the opt out box.

Specifically, the proposed Ballot states:

IMPORTANT INFORMATION REGARDING
CERTAIN RELEASES BY HOLDERS OF CLAIMS:

IF YOU VOTE TO *ACCEPT* THE PLAN, YOU WILL BE DEEMED TO GRANT THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN (REPRODUCED ABOVE), REGARDLESS OF WHETHER YOU CHECK THE BOX IN ITEM 3 BELOW.

IF YOU VOTE TO *REJECT* THE PLAN AND DO NOT CHECK THE BOX IN ITEM 3 BELOW, YOU WILL BE DEEMED TO CONSENT TO THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN.

IF YOU *ABSTAIN* FROM VOTING ON THE PLAN AND SUBMIT A BALLOT *WITHOUT* CHECKING THE BOX IN ITEM 3 BELOW, YOU WILL BE DEEMED TO CONSENT TO THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN.

IF YOU *ABSTAIN* FROM VOTING ON THE PLAN AND WISH TO OPT OUT OF THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN, YOU MUST SUBMIT A BALLOT IN WHICH YOU HAVE *CHECKED* THE BOX IN ITEM 3 BELOW IN ORDER TO NOT BE BOUND BY THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN.

IF YOU *FAIL TO SUBMIT* A BALLOT, YOU WILL BE DEEMED TO HAVE CONSENTED TO THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN.

Motion, Ex.1-A, p.12.

12. Debtors will also provide an opt-out form to unimpaired creditors with no right to vote as part of the Non-Voting Status Notice. *Motion*, Ex. 4-1.

ARGUMENT

Nonconsensual third-party releases are not authorized under the United States Bankruptcy Code. *Harrinton v. Purdue Pharma*, *L. P.*, 144 S. Ct. 2071, 2082–88 (2024). This limited objection is focused on the improper use of an opt-out procedure and votes on the Plan in the Disclosure Statement and ballots to strip creditors of rights against third parties without their consent.

A. The Disclosure Statement Fails to Adequately Explain the Basis for Imposing Third-Party Releases and Exculpations on Creditors Who Vote to Accept the Plan or Who Reject the Plan, Abstain from Voting, Fail to Vote, or Cannot Vote, But Do Not Affirmatively Opt-Out of the Releases

The Plan purports to treat votes in favor of the economic treatment in the Plan as votes in favor of the third-party releases, but a "court must ascertain whether the creditor unambiguously manifested assent to the release of the nondebtor from liability on its debt." *In re Arrowmill Dev. Corp*., 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (Gindin, C.J.). "'A creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings[.]'" *In re Elsinore Shore Assocs*., 91 B.R. 238, 247 (Bankr. D.N.J. 1988) (Gambardella, J.) quoting *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (analyzing section 16 of the Bankruptcy Act of 1898, precursor to 11 U.S.C. § 524(e)). The Disclosure Statement does not describe any basis for treating a vote on the Plan as consent to a release.

In addition, the Disclosure Statement states that creditors who vote to reject the Plan are still bound by the Releases unless they take the additional step of opting out. *Discl.* p.3; pp.68-69. It also states that creditors who abstain from voting (by returning a ballot without indicating their vote for or against the Plan), creditors who simply fail to return their ballots, and unimpaired creditors not entitled to vote, are all still bound by the Releases unless they opt-out. *Discl.* p.3 The Disclosure Statement does not, however, explain why such creditors should have their rights against third parties stripped away for failing to take additional steps.

The Disclosure Statement also states that all creditors are bound by the Exculpation clause. *Discl.* pp.69-70. Exculpation clauses are merely a type of third-party release and standards for consensual third-party releases apply. *See SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying)*, 780 F.3d 1070 (11th Cir. 2015) (analyzing an exculpation clause under the same standard as applies to any other type of third-party release); *In re Stein Mart, Inc.*, 629 B.R. 516, 524 (Bankr. M.D. Fla. 2021) (relying on *Seaside Eng'g* and explaining that

third-party releases, bar orders, and exculpation clause are all akin and analyzed under the same standard).

Accordingly, hereinafter for the sake of efficiency, references in the the U.S. Trustee's argument to "Releases" under the Disclosure Statement and Plan incorporates the Exculpations even if not specifically noted therein.

