Docket #0311 Date Filed: 07/25/2018

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

| | | |
|---|---|---|
| In re: | ) | Chapter 11 |
| ENDURO RESOURCE PARTNERS LLC, *et al.*, | ) | Case No. 18-11174 (KG) |
| Debtors.[1] | ) | (Jointly Administered) |

**DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE JOINT PLAN OF LIQUIDATION OF ENDURO RESOURCE PARTNERS LLC AND ITS DEBTOR AFFILIATES UNDER CHAPTER 11 OF THE BANKRUPTCY CODE**

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's United States federal tax identification number, if applicable, or other applicable identification number, are: Enduro Resource Partners LLC (6288); Enduro Resource Holdings LLC (5571); Enduro Operating LLC (7513); Enduro Management Company LLC (5932); Washakie Midstream Services LLC (7562); and Washakie Pipeline Company LLC (7798). The debtors' mailing address is 777 Main Street, Suite 800, Fort Worth, Texas 76102.


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## PRELIMINARY STATEMENT

1. This Memorandum of Law (this "***Memorandum***")[2] in support of confirmation of the *Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* [Docket No. 202] (as may be amended or modified from time to time, the "***Plan***") filed by the above-captioned debtors and debtors-in-possession in these chapter 11 cases (collectively, the "***Debtors***"), by and through their undersigned attorneys, presents an analysis of the issues regarding confirmation of the Plan pursuant to section 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "***Bankruptcy Code***").

2. As provided in detail below and in the Confirmation Declarations,[3] the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and is unanimously supported by every single creditor that timely submitted a ballot. Only three objections have been filed to date in connection with confirmation of the Plan. The Debtors' responses to these objections are set forth in the *Debtors' Omnibus Reply to Objections to Confirmation of the Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (the "***Reply***"), filed contemporaneously herewith. As set forth in detail in the Reply, the Debtors believe all of the objections, to the extent not resolved by agreement, should be overruled.[4] Accordingly, the Debtors submit that the Plan should be confirmed.

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2 Unless otherwise noted, capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan.

3 As used herein, the *Declaration of Kimberly Weimer in Support of Confirmation of the Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (the "***Weimer Declaration***"), the *Declaration of David Jansing Baker in Support of Confirmation of the Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (the "***Baker Declaration***"), and the *Declaration of James A. Grady in Support of Confirmation of the Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* (the "***Grady Declaration***"), and the Voting Report (as defined below), collectively, the "***Confirmation Declarations***."

4 The objections to the Plan and the Debtors' responses thereto are addressed in the Reply, filed contemporaneously herewith.

## BACKGROUND

3. On May 15, 2018 (the "***Petition Date***"), the Debtors filed voluntary petitions in this Court commencing cases (the "***Chapter 11 Cases***") for relief under chapter 11 the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors in possession under sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested in the Chapter 11 Cases, and no committees have been appointed. On May 17, 2018, the Court entered an order [Docket No. 57] authorizing the joint administration and procedural consolidation of the Chapter 11 Cases pursuant to Bankruptcy Rule 1015(b).

4. The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the *Declaration of Kimberly A. Weimer, Vice President and Chief Financial Officer of Enduro Resource Partners LLC, In Support of Chapter 11 Petitions and First Day Motions* [Docket No. 11], which is fully incorporated herein by reference.

5. By order entered on June 11, 2018 [Docket No. 168] (the "***Bid Procedures Order***"), this Court approved the bidding procedures for a sale of all or a portion of the Debtors' assets. In accordance with the Bid Procedures Order, a hearing to approve the Debtors' proposed sale of their assets was held on July 20, 2018. At the conclusion of that hearing, this Court approved the sale of substantially all of the Debtors' assets pursuant to four separate orders corresponding to the Debtors' four asset packages [Docket Nos. 290, 291, 292, 293].

6. By order dated June 18, 2018 [Docket No. 199], the Court approved the Disclosure Statement and certain solicitation procedures (the "***Solicitation Procedures***"). On June 20, 2018, the Debtors filed the *Disclosure Statement for Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code* [Docket No. 203] (the "***Disclosure Statement***"). On July 9, 2018, as contemplated by the Plan and the Disclosure Statement, the Debtors filed drafts of the documents comprising the Plan Supplement [Docket No. 251]. The Plan

Supplement contains the Plan Administration Trust Agreement, the Schedule of Retained Causes of Action, and the Wind Down Budget.

7. Contemporaneously with this Memorandum, the Debtors will file a further revised version of the Plan, reflecting technical modifications, including to address certain formal and informal objections to confirmation. None of the Plan modifications will adversely affect the treatment of those Classes of Claims that voted to accept the Plan.[5] Therefore, the modifications do not require the Debtors to re-solicit acceptances for the Plan.[6]

## ACCEPTANCE OF THE PLAN BY THE VOTING CLASSES

8. On July 25, 2018, the Debtors' notice, claims, and voting agent, Kurtzman Carson Consultants LLC (the "***Voting and Claims Agent***"), filed a report detailing the results of the Plan voting process.[7] As set forth more fully in the Voting Report, the Plan has been accepted ***unanimously*** by all creditors in voting classes—Classes 2, 3, and 4.

9. Creditors in Classes 1 are Unimpaired and deemed to have accepted the Plan. Therefore, Class 1 is not entitled to vote to accept or reject the Plan. Creditors and holders of Claims and Interests in Classes 5, 6, and 7 (collectively, the "***Deemed Rejecting Classes***") are Impaired and will receive no distribution under the Plan on account of their Claims or Interests. Therefore, Classes 5, 6, and 7 are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. As discussed below, the Debtors satisfy section 1129(b)'s "cramdown" requirements with respect to

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5 *See* 11 U.S.C. § 1127(a) ("The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.")

6 *See* Fed. R. Bankr. P. 3019(a); *In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988) ("[I]f a modification does not 'materially' impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.").

7 *See Certification of Andres A. Estrada With Respect to the Tabulation of Votes on the Joint Plan of Liquidation of Enduro Resource Partners LLC and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* (the "***Voting Report***"), filed contemporaneously herewith.

the Deemed Rejecting Classes, and such deemed rejection should not prevent the Court from confirming the Plan.

## THE PLAN SHOULD BE CONFIRMED

10. To confirm the Plan, the Court must find that the provisions of section 1129 of the Bankruptcy Code have been satisfied by a preponderance of the evidence.[8] The Debtors submit that based on the record of the Chapter 11 Cases, the Confirmation Declarations, and the Debtors' arguments set forth herein, the applicable burden is clearly satisfied and the Plan complies with all relevant sections of the Bankruptcy Code, Bankruptcy Rules, and applicable non-bankruptcy law. In particular, the Plan fully complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code. This Memorandum addresses each requirement individually.

### I. The Plan Complies with the Applicable Provisions of the Bankruptcy Code in Accordance with Section 1129(a)(1).

11. Section 1129(a)(1) of the Bankruptcy Code requires that a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. A principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan. Consequently, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of sections 1122 and 1123 of the Bankruptcy Code.[9] As explained below, the Plan complies with sections 1122 and 1123 in all respects.

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[8] *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006); *In re Tribune Co.*, 464 B.R. 126, 151-52 (Bankr. D. Del. 2011). Preponderance of the evidence has been described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true. *See Grogan* v. *Garner*, 498 U.S. 279, 286 (1991) ("The preponderance-of-the-evidence standard results in roughly equal allocation of the risk of error between litigants.") (citations omitted).

