Docket #1588 Date Filed: 06/05/2017

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	**Chapter 11**
PARAGON OFFSHORE PLC, *et al.*	**Case No. 16–10386 (CSS)**
Debtors. [1]	**(Jointly Administered)**
	Hearing Date: June 7, 2017 at 10:00 a.m. (ET)

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF FIFTH JOINT CHAPTER 11 PLAN OF PARAGON OFFSHORE PLC AND ITS AFFILIATED DEBTORS

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Paragon Offshore plc (6017); Paragon Offshore Finance Company (6632); Paragon International Finance Company (8126); Paragon Offshore Holdings US Inc. (1960); Paragon Offshore Drilling LLC (4541); Paragon FDR Holdings Ltd. (4731); Paragon Duchess Ltd.; Paragon Offshore (Luxembourg) S.à r.l. (5897); PGN Offshore Drilling (Malaysia) Sdn. Bhd. (9238); Paragon Offshore (Labuan) Pte. Ltd. (3505); Paragon Holding SCS 2 Ltd. (4108); Paragon Asset Company Ltd. (2832); Paragon Holding SCS 1 Ltd. (4004); Paragon Offshore Leasing (Luxembourg) S.à r.l. (5936); Paragon Drilling Services 7 LLC (7882); Paragon Offshore Leasing (Switzerland) GmbH (0669); Paragon Offshore do Brasil Ltda.; Paragon Asset (ME) Ltd. (8362); Paragon Asset (UK) Ltd.; Paragon Offshore International Ltd. (6103); Paragon Offshore (North Sea) Ltd.; Paragon (Middle East) Limited (0667); Paragon Holding NCS 2 S.à r.l. (5447); Paragon Leonard Jones LLC (8826); Paragon Offshore (Nederland) B.V.; and Paragon Offshore Contracting GmbH (2832). The Debtors' mailing address is 3151 Briarpark Drive, Suite 700, Houston, Texas 77042. Neville Barry Kahn and David Philip Soden, each of Deloitte LLP, are the joint administrators of Paragon Offshore plc (in administration) (the "**Joint Administrators**"). The affairs, business and property of Paragon Offshore plc (in administration) are managed by the Joint Administrators.

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Paragon Offshore plc (in administration) ("**Paragon Parent**") and certain of its affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**"), submit this memorandum of law (the "**Memorandum**") in support of confirmation of the *Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* (D.I. 1459) (as amended, supplemented, restated or modified from time to time, the "**Plan**")[2] pursuant to section 1129 of title 11 of the United States Code (the "**Bankruptcy Code**"), and respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Debtors are pleased to request confirmation of the Plan, which is supported by the overwhelming majority of the Term Lenders, the overwhelming majority of the Revolving Lenders, and the Creditors' Committee (collectively, the "**Consenting Creditors**") and satisfies the requirements of the Bankruptcy Code. The Plan is the culmination of significant effort, arm's length negotiation, a successful mediation and hard-won concessions by and between the Debtors and their major creditor constituencies. It will permit the Debtors to reorganize in the broadest sense of the word, by restructuring their balance sheet and their business. Pursuant to the Plan, they will shed significant liabilities by equitizing their secured and unsecured funded debt, maximize the value of their assets by consolidating, and streamlining their organizational structure and operations under new ownership, and preserve jobs for over 700 employees.

2. Given the complexities and international nature of the Debtors' business and capital structure, and the challenges inherent in restructuring a global enterprise whose parent is a United Kingdom company, the consensual Plan is a tremendous accomplishment. It

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan, the Plan Supplement, or the Disclosure Statement (each as defined herein).

is a testament to the hard work by, and cooperation among, the Debtors' management, the Debtors' advisors, and the Consenting Creditors and their advisors. The Debtors look forward to confirmation of the Plan and a quick emergence from chapter 11 to begin their fresh start.

3. For the reasons set forth herein and in the Supporting Declarations, the Plan Settlement (as defined herein) should be approved pursuant to Rule 9019 of Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), because it is fair, reasonable, and in the best interests of the Debtors' estates. Furthermore, for the reasons set forth herein and in the Supporting Declarations, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code. Accordingly, this Court should approve the Plan Settlement and confirm the Plan. A proposed order granting such relief has been filed contemporaneously herewith (the "**Proposed Confirmation Order**").

BACKGROUND

4. Except as set forth herein, the pertinent and salient facts relating to these Chapter 11 cases and the Plan are set forth in the Plan, the *Disclosure Statement for Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* (D.I. 1460) (as amended, supplemented, restated or modified from time to time, the "**Disclosure Statement**"), and the Plan Supplement (defined below). In addition, prior to or contemporaneously with the filing of this Memorandum, the following documents were filed in support of confirmation of the Plan:

- *Declaration of Lee M. Ahlstrom in Support of the Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* (D.I. 1586) (the "**Ahlstrom Declaration**");
- *Declaration of Thomas B. Osmun in Support of Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* (the "**Confirmation Declaration**");
- *Declaration of Marc J. Brown in Support of Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* (D.I. 1587) (the "**Brown Declaration**");

- *Declaration of Ari Lefkovits in Support of the Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* (the "**Valuation Declaration**");

- *Certification of James Lee with Respect to the Tabulation of Votes on the Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* (D.I. 1584) (the "**Voting Certification**");

- *Affidavit of Service of Solicitation Packages by James Lee on behalf of Kurtzman Carson Consultants LLC*, dated May 9, 2017 (D.I. 1475); *Supplemental Affidavit of Service of Solicitation Packages by Stephanie Delgado on behalf of Kurtzman Carson Consultants LLC*, dated May 19, 2017 (D.I. 1519); *Affidavit of Service of Solicitation Packages by James Lee on behalf of Kurtzman Carson Consultants LLC*, dated May 30, 2017 (D.I. 1554) (collectively, the "**Solicitation Affidavit**");

- *Affidavit of Service of Notice of Commencement of Foreign Proceeding in Relation to Paragon Offshore plc by Alvaro Salas, Jr. on behalf of Kurtzman Carson Consultants LLC*, dated May 19, 2017 (D.I. 1520) (the "**U.K. Administration Affidavit**");

- *Affidavit of Service of Plan Supplement by Alvaro Salas, Jr. on behalf of Kurtzman Carson Consultants LLC*, dated May 24, 2017 (D.I. 1536); *Amended Affidavit of Service of Plan Supplement by Alvaro Salas, Jr. on behalf of Kurtzman Carson Consultants LLC*, dated May 30, 2017 (D.I. 1555); (together, the "**Plan Supplement Affidavit**"); and

- *Affidavit of Service of Notice of Appointment of Joint Administrators to Paragon Offshore plc by Alvaro Salas, Jr. on behalf of Kurtzman Carson Consultants LLC*, dated May 30, 2017 (D.I. 1557) (the "**Joint U.K. Administrators Affidavit**").

5. In addition, in support of confirmation of the Plan, the Debtors rely on the following previously filed documents:

- *Declaration of Ari Lefkovits in Support of the Debtors' Chapter 11 Petitions and First Day Relief* (D.I. 17);

- *Declaration of James A. Mesterharm in Support of the Debtors' Chapter 11 Petitions and First Day Relief* (D.I. 18) (together with (D.I. 17), the "**First Day Declarations**"); and

- *Declaration of Todd D. Strickler in Support of Approval of the Noble Settlement Agreement Pursuant to Bankruptcy Rule 9019* (D.I. 716) (the "**Strickler Declaration**," and together with the above declarations, certification, and affidavits, the "**Supporting Declarations**").

6. On May 2, 2017, the Debtors and their three major creditor constituents—the Term Lenders, the Revolving Lenders, and the Creditors' Committee announced a global

settlement (the "**Plan Settlement**") regarding a potential plan of reorganization for the Debtors and filed the Plan and the Disclosure Statement. As further described in the Ahlstrom Declaration, the Plan Settlement settles, among other things, the following issues: (i) the calculation and valuation of any Adequate Protection Obligations; (ii) the value of certain collateral; (iii) the extent, priority, and validity of the Secured Lenders' liens; (iv) the allowance of the "Applicable Premium" (as defined in the Senior Notes Indenture); (v) the value of the Secured Lenders' deficiency claims; (vi) whether the Plan satisfies the best interest test under section 1129(a)(7) of the Bankruptcy Code; and (vii) a determination to not pursue the Noble Settlement Agreement, and to instead allow the Litigation Trust to pursue the Noble Claims. *See* Ahlstrom Declaration at ¶¶ 24-37; Plan §§ 5.1, 5.7.

7. On the same date, this Court issued an *Order (I) Approving Proposed Disclosure Statement and Form and Manner of Notice of Disclosure Statement, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling Confirmation Hearing and (IV) Establishing Notice and Objection Procedures for Confirmation of The Proposed Plan Pursuant to Sections 105, 502, 1125, 1126, and 1128 of the Bankruptcy Code and Bankruptcy Rules 2002, 3003, 3017, 3018, 3020, and 9006 and Local Rules 2002-1, 3017-1, and 9006-1* (D.I. 1456) (the "**Disclosure Statement Order**"). Further, on the same day the Debtors filed and caused their noticing agent, Kurtzman Carson Consultants LLC ("**KCC**), to serve on all parties in interest a *Notice of (I) Approval of Disclosure Statement, (II) Establishment of Record Voting Date, (III) Hearing on Confirmation of the Proposed Plan, (IV) Procedures for Objecting to the Confirmation of the Proposed Plan, and (V) Procedures and Deadline for Voting on Proposed Plan* (D.I. 1462) (the "**Confirmation Hearing Notice**"). *See* Solicitation Affidavit.

8. Pursuant to the Disclosure Statement Order, the Court set the Record Voting Date for all holders of Claims against the Debtors entitled to vote on the Plan as April 28,

2017, with a Voting Deadline of May 31, 2017 at 5:00 p.m. (prevailing Eastern Time). On May 5, 2017 the Debtors, through KCC, caused the relevant solicitation packages including the Plan, the Disclosure Statement, the Confirmation Hearing Notice, and the ballots (the "**Solicitation Packages**") to be served on holders of Claims in Class 3 (Secured Lender Claims), Class 4 (Senior Notes Claims), and Class 5 (General Unsecured Claims). *See* Voting Certification at ¶ 7. The forms of ballots sent to the respective Classes are **Exhibits 2** through **3-3** to the Disclosure Statement Order. Pursuant to the Disclosure Statement Order, the Debtors were not required to solicit votes from the holders of Claims in Class 1 (Priority Non-Tax Claims), Class 2 (Other Secured Claims), and Class 6 (Intercompany Claims), because such claims are Unimpaired; from the holders of Claims in Class 7 (Subordinated Claims) and the holders of Interests in Class 8 (Parent Interests) because those parties were fully Impaired and would not receive any recovery under the Plan; and from the holders of Interests in Class 9 (Intercompany Interests), because such holders are either Unimpaired or fully Impaired. *See* Disclosure Statement Order at ¶ F. Except for the holders of Claims in Class 6 (Intercompany Claims) and Interests in Class 9 (Intercompany Interests), the Debtors sent a *Notice of Non-Voting Status*, attached as **Exhibit 4** to the Disclosure Statement Order, to all holders of Claims or Interests in the Non-Voting Classes of their Non-Voting Status. *See* Voting Certification at ¶ 7; Solicitation Affidavit at ¶ 14 (May 9, 2017); Disclosure Statement Order ¶¶ 18-20.

9. The Debtors filed a supplement to the Plan (D.I. 1516) on May 19, 2017 (as amended, supplemented, restated or modified from time to time, the "**Plan Supplement**"), which included the following documents: (i) the Form of Articles of Association of Reorganized Paragon; (ii) a list of Directors and Officers of the Reorganized Debtors (except for the New Board for Reorganized Paragon, for which, as further discussed below, the Debtors are retaining Korn Ferry to assist in a search for qualified directors); (iii) the Form of U.K. Implementation

Agreement (which provides for the creation of the U.K. Administration Reserve, which will fund Paragon Parent for the duration of the U.K. Administration); (iv) the Form of Take Back Debt Agreement; (v) the Form of New Letter of Credit Agreement; (vi) the Form of Existing L/C Escrow Agreement; (vii) an Illustrative Allocation and Distribution of Plan Consideration on Account of Outstanding Letters of Credit; (viii) the Form of Registration Rights Agreement; (ix) the Form of Litigation Trust Agreement; (x) the Schedule of Rejected Contracts and Leases; and (xi) the list of Retained Causes of Action.

10. On May 17, 2017, the board of directors for Paragon Parent applied to the High Court of Justice, Chancery Division, Companies Court of England and Wales (the "**English Court**") to place Paragon Parent into administration in the United Kingdom, in accordance with the Plan. *See Notice of Commencement of Foreign Proceeding in Relation to Paragon Offshore plc* (D.I. 1507); U.K. Administration Affidavit; *see also Second Witness Statement of Todd Strickler*, CR-2017-003729 (Eng. High Ct. May 19, 2017).[3] A hearing to consider the application was held by the English Court on May 23, 2017, at which time the English Court approved of the application and appointed Neville Barry Kahn and David Philip Soden, each of Deloitte LLP, as joint administrators of Paragon Parent. *See Notice of Appointment of Joint Administrators to Paragon Offshore plc* (May 24, 2017) (D.I. 1531); Joint U.K. Administrators Affidavit; *see also Administration Order*, CR-2017-003729 (Eng. High Ct. May 23, 2017) (the "**Administration Order**").

11. As forth in the Voting Certification, the holders of Claims in Class 3 and Class 4 have overwhelmingly voted to accept the Plan. Upon the conclusion of a twenty-six (26) day solicitation period, the Debtors have received acceptances on the Plan from 99.43% in

[3] Electronic copies of all documents filed with the English Court in connection with Paragon Parent's U.K. Administration may be found on KCC's website, at http://www.kccllc.net/paragon/info/7655.

number and 99.16% in value of Class 3 (Secured Lender Claims) and from 97.06% in number and 99.55% in value of Class 4 (Senior Notes Claims). *See* Voting Certification at ¶ 16. The holders of Claims in Class 5 (General Unsecured Claims) have voted to reject the Plan. *See id.* Of these holders, only 2 holders of claims totaling approximately $7.5 million out of the 22 holders of claims totaling approximately $32.1 million voted to reject the Plan. *See id.* at Ex. A. As discussed further below, Class 5 (General Unsecured Claims) will be crammed down pursuant to section 1129(b) of the Bankruptcy Code.

