IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: USA GYMNASTICS,[1] Debtor.	Chapter 11 Case No. 18-09108-RLM-11

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE THIRD AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION PROPOSED BY USA GYMNASTICS AND THE ADDITIONAL TORT CLAIMANTS COMMITTEE OF SEXUAL ABUSE SURVIVORS AND OMNIBUS REPLY TO CONFIRMATION OBJECTIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES IV

INTRODUCTION 1

BACKGROUND 3

A. Overview Of The Plan. 3

B. Solicitation Of The Plan And Notice Of The Confirmation Hearing..... 6

ARGUMENT 8

I. THE CONFIRMATION OBJECTIONS SHOULD BE OVERRULED. 8

A. The UST's Limited Objection Should Be Overruled. 8

1. The Plan's Third-Party Releases And Channeling Injunction Are Consensual Releases Required Under 11 U.S.C. §363 That Also Satisfy The Seventh Circuit's Standard For Approval Of Third-Party Releases. 8

a. Abuse Claimants Have Consented To The Plan's Third-Party Releases And Channeling Injunction……8

b. Section 363 Requires The Releases And Injunctions In Favor Of The Protected Parties…….. 10

c. Seventh Circuit Case Law Authorizes The Plan's Narrow And Essential Third-Party Releases And Channeling Injunction…...13

2. The Bankruptcy Court Has The Constitutional Authority To Confirm The Plan Under *Stern*……17

3. The Plan's Debtor Release Is Proper…….. 19

B. The Indiana Attorney General's Limited Objection Should Be Overruled. 25

C. TIG And LIU's Objections Should Be Overruled. 29

1. Both LIU And TIG Lack Standing To Make Their Objections……..30

2. TIG And LIU's Insurance Neutrality Objections Should Be Overruled…… 32

a. TIG And LIU's Policies Must Be "Subject To The Plan" If USAG Is To Invoke Certain Bankruptcy Preemption Rules…….. 33

b. TIG's Inability To Object To Channeled Claims Does Not Infringe On TIG's Policy Provisions……..... 34

3. The Plan's Settling Insurer Injunction Is Authorized Under Indiana And Colorado Law……. 39

4. TIG's And LIU's Good Faith Objections Should Be Overruled…… 46

5. The Plan's Assignment Provisions Are Authorized By Applicable Non-Bankruptcy Law And The Bankruptcy Code……. 50

6. The Plan Does Not Violate Section 502 Of The Bankruptcy Code……52

7. The Bankruptcy Court Has Post-Confirmation Jurisdiction To Resolve The Insurance Coverage Adversary Proceeding…….53

II. THE PLAN SATISFIES EACH REQUIREMENT FOR CONFIRMATION..... 54

A. Section 1129(a)(1): The Plan Complies With The Applicable Provisions Of The Bankruptcy Code. 54

1. The Plan Complies With The Classification Requirements Of Section 1122 Of The Bankruptcy Code…….. 55

2. The Plan Complies With The Requirements Of Section 1123(a) Of The Bankruptcy Code…… 57

a. The Plan Specifies Classes, Impairment, and Treatment……57

b. The Plan Provides Equal Treatment To Claims……..58

c. The Plan Provides Adequate Means For Its Implementation…. 59

d. The Reorganized Debtor, As A Non-Profit Corporation, Does Not Issue Equity Securities……61

e. The Plan's Provisions Regarding The Selection Of Directors And Officers Are Consistent With The Interests Of Creditors And Public Policy……... 61

B. Section 1129(a)(2): The Plan Proponents Have Complied With The Applicable Provisions Of The Bankruptcy Code. 61

1. The Plan Proponents Have Complied With the Disclosure and Solicitation Requirements Of Section 1125……... 62

2. The Plan Proponents Satisfied The Plan Acceptance Requirements Of Section 1126..... 63

C. Section 1129(a)(3): The Plan Is Proposed In Good Faith And Not By Any Means Forbidden By Law. 63

D. Section 1129(a)(4): The Plan Provides For Bankruptcy Court Approval Of Certain Administrative Expenses. 64

E. Section 1129(a)(5): The Plan Adequately Discloses Information Regarding Directors And Officers Of The Reorganized Debtor. 64

F. Section 1129(a)(7): The Plan Is In The Best Interests Of Creditors. 65

G. Section 1129(a)(8): Every Class Has Voted To Accept The Plan Or Is Deemed To Accept The Plan. 67

H. Section 1129(a)(9): The Plan Provides For Payment In Full Of Allowed Administrative And Priority Claims. 68

I. Section 1129(a)(10): At Least One Impaired Class Of Claims Has Accepted The Plan. 69

J. Section 1129(a)(11): The Plan Is Feasible. 69

K. Section 1129(a)(12): The Plan Provides For The Payment Of All Fees Under 28 U.S.C. §1930. 70

L. Section 1129(a)(16): The Plan Provides For Transfers Of Property In Accordance With Applicable Non-Bankruptcy Law. 70

M. Section 1129(b): If Applicable, The Plan Satisfies The Bankruptcy Code's Cramdown Requirements. 72

N. The Discretionary Contents Of The Plan Are Appropriate. 73

CONCLUSION 75

TABLE OF AUTHORITIES

PAGE(S)

CASES

In re A.P.I., Inc.,
331 B.R. 828 (Bankr. D. Minn. 2005) 30

In re Abengoa Bioenergy Biomass of Kansas, LLC, 16-10446,
2018 WL 2138620 (Bankr. D. Kan. May 7, 2018) 52, 353

Ad Hoc Comm. Of Non-Consenting Creditors v. Peabody Energy Corp. (In re Peabody Energy Corp.),
933 F.3d 918 (8th Cir. 2019) 49, 50

In re Adelphia Comm'cns Corp.,
364 B.R. 518 (Bankr. S.D.N.Y. 2007) 11

In re Adelphia Comm'cns Corp.,
368 B.R. 140 (Bankr. S.D.N.Y. 2007) 67

In re Adelphia Comm'cns Corp.,
371 B.R. 660 (S.D.N.Y. 2007) 53

In re Affiliated Foods, Inc.,
249 B.R. 770 (Bankr. W.D. Mo. 2000) 65

In re Airadigm Commc'ns, Inc.,
519 F.3d 640 (7th Cir. 2008) ..... *passim*

Allstate Ins. Co. v. Med. Lien Mgmt.,
348 P.3d 943 (Colo. 2015) 52

In re Am. Consol. Transp. Cos.,
470 B.R. 478 (Bankr. N.D. Ill. 2012) 69

Matter of Andreuccetti,
975 F.2d 413 (7th Cir. 1992) 47, 48, 63

In re Archdiocese of St. Paul & Minn.,
579 B.R. 188 (Bankr. D. Minn. 2017) 11, 42

In re Archdiocese of St. Paul & Minneapolis,
No. 15-30125 (Bankr. D. Minn. Sept. 19, 2018), Dkt. 1262 24

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999) 55, 64, 72

Bath Iron Works Corp. v. Congoleum Corp. (In re Congoleum Corp.),
627 B.R. 62 (Bankr. D. N.J. 2021) 11, 12

In re C.P. Hall Co. v. Columbia Casualty Co.,
750 F.3d 659 (7th Cir. 2014) 30, 31

In re Catholic Bishop of Spokane,
No. 04-08822 (Bankr. E.D. Wash. Mar. 7, 2007), Dkt. 1774.....24

In re Catholic Diocese of Wilmington,
No. 09-13560 (Bankr. D. Del. May 23, 2011), Dkt. 1321 24

In re Christian Brothers Institute,
No. 11-22820 (Bankr. S.D.N.Y. December 9, 2013), Dkt. 620.....24

Condo v. Conners,
266 P.3d 1110 (Colo. 2011).....52

In re Conseco, Inc.,
301 B.R. 525 (Bankr. N.D. Ill. 2003) 10

Cont'l W. Ins. Co. v. Colony Ins. Co.,
69 F. Supp. 3d 1075 (D. Colo. 2014).....41

In re Davidson,
402 B.R. 877 (Bankr. S.D. Ind. 2009) 20

In re Doctors Hosp. of Hyde Park, Inc.,
474 F.3d 421 (7th Cir. 2007) 20, 23

Donovan v. Robbins,
752 F.2d 1170 (7th Cir. 1985) 42, 43

In re Dow Corning Corp.,
255 B.R. 445 (E.D. Mich. 2000).....24

In re Drexel Burnham Lambert Group, Inc.,
138 B.R. 723 (Bankr. S.D.N.Y. 1992).....54, 57, 64, 65

Matter of Dues,
98 B.R. 434 (Bankr. N.D. Ind. 1989).....67, 71

In re Efoora, Inc.,
472 B.R. 481 (Bankr. N.D. Ill. 2012) 21

Eli Lilly & Co. v. Aetna Cas. & Sur. Co.,
No. 49D12-0102-CP-0000243 (Marion Cty. Sup. Ct. June 15, 2002)
(Moberly, J.).....39, 40

Empl'rs Ins. of Wausau v. Recticel Foam Corp.,
716 N.E.2d 1015 (Ind. Ct. App. 1999).....32

Matter of Energy Co-Op.,
886 F.2d 921 (7th Cir. 1989) 20, 23

In re Envirodyne Indus., Inc.,
1993 WL 566565 (Bankr. N.D. Ill. Dec. 20, 1993) 54, 72

Ernst & Young LLP v. Baker O'Neal Holdings, Inc.,
304 F.3d 753 (7th Cir. 2002) 53, 54

In re Exide Holdings, Inc.,
20-11157-CSS, 2021 WL 3145612 (D. Del. July 26, 2021).....15, 22

In re Fed.-Mogul Global,
684 F.3d 355 (3d Cir. 2012).....50

Fluor Corp. v. Superior Court,
354 P.3d 302 (Cal. 2015) 51

In re Forty-Eight Insulations,
149 B.R. 860 (N.D. Ill. 1992) 11, 12

In re Fuller-Austin Insulation,
No. 98-2038-JJF, 1998 WL 812388 (D. Del. Nov. 10, 1998) 30

G & N Aircraft, Inc. v. Boehm,
743 N.E.2d 227 (Ind. 2001) 21

In re G-I Holdings Inc.,
420 B.R. 216 (D.N.J. 2009) 15

In re Greenwood Point, LP,
445 B.R. 885 (Bankr. S.D. Ind. 2011) ..... *passim*

Grupo Dataflux v. Atlas Glob. Group, L.P.,
541 U.S. 567 (2004).....53

Harden v. Raffensperger, Hughes & Co.,
933 F. Supp. 763 (S.D. Ind. 1996).....43, 44

In re Harvey,
213 F.3d 318 (7th Cir. 2000) 59, 71, 74

In re Hegeduis,
525 B.R. 74 (Bankr. N.D. Ind. 2015).....59, 74

In re Holly Marine Towing, Inc.,
669 F.3d 796 (7th Cir. 2012) 20

Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund,
No. 13-CV-03306, 2015 WL 11255491 (N.D. Ill. Aug. 21, 2015) 13, 14, 15

Ind. Ins. Co. v. Sentry Ins. Co.,
437 N.E.2d 1381 (Ind. Ct. App. 1982)..... *passim*

In re Indianapolis Downs, LLC,
486 B.R. 286 (Bankr. D. Del. 2013) 10

In re Ingersoll, Inc.,
562 F.3d 856 (7th Cir. 2009) 13, 14, 15

In re Jartran, Inc.,
44 B.R. 331 (Bankr. N.D. Ill. 1984) 22, 65, 72

In re Keck, Mahin & Cate,
241 B.R. 583 (Bankr. N.D. Ill. 1999) 10, 65

In re Kirwan Offices S.a.R.L.,
592 B.R. 489 (S.D.N.Y. 2018).....19

Klepper v. Ace Am. Ins. Co.,
999 N.E.2d 86 (Ind. Ct. App. 2013).....32, 46

In re KMC Real Est. Inv'rs, LLC,
531 B.R. 758 (S.D. Ind. 2015) 69

In re Machne Menachem, Inc.,
371 B.R. 63 (Bankr. M.D. Pa. 2006) 71

Matter of Madison Hotel Associates,
749 F.2d 410 (7th Cir. 1984) 47, 48, 63

Metro. Life Ins. Co. v. Lanigan,
222 P. 402 (Colo. 1924).....51

In re Millennium Lab Holdings II, LLC,
945 F.3d 126 (3d Cir. 2019).....18, 19

Nat'l Am. Ins. Co. v. Artisan & Truckers Cas. Co.,
796 F.3d 717 (7th Cir. 2015) 52

Nat'l Cas. Co. v. Great Sw. Fire Ins. Co.,
833 P.2d 741 (Colo. 1992).....41, 42

In re Oaks,
No. 11-48903, 2012 WL 5717940 (Bankr. N.D. Ill. Nov. 15, 2012) 73, 74

OneBeacon Am. Ins. Co. v. A.P.I., Inc.,
No. 06-CV-167 (JNE), 2006 WL 1473004 (D. Minn. May 25, 2006) 50

In re Pac. Gas & Electric Co.,
No. 19-30088 (Bankr. N.D. Cal. June 19, 2020), Dkt. 8048 24

Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co.,
874 P.2d 1049 (Colo. 1994).....52

In re Polis,
217 F.3d 899 (7th Cir. 2000) 17

Preferred Prof'l Ins. Co. v. Doctors Co.,
419 P.3d 1020 (Colo. Ct. App. 2018) 39, 41

In re Purdue Pharma L.P.,
19-23649 (RDD), 2021 WL 4240974 (Bankr. S.D.N.Y. Sept. 17, 2021) 19, 32

In re Republic Airways Holdings Inc.,
565 B.R. 710 (Bankr. S.D.N.Y. 2017).....58

In re Rimstat, Ltd.,
193 B.R. 499 (Bankr. N.D. Ind. 1996).....30, 31, 47

In re Roman Catholic Archbishop of Portland,
No. 04-37154, 2007 Bankr. LEXIS 1180 (Bankr. D. Or. Apr. 13, 2007) 71

In re Roman Catholic Bishop of Great Falls, Montana,
No. 17-60271 (Bankr. D. Mont. Aug. 15, 2018), Dkt. 422 24

In re Roman Catholic Bishop of Stockton,
No. 14-20371, 2017 WL 118013 (Bankr. E.D. Cal. Jan. 10, 2017) 12, 13, 15, 22, 70

In re Ruti-Sweetwater, Inc.,
836 F.2d 1263 (10th Cir. 1988) 67

In re Schipper,
933 F.2d 513 (7th Cir. 1991) 21

In re SelectBuild Illinois,
No. 09-12085, 2015 WL 3452542 (Bankr. D. Del. May 28, 2015).....11

In re Sentinel Mgt. Group, Inc.,
398 B.R. 281 (Bankr. N.D. Ill. 2008) 55, 58, 62, 66, 69

Matter of Snyder,
56 B.R. 1007 (N.D. Ind. 1986) 30, 31, 52

So. Ind. Gas & Elec. Co. v. Admiral Ins. Co.,
No. 49D05-0411-PL-2265 (Marion Cty. Sup. Ct. Oct. 31, 2011) (Moberly, J.) 40

In re Society of Jesus, Oregon Province,
No. 09-30938 (Bankr. D. Or. May 27, 2011) Dkt. 1317-1 24

In re SoyNut Butter Co.,
No. 17-14970, 2018 WL 3689549 (Bankr. N.D. Ill. Aug 1, 2018) 11

Matter of Specialty Equip. Cos., Inc.,
3 F.3d 1043 (7th Cir. 1993) 16, 19

In re Sportstuff, Inc.,
430 B.R. 170 (BAP 8th Cir. 2010).....11, 42

Stern v. Marshall,
564 U.S. 462 (2011).....8, 17, 18, 19

In re Thorpe Insulation Co.,
677 F.3d 869 (9th Cir. 2012) 50

In re TK Holdings Inc.,
No. 17-11375 (BLS), 2018 WL 1306271 (Bankr. D. Del. Mar. 13, 2018) 50

Travelers Cas. & Sur. Co. v. U.S. Filter Corp.,
895 N.E.2d 1172 (Ind. 2008) 50, 51

Travelers Indem. Co. of Am. v. AAA Waterproofing, Inc.,
2014 WL 201726 (D. Colo., Jan. 17, 2014).....41

Travelers Ins. Cos. v. Maplehurst Farms, Inc.,
953 N.E.2d 1153 (Ind. Ct. app. 2011).....35

In re Tribune Co.,
464 B.R. 126 (Bankr. D. Del. 2011) 67

In re UAL Corp.,
443 F.3d 565 (7th Cir. 2006) 21

UNARCO Bloomington Factory Workers v. UNR Industries, Inc.,
124 B.R. 268 (N.D. Ill. 1990) 13, 14

In re W.R. Grace & Co.,
729 F.3d 311 (3d Cir. 2013).....24

In re Wabash Valley Power Assoc.,
72 F.3d 1305 (7th Cir. 1995) 55, 57

In re Washington Mutual, Inc.,
442 B.R. 314 (Bankr. D. Del. 2011) 22, 23, 24

In re Weinstein Co. Holdings LLC,
No. 18-10601 (Bankr. D. Del. Jan. 20, 2021), Dkt. 3182 24

West Bend Mut. Ins. Co. v. Arbor Homes, LLC,
703 F.3d 1092 (7th Cir. 2013) 36, 37

In re Western Asbestos Co.,
313 B.R. 832 (Bankr. N.D. Cal. 2003) 53

In re Witt,
473 B.R. 284 (Bankr. N.D. Ind. 2012).....20

STATUTES

11 U.S.C. § 363 .....12, 13

11 U.S.C. § 363(b) 10, 21

11 U.S.C. § 363(f).....8, 10, 11, 19

11 U.S.C. § 502.....31, 52, 53

11 U.S.C. § 503(b) 68

11 U.S.C. § 507(a)(2).....68

11 U.S.C. § 507(a)(8).....68

11 U.S.C. § 524.....15, 16

11 U.S.C. § 726(a)(3).....66

11 U.S.C. § 1122.....55, 56, 57

11 U.S.C. § 1123(a)(1).....57

11 U.S.C. § 1123(a)(2).....57

11 U.S.C. § 1123(a)(3).....57

11 U.S.C. § 1123(a)(4).....58, 59

11 U.S.C. § 1123(a)(5).....59, 60

11 U.S.C. § 1123(a)(6) 61

11 U.S.C. § 1123(a)(7) 61

11 U.S.C. § 1123(b) 73

11 U.S.C. § 1123(b)(1) 73

11 U.S.C. § 1123(b)(2) 73

11 U.S.C. § 1123(b)(3) 20, 73

11 U.S.C. § 1123(b)(4) 73

11 U.S.C. § 1123(b)(5) 73

11 U.S.C. § 1123(b)(6) 13, 73

11 U.S.C. § 1124(1) 57

11 U.S.C. § 1126 ..... 62, 63

11 U.S.C. § 1126(c) 63, 67

11 U.S.C. § 1126(f) 67

11 U.S.C. § 1128(b) 30

11 U.S.C. § 1129(a)(1) 54

11 U.S.C. § 1129(a)(2) 61, 62

11 U.S.C. § 1129(a)(3) 47, 49, 50, 63

11 U.S.C. § 1129(a)(4) 64

11 U.S.C. § 1129(a)(5) 64

11 U.S.C. § 1129(a)(6) 54

11 U.S.C. § 1129(a)(7) 65

11 U.S.C. § 1129(a)(8) 67

11 U.S.C. § 1129(a)(9) 68, 69

11 U.S.C. § 1129(a)(10) 69

11 U.S.C. § 1129(a)(11) 69, 70

11 U.S.C. § 1129(a)(12) 70

11 U.S.C. § 1129(a)(16) 70, 71

11 U.S.C. § 1129(b) 72, 73

11 U.S.C. § 1141(a) 53

28 U.S.C. § 1334(b) 18, 54

28 U.S.C. § 1930 70

36 U.S.C. § 220541 25

Ind. Code Ann. § 23-17-1-0.2, *et seq* 71

Ind. Code Ann. § 23-17-20-2 71

Tex. Bus. Orgs. Code Ann. § 22.001, *et seq*. 61, 71

OTHER AUTHORITIES

H.R. Rep. No. 95-595 (1977) 55, 62

USA Gymnastics, as debtor and debtor in possession in the above-captioned chapter 11 case ("**Debtor**" or "**USAG**"), respectfully submits its memorandum in support of confirmation of the *Third Amended Joint Chapter 11 Plan Of Reorganization Proposed By USA Gymnastics And The Additional Tort Claimants' Committee Of Sexual Abuse Survivors* [Dkt. 1655] (as it may be modified, amended, or supplemented, the "**Plan**") and its omnibus reply to the four objections filed in opposition to the Plan ("**Confirmation Brief**").[1] In further support of confirmation of the Plan, USAG previously submitted the Declaration of Catherine Nownes-Whitaker [Dkt. 1732] and will submit the Declarations of (i) Christopher J. Schneider; (ii) Bernadette Barron; (iii) Lauryn Turner; and (iv) Li Li Leung contemporaneously with the filing of this Confirmation Brief.

