IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

In re:	)	**Chapter 11**
	)	
FIBRANT, LLC, *et al.*,[1]	)	**Case No. 18-10274 (SDB)**
	)	
	)	
Debtors.	)	**Jointly Administered**
	)	

DEBTORS' BRIEF ADDRESSING SPECIFIED CONFIRMATION ISSUES

Fibrant, LLC and its affiliated debtors-in-possession (collectively, "Debtors") file this Brief addressing certain issues set forth in the Court's order dated February 28, 2019 [Docket No. 694] (the "Briefing Order"), in connection with confirmation of the *Amended and Restated Plan of Liquidation for Fibrant, LLC, et al.* dated February 13, 2019 [Docket No. 600] (the "Plan").[2]

INTRODUCTION

As discussed in more detail below, the ChemicaInvest Parties have agreed to pay approximately $17.3 million to fund the Debtors' Plan. The ChemicaInvest Parties do not have any legal or contractual obligation to provide the Plan funding, and they have only agreed to do so pursuant to a "global settlement" under which they receive the releases from liability and other protections and consideration set forth in the Plan and related documents. The funds provided by the ChemicaInvest Parties will be used to make distributions to unsecured creditors and to make certain payments in connection with the closing of the ELT Transaction. The Debtors anticipate

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Fibrant, LLC (6694); Evergreen Nylon Recycling, LLC (7625); Fibrant South Center, LLC (8270); and Georgia Monomers Company, LLC (0042).

[2] Capitalized terms used but not defined in this Brief have the meanings ascribed to them in the Plan. Because the deadline for objections to confirmation of the Plan is April 5, 2019, nine days after the deadline for filing this Brief, the Debtors reserve all rights to respond, supplement, or amend this Brief.

that, if the ELT Transaction is closed, the environmental contamination at the Debtors' Augusta, Georgia plant site will be remediated as required by law. Without the funding provided by the ChemicaInvest Parties, the Plan would not be feasible; any alternative plan would be highly unlikely to provide for full remediation of the Augusta plant site and distributions to creditors would be reduced substantially and delayed materially.

The Debtors are not aware of any valid, legally cognizable, claims or causes of action that could be asserted successfully against the ChemicaInvest Parties relating to the Debtors, their businesses or these chapter 11 cases. Among other things, prior to the Filing Date and as described in the Disclosure Statement, the ChemicaInvest Parties provided $30 million to the Debtors to fund the winddown of the Debtors' business and received a "blanket" release from the Debtors at that time. This prepetition release has never been questioned or challenged by any party in interest (whether before or after the filing of these Chapter 11 cases). As a result, the releases in favor of the ChemicaInvest Parties are, in one sense, simply a "bring down" of the prepetition release that are intended to give the ChemicaInvest Parties "finality."

After more than two years of pre-petition and post-petition planning and negotiations among the Debtors, their creditors, state and federal environmental authorities, the Creditors' Committee, the ChemicaInvest Parties and experts in environmental remediation, the Debtors have concluded that the Plan provides the best possible outcome for the Debtors' stakeholders.

These are extraordinary cases. In most liquidations, "success" is defined by selling off the debtor's remaining assets for the best price or by abandoning them. Here, the Debtors' remaining tangible assets (taken as a whole) have too much *negative* value to be sold or abandoned. "Success" in these cases means establishing a long-term mechanism to remediate the environmental

contamination at the Debtors' real property, while maximizing creditor recoveries. This result can only be achieved through the Plan.

ANALYSIS AND AUTHORITIES

In the Briefing Order, the Court asked the Debtors to address the following issues: (i) legal support and arguments regarding the releases contained in the Plan, (ii) legal support and arguments regarding the waiver of the statutory limitation on releases contained in the Plan, (iii) the substantive consolidation proposed by the Plan, (iv) the sufficiency of notice of the Plan, (v) the abandonment of assets under the Plan, including any assets requiring environmental remediation, and (vi) any remaining objections to the Plan set forth in purported disclosure statement objections filed by DSM, the EPD or the Office of the U.S. Trustee.

This Brief addresses these issues in the order listed by the Court in the Briefing Order.

I. THE PROPOSED RELEASES ARE PERMISSIBLE AND APPROPRIATE (Briefing Order Items 1 and 2).

The Plan contains three different release provisions: (i) first, in Section 10.3 of the Plan, the Debtors are proposing to release the ChemicaInvest Parties and the ChemicaInvest Affiliated Parties; (ii) second, in Section 10.4 of the Plan, the Debtors are proposing that all parties in interest and holders of Claims (including the EPD, but excluding the United States of America and any department, agency or instrumentally thereof, other than the Office of the United States Trustee or a chapter 7 trustee appointed in any bankruptcy case) release the ChemicaInvest Parties and the ChemicaInvest Affiliated Parties, and; (iii) finally, in Section 10.5 of the Plan, the ChemicaInvest Parties are providing mutual releases to the Debtors and all parties in interest and holders of Claims. Because the Debtors are not aware of any basis for challenging the decision by the ChemicaInvest Parties to grant the releases contained in Section 10.5 of the Plan (as part of the

global settlement with the ChemicaInvest Parties that is embedded in the Plan), this Brief does not analyze or discuss the releases proposed to be granted by the ChemicaInvest Parties.

The release of claims by the Debtors is part of a global settlement with the ChemicaInvest Parties, and the Debtors are not aware of any valid, legally cognizable, claims or purported causes of action they hold against any one or more of the ChemicaInvest Parties. Similarly, the Third Party Release (as defined below) is also part of a global settlement; the payment by the ChemicaInvest Parties of $17.3 million to fund the Plan is more than sufficient consideration for the releases and the global settlement under applicable law.

The ChemicaInvest Parties have been good corporate citizens and provided $30 million in prepetition funding, made DIP financing available to the Debtors, and agreed to make the Settlement Payments, even though they had no legal or contractual obligation to do so. The Debtors believe the equities of these cases and sound public policy support the granting and approval of these releases, so as to incentivize these types of contributions in other chapter 11 cases. The release provisions of the Plan were negotiated on an arms' length basis with the Committee and were approved by the independent manager of Fibrant (Mike McGovern), who has extensive experience with environmental issues in chapter 11 cases.

The Eleventh Circuit consigns approval of non-consensual third-party releases to the discretion of the bankruptcy court. The bankruptcy court's discretion is to be exercised with reference to guidelines established in the Eleventh Circuit's *Matter of Munford* and *In re Seaside Engineering* decisions, discussed below.

The proposed releases fall well within the Eleventh Circuit's guidelines. Without the releases, the ChemicaInvest Parties will not fund the Plan. Without the Plan funding, general unsecured creditors would receive substantially lower distributions than they would under the Plan,

and there would be no ongoing mechanism for conducting environmental remediation of the Debtors' real property. Additionally, the EPD, which is the only environmental regulatory authority directly affected by the Plan releases,[3] has indicated (informally) its support for confirmation of the Plan.