12. As a result of the support of the Consenting Creditors and other key constituents, the Plan provides recoveries to creditors far in excess of those achievable through a hypothetical liquidation in chapter 7. The Plan provides for the (i) reduction of approximately $2.3 billion of the Debtors' existing debt; (ii) elimination of $58 million of the Debtors' annual cash interest expense; and (iii) right-sizing of the Debtors business so that it can operate on as close to a cash neutral basis (measured by unlevered free cash flow) as possible and successfully weather an extended industry downturn. *See* Disclosure Statement at 3, 25. Pursuant to the Plan, the Debtors will emerge from these Chapter 11 Cases with only $85 million in Take Back Debt, a $10 million unsecured Litigation Trust Loan to fund the Litigation Trust, and approximately $169.9 million in sale-leaseback obligations of the Prospector entities. *See* Disclosure Statement at 21, 37, 93; Plan § 5.7(f); Valuation Declaration at ¶ 12; Ahlstrom Declaration at ¶ 19 n.6. In addition, approximately $46.6 million of Existing Letters of Credit will also continue in effect under the New Letter of Credit Agreement. *See* Disclosure Statement at 14, 93; Plan § 5.4(c). A modified version of the Plan and a redline showing such modifications was filed with the Court on June 5, 2017 (D.I. 1582 & 1583).

13. Prior to filing this Memorandum with the Court, the Debtors received informal comments to the Plan regarding the assumption of certain executory contracts from

SAP America, Inc. ("**SAP**") and Aspen American Insurance Company and Aspen Insurance UK Limited (collectively, "**Aspen**"). Both SAP and Aspen have requested clarification of their rights under the Plan regarding their particular contracts. The Debtors continue to negotiate with both SAP and Aspen regarding their contracts, and for each, have included language in the Proposed Confirmation Order clarifying their rights in connection with the Plan. The addition of such language in the Proposed Confirmation Order fully resolves SAP's and Aspen's informal comments to the Plan.

14. The process for implementing the Plan has been set in motion. Paragon Parent has been placed into the U.K. Administration. Should this Court confirm the Plan, the Debtors will, among other things, undergo the following transactions in connection with effectuating the Plan:

- After the Confirmation Date but prior to the Effective Date, Reorganized Paragon shall be formed, and shall enter into the U.K. Implementation Agreement with, among others, Paragon Parent, certain of the Debtors, and certain non-Debtor affiliates of the Debtors. *See* Plan § 5.13(b)(i).

- On or prior to the Effective Date, the Corporate Restructuring will occur, whereby: (i) certain assets of the Liquidating Subsidiaries will be transferred to certain Transferred Subsidiaries and/or Reorganized Paragon; (ii) the Transferred Subsidiaries will be directly or indirectly transferred to Reorganized Paragon; and (iii) the Liquidating Subsidiaries will remain as direct or indirect subsidiaries of Paragon Parent. *See* Plan § 5.13.

- Prior to or substantially contemporaneously with the Effective Date, following the Corporate Restructuring, and pursuant to the U.K. Implementation Agreement and the Plan, Paragon Parent shall distribute the New Equity Interests in Reorganized Paragon to holders of Allowed Secured Lender Claims and holders of Allowed Senior Notes Claims, subject to the terms of the Shareholders Agreement, if any, shall distribute Cash, along with certain Debtor-affiliates, to the holders of certain Allowed Claims, and shall make any other distribution or transfer contemplated by the Plan. Reorganized Parent shall enter into the Take Back Debt Agreement with the holders of Allowed Revolver Claims and Allowed Term Loan Claims. Paragon Parent shall maintain a certain amount of required Cash as the U.K. Administration Reserve. *See* Plan § 5.13(b).

- On or after the Effective Date, the members of the New Board shall be appointed to serve pursuant to the terms of the applicable new organizational documents of Reorganized Paragon. *See* Plan §§ 5.8, 5.13(b)(iii)(C); *see also infra* Section II.H.

- On the Effective Date, the Debtors and the Estates shall enter into the Litigation Trust Agreement and transfer to the Litigation Trust the Noble Claims, pursuant to the Litigation Trust Agreement. The Noble Claims are to be pursued by the Litigation Trust Management on behalf of the holders of the Litigation Trust Interests. *See* Plan § 5.7.

- After giving effect to the Restructuring Transactions, all Parent Interests in Paragon Parent shall be deemed valueless and shall not receive any distribution under the Plan. *See* Plan § 4.8.

- Following the Effective Date, each Liquidating Subsidiary shall be wound-down, liquidated or dissolved pursuant to applicable law, as coordinated by the U.K. Administrators. *See* Plan § 5.13(d).

- After the Effective Date, the New Board shall have the right to implement the Management Incentive Plan, the terms of which, including eligibility to participate therein, the amount and timing of any award and the vesting conditions of any award shall be determined by the New Board in its sole discretion. *See* Plan § 5.10.

15. The Debtors respectfully refer the Court to the Plan, the Disclosure Statement, the Disclosure Statement Order, the Plan Supplement, the Supporting Declarations, and the record of these Chapter 11 Cases for an overview of the Debtors' business and any other relevant facts that may bear on approval of the Plan Settlement and confirmation of the Plan. The Supporting Declarations and any testimony and other declarations that may be adduced or submitted at or in connection with the confirmation hearing of the Plan, beginning on June 7, 2017 (the "**Confirmation Hearing**"), are herein incorporated in full.

ARGUMENT

16. This Memorandum is divided into five parts. Section I addresses the requirements for approval of the Plan Settlement under Bankruptcy Rule 9019, and demonstrates the satisfaction of such requirements. Section II addresses the requirements for confirmation of the Plan under section 1129 of the Bankruptcy Code and demonstrates the satisfaction of each

requirement and achievement of the objectives of chapter 11. Section III addresses objections filed against the Plan that were not otherwise resolved prior to the date hereof.[4] Section IV addresses the Debtors' request for a waiver of the 14-day stay imposed by operation of Bankruptcy Rule 3020(e). Section V concludes this Memorandum.

I. THE PLAN SETTLEMENT SHOULD BE APPROVED

17. The Plan Settlement encompasses a global settlement between the Debtors and their three major creditor constituencies: the Term Lenders, the Revolving Lenders, and the Creditors' Committee. The Plan Settlement is the result of mutual discussion and negotiation during mediation under the supervision of Judge Kevin J. Carey (D.I. 1140). Prior to the Plan Settlement, the chapter 11 plan issues in dispute included, but were not limited to, the following:

- Adequate Protection Issues: The Requisite Lenders contended that adequate protection claim for the diminution in the value of their prepetition collateral was in excess of $600 million. In contrast, the Debtors contended that such adequate protection claim was approximately $300 million, and the Creditors' Committee asserted that the amount should have been substantially less than that. The Debtors and Requisite Lenders settled at an adequate protection claim of not less than $352 million under the *Third Joint Chapter 11 Plan of Paragon Offshore plc and its Affiliated Debtors* (D.I. 1232), which is now null. The settled adequate protection claim amount was disputed by the Creditors' Committee. *See* Ahlstrom Declaration at ¶¶ 25-27, 30.

- Valuation of Certain Collateral: A sub-issue of the adequate protection claim above was the valuation of the Requisite Lenders' collateral, including, among other things, the Debtors' rigs. *See id.* at ¶ 28. This issue derived mainly from differences between the Debtors', the Requisite Lenders', and the Creditors' Committee's respective calculations of the diminution in value of the rigs. *See id.* at ¶ 29.

[4] Such objections are as follows: *United States of America's Objection to Confirmation* (D.I. 1559) (the "**IRS Objection**"); *Objection of the United States Trustee to Confirmation of the Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* (D.I. 1560) (the "**U.S. Trustee's Objection**"); *Objection of the Unofficial Equity Committee to Confirmation of the Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliate Debtors* (D.I. 1562) (the "**Shareholders' Objection**"). The Debtors received two informal letters from individual shareholders of Paragon Parent in addition to the Shareholders' Objection: *Letter to the Court by Sanjay Mehta Regarding Paragon Offshore plc Chapter 11 Proceedings*, dated May 19, 2017 (D.I. 1540); *Letter to the Court by Ezequiel Mariano Aiello Regarding Paragon Offshore plc Chapter 11 Proceedings*, dated May 19, 2017 (D.I. 1539). To the extent the Court considers such letters to be formal objections, the Debtors' response to such letters would be identical to the response to the Shareholders' Objection below, as applicable.

- Whether Certain Cash is Encumbered: The Debtors and Secured Lenders disputed which portions of the Debtors' Cash is subject to the liens of the Secured Lenders. The Secured Lenders had asserted that approximately $343,000,000 of Cash held by Paragon Parent, which Cash is the proceeds of draws under the Revolving Credit Agreement, is subject to the Liens of the Secured Lenders and is not available for distribution to unsecured creditors. The Secured Lenders contended that the Guaranty and Collateral Agreement granted the Secured Lenders liens on the Debtors' contracts and proceeds therefrom, which, they asserted, included Cash from draws under the Revolving Credit Agreement. The Debtors disputed such assertion and maintained that the Revolving Credit Agreement is an obligation or liability of the Debtors, not an asset that they could pledge as collateral under the Revolving Credit Agreement, a position with which the Creditors' Committee agreed. *See id.* at ¶ 32.

- Application of the "Applicable Premium" under the Senior Notes Indenture: Pursuant to subsections (a) and (e) of Section 3.07 of the Senior Note Indenture, the "Optional Redemption" provisions, the Senior Noteholders asserted that they were entitled to a make-whole claim of approximately $200 million. In contrast, the Debtors asserted that they were not exercising such optional redemption provisions because (i) they were not redeeming the notes and (ii) even if there were a redemption, such redemption was neither "optional" nor at a redemption price equal to 100% of the principal amount of the Senior Notes redeemed. *See id.* at ¶¶ 33-34.

- Pursuit of the Noble Claims: Previously, the Debtors negotiated the Noble Settlement Agreement with Noble to release certain fraudulent transfer claims relating to and arising out of the Noble Spin-off, in return for certain tax benefits from Noble. The Creditors' Committee disputed whether entry into the Noble Settlement was appropriate and in the best interests of the Debtors' estates. *See id.* at ¶¶ 35-37.

18. These and other major issues were settled pursuant to the Plan Settlement. *See id.* at ¶¶ 21-24, 38.

A. Bankruptcy Rule 9019: The Plan Settlement is Fair and Reasonable, Supported by Sound Business Justifications, and in the Debtors' Best Interests

19. The Debtors submit that this Court should approve the Plan Settlement pursuant to Bankruptcy Rule 9019 because it is fair and reasonable, supported by sound business justifications, and in the Debtors' best interests. *Id.* at ¶¶ 37-41. Bankruptcy Rule 9019 provides that "[o]n motion by [a debtor] and after notice and a hearing, the court may approve a compromise or settlement." Furthermore, section 105(a) of the Bankruptcy Code provides that

the "court may issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code]."

20. Courts have long considered compromises to be a "normal part of the process of reorganization."[5] They are favored in bankruptcy to minimize litigation and expedite the administration of the estate.[6] Accordingly, the decision to approve a particular settlement lies "within the sound discretion of the bankruptcy court."[7] Ultimately, the settlement must be fair, reasonable, and in the best interests of the debtor's estate.[8]

21. A court need not decide the issues of law and fact raised by a settlement, nor need it be convinced that the settlement is the best possible compromise.[9] Rather, a court should canvass the issues to see whether the settlement "falls below the lowest point in the range of reasonableness."[10] In determining whether a settlement should be approved under Bankruptcy Rule 9019, a court must assess and balance the value of the claim or claims being compromised against the value to the estate of the acceptance of the compromise in light of several factors: (i) the probability of success in litigation; (ii) the likely difficulties in collection; (iii) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily

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[5] *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (citations omitted).

[6] *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996).

[7] *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) (citations omitted); *In re Key3Media Grp.,* 336 B.R. 87, 92 (Bankr. D. Del. 2005) (citations omitted).

[8] *See Law Debenture Trust Co. of N.Y. v. Kaiser Aluminum Corp. (In re Kaiser Aluminum Corp.)*, 339 B.R. 91, 95-96 (D. Del. 2006) (citing *In re Martin*, 91 F.3d at 394) (citations omitted); *In re Marvel Entm't Grp., Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (citations omitted); *see also In re Key3Media Grp., Inc.,* 336 B.R. at 92 ("Under Rule 9019(a), the bankruptcy court has a duty to make an informed, independent judgment that the compromise is fair and equitable.") (citing *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424 (1968)).

[9] *See In re World Health Alts., Inc.*, 344 B.R. at 296; *In re Key3Media Grp., Inc.,* 336 B.R. at 92.

[10] *In re World Health Alts., Inc.*, 344 B.R. at 296 (quoting *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983)); *see also In re Key3Media Grp., Inc.*, 336 B.R. at 93 (internal quotations and citations omitted).

attending it; and (iv) the paramount interest of the creditors. *In re Martin*, 91 F.3d at 393. Applying the *Martin* factors, this Court should approve the Plan Settlement as fair, reasonable, and in the best interests of the Debtors' estates.

22. The probability of success in litigation. Pursuing any one of the estates' claims that are settled pursuant to the Plan Settlement would require engaging in highly fact-intensive litigation and discovery, which would involve a variety of complex issues such as valuation, solvency, and contract interpretation. Furthermore, many of the settled claims may be subject to multiple defenses, which, as the Debtors have identified, may diminish the probability of a successful outcome. Accordingly, the likelihood of success in pursuit of such multitudinous and complex litigation is, at best, uncertain.

23. The complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it. This factor weighs heavier than the others as pertains to the Debtors. As discussed, given the variety, complexity, and nature of the claims settled pursuant to the Plan Settlement, and that such claims arise under many state and federal laws, pursuit of such claims would require the employment of advisors and experts to undertake extensive diligence and perform complicated financial analyses. The Debtors, their advisors, and all counterparties involved would be required to engage in intense and expensive discovery and depositions, further delaying the Debtors from a successful reorganization. Finally, the necessary participation of the Debtors' management would divert attention and resources from successfully completing the Debtors' restructuring. Accordingly, under the circumstances, the pursuit of the claims settled would be very expensive and time consuming, and would likely harm, rather than aid, the Debtors' ability to successfully reorganize in these Chapter 11 Cases.

