Docket #0999 Date Filed: 7/17/2012

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: **ENERGY CONVERSION DEVICES, INC., et al.,**[1] Debtors.	Chapter 11 Case No. 12-43166 (Jointly Administered) Judge Thomas J. Tucker

DEBTORS' MEMORANDUM OF LAW (I) IN SUPPORT OF CONFIRMATION OF THE SECOND AMENDED JOINT PLAN OF LIQUIDATION OF ENERGY CONVERSION DEVICES, INC. AND UNITED SOLAR OVONIC LLC AND (II) IN RESPONSE TO OBJECTIONS THERETO

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[1]The Debtors in these jointly administered cases are Energy Conversion Devices, Inc. (Case No. 12-43166) and United Solar Ovonic LLC (Case No. 12-43167).

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I. Preliminary Statement

Pre-petition, the Debtors and the Ad Hoc Consortium of Noteholders executed a Plan Support Agreement. The dominate purposes of the Plan Support Agreement were (i) to structure a brief sale process (ii) to minimize the adverse impact on displaced employees, (iii) to treat creditors of the two different estates equitably by replicating substantive consolidation, and (iv) to provide for an efficient administration of the estates by avoiding costly and unnecessary litigation and expediting the distribution of funds to creditors.

The Plan Support Agreement was the product of months of intense negotiations between the Debtors and the Noteholders, and embodies a number of hard-fought compromises between the parties. None of these compromises were separately negotiated. Each of the promises and performances in the Plan Support Agreement are interrelated and interdependent, working together as part of a single unified document to allocate certain risks, costs, and benefits.

All creditors of the Debtors' estates have benefitted and continue to benefit from the efficient administration of these Chapter 11 Cases that is directly attributable to the Plan Support Agreement. The creditors of USO, in particular, stand to benefit. According to the Committee's financial advisor, the distribution to USO creditors under a stand-alone liquidation would range from 11 to 41%. But under the Plan, USO creditors are projected to receive between 40 to 54%. This improvement range of 13 to 29% is effectively a transfer of value from the Noteholders and the ECD creditors to USO creditors of at least $10,000,000, and likely significantly more, all of which is attributable to the substantive consolidation contemplated by the Plan Support Agreement.

Acknowledging these clear benefits to its constituents, the Committee previously supported the Plan and encouraged all creditors to vote in favor of the Plan. Now, at the last minute, and after its constituents voted overwhelmingly in favor of the Plan, the Committee has changed course, arguing that one term of the Plan Support Agreement—the releases—should be severed from the agreement, effectively depriving the Noteholders of the essential benefit of the bargain and fatally upsetting the delicate compromise struck by the parties. In essence, the Committee seeks to impermissibly obtain the benefits of the Plan Support Agreement—the financial benefit of substantive consolidation—while avoiding the burdens.

The United States Trustee similarly seeks to invalidate the releases, but completely ignores the unique circumstances surrounding the execution of the Plan Support Agreement, and the substantial benefits of the Plan Support Agreement to estate creditors.

The Debtors' have fully disclosed to the Court and to the creditors the costs and benefits of the Plan Support Agreement. After evaluating these costs and benefits, the creditors of each estate have voted to accept the Plan. Sustaining the Committee's and UST's objections would almost certainly lead to the termination of the Plan Support Agreement, throwing these chapter 11 cases into turmoil on the doorstep of confirmation, to the detriment of all interested parties. The Plan should be confirmed and the objections overruled.

II. Status of Objections

The Debtors received nine (9) objections to the Plan's Confirmation and one objection to final approval of the Disclosure Statement. All of the objections to the Plan's confirmation have been resolved or addressed through the proposed immaterial Plan amendments contained in the Proposed Confirmation Order except for (i) the Committee's objection; (ii) the UST's objection; and (iii) certain landlord objections. The objection to final approval of the Disclosure Statement has not been resolved.

A. Resolved Objections

The Debtors believe the following objections are resolved:

i. JPMorgan Chase Bank, N.A.'s Limited Objection to Confirmation of Debtors' Second Amended Joint Plan of Liquidation [Docket No. 928] has been addressed by immaterial Plan amendments set forth in Paragraph 4.b of the Proposed Order.

ii. State of Michigan Department of Treasury's Objection to the First Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic, LLC [Docket No. 949] has been addressed by immaterial Plan amendments set forth in Paragraph 4.a of the Proposed Order.

iii. Objection to Second Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic, LLC by Sunway 2, LLC and Sunway 3, LLC [Docket No. 962] has been addressed by immaterial Plan amendments set forth in Paragraphs 4.c and 4.e of the Proposed Order.

iv. Objection of Metecno Industrie S.pA to Second Amended Joint Plan of Liquidation of Debtors Energy Conversion Devices, Inc. and United Solar Ovonic, LLC [Docket No. 963] has been addressed by immaterial Plan amendments set forth in Paragraph 4.c of the Proposed Order.

v. Objection to Second Amended Joint Plan of Liquidation by Charles L. Wells, III, the Chapter 7 Trustee of Solar Integrated Technologies, Inc. [Docket No. 921] has been addressed by immaterial Plan amendments set forth in Paragraphs 4.g and 4.h of the Proposed Order.

B. Unresolved Objections

i. The Committee and the UST have objected on the basis that certain structural aspects of the Liquidation Trust and the releases contained in the Plan make the Plan non-compliant with the so-called Best Interest of Creditors' test set forth in 11 U.S.C. 1129(a)(7) or otherwise non-confirmable.

ii. The Pegasus Group's and JBD Troy, LLC's Objection to Confirmation of Second Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic LLC [Docket No. 947] and the Objections to Confirmation of Second Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic LLC by U.S. Bank, N.A., as Trustee in Trust to the Registered Holders of Banc of America Commercial Mortgage Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-1 By and Through CWCapital Asset Management LLC, Acting Solely in Its Capacity as Special Servicer [Docket No. 965] are unresolved. These landlords are asserting a guaranty claim in addition to their lease rejection claim, and argue that elimination of the guaranty claim causes the Plan not to be better than if the cases were in a chapter 7 liquidation.