INTRODUCTION

1. As of the filing of this Confirmation Brief, the Survivors' Committee has not yet elected the Partial Settlement Option. TIG Insurance Company ("**TIG**"), the lone hold-out Debtor CGL Insurer, also has not accepted the Survivors' Committee's settlement proposal or reached an alternative agreement with the Survivors' Committee. The Debtor, with the assistance of the mediators, has been working and will continue to work to assist the Survivors' Committee, TIG, and the United States Olympic and Paralympic Committee ("**USOPC**") in reaching a settlement.

2. If, however, a settlement is not reached, the Plan before the Court will likely be the Litigation Only Alternative. This is not the result the Debtor wants, but if those speaking for survivors believe that a return to the civil courts is truly in their clients' best interests, the Debtor believes that the time has come to respect that position.

3. Over 92% of the survivors participated in the voting process and all of those 476 survivors accepted the Plan and all three of its options. Of the 476 Abuse Claimants who voted for

[1] Capitalized terms used herein and not defined shall have the meaning given to them in the Plan.

the Plan, 472 of them are represented by counsel. Given the strong voter turnout and the unanimous informed acceptance of the Plan, the time has come to provide Abuse Claimants with a path to resolve their claims.

4. Ignoring creditors' overwhelming support for the Plan, four parties—*none of which are creditors themselves, and one of which remains the sole "hold-out" insurer*—objected to confirmation. These four objections were filed by: (1) the United States Trustee [Dkt. 1734] (the "**UST Obj.**" filed by the "**UST**"); (2) the Indiana Attorney General [Dkt. 1739] (the "**IAG Obj.**" filed by the "**IAG**"); (3) TIG [Dkt. 1736] (the "**TIG Obj.**"); and (4) Liberty Insurance Underwriters, Inc. [Dkt. 1735] (the "**LIU Obj.**" filed by "**LIU**").

5. As set forth in Part I of this Confirmation Brief, none of these objections preclude confirmation of the Plan. Contrary to the UST's arguments, the Bankruptcy Code and binding Seventh Circuit authority authorizes the Plan's various releases and injunctions. This Court also has the constitutional authority to enter an order confirming the Plan. As to the IAG's objection, the Plan is feasible. The Debtor is in compliance with Indiana law. And contrary to the picture painted in the IAG objection, the Debtor has worked cooperatively with the IAG throughout its chapter 11 case (and before) and will continue to do so post-confirmation. Finally, TIG and LIU, both of whom have breached their obligations under their insurance contracts with the Debtor, lack standing to make their objections. But if the Court considers those objections, it should reject them for multiple reasons. The Plan does not impermissibly impair their rights under their policies. The Debtor and the Survivors' Committee—with the assistance of the mediators—proposed the Plan in good faith. The Bankruptcy Code and state law (Indiana and Colorado) authorize all provisions of the Plan, including the Full or Partial Settlement Alternative's protections for the Settling

Insurers, the assignment of insurance claims to the Trust, and the resolution of Abuse Claims through the Trust and Allocation Protocol.

6. In the end, sustaining any of these objections would be wrong as a matter of law for the many reasons that follow. But, more fundamentally, these objectors seek to interfere with the will of the Debtor's creditors—most notably the Abuse Claimants—who have voted overwhelmingly to accept this Plan, and who have consented to its distributional framework, its releases and injunctions, and its confirmation. The objectors, all of which lack any financial interest in the Debtor's assets, should not be allowed to stand in the way of confirmation. For the reasons set forth in Part II of the Debtor's Confirmation Brief, the Plan satisfies all of the requirements of Section 1129 of the Bankruptcy Code and should be confirmed.

BACKGROUND

7. On December 5, 2018, USAG filed its chapter 11 case. On December 19, 2018, the UST appointed the Survivors' Committee, comprised of nine survivors holding Abuse Claims against the Debtor. (Dkt. 97.)

A. Overview Of The Plan.

8. On August 31, 2021, the Debtor and the Survivors' Committee filed the Plan. (Dkt. 1551.) It was amended two times after that. (Dkts. 1566, 1655.)

9. The Plan before the Court is the product of over two years of mediation between USAG, the Survivors' Committee, the USOPC, and insurance carriers for both USAG and the USOPC. With the assistance first of the Honorable Gregg Zive and then of the Honorable James Carr, USAG and the Survivors' Committee were able to reach an agreement on a plan structure that is intended to provide the survivors with compensation or a path forward to resolve their Abuse Claims.

10. The Plan constitutes the Survivors' Committee's settlement proposal to each of the Debtor's insurance carriers and the carriers insuring USOPC and the Karolyis. (Plan §3.2.2, §3.2.4.) The Survivors' Committee developed these demands without input from the Debtor or USOPC based on its analysis of the Abuse Claims that each of the USAG and USOPC policies covered. (*Id*. §3.2.2.) To facilitate the settlement proposals, USAG agreed that any of its carriers that accepted the Survivors' Committee's settlement demand would be allowed to buy back their insurance policies for the amount of the demand and that USAG would seek to confirm a Plan that contained a channeling injunction, a settling insurer injunction, and releases that would protect both the Settling Insurers and non-debtor parties who could make claims against the Debtor's insurance policies. (*Id*. §3.3, §9.4.)

11. In addition, the Survivors' Committee made settlement proposals to each of the USOPC carriers and an insurer of the Karolyis. (*Id*. §3.2.4.) To facilitate these proposals, USOPC and the Karolyis agreed that they would provide releases to each of their carriers that accepted the Survivors' Committee's proposals. (*Id*. §3.3.)

12. Under the Plan, the Debtor agreed that it would transfer the sales proceeds from the insurance policy sales to the Trust less certain administrative expenses of the estate. (*Id*. §9.3.2, §9.4.) The settlement payments from the USOPC and Karolyi Settling Insurers will also be paid to the Trust. (*Id*. §9.3.2.) The final source of funding for the Trust comes from the Twistars Settling Insurers. (*Id*.) Twistars and its Settling Insurers reached an agreement with the Survivors' Committee in the spring of 2019 that was conditioned on the settlement being included as part of a future USAG plan of reorganization that contained a channeling injunction and other protection for the Twistars Settling Insurers. (*Id*. §3.2.3.)

13. The Plan also provided a means for the Survivors' Committee to proceed to settlement if some, but not all, of the insurance carriers accepted their settlement proposals. (*Id*. §3.1.1, Art. X.) Under the Partial Settlement Option, the claims of the Settling Insurers, the Debtor, and the USOPC against any Non-Settling Insurer (defined in the Plan as the "**Insurance Claims**") would be transferred to the Trust and the Trust would pursue payment from the Non-Settling Insurer on account of any such transferred Insurance Claims. (*Id*. §9.3.2, §10.5.) In addition, only Abuse Claimants whose Abuse Claims are covered by a Non-Settling Insurer's policy may opt out of receiving a payment from the Trust and instead may pursue recovery in civil litigation. (*Id*. §10.8.) If an Abuse Claimant opts out of the Trust, that Abuse Claimant's recovery is limited to what can be collected from the Non-Settling Insurer. (*Id*.) If the Trust settles with the Non-Settling Insurer while opt-out lawsuits are pending, the Abuse Claimants who opted out will be required to return to the Trust to receive their compensation from the Trust but will be entitled to certain claim enhancements depending on the stage of their lawsuit. (*Id*. §10.8.2, §10.8.3.)

14. The Plan also provides a pathway for the survivors to return to state or federal court to litigate their lawsuits if an insufficient number of carriers agree to settle. (*Id*. §3.1.2, Art. XIII.) Under the Litigation Only Alternative, Abuse Claimants may litigate their Abuse Claims against the Debtor in name only, with recovery limited to the proceeds of the Debtor's insurance policies. (*Id.* § 13.2.) If the Plan is confirmed under the Litigation Only Alternative, the Debtor will receive a discharge but the Settling Insurers, Participating Parties, and other Protected Parties will not receive the benefit of the releases and injunctions proposed under the Full or Partial Settlement Alternative. (*Id.* §12.1.)

15. All of the CGL Insurers except TIG have either accepted their initial CGL Insurer Settlement Offers or negotiated a modest discount from that initial proposal. Including the funds

committed by the Twistars Settling Insurers, the total that has been raised to date is $294,484,311.00. Of this amount, $231,206,453 is being paid to buy back certain USAG insurance policies and $60,834,765 is being paid on behalf of USOPC by its insurance carriers, $2,125,000 is being paid on behalf of Twistars by its insurance carriers, and $318,093 is being paid on behalf of the Karolyis by their insurance carriers. The Debtor will continue working diligently through the Confirmation Hearing in an attempt to reach further settlement agreements so that the Plan may be confirmed under the Full or Partial Settlement Alternative.

B. Solicitation Of The Plan And Notice Of The Confirmation Hearing.

16. On October 26, 2021, this Court entered its *Order Approving The Disclosure Statement And Plan Confirmation Procedures* [Dkt. 1659] (the "**Disclosure Statement Order**"). The Disclosure Statement Order approved the Debtor's *Disclosure Statement For Third Amended Joint Chapter 11 Plan Of Reorganization Proposed By USA Gymnastics And The Additional Tort Claimants Committee Of Sexual Abuse Survivors* [Dkt. 1656] (the "**Disclosure Statement**"), and authorized the Debtor and Omni Agent Solutions, Inc. (the "**Balloting Agent**") to solicit votes to accept or reject the Plan.

17. Pursuant to the Disclosure Statement Order, on October 26, 2021, the Balloting Agent commenced service of solicitation packages to all holders of impaired claims entitled to vote on the Plan (each, a member of a "**Voting Class**"). These solicitation packages contained a creditor's Ballot for its respective Voting Class, the Plan, the Disclosure Statement, the Disclosure Statement Order, a cover letter from the Debtor recommending voting to accept the Plan, a cover letter from the Survivors' Committee recommending voting to accept the Plan (only distributed to Class 6 Abuse Claimants), a notice of the Confirmation Hearing, and a pre-addressed return envelope. The Balloting agent completed service of the solicitation packages to creditors on

October 29, 2021 and supplemented its service thereafter based upon specific requests from individual creditors or their counsel.

18. In addition to soliciting votes from all holders of impaired claims entitled to vote, the Balloting Agent and USAG gave broad notice of the Confirmation Hearing and the deadlines to vote on and object to the Plan, above and beyond the requirements of the Bankruptcy Code and Bankruptcy Rules. The Balloting Agent published notice of the Confirmation Hearing and deadlines in the National Edition of USA Today on November 1, 2021 (*see* Dkt. 1679), and it emailed notice of the Confirmation Hearing and deadlines to over 733,000 former and current USAG members (*see* Dkt. 1722, Ex. J). It also mailed a notice of the Confirmation Hearing and related deadlines to over 6,000 other interested parties, including parties not entitled to vote because their claims are unimpaired under the Plan. (*Id.*, Exs. H-I.) Finally, the Debtor posted notice of the Confirmation Hearing and deadlines on its website, its social media, and the Safe Sport website, and placed ads containing such information in the GymCastic podcast and the Inside Gymnastics magazine. Certificates of service reflecting service of the solicitation packages and related notices are filed on the docket. (*See* Dkts. 1670, 1679, 1722, 1723, 1724, 1725, 1726, 1727, 1730, and 1731.)

19. On December 2, 2021, the Balloting Agent filed its declaration certifying the vote on the Plan [Dkt. 1732] (the "**Voting Report**"). Every Voting Class that submitted ballots has voted to accept the Plan, including 100% of the 476 Class 6 Abuse Claimants who voted on the Plan. (Voting Report at Classes 5-10.) In fact, of the 552 ballots received, only three creditors voted to reject the Plan. (*Id.* at Class 5 (one General Unsecured Claim voting to reject); *id.* at Class 10 (two Abuse Claims Filed After The Bar Date voting to reject).)

ARGUMENT

I. The Confirmation Objections Should Be Overruled.

A. The UST's Limited Objection Should Be Overruled.

20. The UST filed a limited objection contending the Plan is unconfirmable for three reasons, none of which has merit. ***First***, the UST argues that the Plan contains impermissible non-consensual third-party releases, even though the Plan's releases are required by 11 U.S.C. §363(f) and also are permissible under binding Seventh Circuit authority. ***Second***, relying upon *Stern v. Marshall*, 564 U.S. 462 (2011), the UST argues that this Court lacks the constitutional authority to enter an order confirming the Plan if it provides for releases of third-party claims. But *Stern* did nothing to disturb a bankruptcy court's broad and historic power to confirm plans of reorganization that include releases and injunctions that are integral to a debtor's successful restructuring. ***Third***, the UST complains that the Debtor's releases of its own claims and causes of action are not justified under Third Circuit (not Seventh Circuit) law. But the Debtor's releases are proper under Seventh Circuit law and Abuse Claimants, nearly all of whom are represented by counsel, have voted and agreed that the settlement consideration proposed under the Plan is adequate and reasonable.

1. The Plan's Third-Party Releases And Channeling Injunction Are Consensual Releases Required Under 11 U.S.C. §363 That Also Satisfy The Seventh Circuit's Standard For Approval Of Third-Party Releases.

21. The Plan's Channeling Injunction and release provisions are consensual releases that do not violate applicable law.

a. Abuse Claimants Have Consented To The Plan's Third-Party Releases And Channeling Injunction.

22. As an initial matter, the UST is incorrect to characterize the Plan's release and Channeling Injunction provisions as non-consensual. The UST contends that Abuse Claimants did

not have "any mechanism to express their consent or lack thereof" to those Plan provisions. (*Id.* at 7; *see also id.* at 11 n.4.) But there was a vote on the Plan. In accordance with the solicitation and voting procedures approved in this Court's Disclosure Statement Order, ***all 476*** Abuse Claimants who voted on the Plan voted to accept the Plan. (Voting Report at Class 6.) They did so using ballots that described the Plan's releases and Channeling Injunction in detail and stated—in bold, capitalized words—that, "[b]y accepting the Plan, if the Plan is confirmed, you will be deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever agreed to the terms of the Plan, including the releases, injunctions, and exculpations in the Plan." (Disclosure Statement Order, Ex. 2, at 5.)[2] Further, all but ***four*** of the Abuse Claimants who voted to accept the Plan are represented by counsel who presumably advised their clients as to the Plan's terms and the consequences of their vote to accept. Finally, as clearly described in Section 11.2.1 of the Plan, each Abuse Claimant will only be required to execute the General Release appended to the Plan as Exhibit J once the Settlement Trustee of the Trust determines that they are entitled to a Trust distribution.

23. If this is not consent, it is not clear what is. Ignoring this evidence of Abuse Claimants' affirmative consent to the Plan's terms, the UST argues that "[a] vote in favor of—and the absence of an objection to—a plan are not necessarily consent to non-debtor releases." (*Id.* at 11 n.4.) The UST does not support this argument with case law or any other authority. That is

[2] The Class 6 ballot disclosed that Abuse Claims would be channeled to the trust and described the release as follows: "Under the Plan's Full or Partial Settlement Alternative, the Trust will be created and your Abuse Claim will be channeled to the Trust for payment….In exchange for payment from the Trust, Abuse Claimants shall agree to a full and complete release of the Debtor, its Estate, the Reorganized Debtor, the Settling Insurers (identified in the Disclosure Statement), the Participating Parties (identified in the Disclosure Statement), and all known or unknown parties who may claim coverage under any insurance policy issued to the Debtor, including the Non-Debtor CGL Settling Insurer Covered Persons (identified in the Disclosure Statement), and for each of the foregoing, their Related Persons but solely acting in their capacity as such." (Disclosure Statement Order, Ex. 2, at 3.)

because the cases go the other way: "creditors who vote to accept a plan containing releases of non-debtors have consented to the releases." *In re Conseco, Inc.*, 301 B.R. 525, 527 (Bankr. N.D. Ill. 2003); *see also In re Keck, Mahin & Cate*, 241 B.R. 583, 592 (Bankr. N.D. Ill. 1999) (holding that creditors consented to plan's release if they voted to accept plan or accepted distributions under plan); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) (holding that plan's releases were consensual and binding on parties who voted to accept plan or who abstained from voting). Accordingly, Abuse Claimants consented to the Plan's releases and Channeling Injunction when they voted to accept the Plan and they will further demonstrate their consent upon executing the General Release to receive a distribution from the Trust.

b. Section 363 Requires The Releases And Injunctions In Favor Of The Protected Parties.

24. The UST's attack on the Plan's protections for the Settling Insurers, Participating Parties, and other Protected Parties ignores the primary legal rationale for those protections. Fundamentally, the Plan implements a free and clear sale of assets—the Debtor's insurance policies—pursuant to 11 U.S.C. §363(f). The Debtor will then use the sale proceeds to pay certain administrative claims and fund the Trust for survivors. *See* 11 U.S.C. §363(b), (f) (permitting sales of property of the estate); Plan §§3.6, 9.3.2.

25. Each of the Protected Parties, however, is either a named or additional insured under the Debtor's insurance policies. In the case of USOPC, it is expressly named as an additional insured in most of the Debtor's policies and for almost all of those policies where it is not named expressly, it nonetheless claims coverage as a sponsor or co-promoter. The other proposed Protected Parties also claim interests in the Debtor's policies as entities or individuals who fall under the categories of persons that the policies cover. That fact gives each of the Protected Parties a contractual interest in the Debtor's insurance policies. The majority of courts hold a bankruptcy

court lacks the power to terminate non-debtor contractual rights in a debtor's insurance policies through a free and clear sale unless the non-debtor consents or receives adequate compensation for its contractual rights. *See, e.g.*, *In re Sportstuff, Inc.*, 430 B.R. 170, 178 (BAP 8th Cir. 2010) (bankruptcy courts lack "jurisdiction or authority to impair or extinguish" an additional insured's "independent contractual rights"); *In re Forty-Eight Insulations*, 149 B.R. 860, 863-64 (N.D. Ill. 1992); *Bath Iron Works Corp. v. Congoleum Corp. (In re Congoleum Corp.)*, 627 B.R. 62, 70 (Bankr. D.N.J. 2021); *In re SoyNut Butter Co.*, No. 17-14970, 2018 WL 3689549, at *3-4 (Bankr. N.D. Ill. Aug 1, 2018); *In re Archdiocese of St. Paul & Minn.*, 579 B.R. 188, 197-98, 202-03 (Bankr. D. Minn. 2017); *In re SelectBuild Illinois*, No. 09-12085, 2015 WL 3452542, at *9 (Bankr. D. Del. May 28, 2015); *In re Adelphia Comm'cns Corp.*, 364 B.R. 518, 527-28 (Bankr. S.D.N.Y. 2007). As the bankruptcy court explained in *Congoleum*, a debtor cannot sell an insurance policy back to a carrier "without ensuring that [the additional or named insured] received suitable compensation" for its interests in the policy being sold. 627 B.R. at 70.