24. The paramount interests of the creditors. In determining whether to accept the Plan Settlement, the Debtors balanced the risk of success in pursuit of litigation and

resolution of such claims, and the additional time it would take to pursue such litigation, against the decrease in value the Debtors would suffer by remaining in chapter 11 through lost business and revenues. As discussed in Ahlstrom Declaration at ¶ 57, the Debtors' ability to obtain new and maintain a competitive business has been hampered by their stay in chapter 11.

25. Ultimately, the Debtors determined that settling the claims pursuant to the Plan Settlement, and facilitating a global consensual resolution between the Debtors and all of their major creditor stakeholders, would be in the best interests of the Debtors' creditors. By agreeing to the Plan Settlement, the Debtors (i) avoid postponing their emergence from these Chapter 11 Cases; (ii) avoid the risk of further lost contracts by customers fearful of a further prolonged stay in chapter 11; (iii) reduce the uncertainty of complex litigation in favor of a prompt restructuring; and (iv) provide for the best alternative for their creditors in light of the facts and circumstances. Accordingly, the Debtors, through implementation of the Plan Settlement, are acting in the paramount interests of all the creditors. Thus, for the foregoing reasons, this Court should find that the Debtors have satisfied the *Martin* factors and should approve the Plan Settlement.

II. THE PLAN SATISFIES THE BANKRUPTCY CODE'S REQUIREMENTS FOR CONFIRMATION AND SHOULD BE APPROVED

26. To achieve confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies section 1129(a) of the Bankruptcy Code by a preponderance of the evidence.[11] The Plan satisfies all provisions of section 1129 of the Bankruptcy Code and complies with all other applicable sections of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable nonbankruptcy law.

[11] *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 606 n.23 (Bankr. D. Del. 2001).

A. Section 1129(a)(1): The Plan Complies with the Applicable Provisions of the Bankruptcy Code

27. Under section 1129(a)(1) of the Bankruptcy Code, a plan must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification of claims and contents of the plan, respectively.[12]

B. Section 1122: The Plan's Classification Structure is Proper

28. Section 1122(a) of the Bankruptcy Code provides as follows:

> 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.

11 U.S.C. § 1122(a). The Plan has 9 Classes of Claims against and Interests in the Debtors:[13] (i) Class 1 (Priority Non-Tax Claims); (ii) Class 2 (Other Secured Claims); (iii) Class 3 (Secured Lender Claims); (iv) Class 4 (Senior Notes Claims); (v) Class 5 (General Unsecured Claims); (vi) Class 6 (Intercompany Claims); (vii) Class 7 (Subordinated Claims); (viii) Class 8 (Parent Interests); and (ix) Class 9 (Intercompany interests).

29. A plan proponent is afforded significant flexibility in classifying claims and interests into different classes, provided that there is a rational legal or factual basis to do so and all claims or interests within a particular class are substantially similar.[14] The classification

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[12] *See* H.R. Rep. No. 95-595, First Session at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 223 (Bankr. D.N.J. 2000) ("The legislative history reflects that the applicable provisions of chapter 11 includes sections such as section 1122 and 1123, governing classification and contents of plan.") (internal citations and quotations omitted).

[13] Administrative Expense Claims, Fee Claims, and Priority Tax Claims are not classified and are separately treated under the Plan.

[14] *See, e.g., John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993) (noting that a classification scheme is permissible if a legal difference exists between the classes); *In re Kaiser Aluminum Corp.*, No. 02-10429 (JKF), 2006 WL 616243, at *5 (Bankr. D. Del. Feb. 6, 2006) (finding that the classification was proper under section 1122 of the Bankruptcy Code because the scheme reflected the "diverse

structure of the Plan is rational and complies with the Bankruptcy Code. All Claims and Interests within a Class have the same or similar rights against the Debtors. The Plan provides for the separate classification of Claims against and Interests in each Debtor based upon the differences in legal nature and/or priority of such Claims and Interests. Moreover, the Plan's classification scheme generally tracks the Debtors' prepetition capital structure and divides the applicable Claims and Interests into Classes based on the underlying instruments giving rise to such Claims and Interests. Accordingly, the classification scheme of the Plan complies with section 1122 of the Bankruptcy Code and should be approved.

C. Section 1123(a): The Plan's Content is Appropriate

30. Section 1123(a) of the Bankruptcy Code sets forth seven requirements that a chapter 11 plan (other than a plan of an individual) must satisfy. *See* 11 U.S.C. § 1123(a). The Plan fully satisfies each such applicable requirement:

- The Plan designates Classes of Claims and Classes of Interests as required by section 1123(a)(1). *See* Plan § 3.
- The Plan specifies whether each Class of Claims and Interests is impaired or unimpaired under the Plan as required by section 1123(a)(2). *See* Plan § 3.3.
- The Plan specifies the treatment of any Class of Claims or Interests that is impaired as required by section 1123(a)(3). *See* Plan § 4.
- Except as otherwise agreed to by a holder of a particular Claim or Interest, the treatment of each Claim or Interest in each particular Class is the same as the treatment of each other Claim or Interest in such Class, as required by section 1123(a)(4). *See* Plan § 4. Furthermore, as the proponents of the Plan and the direct holders of all Class 9 (Intercompany Interests),[15]

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characteristics" of those claims and interests), *aff'd*, 343 B.R. 88 (D. Del. 2006); *see also Aetna Cas. & Sur. Co.* v. *Chateaugay Corp*. (*In re Chateaugay Corp.*), 89 F.3d 942, 949 (2d Cir. 1996) ("[C]lassification is constrained by two straight-forward rules: Dissimilar claims may not be classified together; similar claims may be classified separately only for a legitimate reason."); *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549, at 203 (Bankr. S.D.N.Y. July 15, 2004).

[15] Section 1123 permits disparate treatment when "the holder of a particular claim or interest agrees to . . . less favorable treatment . . . ." *See In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3rd Cir. 2013)

and as permitted by section 1123(a)(4), the Reorganized Debtors may choose which form of treatment the Class 9 (Intercompany Interests) receive. Section 1123(a)(4) also permits variations in the ultimate form of the recovery received by holders of interests in the same class, where the plan offers each interest holder the same treatment options.[16] The Plan in connection with Class 9 (Intercompany Interests) meets this standard. Section 4.9 of the Plan allows for each holder of an Interest in Class 9 the option to be fully Impaired or Unimpaired, at the option of the Reorganized Debtors and with consent of the Consenting Creditors. Accordingly, the Debtors have satisfied the requirements of section 1123(a)(4).

- The Plan provides adequate means for its implementation as required by section 1123(a)(5) through, among other things: (i) the U.K. Administration and U.K. Sale Transaction, *see* Plan § 5.13; (ii) the Take Back Debt Agreement, New Letter of Credit Agreement, and Existing L/C Escrow Agreement, *see* Plan § 5.4; (iii) the settlement of the Secured Lender Claims and Senior Notes Claims, *see* Plan § 5.1; (iv) the provisions governing the issuance of New Equity Interests, with such interests to be governed by the terms of the Shareholders Agreement,[17] if any, *see* Plan § 5.3; (v) the provisions governing distributions under the plan, *see* Plan Art. 6; (vi) the cancellation of the Senior Notes Indenture, *see* Plan § 5.5; (vii) the release of liens securing certain existing security interests upon receipt of the Plan consideration, *see* Plan § 5.6; (viii) the preservation of causes of action in connection with the Litigation Trust, *see* Plan § 5.7; (ix) the composition of the board of directors and list of officers of each Reorganized Debtor,[18] *see* Plan § 5.8; (x) the consummation of the Restructuring Transactions, *see* Plan § 5.12; (xi) the maintenance and establishment of the Retained Accounts, including the U.K. Administration Reserve, *see* Plan § 5.14, *see also* Plan § 5.13(b)(ii); and (xii) provisions for payment of Restructuring Expenses, *see* Plan § 5.17.

- The governing corporate documents of each Debtor have been or will be amended on or prior to the Effective Date to prohibit the issuance of non-

[16] *See id.* at 327 ("[C]ourts have interpreted the 'same treatment' requirement to mean that all claimants in a class must have 'the same opportunity' for recovery."); *Ad Hoc Comm. of Pers. Injury Asbestos Claimants v. Dana Corp. (In re Dana Corp.)*, 412 B.R. 53, 62 (S.D.N.Y. 2008) ("The key inquiry under § 1123(a)(4) is not whether all of the claimants in a class obtain the same thing, but whether they have the same opportunity.").

[17] In connection with such Shareholders Agreement, it is contemplated that DTC would be granted an indemnity in its favor by Reorganized Paragon; the Debtors and the Consenting Creditors are continuing to discuss this indemnity.

[18] Except for the chairman, who will be appointed by the proposed Effective Date of the Plan, the full composition of the New Board of Reorganized Paragon will be appointed after the Effective Date. *See infra* Section II.H.

voting equity securities, in accordance with section 1123(a)(6) of the Bankruptcy Code. *See* Plan §§ 5.2, 5.13.

- Section 5.8 of the Plan provides for the manner by which the composition of the board of directors of the Reorganized Debtors will be selected, and also provides for the manner by which the composition of the board of directors of the Reorganized Debtors will be disclosed in accordance with section 1129(a)(5) of the Bankruptcy Code. As discussed below in Section II.H., except for the New Board, this information was disclosed in the Plan and Plan Supplement. The Plan provisions governing the manner of selection of any officer, director, or manager under the Plan are consistent with the interests of creditors and equity security holders and with public policy in accordance with section 1123(a)(7) of the Bankruptcy Code. *See* Plan § 5.5.

31. Accordingly, the requirements of section 1123(a) of the Bankruptcy Code have been satisfied.

D. Section 1123(b): The Plan's Content is Permitted

1. Plan Permissive Provisions

32. Section 1123(b) of the Bankruptcy Code sets forth permissive provisions that may be incorporated into a chapter 11 plan. Each provision of the Plan is consistent with section 1123(b):

- Section 1123(b)(1). Pursuant to Sections 3 and 4 of the Plan, (i) Class 1 (Priority Non-Tax Claims), Class 2 (Other Secured Claims), and Class 6 (Intercompany Claims) are unimpaired; (ii) Class 3 (Secured Lender Claims), Class 4 (Senior Notes Claims), Class 5 (General Unsecured Claims), Class 7 (Subordinated Claims), and Class 8 (Parent Interests) are impaired; and (iii) Class 9 (Intercompany Interests) is unimpaired or impaired depending in the treatment approved on Intercompany Interests;

- Section 1123(b)(2). The Plan provides for the assumption of all executory contracts and unexpired leases upon the Effective Date, except for an executory contract or unexpired lease that (i) has previously been assumed or rejected pursuant to a final order of the Bankruptcy Court, (ii) is specifically designated on the Schedule of Rejected Contracts and Leases filed and served prior to commencement of the Confirmation Hearing, or (iii) is the subject of a separate (A) assumption motion filed by the Debtors or (B) rejection motion filed by the Debtors under section 365 of the Bankruptcy Code before the Confirmation Date. *See* Plan § 8.1. There have been no objections to the Debtors' assumption of executory contracts and unexpired leases pursuant to Section 8 of the Plan. As

contemplated by section 1123(d) of the Bankruptcy Code, to the extent the Debtors are unable to agree upon the amount necessary to cure any unpaid obligations due prior to assumption, such cure amount will be determined in accordance with the underlying agreement and applicable nonbankruptcy law;

- Section 1123(b)(3)(A) and (B). As set forth in Section II above, the Plan incorporates the Plan Settlement, which settles a variety of issues and potential causes of action. *See* Plan § 5.1. This includes retention of the Noble Claims by the Litigation Trust, to be pursued by the Litigation Trust Management on behalf of the holders of the Litigation Trust Interests. *See* Plan § 5.7. Additionally, Section 10.6(a) of the Plan provides for a release of certain Claims and Causes of Action owned by the Debtors. Finally, Section 10.10 of the Plan preserves for the Reorganized Debtors any rights, Claims, Causes of Action, rights of setoff or recoupment, and other legal or equitable defenses that the Debtors had immediately prior to the Effective Date, except as otherwise provided in the Plan;

- Section 1123(b)(4). The Plan does not provide for the sale of all or substantially all of the property of these estates;

- Section 1123(b)(5). The Plan modifies the rights of holders of Claims or Interests in the Impaired Classes, and leaves unaffected the rights of holders of Claims or Interests in the Unimpaired Classes; and

- Section 1123(b)(6). Plan Sections 10.6 and 10.7 contain certain release and exculpation provisions that are essential to the reorganization and consistent with the applicable provisions of the Bankruptcy Code and Third Circuit law. In addition, Section 6.13 of the Plan provides that the offer, issuance, and distribution of the New Equity Interests under the Plan shall be exempt from registration, pursuant to section 1145 of the Bankruptcy Code, and such securities may be resold without registration pursuant to section 4(a)(1) of the Securities Act. Section 4.4(a) of the Plan provides for payment of the Noteholders' Professional Fees and Section 5.17 of the Plan provides for payment of Restructuring Expenses.

Accordingly, each of the foregoing permissive provisions is consistent with section 1123(b) of the Bankruptcy Code.

2. The Plan Releases Should Be Approved

33. The Plan provides for releases of claims by the Debtors and their Estates as well as releases of certain claims held by certain creditors[19] of the Debtors. The release provisions are integral components of the Plan, are consistent with the Bankruptcy Code and comply with applicable case law and, as such, should be approved.

(a) The Debtors' Release Is Appropriate and Should Be Approved

34. Section 10.6(a) of the Plan provides for a release of certain claims of the Debtors and the Reorganized Debtors against the Released Parties[20] relating to, in whole or in part, the Debtors, the Plan, the Restructuring, or the Chapter 11 Cases, other than Claims or Causes of Action arising out of or related to any act or omission of a Released Party that is a criminal act or constitutes intentional fraud, willful misconduct, or gross negligence as determined by a Final Order (the "**Debtors' Release**").