A. Scope of the Proposed Releases

1. Debtors' Releases of ChemicaInvest Parties and ChemicaInvest Affiliated Parties (Plan Section 10.3)

Section 10.3 of the Plan provides for the following releases of claims held by the Debtors and their Estates:

> Notwithstanding anything contained in the Plan to the contrary, as of the Effective Date, for good and valuable consideration provided by or on behalf of the Debtor Released Parties (including payment of the Settlement Payments), each of the Debtors and the Estates shall be deemed to have provided a full, complete, unconditional, final and irrevocable release to the Debtor Released Parties, from any and all Causes of Action and any other claims, debts, obligations, rights, suits, damages, actions, causes of action, remedies and liabilities whatsoever, including any derivative claims asserted on behalf of any Debtor, whether accrued or unaccrued, whether matured or unmatured, whether existing or hereafter arising, whether known or unknown, foreseen or unforeseen, direct or indirect, fixed or contingent, liquidated or unliquidated, disputed or undisputed, asserted or unasserted, in law, equity, contract, tort or otherwise, which any of the Debtors and the Estates has, including Avoidance Actions, those Causes of Action based on veil piercing or alter-ego theories of liability, equitable subordination, breach of fiduciary duty, contribution, indemnification, joint liability, or otherwise, or based in whole or in part upon any act or omission, event, transaction, or other occurrence or circumstances existing or taking place prior to or on the Effective Date and arising from or related in any way to the Debtors, including those in any way related to the Bankruptcy Cases or the Plan; provided, however, the foregoing release does not release any obligations of any Debtor Released Party under the Plan or any document, instrument or agreement executed to implement the Plan.

[3] The EPA, among other federal agencies, is excluded from the scope of the Third Party Release. Section 11.2.4 of the Plan provides that a condition precedent to the Effective Date is a settlement agreement between the EPA and the ChemicaInvest Parties, which provides that the EPA will not pursue the ChemicaInvest Parties under the Comprehensive Environmental Response, Compensation, and Liability Act or the Resource Conservation and Recovery Act. Thus, the Plan does not contemplate a non-consensual release from the EPA.

The "Debtor Released Parties" include: (a) ChemicaInvest Holding, B.V., CAP I, B.V., CAP II B.V., Fibrant Holding B.V., and Augusta Holdco, Inc. (collectively, the "ChemicaInvest Parties"); and (b) each direct and indirect equity holder of the ChemicaInvest Parties (including ChemicaInvest Netherlands, B.V., ChemicaInvest Netherlands II B.V., ChemInvest Holdings S.à.r.l., ChemInvest Holdings II S.à.r.l., Top Hat Holdings Limited and Top Hat Holdings II Limited, but excluding Newco C B.V. and any direct or indirect equity holders thereof), and any investment funds or vehicles directly or indirectly owning equity in such equity holder companies and any investment advisers to and/or partners of such funds, vehicles or equity holder companies, together with their respective Affiliates, subsidiaries, officers, directors, managers, members, equity holders, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals (collectively, the "ChemicaInvest Affiliated Parties"); provided, however, the ChemicaInvest Affiliated Parties do not include any of the DSM Entities.

2. Third-Party Releases (Plan Section 10.4)

Section 10.4 of the Plan provides:

> Notwithstanding anything contained in the Plan to the contrary, as of the Effective Date, for good and valuable consideration provided by or on behalf of the Creditor Released Parties (including payment of the Settlement Payments), each Releasing Party shall be deemed to have provided a full, complete, unconditional, final and irrevocable release to each Creditor Released Party from any and all causes of action and any other claims, debts, obligations, rights, suits, damages, actions, remedies and liabilities whatsoever, including any derivative claims asserted on behalf of any Debtor, whether accrued or unaccrued, whether matured or unmatured, whether existing or hereafter arising, whether known or unknown, foreseen or unforeseen, direct or indirect, fixed or contingent, liquidated or unliquidated, disputed or undisputed, asserted or unasserted, in law, equity, contract, tort or otherwise, which any Releasing Party has, based in whole or in part upon any act or omission, event, transaction, or other occurrence or circumstances existing or taking place prior to or on the Effective Date and arising from or related in any way to the Debtors, the Estates and their business operations, assets and liabilities, including those in any way related to the Bankruptcy Cases or the Plan;

> provided, however, the foregoing release does not release any obligations of any Creditor Released Party under the Plan or any document, instrument, or agreement executed to implement the Plan; provided, further, that if prior to or on the Effective Date, any Releasing Party has directly or indirectly brought or asserted a claim or cause of action that has been released or is contemplated to be released pursuant to the Plan against any Creditor Released Party, such Releasing Party shall withdraw and/or dismiss, with prejudice, such pending claim or cause of action.

The term "Creditor Released Parties" has the same meaning as the "Debtor Released Parties" (*i.e.*, the ChemicaInvest Parties and the ChemicaInvest Affiliated Parties). "Releasing Parties" means all parties-in-interest in these cases, including the EPD and all Holders of Claims, but "Releasing Parties" excludes the United States of America or any department, agent or instrumentality thereof, other than the United States Trustee or any trustee appointed in any bankruptcy case. (For convenience, in this Brief the Debtors will refer to the release contained in Section 10.4 of the Plan as the "Third Party Release.")

Significantly, Section 10.4 limits the Third Party Release, among other things, to claims "arising from or related in any way to the Debtors, the Estates and their business operations, assets and liabilities…." If a creditor or other party-in-interest had, for example, a commercial contract claim against a ChemicaInvest Party unrelated to the Debtors, that claim would not be barred under Section 10.4 of the Plan. The Debtors are not aware of any valid, legally cognizable, claims against the ChemicaInvest Parties or ChemicaInvest Affiliated Parties that would be affected by the Third Party Release.

3. What The Estates Receive For The Releases—And The Likely Outcome Without the Releases

In return for the Plan releases, the ChemicaInvest Parties will provide (a) $12.85 million in cash to fund an environmental remediation trust; (b) up to $2.5 million in cash to fund distributions with respect to claims held by Class 4 General Unsecured Creditors and the administration of a creditor trust (the "Estate Payment"); (c) $850,000 in cash to fund a deductible

trust, which will be used to cover deductibles/self-insured retentions under certain insurance policies; and (d) an amount sufficient to obtain certain insurance policies in the face amount of $30 million, which are estimated to cost approximately $1.092 million (collectively, the "Settlement Payments"). The Settlement Payments are thus expected to total at least $17.3 million.[4]

The Settlement Payments (other than the Estate Payment) are required in order to close the transactions contemplated by the ELT Property Transfer Agreement, pursuant to which the Debtors' real property, improvements and personalty will be conveyed to ELT, which will then assume responsibility for remediating the Debtors' contaminated real property.

If the Plan releases are not approved, the ChemicaInvest Parties will not make the Settlement Payments. Without these payments: (a) the Plan would not be feasible and could not be confirmed; (b) the Class 4 General Unsecured Creditors will receive recoveries far lower than the returns contemplated under the Plan; and (c) there will be no meaningful funding for, and no mechanism or party to perform, the remediation of environmental contamination at the Debtors' plant site.