[9] *See In re S & W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) (determining that the provisions of section 1129(a)(1) of the Bankruptcy Code are aimed most directly at sections 1122 and 1123; *see also* S. REP. NO. 95-989, at 126 (1978); H.R. REP. NO. 95-595, at 412 (1977).

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

12. The Plan satisfies the classification requirements of section 1122 of the Bankruptcy Code. Section 1122 provides as follows:

> (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.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.[10]

13. Claims or interests in a class need not be identical but should be substantially similar in nature to each other.[11] The Third Circuit has recognized that plan proponents have significant flexibility in placing similar claims into different classes if there is a rational basis to do so.[12] Courts have identified grounds justifying separate classification, including where members of a class possess different legal rights[13] and where there are good business reasons for separate classification.[14]

14. The Plan's classification of Claims and Interests into seven Classes[15] satisfies the requirements of section 1122 because the Claims and Interests in each Class differ from the Claims and

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10 11 U.S.C. § 1122.

11 *In re DRW Prop. Co. 82*, 60 B.R. 505, 511 (Bankr. N.D. Tex. 1986).

12 *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (explaining that a classification is proper as long as each class represents a voting interest "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed").

13 *In re Kaiser Aluminum Corp.*, No. 02-10429, 2006 WL 616243, at *5–6 (Bankr. D. Del. Feb. 6, 2006) (permitting a classification scheme after consideration of the characteristics of each class and creditors' legal rights); *In re Coram Healthcare Corp.*, 315 B.R. 321, 348 (Bankr. D. Del. 2004) (noting that "Section 1122 . . . provides that claims that are not 'substantially similar' may not be placed in the same class; it does not expressly prohibit placing 'substantially similar' claims in separate classes").

14 *See Aetna Cas. & Sur. Co. v. Clerk of U.S. Bankr. Court (In re Chateaugay Corp.)*, 89 F.3d 942, 949 (2d Cir. 1996) (finding that the debtor must have a legitimate reason supported by credible proof to justify separate classification of similar, unsecured claims); *Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 10 F.3d 944, 956–57 (2d Cir. 1993) (finding separate classification appropriate because the classification scheme had a rational basis; separate classification based on bankruptcy court-approved settlement); *In re Magnatrax Corp.*, No. 03-11402, 2003 WL 22807541, at *4 (Bankr. D. Del. Nov. 17, 2003) (permitting separate classification based on valid business, factual and legal reasons).

15 The Plan contains seven Classes of Claims and Interests, designated as Classes 1 through 7. *See* Plan Art. III.

Interests in each other Class based on the different rights and attributes of the respective holders.[16] Thus, valid business, factual, and legal reasons exist for classifying separately the various Classes and Interests under the Plan. Additionally, each of the Claims or Interests in each particular Class is substantially similar to the other Claims or Interests in such Class. Thus, the Plan satisfies section 1122 of the Bankruptcy Code.

**B. The Plan Satisfies the Seven Plan Requirements of Section 1123(a) of the Bankruptcy Code.**

15. The Plan meets the seven mandatory requirements of section 1123(a) of the Bankruptcy Code. Specifically, section 1123(a) requires that a plan:

(1) designate classes of claims and interests;

(2) specify unimpaired classes of claims and interests;

(3) specify treatment of impaired classes of claims and interests;

(4) 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;

(5) provide adequate means for implementation of the plan;

(6) provide for the prohibition of the issuance of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and

(7) 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.[17]

16. Article III of the Plan satisfies the first three requirements of section 1123(a) by: (a) designating Classes of Claims and Interests, as required by section 1123(a)(1); (b) specifying the Classes of Claims and Interests that are Unimpaired under the Plan, as required by section 1123(a)(2); and (c) specifying the treatment of each Class of Claims and Interests that is Impaired, as required by section 1123(a)(3). The Plan also satisfies section 1123(a)(4)—the fourth requirement—because the

[16] *See* Plan Art. III.

[17] 11 U.S.C. § 1123(a).

treatment of each Claim or Interest within a Class is the same as the treatment of each other Claim or Interest within that Class, unless the holder agrees to a less favorable treatment on account of its Claim or Interest.

17. Article V and various other provisions of the Plan provide adequate means for the Plan's implementation, thus satisfying the fifth requirement, which is set forth in section 1123(a)(5) of the Bankruptcy Code.[18] Article V of the Plan and various other provisions of the Plan specifically provide for, among other things: (i) the establishment of a Plan Administration Trust for the purpose of winding down the Debtors' remaining Assets and distributing the proceeds as prescribed by the Plan; (ii) the ability, following confirmation and prior to the Effective Date, of the then-current officers and directors of each of the Debtors to execute such documents and take such other action as is necessary to effectuate the transactions provided for in the Plan; and (iii) the transfer and assignment, on the Effective Date, of the Debtors' remaining Assets to the Plan Administration Trust free and clear of all Liens, Claims, and Interests. As a result thereof, the requirements of section 1123(a)(5) of the Bankruptcy Code have been satisfied.

18. The sixth requirement of section 1123(a)—that a plan prohibit the issuance of nonvoting equity securities—does not apply to the Plan because it is a liquidating plan and, therefore, the Debtors are not seeking to issue any equity securities under the Plan.

19. Similarly, the seventh requirement of section 1123(a)—that a 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"[19]—

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[18] *See id.* at § 1123(a)(5); Plan Art. V. Section 1123(a)(5) specifies that adequate means for implementation of a plan may include: (A) retention by the debtor of all or part of its property; (B) the transfer of property of the estate to one or more entities; (C) merger or consolidation of the debtor with one or more persons; (D) sale or distribution of property of the estate; (E) satisfaction or modification of any lien; (F) cancellation or modification of any indenture; (G) curing or waiving of any default; (H) extension of a maturity date or a change in an interest rate or other term of outstanding securities; (I) amendment of the debtor's charter; or (J) issuance of securities for cash, for property, for existing securities, in exchange for claims or interests, or for any other appropriate purpose. 11 U.S.C. § 1123(a)(5).

[19] 11 U.S.C. § 1123(a)(7).

does not apply because the Plan does not propose to retain any of the Debtors' officers as officers of the post-confirmation Debtors.[20] After the Effective Date, the Plan Administrator will be authorized to file each Debtor's tax returns, pursue retained causes of action, and enact other duties on behalf of the Estates during the wind-down process in accordance with the Plan and the Plan Administration Trust Agreement.[21] The Plan Administrator is well qualified and was chosen with the input of the Consenting First Lien Lenders—the only party whose recoveries are impacted by post-Effective Date actions—after a competitive selection process. The Plan thus satisfies section 1123(a)(7) of the Bankruptcy Code.

**C. The Discretionary Contents of the Plan Are Appropriate.**

20. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan. For example, a plan may impair or leave unimpaired any class of claims or interests, provide for the assumption or rejection of executory contracts or unexpired leases,[22] provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate" or "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest,"[23] provide for the sale of substantially all of the property of the estate and for the distribution of the proceeds of any such sale,[24] "modify the rights of holders of secured claims . . . or . . . unsecured claims, or leave unaffected the rights of holders of any class of claims"[25] and may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[26]

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20 *See* Plan § V.J.

21 *See* Plan §§ V.D, V.E, and V.F.

22 11 U.S.C. § 1123(b)(1), (2).

23 *Id.* § 1123(b)(3)(A), (B).

24 *Id.* § 1123(b)(4).

25 *Id.* § 1123(b)(5).

26 *Id.* § 1123(b)(6).