26. Because the Debtor is unable to extinguish the rights of the Protected Parties in its insurance policies, it has to provide "suitable compensation" to the Protected Parties or obtain the consent of the Protected Parties to forgo their interests in the Debtor's insurance policies. *Id.* But neither the USOPC nor any of the other Protected Parties are willing to consent to the Debtor's sale of its insurance policies without receiving suitable compensation for their interests. Likewise, the Settling Insurers have made clear that they will not agree to buy back their policies unless such sales are free and clear of all third-parties' interests in the policies pursuant to Section 363(f) of the Code. The Settling Insurers make this demand because they want to finally extinguish their obligations under the purchased policies and do not want to buy back the policies only to face claims for coverage from the Protected Parties or those suing the Protected Parties.

27. While typically a non-debtor party with an interest in the asset being sold has its interest transferred to the sales proceeds, that does not work in this case because granting the Protected Parties a right to some of the insurance policy sales proceeds would reduce the compensation available to the survivors, which is an outcome the Survivors' Committee is unwilling to accept. Under these circumstances, the only way to provide USOPC and the other Protected Parties with "suitable compensation" for their lost insurance rights is to insulate them from the claims that the insurance would have covered through the channeling injunction and the Plan releases. *Congoleum*, 627 B.R. at 70.

28. Accordingly, the real question here is not whether the Plan's protections for the Protected Parties are permissible under the general case law addressing third-party releases, as the UST argues. Instead, Section 363 of the Bankruptcy Code supplies the legal basis for approving the proposed releases and channeling injunction. *See, e.g., Congoleum*, 627 B.R. at 70; *In re Roman Catholic Bishop of Stockton*, No. 14-20371, 2017 WL 118013, at *9 (Bankr. E.D. Cal. Jan. 10, 2017) (relying upon Section 363 to confirm mass tort plan and releases and injunctions protecting additional insureds under debtor's insurance policies because those third-parties "would not release their interests under the Released Insurance Policies unless they obtained the benefits of the [releases and] Injunctions under the Plan, because to do so may have left them exposed to Channeled Claims, whether or not such Claims are valid and whether or not coverage exists under the Settling Insurers' Insurance Policies for such Claims"); *Forty-Eight Insulations*, 149 B.R. at 863-64. In fact, the successful and consensual resolution of mass tort cases like this one, where the only material assets of the estate are a debtor's insurance policies, "would not [be] possible" if a plan could not protect the non-debtor entities and individuals with contractual interests in the

debtor's insurance policies with appropriate releases and injunctions. *Roman Catholic Bishop of Stockton*, 2017 WL 118013, at *9.

29. For these reasons, the Plan's releases and Channeling Injunction are proper under—and indeed compelled by—Section 363.

c. Seventh Circuit Case Law Authorizes The Plan's Narrow And Essential Third-Party Releases And Channeling Injunction.

30. Alternatively, the releases and Channeling Injunction at issue here satisfy the Seventh Circuit's standard for approval of such provisions. As the UST recognizes, the Bankruptcy Code permits non-consensual third-party releases and injunctions. (*See* UST Obj. at 12.) The Seventh Circuit has held that "Congress affirmatively gave the bankruptcy court the power to release third parties from a creditor's claims without the creditor's consent." *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008). In so ruling, the Court noted that bankruptcy courts have "broad" "residual authority" to "appl[y] the principles and rules of equity jurisprudence," and Sections 105(a) and 1123(b)(6) of the Bankruptcy Code "codif[y]" courts' ability to enter orders and confirm plans with provisions that are "'appropriate' and not inconsistent with any provision of the Bankruptcy Code." *Id.*

31. Under *Airadigm*, non-consensual third-party releases are "appropriate" and confirmable when they are "narrow" and "essential" to the reorganization. *Id.*; *see also In re Ingersoll, Inc.*, 562 F.3d 856, 864-65 (7th Cir. 2009) (applying *Airadigm* and affirming non-consensual third-party release); *Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, No. 13-CV-03306, 2015 WL 11255491, at *13-14 (N.D. Ill. Aug. 21, 2015) (affirming confirmation order for chapter 11 plan with non-consensual third-party release in favor of party making substantial contribution to plan settlement); *UNARCO Bloomington Factory Workers v. UNR Industries, Inc.*,

124 B.R. 268, 278-80 (N.D. Ill. 1990) (affirming confirmation order for mass tort chapter 11 plan with channeling injunction barring claims against settling insurers).

32. Here, both factors are satisfied. On the first prong, the Plan's releases and Channeling Injunction are "narrow" because they only release and bar potential claims related to the Debtor, Abuse Claims, Future Claims, and the policies of the Settling Insurers issued to the Debtor, the USOPC, or certain other related parties that are identified in the Disclosure Statement. (*See* Plan §§11.2.1, 12.3, Ex. J; Disclosure Statement at 9-10.) Any claims against third-parties that are unrelated to the liabilities that drove the Debtor into this chapter 11 case are preserved. In addition, "any Person who personally committed an act of Sexual Abuse that resulted or would result in a Claim against the Debtor or a Participating Party" is excluded from the protections of the Plan's releases and injunctions. (Plan §1.1.55; *see also id.* §§11.2.1, 12.3.1, Ex J ¶3.) The Plan's third-party release and Channeling Injunction are therefore sufficiently "narrow" to be approved. *Airadigm*, 519 F.3d at 657 (third-party release sufficiently narrow where it excluded claims arising from "willful misconduct"); *see also Ingersoll,* 562 F.3d at 865 (affirming "narrowly tailored" release of claims against third-parties related to claims asserted in non-bankruptcy litigation); *Hotel 71 Mezz Lender*, 2015 WL 11255491, at *12 (affirming "narrowly tailored" release that carved out claims arising from third-parties' misconduct that precipitated chapter 11 case).

33. On the second prong, the Plan's releases and Channeling Injunction are essential because, without them, the settlement incorporated into the Plan would not exist. As noted, the Settling Insurers, the USOPC, and other parties making contributions to the Settlement Trust will not fund any settlement unless they receive finality with respect to the Debtor's mass tort liabilities. As the Declarations filed in support of confirmation make clear, this was not an empty demand

from the Settling Insurers, the USOPC, and other Protected Parties. There simply would be no settlement for Abuse Claimants unless the parties contributing their insurance policies and interests in insurance coverage to the Settlement Trust receive the protections of the Plan's releases and Channeling Injunction.

34. Because the Protected Parties "required [these provisions] before [they] would provide the requisite financing" for the Trust, the Plan's releases and Channeling Injunction are "essential to the reorganization." *Airadigm*, 519 F.3d at 657; *see also Ingersoll*, 562 F.3d at 865 (affirming third-party release because "third-party would not have participated without the release, and its participation was 'essential' to the plan's success"); *Hotel 71 Mezz Lender*, 2015 WL 11255491, at *13 (affirming plan's third-party release as "essential" because, without it, distributions to creditors "would have been severely compromised"); *Roman Catholic Bishop of Stockton*, 2017 WL 118013, at *9 (third-party release and injunction were "essential" because third-parties "would not have made any contribution to the Plan without obtaining such releases and Injunctions"); *In re Exide Holdings, Inc.*, 20-11157-CSS, 2021 WL 3145612, at *13 (D. Del. July 26, 2021) (affirming non-consensual third-party releases of parties that made "critical and substantial contributions to the plan" that were "necessary" to the restructuring); *In re G-I Holdings Inc.*, 420 B.R. 216, 280, 282 (D.N.J. 2009) (affirming confirmation of non-consensual releases that were "essential" to plan).

35. Notwithstanding *Airadigm*'s governing test, the UST claims that Section 524 of the Bankruptcy Code makes non-consensual third-party releases and channeling injunctions *per se* unconfirmable. (UST Obj. at 12-13.) Section 524(e) provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e). In the UST's view, any third-party release or channeling injunction

effects a discharge of the Settling Insurers, the USOPC, and the other Protected Parties even though they have not filed for bankruptcy, in violation of Section 524(e). (UST Obj. at 12-13.)

36. The Seventh Circuit, however, has squarely rejected the UST's argument. "[S]ection 524(e) provides only that a *discharge* does not affect the liability of third parties." *Matter of Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (emphasis added). "This language does not purport to limit or restrain the power of the bankruptcy court to otherwise grant a *release* to a third party." *Id.* (emphasis added) A plan provides an improper "discharge," as opposed to a permissible "release," if it grants the beneficiary "'blanket immunity' for all times, all transgressions, and all omissions." *Airadigm*, 519 F.3d at 656-57.

37. The UST claims that the Plan's releases and Channeling Injunction provide the Protected Parties with this "blanket immunity." (UST Obj. at 13.) This argument is baseless. As noted, the scope of the Plan's releases and Channeling Injunction is limited to any claims that are related to the Debtor, Abuse Claims, Future Claims, and the policies of the Settling Insurers bought back under the Plan—*i.e.*, claims related to the mass tort liability that compelled the Debtor to file this chapter 11 case. (Plan §§11.2.1, 12.3.) The Protected Parties are not protected from any claims arising from willful or criminal conduct (*Id.* §§12.3.1, 18.4; *id.* Ex. J §§1, 3); any claims arising from Sexual Abuse that the person personally committed (Plan §12.3.1; *id.* Ex. J, §§1, 3); or any other claims that may have arisen prior to the Effective Date and in the ordinary course of their operations that are unrelated to the Debtor's potential abuse liability (Plan §§1.1.25, 12.3-12.3.1; *id.* Ex. J §1). Given all of these carveouts, to say that the Plan's releases and Channeling Injunction grant the Protected Parties *blanket immunity* is to drain those words of any meaning.

38. The UST further supports its argument by complaining that the list of Protected Parties is unnecessarily long (as it includes the Settling Insurers, Participating Parties, Non-Debtor

CGL Settling Insurer Covered Persons, and each of their Related Parties (consisting of individuals like employees acting in their capacities as such), and that the Debtor has not identified all of these parties by name. (UST Obj. at 13.) But that looks at the wrong issue. When discussing what constitutes a "discharge," the Seventh Circuit speaks in terms that reference the *claims* at issue, not *parties*. It stated that a party gets a "discharge" if it receives "blanket immunity" for "all *times*, all *transgressions*, all *omissions*." *Airadigm*, 519 F.3d at 657 (emphasis added). Those words reference conduct that may give rise to liability. They do not concern a party's identity. *See In re Polis*, 217 F.3d 899, 902 (7th Cir. 2000) (a claim is based upon and arises from conduct (or omissions) causing injury).

39. Accordingly, the Court only needs to look to what conduct is released or enjoined to determine whether the Plan effects an improper release. And, here, as already explained, in order to be released and enjoined under the Plan, claims against the Protected Parties must be narrowly related to the mass tort liability that has driven this chapter 11 case from day one, and the release of such claims is essential to obtain the Protected Parties' consent to the free and clear sales of insurance policies that will fund the Trust. The Protected Parties are not receiving an improper discharge and the Court should hold that the Plan's releases and Channeling Injunction are proper under *Airadigm*.

2. The Bankruptcy Court Has The Constitutional Authority To Confirm The Plan Under *Stern*.

40. The UST's next argument is that the Court lacks the constitutional authority under *Stern*, 564 U.S. at 462, to enter a confirmation order that releases and enjoins non-debtors' claims against the Protected Parties. But, *Stern* is not applicable by its own terms. In *Stern*, the Supreme Court held that bankruptcy courts, as Article I courts, lack the constitutional authority to finally adjudicate common law claims that are only "related to" the bankruptcy case under 28 U.S.C.

§1334(b), that would not "necessarily be resolved in the claims allowance process," 564 U.S. at 499, and that are not "integral to the restructuring of the debtor-creditor relationship." *id*. at 497. That holding has no impact on this Court's authority to confirm the Plan because by definition confirmation of a Plan is integral to the restructuring of the debtor-creditor relationship. Indeed in a chapter 11 case the exclusive means to a restructuring of the debtor-creditor relationship is through confirmation of a plan.

41. The Third Circuit recently explained why bankruptcy courts may enter confirmation orders that contain third-party releases in *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019). The Third Circuit discussed *Stern* in detail and read it to hold that "a bankruptcy court is within constitutional bounds when it resolves a matter that is integral to the restructuring of the debtor-creditor relationship." *Id.* at 135. This includes confirming a plan that contains non-consensual third-party releases and related injunctions to the extent those provisions "are critical to the success of the Plan" and the restructuring it proposes. *Id.* at 137. In *Millennium*, that test was satisfied because "without the [non-consensual third-party] releases, and the enforcement of such releases through the Plan's injunction provisions, the Released Parties would not be willing to make their contributions under the Plan and, absent those contributions, the Debtors would be unable to satisfy their obligations under…the settlement with the government and no chapter 11 plan would be feasible and the Debtors would likely have shut down." *Id.* (internal alterations omitted). Stated differently, "[a]bsent [the Released Parties'] payment, the company could not have paid the government, with the result that liquidation, not reorganization, would have been Millennium's sole option." *Id.* The Third Circuit concluded that the bankruptcy court could confirm the plan and its non-consensual third-party releases and injunctions without violating *Stern* because the plan was only possible with those releases and injunctions, rendering

those provisions "integral to the restructuring" and implicating the bankruptcy court's constitutional Article I jurisdiction. *Id.* at 140.

42. Same here. As explained above, the Settling Insurers will not agree to buy back their insurance policies without the Plan's releases and injunctions providing them with complete finality as to any claims related to the Debtor, Abuse Claims, Future Claims, and the Settling Insurer policies. Further, Section 363(f) of the Bankruptcy Code requires that the Debtor include third-parties with potential claims against the settling insurance policies within the definition of Protected Parties so that those policies can be sold free and clear of those third-parties' interests. As in *Millennium*, there simply would be "no reorganization" and payment to Abuse Claimants absent the Plan's releases and injunctions. *Id.* at 137. Under these circumstances, the Plan's releases and injunctions are "'integral to the restructuring of the debtor-creditor relationship,'" and the Court has the authority to enter an order confirming the Plan. *Id.* at 138 (quoting *Stern*, 564 U.S. at 497); *see also Matter of Specialty Equipment Cos.*, 3 F.3d at 1045 ("As a preliminary matter, we note that a bankruptcy court does have the power to determine the legality of provisions, including releases, incorporated into a reorganization plan"); *In re Kirwan Offices S.a.R.L.*, 592 B.R. 489, 504-05 (S.D.N.Y. 2018) (holding bankruptcy court had core jurisdiction to confirm non-consensual third-party release under *Stern*), *aff'd sub nom. In re Kirwan Offices S.a.R.L.*, 792 F. App'x 99 (2d Cir. 2019); *In re Purdue Pharma L.P.*, 19-23649 (RDD), 2021 WL 4240974, at *38 (Bankr. S.D.N.Y. Sept. 17, 2021) (same). The UST cites no contrary authority and thus its *Stern* objection should be overruled.

3. The Plan's Debtor Release Is Proper.

43. The UST's final argument is that the Debtor's mutual release of the Protected Parties under the Plan is not justified under applicable law and is not given in exchange for adequate compensation. (UST Obj. at 14-18.) On the latter point, the UST complains that the

Debtor has 'left money off the table'" to "the detriment of the Abuse [Claimants] who deserve better and deserve more." (*Id.* at 17.) As the Court previously indicated, though, the UST should not be "standing in the way" of Abuse Claimants who support the Plan. (10/4/21 Tr. at 46:4-17.) And Abuse Claimants, nearly all of whom are represented by counsel, have unanimously voted to accept the Plan and the total settlement amount it proposes. If the settlement value is sufficient for the Abuse Claimants who are the only individuals with a financial stake in the settlement fund, it is unclear why it is not sufficient for the UST. (*Id.* at 46:16 (Court: "when [creditors are] happy, we're happy, right?").

44. Regardless, the Plan's Debtor release is appropriate. Section 1123(b)(3) of the Bankruptcy Code permits the Debtor to "settle[] or adjust[] any claim or interest belonging to the debtor or to the estate," which authorizes the Debtor to settle and release estate claims against the Protected Parties. 11 U.S.C. §1123(b)(3). In the Seventh Circuit, a settlement should be approved if it is "in the best interests of the estate." *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007); *accord In re Holly Marine Towing, Inc.*, 669 F.3d 796, 801-02 (7th Cir. 2012). The "linchpin" of this test "is a comparison of the value of the settlement with the probable costs and benefits of litigating." *Doctors Hosp.*, 474 F.3d at 426. To conduct this cost-benefit analysis, courts consider a number of factors, including "the litigation's probability of success, the litigation's complexity, the litigation's attendant expense, inconvenience, and delay, including the possibility that disapproving the settlement will cause wasting of assets." *In re Davidson*, 402 B.R. 877, 880 (Bankr. S.D. Ind. 2009). Ultimately, so long as the Court determines that the settlement does not fall outside the "low end in the reasonable range of litigation possibilities," the settlement is in the best interests of the estate and should be approved. *In re Witt*, 473 B.R. 284, 288 (Bankr. N.D. Ind. 2012); *accord Matter of Energy Co-Op.*, 886 F.2d 921, 927 (7th Cir. 1989).

45. In addition, where a settlement contemplates the sale or release of claims that are estate property, Section 363(b) authorizes the Court to approve the settlement if it is a sound exercise of the debtor's business judgment. *In re UAL Corp.*, 443 F.3d 565, 571-72 (7th Cir. 2006); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991). When applying the business judgment standard, courts show "great judicial deference" to a debtor's business judgment. *In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012); *accord G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 238 (Ind. 2001) (describing Indiana's business judgment rule as "strongly pro-management").

46. The Plan's Debtor release easily meets these standards. If the Full or Partial Settlement Alternative Plan is confirmed, the Debtor will release the Settling Insurers, Participating Parties, and Non-Debtor CGL Settling Insurer Covered Persons of all of the estate's claims against them, including any claims arising under the Debtor's insurance policies and any avoidance actions. In exchange, the Debtor will receive an identical, reciprocal release from these same parties, and it will receive their consent to the buy back of the Settling Insurer policies free and clear of all third-parties' interests. The proceeds of those buy backs will then fund the Trust for Abuse Claimants, and confirmation of the Plan will allow for 80% distributions to all general unsecured creditors as well as permit the Debtor to exit chapter 11 without litigation that would threaten its ability to operate as a going-concern.