B. The Proposed Releases Are Permitted Under the Bankruptcy Code.

1. The Eleventh Circuit's Framework for Approving Third-Party Releases

In its seminal case *Munford v. Munford, Inc. (Matter of Munford, Inc.)*, 97 F.3d 449, 454-55 (11th Cir. 1996), the Eleventh Circuit joined a majority of other Circuit Courts in holding that Bankruptcy Code Section 105(a) provides "ample authority" for a bankruptcy court to enter an order barring claims held by non-consenting, non-debtor entities in the context of a settlement of

[4] Additionally, to the extent any ChemicaInvest Party has an otherwise allowable claim against any Debtor, that claim (other than any DIP financing claim) will be released under the Plan, benefiting the Debtors' estates and the Class 4 General Unsecured Creditors.

litigation claims. The Eleventh Circuit held that public policy "strongly favors settlement in all types of litigation," and noted that "bar orders play an integral role in facilitating settlement." *Id.* The Eleventh Circuit, therefore, upheld the bankruptcy court's injunction of claims against the released third-party.

In 2015, the Eleventh Circuit reaffirmed its holding in *Munford* and refined its analysis of the factors courts should look to when evaluating proposed non-consensual third-party releases. *SE Property Holdings, LLC v. Seaside Eng'g. & Surveying, Inc. (In re Seaside Eng'g. & Surveying Inc.)*, 780 F.3d 1070, 1076-77 (11th Cir. 2015). In *Seaside Engineering*, the Eleventh Circuit approved the Sixth Circuit's seven-factor analysis in *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002). Those *Dow Corning* factors include:

i. There is an identity of interests between the debtor and the released third party, usually an indemnity relationship;
ii. The non-debtor has contributed substantial assets to the reorganization;
iii. 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;
iv. The impacted class, or classes, has overwhelmingly voted to accept the plan;
v. The plan provides for a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
vi. The plan provides an opportunity for those claimants who choose not to settle to recover in full; and
vii. The bankruptcy court made a record of specific factual findings that support its conclusion.

Seaside Eng'g., 780 F.3d at 1079.

In approving the *Dow Corning* factors, the Eleventh Circuit stressed the fact-intensive nature of this analysis and held that "bankruptcy courts should have the discretion to determine which of the *Dow Corning* factors will be relevant in each case." In keeping with *Munford*, the court added, "The factors should be considered a nonexclusive list of considerations, and should

be applied flexibly, always keeping in mind that such bar orders should be used 'cautiously and infrequently… and only where essential, fair, and equitable.'" *Seaside Eng'g.*, 780 F.3d at 1079 (quoting *Munford*, 97 F.3d at 455; citation to *Dow Corning* omitted). *See also, e.g., In re Scrub Island Dev. Group Ltd.*, 523 B.R. 862, 876 (Bankr. M.D. Fla. 2015) (approving third-party release under *Dow Corning* factors with no identity of parties and where affected creditor voted against the plan).

2. The Proposed Third Party Release is Appropriate.

a. The ChemicaInvest Parties' Interests and the Debtors' Interests Are Aligned on Releases.

The *Dow Corning* factors approved in *Seaside Engineering* either favor approval of the proposed releases or are not applicable to Plan confirmation. The first factor, an identity of interests between debtor and releasee, favors approval of the Third Party Release as this factor was interpreted in *Seaside Engineering*. In that case, the Eleventh Circuit noted that without the releases, the releasees "would expend their time in defense of litigation as opposed to focusing on their professional duties for the reorganized entity." Applying this factor "flexibly," the Eleventh Circuit held it favored approving the release of individuals because valuable personal management and technical services were rendered by the releasees. "Time equates to money…," the Eleventh Circuit reasoned. *Seaside Eng'g.*, 780 F.3d at 1079-80.

Here, the ChemicaInvest Parties are not simply providing time that equates to money; they are actually providing money. More than $17.3 million. The Debtors and the ChemicaInvest Parties have a shared interest in ensuring the remediation of the Debtors' plant site; the ChemicaInvest Parties are the only parties willing to provide the funding to ensure that such remediation can occur.

Moreover, the Third Party Release would release potential (highly speculative) causes of action against Fibrant's Board of Managers; if those claims were not being released and if those claims were to be asserted (despite the fact there is no legal or factual support for such claims), Fibrant would have a legal obligation to provide an indemnity with respect to such claims. Consequently, the first *Dow Corning* factor has been satisfied.

b. The ChemicaInvest Parties Are Contributing Substantial Assets to the Estate.

As set forth previously, the ChemicaInvest Parties are making more than $17.3 million in payments to or for the benefit of the Debtors' Estates (in addition to the $30 million payment that was made prior to the Filing Date). The Settlement Payments will provide a guaranteed return to general unsecured creditors and will allow the ELT Transaction to close, and ELT will then rehabilitate the Debtors' plant site. In cases of this size, with an absence of other significant assets or funding sources, the Settlement Payments are definitely "substantial."

c. The Releases Are Essential to the Debtors' Orderly Liquidation.

As indicated, absent the Third Party Release, the ChemicaInvest Parties will not make the Settlement Payments. Thus, the Third Party Release is essential to the environmental remediation of the Debtors' property and the payment of meaningful distributions to the Class 4 General Unsecured Creditors.

This *Dow Corning* factor was articulated by the Sixth Circuit in 2002 in the context of a reorganization. *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002). The Plan under consideration is denominated a liquidating plan. However, the goal of this "liquidation" is the long-term remediation of the Debtors' real property, which is akin to a reorganization handled through a post-confirmation entity (in this case, ELT). While the Debtors, as legal entities, are not being reorganized, the Debtors' property certainly is. Given the flexibility with which the Eleventh

Circuit directs bankruptcy courts to apply *Dow Corning*, the present case is one in which the Settlement Payments should be considered tantamount to financing a reorganization.

d. Vote of The Impacted Classes

The Third Party Release affects one of the two creditors holding Class 3 Environmental Claims (EPD) and the Class 4 creditors. As of the date of this Brief, preliminary results of Plan voting show overwhelming support of the Class 4 General Unsecured Creditors.[5] The Committee was actively involved in negotiating the Plan and strongly supports Plan confirmation. If EPD votes to accept the Plan and Class 4 votes to accept the Plan (as anticipated), this *Dow Corning* factor also favors approval of the Third Party Release.

e. The Plan Provides a Mechanism to Pay Class 3 Claims in Full and to Make Substantial Distributions to Class 4 Claims.

The Plan contemplates the remediation of the Debtors' real property at the direction of ELT, and such remediation will be funded, directly and indirectly, through the Settlement Payments. Remediation will eliminate—effectively, "pay"— the claims of EPA and EPD by satisfying their Class 3 environmental remediation claims in full. Furthermore, the Estate Payment will result in substantial distributions to Class 4 claimants. This *Dow Corning* factor favors approval of the Third Party Release.

f. The Plan Avoids Cleanup Expenses, So All Potential Claims of Objecting Creditors Against the ChemicaInvest Parties Are Satisfied.