21. Here, the Plan employs various provisions in accordance with section 1123(b)'s discretionary authority. For example, the Plan provides for treatment of Executory Contracts and Unexpired Leases,[27] provides a structure for Claim allowance and disallowance,[28] sets forth a process to distribute proceeds to holders of Allowed Claims through the establishment of the Plan Administration Trust,[29] and provides for the implementation of release, exculpation, and injunction provisions.[30]

**D. The Release, Exculpation, and Injunction Provisions Are Integral Components of the Plan.**

22. Article X of the Plan provides for releases to Debtors and certain other parties in interest, as well as exculpation and injunction provisions prohibiting parties from pursuing Claims and causes of action released under the Plan. These provisions are proper because, among other things, they are the product of arm's-length negotiations, are supported by substantial consideration provided by the beneficiaries thereof, have been critical to obtaining the support of the various constituencies for the Plan, and, as part of the Plan, and have received unanimous support from the creditors that voted for the Plan, including those creditors who would benefit from any proceeds of the potential Claims and causes of action released under the Plan. The releases, exculpation, and injunction provisions of Article X of the Plan are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and the Chapter 11 Cases. None of these provisions is inconsistent with the Bankruptcy Code, and therefore, the requirements of section 1123(b) of the Bankruptcy Code are satisfied. The principal terms of these provisions in Article X of the Plan are discussed below.

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27 *See* Plan Art. VI.

28 *See* Plan Art. VIII.A.

29 *See* Plan Art. V.D.

30 *See* Plan Art. X.

**1. The Releases**

23. The Plan provides for releases by the Debtors and by certain Holders of Claims and Interest for the benefit of the Released Parties, including with respect to any and all actions, causes of action (including Avoidance Actions), Claims, liabilities, obligations, rights, suits, debts, dues, sums of money, damages, reckonings, rights to legal remedies, rights to equitable remedies, rights to payment and claims, controversies, covenants, promises, judgments, remedies, demands, setoffs, defenses, recoupments, cross claims, counterclaims, third-party claims, indemnity claims, contribution claims, or any other claims, disputed or undisputed, suspected or unsuspected, foreseen or unforeseen, direct or indirect, choate or inchoate, existing or hereafter arising, in law, equity, or otherwise, based in whole or in part upon any act or omission or other event occurring prior to the Petition Date or during the course of the Chapter 11 Cases, including through the Effective Date and also includes, without limitation: (a) any right of setoff, counterclaim, or recoupment and any claim on contracts or for breaches of duties imposed by law or in equity; (b) the right to object to Claims or Interests; (c) any claim pursuant to section 362 of the Bankruptcy Code; (d) any claim or defense, including fraud, mistake, duress, and usury, and any other defenses set forth in section 558 of the Bankruptcy Code; and (e) any state law fraudulent transfer claim.[31]

24. As an initial matter, this Court has jurisdiction to grant the releases under its "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) and the Third Circuit's decision in *Pacor, Inc. v. Higgins*,[32] because the releases are integral to the consensual Plan.[33] Moreover, as explained below, the Debtor Releases and Releases by Holders of Claims and Interests are proper under section 1123(b)(3)(A) of the Bankruptcy Code, Bankruptcy Rule 9019, and applicable case law.

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31 *See* Plan Art. V.

32 743 F.2d 984 (3d Cir. 1984), *rev'd on other grounds.*

33 *See* Tr. of Hr'g Held on Apr. 20, 2006 at 114, *In re Freedom Rings, L.L.C.*, No. 05-14268 (Bankr. D. Del. May 9, 2006) (Docket No. 385) (CSS) ("[T]here is a jurisdictional nexus between the proposed releases to non-Debtor third parties and the Debtor. The entire Plan hinges on the releases, and the evidence is uncontroverted that without the releases, there is little prospect of confirming a Plan.").

**a. Debtor Releases**

25. Pursuant to the Plan and subject to the terms thereof and the Confirmation Order, the Debtors and their Estates will release certain entities from all of the Debtors' Claims and Causes of Action that have arisen on or prior to the Effective Date of the Plan against such entities, with certain exceptions. The Debtor Releases are contained in Article X.B of the Plan.

26. Each of the parties to be released by the Debtors is a stakeholder and/or a critical participant in the Plan process that is typically released from claims of the debtors in a chapter 11 plan. Specifically, the Released Parties are: (a) the Debtors, (b) the First Lien Agent, (c) each Holder of a First Lien Claim, (d) the Second Lien Agent, (e) each Holder of a Second Lien Claim, and (f) with respect to each of the foregoing Entities in clauses (a) through (e), such Entity's current or former subsidiaries and Affiliates, and its and their managed accounts or funds, officers, directors, managers, managing members, principals, partners, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives and other Professionals; *provided, however*, that if Holders of Second Lien Claims do not vote in favor of the Plan or object to confirmation, such Holders will be excluded from the Released Parties.

27. As more fully addressed in the Reply, the Debtors submit that the Debtor Releases satisfy both the principles governing compromises under section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019, as well as the five-factor test set forth in *In re Master Mortgage Investment Fund, Inc.*[34] and applied in *In re Zenith Electronics Corp.*[35]

28. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or the estate." Bankruptcy Rule 9019(a) further provides, in relevant part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Compromises and

[34] *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 937-38 (Bankr. W.D. Mo. 1994).

[35] *In re Zenith Electronics Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999).

settlements are "a normal part of the process of reorganization."[36] The compromise or settlement of time-consuming and burdensome litigation, especially in the bankruptcy context, is encouraged and "generally favored in bankruptcy."[37] Specifically in the context of a plan, the debtor "can elect to release claims as part of the plan and as part of the fresh start, concentrating on the business affairs and forgetting about litigation that may have questionable value or no value at all, just to settle past scores of charges and expressions of discontent."[38]

29. "[T]he decision whether to approve a compromise under Bankruptcy Rule 9019 is committed to the sound discretion of the Court, which must determine if the compromise is fair, reasonable, and in the interest of the estate."[39] Courts should not, however, substitute their judgment for that of the debtor, but instead canvas the issues to see whether the compromise falls below the lowest point in the range of reasonableness.[40] "[T]he debtor should be given considerable latitude in addressing" whether to release claims as part of its plan.[41]

30. The Third Circuit Court of Appeals has enumerated four factors that should be considered in determining whether a compromise should be approved. The four enumerated factors are: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending

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36 *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (quoting *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)).

37 *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006); *see also In re Penn Cent. Transp. Co.*, 596 F.2d 1102 (3d Cir. 1979).

38 Tr. of Hr'g Held on Jan. 18, 2006 at 44-45, *In re AAI Pharma*, No. 05-11341 (PJW) (Bankr. D. Del. Feb. 22, 2006) (Docket No. 893).

39 *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997) (declining to approve a settlement found to be a *sub rosa* plan).

40 *See In re Neshaminy Office Bldg. Assocs.*, 62 B.R. 798, 803 (E.D. Pa. 1986); *In re W.T. Grant & Co.*, 699 F.2d 599, 608 (2d Cir. 1983); *see also In re World Health*, 344 B.R. at 296.

41 Tr. of Hr'g Held on January 18, 2006 at 45, *In re AAI Pharma*, No. 05-11341.

it; and (4) the paramount interest of the creditors."[42] The test boils down to whether the terms of the proposed compromise fall "within a reasonable range of litigation possibilities."[43]

31. The compromise embodied in the Debtor Releases in the Plan is fair and equitable. It represents a compromise that is in the reasonable range of potential litigation outcomes and obviates the expense, delay, inconvenience and uncertainty that would attend any litigation regarding the Released Parties. Importantly, there are no significant potential causes of actions that the Debtors are releasing in the Debtor Releases.[44] As detailed in the Baker Declaration, the Debtors' independent directors oversaw an investigation into any potential causes of action the Debtors might have against each of the Released Parties, including conducting interviews with members of the Debtors' management team, prepetition equity sponsor, and restructuring advisor regarding the conduct of and transactions negotiated with the Released Parties.