47. In evaluating this release, it is important to note that the Debtor's claims against the Settling Insurers are all coverage claims. By agreeing to buy back their policies in an amount the survivors have agreed is acceptable to them, the Settling Insurers have in effect satisfied the Debtor's claims for indemnity in full. With respect to the USOPC and the other Protected Parties, these individuals and entities all hold indemnification and other claims against the Debtor or purport to hold such claims and also assert interests in the Debtor's insurance policies. They have

agreed to release these claims against the estate and most importantly release their contractual rights against the Debtor's insurance policies in exchange for all of the releases in the Plan, including a release by the Debtor of any estate claims. The benefit of receiving that consent, which is what allows the Debtor's Plan to be funded, far outweighs the value of any claims the estate may have against these Protected Parties. Under these circumstances, it was a reasonable exercise of the Debtor's business judgment and in the best interests of the estate for the Debtor to agree to its release in exchange for the Plan. *In re Jartran, Inc.*, 44 B.R. 331, 381-83 (Bankr. N.D. Ill. 1984) (approving debtor release because it was "fair and equitable"); *Exide*, 2021 WL 3145612, at *14 (affirming debtor release because it was "a valid exercise of the debtor's business judgment, [and was] fair, reasonable, and in the best interests of the estate"); *Roman Catholic Bishop of Stockton*, 2017 WL 118013, at *8-9 (confirming debtor releases in connection with insurers' buyback of policies because the debtor "exercised appropriate business judgment" in agreeing to the releases, which were "reasonable").

48. The UST relies upon a Delaware bankruptcy court decision—*In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011)—to argue for a contrary result. (UST Obj. at 15.) But *Washington Mutual* applies a standard that evaluates whether a non-consensual third-party release should be granted, not a *debtor* release. *See Washington Mutual*, 442 B.R. at 346 (incorporating standard from *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D.Mo.1994), which addressed non-consensual third-party releases). *Washington Mutual* also posits a standard that is different from controlling Seventh Circuit case law. The Seventh Circuit has never cited any of the *Washington Mutual* factors as relevant or controlling when determining the propriety of either a release by a debtor of estate claims or a plan provision requiring a third-party release. Instead, the Seventh Circuit's general case law on the approval of settlements and

the use of estate property applies here, and the Plan's Debtor release easily scales the low bar proposed by such cases. *See Doctors Hosp.*, 474 F.3d at 426; *Matter of Energy Co-Op.*, 886 F.2d at 927.

49. But assuming the UST is mixing apples and oranges and confusing the approval of an estate release with a third-party release, the third-party releases in the Debtor's Plan easily satisfy the *Washington Mutual* factors. *First*, there is an identity of interest between the Protected Parties and the Debtor because the Protected Parties either assert indemnification claims against the Debtor or claim an interest in the Debtor's insurance policies.

50. *Second*, each of the Protected Parties has made a substantial contribution to the Debtor's estate by releasing their claims against the estate and the Debtor's insurance policies. And in the case of the USOPC, the Karolyis, and Twistars, each has contributed substantial cash amounts through their insurance policies.

51. *Third*, without the Protected Parties' agreement to release their claims, the Debtor would be unable to sell its insurance policies and fund its Plan.

52. *Fourth*, as the UST concedes (UST Obj. at 17), there has been "overwhelming acceptance of the plan and release by creditors." *Washington Mutual*, 442 B.R. at 346. All of the 476 voting Abuse Claimants voted to accept the Plan. In addition, all but 1 of the Debtor's 62 voting Class 5 General Unsecured Claimants voted to accept the Plan. No creditor has challenged the Plan on any basis. And no creditor has challenged the Plan because the Debtor release purportedly "left money off the table," as the UST asserts. (UST Obj. at 17.) Because creditors who stand to lose if the Debtor has inadequately valued its claims against Protected Parties have affirmatively consented to that release, there is no basis to invalidate it.

53. *Finally*, the Plan proposes to pay "all or substantially all of the claims of the creditors…under the Plan." *Washington Mutual*, 442 B.R. at 346. Here, the Debtor will pay all General Unsecured Claimants 80% on their claims, and then Abuse Claims and Future Claims will all be resolved by, and potentially receive distributions from, the Trust (under the Full or Partial Settlement Alternative) or through continued litigation (the Litigation Only Alternative). The UST complains that Abuse Claims have not been liquidated at this stage, and so it is impossible to know, as it pertains to this factor, whether all or substantially all of them will be paid. But the Court has correctly noted that unliquidated tort claims are almost never liquidated prior to confirmation. (12/1/21 Tr. at 7:2-14.) Under the Plan and Trust Documents, all allowed Abuse Claims will be channeled to and resolved by the Trust or permitted to restart litigation in the tort system. That is sufficient to satisfy this fifth factor. *See In re Dow Corning Corp.,* 255 B.R. 445, 497 (E.D. Mich. 2000) (holding that nothing in the Bankruptcy Code requires unliquidated claims to be liquidated prior to confirmation, especially in mass tort cases); *accord In re W.R. Grace & Co.*, 729 F.3d 311, 328-29 (3d Cir. 2013).[3]

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[3] As the Debtor noted in its reply in support of the Disclosure Statement, it is common procedure for post-confirmation trusts to liquidate and resolve unliquidated mass tort claims. (Dkt. 1604 at 10 n.3.) The UST has not distinguished any of these cases, despite having notice of them for two months between the Debtor's filing of the Disclosure Statement reply and the deadline to object to the Plan. *See, e.g., In re Archdiocese of St. Paul & Minneapolis,* No. 15-30125 (Bankr. D. Minn. Sept. 19, 2018), Dkt. 1262 §4.6(b) (confirmed plan provided that post-confirmation trust would determine distributions for Abuse Claims in accordance with the plan and trust documents, including a trust allocation protocol, rather than liquidate such claims pre-confirmation); *In re Roman Catholic Bishop of Great Falls, Montana,* No. 17-60271 (Bankr. D. Mont. Aug. 15, 2018), Dkt. 422, §7.1.1 (same); *In re Christian Brothers Institute,* No. 11-22820 (Bankr. S.D.N.Y. December 9, 2013), Dkt. 620, §10.1.1 (same); *In re Society of Jesus, Oregon Province,* No. 09-30938 (Bankr. D. Or. May 27, 2011) Dkt. 1317-1, §5.1.1 (same); *In re Catholic Diocese of Wilmington,* No. 09-13560 (Bankr. D. Del. May 23, 2011), Dkt. 1321, §4.3(a) (same); *In re Catholic Bishop of Spokane,* No. 04-08822 (Bankr. E.D. Wash. Mar. 7, 2007), Dkt. 1774, §11.5 (same); *In re Weinstein Co. Holdings LLC,* No. 18-10601 (Bankr. D. Del. Jan. 20, 2021), Dkt. 3182, §3.13.1 (confirmed plan provided that post-confirmation Sexual Misconduct Claims Fund would determination distributions for Sexual Misconduct Claims in accordance with the plan and allocation protocol); *In re Pac. Gas & Electric Co.,* No. 19-30088 (Bankr. N.D. Cal. June 19, 2020), Dkt. 8048, §§4.7, 4.26, 6.7 (confirmed plan provided that post-confirmation trust would determine distributions for tort claims in accordance with the plan and allocation protocol).

54. For these reasons, the Debtor release and the third-party release contained in the Plan are appropriate. They are a necessary component of the Plan, without which the Settling Insurers, Participating Parties, and Non-Debtor CGL Settling Insurer Covered Persons would not consent to the insurance buyback agreements and the funding of the Trust. In sum, the Plan's Debtor release is a reasonable exercise of the Debtor's business judgment and is well above the lowest point of reasonableness. The Court should therefore overrule the UST's objections.

B. The Indiana Attorney General's Limited Objection Should Be Overruled.

55. The IAG's Limited Objection should be denied. The IAG takes the position that the Plan "potentially" cannot be confirmed unless the IAG is included in "discussions to strengthen athlete safety." (IAG Obj. ¶2). The picture the IAG attempts to paint is that he has been left in the dark about what has been happening at USAG and, therefore, before USAG emerges from bankruptcy, the IAG needs some assurance that USAG will comply with Indiana law (although the IAG does not specify exactly what conduct or law is causing him concern). The reality is much different.

56. Since 2018, USAG has provided the IAG with over 257,825 documents regarding all facets of its operations. USAG periodically updates its document productions to the IAG, including providing the IAG on a semi-annual basis with reporting documents from USAG's Safe Sport department about complaints that are received by USAG and the actions USAG takes with respect to those complaints, including reports to law enforcement and to the Center for SafeSport (the "**Center**").[4] The most recent production of such documents occurred on November 30, 2021.

[4] In 2017, Congress codified the Center through the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017. *See* 36 U.S.C. §220541, *et seq*. The Center is charged with investigating and adjudicating all complaints "involving emotional, physical, and sexual abuse" made to any of the national governing bodies ("**NGBs**") for sports in the United States. *Id.* USAG is the NBG for gymnastics and thus, federal law requires that it turn over jurisdiction over all complaints of the type falling under the Center's legislative grant to the Center.

57. In addition to providing the IAG with millions of pages of documents, USAG also meets periodically with the IAG. Since March 2019, representatives of the IAG and USAG have met 11 times to discuss USAG's operations. Most recently, on August 31, 2021, USAG provided the IAG with a 19-page letter that details USAG's commitment to athlete safety and wellness. This letter, and other examples of the type of follow-up communications that occurred after USAG's meetings with the IAG are attached to the Schneider Declaration as Exhibits 1 through 4.

58. In addition, USAG has facilitated communications between IAG and Deborah Daniels, the consultant USAG hired in 2017 and again in 2020. In 2017, USAG asked Deborah Daniels, a former U.S. Attorney for the Southern District of Indiana, to study USAG's organization and operations and to make recommendations to strengthen athlete safety. She issued a report in 2017 making over 70 recommendations in a variety of areas. In the fall of 2020, USAG asked Ms. Daniels to audit USAG's progress on meeting those recommendations and agreed with the IAG that the IAG could meet privately with Ms. Daniels to discuss her audit and conclusions.

59. In her February 23, 2021 audit report (which is publicly available), Ms. Daniels concluded:

> Overall, it appears that USA Gymnastics, particularly in the time period since the current CEO was installed in the Spring of 2019, has made significant forward progress toward not only improving its written policies but also improving its performance in terms of athlete abuse reporting and response to reports of abuse; training of various constituencies to enhance their understanding of what constitutes abuse and what action is expected if misconduct is detected; outreach to, protection and support of athletes; and communication from the top down of a culture that values and protects its athletes first and foremost .... USA Gymnastics has made myriad, highly visible and potentially highly impactful changes that appear to be making a real difference on behalf of the young athletes for whose safety it is responsible.

(*See* Schneider Declaration, Ex. 5 at 2.)

60. Ms. Daniels further concluded that USAG "has made significant positive strides and has, in fact, fully satisfied the proposals for change made in the vast majority of the original 70 recommendations from the 2017 Report. (*Id.*) USAG understands that the IAG (or individuals working for the IAG) met privately with Ms. Daniels about her 2021 audit and conclusions and they have not expressed any dissatisfaction to USAG with regard to this audit.

61. In short, and contrary to the impression created by the IAG's Limited Objection, the record demonstrates that USAG has worked extensively and cooperatively with the IAG and will continue to do so going forward. Given the extensive information provided to the IAG, the Court should reject the IAG's unsupported and vague claim that USAG has not collaborated with the State.

62. The IAG's extremely vague Objection also should be denied because it is not tethered to any provision of Section 1129. Nothing in Section 1129 or any other Section of the Bankruptcy Code requires a debtor to involve the state where it is located in the negotiation of its agreements with creditors. Yet, the gist of the IAG's Objection is that, because it was not involved in the discussions between the Survivors' Committee and USAG about the non-monetary commitments USAG has made, the Plan cannot go forward. The IAG cites no case law in support of this proposition and the Court should therefore reject it. *See Deb v. SIRVA, Inc.*, 832 F.3d 800, 814 n.4 (7th Cir. 2016) ("undeveloped arguments are waived").

63. Finally, the IAG argues that the Debtor has not shown that it has the funds to implement the non-monetary commitments. But the Debtor's Disclosure Statement does in fact contain cash flow projections running from 2021 through 2024, which show the Debtor paying all of its operating expenses (which include amounts budgeted for ongoing Safe Sport and athlete health and wellness initiatives) and the amounts due to its general unsecured creditors.

64. Further, as the IAG well knows, the Debtor has already implemented (and thus paid for) most of the non-monetary commitments. As Ms. Daniels' audit demonstrates, the Debtor has not waited to reach a monetary settlement with survivors to change the culture and operations of USAG.

65. So, running down the list of items that the IAG questions in paragraph 20 of its Objection, USAG has already (a) developed 14 educational webinars and 4 PowerPoint presentations and posted those materials on its Safe Sport website;[5] (b) developed a section of its website focusing on Athlete Health and Wellness, which includes webinars and educational materials on various topics including mental health, nutrition and mindfulness, as well as created an Athlete Health and Wellness Council and hired Kim Kranz as the Chief of Athlete Wellness; (c) provided reporting poster templates to its meet directors, (d) conducted educational programs and training that it provides to volunteers, gymnasts and coaches, (e) set up a reporting portal and a hotline for the reporting of abuse, (f) required its member clubs to post a link to the reporting portal on their websites, (g) partnered with the Positive Coaching Alliance, and (h) paid Deborah Daniels to conduct her audit. Given that USAG has already done these things (and previously told the IAG that it has done these things), it is hard to comprehend why the IAG questions the feasibility of USAG performing these tasks.

66. The remaining item on the IAG's list of questioned expenses is described as the strategy and execution of holistic athlete health and wellness initiatives. Presumably the IAG is

[5] In addition, the USAG Education website currently contains 43 webinars on various topics that include Safe Sport, and it is updated monthly. The website also contains a complete course catalog of 147 unique courses with the goal of "provid[ing] a multi-level, standardized education and certificate that is available throughout the country with emphasis on the proper development of gymnastics participants in a positive and safe environment." *See* https://usagym.org/pages/membership/pages/webinars.html (last visited Dec. 9, 2021); https://usagym.org/pages/education/pages/about.html (last visited Dec. 9, 2021).

questioning whether USAG can pay for individuals to implement its programs. But USAG has already expanded its Safe Sport Department to include a Director of Safe Sport Education and Policy, a Safety and Compliance Counsel (who happens to be a former Deputy Director in the IAG's office), four Safe Sport investigators, a Safe Sport Administrative Manager, and a paralegal with dedicated Safe Sport responsibilities. It also has hired a Chief of Athlete Wellness who works closely with an Athlete Heath and Wellness Counsel established last year made up of athlete representatives and medical care experts. She also has a Team Health Provider/Coordinateor working under her and will hire another resource in the coming months. The salaries for these individuals are included in the cash projections.

67. In total, USAG has budgeted $2,521,500 annually towards its Safe Sport, health, and wellness initiatives and, as set forth in its cash flow projections attached to the Disclosure Statement, USAG projects that it will have sufficient cash flow to cover all of these expenses. In addition, USAG anticipates a variety of opportunities to increase its revenues after exiting bankruptcy. USAG has therefore demonstrated that its agreement to satisfy certain non-monetary commitments is feasible.

C. TIG And LIU's Objections Should Be Overruled.

68. The Court should overrule the objections filed by two of the Debtor's insurers, TIG and LIU. TIG is the only Debtor CGL Insurer that has not accepted the Survivors' Committee's settlement offer. LIU provides D&O coverage to USAG. This Court has previously ruled that LIU is in breach of its contract with USAG and the District Court has entered a $2,171,951.18 judgment against LIU. (*See USA Gymnastics v. Ace Ins. Co.*, 18-CV-1306 ("**Dist. Dkt**."), ECF No. 329.) LIU is currently contesting that judgment in the Seventh Circuit.

1. Both LIU And TIG Lack Standing To Make Their Objections.

69. As an initial matter, the Court should reject certain of TIG's and LIU's confirmation objections because they lack standing to make them. *See, e.g., Matter of Snyder*, 56 B.R. 1007, 1011 (N.D. Ind. 1986) (holding that parties must allege a "particular injury" in order to have standing to object); *In re A.P.I., Inc.*, 331 B.R. 828, 861 (Bankr. D. Minn. 2005) (holding that insurers "who are not claimants against the estate" lack standing to object to confirmation); *In re Fuller-Austin Insulation*, No. 98-2038-JJF, 1998 WL 812388, at *3 (D. Del. Nov. 10, 1998) (insurers "not 'directly and pecuniarily affected'" by plan lacked standing to object to confirmation).

70. Section 1128(b) provides that only a "party in interest" may object to the confirmation of a plan. 11 U.S.C. §1128(b). The Seventh Circuit has defined a "party in interest" as someone "with a claim to the *res* [the debtor's assets]" holding that such a person "has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims." *In re C.P. Hall Co. v. Columbia Casualty Co.*, 750 F.3d 659, 661 (7th Cir. 2014). Neither TIG nor LIU are creditors of the Debtor and thus, they have no claim to assets of this estate.

71. Further, the Seventh Circuit has held that even those entities that might qualify as "parties in interest" still must show that the interest they seek to vindicate is one that the statute at issue is intended to protect. *See In re Rimstat, Ltd.*, 193 B.R. 499, 502-03 (Bankr. N.D. Ind. 1996) (citing *Matter of James Wilson Assoc's*, 965 F.2d 160, 168 (7th Cir. 1992)) (holding pre-petition receiver of debtor's property was not a "party in interest" who could move to dismiss the bankruptcy case because a receiver is not within the parties protected by 11 U.S.C. §1112).

72. *C.P. Hall* is instructive. In that case, an excess insurance carrier wanted to press an objection to a settlement between the debtor and another party on the basis that having settled its insurance claim against a primary insurer, the debtor had increased the likelihood that the excess

insurer would have to make payments under its policy. 750 F3d. at 660. The Seventh Circuit held that the excess insurer was not a "party in interest" because it had no claim to the bankruptcy estate's assets and any risk of harm was too remote to create "party in interest" status. *Id*. at 661-62. The Seventh Circuit also noted that the settlement did not alter the debtor's contract with the excess insurer and that if the excess insurer had wanted to prevent its policy from dropping down, it should have done so by including limits in its contract, not by objecting to the debtor's settlement with the primary carrier. *Id*. at 662.

73. With respect to Plan's settlement of Abuse Claims, TIG and LIU are in the same situation as the excess insurer in *C.P. Hall*. They are not entitled to object to the Debtor's settlements with survivors even if they perceive that those settlements *might* require them to pay more under their policies. Under *C.P. Hall* that concern is not sufficient to make TIG or LIU a "party in interest." 750 F.3d at 660-62. Without that status, TIG and LIU have no standing to object to the settlements with survivors under the Plan.

74. In addition, certain of TIG's and LIU's objections are aimed at Plan provisions that have nothing to do with any interest TIG or LIU could conceivably assert in this case. For example, TIG argues that by establishing a claims resolution procedure to be administered by the Trust, the Plan violates the protections provided to creditors under Section 502 of the Code. (TIG Obj. at 19-21.) However, TIG is not a creditor and has no standing to argue about a claims resolution process that every Abuse Claimant who voted agreed to accept. Similarly, both TIG and LIU complain that the Plan was not proposed in good faith (TIG Obj. at 16-19; LIU Obj. ¶¶52-58), but the Plan is being proposed for the benefit of creditors. Thus, TIG and LIU are *not* the intended beneficiaries of the Code's good faith requirement and have no standing to object on this basis. *See, e.g., Snyder*, 56 B.R. at 1011; *Rimstat*, 193 B.R. at 502-03.