35. Claims held by a debtor against third parties are property of the estate and may be released in exchange for settlement. *See MacArthur Co. v. Johns-Manville Corp., (In re*

[19] To the extent there are any Unimpaired Class 9 (Intercompany Interests), the holders of such Interests will also grant releases, as discussed below. The Plan does not, however, provide for any holders of Class 8 (Parent Interests) to grant releases of claims.

[20] "**Released Parties**" means, collectively, and in each case solely in their capacities as such: (a) the Debtors; (b) the Debtors' non-Debtor affiliates; (c) the Term Lenders; (d) the Revolving Lenders; (e) the Creditors' Committee; (f) the Revolving Credit Facility Agent; (g) the Term Loan Agent; (h) the Senior Notes Indenture Trustee; (i) each of the Global Coordinators, Joint Lead Arrangers, Joint Bookrunners, Senior Managing Agents, and Managing Agents named in the Term Loan Agreement; (j) JPMorgan Chase Bank, N.A., in its capacity as former administrative agent under the Term Loan Agreement; (k) the Disbursing Agent; (l) each of the Syndication Agents, Documentation Agents, Joint Lead Arrangers and Joint Lead Bookrunners named in the Revolving Credit Agreement; (m) each of the Issuing Banks under the Revolving Credit Agreement; (n) the U.K. Administrators; and (o) with respect to each of the foregoing entities, such entities' predecessors (other than the Non-Released Parties), professionals, restructuring advisors, successors, assigns, subsidiaries, affiliates, managed accounts and funds, current and former officers and directors (other than the Non-Released Parties), principals, shareholders, members, partners, managers, employees, subcontractors, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors, and other professionals, and such entities' respective heirs, executors, estates, servants, and nominees, in each case in their capacity as such and, in respect of the Senior Noteholders on the Creditors' Committee who also were members of an ad hoc group of Senior Noteholders earlier in these Chapter 11 Cases in their capacity as members of the Creditors' Committee and of an ad hoc group of Senior Noteholders.

Johns-Manville (Manville I)), 837 F.2d 89, 91-92 (2d Cir. 1988); *see also* 11 U.S.C. §541(a)(1). A plan of reorganization may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). The standard for approving a debtor's release of claims under a plan is generally the same as the standard for approving settlements pursuant to Bankruptcy Rule 9019.[21] Under Bankruptcy Rule 9019, a settlement of a cause of action generally should be approved if it exceeds the lowest point in the range of reasonable outcomes.[22] The release of a claim of the estate should be approved if the release "is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank Nat'l Assoc. v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010).

36. The Debtors' Release is an essential component of the Plan and constitutes a sound exercise of the Debtors' business judgment. During the course of negotiations regarding the Plan, it was clear that the Debtors' Release would be a necessary condition to entry into and consummation of the restructuring transaction embodied in the Plan. *See* Confirmation Declaration at ¶¶ 27-29. Without the Debtors' Release, the Debtors and their creditors would not have been able to secure the substantial benefits provided by the Plan in the form of a fully consensual deal, including the significant reduction of debt and annual interest expense, the waiver of payment of the Applicable Premium that the Senior Noteholders could assert is due as a result of the chapter 11 filing under the Senior Notes Indenture, settlement of disputes relating to the Adequate Protection Obligations, and the implementation of the U.K. Administration and

[21] *See In re Coram Healthcare Corp.*, 315 B.R. 321, 334 (Bankr. D. Del. 2004) (holding that standards for approval of a settlement under section 1123 of the Bankruptcy Code generally are the same as those under Bankruptcy Rule 9019).

[22] *See, e.g., In re New Century TRS Holdings*, *Inc.*, 390 B.R. 140, 168 (Bankr. D. Del. 2008), *rev'd on other grounds*, 407 B.R. 576 (D. Del. 2009), *remanded on other grounds to* No. 07-10416 (KJC), 2009 WL 1833875 (D. Del. June 26, 2009); *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006).

U.K. Sale Transaction. Had the Debtors' Release not been provided, it would have significantly diminished (and potentially eliminated) the Debtors' chances of securing all of the valuable consideration provided by the Plan. *See id.*

37. In addition to the substantial consideration provided by the Released Parties, the Debtors' Release also is appropriate because the Debtors do not believe that the released claims or causes of action represent material value to the Debtors and their Estates, and the value of such claims certainly is not greater than (or even close to) the significant value and benefits provided by the Plan and related transactions. *See id.* Accordingly, there is ample justification for providing the Debtors' Release and it should be approved.

(b) The Non-Debtor Releases Are Appropriate and Should Be Approved

38. Section 10.6(b) of the Plan provides for releases by certain non-debtor holders of claims and interests (collectively, the "**Releasing Parties**")[23] against the Released Parties for any liability relating to the Debtors, the Plan, the Restructuring, or these Chapter 11 Cases, other than Claims or Causes of Action arising out of or related to any act or omission of a Released Party that is a criminal act or constitutes intentional fraud, willful misconduct, or gross negligence as determined by a Final Order (collectively, the "**Non-Debtor Releases**"). As

[23] "**Releasing Parties**" means, collectively, and in each case solely in their capacities as such: (a) the holders of all Claims or Interests who vote to accept this Plan; (b) the holders of Claims or Interests that are Unimpaired under this Plan and do not timely object to the releases provided for in the Plan; (c) the holders of Claims or Interests whose vote to accept or reject this Plan is solicited but who do not vote either to accept or to reject this Plan and do not opt out of granting the releases set forth herein; (d) the holders of Claims or Interests who vote to reject this Plan but do not opt out of granting the releases set forth herein; (e) the Revolving Credit Facility Agent; (f) the Term Loan Agent; (g) the Senior Notes Indenture Trustee; (h) each of the Global Coordinators, Joint Lead Arrangers, Joint Bookrunners, Senior Managing Agents, and Managing Agents named in the Term Loan Agreement; (i) JPMorgan Chase Bank, N.A., in its capacity as former administrative agent under the Term Loan Agreement; (j) the Disbursing Agent; (k) each of the Syndication Agents, Documentation Agents, Joint Lead Arrangers and Joint Lead Bookrunners named in the Revolving Credit Agreement; (l) each of the Issuing Banks under the Revolving Credit Agreement; and (m) with respect to each of the foregoing entities, such entities' predecessors, professionals, restructuring advisors, successors, assigns, subsidiaries, affiliates, managed accounts and funds, current and former officers and directors, principals, shareholders, members, partners, managers, employees, subcontractors, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors, and other professionals, and such entities' respective heirs, executors, estates, servants, and nominees, in each case in their capacity as such.

discussed below, the Non-Debtor Releases satisfy the standards established by the Third Circuit and, accordingly, should be approved.

(i) The Non-Debtor Releases Are Consensual

39. In the Third Circuit, where releasing parties have consented to a provision in a plan of reorganization that releases claims against non-debtors, such releases will be approved on the basis of general principles of contract law.[24] Here, the Releasing Parties have either expressly consented or are deemed to have consented, to the Non-Debtor Releases. As set forth above, and in the Supporting Declarations, an overwhelming majority of the holders of Claims in the Voting Classes have voted to accept the Plan, indicating their express consent to the Non-Debtor Releases.[25] Of those Releasing Parties that did not vote on or for the Plan, the Non-Debtor Releases are nonetheless consensual because such parties either (i) had an opportunity to affirmatively opt out of the releases, but did not return a Ballot or elected not to opt out of the Non-Debtor Releases, or (ii) are holders of Claims or Interests that are Unimpaired under the Plan and do not timely object to the releases provided for in the Plan.

40. Courts in this district have approved third-party releases as consensual where holders of claims or interests failed to opt out of the releases, either by abstaining from voting or by voting against the plan, but not otherwise opting out of the releases when such

[24] *First Fid. Bank v. McAteer*, 985 F.2d 114, 118 (3d Cir. 1993) (noting that a consensual third-party release is no different from any other settlement or contract and does not implicate section 524(e)); *see In re Indianapolis Downs* LLC, 486 B.R. at 305 ("Courts in this jurisdiction 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.").

[25] *See In re Coram Healthcare Corp.*, 315 B.R. at 336 (finding that voting in favor of a plan of reorganization that provides for a third-party release indicates consent to the release, even without an explicit election opting to accept the third-party release provision); *see also In re American Gilsonite Company*, Case No. 16-12316 (CSS) (Bankr. D. Del. Dec. 12, 2016), H'ring Transcript at 25-11 to 26-18 (confirming a plan with third-party releases where the voting classes were provided with instructions on how to opt out of such releases, and where the voting classes "voted overwhelmingly in favor of the plan"); *In re Energy Future Holdings Corp.*, Case No. 14-10979 (CSS) (Bankr. D. Del. Dec. 3, 2015), H'ring Transcript at 63-19 to 63-20, 64-3 to 64-9 (overruling the U.S. Trustee's objection where non-debtor releasing parties were deemed to consent unless they opted out of such releases); Voting Certification, Ex. A (setting forth tabulation of votes).

creditors were provided detailed instructions on how to opt out.[26] Here, the Ballots for the solicitation of the Plan provided clear notice of the release, exculpation, and injunction provisions of the Plan and indicated that the solicited holders would be deemed to have consented to the releases contained in Section 10.6(b) of the Plan if they (i) voted to accept the Plan; (ii) did not vote on the Plan and did not opt out of the releases, and (iii) voted to reject the Plan and did not opt out of the releases. *See* Disclosure Statement Order, Exs. 2 to 3-3. Courts in this district have also found releases to be consensual where creditors are unimpaired and deemed to accept a plan without their affirmative consent where, as is the case here, such deemed accepting creditors are receiving adequate consideration for their release by being paid in full pursuant to the plan.[27] Because the Releasing Parties have consented to the Non-Debtor Releases or are otherwise Unimpaired and receiving payment in full under the Plan, they should be approved.

[26] *In re Indianapolis Downs, LLC,* 486 B.R. at 306 ("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."); *see also In re American Gilsonite Company*, No. 16-12316 (CSS) (Bankr. D. Del. Dec. 12, 2016) (D.I. 174) (confirming plan and approving third party releases by creditors who had consented by not opting out of the release, either by abstaining from voting or by voting against the plan without affirmatively electing to opt out); *In re Basic Energy Services, Inc.*, No. 16-12320 (KJC) (Bankr. D. Del. Dec. 9, 2016) (D.I. 257) (same); *In re New Gulf Res., LLC*, No. 15-12566 (BLS) (Bankr. D. Del. Apr. 20, 2016) (D.I. 514) (same); *In re Am. Apparel, Inc.*, No. 15-12055 (BLS) (Bankr. D. Del. Jan. 27, 2016) (D.I. 687) (same); *In re Offshore Grp. Inv. Ltd*, No. 15-12422 (BLS) (Bankr. D. Del. Jan. 15, 2016) (D.I. 188) (same); *In re Optim Energy, LLC*, No. 14-10262 (BLS) (Bankr. D. Del. Oct. 14, 2015) (D.I. 1318) (same); *but see In re Washington Mutual, Inc.*, 442 B.R. at 355 ("Failing to return a ballot is not a sufficient manifestation of consent to a third-party release."); *In re Zenith Elecs. Corp*., 241 B.R. 92 at 111 (finding that a release provision had to be modified to permit third parties' release of non-debtors only by those creditors who voted in favor of the plan); *In re Corinthian Colleges, Inc., et al* Hr'g Tr. 70:16–25, 86:16–87:21, Aug. 26, 2015, *In re Corinthian Colleges, Inc.*, No. 15-10952 (KJC) (Bankr. D. Del. Sept. 2, 2015) (D.I. 921).

[27] *See In re Spansion, Inc.*, 426 B.R. 114, 144 (finding that a release was not overreaching to the extent it bound unimpaired classes deemed to have accepted the plan as those creditors had not objected to the release, were being paid in full, and had received adequate consideration for the release); *see also In re Indianapolis Downs, LLC*, 486 B.R. at 306 ("In this case, the third party releases in question bind certain unimpaired creditors who are deemed to accept the Plan: these creditors are being paid in full and have therefore received consideration for the releases."); *see also In re Offshore Grp. Inv. Ltd*, No. 15-12422 (BLS) (Bankr. D. Del. Jan. 15, 2016) (D.I. 188) (confirming plan and approving third party releases where releasing creditor was unimpaired); *In re Optim Energy, LLC*, No. 14-10262 (BLS) (Bankr. D. Del. Oct. 14, 2015) (D.I. 1318) (same).

3. The Plan Exculpation Provision Should Be Approved

41. In addition to the releases discussed above, Section 10.7 of the Plan contains a release and exculpation for certain Exculpated Parties[28] for claims arising out of or relating to the Debtors' Chapter 11 Cases and the agreements made in connection therewith (the "**Exculpation Provision**"). The Exculpation Provision carves out criminal acts and acts or omissions that are determined in a final order to have constituted intentional fraud, gross negligence, or willful misconduct.

42. Exculpation provisions similar to the Exculpation Provision in the Plan are appropriate where the exculpated parties have acted in good faith in negotiating and working toward the implementation of a chapter 11 plan.[29] Each of the Exculpated Parties has participated in the Debtors' restructuring in good faith.

43. The Exculpation Provision is necessary to protect parties who have made substantial contributions to the Debtors' reorganization from collateral attacks related to good faith acts or omissions related to the Debtors' Restructuring. Further, the scope of the Exculpation Provision is appropriately tailored to cover only actions taken in connection with the negotiation and implementation of the Plan and Definitive Documents and will not affect any liability that arises from fraud, gross negligence, or willful misconduct, as determined by final

[28] "**Exculpated Parties**" means, collectively, and in each case in their capacities as such: (a) the Debtors; (b) the Disbursing Agent; (c) the U.K. Administrators; (d) Deloitte; (e) the Creditors' Committee; (f) the Professional Persons; and (g) with respect to the foregoing, such entities' postpetition predecessors, professionals, successors, assigns, subsidiaries, affiliates, officers and directors, principals, shareholders, members, partners, managers, employees, agents, and representatives, in each case solely in their capacity as such and whether currently serving or having previously served postpetition. For the avoidance of doubt, Exculpated Parties shall not be defined to include the Non-Released Parties in any capacity.