32. The Debtors negotiated the terms of the Debtor Releases in good faith and at arm's length with the Key Constituencies, including several of the creditors who are the beneficiaries of the released potential causes of actions.[45] Accordingly, because the provision for the Debtor Releases is in the best interests of the Debtors, their estates and their creditors, it should be approved pursuant to section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019(a).

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42 *Meyers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *accord Will v. Nw. Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006) (finding that the *Martin* factors are useful when analyzing a settlement of a claim against the debtor as well as a claim belonging to the debtor); *see also TMT Trailer Ferry, Inc.*, 390 U.S. at 424 (1968); *In re Marvel Entm't Group, Inc.*, 222 B.R. 243 (D. Del. 1998) (proposed settlement held in best interest of the estate).

43 *Penn Cent. Transp. Co.*, 596 F.2d at 1114 (citations omitted).

44 *See In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) (noting that "the record does not reflect that there is any pending litigation in [that] case that would be discontinued by such a release" and citing *In re DBSD North America, Inc.*, 419 B.R. 114, 143 (Bankr. S.D.N.Y. 2009), which "approv[ed] a debtor's release of third parties when the debtor testified that it was unaware of any significant potential claims that were being released"); *In re AAI Pharma*, No. 05-11341, Hr'g Tr. at 44 (Bankr. D. Del. Jan. 18, 2006) (noting that there was "nothing in this case that would suggest that there is any serious cause of action out there that the debtor is giving up").

45 *See In re Spansion, Inc.*, 426 B.R. at 143 ("The Debtor Releasees were actively involved in negotiating and formulating the Plan. It is a valid exercise of the Debtors' business judgment to include a settlement of any claims it might own against such parties as a discretionary provision of the plan."); Tr. of Hr'g Held on Jan. 18, 2006 at 44, *In re AAI Pharma*, No. 05-11341 (recognizing plan's debtor releases as the result of good faith negotiations among the various plan constituencies).

33. In addition, the Debtor Releases are appropriate under all five of the *Master Mortgage/Zenith* factors. These factors include: (i) whether an identity of interest between the debtors and the releasees exists, such that a suit against the releasees is, in essence, a suit against the debtors or would deplete assets of the estates; (ii) the contribution of the releasees since the petition date; (iii) the essential nature of the releases to the approval of the plan; (iv) whether a substantial majority of the impacted creditors support the plan; and (v) whether the plan pays substantially all of the claims of the impacted creditors.[46] The *Master Mortgage/Zenith* factors are not a rigid test; rather, the court should "engage[] in a fact specific review, weighing the equities of [the individual] case."[47]

34. The factors are not "an exhaustive list of considerations, nor are they a list of conjunctive requirements."[48] Nevertheless, all of the factors weigh in favor of approving the Debtor Releases under the Plan. First, the Released Parties all may be entitled to indemnification and fee reimbursements from the Debtors. Second, all of the Released Parties have made significant contributions to these cases, as detailed in the Weimer Declaration. Management's and the board of managers' extraordinary postpetition efforts have already brought more than $35,000,000 in additional cash sale proceeds to the Estates, including (a) finding a stalking horse bidder for the Debtors' North Louisiana assets and (b) improving on stalking horse bids by attracting six new bidders to the Debtors' sale process. The Debtors' first lien lenders, for their part, have willingly funded this chapter 11 process and recoveries for other creditors, when they would have been well within their rights to opt for a foreclosure process. And the second lien lenders have agreed to forego any and all potential litigation in exchange for a minimal recovery, which has smoothed the path to this notably consensual Plan process. Third, the Debtor Releases have been a critical aspect of the Plan since the beginning, all the way back to the Sale and Plan Support Agreement that has served as the foundation for the

46 *See* 168 B.R. at 935-36.

47 *See id.* at 935.

48 *See id.*

Debtors' success here. Fourth, every voting creditor accepted the Plan, including all of the Debtors' first lien lenders, who would stand to gain from claims and causes of action being retained and contributed to the Plan Administration Trust. Fifth, while the Plan will not result in full payment of all First Lien Claims, it will provide those Holders with substantially all of the value of their collateral, other than the amounts they have unanimously voted to make available to pay other creditors and the costs of these Chapter 11 Cases. Thus, all of the *Master Mortgage/Zenith* factors support the Debtor Releases here.

35. Furthermore, the *Master Mortgage/Zenith* analysis must be conducted in light of the potential value of the Claims to be released,[49] and the Debtors do not believe that they will be releasing any worthwhile Claims or causes of action. As explained in the Baker Declaration, the Debtors' independent directors investigated potential causes of action against the Released Parties and concluded that no such causes of action likely exists and that the benefit of pursuing any such actions is so *de minimis* it would not be beneficial to the Estates to pursue them.[50]

36. The Weimer Declaration and the Baker Declaration provide ample evidentiary support that the Debtor Releases are fair and appropriate, and, if necessary, the Debtors will supplement the record at the Confirmation Hearing. Accordingly, because the provision for the Debtor Releases satisfies the *Master Mortgage/Zenith* factors, it should be approved.

**b. Releases by Holders of Claims and Interests**

37. The Plan also provides for customary, consensual third-party releases, subject to the terms thereof and the Confirmation Order. Such releases are contained in Article X.C of the Plan (the "***Third Party Releases***").

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49 *See Tribune*, 464 B.R. at 187 ("Because I have already decided that the Settlement meets the standard for approval [under Bankruptcy Rule 9019], I likewise conclude that the Settling Parties' consideration for the Debtors' Release is sufficient.").

50 Baker Decl. ¶ 26 ("[T]he Special Committee has concluded that any potential claim or cause of action that the Debtors may conceivably have against a Released Party is not significant and that the cost of pursuing any such potential claim would outweigh the potential benefit to the Debtors' estates.").

38. Numerous courts in this jurisdiction have recognized that a chapter 11 plan may include a release of non-debtors by other non-debtors when such release is consensual, as the releases are in Article X.C of the Plan.[51] Further, in this jurisdiction courts "have consistently held that a plan may provide for a release of third party claims against a non-debtor upon consent of the party affected."[52] In other cases in this jurisdiction in which holders of claims or equity interests had an opportunity, but chose not, to opt out of releases, courts have approved third-party releases as consensual. In approving an opt-out release, a court in this jurisdiction found that:

> As for those impaired creditors who abstained from voting on the Plan or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots.[53]

39. The record here is the same as in *In re Indianapolis Downs*. All Holders of General Unsecured Claims who submitted a ballot voted to accept the Plan.[54] Furthermore, Courts in this jurisdiction have also approved third-party releases that are binding on unimpaired creditors that do not object to the plan or the release, reasoning that the lack of objection is tantamount to consent.[55] Holders of Unimpaired Claims were served with the Notice of Non-Voting Status which included the proposed Third Party Releases and prominent instructions that these releases will be binding on all

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51 *See, e.g.*, *In re Seventy Seven Fin. Inc.*, No. 16-11409 (LSS) (Bankr. D. Del. July 14, 2016) (approving substantially similar third-party releases); *In re Quiksilver Inc.*, No. 15-11880 (BLS) (Jan. 29, 2016) (Docket No. 740) (same); *In re EveryWare Glob., Inc.*, No. 15-10743 (LSS) (Bankr. D. Del. May, 22, 2015) (same); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 305 (Bankr. D. Del. 2013) (collecting cases); *Spansion*, 426 B.R. at 144 (stating that "a third party release may be included in a plan if the release is consensual").