2. TIG And LIU's Insurance Neutrality Objections Should Be Overruled.

75. To justify their standing to make their objections, both TIG and LIU repeat the mantra that the Plan is not sufficiently insurance neutral and that its provisions somehow alter their insurance policies. (TIG Obj. at 1-6; LIU Obj ¶¶46-51.) This is not true, as explained below. In fact, what TIG and LIU want are amendments to the Plan that improve their rights and enhance their coverage defenses. They are not entitled to any of this because nothing in Section 1129 or any other provision of the Bankruptcy Code entitles an insurance carrier to an expression of neutrality in a Plan. *Purdue Pharma*, 2021 WL 4240974, at *6.

76. LIU, for its part, cannot complain if the Plan alters its obligations under its policy. LIU has breached its duty to defend, something that "constitutes a repudiation of the contract" under Indiana law. *Empl'rs Ins. of Wausau v. Recticel Foam Corp.*, 716 N.E.2d 1015, 1028 n.16 (Ind. Ct. App. 1999). LIU's breach precludes it from relying upon policy terms in its defense anyway. *Klepper v. ACE Am. Ins. Co.*, 999 N.E.2d 86, 93 (Ind. App. 2013). Thus, having breached the contract, LIU cannot complain about how USAG has chosen to protect itself. Its objections therefore lack merit, although they mostly repeat TIG's objections, refuted below. (LIU Obj. ¶¶46-51.)

77. TIG has not (yet) been found in breach, but is objections still fail.[6] It never clearly articulates *what* policy terms it claims are being altered. Its failure to do so is undoubtedly because the Plan goes to extraordinary lengths to make clear that it "makes no judgments about the validity of, or insurance coverage for, any particular claims." (Plan §2.11.) The Plan repeatedly affirms

[6] USAG maintains that TIG is and has been in breach of its duty to defend. For example, it failed to ensure that USAG was fully defended in the underlying tort lawsuits. TIG has also failed to provide any justification for why it was not required to pay USAG's mediation-related defense costs under the express terms of its policies.

that the Plan is not intended to alter the terms of any insurance policies and that USAG does not assume or admit liability for any Claims. (Plan §§2.11, 3.3, 14.1, 14.2, 14.3, 14.4, 14.5, 21.1(d).) The Plan also contains numerous savings clauses, the goal of which is to enforce the Plan "to the full extent allowed *without* impairment of any CGL Insurers' coverage obligations," *i.e.*, to the full extent permitted without altering or violating the terms of those policies. (Plan §§3.1.1, 10.4(b)-(c), 10.5(a), 10.5(d) (emphasis added).) For reasons that are unclear, TIG's proposed changes actually *delete* some of this protective language. (TIG Obj., Ex. A at 4.)

a. TIG And LIU's Policies Must Be "Subject To The Plan" If USAG Is To Invoke Certain Bankruptcy Preemption Rules.

78. Ignoring the text of the Plan that preserves their rights and defenses under their insurance policies, both TIG and LIU claim that the Plan is not insurance neutral because it states in Section 14.4 that their rights with respect to any Claim or Cause of Action "shall be determined by and in accordance with the terms of their respective insurance policies and applicable non-bankruptcy law, subject in all respects to the provisions of this Plan." (TIG Obj. at 1, 5; LIU Obj. ¶50.) TIG contends that making its rights subject to the Plan somehow "fundamentally alter[s]" its rights, but it never specifies how or why. (TIG Obj. 1.) The aim of this language is simply to invoke bankruptcy preemption to the fullest extent allowed by federal law, but with neutrality as to the insurance policy terms outside the scope of that preemption. As TIG repeatedly notes, the Court cannot determine the preclusive effect of its own judgment (TIG Obj. at 5-6, 13-14), and so if these provisions harm TIG in the future, it can object and have its rights protected. But in light of USAG's assets (consisting almost entirely of insurance policies) bankruptcy preemption is crucial to reorganization and must be reflected in the Plan.

79. For example, a key feature of the plan is the assignment of USAG's policy rights to the Trust. TIG claims this assignment violates its policies' anti-assignment terms. (TIG Obj. at

14-16.) As USAG explains below, however, the Bankruptcy Code preempts those terms.[7] Thus, for the Plan to work, it *must* state that TIG's policies are "subject to the Plan" in this (and other) limited ways. Because TIG has not presented *specific* reasons why this language is problematic, the Court should overrule this objection. *See SIRVA*, 832 F.3d at 814 n.4 ("undeveloped arguments are waived").

b. TIG's Inability To Object To Channeled Claims Does Not Infringe On TIG's Policy Provisions.

80. TIG also argues the Plan is not insurance neutral because it cannot object to Channeled Claims. (TIG Obj. at 5 (citing Plan §9.10).) But "claims by or against any Non-Settling Insurer *shall not be Channeled Claims*." (Plan §12.3 (emphasis added); *see also id.* §1.1.25.) TIG never explains why or how it is prejudiced by the inability to object to claims by *other* parties seeking money from *other* insurers.

81. For Claims against TIG, the Plan is carefully drafted to avoid infringing upon or eliminating TIG's right to dispute those Claims. The Plan does not provide for a consent judgment against TIG or otherwise seek to impose liability on TIG. Instead, it rearranges (by consent) the obligations of the settling parties to allow TIG to have its day in court.

82. Under the Plan's Partial Settlement Option, USAG and the Settling Insurers assign any rights they might have against TIG to the Trust. (Plan §10.2, §10.4, §10.5.) Those include USAG's right to indemnity under the TIG policies and the Settling Insurers' rights to contribution from TIG. (*Id.*) As explained below, the law permits such assignments, and TIG's objections to

[7] Even if TIG is correct that the Bankruptcy Code does not preempt similar clauses in the non-debtor insurance policies (TIG Obj. at 15 & n.7), and the Debtor does not concede as much, TIG's argument still lacks merit. As explained below, even under *ordinary insurance law*, the clauses are not enforceable, and the policy rights are assignable, at this point in time.

them fail. Those assignments allow the Settlement Trustee to equitably address "overlapping" claimants (*i.e.*, those who implicate both the Settling Insurers' policies and TIG's policies).

83. Such Claimants can either recover exclusively under the Trust or can elect to become a "Litigation Claimant." (Plan §10.8.) In the former situation, the Trust adjudicates and pays the Claim using the Settling Insurers' funds. The Trust then has the right to exercise the Settling Insurers' subrogation rights to recover an equitable share from TIG. (Plan §§7.2.2, 11.2.) To do so, the Trust would be required to either: (1) file a subrogation action in an appropriate court, or (2) negotiate a settlement with TIG. In either situation, TIG would have the right to participate and defend itself.

84. If the Claimant decides to become a "Litigation Claimant," then the Trust does not immediately pay the Claim. (*Id.* §§10.8.2, 10.8.5.) Instead, it withholds payment while the Claimant pursues litigation against USAG (in name only, with TIG defending), seeking to establish liability and damages, as the TIG policies require. (*Id.* §10.8.1.) If TIG defeats the Claim on the merits, then TIG owes nothing and the Trust owes nothing. (*Id.* §10.8.5(a).) If the Claimant establishes liability against USAG, then the Trust either: (a) pays the claim in full and exercises the *Settling Insurers'* assigned subrogation rights, or (b) pays that portion of the claim attributable to the Settling Insurers' funds and then enforces *USAG*'s assigned right of indemnity to satisfy the judgment against it. (*Id.* §§7.2.2, 10.8.5(b), (d), 11.2.) And if the Trust settles its coverage issues with TIG before a judgment, then the Claim becomes a "Channeled Claim" and is paid accordingly. (*Id.* §10.8.5(c).) Once again, under any of those situations, TIG has the right to fully participate and defend itself.

85. In light of these terms, it is difficult to see why TIG is upset. Under any scenario, it will only become liable by its consent (by settling with the Trust) or by judgment (if the Trust or

the Litigation Claimants prevail in a tort or a subrogation lawsuit). That is precisely what TIG claims must happen before it can be liable (TIG Obj. at 11), making the Plan insurance neutral.

86. Nonetheless, TIG advances two reasons why these provisions are not neutral. ***First***, TIG implies that these provisions violate a voluntary-payments clause. (TIG Obj. at 5-6, 11-12.) While TIG is correct that policyholders generally cannot settle a claim without a defending insurer's consent, that is not happening here. Even if it were, TIG misunderstands the available remedy.

87. Insurance policies, including TIG's, generally provide that "[n]o insured will, *except at that insured's own cost*, may voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent." (*USA Gymnastics v. Liberty Ins. Underwriters, et al.*, No. 19-50012 ("**Adv. Dkt**.") Dkt. 2-5, at 528, §IV.2.d (emphasis added).) "[U]nder the clear language of the provision, the insurer must consent to a payment, obligation or expense before the insurer is liable for that amount." *West Bend Mut. Ins. Co. v. Arbor Homes, LLC*, 703 F.3d 1092, 1096-97 (7th Cir. 2013) (Indiana law). If the policyholder incurs an obligation anyway, then "that obligation cannot be recovered from the insurer." *Travelers Ins. Cos. v. Maplehurst Farms, Inc.*, 953 N.E.2d 1153, 1161 (Ind. Ct. App. 2011).

88. TIG suggests that the Plan's insurance-neutrality terms eliminate this defense. (TIG Obj. at 5-6, 11-12 (objecting to §§14.2 and 14.3).) That is incorrect. Under the Plan, USAG will not make any "payment" or incur any "obligation" that would conceivably trigger this clause in the policy. The Plan explicitly states that USAG is not admitting liability for the claims. (Plan §§2.11, 3.3.) TIG does not contend otherwise, and it never identifies a specific "obligation" or "payment" to which this clause might operate as a defense. And even if there was some technical

violation, the remedy is to excuse the insurer from the offending payment or obligation, not to void the policy entirely. *West Bend*, 703 F.3d at 1096-97.

89. If what TIG means to argue that the settlement by and with USAG's *other* insurers violates this clause (TIG Obj. at 5-6), then it is deeply mistaken. TIG's right to veto a settlement stops at the boundary of its own policy. It cannot use this clause to block the Settling Insurers' rights to resolve claims against them. The voluntary-payments clause only applies to payments made or obligations assumed *by the policyholder*, not by the policyholder's other insurers. (Adv. Dkt. 2-5, at 528, §IV.2.d.) As a result, it cannot bar the Trust's right to make payments under the Allocation Protocol (using the Settling Insurers' money) and pursue TIG for reimbursement (using the Settling Insurers' subrogation rights). Indeed, if non-settling insurers could invoke voluntary-payments clauses in this expansive manner, the right to equitable subrogation would never exist.

90. TIG also complains that the Plan deprives it of the ability to "defend" against Claims falling under its policies, which it says it is willing to do. (TIG Obj. at 6.) For one, if the Claimant elects to be treated as a Litigation Claimant, then TIG will get that opportunity. For Litigation Claimants, the amount of the Trust's payment is contingent on *TIG*'s liability as established in a settlement or a court of law—not the other way around. (Plan §10.8.5.) But even if a Claimant wants to forgo litigation in favor of the Trust payments, TIG still cannot complain. TIG may want to defend such a Claim, not settle it. But that is a risk inherent in all mass-tort, multi-insurer cases. Some insurers may want to settle; others may want to litigate. Neither can tell the others what to do, and each is simply trading one risk for another. The settling insurer risks that the litigious insurer may prove that its liability is $0; the litigious insurer, by electing to litigate, loses the right to complain about certain aspects of the settlement. *Ind. Ins. Co. v. Sentry Ins. Co.*,

437 N.E.2d 1381, 1390 (Ind. Ct. App. 1982). That is not unique to bankruptcy or the Plan, and it does not justify denying confirmation.

91. ***Second***, in the context of the Settlement Trustee's subrogation claims, TIG fears it will be locked into the Settlement Trustee's valuations. (TIG Obj. at 4, 6, 12, 17-20.) TIG is refusing to settle now because it thinks USAG is not liable to the Abuse Claimants and that the claims are not worth as much as the Abuse Claimants say they are. Thus, it worries that the Settlement Trustee will force it to "pay invalid or inflated claims," that the Plan bars it from asserting those defenses in a subrogation action, and that "TIG would simply be asked to pay the Tort Claims in whatever amounts the Trustee allowed them." (*Id.* at 4, 20.) Thus, it argues, TIG must have the right to assert liability defenses in the Settlement Trustee's liquidation and allocation process in order to protect against fraud and inflation. (*Id.* at 16-20.)

92. Those concerns misrepresent the Plan terms and are overblown in any event. The Settlement Trustee's role is to liquidate and pay Channeled Claims, not claims involving TIG. (Plan §11.2) The Settlement Trustee has only a limited fund to make those payments, and thus has the incentive (and the fiduciary obligation) to spend that money judiciously. Nor does the Plan compel TIG to pay whatever the Settlement Trustee demands—the Plan simply gives the Settlement Trustee a Settling Insurer's right to *seek* an equitable share of those amounts from TIG in a court of law. (*Id.* §§10.5, 11.2)

93. TIG claims that USAG "takes the position that TIG would be bound to payments made by the trust." (TIG Obj. at 20.) That is not correct, and it mischaracterizes USAG's discovery responses. In response to one of TIG's Requests for Admission, USAG admitted only that (1) TIG was in breach of the policy, and (2) "the Abuse Claims Reviewer, acting in the place of the Debtor,

has the right to compromise Abuse Claims and *seek recovery of* the compromised amounts from TIG." (Dkt. 1736-5, at 10.) USAG denied the remainder of the Request.

94. Even without TIG's breach, the result is the same. The Settlement Trustee, by virtue of the Settling Insurers' assignment, only has the right to *seek* equitable subrogation from TIG. The Plan does not guarantee that the Settlement Trustee will succeed. TIG's rights and defenses in that proceeding are no greater or less than those it would enjoy in the absence of the Plan. TIG's breach of its policy obligations may well limit the defenses available to it. But that is a weakness of its own creation, not a product of the Plan. Accordingly, the Plan is neutral as to TIG's policy rights, and it should be confirmed.

3. The Plan's Settling Insurer Injunction Is Authorized Under Indiana And Colorado Law.

95. LIU and TIG argue that the Plan cannot be confirmed because it supposedly extinguishes their "contribution" rights against the Settling Insurers. (LIU Obj. ¶¶34-45; TIG Obj. at 6-10.) The Plan does not "extinguish" any contribution rights—because those rights do not exist. Both Indiana law (which controls USAG's policies) and Colorado law (which controls USOPC's policies) follow principles of equitable subrogation, not contribution, when allocating rights among insurers. *Ind. Ins. Co.*, 437 N.E.2d at 1390; *Preferred Prof'l Ins. Co. v. Doctors Co.*, 419 P.3d 1020, 1024 (Colo. Ct. App. 2018).

96. An insurer's right to subrogation accrues if—and only if—the insurer "pays a debt for another, primarily liable, and which, in good conscience, should have been paid by the latter." *Ind. Ins. Co.*, 437 N.E.2d at 1390. That payment causes the insurer to be "the subrogee of the insured" and thus eligible "to recover from the disclaiming co-insurer." *Id.* Critically, "regardless of how an insurer obtains ownership of subrogation rights…they are derivative of the rights of the insured." *Preferred*, 419 P.3d at 1024; *accord*, *Eli Lilly & Co. v. Aetna Cas. & Sur. Co.*,

No. 49D12-0102-CP-0000243, at *4-5 (Marion Cty. Sup. Ct. June 15, 2002) (Moberly, J.); *So. Ind. Gas & Elec. Co. v. Admiral Ins. Co.*, No. 49D05-0411-PL-2265 (Marion Cty. Sup. Ct. Oct. 31, 2011) (Moberly, J.). That means that the Debtor, like any other policyholder, can dispose of its rights to collect under a policy. So long as that settlement is made in good faith (as the arm's length, contested settlement was here), the non-settlor simply has no contribution rights. The Plan cannot extinguish a right that does not exist.

97. Thus, TIG and LIU cannot object on this basis. They have contributed *nothing* to the Plan. At this point, they both propose to contribute nothing. Any right to recover from the Settling Insurers remains *vested exclusively in USAG*. The Debtor has every right to dispose of its own property in the Plan—which it has done here by agreeing, under the Full or Partial Settlement Alternative, to enter into Buy-Back Agreements with the Settling Insurers. TIG and LIU have no standing to complain about what USAG does with USAG's own property.

98. TIG raises a few other contribution objections, none of which has merit. It complains that the existence (or nonexistence) of its contribution rights cannot be determined at a confirmation hearing. But *TIG itself* has put that question at issue by objecting to the Plan on that basis and asking the Court to recognize such rights. (TIG Obj. at 7.) If the Court has authority to ascertain whether TIG has such rights, it can certainly decide that TIG lacks them.

99. TIG also contends that *Indiana Insurance* does not apply because the insurers ultimately were liable for a *pro rata* share of the loss. 437 N.E.2d at 1390. But that was because, as is the case here, the settling insurer (1) paid *both* insurers' shares, and (2) sought a *pro rata* share from the non-settling insurer. *Id.* The court allowed that claim squarely because of the equitable-subrogation rules just discussed. *Id.* Under those rules, the settling insurer acquired, by payment, the right to recover against the non-settling insurer. *Id.* Nothing in *Indiana Insurance*, or

any other case TIG cites, suggests that Indiana courts allow a non-settling insurer to insist on contribution for losses it has refused to pay. Indeed, *Indiana Insurance* recognizes that payment is a prerequisite to recovery from a co-insurer. TIG has made no such payment.

100. TIG also asserts that Colorado law recognizes a different rule. That is incorrect. *See Preferred*, 419 P.3d at 1024 (under Colorado law, subrogation rights are derivative of the rights of the policyholder). The Colorado Supreme Court's decision in *National Casualty* explicitly recognized that contribution or subrogation rights only extend to "an insurer that voluntarily pays more than its share of a loss." *Nat'l Cas. Co. v. Great Sw. Fire Ins. Co.*, 833 P.2d 741, 747-48 (Colo. 1992). Like Indiana, the Court adopted that rule because it did not want to "reward an insurer for refusing to honor its contractual obligations." *Id.* at 748. The Court's ultimate conclusion was the same as those under Indiana law: that the settling insurer, "having paid the settlement on behalf of the city…is subrogated to the rights of the city." *Id.*

101. *None* of the Colorado cases TIG (or LIU) cites hold that a non-settling insurer can assert a contribution claim against a settling insurer. All of them involve the reverse—insurers who settled a claim and sought reimbursement from an insurer who refused to pay. *Id.*; *Cont'l W. Ins. Co. v. Colony Ins. Co.*, 69 F. Supp. 3d 1075, 1084-86 (D. Colo. 2014) (discussing *D.R. Horton* and *Signature Dev. Co.*); *Travelers Indem. Co. of Am. v. AAA Waterproofing, Inc.*, 2014 WL 201726, *2 (D. Colo., Jan. 17, 2014). None of these cases actually recognize TIG's (or LIU's) purported right to bring a contribution or subrogation claim as a *non-settling* insurer.[8] Accordingly, this objection does not destroy the Plan's insurance neutrality, and it cannot bar confirmation.

[8] TIG also argues that subrogation does not apply because there is no actual "settlement" of the claims right now. (TIG Obj. at 8.) That is not necessary; under basic rules of subrogation law, all that matters is that the settling insurer *paid* the loss. 4 NEW APPLEMAN LAW OF LIABILITY INSURANCE §42.02[2][a].