[29] *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties . . . .").

order. Courts in this and other districts have approved similar exculpation provisions in chapter 11 plans of similarly-situated debtors.[30]

44. Based upon the foregoing, the Plan complies fully with the requirements of sections 1122 and 1123, and, therefore, satisfies the requirement of section 1129(a)(1) of the Bankruptcy Code and should be approved.

E. Section 1129(a)(2): The Debtors have Complied with the Bankruptcy Code

45. Section 1129(a)(2) of the Bankruptcy Code requires that plan proponents comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(2). The legislative history to section 1129(a)(2) indicates that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code.[31]

1. Section 1125: Postpetition Disclosure Statement and Solicitation

46. Section 1125(b) of the Bankruptcy Code provides, in pertinent part, that:

> An acceptance or rejection of a plan may not be solicited after the commencement of [a] case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. . . .

11 U.S.C. § 1125(b).

[30] *See, e.g., In re American Gilsonite Company*, No. 16-12316 (CSS) (Bankr. D. Del. Dec. 12, 2016) (D.I. 174); *In re Halcón Res. Corp.*, Case No. 16-11724 (BLS) (Bankr. D. Del. Sept. 8, 2016) (Docket No. 200); *In re Overseas Shipholding Grp., Inc.*, Case No. 12-20000 (PJW) (Bankr. D. Del. July 18, 2014) (D.I. 3683); *In re Ablest Inc.*, No. 14-10717 (KJC) (Bankr. D. Del. May 8, 2014) (D.I. 238); *In re Physiotherapy Holdings Inc.*, No. 13-12965 (KG), at ¶ 34, (Bankr. D. Del. Dec. 23, 2013) (D.I. 197); *In re Genco Shipping & Trading Ltd.*, No. 14-11108 (SHL), at ¶ 24(d), (Bankr. S.D.N.Y. July 2, 2014) (D.I. 322); *In re LodgeNet Interactive Corp.*, No. 13-10238 (SCC), at ¶ 33, (Bankr. S.D.N.Y. Mar. 7, 2013) (D.I. 220); *In re Reader's Digest Association, Inc.*, No. 09-23529 (RDD), (Bankr. S.D.N.Y. Jan. 12, 2010) (D.I. 574); *In re Cengage Learning Inc.*, No. 13-44106 (ESS), at ¶¶ 52, 105, (Bankr. E.D.N.Y. Mar. 14, 2014) (D.I. 1225).

[31] *See* H.R. Rep. No. 95-595, at 412 (1977) ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re PWS Holding Corp.*, 228 F.3d at 248; *Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 759 (citations omitted).

47. By entry of the Disclosure Statement Order on May 2, 2017, the Court approved the Disclosure Statement as containing "adequate information" pursuant to section 1125(b). As set forth in the Voting Certification, the Debtors solicited votes on the Plan consistent with the Court-approved solicitation procedures within the Disclosure Statement Order. Voting Certification at ¶ 7. Further, in compliance with section 1125(b), the Debtors did not solicit acceptances of the Plan from any holder of a Claim or Interest prior to entry of the Disclosure Statement Order.

2. Section 1126: Acceptance of the Plan

48. Section 1126 of the Bankruptcy Code sets forth the procedures for soliciting votes on a chapter 11 plan and determining acceptance thereof. Pursuant to section 1126, only holders of allowed claims or equity interests, as the case may be, in impaired classes of claims or equity interests that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan. Section 1126 provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

11 U.S.C. § 1126(a), (f), (g).

49. As set forth in the Voting Certification and above, the Debtors solicited acceptances of the Plan from the holders of Claims against the Debtors in each Class of Impaired Claims entitled to receive distributions pursuant to the Plan in accordance with section 1126 of the Bankruptcy Code. Voting Certification at ¶ 7. The Impaired Classes entitled to vote on the Plan were (i) Class 3 (Secured Lender Claims), (ii) Class 4 (Senior Notes Claims), and (iii) Class 5 (General Unsecured Claims) (the "**Voting Classes**"). *Id*. at ¶ 7.

50. The Debtors did not solicit votes for the Plan by any holder of Claims or Interests, as applicable, in (i) Class 1 (Priority Non-Tax Claims), (ii) Class 2 (Other Secured Claims), and (iii) Class 6, (Intercompany Claims), as such Classes are Unimpaired and, therefore, deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code.

51. The Debtors also did not solicit votes for the Plan by any holder of Claims in Class 7 (Subordinated Claims) or Interests in Class 8 (Parent Interests), as such Classes did not receive or retain any property on account of their Claims or Interests and, therefore, are deemed not to have accepted the Plan pursuant to section 1126(g) of the Bankruptcy Code. Similarly, the Debtors did not solicit votes for the Plan by any holder of Interests in Class 9 (Intercompany Interests) because such Interests are either Unimpaired, in which case the holders of such Interests are deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code, or Impaired, in which case the holders of such Interests are deemed not to have accepted the Plan pursuant to 1126(g) of the Bankruptcy Code.

52. Section 1126(c) of the Bankruptcy Code specifies the requirements for acceptance of a plan by impaired classes of claims entitled to vote to accept or reject the plan:

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

> any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. § 1126(c).

53. As evidenced in the Voting Certification, with the exception of the holders of Claims in Class 5 (General Unsecured Claims), the Plan has been accepted by the holders of Allowed Claims in Class 3 (Secured Lender Claims) and Class 4 (Senior Notes Claims) in excess of two-thirds in amount and one-half in number of those holders of who timely voted to accept or reject the Plan at each Debtor, for both Classes. Voting Certification, Ex. A. As discussed further below, the cram down provisions of section 1129(b) of the Bankruptcy Code will be applied as to the rejecting Class 5 (General Unsecured Claims).

54. Based on the foregoing, the Debtors submit that that the requirements of sections 1125 and 1126 of the Bankruptcy Code have been satisfied, and thus, the Debtors have satisfied the requirement of section 1129(a)(2) of the Bankruptcy Code.

F. Section 1129(a)(3): The Plan Has Been Proposed in Good Faith and is Not by any Means Forbidden by Law

55. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Third Circuit has held that "good faith" 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 the purposes of the Bankruptcy Code.'"[32]

56. The Plan has been proposed by the Debtors in good faith and solely for the legitimate and honest purposes of reorganizing the Debtors' ongoing business and enhancing their long-term financial viability while providing recoveries to all of the Debtors' stakeholders.

[32] *In re SGL Carbon Corp*., 200 F.3d 154, 165 (3d Cir. 1999); *In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 347 (Bankr. D. Del. 1998); *see also In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d. Cir. 2000) ("[F]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.").

The Plan is the culmination of months of rigorous, arm's length negotiations and a court-sanctioned mediation among the Debtors, Revolving Lenders, Term Lenders, and Creditors' Committee. As noted above, the Plan received the overwhelming support of Class 3 (Secured Lender Claims) and Class 4 (Senior Notes Claims), which is a further testament to its fairness and to the good-faith of the Plan negotiation process.

57. Furthermore, the Plan is "not by any means forbidden by law," including that of applicable international law. 11 U.S.C. § 1129(a)(3). As pertains to English Law, the directors of Paragon Parent were entitled to apply to the English Court for an order placing Paragon Parent, an English company, into the U.K. Administration.[33] The directors made this application because: (a) under English Law, it is not permitted to amend an English company's constitution and issue new shares to creditors without shareholder consent;[34] and (b) the U.K. Sale Transaction will involve the transfer of a substantial proportion of Paragon Parent's assets at a time when Paragon Parent is insolvent.[35] As the Plan does not envisage seeking the consent of the Parent Interests, because they are fully Impaired under the Plan, Paragon Parent cannot issue new Paragon Parent shares to creditors. Also, because Paragon Parent is insolvent, it was not considered appropriate as a matter of English law for the directors to transfer a substantial proportion of Paragon Parent's assets, by issuing the New Equity Interests in Reorganized Paragon, without first applying for the Administration Order.

58. As part of the administration application, the directors and the proposed administrators gave the English Court a full description of the U.K. Sale Transaction and the

[33] *See* United Kingdom Insolvency Act of 1986, Schedule B1, ¶ 12(1).

[34] *See First Witness Statement of Todd Strickler in Support of Administration Application*, CR-2017-003729, at ¶ 14 (Eng. High Ct. May 16, 2017) (the "**Strickler Statement**").

[35] *Id.*

reasoning behind it.[36] The English Court made the Administration Order with the knowledge that the proposed administrators intended to implement the U.K. Sale Transaction if the Plan were confirmed. As described below, the Parent Interests no longer have any economic interest in Paragon Parent. *See* Valuation Declaration at ¶¶ 13-19; Brown Declaration at ¶ 11. Under these circumstances, the U.K. Administrators will owe their duties to act in the best interests of Paragon Parent's creditors as a whole.[37] The U.K. Administrators, in accordance with English Law, are empowered to implement the Plan by issuing the New Equity Interests in Reorganized Paragon to the Consenting Creditors.

59. Notwithstanding that Paragon Parent is already a Debtor, the English Court had jurisdiction under the Insolvency Act 1986 to make an administration order with respect to Paragon Parent, provided the conditions for commencing administration had been satisfied. The U.K. Cross-Border Insolvency Regulations 2006 ("**CBIR**"), which are based on the Model Law on Cross-Border Insolvency, also contemplate that an English company may enter into English insolvency proceedings when it is already in a foreign proceeding, such as chapter 11 in the United States. As demonstrated by the Administration Order, the conditions for commencing the U.K. Administration were satisfied and approved by the English Court for Paragon Parent. The U.K. Administrators are prepared to implement the Plan once this Court confirms the Plan as proposed, all in accordance with applicable international law, as they are satisfied that it meets the purpose of administration and is in the best interests of Paragon Parent's creditors as a whole. *See* Kahn Statement at ¶¶ 50-51, 60-62; Soden Statement ¶¶ 8-12.

[36] *See* Strickler Statement; *First Witness Statement of Neville Kahn in Support of Administration Application*, CR-2017-003729 (Eng. High Ct. May 17, 2017) (the "**Kahn Statement**"); First Witness Statement of David Soden in Support of Administration Application, CR-2017-003729 (Eng. High Ct. May 19, 2017) (the "**Soden Statement**").

[37] *See* United Kingdom Insolvency Act of 1986, Schedule B1, ¶ 3(2).

60. Finally, except for the Shareholders, no party has objected on the basis that the Debtors did not propose the Plan in good faith. However, contrary to the Shareholders allegations and as discussed above, the Plan has been proposed in good faith. The Plan (i) has been proposed with honesty and good intentions (ii) expressly for the purpose of successfully reorganizing in accordance with the objectives of the Bankruptcy Code, and (iii) as demonstrated, is designed to be in full compliance with and not forbidden by all applicable nonbankruptcy law, including relevant international law. The Bankruptcy Code requires nothing more to make a finding of good faith. Accordingly, the Debtors respectfully submit that this Court should find that the Debtors have satisfied the good faith requirements of section 1129(a)(3) of the Bankruptcy Code.

G. Section 1129(a)(4): The Plan The Plan Provides that Professional Fees and Expenses are Subject to Court Approval

61. Section 1129(a)(4) requires that "any payment made or to be made by the proponent . . . 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." 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval as to their reasonableness by the court.[38]

62. All payments for services provided to the Debtors during these Chapter 11 Cases must be approved by the Court as reasonable in accordance with section 1129(a)(4) of the Bankruptcy Code. Specifically, Section 2.2 of the Plan provides that all retained professional

[38] *See In re TCI 2 Holdings, LLC*, 428 B.R.117, 145 (Bankr. D.N.J. 2010) ("Under its clear terms, 'any payment' made or to be made by the plan proponent or the debtor for services 'in or in connection with' the plan or the case must be approved by or 'subject to the approval of' the bankruptcy court as 'reasonable.'"); *Lisanti Foods*, 329 B.R. at 503 ("Pursuant to § 1129(a)(4), a plan should not be confirmed unless fees and expenses related to the revised plan have been approved, or are subject to the approval, of the Bankruptcy Court."), *aff'd sub nom. In re Lisanti Foods Inc.*, 241 F. App'x 1 (3d Cir. 2007).

fees must be approved by the Court pursuant to final fee applications. *See* Plan § 2.2. Further, Section 11.1 of the Plan provides that the Court shall retain jurisdiction to hear and determine all applications under Bankruptcy Code sections 330, 331, and 503(b) for awards of compensation and reimbursement of expenses incurred before the Confirmation Date. Plan § 11.1. Based on the foregoing, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

H. Section 1129(a)(5): The Debtors have Disclosed All Necessary Information Regarding Directors, Officers, and Insiders

63. Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors; that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and, to the extent there are any insiders that will be retained or employed by the reorganized debtors, that there be disclosure of the identity and nature of any compensation of any such insiders. *See* 11 U.S.C. § 1129(a)(5). If, at the time of confirmation, the debtor is unable to identify these individuals by name a debtor still satisfies this requirement so long as directors will be appointed consistent with the company's organizational documents and applicable state and federal law.[39]

64. The Debtors have satisfied the foregoing requirements through disclosure in the Plan Supplement. Section 5.8(a) of the Plan provides that the initial board of directors of Reorganized Paragon will consist of up to seven (7) members, comprising: the Chief Executive Officer of Reorganized Paragon, three (3) members designated by the Requisite Lenders, and three (3) members designated by the Creditors' Committee. *See* Plan § 5.8.

[39] *In re Charter Commc'ns*, 419 B.R. 221, 260 n.30 (Bankr. S.D.N.Y. 2009) ("Although section 1129(a)(5) requires the plan to identify all directors of the reorganized entity, that provision is satisfied by the Debtors' disclosure at this time of the identities of the *known* directors."); *Am. Solar King*, 90 B.R. at 815 ("The subsection does not (and cannot) compel the debtor to do the impossible, however. If there is no proposed slate of directors as yet, there is simply nothing further for the debtor to disclose under subsection (a)(5)(A)(i).").