52 *Indianapolis Downs*, 486 B.R. at 305; *see also First Fid. Bank v. McAteer*, 985 F.2d 114, 118 (3d Cir. 1993) (stating that a consensual third-party release is no different from any other contract and does not implicate section 524(e)).

53 *Indianapolis Downs*, 486 B.R. at 306.

54 Certain Holders of General Unsecured Claims submitted ballots indicating acceptance of the Plan or abstaining from voting on the Plan, but marking the opt-out election for the Third Party Release. Another Holder that asserted a Secured Claim, and therefore was not entitled to vote, submitted an abstaining ballot with the opt-out election made. As clearly and expressly instructed on the ballots and solicitation notices and as contemplated by the solicitation procedures approved by the Court, the Debtors do not consider these Holders to have validly opted out of the Third Party Release.

55 *See Spansion*, 426 B.R. at 144 (overruling an objection to a release that bound unimpaired creditors, noting that "no creditor or interest holder whose rights are affected by the 'deemed' acceptance language has objected to the Plan" and the "silence of the unimpaired classes on this issue is persuasive.").

Holders of Unimpaired Claims if such Holders did not timely object to the Plan. Finally, the Debtors will exclude the United States of America, which objected to providing the Third Party Release, from its scope, which will be reflected in the Confirmation Order.

40. On these facts and under the foregoing authority, the Third Party Releases are consensual. In this case, the Disclosure Statement, the Ballots, and the Notice of Non-Voting Status provided parties-in-interest with timely, sufficient, appropriate and adequate notice of the releases. As described in the Voting Report, all of the Impaired Holders that voted determined to accept the Plan. Moreover, each Holder of a Claim or Interest in Class 1 is Unimpaired and therefore deemed to accept the Plan and, in turn, deemed to consent to the releases (barring a properly-filed objection to the Plan). In addition, the Notice of Non-Voting Status, which was approved by this Court and incorporated comments from the United States Trustee, included the releases and contained prominent instructions that these releases would bind Holders of Unimpaired Claims if such Holders did not timely object. Given the extensive disclosure and opportunity to either opt out or object to the Plan, the Debtors submit that it is wholly reasonable to treat the Third Party Releases as consensual.

41. Even if this Court deems the Third Party Releases non-consensual, they also satisfy the factors applied by this Court and the "fairness and necessity" guidelines discussed by the Third Circuit in *In re Continental Airlines*.[56]

42. As discussed below, there is also substantial overlap in the *Master Mortgage/Zenith* factors outlined above and the *Continental* guidelines. The Released Parties have provided significant value to the Plan, resulting in a consensual Plan and a distribution to the creditors that otherwise would benefit from the released potential Claims and causes of action. Therefore, the provision for Third Party Releases are proper under either standard.

[56] 203 F.3d 203 (3d Cir. 2000).

43. In *Continental*, the Third Circuit surveyed the case law regarding plan releases but declined to establish its own rule regarding plan releases and injunctions.[57] The Third Circuit, however, focused on the fairness of releases, the necessity to the reorganization, and the specific factual findings regarding fairness and necessity.[58] Thus, this Court has held that, under *Continental*:

> to meet the burden of establishing that the third party releases are fair and necessary to the reorganization, . . . Plan proponents must establish by a preponderance of the evidence that, [1] there is material, specific and identifiable consideration flowing from the releasees to the releasors, either directly or through the Plan, that is a fair exchange for the releases being granted, and [2] that it is unlikely that the Debtor will be able to confirm a Plan, not necessarily the specific Plan before the Court, absent such releases.[59]

44. Under both the *Master Mortgage/Zenith* and *Continental* standards, third-party releases are appropriate where material consideration is provided by the releasees that results in a distribution to unsecured creditors through the plan in exchange for the release of potential Claims that are unlikely to be pursued.[60] First, each of the Released Parties has participated in the Plan process and made significant contributions to the Plan, including (a) compromising Claims and accepting diminished recoveries, (b) permitting the use of encumbered assets and cash collateral during these Chapter 11 Cases, (c) negotiating and supporting the Plan and Sale, and (d) in the case of directors, officers, and employees, their efforts on behalf of the Debtors prior to and throughout the Chapter 11 Cases.[61]

45. Second, the Released Parties share an identity of interest with the Debtors, in particular as a result of indemnification likely owed to them by the Debtors with respect to the released Claims. In the case of the directors, such Claims are also likely insured under the Debtors' D&O insurance

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57 *Id.* at 212-14.

58 *See* Tr. of Hr'g Held on Apr. 20, 2006 at 114-15, *In re Freedom Rings, L.L.C.*, No. 05-14268.

59 *See id.*

60 *See* Tr. of Hr'g Held on Apr. 20, 2006 at 116-17, *In re Freedom Rings, L.L.C.*, No. 05-14268 (finding that third-party releases are proper when the releasees provided significant consideration that flowed to the benefit of the third party releasors through the plan of reorganization in exchange for release of potential claims that were unlikely to be asserted given the small size of the case and small size of the average claim).

61 *See* Weimer Decl. ¶ 9.

policies.[62] Moreover, the Debtors and Released Parties "share the common goal of confirming the . . . Plan," which is the culmination of negotiations among and settlements between the Debtors and their Key Constituencies from the start of these Chapter 11 Cases.[63] These constituencies invested substantial time and effort in negotiating and drafting the Plan, and they stand to receive a substantial portion of the distributions made under the Plan.[64]

46. Finally, although releases of directors and officers in a liquidating plan may not be routine, the significant and substantial work performed by Debtors' directors, officers, and employees—which has been absolutely critical in negotiating one stalking horse agreement postpetition and then generating a purchase price increase of more than $18 million over the stalking horse bids—constitutes compelling circumstances to support the release of such parties.[65] Recognizing the importance of the director, officer, and employee efforts to the Debtors' value in these Chapter 11 Cases, before these Chapter 11 Cases were even filed, the Debtors sought and obtained the Consenting First Lien Lenders' support for the Third Party Releases relating to these key persons in exchange for their efforts during the Chapter 11 Cases.[66] Thus, the Third Party Releases have been an integral part of the Debtors' negotiations with the Key Constituencies, starting long before the filing of the Chapter 11 Cases and culminating in the consensual Plan.

47. For the reasons explained above, the Debtor Releases and Third Party Releases are proper under section 1123(b)(3)(A) of the Bankruptcy Code, Bankruptcy Rule 9019, and applicable case law in this jurisdiction. The releases are fair and equitable provisions and, as part of the Plan and

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62 *See* Weimer Decl. ¶ 14.

63 *See In re Tribune Co.*, 464 B.R. 126, 153 (Bankr. D. Del. 2011).

64 *See* Weimer Decl. ¶ 8.

65 *See* Tr. of Hr'g Held on June 30, 2004 at 17, *In re Waterlink*, No. 03-11989 (Bankr. D. Del. July 7, 2004) (PJW). This Court has noted that, once the Court determines it has jurisdiction over third-party releases, a per se rule against exercising its jurisdiction (i.e., rejecting such releases as in *Zenith*, 241 B.R. 92), is not appropriate. *See* Transcript of Hearing Held on Apr. 20, 2006 at 114, *In re Freedom Rings, L.L.C.*, No. 05-14268.