III. Background

On February 14, 2012 (the "**Petition Date**"), Energy Conversion Devices, Inc. ("**ECD**") and United Solar Ovonic LLC ("**USO**"), as debtors in the above-captioned cases (collectively, the "**Debtors**") filed voluntary petitions for relief (the "**Chapter 11 Cases**") under chapter 11 of Title 11 of the United States Code. Each of the Debtors continues to operate its business and manage its financial affairs and properties as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in either of the Chapter 11 Cases.

The Debtors filed the Second Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic LLC (the "**Plan**") and related Disclosure Statement (the "**Disclosure Statement**") on May 31, 2012 [Docket No. 611].

On May 31, 2012, the Official Committee of Unsecured Creditors filed (i) a Motion to Terminate the Debtors' Exclusivity Period Pursuant to Section 1121(d) of the Bankruptcy Code [Docket No. 617]; and (ii) a Motion for A Limited Adjournment of Solicitation of Votes on Debtors' First Amended Joint Plan of Liquidation [Docket No. 613], seeking to defer solicitation of the Plan. In these motions, the Committee did not oppose the Plan, but sought the ability to propose a competing plan so that, with the benefit of additional information, creditors of United Solar Ovonic LLC could vote to accept the competing plan if it turned out to provide to those creditors a higher recovery than the recovery anticipated under the Plan. Alternatively, the Committee sought to adjourn solicitation of the Plan so that additional information could be gathered to inform creditor's voting decision. Each of the Committee's motions was denied on June 7, 2012 [Docket No. 685].

The Bankruptcy Court granted approval of the solicitation materials on June 7, 2012. The Debtors completed service of the solicitation materials on June 12, 2012. The deadline for voting and objecting to the Plan was July 13, 2012.

On June 29, 2012 the Committee, on behalf of its subcommittees, sent to creditors a Recommendation Regarding Plan [Docket No. 838] (the "**Committee Recommendation**") in which the Committee, through each of its subcommittee, recommended that creditors vote in favor of the Plan. The ECD subcommittee stated its belief that:

> "it is in the best interest of the creditors of both ECD and USO to avoid those disputes in exchange for a significantly more expeditious distribution that is not eroded by the litigation expenses and risks of addressing these issues. As a result, the ECD Subcommittee recommends that the ECD unsecured creditors vote in favor the Plan."

The Committee Recommendation at 3-4.

In the letter, the USO Subcommittee stated that it "believes that the Plan provides the best recovery to the creditors of USO, and recommends that the USO unsecured creditors vote in favor of the Plan." The Committee Recommendation at 4.

Notwithstanding its stated support for the Plan, the Committee has filed an objection to the Plan alleging, among other arguments, that the Plan is not in the best interest of creditors. Certain of the Committee's objections are also raised by the United States Trustee (the "**UST**")

The Plan has received overwhelming support, with over 90% of all voting classes voting in favor of the Plan, and as discussed below, except for the unresolved objections of the Committee, the UST, and certain landlords, all objections are resolved or addressed through immaterial plan amendments.

On June 16, 2012, the Debtors filed their Plan Supplement and Immaterial Amendments to the Second Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic LLC [Docket No. 983]; Exhibit 4 thereto contained a proposed Finding of Fact, Conclusions of Law and Order Approving Disclosure Statement and Confirming the Second Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic LLC (the "**Proposed Confirmation Order**").

A. Voting Results - Each Impaired Class of Claims has Accepted the Plan

The Plan is fully consensual on a class-by-class basis as all Classes of Claims entitled to vote have accepted the Plan in the requisite amount and number required by section 1126 of the Bankruptcy Code. Specifically, as evidenced by the Certification of Angela M. Nguyen with Respect to the Tabulation of Votes on the Second Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic LLC [Docket No. 975] (the "**Voting Certificate**") filed with the Court, ECD Class 2A (Secured Claims of ECD), ECD Class 3 (General Unsecured Claims), ECD Class 4 (Warranty Claims), USO Class 3 (General

Unsecured Claims) and USO Class 4 (Warranty Claims) voted in the requisite two-thirds in dollar amount and more than one-half in number of Claims to accept the Plan. The Voting Certificate indicates the following voting results on a consolidated basis:

Class Name	Class Description	Votes to Accept	Votes to Reject	Total $ to Accept	Total $ to Reject
2A	Secured Claims of ECD	1 **100%**	0 **0%**	$5,000,000.00 **100%**	$0.00 **0%**
3	General Unsecured Claims - ECD	989 **99.30%**	7 **.70%**	$211,081,073.61 **99.96%**	$92,333.72 **.04%**
3	General Unsecured Claims - USO	182 **93.33%**	13 **6.67%**	$14,826,233.42 **94.34%**	$890,237.88 **5.66%**
4	Warranty Claims - ECD	3 **100%**	0 **0%**	$30,222.73 **100%**	$0.00 **0%**
4	Warranty Claims - USO	12 **92.31%**	1 **7.69%**	$1,075,878.35 **100%**	$0.00 **0%**

IV. Argument

This memorandum in support of confirmation is divided into two parts. In the first part, the Debtors demonstrate that the Plan satisfies the statutory requirements for confirmation set forth in section 1129 of the Bankruptcy Code. In the second part of the memorandum, the Debtors address each of the outstanding objections to the Plan's Confirmation. Where applicable, the Debtors have noted in the first part of the memorandum the objections that parties have made to a particular Confirmation requirement, and cross-referenced the second section of the memorandum containing the Debtors' response to that objection. In addition, the Debtors have filed contemporaneously the Declaration of Gregory G. Coppola, Vice President and Treasurer of the Debtors, in support of the Debtors' Plan.

A. The Plan should be Confirmed

To confirm the Plan, the Court must find that the Plan satisfies the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[2] The Plan complies with all relevant sections of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and applicable local rules of this Court (the "**Bankruptcy Rules**") and applicable non-bankruptcy law. In particular, the Plan fully complies with all of the requirements of sections 1122, 1123 and 1129 of the Bankruptcy Code.