65. The identity of the directors, officers, and managers (as the case may be) of each of the Reorganized Debtors are disclosed in the Plan Supplement, except for the directors of Reorganized Paragon. The Debtors are retaining Korn Ferry, a management search firm, to facilitate the search for qualified individuals to serve on the New Board, and along with the Requisite Lenders and the Creditors' Committee, are currently engaged in a robust effort to identify the directors of the board of Reorganized Paragon. Confirmation Declaration at ¶ 24. With the exception of the chairman of the New Board, such directors will be determined after the Effective Date of the Plan. This process will ensure that the New Board of Reorganized Paragon will be comprised of qualified individuals who meet the requirements of state, federal, and Cayman Islands law, and are eligible to be board members under the organizational documents of Reorganized Paragon. With further respect to Reorganized Paragon, the Debtors intend to appoint at least the chairman of the New Board prior to the proposed Effective Date to effectuate any actions required by Reorganized Paragon on or prior to the Effective Date, which would be in full compliance with Cayman Islands law. Accordingly, all proposed members of the new boards and officers of the Reorganized Debtors are (or, if not yet proposed with respect to Reorganized Paragon, will be) competent, have relevant and valuable business and industry experience, and will provide continuity and fresh perspectives on running the Reorganized Debtors' business. Accordingly, the Plan satisfies the requirements under section 1129(a)(5) of the Bankruptcy Code.

I. Section 1129(a)(6): The Plan Does Not Contain Any Rate Changes

66. Section 1129(a)(6) of the Bankruptcy Code provides that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is

expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). Section 1129(a)(6) is inapplicable to these cases, as the Plan does not provide for any rate changes by the Debtors.

J. Section 1129(a)(7): The Plan Is in the Best Interests of All Creditors and Equity Interest Holders

67. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and stockholders in each Debtor—commonly referred to as the "best interests" test. The best interests test focuses on potential individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 441 n.13 (1999). It requires that each holder of a claim or equity interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code.

68. Under the best interests test, "the court must measure what is to be received by rejecting creditors . . . under the plan against what would be received by them in the event of liquidation under chapter 7. In doing so, the court must take into consideration the applicable rules of distribution of the estate under chapter 7, as well as the probable costs incident to such liquidation."[40] The Court must evaluate the liquidation analysis cognizant of the fact that "[t]he hypothetical liquidation entails a considerable degree of speculation about a situation that will not occur unless the case is actually converted to chapter 7."[41] As section

[40] *In re Adelphia Commc'ns Corp.*, 368 B.R., at 252; *see also In re W.R. Grace & Co.*, 475 B.R. 34, 141 (D. Del. 2012) ("Under the test, every creditor to a Chapter 11 reorganization plan must receive at least the liquidation value of its claim under the plan as it would in a Chapter 7 proceeding against the debtor in order for the court to find the plan is in the creditors' best interest."), *aff'd sub nom. In re W.R. Grace & Co.*, 729 F.3d 332 (3d Cir. 2013), and *aff'd*, 532 F. App'x 264 (3d Cir. 2013), and *aff'd*, 729 F.3d 311 (3d Cir. 2013).

[41] *In re Affiliated Foods, Inc.*, 249 B.R. 770, 788 (Bankr. W.D. Mo. 2000) (citations omitted); *In re W.R. Grace & Co.*, 475 B.R. at 142 ("[T]he court need only make a well-reasoned estimate of the liquidation value that is supported by the evidence on the record. It is not necessary to itemize or specifically determine precise values during this estimation procedure. Requiring such precision would be entirely unrealistic because exact values could only be found if the debtor actually underwent Chapter 7 liquidation.").

1129(a)(7) makes clear, the liquidation analysis applies only to non-accepting holders of impaired claims or equity interests. *See In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992). Accordingly, the best interests test does not apply to the holders of Claims or Interests in the Unimpaired Classes.

69. As set forth in the liquidation analysis attached to the Disclosure Statement as Exhibit D (the "**Liquidation Analysis**"), the best interests test is satisfied as to every single holder of a Claim against or Interest in each Debtor. Specifically, the Liquidation Analysis demonstrates that all Classes of Claims or Interests will recover under the Plan value equal to or in excess of what such Claims or Interests would receive in a hypothetical chapter 7 liquidation.

70. Notably, (i) the holders of Claims in Class 3 (Secured Lender Claims) are estimated to receive an approximate fifty-three-point-five percent (53.5%) recovery under the Plan, as opposed to an estimated recovery of approximately thirty-eight-point-two percent (38.2%) at the low end and forty-point-three percent (40.3%) at the high end in a hypothetical liquidation; (ii) the holders of Claims in Class 4 (Senior Notes Claims) are estimated to receive an approximate thirty-five percent (35.0%) under the Plan, as opposed to an estimated recovery of approximately ten-point-two percent (10.2%) at the low end and ten-point-four percent (10.4%) at the high end in a hypothetical liquidation; and (iii) the holders of Claims in Class 5 (General Unsecured Claims) are estimated to receive an approximate thirty percent (30.0%) under the Plan, as opposed to an estimated recovery of approximately point-nine percent (0.9%) at the low end and one-point-one percent (1.1%) at the high end in a hypothetical liquidation. *See* Liquidation Analysis; Disclosure Statement at 5-8. The holders of Interests in Class 8

(Parent Interests), who do not retain or recover any value under the Plan, are not estimated to recover anything in a hypothetical liquidation.[42] *See id.*; Disclosure Statement at 8.

71. The Debtors' Liquidation Analysis is sound and reasonable and incorporates justified assumptions and estimates regarding the liquidation of the Debtors' assets and claims, such as (i) the additional costs and expenses that would be incurred by the Debtors as a result of a chapter 7 trustee's fees and retention of new professionals; (ii) the delay and erosion of value that would be caused to the Debtors' assets due to the need of the newly-appointed chapter 7 trustee and its professionals to familiarize themselves with the assets and liabilities of the Debtors; (iii) the reduced recoveries caused by an accelerated sale or disposition of the Debtors' assets by the trustee; (iv) the additional General Unsecured Claims that would arise, rejection of certain executory contracts and unexpired leases, and other potential claims that may arise in a chapter 7 liquidation; and (v) projected market impediments, including reduced recoveries from the Debtors' relatively vintage fleet of drilling rigs, drillships and related equipment, the current scrap rate for such equipment, and the limited universe of prospective buyers. *See* Liquidation Analysis, Introduction; Brown Declaration at ¶¶ 8-10.

72. The assumptions and estimates in the Liquidation Analysis are appropriate in the context of these Chapter 11 Cases and are based upon the knowledge and expertise of the Debtors' advisors. The Debtors' advisors have intimate knowledge of the Debtors' business and relevant industry and restructuring experience. *See* Brown Declaration at ¶¶ 1-4, 8. Accordingly, the recoveries provided to creditors by the Plan far exceed the recoveries they would receive in a hypothetical chapter 7 liquidation, and therefore, the Plan satisfies the

[42] In addition, as further discussed below in the Debtors' response to the Shareholders' Objection, the value of Noble Claims transferred to the Litigation Trust is highly unlikely to provide a recovery large enough to benefit the holders of Class 8 (Parent Interests) in a hypothetical chapter 7 liquidation. *See* Valuation Declaration at ¶¶ 16-19; Brown Declaration at ¶¶ 13-14.

requirements of the best interests test under section 1129(a)(7) of the Bankruptcy Code. *See* Brown Declaration at ¶¶ 11-12, 15; Confirmation Declaration at ¶¶ 49, 54-58.

K. Section 1129(a)(8): The Plan Has Been Accepted by Impaired Voting Classes

73. Section 1129(a)(8) of the Bankruptcy Code requires that each class of impaired claims or interests accept the plan, as follows: "With respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8). Section 1126 of the Bankruptcy Code provides that a plan is accepted by an impaired class of claims if the accepting class members hold at least two-third in amount and more than one-half in number of the claims in their respective class. 11 U.S.C. § 1126(c).

74. The holders of Claims in Class 3 (Secured Lender Claims) and Class 4 (Senior Notes Claims) have voted to accept the Plan in accordance with section 1126 of the Bankruptcy Code. *See* Voting Certification, Ex. A. The holders of Claims in Class 5 (General Unsecured Claims) have voted to reject the Plan. *Id.* However, as discussed below, the Debtors have satisfied the requirements of section 1129(a)(10) of the Bankruptcy Code, and thus will be able to "cram down" the remaining Impaired Classes under section 1129(b) of the Bankruptcy Code. Accordingly, the Debtors submit that they have satisfied section 1129(a)(8) of the Bankruptcy Code.

L. Section 1129(a)(9): The Plan Provides for Payment in Full of All Allowed Priority Claims

75. Under section 2.1 of the Plan, holders of Allowed Administrative Expense Claims under section 503(b) of the Bankruptcy Code, except to the extent such holders agree to less favorable treatment, will be paid Cash in an amount equal to the Allowed amount of such Claim, on the later of the Effective Date and the date on which such Administrative Expense Claim becomes an Allowed Claim, or, in each case, as soon thereafter as is reasonably practicable. *See* Plan § 2.1. Moreover, the Plan provides that, unless a holder agrees to less

favorable treatment, holders of Allowed Priority Non-Tax Claims under section 507(a) of the Bankruptcy Code (excluding Priority Tax Claims under section 507(a)(8)) will receive Cash in an amount equal to the Allowed amount of such Claim, payable on the later of the Effective Date and the date on which such Priority Non-Tax Claim becomes an Allowed Claim, or, in each case, as soon thereafter as is reasonably practicable. *See* Plan § 4.1. The Plan, therefore, satisfies the requirements of section 1129(a)(9)(A) and (B).

76. The Plan also satisfies the requirements of section 1129(a)(9)(C) of the Bankruptcy Code in respect of the treatment of Priority Tax Claims. Pursuant to Section 2.3 of the Plan, except as otherwise may be agreed, holders of Allowed Priority Tax Claims will be paid (i) Cash in an amount equal to the Allowed amount of such Claim, or (ii) equal annual installment payments in Cash (x) beginning on the Effective Date or as soon thereafter as reasonably practicable, or such later date as the Claim is due in the ordinary course over a period ending not later than five (5) years after the Petition Date, together with interest at the applicable non-bankruptcy rate as of the Confirmation Date, subject to the sole option of the Reorganized Debtors to prepay the entire amount of the Allowed Priority Tax Claim and (y) in a manner not less favorable than the most favored non-priority unsecured claim provided for by this Plan, on the later of the Effective Date and the date on which such Priority Tax Claim becomes an Allowed Claim, or, in each case, as soon thereafter as is reasonably practicable. Plan § 2.3. Accordingly, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

M. Section 1129(a)(10): At Least One Class of Impaired Claims Has Accepted the Plan

77. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). As set forth above and in

the Voting Certification, of the Voting Classes, Class 3 (Secured Lender Claims) and Class 4 (Senior Notes Claims) are impaired and have voted to accept the Plan, even excluding the acceptance of the Plan by any insiders in such Classes. Accordingly, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

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

78. Section 1129(a)(11) of the Bankruptcy Code requires the bankruptcy court to determine that a plan is feasible as a condition precedent to confirmation. Specifically, it requires that confirmation is not likely to be followed by liquidation of the debtor, unless such liquidation is proposed in the plan. 11 U.S.C. § 1129(a)(11). The feasibility test set forth in section 1129(a)(11) requires the bankruptcy court to determine whether a plan may be implemented and has a reasonable likelihood of success.[43] Section 1129(a)(11) does not, however, require a guarantee of a plan's success; rather, the appropriate inquiry is whether a plan offers a reasonable assurance of success.[44] A debtor must prove a chapter 11 plan's feasibility by a preponderance of the evidence.[45]

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[43] *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 649 (2d Cir. 1988).

[44] *See In re Am.Capital Equip., LLC*, 688 F.3d 145, 162 (3d Cir. 2012); *In re Tribune Co.*, 464 B.R. 226, 185; on reconsideration, 4564 B.R. 208 (Bankr. D. Del. 2011); *In re Applied Safety, Inc.*, 200 B.R. 576, 584 (Bankr. E.D. Pa. 1996) (discussing the standard under 1129(a)(11) and stating that "it is not necessary for plan success to be guaranteed, nor is the feasibility requirement generally viewed as rigorous"); *see also In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. at 762 ("'It is not necessary that success be guaranteed, but only that the plan present a workable scheme of reorganization and operation from which there may be a reasonable expectation of success.' . . . The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required." (citations omitted)); *In re Texaco, Inc.*, 84 B.R. 893, 910 (Bankr. S.D.N.Y 1988) ("All that is required is that there be a reasonable assurance of commercial viability.").

[45] *See Fin. Sec. Assurance v. T.H. New Orleans Ltd. P'Ship* (*In re T-H New Orleans Ltd. P'Ship)*, 116 F.3d 790, 801 (5th Cir. 1997); *see also In re W.R. Grace & Co.*, 475 B.R. 34, 114 (D. Del. 2012) ("The debtor bears the burden of proof on this inquiry, and must show by a preponderance of the evidence that a reorganization plan is feasible."), *aff/d sub nom. In re WR Grace & CO., F3d 332 (3d Cir. 2013),* and *aff'd,* 532 F. App'x 264 (3d Cir. 2013), and *aff'd* 729 F.3d 311 (3d Cir. 2013); *see also In re Exide Techs.*, 303 B.R. 48, 58 (Bankr. D. Del. 2003) ("The plan proponent bears the burden of establishing the plan's compliance with each of the requirements set forth in § 1129(a)"); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 598–99 (Bankr. D. Del. 2001) ("To confirm a proposed Chapter 11 plan of reorganization, the proponent bears the burden of establishing the plan's compliance with each of the thirteen elements of 11 U.S.C. § 1129(a)").