Similarly, if the Plan, including the Third Party Release, is approved over the objection of either the EPD or the EPA, both those entities will still benefit from remediation of the Augusta plant site to the extent required by law. If the property is remediated at no cost to EPD, EPA or

[5] Ballots and objections to confirmation are due April 5, 2019.

the U.S. taxpayers, all potential, theoretical claims for cleanup costs against the ChemicaInvest Parties will have been satisfied. This *Dow Corning* factor favors approval.

g. The Bankruptcy Court's Record

At or after the hearing on confirmation of the Plan, scheduled for April 17, 2019, the Court will presumably enter an Order that will contain a complete record of its findings of facts and conclusions of law, thus satisfying this *Dow Corning* factor.

C. The Release By The Debtors is Permissible.

The Debtors' release of the ChemicaInvest Parties and ChemicaInvest Affiliated Parties is part of a global settlement. In return for over $17.3 million in Plan funding, the Debtors will release any and all claims they may have against the ChemicaInvest Parties and ChemicaInvest Affiliated Parties. This arrangement is highly advantageous to the Debtors' Estates because (a) it secures funding for environmental remediation and a recovery to creditors, and (b) the Debtors do not believe they hold any valid, legally cognizable, claims or causes of action against the ChemicaInvest Parties or ChemicaInvest Affiliated Parties.

A debtor's business judgment is generally afforded wide deference when evaluating the release of its own claims. *See, e.g.*, *In re Quincy Med. Ctr., Inc.*, 2011 WL 5592907, at *2 (Bankr. D. Mass. Nov. 16, 2011) ("With respect to a debtor's releases, there is no reason why a debtor in its reasonable business judgment should not be permitted, as part of its own plan, to propose to release whomever it chooses. Bankruptcy Code § 1123(b)(3) contemplates such plan provisions, which are analogous to Federal Rule of Bankruptcy Procedure 9019 compromises and settlements."). In the present case, the Debtors' release of the ChemicaInvest Parties and ChemicaInvest Affiliated Parties is supported by $17.3 million in consideration and a mutual release of claims against the Debtors. The Debtors' business judgment to release the

ChemicaInvest Parties and ChemicaInvest Affiliated Parties under these circumstances is reasonable and should be accepted.

II. THE PROPOSED WAIVER OF UNKNOWN CLAIMS IS APPROPRIATE (Briefing Order Item 2).

Section 10.9 of the Plan provides:

> Each Releasing Party expressly acknowledges that although ordinarily a general release may not extend to claims which the Releasing Party does not know or suspect to exist in its favor, which if known by it may have materially affected its settlement with the party released, they have carefully considered and taken into account in determining to enter into the releases provided under the Plan the possible existence of such unknown losses or claims. Without limiting the generality of the foregoing, each Releasing Party expressly waives any and all rights conferred upon it by any statute or rule of law which provides that a release does not extend to claims which the claimant does not know or suspect to exist in its favor at the time of granting the release, which if known by it may have materially affected its settlement with the released party. The releases contained in this Article X are effective regardless of whether those released matters are presently known, unknown, suspected or unsuspected, or foreseen or unforeseen.

This section primarily affects California parties-in-interest, as California Civil Code section 1542 provides that general releases do not release unknown claims. As noted by the New York bankruptcy court in *In re Bogdanovich*, 301 B.R. 129, 146 n. 66 (Bankr. S.D.N.Y. 2003), waivers of California's statutory limit on releases of unknown claims are "common in California releases." Releases of unknown claims by bankruptcy courts have been upheld on appeal. *See, e.g., Sheen v. Diamond (In re Am. Computer & Digital Components, Inc.)*, 2005 WL 6960172, at*7 (9th Cir. BAP July 14, 2005) (affirming bankruptcy court's approval of California Civil Code section 1542 waiver that "expressly waives all claims, known and unknown, related to the bank's loan relationship with the debtor"). Similar language has been approved in other chapter 11 plans where claims are waived. *See, e.g., In re Sabine Oil & Gas Corp.*, 2016 WL 11565432 (Bankr. S.D.N.Y. July 27, 2016) (approving plan with "Waiver of Statutory Limitation on Releases" nearly identical to that in Section 10.9 of the Plan).

A waiver of unknown claims is necessary and appropriate in these cases because the ChemicaInvest Parties have made it clear they will only provide the $17.3 million of Plan funding if they achieve "finality" through the Plan. In other words, the ChemicaInvest Parties are unwilling to be exposed to the risk of post-confirmation litigation regarding whether certain purported claims were "unknown" by the claimant as of the Confirmation Date and thus could be asserted against the ChemicaInvest Parties after they provide the Plan funding. The language of Section 10.9 of the Plan does not affect the propriety or scope of the Third Party Release, the release by the Debtors, or the Plan's exculpation provision. It simply ensures the ChemicaInvest Parties receive the benefit of their bargain and, therefore, the waiver of unknown claims should be approved.

III. THE PROPOSED SUBSTANTIVE CONSOLIDATION IS APPROPRIATE (Briefing Order Item 3).

The Plan provides for the substantive consolidation of the Debtors with respect to the treatment of all Claims and Equity Interests. In these cases, substantive consolidation will not have an adverse affect on any creditor or other party in interest, will provide material financial benefits to the Estates and creditors, and is fully consistent with Eleventh Circuit precedent.

As courts of equity, bankruptcy courts have the power to consolidate substantively the assets and liabilities of different debtors:

> The power to consolidate is one arising out of equity, enabling a bankruptcy court to disregard separate corporate entities, to pierce their corporate veils in the usual metaphor, in order to reach assets for the satisfaction of debts of a related corporation.

In re Continental Vending Mach. Corp., 517 F.2d 997, 1000 (2d Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). *See also* 11 U.S.C. § 105(a) (empowering bankruptcy courts to issue any order, process or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code); 5 COLLIER ON BANKRUPTCY, ¶ 1100.06[1], at 1100-33 (15th ed. 1993).

No single test for determining when the power to substantively consolidate estates should be exercised has been uniformly adopted. The Second Circuit's approach enunciated in *Union Sav. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.),* 860 F.2d 515, 518 (2d Cir. 1988), emerged as a leading standard for substantive consolidation. It established two critical factors: (1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; and (2) whether the affairs of the two companies are so entangled that consolidation will be beneficial. In *In re Bonham*, 229 F.3d 750, 765 (9th Cir. 2000), the Ninth Circuit Court of Appeals adopted the Second Circuit Test, which it deemed "more grounded in substantive consolidation and economic theory" than the standards set forth in the *Auto-Train* test described below. By applying the Second Circuit Test, the *Bonham* court ordered the substantive consolidation of several business entities controlled by a single individual with the same individual's estate. *Id.* at 771. *See also In re Republic Airways Holdings, Inc.*, 565 B.R. at 719-22, *aff'd, In re: Republic Airways Holdings Inc.*, No. 17-CV-3442 (S.D.N.Y. March 28, 2018).