102. Without support in the governing law, TIG tries to analogize from different factual situations. (TIG Obj. at 8-10.) Both of the cases it cites—*SportStuff,* 430 B.R. at 177-81 and *Archdiocese of St. Paul & Minneapolis*, 579 B.R. at 198—refused to extinguish a non-debtor *policyholder*'s rights against the insurance carrier. This is a critical difference. The policyholder's right to payment from its insurer is contractual and exists regardless of whether the policyholder contributes to a settlement. But an *insurer*'s right to equitable contribution or subrogation only arises as a matter of equity when it pays the share of another, non-settling insurer. *Nat'l Cas. Co.*, 833 P.2d at 747-48; *Ind. Ins. Co.*, 437 N.E.2d at 1390. Neither of these cases support TIG's claim that it is being deprived of contribution claims against the Settling Insurers. It has no such claims to begin with.

103. This case, in fact, illustrates the wisdom of the policy interests underlying Indiana and Colorado insurance contribution law. LIU and TIG have refused to settle. Every other insurer—including those with vastly more at stake—understands the value and reasonableness of the proposed settlement. They have set aside their disagreements with the Debtor and the Abuse Claimants to reach a settlement. Not TIG. Not LIU. They want to wait until a court *forces* them to pay what they owe. And then they want to sue the cooperating insurers to offset the cost of their own tight-fisted intransigence.

104. Colorado and Indiana reject that framework, and for good reason. Allowing such claims would create a perverse incentive: it would punish cooperation, discourage settlement, and reward obstruction. That would defeat the goal of informal, consensual resolution, and it would drive up the cost of mediation and settlement. If a party is going to spend three years and millions of dollars in a global mediation—only to have nothing to show for it because a Court gives special treatment to the recalcitrant parties—then why would parties ever try to settle those cases?

Donovan v. Robbins, 752 F.2d 1170, 1180-81 (7th Cir. 1985). Such money, after all, could be spent on securing some limited resolution through litigation. *Id.*[9]

105. TIG could make this a consensual, full settlement plan. USAG and the Survivors' Committee gave it every opportunity to do so. There is only one barrier: TIG does not want to write a check the Survivors' Committee will accept. LIU for its part still insists it owes *nothing* under its policy, despite defeat after defeat in the coverage litigation. But these are the insurers' problems. Nothing in the law requires the Court to punish USAG (by denying confirmation) or the Settling Insurers (by denying them the benefit of their bargain) just because TIG and LIU have taken intransigent positions.

106. LIU reacts to this case law by arguing that bad-faith settlements do not bar contribution claims. (LIU Obj. ¶¶36-45.) True enough. But as Judge McKinney pointed out in the *Harden* case LIU cites, the *objecting party* bears the burden of showing the kind of egregious bad faith necessary "[t]o justify the Court denying the settling parties the benefit of their bargain." *Harden v. Raffensperger, Hughes & Co.*, 933 F. Supp. 763, 772 (S.D. Ind. 1996) (overruling objections and approving settlement). LIU's contrary argument—that *USAG* must prove that the settlement is fair to its recalcitrant insurers—is erroneous. The burden of proof rests squarely on the party attacking a settlement in which it refused to participate. *Id.*

107. LIU's other case (*Donovan*) illustrates why. LIU invokes, as the court's holding, a discussion of the economic incentives created by various settlement frameworks. *Donovan*, 752 F.2d at 1180-81. In the end, however, the Seventh Circuit *rejected* LIU's proposed rule because

[9] This response applies with equal force to TIG's objection that the Allocation Protocol must be a "litigation-lite" option where insurers and USAG vigorously contest the validity of the claims. (TIG Obj. at 19-21.) But that misses the whole point of a settlement—to avoid the cost and burden of litigation for the parties who wish to settle. If TIG wants litigation, then it will get litigation. But it has no right to deprive others of their right to buy peace just because it wants to wage war.

"it means bogging down the settlement process in a miniature trial" to determine what is "fair" to the recalcitrant party. *Id.* at 1181. "The fairness hearing makes the settlement process more costly; and as the costs of settlement rise closer to those of trial, the likelihood of settlement falls—maybe far enough to offset the incentive to settle that a defendant has who knows that settling will enable him to avoid all liability to the other tortfeasors." *Id.* Thus, the Seventh Circuit concluded, the best rule "encourages settlement *by immunizing the settling defendant from liability for contribution* but does not require a hearing on the fairness of the settlement to other tortfeasors." *Id.* (emphasis added).

108. That is precisely what the Plan does. The Plan must be fair to USAG's *creditors*—who overwhelmingly support it. But USAG need not prove that it is the optimal result for insurers who refuse to contribute to the Plan and who are not USAG's creditors. If LIU wants to tear the Plan down, then it bears the burden of showing that the Plan was conceived in and reflects "bad faith." LIU has not made that showing here. No such facts exist.

109. LIU's other points lack merit. ***First***, LIU complains that USAG has not provided evidence "concerning the scope of USAG's liabilities and how they are allocated among the coverage periods of the Insurer's policies." (LIU Obj. ¶39.) Setting aside that USAG has no burden to do anything like that, *Harden*, 933 F. Supp. at 772, LIU only has $5 million in aggregate limits. And LIU contests even that obligation, claiming it has a $250,000 limit. The proposed settlement is for *hundreds of millions of dollars*. In light of that, there is no prospect that LIU will be paying a disproportionate share of USAG's liability, even if it paid the full $5 million. Nor does LIU's allocation argument make any sense. It is a claims-made insurer. (LIU Obj. ¶7.) Unlike the CGL insurers, LIU must defend *all* of the Nassar-related claims, and so any allocation among the CGL insurers' occurrence-based policies has no impact on LIU. The claims covered by LIU's policy

(which cover all of the Nassar-related claims as this Court has ruled) far exceed its $5 million indemnity exposure, under any possible allocation.

110. ***Second***, LIU complains that it was not "invited" to the latest round of mediations, and so the settlement must have been a product of bad faith. (LIU Obj. ¶42.) Yet the reason for the non-invitation (a decision made by the mediator, not USAG, which is well within his discretion) is obvious. Unlike most of USAG's insurers, who have been more or less cooperative and offered substantial contributions, LIU has pursued a scorched-earth litigation strategy. It has obstructed compromise, delayed resolution, and run up everyone else's costs without a second thought.

111. Examples are not hard to find. LIU violated the automatic stay (and nearly caused USAG's e-Discovery vendor to cease work) because it did not like Judge Young's duty-to-defend order and wanted a 1% reduction in a cost-sharing agreement with other insurers. For a year and a half (and counting), LIU litigated the reasonableness of USAG's $2.1 million in costs—without ever conceding or paying any sum, even though it has no specific objection to most of the defense costs at issue. Despite this Court's ruling that LIU has $5 million in limits, LIU continues to contest its obligation to satisfy that amount. (Adv. Dkt. 260, at 1, 31-32; Dist. Dkt. 146, at 5.) It has cost USAG—and by extension, USAG's creditors—an enormous sum in pointless legal battles, with the obvious goal of wearing down USAG or delaying payment as long as possible.

112. In short, LIU has intentionally burned bridges with every other party in this case. No one has ever stopped it from offering a reasonable settlement; it has *chosen* not to do so. Finally excluding the schoolyard bully is not "bad faith." It is essential if you want to finish the game at all.

113. ***Third***, LIU asserts that USAG is trying to prevent LIU from "discharging its liability under the LIU Policy by paying the policy limits." (LIU Obj. ¶43.) That objection is ironic.

LIU has denied, delayed, and resisted payment at every turn. It is in breach of its policy and has not tried to cure that breach.

114. Of course, LIU does not *want* to cure its breach. It wants to hold on to its $5 million in limits (and the $2.1 million it owes in defense costs) because it wants the Seventh Circuit to find that it owes nothing. But that is not a basis for the Court to deny confirmation of the Plan. If the Seventh Circuit reverses, and LIU has no future liability, it is not harmed by the Plan's terms. If the Seventh Circuit affirms, then its mandate establishes, conclusively, that LIU breached its policy—and thus LIU *cannot* raise its policy terms as a defense to the Plan. Under Indiana law, "[a] party first guilty of a material breach of contract may not…seek to enforce the contract against the other party." *Klepper*, 999 N.E.2d at 96. LIU's right to terminate its duty to defend by paying its limits in settlement of a claim is a contractual right flowing from the policy. (Adv. Dkt. 2-14, at 134, §9.3.) Like all contractual rights, a party can be estopped from enforcing it due to its own breach. *Klepper*, 999 N.E.2d at 93. That is the case here. LIU cannot object to USAG's reorganization based on the terms of a contract that it refused to honor.

115. ***Fourth***, LIU argues that the "one-sided elimination of LIU's contribution claims" shows bad faith. (LIU Obj. ¶44.) Yet again, that misstates the law. The Plan does not eliminate any Non-Settling Insurer's contribution rights, because such rights do not exist. LIU has not paid anything, and thus it does not have a subrogation claim. What LIU describes as a "one-sided elimination" of its rights is the normal, intended function of Indiana' subrogation rules. (*Id.*) LIU may not particularly like Indiana law on this point, but following the law is not a basis for denying confirmation of Plan.

4. TIG's And LIU's Good Faith Objections Should Be Overruled.

116. In addition to making the argument that the Settling Insurer Injunction cannot be approved under a "good faith" theory, LIU also argues that the Plan is not proposed in good faith

as required by Section 1129(a)(3) of the Bankruptcy Code. (LIU Obj. ¶¶52-58.) TIG also makes the same argument. (TIG Obj. 16-19.) As explained above, this good faith requirement is intended to protect creditors; because neither TIG nor LIU are creditors, they lack standing to raise this objection. *See Rimstat,* 193 B.R. at 502-03. But if the Court considers their arguments, it should reject them.

117. The Seventh Circuit has held that "good faith" under Section 1129(a)(3) is "generally interpreted to mean that there exists 'a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'" *Matter of Madison Hotel Associates*, 749 F.2d 410, 425 (7th Cir. 1984). When evaluating good faith, courts also look to "the conduct of the parties over the course of the bankruptcy proceedings" and whether the plan received "support from the [debtor's] creditors." *Matter of Andreuccetti*, 975 F.2d 413, 420 (7th Cir. 1992); *accord Madison Hotel Associates*, 749 F.2d at 425. If a good faith objection appears "directed to the frustrations of a creditor which has pursued a variety of disputes for a long period of time," it likely lacks merit. *Id.*

118. Here, the Debtor has satisfied Section 1129(a)(3)'s good faith requirement. As the Court is aware from the "whole record in this case," *id.*, the Plan is the result of extensive, hard-fought, arms-length, and mediated negotiations among the Debtor, the Survivors' Committee, individual Abuse Claimants, the FCR, the USOPC, and the Settling Insurers for the Debtor and the USOPC, among other key stakeholders of the Debtor. Those mediations began in July 2019. The settlement conference the Court ordered in September, 2020 had the effect of continuing those mediation sessions. Indeed, they are ongoing as of the filing of this Confirmation Brief. After repeated mediation sessions over the course of 2021 and the exchange of various competing plan proposals, the Plan's supporting parties agreed to the terms of the current Plan. Each supporting

party made numerous, material concessions in its positions to reach the settlements reflected in the Plan and each acted with the reasonable, good faith goal of avoiding uncertain litigation that might result in lower recoveries for the Debtor's creditors (including Abuse Claimants) or imperil the Debtor's ability to operate as a going-concern.

119. Accordingly, the Plan is proposed in good faith and "achieve[s] a result consistent with the objectives and purposes of the Bankruptcy Code," namely, a consensual restructuring agreed to by the Debtor, its creditors, and its other key stakeholders. *Madison Hotel Associates*, 749 F.2d at 425. The Plan fairly and equitably addresses all Abuse Claims and other prepetition claims, maximizes value for all parties in interest, allows the Reorganized Debtor to continue to discharge its duties as a National Governing Body, and promotes the Reorganized Debtor's efforts to enhance and protect athlete health, wellbeing, and safety. It clearly is the best way forward for USAG's organization, its estate, and its creditors, as evidenced by the Plan voting results, which show "overwhelming support" for the Plan by creditors—indeed, *unanimous* support by Abuse Claimants. *Andreucetti*, 975 F.2d at 420 (holding Plan with "overwhelming support" by creditors was proposed in good faith); Voting Report at Class 6.

120. Notwithstanding this record, TIG argues that the Plan is not proposed in good faith. TIG alleges that the Allocation Protocol does not sufficiently account for the Debtor's defenses to Abuse Claims, meaning that the Trust will purportedly allow legally "invalid" claims. (TIG Obj. at 18.). TIG then expects the Settlement Trustee to act in bad faith by valuing claims at inflated amounts and demanding that TIG pay those amounts without any opportunity to defend itself. (*Id.*)

121. TIG is seeing ghosts. This Court previously rejected TIG's conjecture about the Settlement Trustee's potential future conduct, which are not supported by any facts in the record and wrongfully impugn the integrity of a retired judge with demonstrated experience adjudicating

mass tort claims in good faith. (*See* 12/1/21 Tr. at 25:1-26:3 (Court: stating that TIG had not offered "any evidence that there was some trickery and deceit and anticipated collusion with [the Abuse Claims Reviewer], this retired judge" and that the mediation "has all of the badges of good faith negotiations among all these parties"). Moreover, as explained above, if the Settlement Trustee inflates the payments made to Abuse Claims that trigger a subrogation claim against TIG, TIG will be able to defend against the subrogation claim on that basis. Because nothing in the Plan impairs that defense right, TIG is not harmed.

122. The cases that TIG cites in support of its good faith objection are inapplicable here. In *In re American Capital Equipment, LLC*, the Third Circuit determined that a mass tort plan was not proposed in good faith because the debtor was "financially incentivized to sabotage its own defense" of asbestos claims, which prejudiced the insurers. 688 F.3d 145, 158 (3d Cir. 2012). Specifically, the plan required tort claimants to pay 20% of any recoveries they obtained from the insurers back to the debtor, which funds the debtor would use to pay other creditors. *Id.* at 151-52 & 152 n.3. The Third Circuit held that these kickbacks showed that the plan was not proposed in good faith as a matter of law because the debtor, to fund distributions to other creditors, would be "incentivized" not to "cooperate in its defense" but to subvert that defense. *Id.* at 159.

123. Here, though, the Debtor will not receive any kickbacks or other compensation based upon any recoveries the Trust ultimately recovers from TIG as a Non-Settling Insurer. There is no financial incentive or occasion for the Debtor to "sabotage" TIG's defenses to payment of Abuse Claims, which are governed by the terms of the Plan, the insurance policies, and applicable non-bankruptcy law. *American Capital Equipment* therefore has no bearing here.

124. For these reasons, the Plan is proposed in good faith and TIG's Section 1129(a)(3) objection should be overruled. *See Ad Hoc Comm. Of Non-Consenting Creditors v. Peabody*

Energy Corp. (In re Peabody Energy Corp.), 933 F.3d 918, 928 (8th Cir. 2019) (finding good faith where debtors mediated with creditors to resolve a dispute, where the negotiating parties had "substantial input," and where other parties had received notice and could have participated in the mediation).

125. Likewise LIU's good faith objection is equally without merit. LIU's Section 1129(a)(3) good faith objection mirrors its incorrect claim that the Court may not confirm the Settling Insurer Injunction because the injunction is supposedly the product of a bad faith settlement. For the reasons argued above, LIU's arguments all fail and its good faith objection should be overruled.

5. The Plan's Assignment Provisions Are Authorized By Applicable Non-Bankruptcy Law And The Bankruptcy Code.

126. TIG objects to the assignment of USAG's and USOPC's rights under their policies to the Trust. (TIG Obj. at 14-16.) Its objection fails because the Bankruptcy Code preempts the anti-assignment clauses in USAG's policies and the assignments are valid under applicable state law in any event. *See, e.g., In re Fed.-Mogul Global,* 684 F.3d 355, 379-81 (3d Cir. 2012) (Section 1123(a)(5)(B) preempts insurance policies' anti-assignment provisions); *In re Thorpe Insulation Co.,* 677 F.3d 869, 889-91 (9th Cir. 2012); *OneBeacon Am. Ins. Co. v. A.P.I., Inc.*, No. 06-CV-167 (JNE), 2006 WL 1473004, at *2 (D. Minn. May 25, 2006); *In re TK Holdings Inc.*, No. 17-11375 (BLS), 2018 WL 1306271, at *32 (Bankr. D. Del. Mar. 13, 2018).

127. Once again, TIG invokes state law on this subject but then declines to cite any state law in its analysis. (TIG Obj. at 15.) That is because state law forecloses its argument. *See Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172, 1174 (Ind. 2008). In *U.S. Filter*, the Indiana Supreme Court held that anti-assignment clauses in insurance policies are void as restraints on alienation once the loss occurs and is "identifiable with some precision." *Id.* at 1179-

80. Such assignments do not increase the risk to the insurer, because the risk has already materialized. *Id.* at 1178-79. Stated differently, insurance-policy rights are transferable if they are "assigned at a moment when the policyholder could have brought its own action against the insurer for coverage." *Id.* at 1180. We are quite clearly in that moment. TIG helped shape the unique proof-of-claim forms the Court used for Abuse Claims specifically so they would provide sufficient information to ascertain coverage. And USAG, of course, has in fact sued its insurers for coverage.

128. Under any formulation of the *U.S. Filter* test, USAG's policy rights are assignable under Indiana law. In fact, Indiana law is actually more restrictive than the rule prevailing in most states. *Fluor Corp. v. Superior Court*, 354 P.3d 302, 327 n.46 (Cal. 2015). The "overwhelming majority of courts" hold that anti-assignment clauses are not enforceable once the loss occurs, period, "even if those losses were not determined with precision or indeed known, let alone reduced to a judgment." *Id.* at 326. *Fluor* overruled California's longstanding adherence to the minority rule that policy rights cannot be assigned until after a judgment. *Id.* at 326-27 & n.46 (noting that only Texas, Louisiana, Oregon, and Hawai'i follow the minority rule). It did so because the minority rule makes no sense—the purpose of anti-assignment clauses is to prevent "a material increase in risk for which [the insurer] did not bargain" based on "a change in the nature of the insured." *U.S. Filter*, 895 N.E.2d at 1178; *Fluor*, 354 P.3d at 326-27. Once the loss occurs, that risk cannot be increased, regardless of who holds the right to bring the cause of action.

129. Colorado also follows this majority rule. In a 1924 case, the Colorado Supreme Court found an anti-assignment clause "not applicable" because "the assignment here was not of the policy before the [loss], but of the cause of action accruing thereon after loss." *Metro. Life Ins. Co. v. Lanigan*, 222 P. 402, 403 (Colo. 1924). Thus, the Colorado Supreme Court held that "[a]n

assignment of a policy, and the right to recover upon it, after maturity, is valid, regardless of the conditions of the policy." *Id.* Even in recognizing limited exceptions to that rule, it has acknowledged the traditional distinction between (invalid) pre-loss assignments and (valid) post-loss assignments. *Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co.*, 874 P.2d 1049, 1052-53 (Colo. 1994) (recognizing limited exception to liberal assignment rules in the context of "group health care contracts"); *Allstate Ins. Co. v. Med. Lien Mgmt.*, 348 P.3d 943, 947 (Colo. 2015) (reiterating that anti-assignment clauses in insurance policies are "strictly enforced" only against pre-loss transfers); *Condo v. Conners*, 266 P.3d 1110, 1119 (Colo. 2011) (declining to read *Parrish* "as a blanket rejection of the modern approach to assignments").

130. This Court must follow *Lanigan* unless and until it is overruled. *Nat'l Am. Ins. Co. v. Artisan & Truckers Cas. Co.*, 796 F.3d 717, 723 (7th Cir. 2015). TIG presents no argument that the Colorado Supreme Court, if presented with this case, would diverge from its longstanding precedent or would identify some special circumstances warranting an exception. Nor does TIG provide any argument that the USOPC policies would be governed by the law of one of the four states following the formalistic no-assignment rule. The Plan's insurance assignments are therefore valid, and they do not prevent confirmation.