(i) The Court Should Reject the Disclosure Statement to the Extent it Fails to Explain Why Creditors' Rights as to Third Party Releases are Stripped By Their Votes for the Plan, Silence, or Failure to Check an Opt-Out Box

As an initial matter, given the *Purdue Pharma* Court's emphasis on obtaining a claimant's consent before its claims are "bargained away" or otherwise "extinguished", it is clear that merely voting for a plan is not sufficient to evince a claimant's affirmative consent to third-party releases. *Harrington v. Purdue Pharma L.P.*, 219 L. Ed. 2d 721, 735-36 (2024). *See, e.g*., *In re Congoleum Corp*., 362 B.R. 167, 194 (Bankr. D.N.J. 2007) (Ferguson, J.) ("[T]his Court agrees with those courts that have held that a consensual release cannot be based solely on a vote in favor of a plan."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (Gindin, C.J.) ("[I]t is not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan". . . . Thus, the court must ascertain whether the creditor unambiguously manifested assent to the release of the nondebtor from liability on its debt."); *In re Elsinore Shore Assocs*., 91 B.R. 238, 247 (Bankr. D.N.J. 1988) (Gambardella, J.) ("'A creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings[.]'") (quoting *Union Carbide Corp. v. Newboles*, 86 F.2d 593, 595 (7th Cir. 1982)) (analyzing section 16 of the Bankruptcy Act of 1898, precursor to 11 U.S.C. § 524(e)); *id*. at 252 (holding that, as "[a] voluntary election to release non-debtors is not present in the present plan before the court . . . the release provisions in the Second Amended Joint Plan are prohibited by the Bankruptcy Code and relevant case law").

Moreover, in *Chassix Holdings, Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015), the court described an opt out requirement for a rejecting creditor as "little more than a Court-endorsed trap for the careless or inattentive creditor." *Id.* Indeed, deeming voters who rejected a plan to have consented to releases "would defy common sense" *Id*. at 81.

The court in *Chassix* explained further that "opt-out" and "deemed consent" voting rules are to "aid the parties in compiling a broader set of third-party releases than might be obtained if a different "affirmative consent" approach were adopted. *Chassix Holdings* at 78. The court stated:

> Finding "consent" in these circumstances is to some extent a legal fiction. We know from experience that many creditors and interest holders who receive disclosure statements and solicitation materials simply will not respond to them, either because they elect not to read them at all or for other reasons.

Id.

This was a particular concern in the *Chassix Holdings* case because "the relatively small recoveries that were initially proposed, and the widely publicized fact that other creditor groups endorsed the Plan, could easily have prompted an even higher-than-usual degree of inattentiveness or inaction among affected creditors in these cases." *Id.* at 80. "Furthermore, many creditors may simply have assumed that a package that related to the Debtors' bankruptcy case must have related only to their dealings with the Debtors and would not affect their claims against other parties." *Id.* at 80-81.

The court stated strongly that charging inactive creditors with understanding the scope and affect of the proposed third-party releases was beyond realistic or fair:

> Charging all inactive creditors with full knowledge of the scope and implications of the proposed third party releases and implying a "consent" to the third party releases based on the creditors' inaction, is simply not realistic or fair, and **would stretch the meaning of "consent" beyond the breaking point**. *See In re Washington Mut. Inc.,* 442 B.R. 314, 355 (Bankr. D. Del. 2011)(holding that "inaction" was not a sufficient manifestation of consent to support a release).

Id. at 81 (emphasis added).

Similarly, the court in the Delaware bankruptcy case *In re Emerge Energy Servs. LP* held "a waiver cannot be discerned through a party's silence or inaction unless specific circumstances are present. A party's receipt of a notice imposing an artificial opt-out requirement, the recipient's *possible* understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify." *In re Emerge Energy Servs. LP*, Case 19-11563 (KBO), 2019 WL 7634308 (Bankr. D. Del. Dec. 05, 2019).

The circumstances of this case warrant consideration of similar concerns addressed in *Chassix Holdings*. Recoveries of General Unsecured Creditors in this case may be relatively small or possibly nonexistent. It will be clear to General Unsecured Creditors that under the Plan they only recover if the GUC Litigation Trust is successful in pursuing claims against the direct and indirect equity holders and/or prior management. If the GUC Litigation Trust is unsuccessful pursuing such claims, or can simply not collect on a judgment, the General Unsecured Creditors may receive nothing.

This small and possibly non-existent recovery for General Unsecured Creditors might prompt the higher-than-usual degree of inattentiveness or inaction that concerned the court in *Chassix Holdings*, especially if the recovery and assent of other creditor bodies becomes widely publicized as many aspects of this case have become. Under those circumstances, the Releases may impact particularly the tens of thousands of past and current employees with only unsecured claims arising from their deferred compensation retirement accounts.