1. The Plan Complies with Section 1129(a)(1) of the Bankruptcy Code

Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of chapter 11 of the Bankruptcy Code. Although broadly drafted, the legislative history and the case law make clear that this provision is directed at compliance with sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and interests and the contents of a plan, respectively.[3]

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[2] *See In re Trevarrow Lanes*, 183 B.R. 475, 479 (Bankr. E.D. Mich. 1995) ("The Debtors [bear] the burden of proving by a preponderance of the evidence that their respective plans satisfy the requirements for confirmation."); *In re Dow Corning Corp*., 244 B.R. 696, 700 (Bankr. E.D. Mich. 1999) ("The Proponents have the burden of proving all of the elements of § 1129(b)(1) by a preponderance of the evidence."); *In re Dow Corning Corp.*, 255 B.R. 445, 499 (E.D. Mich. 2000) ("To determine whether a plan is in the best interests of the creditors, a bankruptcy court must review the facts before it by a preponderance of the evidence.").

[3] *See In re Texaco Inc.*, 84 B.R. 893, 905 (Bankr. S.D.N.Y. 1988) ("In determining whether a plan complies with section 1129(a)(1) [of the Bankruptcy Code], reference must be made to [Bankruptcy] Code §§ 1122 and 1123 with respect to the classification of claims and the contents of a plan of reorganization"), appeal dismissed, 92 B.R. 38 (S.D.N.Y. 1988).

a. The Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code

Section 1122 requires that Claims placed in the same Class be substantially similar.[4] The Plan complies with section 1122, as each Class contains substantially similar Claims and each Class of Claims and Interests differs from each other Class in either a legal or factual nature such that classification has not been used for gerrymandering purposes. Notably, if Classes 3 and 4 were combined to one class, it would have no effect on the voting outcome of the Plan.

Here, the Plan separately classifies Claims arising from the Debtors' secured debt in Class 2A (Secured Claims of ECD) and Class 2B (Secured Claims of Wieland-Davco Corporation). The Plan also separately classifies two unsecured creditor groups—Class 3 (General Unsecured Claims) and Class 4 (Warranty Claims)—based on the nature of their Claims and expectations of such claimants.

Bankruptcy courts have broad discretion to determine classifications. Classification of unsecured claims is measured by a flexible standard in the Sixth Circuit.[5] In fact, it is well recognized that "[s]ection 1122(a) does not demand that all similar claims be in the same class."[6] Similar classes may be classified separately for section 1122(a) purposes so long as there is a business justification for the separate classification.[7]

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[4] 11 U.S.C. § 1122(a) ("Except as provided in subsection (b) of this section, 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.").

[5] *See In re U.S. Truck Co., Inc.*, 800 F.2d 581, 586-87 (6th Cir. 1986).

[6] *In re Dow Corning Corp.*, 280 F.3d 648, 661 (6th Cir. 2002).

[7] *See In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996) (permitting separate classification of similar claims for business reasons, finding that "classification is constrained by two straight-forward rules: Dissimilar claims may not be classified together; similar claims may be classified separately only for a legitimate reason.").

Here, the Plan's classification structure is straightforward and complies with section 1122(a) of the Bankruptcy Code. Each secured claim is separately classified as it has different sorts of collateral. Also, general unsecured claims are separately classified from warranty claimants because warranty claimants have generally accepted repair and replacement, instead of money, as a contractual remedy. The Claims in each Class described above are substantially similar in nature to the other Claims in that Class. Accordingly, the classification structure embodied in the Plan complies with section 1122 of the Bankruptcy Code.

Sunway 2, LLC, Sunway 3, LLC, and Metecno Industrie S.p.A. have alleged that the classification is improper and amounts to impermissible gerrymandering. The Debtors believe these objections have been resolved.

b. The Plan Satisfies the Seven Mandatory Plan Requirements of Sections 1123(a)(1) – (a)(7) of the Bankruptcy Code

The Plan meets the seven mandatory requirements of section 1123(a). Specifically, sections 1123(a)(1)-(7) require that a plan:

i. designate classes of claims and interests, with certain exceptions;

ii. specify unimpaired classes of claims and interests;

iii. specify the treatment of impaired classes of claims and interests;

iv. provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim agrees to a less favorable treatment of its particular claim or interest;

v. provide adequate means for the plan's implementation;

vi. provide for the prohibition in the charter of issuance of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and

vii. contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors.

i. The Plan Designates Classes of Claims and Interests (Section 1123(a)(1))

The Plan satisfies the first requirement of section 1123(a) by designating Classes of Claims and Equity Interests, subject to the exceptions listed under this provision—i.e., Administrative Expense Claims, Priority Tax Claims, and United States Trustee Fees are not classified. *See* Article II and III of the Plan.

ii. The Plan Specifies Unimpaired Classes of Claims and Interests (Section 1123(a)(2))

The Plan satisfies the second requirement of section 1123(a) by specifying the Classes of Claims that are unimpaired under the Plan. *See* Article II of the Plan.

iii. The Plan Specifies the Treatment of Impaired Classes of Claims and Interests (Section 1123(a)(3))

The Plan satisfies the third requirement of section 1123(a) by specifying the treatment of each Class of Claims and Equity Interests that are impaired. *See* Article II of the Plan.

iv. The Plan Provides the Same Treatment for Each Claim or Interest in Particular Class (Section 1123(a)(4))

The Plan also satisfies section 1123(a)(4)—the fourth requirement of section 1123—because the treatment of each Claim or Equity Interest within a Class is the same as the treatment of each other Claim or Equity Interest in that Class. Each Allowed Class 1 Priority Claim will be paid in full. The Class 2A Claim will be eliminated. The Class 2B Claim will be paid in full. Each Allowed Class 3 Claim is to receive a pro rata share of the Liquidation Trust and the Distributions pursuant to the Plan. Each Allowed Class 4 Claim will receive cash or inventory in an amount not to exceed the Warranty Claimant Percentage Amount. The Class 5 Interests is expected to receive no distribution.

v. The Plan Provides Adequate Means for Its Implementation (Section 1123(a)(5))

Article IV and various other provisions of the Plan provide adequate means for the Plan's implementation, thus satisfying the fifth requirement of section 1123(a). The provisions of Article IV of the Plan relate to, among other things: (a) substantive consolidation of the Estates; (b) preservation of certain of the Debtors' Causes of Action; (c) vesting of all of the Debtors' assets, including certain Causes of Action, in the Liquidation Trust; (d) creation of a Warranty Trust, which is sub-trust of the Liquidation Trust, to satisfy Allowed Warranty Claims; (e) sale of the Debtors' remaining assets by the Liquidation Trustee; and (f) the distribution of cash to the beneficiaries of the Liquidation Trust upon liquidation of the Liquidation Trust's assets.