Other cases have attempted to balance the benefits of consolidation against the harm it would cause to creditors, and courts have placed on the parties seeking consolidation the burden of proving "that any prejudice resulting from consolidation is outweighed by the greater prejudice posed by the continued separation of the estates." *In re DRW Property Co.*, 54 B.R. 489, 495 (Bankr. N.D. Tex. 1985), and cases cited therein. *See also In re Auto-Train Corp.*, 810 F.2d 270, 276 (D.C. Cir. 1987) ("Before ordering consolidation, a court must conduct a searching inquiry to assure that consolidation yields benefits offsetting the harm it inflicts on objecting parties. . . . The proponent must show not only a substantial identity between the entities to be consolidated, but also that consolidation is necessary to avoid some harm or realize some benefit. . . . At this point, a creditor may object on the grounds that it relied on the separate credit of one of the entities and

that it will be prejudiced by consolidation. If a creditor makes such a showing, the court may order consolidation only if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm") (citations omitted).

While most courts slipstreamed behind either the Second Circuit's rationale in *Augie/Restivo* or that of the D.C. Circuit in *Auto-Train*, still other courts, including the Eleventh Circuit, have identified a "modern" or "liberal" trend toward allowing substantive consolidation that "has its genesis in the increased judicial recognition of the widespread use of interrelated corporate structures by subsidiary corporations operating under a parent entity's corporate umbrella for tax and business purposes." *Eastgroup Properties v. Southern Motel Assoc., Ltd.*, 935 F.2d 245, 248-49 (11th Cir. 1991), *quoting In re Murray Indus.*, 119 B.R. 820, 828-29 (Bankr. M.D. Fla. 1990) (permitting substantive consolidation); *see also In re Republic Airways Holdings, Inc.*, 565 B.R. 710, 719-22 (Bankr. S.D.N.Y. 2017) (granting substantive consolidation where the court determined the holding company and affiliates functioned as a single economic unit, as they operated a single business under one business plan; shared the same management and administrative functions; issued joint financial statements and filed joint tax returns; shared a budget; and used the same cash management system, among other considerations, despite the fact the owner trustee and owner participant testified to relying on the corporate separateness of the entities), *aff'd, In re: Republic Airways Holdings Inc.*, No. 17-CV-3442 (S.D.N.Y. March 28, 2018).

Courts analyzing substantive consolidation do so with reference to flexible guidelines. First, while the Bankruptcy Code nowhere specifically authorizes substantive consolidation of separate entities, a bankruptcy court may order consolidation by virtue of its general equitable power. *Eastgroup*, 935 F.2d at 248; *Auto-Train*, 810 F.2d at 276. Second, the power of a

bankruptcy court to consolidate substantively the assets and liabilities of separate entities is of imprecise scope and dimension. *In re Continental Vending Mach. Corp.*, 517 F.2d at 1000. Third, the doctrine of substantive consolidation continues to evolve, and there is no uniform methodology for analyzing cases in which substantive consolidation is sought. Fourth, the decision to impose substantive consolidation varies according to the facts and circumstances of each case and cannot be decided based upon mathematical formulas. Rather, in ascertaining whether substantive consolidation should be imposed, each case is *sui generis* and must be decided in accordance with its own underlying facts. *In re Murray Indus.*, 119 B.R. at 830; *see also DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681,684 (4th Cir. 1976), *quoting Brown Bros. Equip. Co. v. Michigan*, 215 N.W.2d 591, 593 (Mich. App. 1974). Indeed, as one commentator has observed,

> [i]n determining whether to grant an application for substantive consolidation, the courts have focused special attention on the nature of the relationship between the entities to be consolidated and the effect of consolidation on the creditors of each entity. The result is that substantive consolidation cases are to a great degree *sui generis*.

5 COLLIER ON BANKRUPTCY, ¶ 1100.06(1), at 1100-33.

When considering the appropriateness of substantive consolidation, courts examine, among other things, the structures of the entities proposed to be consolidated, their inter-entity relationships, and their relationships with their respective creditors and other third parties. Because the doctrine of substantive consolidation is an equitable one, courts will also examine the impact upon the creditors of each entity if consolidation were to be ordered, and whether such parties would be unfairly prejudiced or treated more equitably by substantive consolidation. *See Augie/Restivo,* 860 F.2d at 518. *Auto-Train* touched many of the same bases as *Augie/Restivo* and its progeny, but in the end chose as its overreaching test the "substantial identity" of the entities

and made allowance for consolidation in spite of creditor reliance on separateness when "the demonstrated benefits of the consolidation 'heavily' outweigh the harm." *In re Auto-Train*, 810 F.2d at 276.

Whatever the rationale employed, courts consider many factors in assessing whether to order substantive consolidation. In particular, courts and commentators have identified various factors, the presence or absence of which is crucial to the substantive consolidation issue.[6] These factors include:

1. The affiliated corporations have common directors or officers;

2. One corporation owns all or the majority of the capital stock of the affiliated corporation or there is common ownership of all corporations;

3. One corporation subscribes to the capital stock of the affiliated corporation or otherwise causes its incorporation;

4. The debtor corporation has inadequate capital;

5. One corporation was organized to thwart the creditors of the affiliated corporation;

6. One corporation finances or guarantees the finances of the affiliated corporation;

7. One corporation pays the salaries, expenses, or losses of the affiliated corporation;

8. The affiliated corporations commingle assets, liabilities, or business functions;

[6] The "typical" substantive consolidation case involves the consolidation of a parent corporation and its wholly owned subsidiary, where each is a debtor in a separately pending bankruptcy case. *See, e.g., In re Continental Vending Mach. Corp.*, 517 F.2d at 999. Thus, the factors cited by courts and commentators are usually phrased in terms having special significance to the corporate form of organization, such as directors and capital stock. Nevertheless, these factors appear equally relevant to and have been applied in cases involving noncorporate entities. *See, e.g., Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986) (individual, his wholly owned corporation and its wholly owned subsidiary, a partnership in which he and his corporation were the sole partners, and a limited partnership in which he and his corporation were the general partners and in which he was also a limited partner); *In re DRW Property*, 54 B.R. 489 (Bankr. N.D. Tex. 1985) (eighty-five debtor limited partnerships and 109 nondebtor limited partnerships).