6. The Plan Does Not Violate Section 502 Of The Bankruptcy Code.

131. TIG also argues that the Plan cannot be confirmed because the Plan allegedly violates Section 502 of the Bankruptcy Code by depriving TIG of its supposed opportunity to object to Abuse Claims. (TIG Obj. at 19-21.) TIG, however, lacks standing to object to the claims resolution procedures that do not adjust its own claims and which survivors, who are the intended beneficiaries of Section 502's protections, overwhelmingly accepted. Further, as explained above, these claims resolution procedures do not impair in any way TIG's rights under its insurance policies. *See, e.g., Snyder*, 56 B.R. at 1011 (party lacked standing because it failed to allege a

"particular injury"); *In re Abengoa Bioenergy Biomass of Kansas, LLC*, 16-10446, 2018 WL 2138620, at *4 (Bankr. D. Kan. May 7, 2018) (party that was "entitled to 'no distribution' under the Plan" had no standing to object to claims that were assigned to post-confirmation trust).

132. Finally, the case law makes clear that it is proper to assign tort claims to a trust to be liquidated and resolved post-confirmation. This is because Section 502(a) "only governs the right of a party in interest to object to a claim until the plan is confirmed," and after confirmation "the terms of the plan govern who may object to the claim." *In re Western Asbestos Co.*, 313 B.R. 832, 845 (Bankr. N.D. Cal. 2003) (citing 11 U.S.C. §1141(a)); *In re Adelphia Comm'cns Corp.*, 371 B.R. 660, 676 (S.D.N.Y. 2007) (affirming confirmation order assigning exclusive right to object to claims to plan administrator). "There is nothing inconsistent with the Bankruptcy Code" with a provision that assigns the responsibility to resolve and liquidate tort claims exclusively to a post-confirmation trustee. *Western Asbestos Co.*, 313 B.R. at 845. Accordingly, TIG's Section 502 objection should be overruled.

7. The Bankruptcy Court Has Post-Confirmation Jurisdiction To Resolve The Insurance Coverage Adversary Proceeding.

133. LIU argues that the Bankruptcy Court will lose jurisdiction over the Insurance Coverage Adversary Proceeding after confirmation, and so the Plan's provision retaining jurisdiction over that litigation in the Bankruptcy Court must be stricken. (LIU Obj. ¶¶21-33.) But the Seventh Circuit has held that bankruptcy courts may "retain jurisdiction" after confirmation "to adjudicate *pending* adversary proceedings, controversies, and disputes." *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir. 2002) (emphasis added). This holding flows from the "hornbook" rule that "'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Glob. Group, L.P.*, 541 U.S. 567, 570 (2004) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824)). Here, LIU does not contest that

the Bankruptcy Court had jurisdiction over the Insurance Coverage Adversary Proceeding when it was commenced pre-confirmation, since the insurance coverage disputes are "related to" the Debtor's bankruptcy case. 28 U.S.C. §1334(b). The Court therefore has authority to retain jurisdiction over the "pending" Insurance Coverage Adversary Proceeding post-confirmation. *Baker O'Neal*, 304 F.3d at 756.

II. The Plan Satisfies Each Requirement For Confirmation.

134. To confirm the Plan, the Court must find that the Debtor has satisfied the provisions of Section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See, e.g., In re Greenwood Point, LP*, 445 B.R. 885, 914 (Bankr. S.D. Ind. 2011); *In re Envirodyne Indus., Inc.*, 1993 WL 566565, at *28 (Bankr. N.D. Ill. Dec. 20, 1993). As set forth below, the Plan satisfies all applicable elements of Section 1129 and complies with all applicable sections of the Bankruptcy Code, the Bankruptcy Rules, and non-bankruptcy law. No creditor of the Debtor's estate suggests otherwise. Accordingly, the Court should confirm the Plan.[10]

A. Section 1129(a)(1): The Plan Complies With The Applicable Provisions Of The Bankruptcy Code.

135. Section 1129(a)(1) of the Bankruptcy Code requires that a chapter 11 plan comply with the "applicable provisions" of chapter 11 of the Bankruptcy Code. 11 U.S.C. §1129(a)(1). The legislative history indicates that the objective of this provision is to ensure compliance with the requirements of Sections 1122 and 1123 of the Bankruptcy Code, which govern the

[10] Certain provisions of Section 1129 are inapplicable to this chapter 11 case and, for that reason, are omitted from the discussion that follows. Section 1129(a)(6) of the Bankruptcy Code requires that any governmental agency with jurisdiction over a debtor's rates approve any rate changes proposed under the Plan; here, the Debtor does not charge any rates that are subject to regulatory approval. Section 1129(a)(13) concerns retiree benefits governed by Section 1114, which the Debtor does not owe. Section 1129(a)(14) concerns domestic support obligations, which the Debtor also does not owe. Finally, Section 1129(a)(15) and Section 1123(a)(8), incorporated through Section 1129(a)(1), only apply to individual debtors, not non-profit organizations like the Debtor.

classification of claims and the contents of a plan of reorganization, respectively. *See, e.g.,* H.R. Rep. No. 95-595, at 412 (1977); *Greenwood Point*, 445 B.R. at 914; *In re Sentinel Mgt. Group, Inc.*, 398 B.R. 281, 292 (Bankr. N.D. Ill. 2008). The Plan complies with Sections 1122 and 1123 in all respects.

1. The Plan Complies With The Classification Requirements Of Section 1122 Of The Bankruptcy Code.

136. The Seventh Circuit has recognized that "[a] debtor in bankruptcy has considerable discretion to classify claims and interests in a chapter 11 reorganization plan." *In re Wabash Valley Power Assoc.*, 72 F.3d 1305, 1321 (7th Cir. 1995) (citing *In re Woodbrook Assocs.*, 19 F.3d 312 (7th Cir. 1994)), *abrogated on other grounds*, 526 U.S. 434 (1999). Section 1122(a) of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. §1122(a). Section 1122(a) "does not require that similar classes be grouped together, but merely that any groups be homogenous or share some attributes." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992); *accord Greenwood Point*, 445 B.R. at 905, 914; *Sentinel*, 398 B.R. at 296-97. Claims may be separately classified if "significant disparities exist between the legal rights of the holder[s]" of the claims, "if there are 'good business reasons' to do so," or "if the claimants have sufficiently different interests in the plan." *Wabash Valley Power*, 72 F.3d at 1321; *accord Polite Enterprises Corp. Pty Ltd. v. N. Am. Safety Products, Inc.*, 13-CV-01089, 2014 WL 321668, at *5 (N.D. Ill. Jan. 29, 2014).

137. The Plan's classification scheme complies with Section 1122. The Plan contains 10 classes of claims, as follows:

Class	Class Description
1	Other Priority Claims
2	PNC Bank Claim
3	Sharp Claim
4	General Unsecured Convenience Claims
5	General Unsecured Claims
6	Abuse Claims
7	USOPC Claim
8	Indemnification Claims
9	FCR Claim
10	Abuse Claims Filed After The Bar Date

138. The separate classification in the Plan is based upon the respective legal rights and interests of the claims in each Class. Class 1 (Other Priority Claims), Class 2 (the PNC Bank Claim), and Class 3 (the Sharp Claim) are all separately classified because they are entitled to priority (Class 1) or are secured by certain of the Debtor's assets (Class 2 and Class 3), unlike the non-priority, unsecured claims in the remainder of the Plan's classes. Class 4 (General Unsecured Convenience Claims) is separately classified as a convenience class pursuant to Section 1122(b). Class 6 (Abuse Claims) consists of all timely filed Abuse Claims, whereas late-filed Abuse Claims are classified separately in Class 10 (Abuse Claims Filed After The Bar Date). Class 9 (the FCR Claim) consists of Future Claims arising from Sexual Abuse that have not yet manifested for any of the reasons set forth in Section 1.1.63 of the Plan. Class 7 (the USOPC Claim) consists of the USOPC's indemnification and related claims against the Debtor, which arise out of its unique role as the Debtor's regulator and the insurance rights it shares with the Debtor. Class 8 (Indemnification Claims) consists of claims against the Debtor for indemnity, contribution, or any

similar theory of relief, mainly by co-defendants in the mass tort litigation who have made demands for payment under the Debtor's insurance policies. Finally, Class 5 (General Unsecured Claims) consists of all non-priority, unsecured claims that do not separately fit within Classes 6 through 10.

139. No party has objected to the Plan's classification structure. Each class contains only claims that are "substantially similar" and each class is internally "homogenous." *Wabash Valley Power*, 72 F.3d at 1321; *Drexel Burnham*, 138 B.R. at 757. Further, the Debtor's rationales for the separate classification of claims are proper under the Seventh Circuit's holding in *Wabash Valley Power*. 72 F.3d at 1321. The Plan therefore satisfies the classification requirements of Section 1122 of the Bankruptcy Code.

2. The Plan Complies With The Requirements Of Section 1123(a) Of The Bankruptcy Code.

140. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy. The Plan satisfies each of these requirements.

a. The Plan Specifies Classes, Impairment, and Treatment.

141. The first three requirements of Section 1123(a) are that a plan specify (i) the classification of claims, (ii) whether such claims are impaired or unimpaired, and (iii) the precise nature of their treatment under the plan. 11 U.S.C. §1123(a)(1)–(3).

142. As explained above, the Plan properly designates classes of claims. The Plan also identifies Class 1 (Other Priority Claims), Class 2 (PNC Bank Claim), Class 3 (the Sharp Claim), and Class 4 (General Unsecured Convenience Claims) as unimpaired because they will receive payment in full under the Plan. The Plan further designates Class 5 (General Unsecured Claims), Class 6 (Abuse Claims), Class 7 (the USOPC Claim), Class 8 (Indemnification Claims), Class 9 (the FCR Claim), and Class 10 (Abuse Claims Filed After The Bar Date) as impaired because the

Plan does not "leave[] unaltered" the respective "legal, equitable, or contractual rights" of the claims in such Classes. 11 U.S.C. §1124(1). The Plan then sets forth in detail how each Class of claims will be treated after confirmation. (Plan Art. VI-VII.)

b. The Plan Provides Equal Treatment To Claims.

143. Section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. §1123(a)(4). The Plan satisfies this requirement because holders of allowed claims will receive the same rights and treatment as other holders of allowed claims within their respective Class. *See, e.g., Sentinel*, 398 B.R. at 305 ("Section 1123(a)(4) does not require precise equality, only approximate equality"); *In re Republic Airways Holdings Inc.,* 565 B.R. 710, 728 n.13 (Bankr. S.D.N.Y. 2017), *aff'd,* 582 B.R. 278 (S.D.N.Y. 2018) ("The key inquiry under Section 1123(a)(4) is not whether all of the claimants in a class obtain the same thing, but whether they have the same opportunity" for recovery).

144. Specifically, all creditors in Class 1 (Other Priority Claims), Class 2 (PNC Bank Claim), Class 3 (the Sharp Claim), and Class 4 (General Unsecured Convenience Claims will be paid in full. (Plan Art. VI.) All creditors in Class 5 will receive payment of 80% of the allowed amount of their claims in three equal, annual installments beginning on August 15, 2022. All creditors in Class 6 (Abuse Claims), Class 9 (the FCR Claim), and Class 10 (Abuse Claims Filed After The Bar Date) will have their claims treated under one of the Plan's three options. (*Id.* §§7.2, 7.5-7.6.) All claimants in Class 7 (the USOPC Claim) and Class 8 (Indemnification Claims) will receive no distribution but will receive the benefit of the Channeling Injunction if a settlement plan is confirmed or the continued right to seek recovery from the Debtor's insurance policies if a litigation plan is confirmed. (*Id.* §7.3-4.)

145. Further, all but three voting creditors accepted the Plan—including *all* 476 Abuse Claimants who voted on the Plan—and thereby consented to the treatment of their claims even if the Plan's provisions were (incorrectly) construed as treating them unequally. *See* 11 U.S.C. §1123(a)(4) (the equal treatment does not apply if a claimant "agrees to a less favorable treatment"). The three voting creditors who rejected the Plan (a single Class 5 General Unsecured Claimant, and two Class 10 claimants asserting untimely Abuse Claims) have not objected to the Plan on the basis that it treats them unequally compared to other members of their respective Classes. Those rejecting creditors have therefore waived any equal treatment objection. *See, e.g., In re Harvey*, 213 F.3d 318, 322 (7th Cir. 2000); *In re Hegeduis*, 525 B.R. 74, 88 (Bankr. N.D. Ind. 2015). For these reasons, the Plan satisfies Section 1123(a)(4) of the Bankruptcy Code.

c. The Plan Provides Adequate Means For Its Implementation.

146. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation. 11 U.S.C. §1123(a)(5). Under this Section, a plan may "transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan." *Id.* §1123(a)(5)(B).

147. Depending upon which Plan alternative is elected at the Confirmation Hearing, the Plan satisfies Section 1123(a)(5) by: (i) establishing a Trust to administer, liquidate, and satisfy all Abuse Claims, Future Claims, and Abuse Claims Filed After The Bar Date, in accordance with the Plan and Trust Documents (Plan, Art. IX-XI); (ii) funding the Trust with the contributions of the Settling Insurers, Participating Parties, and Protected Parties, including pursuant to the Buy-Back Agreements by and among the Debtor and each Debtor CGL Settling Insurer (*id.* §9.3.2); (iii) funding the Trust with Insurance Claims assigned to the Trust by the Debtor, Settling Insurers, and Participating Parties against the Non-Settling Insurer (*id.* §10.5); (iv) implementing the Channeling Injunction, Settling Insurer Injunction, and related releases by Abuse Claimants,

Future Claimants, the Debtor, the Reorganized Debtor, the Estate, Settling Insurers, Participating Parties, and Non-Debtor CGL Settling Insurer Covered Persons, all of which were necessary to obtain the settlements that underly the Plan's Full or Partial Settlement Alternative (*id.* Art. XI-XII); (v) authorizing the Debtor to retain the Professional Fee Hold-Back to satisfy Professional Claims through the Effective Date (*id.* §§1.1.89, 1.1.115, 3.1.1, 3.6); (vi) lifting the automatic stay and 105 Order to permit Abuse Claimants to return to civil courts to litigate their Abuse Claims against the Debtor in name only (only under the Litigation Only Alternative) (*id.* §13.1); (vii) discharging the Debtor of its pre-Effective Date liabilities, including Abuse Claims (*id.* §18.1); (viii) vesting in the Reorganized Debtor all property of the Debtor that is not assigned to the Trust or otherwise treated under the Plan (*id.* §18.2); (ix) deeming all executory contracts of the Debtor not rejected as of the Effective Date to be assumed (*id.* §19.2); (x) providing for the resolution of Disputed Claims (other than Abuse Claims, the USOPC Claim, Indemnification Claims, and the FCR Claim) by the Debtor (*id.* §15.1); (xi) implementing non-monetary commitments and reforms agreed to between the Debtor and Survivors' Committee (*id.* §20.1); and (xii) deeming any action contemplated by the Plan that requires the approval of the Debtor's officers to be so approved before, on, or after the Effective Date, as required by the Plan (*id.* §21.23).

148. The transactions contemplated by the Plan will maximize distributions to the Debtor's creditors and provide sufficient liquidity for the Reorganized Debtor to operate going forward. Accordingly, the Plan provides the means for implementation of the Plan in satisfaction of Section 1123(a)(5) of the Bankruptcy Code.

d. The Reorganized Debtor, As A Non-Profit Corporation, Does Not Issue Equity Securities.

149. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate charter or other governing documents prohibit the issuance of nonvoting equity securities. 11 U.S.C. §1123(a)(6). This provision is inapplicable because the Debtor is a non-profit organization organized under Texas law that cannot issue equity securities, voting or non-voting. *See generally* Tex. Bus. Orgs. Code Ann. §22.001, *et seq*.

e. The Plan's Provisions Regarding The Selection Of Directors And Officers Are Consistent With The Interests Of Creditors And Public Policy.

150. Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions regarding the manner of selection of any director, officer, or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. §1123(a)(7). The Plan incorporates certain non-monetary commitments and reforms agreed to among the Debtor and the Survivors' Committee, which among other matters, address the Reorganized Debtor's selection of directors and officers. (Plan §20.1.) As a result of these non-monetary commitments, the Reorganized Debtor's board of directors will include at least one survivor as a director, and its Safe Sport Committee and Athlete Health and Wellness Council will each include at least one survivor as well. (*Id.*) These reforms will promote the Reorganized Debtor's efforts to ensure the health and safety of every USAG member by including survivors in the Reorganized Debtor's corporate governance and management. The Plan therefore satisfies Section 1123(a)(7) of the Bankruptcy Code.

B. Section 1129(a)(2): The Plan Proponents Have Complied With The Applicable Provisions Of The Bankruptcy Code.

151. Section 1129(a)(2) of the Bankruptcy Code requires that plan proponents comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. §1129(a)(2). The legislative

history for Section 1129(a)(2) indicates that this provision is intended to encompass the disclosure and solicitation requirements under Sections 1125 and 1126 of the Bankruptcy Code. *See, e.g.,* H.R. Rep. No. 95-595, at 412; *Sentinel*, 398 B.R. at 303. The Plan Proponents have complied with these provisions.

1. The Plan Proponents Have Complied With the Disclosure and Solicitation Requirements Of Section 1125.

152. The Plan Proponents have satisfied Section 1125. On October 26, 2021, before the Plan Proponents commenced solicitation, the Court entered the Disclosure Statement Order, which approved the Disclosure Statement as containing "adequate information" for voting creditors in accordance with Section 1125. (Disclosure Statement Order ¶2.) The Disclosure Statement Order then approved certain procedures for soliciting to accept or reject on the Plan. (*Id.* ¶¶6-16.)

153. In accordance with the Disclosure Statement Order, and as set forth in the solicitation certificates of service, Omni, the Court-appointed solicitation and balloting agent, on behalf of the Plan Proponents, distributed copies of the Plan, Disclosure Statement, Disclosure Statement Order, ballots, notice of the Confirmation Hearing, and other applicable materials to all creditors of the Debtor, as well as counsel for Abuse Claimants. (*See* Dkts. 1670, 1679, 1722, 1723, 1724, 1725, 1726, 1727, 1730, and 1731.) Omni's service began on October 26, 2021, was completed on October 29, 2021, and was supplemented thereafter based upon requests from specific creditors, including creditors whose notice addresses had changed since filing their claims. (*Id.*) Accordingly, the Plan Proponents complied with Section 1129(a)(2) of the Bankruptcy Code by distributing the Court-approved Disclosure Statement and soliciting acceptances of the Plan through Omni in accordance with the Disclosure Statement Order.

2. The Plan Proponents Satisfied The Plan Acceptance Requirements Of Section 1126.

154. Section 1126 of the Bankruptcy Code provides that only holders of allowed claims in impaired classes that will receive or retain property under a plan on account of such claims may vote to accept or reject a plan. 11 U.S.C. §1126(c), (f)-(g). In accordance with Section 1126, the Plan Proponents did not solicit votes from Class 1 (Other Priority Claims), Class 2 (PNC Bank Claim), Class 3 (the Sharp Claim), and Class 4 (General Unsecured Convenience Claims, all of which are unimpaired. The Plan Proponents solicited votes from holders of claims in Classes that are impaired and entitled to recover under the Plan —*i.e.*, Class 5 (General Unsecured Claims), Class 6 (Abuse Claims), Class 7 (the USOPC Claim), Class 8 (Indemnification Claims), Class 9 (the FCR Claim), and Class 10 (Abuse Claims Filed After The Bar Date). The Plan Proponents' solicitation efforts therefore complied with Section 1126.