vi. The Plan Prohibits the Issuance of Nonvoting Equity Securities (Section 1123(a)(6))

The sixth requirement of section 1123(a)—i.e., that a plan prohibit the issuance of nonvoting equity securities—is also met. Holders of Claims will receive only cash distributions, inventory, and beneficial interests in the Liquidation Trust.

vii. The Plan's Provisions for Selecting Directors and Officers are Consistent with Stakeholders' Interests and Public Policy (Section 1123(a)(7))

Finally, section 1123(a)'s seventh element, which requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan . . . ." does not apply to the Plan because it is a liquidating plan. The Committee and the U.S. Trustee have alleged that the liquidating trust structure is inadequate. The Liquidating Trustee, however, assumes all of the duties, responsibilities, and obligations of the Debtors owed to the creditors, and therefore is duty-bound to act for the benefit of all creditors. Thus, the structure of the liquidation trust is adequate to protect the interest of creditors and complies with 11 U.S.C. § 1123(a)(7).

c. Discretionary Contents of the Plan

Section 1123(b) of the Bankruptcy Code identifies various additional provisions that may be included in a chapter 11 plan. For example, a plan may either impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. 11 U.S.C. § 1123(b).

A plan may also "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6).

The Plan contains certain such additional provisions. In particular, the Plan provides for the release of certain Causes of Action of the Debtors and their estates and limited releases by holders of Claims, an injunction precluding holders of Claims from asserting their prepetition claims against the Debtors, and the exculpation of claims for certain parties. The Committee and the U.S. Trustee have objected to these provisions. U.S. Bank has also objected to these provisions. The response to these objections is included in Sections V.B and V.C.

2. The Debtors have Complied Fully with the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(2))

Section 1129(a)(2) of the Bankruptcy Code requires that a plan proponent comply with all applicable provisions of the Bankruptcy Code. The legislative history and cases discussing section 1129(a)(2) indicate that Congress enacted the provision to ensure that a plan proponent complies with the applicable provisions of chapter 11, including the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code.[8] The Debtors have complied

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[8] *See, e.g.*, *In re Sentinel Mgmt. Group, Inc.*, 398 B.R. 281, 303 (Bankr. N.D. Ill. 2008) ("Section 1129(a)(2) requires that the plan comply with the applicable provisions of Title 11." The

with the applicable provisions of the Bankruptcy Code, including sections 1125 and 1126 of the Bankruptcy Code, as well as Bankruptcy Rules 3017 and 3018.

i. The Plan Proponents Have Complied with the Disclosure and Solicitation Requirements of Section 1125

Section 1125 of the Bankruptcy Code prohibits the solicitation from a holder of a claim or interest of acceptances or rejections of a plan of reorganization "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). On June 7, 2012, this Court entered the *Order Granting Debtors' Motion for Entry of an Order (I) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, Including (A) Approving Form of Solicitation Procedures, (B) Approving the Form and Notice of the Confirmation Hearing, (C) Establishing Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing Deadline for Receipt of Ballots, and (F) Approving Procedures for Vote Tabulations; (II) Establishing Deadline and Procedures for Filing Objections to Confirmation of the Plan; and (III) Granting Related Relief* [Docket No. 687] (the "**Solicitation Procedures Order**"). As set forth in the Certification of Angela M. Nguyen With Respect to The Tabulation of Votes on the Second Amended Joint Plan of Liquidation of Energy Conversion Devices, Inc. and United Solar Ovonic LLC ("**Voting Certificate**"), the Debtors' balloting agent, Kurtzman Carson Consultants LLC ("**KCC**") distributed the Solicitation Packages (as defined in the Solicitation Procedures Order) and

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legislative history of section 1129(a)(2) indicates a focus on the applicable provisions of chapter 11 such as section 1125 regarding disclosure and "Courts have focused on a plan proponent's compliance with the disclosure and solicitation requirements of §§ 1125 and 1126."); *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000).

solicited acceptance of the Plan in accordance with the Solicitation Procedures Order. See Voting Certificate. Therefore, the Debtors have complied with section 1125 of the Bankruptcy Code.

Ovonyx, Inc. objects that the Disclosure Statement does not provide adequate information. A response to this objection is discussed in Section V.A below.

ii. The Plan Proponents Have Complied with the Plan Acceptance Requirements of Section 1126

Section 1126 of the Bankruptcy Code provides that only holders of allowed claims and equity interests in impaired classes that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject a plan. As set forth in the Plan, the Disclosure Statement and the Voting Certificate, in accordance with section 1126 of the Bankruptcy Code, the Debtors solicited acceptances and rejections of the Plan from the holders of all Allowed Claims in each Impaired Class under the Plan (Classes 2A, 3, and 4) (collectively, the "**Voting Classes**"). Classes 1 and 2B are Unimpaired under the Plan. Thus, pursuant to section 1126(f) of the Bankruptcy Code, holders of Claims in Classes 1 and 2B are not entitled to vote on the Plan and are conclusively deemed to have accepted the Plan. Class 5 is impaired under the Plan and will not receive any distributions or retain any property under the Plan. Accordingly, pursuant to section 1126(g) of the Bankruptcy Code, holders of Equity Interests in Class 5 are not entitled to vote on the Plan and are deemed to have rejected the Plan.

With respect to the Voting Classes, section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of [section 1126], that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of [section 1126], that have accepted or rejected the plan.

11 U.S.C. § 1126(c).

The Voting Certificate details the results of the voting process in accordance with section 1126 of the Bankruptcy Code.

As detailed above, Classes 2A, 3, and 4 of each Debtor have accepted the Plan. Accordingly, the Debtors respectfully submit that they have complied with the provisions of the Bankruptcy Code and, in particular, the provisions of sections 1125 and 1126, and therefore have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.