9. The affiliated corporations conduct business at the same location, use the same telephone number, share common overhead, or the operations of the affiliated corporations would be most profitable when consolidated at a single location;

10. The affiliated corporations ignore corporate formalities, including not maintaining separate records, payrolls, bank accounts, not holding separate shareholder and board of directors' meetings, and not passing separate board of directors' resolutions;

11. One corporation uses the property of an affiliated corporation;

12. One corporation has substantially no business except with the affiliated corporation, no assets except those conveyed to it by the affiliated corporation, or the corporation's assets could only be beneficially used in conjunction with assets of the affiliated corporation;

13. The affiliated corporations prepare consolidated financial statements and file consolidated tax returns;

14. One corporation, in its papers and in the statements of its officers, refers to an affiliated corporation as a department or division of the corporation;

15. Creditors regard affiliated corporations as one unified entity;

16. Important business of the affiliated corporations is conducted in the name of one corporation;

17. A bankruptcy court or accountants testifying before a bankruptcy court finds it difficult to separate the assets and liabilities of the affiliated corporations;

18. The directors or executives of one corporation do not act independently in the interest of that corporation but take direction from an affiliated corporation or dominant individual owner;

19. Substantive consolidation will not prejudice any group of creditors;[7]

20. Events complained of were prior to the time the corporations became affiliated; and

[7] The "modern" or "liberal" consolidation test enunciated in *Eastgroup*, 935 F.2d at 249-50, and *Auto-Train*, 810 F.2d at 276, apparently eases the *prima facie* showing required of the party seeking consolidation, thereby imposing upon the opposing party the task of demonstrating "that it relied on the separate credit of the objecting entities and that it will be prejudiced by consolidation." *Id.*

21. Affiliated corporations have similar purposes or objectives.

See, e.g., id.; Eastgroup, 935 F.2d at 249; *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940); *In re Vecco Const. Indus., Inc.*, 4 B.R. 407, 410 (Bankr. E.D. Va. 1980); *In re Donut Queen, Ltd.*, 41 B.R. 706 (Bankr. E.D.N.Y. 1984); *In re Food Fair, Inc.*, 10 B.R. 123 (Bankr. S.D.N.Y. 1981).

In addition to considering the presence or absence of the factors that have traditionally been deemed crucial to the substantive consolidation issue, certain cases have considered whether consolidation would improve the debtors' chances to reorganize and have ordered consolidation where it was deemed necessary for an effective reorganization. *See, e.g., In re Standard Brands Paint Co.*, 154 B.R. 563 (Bankr. C.D. Cal. 1993) (granting motion for temporary consolidation of five debtor corporations for plan voting and distribution purposes, but allowing the five debtor corporations to survive and continue as separate corporations after plan confirmation, where consensual plan premised on such temporary consolidation was confirmable if temporary consolidation was granted); *In re Continental Airlines, Inc., et al.*, Case Nos. 90-932 through 90-984 (Bankr. D. Del. April 16, 1993) (confirming plan of reorganization providing for the creation of four pools of claims and the allocation of consideration among those pools, where court concluded that debtors would incur substantial delay and expense without such consolidation and where court found strong public interest in rehabilitation of the debtors); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 767 (Bankr. S.D.N.Y. 1992) ("Without the consolidation, no reorganized entity will emerge, thus thwarting a primary goal of the Bankruptcy Code - rehabilitation and reorganization"); *In re Murray Indus.*, 119 B.R. at 832 (authorizing consolidation that facilitates and expedites the reorganization process because separate plans would not be feasible); *In re F.A. Potts & Co., Inc.*, 23 B.R. 569, 573-74 (Bankr. E.D. Pa. 1982) (application for substantive consolidation granted over the objection of certain creditors where

court concluded that consolidation was necessary to facilitate the filing of a feasible plan of reorganization). In these cases, the courts (i) emphasized the absence of harm or prejudice to any particular creditor group, (ii) emphasized the absence of objections by creditors to consolidation, (iii) emphasized the presence of affirmative creditor support for consolidation, or (iv) determined that the benefits from consolidation outweighed the harm. In addition to the foregoing, at least one case has suggested that consolidation is permitted merely to reduce administrative expenses. *See In re F.W.D.C.*, 158 B.R. 523 (Bankr. S.D. Fla. 1993) (holding that the savings in administrative costs by having one disclosure statement and plan instead of six separate disclosure statements and plans justifies consolidation).

Taken together, these factors strongly favor consolidation of the four Debtors. Fibrant owns, directly or indirectly, all three other Debtors. All of the Debtors have common officers and managers. Historically, Fibrant paid all of the expenses and liabilities of the other Debtors, all business of the Debtors was conducted under the Fibrant name, the Debtors other than Fibrant generally had no separate bank accounts, and Fibrant used the assets of the other Debtors in conducting its business. All of the Debtors conduct business at the same physical location. Finally, and most important, substantive consolidation will not prejudice any creditor.

A common concern with substantive consolidation is that, when there are different creditors for each debtor, some similarly situated creditors may be paid more than others. That is not the case here. The schedules for each Debtor (other than Fibrant) reveal that they have no non-insider creditors, with the exception of Richmond County, Georgia's tax assessor, which is a creditor of all Debtors and which will be paid in full for its priority claims under Section 4.3 of the Plan. *See* Docket Nos. 189 at 20-25 (Fibrant South Center Schedules), 190 at 19-23 (Evergreen

Schedules), and 191 at 20-24 (Georgia Monomers Company Schedules). Thus, there will be no harm to any creditor from substantive consolidation.

The benefits of substantive consolidation in these cases include elimination of duplicative corporate filings, elimination of the cost of four parallel plans and disclosure statements, elimination of the cost of four separate closings of the ELT Transaction, and assurance for ELT that its rights to the Debtors' real and personal property are bound up in one plan and one confirmation order.

IV. NOTICE OF THE PLAN AND CONFIRMATION HEARING IS PROPER (Briefing Order Item 4).

Notice of a proposed plan is governed by Bankruptcy Rule 3017(d), which provides that creditors and equity holders, and the United States Trustee, shall receive a copy of the plan (or court-approved summary), the disclosure statement, a notice of voting deadline, a notice of objection deadline, and notice of the confirmation hearing, and any other information the court may direct. Bankruptcy Rule 2002(b) provides that the debtor, a trustee, all creditors and indenture trustees must receive at least 28 days' notice by mail of the time fixed for filing objections and the confirmation hearing.

Actual Notice. The certificate of service filed with the Court by Kurtzman Carson Consultants LLC ("KCC") [Docket No. 657] shows that, on February 19, 2019, as directed by the *Court's Order Approving (I) Disclosure Statement with Respect to Amended and Restated Plan of Liquidation; (II) Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan; and (III) Related Notice and Objection Procedures* dated February 14, 2019 [Docket No. 604] (the "Solicitation Procedures Order"), the following entities were served with the following indicated materials:

a. All Class 3 Creditors (*i.e.*, EPD and the EPA) received a transmittal letter; a Class 3 ballot; a USB flash drive containing the Plan, the Disclosure Statement for Amended and Restated Plan of Liquidation Filed by Fibrant, LLC, et al., dated February 13, 2019 [Docket No. 601] (the "Disclosure Statement"), and the Court's order approving the Disclosure Statement; the Court-approved notice of the confirmation hearing, objection deadlines, Rule 3018(a) motion deadline, a bold, all-capitalized notice that states that the Plan contains release, injunction and exculpation provisions, and provides notice to former employees of the Debtors regarding the transfer of records to another entity (the "Confirmation Hearing Notice"); and a return envelope.