C. Section 1129(a)(3): The Plan Is Proposed In Good Faith And Not By Any Means Forbidden By Law.

155. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. §1129(a)(3). As discussed above, the Plan is proposed in good faith and "achieve[s] a result consistent with the objectives and purposes of the Bankruptcy Code," namely, a consensual restructuring agreed to by the Debtor, its creditors, and its other key stakeholders. *Madison Hotel Associates*, 749 F.2d at 425. It clearly is the best way forward for the Debtor's organization, its estate, and its creditors, as evidenced by the Plan voting results, which show "overwhelming support" for the Plan by the Debtor's creditors—indeed, *unanimous* support by Abuse Claimants. *Andreucetti*, 975 F.2d at 420.

D. Section 1129(a)(4): The Plan Provides For Bankruptcy Court Approval Of Certain Administrative Expenses.

156. Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the Debtor be subject to approval of a court as reasonable. The Plan satisfies Section 1129(a)(4). The Plan provides that all final requests for approval and payment of Professional Claims for compensation and reimbursement of expenses accruing from the Petition Date to the Effective Date must be filed no later than 45 business days after the Effective Date, which will permit the Court to review all Professional Fees for reasonableness on a final basis. (Plan §4.2.1.) The Plan therefore complies with Section 1129(a)(4). *See Greenwood Point*, 445 B.R. at 916.

E. Section 1129(a)(5): The Plan Adequately Discloses Information Regarding Directors And Officers Of The Reorganized Debtor.

157. Section 1129(a)(5) requires that prior to confirmation, the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtor, as well as the identity of any "insider" who will be employed or retained by the reorganized debtor and any compensation they will receive. 11 U.S.C. §1129(a)(5).

158. The Plan satisfies Section 1129(a)(5). On the Effective Date, the Reorganized Debtor's current officers, directors, and managers will continue to serve in accordance with the Debtor's bylaws and Section 21.23 of the Plan, which provides that all matters involving "the organizational structure of the Debtor shall be deemed to have occurred and shall be in effect" as of the Effective Date. (Plan §21.23) The Debtor previously disclosed its directors in its Disclosure Statement. (Disclosure Statement §IV.C.) In the Schneider Declaration, the Debtor has disclosed its officers and their compensation. *See In re Drexel Burnham*, 138 B.R. at 770 (Section 1129(a)(5) satisfied by debtors presenting evidence at Confirmation Hearing, "to the extent known as of the

Confirmation Hearing, the identity of the individuals who will hold positions with the Debtors or their successors after confirmation of the Plan").

F. Section 1129(a)(7): The Plan Is In The Best Interests Of Creditors.

159. The "best interests of creditors" test requires that, with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either accepted the plan or will receive or retain property having a value of not less than the value such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code. 11 U.S.C. §1129(a)(7); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."). As Section 1129(a)(7)'s language makes clear, the best-interests test applies only to rejecting impaired claims; "[i]f a class of claims or interests unanimously accepts the plan, then the best interests test is automatically satisfied for all members of that class." *Drexel Burnham*, 138 B.R. at 761.

160. Debtors may satisfy the best interests test by presenting a liquidation analysis that estimates creditors' recoveries if estate assets were liquidated in chapter 7, compared to distributions under a plan. *See Greenwood Point*, 445 B.R. at 916-17 (liquidation analysis demonstrated that best interests test was met); *Jartran*, 44 B.R. at 390–93 (same). In addition, courts may conclude that the best interests test is met if a plan provides quicker and more certain recoveries to creditors than would be the case in a liquidation scenario. *See, e.g., Keck, Mahin & Cate*, 241 B.R. at 592 ("Considering the risks and costs Plan implementation will avoid, however, the Court agrees with the majority that the value of the benefits…under the Plan exceeds any amount [the objectors] might receive in chapter 7"); *In re Affiliated Foods, Inc.*, 249 B.R. 770, 789-90 (Bankr. W.D. Mo. 2000) (noting "time value of money" was a "'hidden' expense that should not be overlooked" in liquidation analysis).

161. Here, Classes 6, 8 and 9 unanimously accepted the Plan and the best interests test is satisfied as to those Classes. The best interests test also is satisfied as to all but one of the creditors that voted in Class 5 and two of the creditors that voted in Class 10. (Voting Report at Class 5, Class 10.) The Plan meets the best interests test as to these rejecting creditors because it provides recoveries equal to or greater than what these creditors would receive in a chapter 7 liquidation with significantly more certainty regarding the amount and timing of such recovery.

162. As set forth in the Barron Declaration, any liquidation recovery for Class 5 General Unsecured Claims would be significantly lower than the 80% of the claim amount proposed under the Plan because the Debtor's available cash in chapter 7 after payment of administrative expenses (approximately $321,500) would amount to less than 20% of the total amount of Class 5 General Unsecured Claims (approximately $1,841,188.24). Because Class 5 General Unsecured Claims will receive significantly less (and may receive nothing) than proposed under the Plan, the best interests is satisfied as to the sole rejecting Class 5 General Unsecured Claim.

163. The two Class 10 creditors who rejected the Plan hold late Abuse Claims. In a chapter 7 liquidation their claims would be subordinated to the Claims of timely filed unsecured creditors and as set forth in the Barron Declaration would receive nothing. 11 U.S.C. §726(a)(3). In contrast, the Plan allows these late claimants access to the Debtor's insurance proceeds contributed to the Trust's Future Claimant Reserve if they qualify as Future Claimants or through lawsuits if the Litigation Only Alternative is confirmed, providing them with a greater recovery than they would receive in a chapter 7 liquidation. *Sentinel*, 398 B.R. at 313.

164. Accordingly, the best interests test is satisfied as to the three creditors who voted to reject the Plan.

G. Section 1129(a)(8): Every Class Has Voted To Accept The Plan Or Is Deemed To Accept The Plan.

165. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims either accept a plan or be unimpaired under a plan. 11 U.S.C. §1129(a)(8). Classes 1 through 4 are unimpaired and deemed to accept the Plan under Section 1126(f) of the Bankruptcy Code. Classes 5, 6, 8, 9, and 10 all affirmatively voted to accept the Plan in the number and amount required by Section 1126(c) of the Bankruptcy Code. (*See* Voting Declaration.) Only Class 7 (the USOPC Claim) abstained from voting and did not affirmatively vote to accept the Plan.

166. The Court may deem Class 7 to have accepted the Plan. Courts have held that classes may be deemed to accept a plan if their members are involved in the case, aware of the plan's contents, and, yet, fail to "take an active role in protecting their claims" by voting on or objecting to the plan. *See, e.g., In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267 (10th Cir. 1988); *In re Tribune Co.*, 464 B.R. 126, 183-84 (Bankr. D. Del. 2011); *In re Adelphia Comm'cns Corp.*, 368 B.R. 140, 261-62 (Bankr. S.D.N.Y. 2007); *accord Matter of Dues*, 98 B.R. 434, 440 (Bankr. N.D. Ind. 1989). These courts reason that "[r]egarding non-voters as rejecters," rather than accepting parties, "runs contrary to the Code's fundamental principle, and the language of Section 1126(c), that only those actually voting be counted in determining whether a class has met the requirements, in number and amount, for acceptance or rejection of a plan, and subjects those who care about the case to burdens (or worse) based on the inaction and disinterest of others." *Adelphia*, 368 B.R. at 261-62.

167. Here, the USOPC is a key, active, and sophisticated participant in this chapter 11 case and in the mediation that produced the Plan. In fact, the USOPC is a Participating Party under the Plan's Full or Partial Settlement Alternative that will contribute assets to the Trust for the benefit of Abuse Claimants. Under these circumstances, the USOPC's knowing failure to vote its

claim—one way or the other—should be deemed to be consent to and acceptance of the Plan's terms. Accordingly, the Court should determine that all Classes are unimpaired or have accepted the Plan in satisfaction of Section 1129(a)(8).

H. Section 1129(a)(9): The Plan Provides For Payment In Full Of Allowed Administrative And Priority Claims.

168. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments. In particular, holders of claims of a kind specified in Section 507(a)(2) of the Bankruptcy Code—administrative expenses allowed under Section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims. 11 U.S.C. §1129(a)(9)(A). Each holder of a claim of a kind specified in Section 507(a)(1) or (4)–(7) of the Bankruptcy Code—*i.e.*, wage, employee benefit, and deposit claims entitled to priority—also must receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan), or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). 11 U.S.C. §1129(a)(9)(B). Finally, the holder of a claim of a kind specified in Section 507(a)(8) of the Bankruptcy Code—*i.e.*, priority tax claims—must receive payment in full or cash payments over a period not to exceed five years from the petition date. 11 U.S.C. §1129(a)(9)(C).

169. The Plan satisfies Section 1129(a)(9) because it provides that, with the exception of Allowed Administrative Claims that arise in the ordinary course of business (which will be paid in the ordinary course of business), each holder of an Allowed Administrative Claim will receive Cash equal to the amount of such Allowed Administrative Claim either (a) on or as soon as practicable following the Effective Date, or, if later, the date such Administrative Claim is

Allowed; or (b) upon such terms as may be agreed to in writing by the Administrative Claimant. (Plan §4.1.) Further, the Plan satisfies Section 1129(a)(9)(B) of the Bankruptcy Code because any holders of the types of claims specified in this Section are unimpaired under the Plan. (*Id.* §6.1.) Finally, the Plan satisfies Section 1129(a)(9)(C) of the Bankruptcy Code because it provides that holders of Allowed Priority Tax Claims shall be paid in full in cash as soon as practicable after the Effective Date, or on such other terms agreed to by the holder of an Allowed Priority Tax Claim. (*Id.* §4.4.)

I. Section 1129(a)(10): At Least One Impaired Class Of Claims Has Accepted The Plan.

170. Section 1129(a)(10) of the Bankruptcy Code requires that at least one impaired class of claims or equity interests must accept the Plan, excluding acceptance by any insider. 11 U.S.C. §1129(a)(10). As set forth above and in the Voting Report, Class 5 (General Unsecured Claims), Class 6 (Abuse Claims), Class 8 (Indemnification Claims), Class 9 (the FCR Claim), and Class 10 (Abuse Claims Filed After The Bar Date) have all affirmatively accepted the Plan, and all of which were impaired. There are no insiders of the Debtor whose votes must be excluded under Section 1129(a)(10).

J. Section 1129(a)(11): The Plan Is Feasible.

171. Section 1129(a)(11) of the Bankruptcy Code requires that a court find that a plan is feasible before confirming it. Specifically, the court must conclude that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. §1129(a)(11). "Under Seventh Circuit law, to determine that a plan is feasible, 'the bankruptcy court need not find that it is guaranteed to succeed; only a reasonable assurance of commercial viability is required.'" *In re KMC Real Est. Inv'rs, LLC*, 531

B.R. 758, 768 (S.D. Ind. 2015) (quoting *In re 203 N. LaSalle St. P'Ship*, 126 F.3d 955, 961–62 (7th Cir. 1997)). In determining whether a plan is feasible, courts consider factors such as the adequacy of the capital structure, the organization's earning power, economic conditions, the ability of management, the probability of the continuation of the same management, and other matters that determine the prospects of a sufficiently successful operation to enable performance under the plan. *See, e.g., Greenwood Point*, 445 B.R. at 917-18; *In re Am. Consol. Transp. Cos.*, 470 B.R. 478, 489-91 (Bankr. N.D. Ill. 2012); *Sentinel*, 398 B.R. at 318-19.

172. The Plan is feasible. As set forth in the Barron Declaration, the Debtor will have sufficient cash to make the payments due under the Plan and operate its business. (Barron Decl. ¶¶4-5.) Because the Debtor will have sufficient liquidity to satisfy the Plan's requirements and the Debtor's operating expenses, the Plan is not likely to be followed by the Debtor's liquidation or need for further reorganization and thus complies with Section 1129(a)(11).

K. Section 1129(a)(12): The Plan Provides For The Payment Of All Fees Under 28 U.S.C. §1930.

173. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. §1930. The Plan provides that all such fees due and payable as of the Effective Date, and not yet paid, shall be paid in cash as soon as practicable after the Effective Date. (Plan §4.3.) The Plan further provides that, after the Effective Date, the Reorganized Debtor shall pay quarterly fees to the U.S. Trustee, in cash, until the chapter 11 case is closed. (*Id.*)

L. Section 1129(a)(16): The Plan Provides For Transfers Of Property In Accordance With Applicable Non-Bankruptcy Law.

174. Section 1129(a)(16) of the Bankruptcy Code provides that "[a]ll transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust." 11 U.S.C. §1129(a)(16). The legislative

history of this provision indicates that it "keeps in place the state law restrictions on [] nonprofit entities," and was intended to "restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation" in violation of, or without regard to, a state's nonprofit laws. 7 COLLIER ON BANKRUPTCY ¶1129.02 (16th ed. 2021). If there are no "applicable provisions of nonbankruptcy law" specifically governing the transfer of property by a nonprofit, then a plan, by definition, complies with Section 1129(a)(16). *Roman Catholic Bishop of Stockton*, 2017 WL 118013, at *7 (confirming plan of nonprofit where there was no showing that any provision of the plan violated state law specifically applicable to nonprofit organizations); *In re Roman Catholic Archbishop of Portland*, No. 04-37154, 2007 Bankr. LEXIS 1180, at *26 (Bankr. D. Or. Apr. 13, 2007) (same); *In re Machne Menachem, Inc.*, 371 B.R. 63, 68 (Bankr. M.D. Pa. 2006) (same).

175. Here, the Debtor proposes to sell certain of its insurance policies and, in the event the Partial Settlement Option is elected, transfer its Insurance Claims against TIG to the Trust. (Plan §3.3, §9.4, §10.5.) No provision of Texas law (where the Debtor is incorporated) or Indiana law (where it is headquartered) applies to restrict the Debtor's ability to transfer these assets as contemplated under the Plan. *See generally* Tex. Bus. Orgs. Code Ann. §22.001, *et seq*; Ind. Code Ann. §23-17-1-0.2, *et seq*; *id.* §23-17-20-2 (permitting nonprofits to "exchange" "all, or substantially all, of the corporation's property…on the terms and conditions and for the consideration determined by the corporation's board of directors"). Further, even though the Indiana Attorney General has objected to the Plan, it has not identified any provision of Indiana law governing the transfer of property by a nonprofit organized in another state that the Plan could violate. Accordingly, any objections on this point are waived and Section 1129(a)(16) is satisfied. *See, e.g., Harvey*, 213 F.3d at 322; *Dues*, 98 B.R. at 440.

M. Section 1129(b): If Applicable, The Plan Satisfies The Bankruptcy Code's Cramdown Requirements.

176. As explained above, the Court should find that Class 7 (the USOPC Claim) has accepted the Plan. If however the Court treats the USOPC's failure to vote as a rejection of the Plan, the Plan may be crammed down on the USOPC under Section 1129(b) because the Plan does not unfairly discriminate against, and is fair and equitable to, the USOPC. *See* 11 U.S.C. §1129(b)(1)-(2) (listing cram down requirements).

177. The Plan does not discriminate unfairly with respect to the USOPC. The Bankruptcy Code does not provide a standard for determining whether "unfair discrimination" exists. *See Envirodyne*, 1993 WL 566565, at *36. Typically, though, courts require that "similar claims or classes must receive similar value under a plan." *Id.* (collecting cases). So long as separate classes are not comparable to one another, it is not unfair discrimination to treat them differently on account of such distinctions. *See Greenwood Point*, 445 B.R. at 918-19; *Jartran*, 44 B.R. at 383-84; *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 152 (Bankr. S.D.N.Y. 1984).

178. Here, the USOPC asserts an unliquidated unsecured claim for indemnification and a small trade claim. With regard to the indemnification claim, like the other Indemnification Claims in Class 8, the USOPC will receive the benefit of the Channeling Injunction (if the Plan's Full or Partial Settlement Alternative is elected) or will be able to pursue that indemnification claim against the Debtor's insurance policies (if the Litigation Only Alternative is elected). (Plan §7.3.2.) In addition, under the Litigation Alternative, the USOPC's small trade claim will be treated as a General Unsecured Claim in Class 5 and will receive 80% of the allowed amount of that claim like all other Class 5 creditors. (Plan §7.3.3.) Because the USOPC's treatment is not materially different from similarly situated claims, there is no unfair discrimination here.

179. The Plan is also fair and equitable as to Class 7. A plan is "fair and equitable" if it follows the "absolute priority" rule. See 11 U.S.C. §1129(b); *203 N. LaSalle St. P'ship*, 526 U.S. at 441–42. That rule mandates that a junior class of claims cannot receive a distribution under the plan unless senior classes are rendered unimpaired or give their consent. *Id*. Here, the Debtor has no creditors junior to the USOPC and as a not-for-profit entity has no interest holders. Accordingly, no junior creditors are receiving or retaining anything under the Plan and the Plan satisfies Section 1129(b) with the respect to the USOPC.

N. The Discretionary Contents Of The Plan Are Appropriate.

180. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a chapter 11 plan, including "any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. §1123(b)(1)-(6). As explained above in connection with the UST Objection, the Debtor releases, third-party releases, and injunctions enforcing those releases are appropriate provisions because they are necessary to obtain the insurance buyback agreements and necessary to fund the Abuse Claims settlement and Trust.

181. In addition, the Plan provides for exculpations for certain actions taken in connection with this chapter 11 case and the Debtor's restructuring, including any claims related to the pursuit of confirmation of the plan and the administration of the Plan. (Plan §18.4.) Courts evaluate the appropriateness of exculpation provisions based upon a number of factors, including whether the plan was proposed in good faith, the extent to which the exculpation is appropriately tailored, and whether the exculpation provision was necessary to the reorganization. *See, e.g., Greenwood Point*, 445 B.R. at 921 (approving exculpation that was an "essential means of implementing the plan"); *In re Oaks*, No. 11-48903, 2012 WL 5717940, at *9 (Bankr. N.D. Ill. Nov. 15, 2012) (approving an exculpation that is "essential to the Plan" and "appropriately tailored

to protect the Exculpated Parties from inappropriate litigation"); *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 500-02 (Bankr. S.D. Ohio 2021). In particular, exculpations are appropriate to induce parties and their advisors to negotiate consensual restructurings without fear of future litigation arising from their good faith conduct in the bankruptcy case. *Oaks*, 2012 WL 5717940, at *9; *Murray*, 623 at 501-02.

182. Here, no party has objected to the Plan's exculpation provision and so it may be approved on that basis. In addition, the exculpation is targeted to claims related to the bankruptcy process and specifically excludes from the list of exculpated parties any parties who personally committed an act of Sexual Abuse that has or may result in a claim against the Debtor or a Participating Party. Because all parties in interest have consented to the exculpation by failing to object thereto, and because the exculpation reasonably protects parties for their good faith efforts to resolve this case, the exculpation should be approved. *See, e.g., Harvey*, 213 F.3d at 322; *Hegeduis*, 525 B.R. at 88; *Greenwood Point*, 445 B.R. at 921; *Oaks*, 2012 WL 5717940, at *9.

CONCLUSION

For the reasons set forth herein, the Plan satisfies all applicable requirements of the Bankruptcy Code. The Debtor respectfully requests that the Court confirm the Plan and grant such other relief as may be just.

Dated: December 10, 2021

Respectfully submitted,

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