3. The Plan has been Proposed in Good Faith and not by Any Means Forbidding by Law (Section 1129(a)(3))

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). Although not defined in the Bankruptcy Code, good faith is generally interpreted to mean that a plan "will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[9] While good faith is a "fuzzy concept," good faith is typically "defined by factual inquiry."[10]

The Debtors proposed the Plan in good faith and not by any means forbidden by law. Consistent with the overriding purpose of chapter 11 of the Bankruptcy Code, the Debtors believe that the Plan enables holders of Claims to realize the highest possible recoveries under the circumstances of these Chapter 11 Cases in the most efficient manner. Moreover, the Debtors are not aware of any viable alternative that would allow recoveries equal to or greater

[9] *In re Dow Corning Corp.*, 244 B.R. 673, 675 (Bankr. E.D. Mich. 1999), aff'd, 255 B.R. 445 (E.D. Mich. 2000), aff'd, 280 F.3d 648 (6th Cir. 2002); In re Madison Hotel Assocs., 749 F.2d 410, 424-25 (7th Cir. 1984) (to find good faith, the issue is whether the plan has been proposed with a legitimate and honest purpose and "that there exists a 'reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'").

[10] *In re Dow Corning Corp.*, 244 B.R. at 675, citing *In re Laguna Assoc. Ltd. P'ship*, 30 F.3d 734, 738 (6th Cir. 1994).

than those projected for creditors under the Plan. Rather, all other alternatives would result in lower recoveries for all claimants receiving distributions under the Plan. Accordingly, under the circumstances of these Chapter 11 Cases, the Plan is consistent with the objectives and purposes of the Bankruptcy Code and was proposed in good faith and complies with section 1129(a)(3) of the Bankruptcy Code.

4. The Plan Provides for Bankruptcy Court Approval of Certain Administrative Payments (Section 1129(a)(4))

Section 1129(a)(4) of the Bankruptcy Code requires that payments for services or costs and expenses incurred in or in connection with a chapter 11 case, or in connection with a plan and incident to the case, either be approved by or be subject to approval of the court as reasonable. See 11 U.S.C. § 1129(a)(4). This section requires that all payments of compensation and reimbursement of expenses to professionals retained in a debtor's case be subject to bankruptcy court review and approval as to the reasonableness of such payments.

Article II of the Plan provides for payment of Allowed Administrative Expense Claims and Allowed Professional Fees in full in such amounts as are allowed by the Bankruptcy Court. In addition, Section 8.A of the Plan provides for the Bankruptcy Court's retention of jurisdiction to hear and determine all applications for compensation and reimbursement of expenses of Professional Fees in these Bankruptcy Cases. Therefore, the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

5. The Plan Discloses All Information regarding the Post-Emergency Directors and Officers (Section1129(a)(5))

Section 1129(a)(5) does not apply because the Debtors will be dissolved upon the Effective Date.

6. The Plan does not Require Governmental Regulatory Approval (Section 1129(a)(6))

Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation has approved any rate change provided for in the plan. 11 U.S.C. § 1129(a)(6). The foregoing provision is inapplicable in these Chapter 11 Cases. No regulatory commission has any jurisdiction over rate changes by the Debtors. Further, the Plan does not provide for rate changes by the Debtors. Therefore, the Plan satisfies the requirements of section 1129(a)(6) of the Bankruptcy Code.

7. The Plan is in the Best Interests of Creditors and Interest Holders (Section 1129(a)(7))

Section 1129(a)(7) of the Bankruptcy Code provides:

> (7) With respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

This section is commonly known as the "best interests" test. By its terms, it applies only to those holders that have not accepted a plan of reorganization. The best interests test is generally satisfied by a liquidation/recovery analysis showing that the class will receive no less under the plan than under a chapter 7 liquidation.[11] Here, the Plan satisfies the best interests test

[11] *See In re Adelphia Commc'ns. Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) (Section 1129(a)(7) satisfied when impaired holder of claim would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

with respect to all holders of Claims because it provides the highest, most prompt recovery while avoiding the costs and expenses associated with litigation.

The Committee has alleged that the Plan fails 11 U.S.C. § 1129(a)(8). The response to this objection is addressed in Sections V.B and V.C.

The Sunway Creditors and Metecno have also alleged that the Plain fails 11 U.S.C. § 1129(a)(8). The Debtors believe this objection has been resolved.

8. Acceptance of Impaired Class (Section 1129(a)(8))

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan. As set forth in the Voting Certificate, all of the Voting Classes accepted the Plan. Thus, section 1129(a)(8) of the Bankruptcy Code has been satisfied.

9. The Plan Complies with Statutorily Mandated Treatment of Administrative and Priority Tax Claims (Section 1129(a)(9))

Section 1129(a)(9) of the Bankruptcy Code requires that persons holding Claims entitled to priority under section 507(a) receive specified cash payments under the plan. 11 U.S.C. § 1129(a)(9). Unless the holder of a particular Claim agrees to a different treatment with respect to such Claim, section 1129(a)(9) of the Bankruptcy Code generally requires the plan to satisfy administrative and priority tax Claims in full in cash.

As required by section 1129(a)(9), Section 2.B.1 of the Plan provides for full payment of Allowed Administrative Claims (i) on the Effective Date or as soon as practicable thereafter; (ii) if such Claim is Allowed after the Effective Date, on the date such Claim is Allowed or as soon as practicable thereafter; (iii) at such time and upon such terms as may be agreed upon by such holder and the Debtors; or (iv) at such time and upon such terms as set forth in an order of the Bankruptcy Court. Further, Section 2.B.1 of the Plan provides for full payment of Priority

Claims (including priority tax claims) on the Effective Date. Therefore, the Debtors submit that the Plan complies with the requirements of section 1129(a)(9) of the Bankruptcy Code.

10. At Least One Impaired Class of Claims has Accepted the Plan Excluding the Acceptances of Insiders (Section 1129(a)(10))

Section 1129(a)(10) of the Bankruptcy Code is an alternative requirement to section 1129(a)(8)'s requirement. Here, the Debtors need not rely on section 1129(a)(10) to confirm the Plan.

11. The Plan is Feasible (Section 1129(a)(11))

Section 1129(a)(11) does not apply because the Debtors will be dissolved upon the liquidating plan.

12. The Plan Provides for the Payment of all Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12))

Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930. See 11 U.S.C. § 1129(a)(12). Section 2.B.2 of the Plan provides that the Debtors shall timely pay to the United States Trustee the appropriate sum required pursuant to 28 U.S.C. §1930(a)(6). The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code.