b. All Class 4 Creditors (*i.e.*, general unsecured creditors) received a transmittal letter; a Class 4 ballot; a letter of support from the Committee; a USB flash drive containing the Plan, Disclosure Statement, and the Court's order approving the Disclosure Statement; the Confirmation Hearing Notice; and a return envelope.

c. All holders of equity interests in any Debtor received a Court-approved Notice of Non-Voting Status Under the Debtors' Amended and Restated Plan Dated as of February 13, 2019 (the "Non-Voting Notice") and Confirmation Hearing Notice.

d. All holders of claims against the Debtors entitled to priority under the Bankruptcy Code (*e.g.*, taxing authorities) received a Court-approved Non-Voting Notice and Confirmation Hearing Notice.

e. All holders of secured claims asserting interests in any property of the Debtors (*i.e.*, miscellaneous secured claims) received a Court-approved Non-Voting Notice and Confirmation Hearing Notice.

f. All owners of real property contiguous to the Debtors' real property, as determined from a review of Richmond County, Georgia's tax records, received a USB flash drive containing the Plan, Disclosure Statement, and the Court's order approving the Disclosure Statement; and the Confirmation Hearing Notice.

g. All parties whose contracts or leases are to be assumed or assigned under the Plan, all parties with claims subject to pending objections, all parties included on the Master Service List as prescribed by the Court in its *Order Establishing Notice and Administrative Procedures* dated March 7, 2018 [Docket No. 100], all Class 4 parties requesting notice at any different address (for instance, the address of counsel), and all other interested parties not falling into any other defined category (*e.g.*, ELT) received a USB flash drive containing the Plan, Disclosure Statement, and the Court's order approving the Disclosure Statement; and the Confirmation Hearing Notice.[8]

[8] Insurer AIG, which received a copy of the materials listed in item (g) on February 19, also received a copy of the items copied onto the USB flash drive and a copy of the Confirmation Hearing Notice at a separate address on March 8, 2019. American Express Travel Related Services Co., whose claim was subject to a pending objection at the time of the service deadline set forth in the Court's Solicitation Procedures Order, received its Class 4 Creditor materials (see item (b)) on March 11. *See Supplemental Certificates of Service* [Docket Nos. 722 & 725]. Three matrix

h. All parties on the Debtors' creditor matrix—a 49-page matrix including thousands of former employees, former creditors, and other parties that may or may not have an interest in the Debtors' cases—also received a copy of the Confirmation Hearing Notice.

The notice set forth above covers all known entities that hold or may hold Claims against or Equity Interests in the Debtors, as well as interests in the Debtors' property, or potential claims related to environmental contamination of the Debtors' real property. Notice was served on February 19, 2019—giving parties 46 days' notice of time to object, and 58 days' notice of the confirmation hearing—and goes far beyond what the Bankruptcy Rules require and in accordance with this Court's order.

Publication Notice. Where a creditor, actual or potential, is not known to the debtor, publication notice of the confirmation hearing and deadline to object to the plan is sufficient to provide due process. *See, e.g., Matter of GAC Corp.*, 681 F.2d 1295, 1300 (11th Cir. 1982) (approving publication notice for unknown creditors under the Bankruptcy Act). *See also, e.g., In re Atherogenics, Inc.*, 2009 WL 2407418, at *2 (Bankr. N.D. Ga. June 9, 2009) (confirming plan after mail and publication notice); *In re Charter Int'l Oil Co.*, 2007 WL 879176 *6 (Bankr. M.D. Fla. Mar. 14, 2007) ("In bankruptcy proceedings, publication notice is legally adequate notice to unknown creditors."). As directed by the Court, on February 27, 2019, the Confirmation Hearing Notice was published in *USA Today* and the *Augusta Chronicle*. This publication was calculated to reach unknown creditors nationwide as well as those in the Augusta, Georgia area.

Service of the various solicitation materials, as set forth above, complies with the Court's Solicitation Procedures Order and goes well beyond the notice required in Bankruptcy Rule

parties, which do not hold claims against or interests in the Debtors (or any other known connection) were served with a copy of the Confirmation Hearing Notice on February 28, 2019. *See Supplemental Certificate of Service* [Docket No. 696].

3017(d). Any entity that could conceivably be affected by the Plan's release, injunction, or other provisions has been given notice of the Plan, the objection deadline, the voting deadline, and the confirmation hearing. Accordingly, service was adequate, both under the Court's order and under the Bankruptcy Code and Rules.

V. THE DEBTORS WILL NOT ABANDON ANY MATERIAL ASSETS ABSENT EXPRESS ORDER OF THE COURT (Briefing Order Item 5).

The Plan provides that certain real and personal property of the Debtors (along with certain assigned contractual rights and intangibles) will be transferred to ELT pursuant to the ELT Property Transfer Agreement. Certain cash and causes of action will be transferred to the Liquidating Agent, the Litigation Trust, the Creditor Trustee, and CIH. (*See* Plan Section 6.3.) Property subject to secured creditors' liens will be either surrendered in satisfaction of the respective secured creditor's secured claim or will be sold. (*See* Plan Section 3.1.2.) Certain books and records unnecessary to the functions of the successor trusts may be abandoned (Plan Section 6.8); certain causes of action *may* be abandoned if permitted by the various plan documents (Plan Section 4.7(b)); and the Liquidating Agent may abandon certain assets that cannot be sold cost-effectively or have an inconsequential value (Plan Section 6.17). The abandonment provisions, however, do not relate to the Debtors' environmentally contaminated real property, and no other property may be abandoned under the Plan unless "abandoned pursuant to an order of the Bankruptcy Court." (*See* Plan Section 10.1.)

VI. RESPONSES TO CERTAIN IDENTIFIED OBJECTIONS (Briefing Order Item 6).

A. Objection of DSM [Docket No. 572] (the "DSM Objection")

All of DSM's Disclosure Statement objections were resolved at or prior to the Disclosure Statement hearing.

However, DSM also argued that potential litigation claims against DSM are not adequately preserved post-confirmation. DSM cites *Bank of the Ozarks v. Coastal Realty Investments, Inc. (In re Coastal Realty Investments, Inc.),* 2013 WL 214235 (Bankr. S.D. Ga. Jan. 17, 2013) (Dalis, J.), for the proposition that "a disclosure statement and plan must disclose the nature of claims to be preserved, and the identity, when possible, of potential defendants." DSM Objection, at 3. The Debtors are aware of courts within the Eleventh Circuit that have required more than just a general statement that debtors "reserve all rights and causes of action." *See, e.g., Samsung Electronics Co., Ltd. v. All-American Semiconductor Inc.*, 2010 WL 11507198, at *8 (S.D. Fla. Apr. 15, 2010).

The Plan adequately preserves claims against DSM because it specifies DSM as a potential defendant by name. Indeed, the definition "DSM SPA Causes of Action," which incorporates the defined terms "DSM SPA" and "DSM," refers to DSM by name. The defined term "Waived Avoidance Action" specifically excludes any waiver of "Avoidance Actions" brought against DSM or its affiliates, clearly indicating the Plan's intention to preserve those rights.