66 *See* Disclosure Statement, Exhibit B; Weimer Decl. ¶ 14.

part of the entire course of arm's length negotiations with Debtors' Key Constituencies, are integral to Debtors' consensual resolution of these Chapter 11 Cases. There are no significant potential Claims and causes of actions to be released, and the Released Parties have provided significant value during the Chapter 11 Cases. As such, the Plan and the releases have received overwhelming support from the creditors, including those creditors who would benefit from the proceeds of the potential Claims and causes of action released under the Plan.

48. Accordingly, in light of all of the circumstances, the Plan's releases are consensual in nature, satisfy the applicable standards, are fair to the Released Parties, and are otherwise appropriate. For all of these reasons, the Plan's releases should therefore be approved.

**2. Exculpation**

49. The exculpation provisions are also integral parts of the negotiations among and global settlement between the Debtors and their constituents, which culminated in the consensual Plan.

50. By requesting that the Court approve the exculpation in Section X.D of the Plan, the Debtors are essentially asking the Court to make a finding of fact that the exculpated parties—which include Debtors and their Affiliates, the First Lien Agent and its affiliates, and the Consenting First Lien Lenders and their Affiliates, and with respect to each of the foregoing, such Entity's current or former subsidiaries and Affiliates, and its and their managed accounts or funds, officers, directors, managers, managing members, principals, partners, members, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives and other Professionals, in their capacity as such—have participated in good faith with respect to the Chapter 11 Cases, the negotiation and execution of the Plan, the Disclosure Statement, the Sale, the solicitation of votes for and the pursuit of confirmation of the Plan, the consummation of the Plan, and the administration of the Plan, the Sale and the property to be distributed under the Plan, including all documents ancillary thereto, all decisions, any other prepetition or postpetition act taken or omitted to be taken in

connection with or in contemplation of the restructuring of the Debtors and all prepetition activities leading to the promulgation and confirmation of the Plan.[67]

51. The Debtors believe—and there are no allegations to the contrary—that the exculpated parties have participated in all of the foregoing in good faith. Further, the scope of the exculpation is targeted and has no effect on liability that is determined to have resulted from actual fraud, gross negligence, willful misconduct, or criminal conduct.[68] Thus, and as more fully detailed in the Debtors' Reply to the outstanding objections, the exculpation should be approved in connection with the confirmation of the consensual Plan.

**3. Injunction**

52. Section X.E of the Plan provides that except as otherwise specifically provided in the Plan or related documents, or for obligations issued pursuant to the Plan, from and after the Effective Date, all Releasing Parties are permanently enjoined from taking any of the following actions against the Debtors or any Released Parties: (1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or Estates of such Entities on account of or in connection with or with respect to any such Claims or Interests; (4) asserting any right of setoff, or subrogation against any obligation due from such Entities or against the property or Estates of such Entities on account of or in connection with or with respect to any such Claims or Interests unless such Holder has Filed a motion requesting the right to perform such setoff on or before the Confirmation Date; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection

[67] *See* Plan § X.D.

[68] *See* Plan § X.D.

with or with respect to any such Claims or Interests released or settled pursuant to the Plan.[69] This injunction is necessary to preserve and enforce the releases and exculpation granted by the Plan, and it is narrowly tailored to achieve that purpose.[70] The Third Circuit in *Continental* indicated that fairness and necessity principles, including the *Master Mortgage* factors, apply to both releases and the injunctions that effectuate such releases.[71] As explained above, the releases are proper under applicable law in this jurisdiction, and, accordingly, the injunction provision tailored thereto should be approved.

## II. The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code in Accordance with Section 1129(a)(2).

53. The Debtors have satisfied section 1129(a)(2), which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. The case law and legislative history discussing section 1129(a)(2) indicate that this section principally embodies the disclosure and solicitation requirements of section 1125 of the Bankruptcy Code.[72] The Debtors have complied with section 1129(a)(2) of the Bankruptcy Code by distributing their Disclosure Statement and soliciting acceptances of the Plan through their Voting and Claims Agent, as authorized by the order dated June 18, 2018 [Docket No. 199] approving the Disclosure Statement and the Solicitation Procedures. The Debtors have also satisfied section 1125 by obtaining Bankruptcy Court approval of the Disclosure Statement as containing adequate information, and the Debtors have complied with all noticing, solicitation and tabulation requirements described in the Solicitation Procedures.

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69 *See id.* § X.E.

70 *See id.*

71 *See Cont'l*, 203 F.3d at 217 & n.17.

72 *See In re WorldCom, Inc.*, No. 02-13533, 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable Bankruptcy Code provisions, including "disclosure and solicitation requirements under sections 1125 and 1126").

## III. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law in Accordance with Section 1129(a)(3).

54. Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law."[73] The section requires that a plan be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code."[74] Courts generally view the good faith requirement in light of the totality of the circumstances surrounding the establishment of the chapter 11 plan.[75] In assessing good faith, courts should look to a chapter 11 plan itself to determine whether it seeks relief in good faith and is otherwise consistent with the Bankruptcy Code.[76] Accordingly, where the plan satisfies the purposes of the Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) is satisfied.[77] Failure to satisfy the section, on the other hand, generally requires a finding of "misconduct in bankruptcy proceedings, such as fraudulent misrepresentations or serious nondisclosures of material facts to the court."[78]

55. The Debtors have proposed the Plan in good faith, with the legitimate and honest purposes of effecting an orderly liquidation of the Debtors' assets and an orderly distribution of the proceeds to holders of Allowed Claims pursuant to the Plan.[79] The Plan is the product of comprehensive and arm's-length negotiations among the Debtors and the Key Constituencies. The overwhelming support of creditors for the Plan is the best evidence that the Plan has been proposed in good faith and treats creditors with fundamental fairness. In addition, the Plan has not been proposed

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73 11 U.S.C. § 1129(a)(3).

74 *Zenith Elecs.*, 241 B.R. at 107 (internal quotation marks omitted).

75 *In re T-H New Orleans L.P.*, 116 F.3d 790, 802 (5th Cir. 1997).

76 *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984).

77 *In re Century Glove, Inc.*, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) (citing *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985)).

78 *In re River Vill. Assocs.*, 161 B.R. 127, 140 (Bankr. E.D. Pa. 1993), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995).

79 *See* Plan Art. VII; Weimer Decl. ¶ 3.

by any means prohibited by law. Accordingly, the Debtors submit that the Plan complies with section 1129(a)(3) of the Bankruptcy Code.

## IV. The Plan Provides for Bankruptcy Court Approval of Certain Administrative Payments in Accordance with Section 1129(a)(4).

56. Section 1129(a)(4) of the Bankruptcy Code requires bankruptcy court approval of certain professional fees and expenses paid by the plan proponent, by the debtor, or by a person issuing securities or acquiring property under the plan. Specifically, section 1129(a)(4) provides that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.[80]

This section of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval by the Court as to their reasonableness.[81]

57. All payments made or to be made by the Debtors for services rendered and expenses incurred in connection with the Chapter 11 Cases have been approved by, or are subject to approval of, the Court. In particular, Article II of the Plan provides for the payment only of ***Allowed*** Administrative Claims and Professional Fee Claims.[82] Finally, the Bankruptcy Court will retain jurisdiction after the Effective Date to grant or deny applications for allowance of compensation or payment of expenses authorized pursuant to the Bankruptcy Code or the Plan.[83] Thus, the Plan complies fully with the requirements of section 1129(a)(4).

## V. The Debtors Have Disclosed the Identity and Affiliations of the Plan Administrator in

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80 11 U.S.C. § 1129(a)(4).