13. The Plan Complies with Section 1129(a)(13) of the Bankruptcy Code

Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue to be paid post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. See 11 U.S.C. § 1129(a)(13). The Debtors do not have any obligations on account of retiree benefits (as such term is used in section 1114) and, therefore, section 1129(a)(13) is inapplicable to the Chapter 11 Cases. Accordingly, the Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code.

V. Responses to Objections

A. The Disclosure Statement contains adequate information.

Ovonyx, Inc. ("**Ovonyx**") has objected to final approval of the Disclosure Statement as not containing adequate information. Ovonyx's objection relates specifically to a provision in the Disclosure Statement addressing a Stockholders Agreement dated February 4, 2000 among Ovonyx, ECD, Intel Corporation and Tyler Lowery, which relates to ECD's interest in Ovonyx (the "**Stockholders Agreement**"). The provision in question states: "the Stockholders Agreement may be an executory contract that could be assumed or rejected." Ovonyx argues that the Stockholders Agreement is not an executory contract and cannot be assumed, and therefore this one sentence of the Disclosure Statement makes the entire Disclosure Statement inadequate to enable a hypothetical investor to make an informed judgment about the Plan. Ovonyx's objections must be overruled because the referenced statement is accurate: the Stockholders Agreement is executory and can be assumed. Even assuming, *arguendo*, that the statements were not accurate, these statement are immaterial to evaluating the Plan.

1. The Stockholders Agreement is an executory contract.

Stockholders agreements are executory contracts because they impose continuing obligations relative to managing the corporation to which they relate. *In re Vecchitto*, 235 B.R. 231 (Bankr. D. Conn. 1999) (stockholders agreements that impose, under certain circumstances, obligations on shareholders to sell shares in the corporation, and on the corporation to buy such shares, are executory contracts for purposes of the Bankruptcy Code). *In re Parkwood Realty Corp.*, 157 B.R. 687, 689 (Bankr. W.D. Wash. 1993) (holding that stockholders agreement is an executory contract). The Stockholders Agreement in this case imposes various continuing obligations on each party thereto, including, without limitation, obligations requiring each party to vote its shares in a certain manner, a right of first refusal and an obligation to consent to certain sale transactions of the stock. The failure of any party to perform any of these obligations would excuse each other party from performing under the Stockholders Agreement.

An executory contract is generally defined, under the *Countryman* definition, as a contract with performance due on both sides, such that the failure of one party to perform would excuse the other party from performing. The Sixth Circuit applies a functional approach to determine whether a contract is executory, looking at what the debtor expects to accomplish by assumption or rejection. *In re Magness*, 972 F.2d 689, 694 (6^{th} Cir. 1992). A court might find a contract executory under the functional approach which might not be found executory under the *Countryman* definition. *Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 952-53 (D. Ohio 1997). ECD's ability under the Stockholders Agreement to appoint two board seats is beneficial to the estate, thereby qualifying this contract as an executory contract which can be assumed under the functional approach. Even under the stricter *Countryman* definition, as noted above, the Stockholders Agreement qualifies as an executory contract because it imposes various continuing and material obligations on each of the parties.

2. The alleged termination of the right to appoint a director is an impermissible restriction on the assignment of an executory contract.

The Bankruptcy Code generally renders unenforceable restrictions on the assignment of executory contracts. Section 365(f) of the Bankruptcy Code authorizes the assignment of an executory contract even if the contract otherwise prohibits the assignment. 11 U.S.C §365(f) ("[N]otwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph 2 of this subsection.") The purported termination of the right to appoint board members of the Stockholder Agreement is a restriction on transfer that is unenforceable under Section 365(f) of the Bankruptcy Code.

3. Even if the Stockholders Agreement cannot be assumed and the right to appoint directors terminates, such provision are immaterial to the Plan.

The enforceability of one provision of the Stockholders Agreement is not material to the overall evaluation of the Plan by a hypothetical investor. The value of the Ovonyx shares make up only a small portion of the overall value of the assets to be distributed under the Plan. Moreover, the impact of the assignability of the Stockholders Agreement can only be a subset of the total value attributable to the Ovonyx shares.

B. The Releases Are Appropriate

1. The releases of Debtors' claims are a valid exercise of debtors' business judgment.

Sections X(B)(3) and (4) of the Plan provide for release by the Debtors of all claims (other than avoidance actions or for actions for gross negligence or willful misconduct) relating in any way to the Debtors or their Chapter 11 Cases against the Debtors' present and former directors, officers, employees, agents, financial advisors, attorneys and professionals, the Ad Hoc Consortium and its members, the Committee and its members and any of their respective employees, agents, financial advisors, attorneys and professionals (collectively, the "**Released Parties**"). The releases set forth in Sections X(B)(3) and (4) of the Plan (the "**Debtors' Releases**") expressly reserve, and do not release, avoidance actions or actions for gross negligence or willful misconduct.

The Debtors' Releases are proper and should be approved. Under 11 U.S.C. §1123(b)(3)(A), a plan under Chapter 11 of the Bankruptcy Code may provide for "the settlement or adjustment of any claim or interest belonging to debtor or the estate." Plan releases of debtors' claims are evaluated under the deferential business judgment standard. *In re DBSD N. Am. Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) ("The releases and discharges of claims and causes of action by the Debtors, pursuant to Section 1123(b)(3)(A) of the Bankruptcy Code represent a valid exercise of the Debtors' business judgment, and are fair, reasonable and in the best interests of the estate."), *aff'd in part, rev'd in part on other grounds*, 627 F.3d 496 (2d Cir. 2010).

Debtors propose to release their claims based on a sound exercise of their business judgment. The Debtors' Releases are in the best interests of their Estates and well within the Debtors' business judgment because the Debtors' Releases are an integral part of the negotiated Plan and the Plan Support Agreement. Most important, the Debtors do not believe that they have any valid claims or causes of action against the Released Parties.