The court in *In re SunEdison* examined whether creditors that abstained from voting can be deemed to accept releases. *In re SunEdison*, 576 B.R. 453, 461 (Bankr. S.D.N.Y 2017). The Court held that creditors that abstained from voting did not consent to non-debtor releases under

the debtor's plan. After examining contract principles, the court found, among other things, that silence does not constitute consent unless it has the effect to mislead. *Id.* at 459. Accordingly, because creditors that abstain from voting have no duty to speak, the court stated that "implying a 'consent' to the third-party releases based on the creditors' inaction, is simply not realistic or fair, and would stretch the meaning of 'consent' beyond the breaking point." *SunEdison*, 576 B.R. at 461 (quoting *Chassix*, 533 B.R. at 81). *But see, In re DBSD N. Am., Inc.*, 419 B.R. 179, 217-19 (Bankr. S.D.N.Y. 2009), aff'd, No. 09 CIV. 1016 (LAK), 2010 U.S. Dist. LEXIS 33253, 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)(holding that consent may be found when a disclosure statement or voting ballet warned that a failure to vote against the plan would be deemed consent to releases).

As to unimpaired creditors with no vote, the *Chassix Holdings* court held that unimpaired creditors cannot be deemed to have consented to third-party releases, because, among other things, "[i]f a creditor must release a claim against a third party under a plan (as a condition to whatever payment or other treatment the plan provides for the creditor's claim against the debtor), it is difficult to understand how such a creditor could properly be considered to be 'unimpaired' by the Plan in the first place."

Therefore, the Court should reject the Disclosure Statement to the extent it fails to explain why creditors' rights as to the Releases are stripped by their mere vote on the Plan, silence, or failure to check an opt-out box.

(ii) State Law on Contracts Also Supports Finding that Silence is not Acceptance

Contract principles govern whether a release is consensual. *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017). Contract principles apply because a third-party release is basically a settlement agreement between a claimant and a defendant. The "general rule of

contracts is that silence cannot manifest consent." *Patterson et al. v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 686 (E.D. Va. 2022).

Applying black letter contract principles to opt-out releases in a chapter 11 plan in *Mahwah*, the Court found that contract law does not support consent by failure to opt-out. *Mahwah*, 636 B.R. at 686. "Whether the Court labels these 'nonconsensual' or based on 'implied consent' matters not, because in either case there is a lack of sufficient affirmation of consent." *Id.* at 688.

Pursuant to the Plan, New York law applies to all agreements entered into in connection with the Plan. *Plan*, p.17. This does not necessarily require that issues arising in connection to underlying Third-Party Claims and Third-Party Releases are to be governed by the laws of any particular state. The law of the state in which such claims arise between the non-debtors would govern the contracts between those non-debtors. Debtors cannot unilaterally change choice of law principles for nonparties.

Nevertheless, a review of New York law finds that silence is not acceptance even if an offer sets that condition. *See Karlin v. Avis*, 457 F.2d 57,62 (2d Cir. 1972). "Thus, the offeror cannot ordinarily force the other party into a contract saying, "If I do not hear from you by next Tuesday, I shall assume you accept." *In re Sun Edison*, 576 B.R. 453, 458 (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW ON CONTRACTS § 2-18, AT 83 (3d ed. 1987)). An exception to this rule may exist where party has a duty to speak due to an ongoing course of conduct, the offeree accepts benefits of the offer despite the opportunity to reject them, or when silence will have the effect of misleading. *See e.g., Weiss v. Macy's Retail Holdings, Inc.*, 265 F. Supp. 3d 358 (S.D.N.Y. 2017).

The bankruptcy court in *In re Sun Edison* analyzed extensively the question of whether creditors have a duty to speak in the context of accepting bankruptcy plan third party releases under

New York law. *In re Sun Edison*, 576 B.R. 453, 458-461. The court held that the creditors had no duty to speak. It explained:

> The Debtor's argument that Non-Voting Releasors' silence should be deemed their consent to the Release is not persuasive because the Debtors have not identified the source of their duty to speak. The Debtors do not contend that an ongoing course of conduct their creditors gave rise to a duty to speak. Furthermore, the Debtors do not argue that creditors understood that if they accepted a distribution under the Plan they were duty-bound to object or accept the Release.
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> * * * *
>
> Moreover, the creditors received the same percentage distribution whether they accepted the Plan, rejected the Plan, or did not vote.

Id. at 460.

Therefore, because silence is not acceptance under New York law, and creditors have no duty to respond, the Court should reject the Disclosure Statement to the extent it fails to explain why the creditors' rights as to the Releases are stripped by their silence or failure to check an opt-out box.

CONCLUSION

The Disclosure Statement and solicitation procedure should be rejected. Consent should be demonstrated through an unequivocal **opt-in** procedure under which no party would be deemed to have granted a third-party release unless the party affirmatively opted to do so in a way that was separate from the party's vote with respect to the Plan.

Dated: July 25, 2024

Respectfully submitted,

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/s/ William J. Simonitsch
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been served electronically through CM/ECF on July 25, 2024, to all parties having appeared electronically in the instant matter.

/s/ William J. Simonitsch
William J. Simonitsch, AUST