79. The key element of feasibility is whether there is a reasonable probability that the provisions of the plan can be performed. The purpose of the feasibility test is to protect against visionary or speculative plans.[46] In assessing feasibility, courts have identified, among others, the following probative factors:

> (1) the prospective earnings or earning power of the debtor's business;
>
> (2) the soundness and adequacy of the capital structure and working capital for the debtor's post-confirmation business;
>
> (3) the debtor's ability to meet its capital expenditure requirements;
>
> (4) economic conditions;
>
> (5) the ability of management and likelihood that current management will continue; and
>
> (6) any other material factors that would affect the successful implementation of the plan.[47]

80. The opposite of a visionary scheme, the Plan embodies a meticulously-tailored restructuring that will provide for the continued viability of the Debtors' business. The Plan at its core is based upon the New Business Plan, which: (i) contains more conservative assumptions regarding the market recovery; (ii) contains a smaller geographic footprint, with the Debtors limiting their global operations to core regions that would bring the best possible returns in the North Sea, Middle East, and India, and away from unprofitable ones such as Mexico; (iii) has been adjusted for actual business performance and in light of conversations with

[46] *Pizza of Hawaii, Inc. v. Shakey's, Inc*. (*In re Pizza of Hawaii, Inc.*), 761 F.2d 1374, 1382 (9th Cir. 1985) ("The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.") (citations omitted); *see also In re W.R. Grace & Co.*, 475 B.R. at 114 ("The purpose of the requirement is to prevent court confirmation of 'visionary schemes.'").

[47] *See, e.g.*, *In re Indianapolis Downs, LLC*, 486 B.R. at 298; *see also In re Prudential Energy Co.*, 58 B.R. 857, 862-63 (Bankr. S.D.N.Y. 1986); *In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985); *In re Sound Radio, Inc.*, 93 B.R. 849, 856 (Bankr. D.N.J. 1988), *aff'd in part*, *remanded in part*, 103 B.R. 521 (D.N.J. 1989), *aff'd sub nom. In re Sound Radio Inc*, 908 F.2d 964 (3d Cir. 1990), and *aff'd sub nom. Appeal of Robinson*, 908 F.2d 964 (3d Cir. 1990).

customers, employees, and advisors and consultants; (iv) reduces cash burn to make the Debtors' business cash flow neutral on an operating basis in the near term; (v) reduces the Debtors' fleet and other equipment assets to right-size the company and lower fixed-costs while eliminating unused assets; and (vi) accounts for the increased professional fees that have been incurred and would be incurred in these Chapter 11 Cases. *See* Ahlstrom Declaration at ¶¶ 8, 12-20, 36; Disclosure Statement at 21, 24, 26, and 67.

81. With the New Business Plan in hand, the Debtors have analyzed their ability to fulfill their obligations under the Plan and taken into consideration their estimated costs of administration. The Debtors, with aid from their advisors, prepared financial projections (the "**Projections**") for the fiscal years 2017 through 2021, as set forth in Section VII of the Disclosure Statement.

82. The Projections were developed using a methodical, iterative process and are based on the extensive experience of the Debtors' management and historical trends and data. *See* Disclosure Statement at 67; Valuation Declaration at ¶ 10. Underlying the Projections are a set of sound assumptions. Key personnel from all of the Debtors' operating areas and across various functions provided input in the development of the Projections. *See* Ahlstrom Declaration at ¶ 20. In preparing the Projections, the Debtors incorporated material considerations pertaining to the current commodity price environment, historical operating and production performance, and operating costs. *See* Disclosure Statement at 67-68; Valuation Declaration at ¶ 10. Further, the Debtors have appropriately built in sufficient liquidity to counter unanticipated economic downturns. *See* Ahlstrom Declaration at ¶ 20.

83. The Projections demonstrate that the Reorganized Debtors will be able to meet their obligations under the Plan. Confirming the Plan will reduce the Debtors' net debt obligations by approximately $2.3 billion and $58 million of the Debtors' annual cash interest

expense. After honoring their obligations under the Plan, the Reorganized Debtors will have sufficient capital and liquidity to operate their business and satisfy ongoing obligations as they become due. *See* Confirmation Declaration at ¶¶ 54-58; *see also* Disclosure Statement at 66; *see also* Ahlstrom Declaration at ¶ 19.

84. For these reasons, the Plan provides for an achievable scheme of reorganization, which exceeds the Debtors' burden of showing that the Plan carries a reasonable likelihood of success. Accordingly, the Plan satisfies the feasibility requirements of section 1129(a)(11) of the Bankruptcy Code and should be approved.

O. Section 1129(a)(12): All Statutory Fees Have or Will be Paid

85. Section 1129(a)(12) requires the payment of "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan . . . ." 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930] of title 28" are afforded priority as administrative expenses. 11 U.S.C. § 507(a)(2). In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, Section 12.5 of the Plan provides that on the Effective Date or as soon as practicable thereafter, and thereafter as may be required, such fees, together with interest, if any, shall be paid by the Reorganized Debtors. *See* Plan § 12.5.

P. Section 1129(a)(13): Continuation of Retiree Benefits

86. Section 1129(a)(13) requires that:

> The plan provides for continuation after the effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to section (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

11 U.S.C. § 1129(a)(13). Pursuant to the Plan, all employee compensation and benefit plans of the Debtors in effect as of the Petition Date shall be deemed to be, and will be treated as if they

were, executory contracts to be assumed under the Plan. *See* Plan § 8.4. Accordingly, the Plan satisfies the requirements of section 1129(a)(13).

Q. Sections 1129(a)(14), 1129(a)(15), and 1129(a)(16): Inapplicable Provisions

87. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations and, as such, section 1129(a)(14) does not apply. *See* Confirmation Declaration at ¶ 79.

88. Section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). The Debtors are not "individuals" and, accordingly, section 1129(a)(15) is inapplicable. *See id.*

89. Section 1129(a)(16) of the Bankruptcy Code applies to transfers of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. The Debtors are each a moneyed, business, or commercial corporation and, accordingly, section 1129(a)(16) is inapplicable. *See id.* To the extent there are any transfers of property made pursuant to the Plan, including those made under the U.K. Administration, such transfers will be made in accordance with applicable nonbankruptcy law.

R. Section 1129(b): The Plan Satisfies the "Cram Down" Requirements for Non-Accepting Classes

90. Section 1129(b) of the Bankruptcy Code provides a mechanism (known colloquially as "cram down") for confirmation of a chapter 11 plan in circumstances where the plan is not accepted by all impaired classes of claims. Under section 1129(b), the court may "cram down" a plan over the dissenting vote of an impaired class or classes of claims or interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such dissenting class or classes.

91. By its express terms, section 1129(b) of the Bankruptcy Code is only applicable to a class of creditors that rejects a plan. *See* 11 U.S.C. § 1129(b) ("the court . . . shall

confirm the plan notwithstanding the requirements of [§ 1129(a)(8)] if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, *and has not accepted*, the plan.") (emphasis added). Accordingly, a dissenting creditor in an accepting class lacks standing to object to the plan on the basis of unfair discrimination or absolute priority.[48] As discussed above, the holders of Claims in Class 3 (Secured Lender Claims) and Class 4 (Senior Notes Claims) voted to approve the Plan, whereas the holders in Claims in Class 5 (General Unsecured Claims) voted to reject the Plan. Accordingly, cram down is only relevant to Class 5 (General Unsecured Claims), as it voted to reject the Plan, and to the Classes that have been deemed to reject the Plan—Class 7 (Subordinated Claims), Class 8 (Parent Interests), and as applicable, Class 9 (Intercompany Interests).

92. As discussed below, the Plan may be confirmed as to each of these Classes pursuant to the "cram down" provisions of section 1129(b) of the Bankruptcy Code.

1. The Plan Does Not Discriminate Unfairly

93. Section 1129(b)(1) does not prohibit discrimination between classes. Rather, it prohibits discrimination that is unfair. Under section 1129(b) of the Bankruptcy Code, a plan unfairly discriminates where similarly-situated classes are treated differently without a reasonable basis for the disparate treatment.[49] As between two classes of claims or two classes

[48] *See Kane v. Johns-Manville Corp.*, 843 F.2d at 650 (refusing to consider objection of dissenting creditor in accepting class because 1129(b) did not need to be satisfied as to an accepting class); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1062 (3d Cir. 1987) (overruling cramdown objection because objecting party was a member of an accepting class and therefore 1129(b)(1) afforded no protection to such party); *In re United Marine Inc.*, 197 B.R. 942, 948 (Bankr. S.D. Fla. 1996) (overruling absolute priority objection of a dissenting creditor in an accepting class because "the absolute priority rule . . . only comes into play in the context of cram down of an impaired rejecting class").

[49] *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (noting that the "hallmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination.") (citing *In re Lernout & Hauspie Speech Prod., N.V.*, 301 B.R. 651, 660 (Bankr. D. Del. 2003), *aff'd*, 308 B.R. 672 (D. Del. 2004)); *In re WorldCom Inc.*, Case No. 02-13533 (AJG), 2003 WL 23861928, at *59 (Bankr. S.D.N.Y. Oct. 31, 2003) (citing *In re Buttonwood*

of equity interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests, *see, e.g.*, *In re Johns-Manville Corp.*, 68 B.R. at 636, or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[50]

94. The Plan does not discriminate unfairly with respect to any Class. Class 4 (Senior Notes Claims) is legally distinct in nature from Class 5 (General Unsecured Claims). The holders of Claims in Class 4 (Senior Notes Claims) derive their Claims from the Senior Notes Indenture, a legal instrument allowing for periodic payments on Senior Notes. The holders of Claims in Class 5 (General Unsecured Claims) instead derive their Claims primarily from Claims arising in the course of the Debtors conducting their business which are not Administrative, Priority, or Secured Claims—these holders are basic contract counterparties, landlords, vendors with disputed litigation claims, and other various small holders of Claims—none of these claims are based on indentures or similar financial instruments. Accordingly, the difference in treatment between these two classes is permissible, as each Class possesses different legal rights.[51]

Partners, Ltd., 111 B.R 57, 63 (Bankr. S.D.N.Y. 1990)); *In re Johns-Manville Corp.,* 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, *In re Johns-Manville Corp.*, 78 B.R. 407 (S.D.N.Y. 1986), *aff'd sub nom. Kane v. Johns-Manville Corp.,* 843 F.2d 636 (2d Cir. 1988)).

[50] *See, e.g., In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 715 (separate classification and treatment was rational where members of each class "possess[ed] different legal rights"); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (approving classification of general unsecured creditors into different classes with different legal bases: doctors' indemnification claims, medical malpractice claims, employee benefit claims and trade claims).

[51] *See In re Jersey City Med. Ctr.*, 817 F.2d at 1061; *In re Coram Healthcare Corp.*, 315 B.R. 321, 350–51 (Bankr. D. Del. 2004) (finding noteholders represented "a voting interest that is sufficiently distinct from the trade creditors to merit a separate voice in this reorganization case"); *see also In re Tribune Co.*, 476 B.R. 843, 856-57 (Bankr. D. Del. 2012); *In re Charter Commc'ns*, 419 B.R. 221, 265-66 (Bankr. S.D.N.Y. 2009).

95. Additionally, this difference in recovery is expressly warranted under the circumstances.[52] Whereas the holders of Claims in Class 5 (General Unsecured Claims) will be receiving an approximate 30% all Cash recovery under the Plan, which is favorable for typical holders of such Claims, the holders of Claims in Class 4 (Senior Notes Claims) will not be receiving an all Cash recovery. Instead, such holders will receive a combination of approximately 10% in Cash, with the remaining 25% of their recovery limited to the issuance of New Equity Interests and Litigation Trust Interests. The latter two forms of consideration would not be as intuitively valuable for a typical holder of General Unsecured Claims, who would likely prefer an immediate cash payout for its ongoing business operations over a recovery of long-term, illiquid and riskier New Equity Interests and Litigation Trust Interests.

96. Considering the relatively small amount of each General Unsecured Claim, the holders of such Claims would likely be entitled to receive only small fractional shares in New Equity Interests and Litigation Trust Interests because they would have to share with the larger holders of Claims in Class 3 (Secured Lender Claims) and Class 4 (Senior Notes Claims). However, because both Section 6.11 of the Plan and Section 3.10 of the Litigation Trust Agreement forbid the issuance of fractional shares, the holders of these relatively small General Unsecured Claims would likely not even receive these interests under the circumstances. This would afford such holders no value on account of the New Equity Interests and the Litigation Trust Interests and a disproportionately smaller overall recovery. Accordingly, the Plan proposes

[52] "Minor or immaterial differences in plan treatment do not rise to the level of unfair discrimination." *See In re Tribune Co.*, 472 B.R. 223, 242 (Bankr. D. Del. 2012) (citing *In re Unbreakable Nation Co.*, 437 B.R. 189, 203 (Bankr. E.D. Penn. 2010)) (difference of 4% or 6.5% not unfair discrimination); *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213 (Bankr. D.N.J. 2000) (difference of 4% recovery not unfair discrimination); *see also, e.g.*, *In re Richard Buick, Inc.*, 126 B.R. 840, 852 (Bankr. E.D. Pa. 1991) (noting reasonableness of plan where certain trade creditors would receive 100% payment and other general unsecured creditors would receive 5% payment because uncontroverted testimony established that the trade claims were "absolutely necessary to the future success of the [d]ebtor's business" and the trade creditors "had made full payment of dealer-trade claims a prerequisite of their continuing respective future relationships with the [d]ebtor").

to provide recoveries to holders of Claims, not just in accordance with the underlying legal instrument, but also in accordance to what a holder of such Claims may find appropriately valuable.[53]

97. Furthermore, there is no unfair discrimination as between Class 5 (General Unsecured Claims) and Class 6 (Intercompany Claims). Class 6 (Intercompany Claims) are legally distinct from all other Classes, and consist of insider Claims by Debtors or non-Debtor Affiliates. It is not unfair discrimination to classify such claims within a separate and distinct class, and much like the Intercompany Interests below, it is reasonable for a business to maintain such Intercompany Claims.[54] Accordingly, there is no unfair discrimination between Class 4 (Senior Notes Claims), Class 5 (General Unsecured Claims) and Class 6 (Intercompany Claims), and there is a reasonable basis for the disparate treatment between those Classes.

98. In addition, Class 8 (Parent Interests) is legally distinct in nature from all other Classes, including Class 9 (Intercompany Interests). All Parent Interests are classified together and afforded the same treatment under the Plan. Similarly, all Intercompany Interests are classified together and afforded the same treatment under the Plan. Moreover, these Classes represent legally distinct Interests. Class 8 (Parent Interests) represent all Interests in Paragon Parent. Class 9 (Intercompany Interests) represent Interests held in Debtors other than Paragon

[53] *See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. at 232 ("[I]t is generally recognized that '[t]rade creditors have short–term maturities; debenture holders have long-term expectations.' Correspondingly, in this case, the trade creditors are receiving an immediate cash payout, while the Old Noteholders are receiving a package of securities that conform to prepetition long-term expectations. No "unfairness" is discerned in this necessary disparity in treatment.") (citations omitted).