81 *See, e.g.*, *Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 503 (D.N.J. 2005); *WorldCom*, 2003 WL 23861928, at *54; *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992).

82 *See* Plan Art. II; *see also In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (holding that the requirements of section 1129(a)(4) were satisfied where the plan provided for payment of only "allowed" administrative expenses).

83 *See* Plan Art. XII.

**Accordance with Section 1129(a)(5).**

58. Section 1129(a)(5)(A) of the Bankruptcy Code provides that a court may confirm a plan only if the plan proponent discloses "the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan."[84] The Plan Administrator, Eric Danner, was identified in the Debtors' Plan Supplement and was selected with the support of the First Lien Agent.

## VI. The Plan Does Not Require Governmental Regulatory Approval in Accordance with Section 1129(a)(6).

59. The Bankruptcy Code permits confirmation of a plan only if any regulatory commission that will have jurisdiction over the debtor subsequent to confirmation has approved any rate change provided for in the debtor's plan.[85] Section 1129(a)(6) of the Bankruptcy Code is inapplicable to these Chapter 11 Cases because the Debtors' rates are not subject to approval of any governmental regulatory commission.

## VII. The Plan Is in the Best Interests of Creditors and Interest Holders in Accordance with Section 1129(a)(7)

60. The Bankruptcy Code requires that, with respect to each class, each holder of a claim or an equity interest in such class either:

(i) has accepted the plan; or

(ii) will receive or retain under the plan . . . 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 [the Bankruptcy Code].[86]

61. This "best interests" test applies to individual dissenting holders of claims and interests rather than classes,[87] and is generally satisfied through a comparison of the estimated recoveries for a

84 11 U.S.C. § 1129(a)(5)(A).

85 *Id.* § 1129(a)(6).

86 *Id.* § 1129(a)(7)(A).

debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[88] As the language of section 1129(a)(7) makes clear, the best interests test applies only to non-accepting impaired claims or interests; if a class of claims or interests unanimously approves a plan, the best interests test is deemed satisfied for all members of that class.[89]

62. To find that a plan satisfies the best interests test, the Court must: (a) estimate the cash liquidation proceeds that a chapter 7 trustee would generate if each of the Debtors' Chapter 11 Cases were converted to a chapter 7 case and the assets of such Debtors' estates were liquidated; (b) determine the liquidation distribution that each non-accepting holder of a claim or an equity interest would receive from such liquidation proceeds under the priority scheme dictated in chapter 7; and (c) compare such holder's liquidation distribution to the distribution under the plan that such holder would receive if the plan were confirmed and consummated.[90]

63. To calculate the probable distribution to holders of each Impaired Class of Claims and Interests if the Debtors were liquidated under chapter 7, a bankruptcy court must first determine the aggregate dollar amount that would be generated from the debtors' assets if their chapter 11 cases were converted to chapter 7 cases.[91] Because the Plan is a liquidating plan, the "liquidation value" in the hypothetical chapter 7 liquidation analysis for purposes of the best interests test is somewhat similar to the estimates of the results of the chapter 11 liquidation contemplated by the Plan.[92] However, the

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87 *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 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.").

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

89 *Drexel Burnham Lambert*, 138 B.R. at 761.

90 *See Adelphia*, 368 B.R. at 251-52.

91 *See id.* at 251-54.

92 *See id.*

Debtors believe that in a chapter 7 liquidation, there would be additional costs and expenses that the Debtors would incur as a result of the ineffectiveness associated with replacing existing management and professionals.[93] Such costs would include the compensation of a trustee, as well as compensation of counsel and other professionals retained by the trustee, asset disposition expenses, all unpaid expenses incurred by the Debtors in their Chapter 11 Cases (such as compensation of attorneys, financial advisors and accountants) that are allowed in the chapter 7 cases, litigation costs, and Claims arising from the operations of the Debtors during the pendency of the Chapter 11 Cases.

64. Attached as Exhibit D to the Disclosure Statement is a liquidation analysis (the "***Liquidation Analysis***") which shows (a) the expected recoveries if these cases were converted to chapter 7 and (b) the expected recoveries under the Plan. Based upon the Liquidation Analysis, and explained in further detail in the Grady Declaration, the Debtors believe that anticipated recoveries to each Class of Impaired Claims under the Plan implies a greater or equal recovery to holders of Claims in Impaired Classes than the recovery available in a chapter 7 liquidation. Accordingly, the Debtors believe that the best interests test of section 1129(a)(7) of the Bankruptcy Code is satisfied.

**VIII. Acceptance of Impaired Classes in Accordance with Section 1129(a)(8).**

65. 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.[94] Pursuant to section 1126(c), a class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the allowed claims in that class actually vote to accept the plan.[95] A class that is not impaired under a plan, and each holder of a claim or interest in such class, is conclusively presumed to

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93 *Cf. id.* at 254 ("[T]he chapter 7 trustee's advisors would be entitled to reasonable compensation for services rendered and related expenses incurred, which would be entitled to treatment as administrative expense claims. Given the amount of time such professionals would be required to devote to become familiar with the Debtors and the issues related to these cases, such fees and costs would reduce overall recoveries." (footnote omitted)).

94 11 U.S.C. § 1129(a)(8).

95 *Id.* § 1126(c).

have accepted the plan.[96] Conversely, a class is deemed to have rejected a plan if the plan provides that the holders of claims or interests of such class are not entitled to receive or retain any property under the plan on account of such claims or interests.[97]

66. As set forth in the Voting Report, Classes 2, 3, and 4 each unanimously voted to accept the Plan, including ballots received from 70 Holders of General Unsecured Claims. Thus, the only Impaired Classes not voting to accept the Plan are the Classes statutorily deemed to reject the Plan (Classes 5, 6, and 7). Section 1129(a)(8) is not satisfied. Nevertheless, as discussed more fully below, the Debtors have satisfied section 1129(a)(10) of the Bankruptcy Code—because at least one Impaired Class accepted the Plan—and section 1129(b), which allows the plan proponent to "cramdown" any rejecting classes under certain conditions that are satisfied here.

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

67. Section 1129(a)(9) of the Bankruptcy Code generally requires that persons holding claims entitled to priority under section 507(a) receive payment in full in cash unless the holder of a particular claim agrees to a different treatment with respect to such claim. As required by section 1129(a)(9) of the Bankruptcy Code, Section II.A of the Plan provides for payment in full of Allowed Administrative Claims on or as soon as reasonably practicable after the Effective Date, unless the holder of such a claim agrees to a different treatment with respect to such claim. Further, Section II.B of the Plan provides for payment in full of Allowed Priority Tax Claims on or as soon as reasonably practicable after the Effective Date, unless the holder of such a Claim agrees to a different treatment with respect to such Claim. Therefore, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

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96 *Id.* § 1126(f); *see also Drexel Burnham Lambert*, 960 F.2d at 290 ("If the claimholder's interests are unimpaired, the claimholder is conclusively presumed to have accepted the plan, and his participation in or approval of the reorganization plan is not necessary for the plan to gain confirmation by the bankruptcy court." (internal quotation marks omitted)).

97 11 U.S.C. § 1126(g).

## X. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders, in Accordance with Section 1129(a)(10).

68. Section 1129(a)(10) provides that to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, excluding acceptance by any insider. Here, Classes 2, 3, and 4 voted to accept the Plan, and such acceptance does not include acceptance of the Plan by an insider. Therefore, the Plan satisfies the requirement of section 1129(a)(10).