These provisions adequately preserve the Debtors' claims against DSM. In *Samsung*, the district court refused to dismiss a case against Samsung Electronics where the plan reserved causes of action relating to "settlements or releases executed prior to the petition date," including a settled antitrust claim, and identified Samsung as a potential defendant. The district court concluded, "I concur with the Bankruptcy Court's conclusion that Samsung knew or should have known that there were potential claims against Samsung [relating] to…a prior settlement and release." *Id.*

In this case, DSM, which was a defendant in prior arbitration claims brought by Fibrant and CIH, knows there are potential claims against DSM and its affiliates relating to the DSM SPA, Avoidance Actions, or other claims. The Plan's multiple references to DSM and the Disclosure Statement's detailed description of DSM's operations at the plant site adequately preserve the Debtors' causes of action against DSM.

B. Disclosure Statement Objection of EPD [Docket No. 573]

All of the EPD's objections to the Disclosure Statement were resolved and the Debtors do not believe there are any remaining (unresolved) confirmation objections in EPD's Disclosure Statement objection.

C. Disclosure Statement Objection of United States Trustee [Docket No. 577] (the "UST Objection")

In the UST Objection, the Office of the United States Trustee ("UST") objected to the UST or a subsequent chapter 11 or chapter 7 trustee being classified as a "Releasing Party" that releases claims under the Plan against the ChemicaInvest Parties and ChemicaInvest Affiliated Parties. UST Objection, at ¶ 8. It is unclear what claims the UST or a subsequent trustee has or could theoretically assert against the ChemicaInvest Parties and ChemicaInvest Affiliated Parties, but it is reasonable and appropriate for this release to be granted as part of Plan confirmation. Granting this objection would, in effect, undermine the reason for the Settlement Payments and deny the ChemicaInvest Parties the "benefit of their bargain" under the global settlement. This objection, should the UST raise it at the Confirmation Hearing, should be overruled.

The UST also objected to the "CIH Released Parties" benefiting from the Plan's exculpation provisions under Section 10.7 of the Plan because they are not fiduciaries of the Debtors' Estates, and noted that the ChemicaInvest Parties and ChemicaInvest Affiliated Parties already benefit from the releases in Sections 10.3 and 10.4 of the Plan. Finally, the UST argued

that the exculpation provision should cover only from the Filing Date to the date of Plan confirmation. UST Objection, at ¶¶ 9-10.

Section 10.7 of the Plan (dealing with exculpation) provides as follows:

> The Debtors, the Estates, the Committee, the members of the Committee solely in their capacities as such, the CIH Released Parties, and any of such parties' respective current and/or post-Filing Date and pre-Effective Date members, officers, directors, managers, employees, advisors, attorneys, representatives, financial advisors, investment bankers, or agents and any of such parties' successors and assigns, shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to one another or to any Holder of any Claim or Equity Interest, or any other party-in-interest, or any of their respective agents, employees, representatives, financial advisors, attorneys, or Affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of the Bankruptcy Cases, the filing of the Bankruptcy Cases, the negotiation, formulation, preparation, dissemination, implementation and filing of this Plan, the pursuit of confirmation, the pursuit of approval, the consummation, or the administration of this Plan, the Estates, the property to be distributed under this Plan, the Disclosure Statement or any other contract, instrument, release or other agreements or documents created or entered into in connection with this Plan, except for their willful misconduct or gross negligence, and in all respects shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities under this Plan. No Holder of any Claim or Interest, or other party in interest, none of their respective agents, employees, representatives, financial advisors, attorneys, or Affiliates, and no successors or assigns of the foregoing, shall have any right of action against the parties listed in this provision for any act or omission in connection with, relating to, or arising out of the Bankruptcy Cases, the filing of the Bankruptcy Cases, the negotiation, formulation, preparation, dissemination, implementation and filing of this Plan, the pursuit of confirmation, the pursuit of approval, the consummation or the administration of this Plan, the Estates, the property to be distributed under this Plan, the Disclosure Statement or any other contract, instrument, release or other agreements or documents created or entered into in connection with this Plan. Nothing in this Section 10.7 relieves any Person from complying with the applicable provisions of the federal securities laws.

As a preliminary matter, the Debtors believe Section 10.7 contains a drafting error – the term "CIH Released Parties" should instead be "Creditor Released Parties," so the Debtors agree with the UST that the current language is overbroad and should be modified.

Exculpation of professionals employed by debtors, creditors committees, and other parties to a bankruptcy case are routinely permitted when the exculpation does not extend to gross negligence, willful misconduct, or breach of fiduciary duty. *See, e.g., Murphy v. Weathers*, 2008

WL 4426080, at *5 (M.D. Ga. Sept. 25, 2008) ("Both construction of the Bankruptcy Code and policy concerns support a reasonableness standard for indemnification and exculpation provisions that do not extend to willful misconduct, gross negligence, or breach of fiduciary duties."); *In re Health Diagnostic Laboratory, Inc.*, 551 B.R. 218, 233-34 (Bankr. E.D. Va. 2016) (approving exculpation clause that carved out willful misconduct or gross negligence); *In re Wash. Mut., Inc.*, 442 B.R. 314, 350-51 (Bankr. D.Del. 2011) (permitting exculpation for estate professionals, committees and members, officers and directors of debtor); *In re Berwick Black Cattle Co.*, 394 B.R. 448 (Bankr. C.D. Ill. 2008) ("inclusion in a plan of reorganization of a narrow release of claims relating to the bankruptcy case, running in favor of the debtor, the creditors committee and all professionals and advisors, now appears to be *de rigueur* in cases filed in New York and Delaware.").

The exculpation provision of Section 10.7 is limited to Estate, Committee and (as amended as described above) ChemicaInvest Party members, officers and professionals, all of whom have been involved with negotiating, documenting and implementing the Plan, and Section 10.7 specifically excludes liability for gross negligence or willful misconduct. To the extent the exculpation provision of Section 10.7 is redundant with the releases of Sections 10.3 and 10.4 of the Plan, there is no harm done to any party-in-interest. The exculpation provisions are not novel and are routinely approved in chapter 11 cases. They should be approved here.

In *Murphy v. Weathers, supra*, the district court for the Middle District of Georgia upheld an exculpation provision for acts "in connection with or in any way related to, or arising out of, the Bankruptcy Case, including, without limitation, the marketing and sale of assets pursuant to the [Agreements], the negotiation, formation, implementation, confirmation, or consummation of this Plan…." *Murphy*, 2008 WL 4426080 *1. Because consummation of the Plan requires

significant expertise and professional time to close the ELT Transaction—by ChemicaInvest and its professionals, as well as the Debtors and their professionals — and because the ChemicaInvest Parties will not fund the Settlement Payments until the Effective Date of the Plan, providing for exculpation through the Effective Date and implementation of the Plan is reasonable and should be approved.

CONCLUSION

The Plan provides the best outcome that is reasonably attainable for all of the Debtors' stakeholders and it should be confirmed by this Court.

[Signature on Following Page]

Dated: March 29, 2019

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