The Released Parties afforded value to the Debtors and their estates by aiding in the reorganization, including preparing the schedules, pleadings, moving the case along quickly, and negotiating with parties in interest to formulate the Plan, which garnered overwhelming support, including by, among others, the Committee. In particular, the Ad Hoc Consortium Released Parties contributed value by their support of attempts to sell the Debtors as a going concern, and their support for substantive consolidation, which results in a substantially lower recovery to the Ad Hoc Consortium Released Parties and a substantially higher recovery to the creditors of USO. Moreover, the Plan reflects the settlement and resolution of several complex issues, and the Debtors' Releases are an integral part of the consideration to be provided in exchange for the compromises and resolutions embodied in the Plan and Plan Support Agreement. Indeed, the Debtors' Releases were critical components of and a threshold item for the Debtors' ability to effectuate their Plan. Further, even if claims or causes of action against the Released Parties arguably exist, litigation would not provide sufficient benefits to outweigh the costs, expenses and delay. The Debtors' Releases are also narrowly tailored to exclude claims for willful misconduct or gross negligence, so that claims based on any such acts are not released.

The Debtors' Releases are similar to releases commonly approved by Bankruptcy Courts in other districts. *See, e.g., In re Readers Digest Ass'n, Inc.*, No. 09-23529 (Bankr. S.D.N.Y. Jan. 19, 2010) [Docket No. 537]; *In re Charter Commc'ns, Inc.*, No. 09-11435 (Bankr. S.D.N.Y. Nov. 17, 2009) [Docket No. 921]; *In re Frontier Airlines Holdings, Inc.*, No. 08-11298 (Bankr. S.D.N.Y. Sept. 10, 2009) [Docket No. 1069]; *In re Delphi Corp.*, No. 05-44481 (Bankr. S.D.N.Y. July 30, 2009) [Docket No. 18707]; *In re Calpine Corp.*, No. 05-60200 (Bankr. S.D.N.Y. Dec. 19, 2007) [Docket No. 7256]; *In re Tower Auto., Inc.*, No. 05-10578 (Bankr. S.D.N.Y. July 9, 2007) [Docket No. 2932].

The Debtors' Releases are a well-considered, reasonable and valid exercise of the Debtors' business judgment. The Debtors' Releases are consistent with applicable law and precedent, and represent a valid settlement under §1123(b)(3)(A) of whatever claims or causes of action the Debtors may have against the Released Parties. The Debtors' Releases should be approved.

2. The Exculpation is proper

Section X(F) of the Plan exculpates the Released Parties to the fullest extent permitted by law relating to the Debtors or the Chapter 11 Cases (the "**Exculpation**"). The Exculpation excludes claims for obligations arising under the Plan and acts of gross negligence or willful misconduct.

An exculpation is not a release. Instead, a plan exculpation provision sets the standard of care in future litigation for acts arising out of the restructuring. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (reasoning that an exculpation provision did not affect third-party liability against the exculpated parties but rather "set[] forth the appropriate standard of liability" for the exculpated parties); *see also Calpine Corp.*, 2007 WL 4565223, at *10 (Bankr. D. Del. December 17, 2007) (finding that an exculpation provision that did not relieve any party of liability for gross negligence or willful misconduct was appropriate); *In re Enron Corp.*, 326 B.R. 501, 503-04 (Bankr. S.D.N.Y. 2004) (holding an exculpation provision was appropriate where such provision excluded gross negligence and willful misconduct.) Additionally, where a court confirms a plan proposed in good faith, it is appropriate to set the standard of liability for those involved in the negotiation and formulation of that plan. *See PWS Holding*, 228 F.3d at 24 (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity" for "actions within the scope of their duties"); *accord In re Worldcom, Inc.*, 2003 WL 23861928, at *28 (Bankr. S.D.N.Y. Oct. 31, 2003) (approving exculpation that excluded gross negligence to effectuate the plan).

Accordingly, exculpation clauses appropriately prevent future collateral attacks against parties that have made substantial contributions to a debtor's reorganization. Generally, three categories of parties are appropriate candidates for exculpation: (a) parties indemnified by the estate for their services; (b) parties to unique transactions that contribute substantial consideration to the reorganization; and (c) any party when the exculpation provision is consensual and those voting had full notice. *Adelphia Communications Corp.*, 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2002). The bankruptcy court has authority and discretion to determine whether causes of action against parties representing the estate can go forward and, accordingly, determine the standard of care in such lawsuits under the court's equity power to serve the ends of justice, 28 U.S.C. § 959(b), or the Barton Doctrine, *see In re DeLorean Motor Co.*, 991 F.2d 1236 (6th Cir. 1993). *See also* 11 U.S.C. § 105(a) (court has power to issue any order which is necessary or appropriate to carry out the Bankruptcy Code); 11 U.S.C. § 1123(b)(6) (plan can include any appropriate provision not inconsistent with the Bankruptcy Code).

The Exculpation is vital to the Chapter 11 Cases because the Debtors were able to formulate the Plan after negotiating extensively with the Ad Hoc Consortium in good faith in the months leading up to the Petition Date. Negotiation and compromise were crucial to the formulation of a feasible Plan and could not have occurred without the protection from liability that the Exculpation provides to the constituents involved. Further, the Exculpation, including the carve-out for gross negligence and willful misconduct, is consistent with established practice. For example, in *In re Oneida Ltd.*, 351 B.R. 79, 94, n.22 (Bankr. S.D.N.Y. 2006) the court approved an exculpation provision that covered prepetition lenders, DIP lenders, creditor committees and their members, and the respective affiliates of each, except in cases of gross negligence, willful misconduct, fraud, or criminal conduct over an objection that was raised but "not pursue[d] at the confirmation hearing." The *Oneida* court noted that the language "generally follows the text that has become standard in this district, is sufficiently narrow to be unexceptional." As in *Oneida*, the Exculpation should be approved.

3. Third Party Releases

The Plan contains two releases of creditors and equity holder claims against third parties. One release only applies to those parties who expressly grant it. The other is a crucial element of the Plan such that, if the Plan is confirmed, the release is approved and binds all creditors and equity holders. Both third party releases should be approved.

a. The Consensual Third Party Releases.

Section X(B)(1) includes a release of the Released Parties, other than the Ad Hoc Released Parties, that applies only to those holders of a Claim or interests who expressly vote in favor of the release (the "**Consensual Release**"). The Consensual Release is fully consensual. Only creditors voting to accept the release are granting the Consensual Release. This was set forth prominently in the Disclosure Statement, the Plan and the ballots soliciting votes on the

Plan. Thus, all creditors voting to accept or reject the Plan had adequate notice that they could, independent of however they voted on the Plan, vote to accept or reject the Consensual Release. A release is entirely appropriate when the creditor granting the release affirmatively consents to the release. *See e.g., In re Metromedia Fiber Network, Inc.*, 416 F3d 136, 142 (2nd Cir. 2005) (approving nondebtor release to which affected creditors consented); *In re Specialty Equip. Co.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (noting that "courts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code"); *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (concluding that "a third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan").