## XI. The Plan Is Feasible in Accordance with Section 1129(a)(11).

69. Section 1129(a)(11) of the Bankruptcy Code requires that the bankruptcy court find that a plan is feasible as a condition precedent to confirmation. Specifically, the bankruptcy court must determine 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.[98]

To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success; rather, only a reasonable assurance that the provisions of a plan can be performed is required.[99]

70. Here, because the Plan is a liquidating plan, there is no need to evaluate the commercial viability of the Debtors after confirmation,[100] but the Plan must still be feasible in what it proposes to do.[101] As will be shown at the Confirmation Hearing, after the asset sales close, the Debtors will have sufficient funds available to meet their obligations under the Plan, as the reserves to be funded amount to only a small fraction of the $115 million in sale proceeds. Indeed, the only fixed-value obligations under the Plan are paying priority, administrative, and other secured claims, and funding the orderly

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98 *Id.* § 1129(a)(11).

99 *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *IRS v. Kaplan (In re Kaplan)*, 104 F.3d 589, 597 (3d Cir. 1997); *Clarkson v. Cooke Sales & Serv. Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985) ("[T]he feasibility test contemplates 'the probability of actual performance of the provisions of the plan. . . . The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts.'" (quoting *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir. 1978)).

100 *Cf. In re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1166 (5th Cir. 1993) (stating that reasonable assurance of commercial viability is required in case of reorganizing debtor).

101 *See Kaplan*, 104 F.3d at 597; *Bergman*, 585 F.2d at 1179.

wind down of the Debtors' businesses and the Claims Reserve Cash Amount, which do not remotely approach the amount of proceeds the Debtors' anticipate receiving from their asset sales. Accordingly, and as more fully discussed in the Reply, the Plan is feasible and satisfies section 1129(a)(11) of the Bankruptcy Code.

**XII. The Plan Provides for the Payment of All Fees under 28 U.S.C. § 1930 in Accordance with Section 1129(a)(12).**

71. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930. Section II.D of the Plan provides that all fees due and payable pursuant to 28 U.S.C. § 1930 shall be paid in full, in Cash, prior to the Effective Date.[102] The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code.

**XIII. Sections 1129(a)(13)-(a)(16) of the Bankruptcy Code are Inapplicable.**

72. Section 1129(a)(13) of the Bankruptcy Code provides that a plan must provide for continued, post-confirmation payments of all retiree benefits at the levels established in accordance with section 1114 of the Bankruptcy Code. 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) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases.

73. None of the Debtors are (a) required to pay any domestic support obligations, (b) individuals, or (c) nonprofit corporations or trusts. Accordingly, sections 1129(a)(14) through (16) of the Bankruptcy Code are not applicable.[103]

**XIV. The Plan Satisfies the "Cramdown" Requirements of 11 U.S.C. § 1129(b).**

74. All three of the Impaired Classes (Classes 2, 3, and 4) have voted to accept the Plan. However, Classes 5, 6, and 7 were deemed to reject the Plan, requiring the Debtors to "cramdown"

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[102] Plan § II.D.

[103] *See In re Sea Launch Co., L.L.C.*, 2010 Bankr. LEXIS 5283, at *41 (Bankr. D. Del. July 30, 2010) ("Section 1129(a)(16) by its terms applies only to corporations and trusts that are not moneyed, business, or commercial.") (internal citations omitted).

these Classes pursuant to section 1129(b) of the Bankruptcy Code. Section 1129(b) provides that if all applicable requirements of section 1129(a), other than section 1129(a)(8), are met, a plan may be confirmed so long as it does not discriminate unfairly and is fair and equitable with respect to each class of claims and interests that is impaired and has not accepted the plan.[104] Thus, to confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan "does not discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[105] The Debtors' satisfaction of these conditions is discussed in detail below.

### A. The Plan Is Fair and Equitable with Respect to Each Impaired Class that Has Not Voted to Accept the Plan.

75. Sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or interests if the plan provides that the holder of any claim or interest that is junior to the claims or interests of such class will not receive or retain under the plan on account of such junior claim or interest any property. This central tenet of bankruptcy law—the "absolute priority rule"—requires that, if the holders of claims or interests in a particular class that votes to reject a plan receive less than full value for their interests, then no holder of claims or interests in a junior class may receive property under the plan.[106] Another condition under

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104 *See* 11 U.S.C. § 1129(b).

105 *See John Hancock Mut. Life*, 987 F.2d at 157 n.5 ("Under [Section 1129(b)], the plan must also satisfy all of the requirements of [Section 1129(a)] except for subsection (a)(8) . . . and must not 'discriminate unfairly' against and must be 'fair and equitable' with respect to all impaired classes that do not approve the plan.").

106 *203 N. LaSalle*, 526 U.S. at 441-42 (explaining that, under the absolute priority rule, "a plan may be found to be 'fair and equitable' only if the allowed value of the claim [in a dissenting class of impaired unsecured creditors] is to be paid in full . . . or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property'" (citations omitted)); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (stating that "the absolute priority rule provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan)," *rev'd on other grounds* (internal quotation marks and citations omitted).

the absolute priority rule is that senior classes cannot receive more than a 100 percent recovery for their claims.[107]

76. The Plan satisfies the absolute priority rule with respect to all impaired Classes of Claims and Interests that have not voted in favor of the Plan. No holders of Claims and Interests junior to the Claims and Interests in Classes 5, 6, and 7 will receive or retain any property on account of their Claims and Interests, and no holders of Claims or Interests senior to the Claims and Interests in Classes 5, 6, and 7 are receiving more than full payment on account of the Claims and Interests in such Classes. Accordingly, the Plan satisfies the requirements of sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) of the Bankruptcy Code and is fair and equitable with respect to all classes of Claims and Interests.

### B. The Plan Does Not Unfairly Discriminate with Respect to Each Impaired Class that Has Not Voted to Accept the Plan.

77. The Plan also does not discriminate unfairly with respect to Impaired Classes that have rejected the Plan. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists.[108] Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.[109] At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so.[110]

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107 *See In re Exide Techs.*, 303 B.R. 48, 61 (Bankr. D. Del. 2003); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 612 (Bankr. D. Del. 2001).

108 *See In re 203 N. LaSalle St. Ltd. P'ship.*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"), *rev'd on other grounds sub nom. Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999).

109 *See In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) (explaining that "whether or not a particular plan does [unfairly] discriminate is to be determined on a case-by-case basis"); *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (finding that determination of unfair discrimination requires court to "consider all aspects of the case and the totality of all the circumstances").

110 *See In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 654-55 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

The Plan does not unfairly discriminate with respect to Impaired Classes and the cramdown test is thus satisfied. Accordingly, the Plan should be confirmed.

## XV. The Purpose of the Plan Is Not the Avoidance of Taxes or the Avoidance of the Securities Laws in Accordance with 11 U.S.C. § 1129(d)

78. "[O]n request of a party in interest that is a governmental unit, the court may not confirm a plan if the principle purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933."[111] The primary purpose of the Plan is not the avoidance of taxes or the avoidance of the application of the Securities Laws. Further, no party currently objects to confirmation of the Plan on the basis of section 1129(d). Accordingly, section 1129(d) does not bar confirmation of the Plan.

[*Remainder of page intentionally left blank.*]

[111] 11 U.S.C. § 1129(d).

## CONCLUSION

For the reasons set forth herein, the Debtors submit that the Plan fully satisfies all applicable requirements of the Bankruptcy Code and respectfully request that the Court confirm the Plan.

Dated: July 25, 2018
Wilmington, Delaware

*/s/ Kara Hammond Coyle*

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