Accordingly, the Consensual Release should be approved.

b. Third Party Releases of The Ad Hoc Consortium are Justified

Section X(B)(2) of the Plan provides for a release of claims and causes of action held by Holders of Claims or Interests against the Ad Hoc Consortium and its members (the "**Ad Hoc Consortium Released Parties**") arising out of the Chapter 11 Cases or relating to the Debtors (the "**Ad Hoc Consortium Release**"), with a carve out for contractual obligations of the Ad Hoc Consortium Released Parties or claims arising from their gross negligence or willful misconduct.[12] Approval of the Ad Hoc Consortium Release is a condition to confirmation of the Plan. Under the Plan Support Agreement, if the Ad Hoc Consortium Release is not approved, the Ad Hoc Consortium Released Parties are entitled to withdraw their approval of the Plan. The claims of the Ad Hoc Consortium Released Parties constitute over ninety (90%) percent of the

[12] The Debtors Releases of causes of action against the Ad Hoc Consortium Released Parties expressly carve out and preserves Avoidance Actions. Plan Section X(B)(3). Avoidance Actions do not belong to creditors and interest holders and cannot be released by them.

allowable unsecured claims against ECD. Without their approval, the Plan cannot be confirmed and there would be no substantive consolidation.

The Ad Hoc Consortium Released Parties' support for the substantive consolidation of the estates justifies the Ad Hoc Consortium Release. Under the Plan, USO creditors share in the assets of ECD, and ECD agrees not assert a claims against USO, which claims could be over $700 million. The Committee estimates that the substantive consolidation made possible by the Ad Hoc Consortium Released Parties increases the distribution to USO creditors to an estimated forty (40%) percent to fifty (50%) percent, compared to only an estimated eleven (11%) percent to forty-one (41%) percent distribution without consolidation. *See* Letter (Docket No. 838 at p. 2). This increase to the USO creditors comes at the expense and detriment of the Ad Hoc Consortium Released Parties, reducing their distribution, according to the Committee, from an estimated fifty-five (55%) percent to fifty-seven (57%) percent, to only an estimated forty (40%) to fifty-four (54%) percent. *Id*. at p. 3. The substantive consolidation also obviates the need for litigation over inter-company transfers and resolves ECD's claims of over $700 million against USO.

The Ad Hoc Consortium Released Parties' support of the substantive consolidation Plan is an unusual circumstance that justifies releasing creditors' claims against the Ad Hoc Consortium Released Parties. In *In re Dow Corning Corporation*, 280 F. 3d 648, 656 (6^{th} Cir. 2002), *cert. denied*, 519 U.S. 1071 (1997), the United States Court of Appeals for the Sixth Circuit recognized that Bankruptcy Courts have authority to enjoin a non-consenting creditors' claims against a non-debtor to facilitate confirmation of a plan. In *Dow Corning*, the Sixth

Circuit listed factors justifying such an injunction (which functions as a release)[13], which in essence are a weighing and balancing of the equitable factors of the detriment to creditors of the release against the benefit to creditors given by released parties.

The Ad Hoc Consortium Released Parties contributed substantial assets to the Plan by substantive consolidation, and will prevent confirmation if the Ad Hoc Consortium Release is not approved. The various classes overwhelmingly, by more than ninety (90%) percent, have voted in favor of the Plan. The Plan increases the distribution to USO creditors by over $10,000,000, giving them a better opportunity to recover than if the Plan is not confirmed, and unmeritorious threatened actions against the Ad Hoc Consortium Released Parties were preserved and prosecuted. The release of the Ad Hoc Consortium Released Parties should be confirmed.

Moreover, the Ad Hoc Consortium Release is caveated by the phrase "and to the fullest extent permissible under applicable law." This savings clause means the Ad Hoc Consortium

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[13] The *Dow Corning* factors justifying a release are:

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

Id. at 658.

Release will be enforced against nondebtors only to the extent it is later determined by a court that the release is enforceable under applicable laws.

C. The Releases Are An Essential Part of the Plan Support Agreement and Cannot be Severed.

The Official Committee of Unsecured Creditors has taken the position that the release provision in the Plan Support Agreement is unenforceable under the Bankruptcy Code and that, pursuant to the severability clause in the Plan Support Agreement, the Release Provisions should be severed from the Plan Support Agreement with the remaining provisions enforced against the Ad Hoc Consortium of the parties. The Release Provisions cannot be severed from the Plan Support Agreement because they are an integral, essential part of the exchange.

Under section 184 of the Restatement (Second) of Contracts, a court can only sever and enforce a portion of a contract if, among other things, the excised terms were "not an essential part of the agreed exchange." RESTATEMENT (SECOND) OF CONTRACTS § 184 (1981). "If the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable." *Id.* at cmt. a. Michigan courts—including the Michigan Supreme Court—have embraced the Restatement rule. *Stokes v. Millen Roofing Co.*, 466 Mich. 660, 666 (Mich. 2002) (citing to the Restatement and holding that a contract is "entire and indivisible" where the illegal provision "was central to the parties' agreement"); *AFSCME v. Detroit*, 267 Mich. App. 255, 262 (Mich. Ct. App. 2005) (citing *Stokes*).

The Release Provisions are an essential part of the Plan Support Agreement. One of the overriding purposes of the Plan Support Agreement was to avoid costly and unnecessary litigation through a final settlement of claims between the major parties to the agreement. The Ad Hoc Consortium and the other Release Parties would certainly not have executed the Plan

Support Agreement without these provisions, and it would be inequitable to enforce the remaining terms without providing the corresponding release. Thus, because the Release Provision are an essential part of the agreed exchange, they cannot be severed from the Plan Support Agreement.

VI. Conclusion

Thus, given the fully consensual nature of the Plan, the impressive liquidation initiatives accomplished by the Debtors in these cases, and the clear satisfaction of the statutory confirmation requirements, the Debtors respectfully request that this Court confirm the Plan.

Respectfully submitted,

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