[54] *In re TLC Vision (USA) Corp.*, 2010 WL 2822008, at *8 (Bankr. D. Del. May 6, 2010) (no unfair discrimination between other unsecured claim classes and intercompany claim classes); *In re Trident Res. Corp.*, 2010 WL 2881345, at *9 (Bankr. D. Del. June 15, 2010); *see also See In re 710 Long Ridge Road Operating Co., II, LLC*, 2014 WL 886433, at *20 to *21 (Bankr. D.N.J. Mar. 5, 2014) (reasonable business justification for disparate treatment between trade creditors and general unsecured claims, where trade creditors received favorable treatment in return for providing value to the on-going business); *In re Crdentia Corp.*, 2010 WL 3313383, at *10 (Bankr. D. Del. May 26, 2010) (same).

Parent, which are held by another Debtor or by a non-Debtor affiliate of a Debtor. Accordingly, there is no unfair discrimination among holders of Parent Interests or holders of Intercompany Interests.[55] Thus, the Plan does not "discriminate unfairly" with respect to any Impaired Classes of Claims or Interests.

2. The Plan Is Fair and Equitable

99. Sections 1129(b)(2)(B)(ii) and (b)(2)(C)(ii) of the Bankruptcy Code provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or interests if under the plan no holder of any junior claim or interest will receive or retain property under the plan on account of such junior claim or interest. *See* 11 U.S.C. § 1129(b)(2)(B)(ii), (C)(ii).

100. Distributions under the Plan are made in the order of priority prescribed by the Bankruptcy Code and in accordance with the rule of absolute priority. As the holders of Claims in Class 5 (General Unsecured Claims) have voted to reject the Plan, and as pursuant to the Plan, the holders of Claims or Interests in Class 7 (Subordinated Claims), Class 8 (Parent Interests), and as applicable, Class 9 (Intercompany Interests) are deemed to have rejected the Plan, the absolute priority rule must therefore be satisfied as to each such Class.

101. As pertaining specifically to the holders of Claims in Class 5 (General Unsecured Claims), that the holders of Claims in Class 6 (Intercompany Claims) are Unimpaired under the Plan, and that the holders of Claims in such Classes receive a higher percentage recovery than do the holders of Allowed General Unsecured Claims, does not violate the absolute priority rule. Both the holders of Class 5 (General Unsecured Claims) and Class 6

[55] *See In re Rubicon U.S. REIT, Inc.*, 434 B.R. 168, 179 (Bankr. D. Del. 2010) (confirming plan where common stock equity interests were classified together and afforded same treatment under plan); *see also In re Extended Stay Inc.,* Case No. 09-13764 (JMP), 2010 WL 6561113, at *10 (Bankr. S.D.N.Y. July 20, 2010) (plan did not unfairly discriminate with respect to rejecting class of equity interests where no holders of equity interests were treated differently).

(Intercompany Claims) are on the same priority level under the Bankruptcy Code as the holders of Claims in Class 4 (Senior Notes Claims). Accordingly, section 1129(b)(2)(B)(ii) of the Bankruptcy Code is satisfied with respect to the holders of Claims in Class 5 (General Unsecured Claims).

102. Where the Creditors' Committee, the Term Loan Agent, and the Revolving Credit Facility Agent reasonably consent to cancelling certain Allowed Intercompany Interests under Section 4.9 of the Plan, the holders of Interests in Class 9 (Intercompany Interests) are Impaired. *See* Plan § 4.9. Under this scenario, the holders of Claims or Interests in Class 7 (Subordinated Claims), Class 8 (Parent Interests), and Class 9 (Intercompany Interests) are all not entitled to any distribution or to retain any property under the Plan, *see* Disclosure Statement; Section VIII, Valuation Analysis; *see also* Valuation Declaration at ¶¶ 13-19, and therefore the Plan complies with the absolute priority rule, is "fair and equitable" and consistent with the requirements of section 1129(b) of the Bankruptcy Code.[56]

103. In the alternative, where the Creditors' Committee, the Term Loan Agent, and the Revolving Credit Facility Agent reasonably consent certain Allowed Intercompany Interests remaining unaffected by the Plan, then the holders of Interests in Class 9 (Intercompany Interests) will remain Unimpaired. *See* Plan § 4.9. This retention of the Allowed Intercompany Interests, however, is justified for several reasons and does not violate the absolute priority rule.

104. The Consenting Creditors have consented to a complex reorganization of the Debtors' corporate structure contemplated by the Plan, which will lead to a more operationally and tax-efficient business going forward. Retention of certain Intercompany Interests in Class 9 would be a key component of the Debtors' reorganization. By allowing the

[56] *See In re Finlay Enters. Inc*., No. 09-14873 (JMP), 2010 WL 6580628, at *7 (Bankr. S.D.N.Y. June 29, 2010) (holding that fair and equitable test was satisfied where no interest junior to interests of rejecting class received any property under plan).

stakeholders to select which Intercompany Interests are to remain Impaired or Unimpaired, the Debtors can strategically determine which Debtors are dormant or carrying potentially large foreign liabilities and should be left behind with Paragon Parent as a Liquidating Subsidiary, and which Debtors are beneficial and essential to the reorganized business operations going forward and should be transferred pursuant to the U.K. Sale Transaction to Reorganized Paragon as a Transferred Subsidiary. *See* Confirmation Declaration at ¶ 73. Full impairment or unimpairment of these Intercompany Interests would jeopardize the Debtors' carefully designed reorganization, and would make the transactions and structural changes necessary to successfully reorganize the Debtors more complex and costly to accomplish.[57] *See id.* Additionally, under this scenario, there are no Interests junior to Class 8 (Parent Interests) and, thus, no junior Interests will receive recoveries under the Plan on account of such interests.[58] Furthermore, no holders of Claims or Interests senior to those in Class 9 will receive recoveries in excess of their respective entitlements under the Bankruptcy Code.

105. Accordingly, the Plan is "fair and equitable" and, therefore, consistent with the requirements of section 1129(b) of the Bankruptcy Code.

[57] *See In re Ion Media Networks, Inc.*, 419 B.R. 585, 601 (Bankr. S.D.N.Y. 2009) (the court found that the plan's preservation of intercompany interests, pursuant to certain creditors' consent, did not violate the absolute priority rule, despite unsecured creditors not being paid in full, because "[t]he Plan's retention of intercompany equity interests for holding company purposes constitutes a device utilized to allow the Debtors to maintain their organizational structure and avoid the unnecessary cost of having to reconstitute that structure."); *In re MPM Silicones, LLC*, 531 B.R. 321, 331 n.8 (S.D.N.Y. 2015) (concurring with the reasoning of *In re Ion Media*); *see also In re Loewen Group Int'l, Inc.*, Case No. 99-1244 (J. Walsh), Tr. at 1129 (Bankr. D. Del. Dec. 4, 2001) (noting that allowing such intercompany interests to remain does not violate the absolute priority rule, where such treatment serves as a "conduit for moving value from the subsidiaries to the creditors who will receive shares of the stock in the parent corporation").

[58] *See In re Rubicon*, 434 B.R. at 179 (finding a plan "fair and equitable" where separate classes of equity were not junior to each other, but merely holding "Equity Interests in different entities").

S. Section 1129(c): The Plan is the Only Plan Currently on File

106. The Plan is the only plan currently on file in these Chapter 11 Cases and, accordingly, section 1129(c) of the Bankruptcy Code does not apply. *See* Confirmation Declaration at ¶ 79.

T. Section 1129(d): The Principal Purpose of the Plan is Not the Avoidance of Taxes

107. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of section 5 of the Securities Act of 1933, and no governmental unit has objected to confirmation of the Plan on any such grounds. *See id.* The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

U. Section 1129(e): Inapplicable Provision:

108. The provisions of section 1129(e) of the Bankruptcy Code apply only to "small business cases." These Chapter 11 Cases are not "small business cases" as defined in the Bankruptcy Code. *See id.* Accordingly, section 1129(e) of the Bankruptcy Code is inapplicable in these cases.

V. Section 1127: Modification of the Plan

109. Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation so long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code and the proponent of the modification complies with section 1125 of the Bankruptcy Code. In addition, with respect to modifications made after acceptance but prior to confirmation of the plan, Bankruptcy Rule 3019 provides, in relevant part:

> [A]fter a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder

> who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Fed. R. Bankr. P. 3019(a).

110. As described above, the Debtors modified the Plan on June 5, 2017. The Plan, as modified, complies with sections 1122 and 1123 of the Bankruptcy Code, and the Debtors have complied with section 1125 of the Bankruptcy Code. Accordingly, the requirements of section 1127 have been satisfied. Moreover, Bankruptcy Rule 3019 is satisfied because the modifications do not impact, let alone materially impact, any creditor's or equity holder's treatment.

III. THE OBJECTIONS TO THE PLAN SHOULD BE OVERRULED

A. The Internal Revenue Service's Objection

111. The IRS Objection raises many purported issues, each of which is either already addressed in the Plan itself, herein, or in the Ahlstrom Declaration at ¶¶50-55, and as such should be overruled. The U.S. Internal Revenue Service's ("**IRS**") primary argument is that the Plan should not be confirmed unless the Debtors can demonstrate the feasibility of the Plan, specifically the Debtors' ability to pay on the Effective Date the alleged administrative expense claim of $17,691,487.00 (the "**Administrative Expense Claim**"). Per the IRS Objection, the alleged Administrative Expense Claim involves U.S. federal income taxes of Paragon Offshore Holdings US Inc. and its consolidated subsidiaries (the "**Paragon US Tax Group**") that were timely paid for the group's 2014 tax year and that were later refunded almost one year ago, on June 20, 2016. Paragon first learned of the alleged Administrative Expense Claim when the IRS filed the IRS Objection on May 31, 2017, and after the objection was filed a copy of a proof of claim dated the same date asserting the alleged Administrative Expense Claim. In fact, the IRS provided no prior notice that it would be seeking a claim in such amount. Ultimately, the Bankruptcy Court should overrule the IRS Objection because (i) the tax return at

issue is accurate and the IRS provides no support for their argument that it is not; (ii) the eventual resolution of the alleged Administrative Expense Claim will not reach finality prior to Plan confirmation as the Debtors dispute and will continue to dispute the IRS's claims through emergence; (iii) upon emergence, Paragon Offshore Holdings Inc. will file the Paragon US Tax Group's 2016 tax return, reporting additional net operating losses available to be carried back to offset taxable income for the 2014 tax year; and (iv) Paragon has proposed incorporating certain language into the Plan to resolve the IRS's other objections.

112. The factual background of the tax issue in question, unaddressed by the IRS, is as follows. The refund was received in June 2016 based on the carry back of a substantial net operating loss incurred by the Paragon Tax Group for the 2015 tax year. Shortly after timely filing the group's 2015 tax return, Paragon Offshore Holdings US Inc. filed a procedural application with the IRS requesting a so-called "quickie refund" of $17,691,487.00 out of taxes paid for the 2014 tax year. The alleged Administrative Expense Claim mirrors the amount of such refund.

113. After a quickie refund is issued, the IRS still has the right to audit the taxpayer's entitlement to such refund. The IRS sent notice of such an audit review in January 2017. The Debtors have cooperated in good faith and in a timely manner with the IRS's inquiries and requests for information and support and have participated in discussions with the IRS revenue agents conducting the review. The last communication, an in-person meeting between Paragon and the IRS, occurred on May 9, 2017. Until the concurrent filing of the IRS Objection and the alleged Administrative Expense Claim, the Debtors were unaware that the IRS had a substantive disagreement with any tax position taken by the Paragon US Tax Group on its 2015 tax return—the return now in question. As of the filing of this Memorandum, the Debtors still do not know the basis of the challenge.

114. The Paragon US Tax Group's 2015 tax return was prepared by an external certified public accountant, and reviewed, approved and signed by income tax compliance accountants at Ernst & Young LLP. Additionally, PricewaterhouseCoopers LLP, Paragon's external auditor, reviewed the computations and tax positions included in the 2015 tax return and did not find a necessity for establishing any financial statement impact for uncertain tax positions, tax contingency or similar reserves with respect to any of the tax positions resulting in the tax refund.

115. Contrary to the IRS's assertion in the IRS Objection, a request for payment of an administrative claim for taxes is not automatically deemed allowed. Furthermore, the IRS provides no evidence in support of the alleged Administrative Expense Claim. Interestingly, the $17,691,487.00 matches—to the exact dollar amount—the amount refunded to Paragon in June 2016. The IRS's *sole* support for its argument that the Debtors need to demonstrate their ability to pay on the Effective Date the alleged Administrative Expense Claim is the conclusory statement that it: "filed a request for payment of postpetition taxes based on its ongoing review of its prior tentative allowance of a refund claim made by debtor Paragon Offshore Holdings US Inc." IRS Objection at 2. Merely stating that the IRS is engaging in an "ongoing review" is insufficient evidence as to why the Debtors now owe over $17 million prior to emergence. Indeed, the Debtors believe that the IRS's claim for a claw-back of the refund is incorrect. Accordingly, the IRS Objection must be overruled.

116. Unless the IRS ultimately withdraws its claim, the Debtors do not expect that there will be a final resolution of the merits of the asserted Administrative Expense Claim, whether through an administrative process with the IRS or otherwise, for at least a year (if not much longer) following the Effective Date. Moreover, there is also pending with the IRS a further claim for refund with respect to the 2014 tax year in the approximate amount of $4.1

million due to previously unapplied tax credits, and shortly after the Effective Date, the Debtors intend to timely file the 2016 tax return for the Paragon US Tax Group and expect to report substantial additional net operating losses that similarly and independently would be available for carry back to offset 2014 taxable income in an amount that would result in a refund of the entire $17,691,487.00.

117. Finally, Paragon has proposed adding the following language to the Plan that, if agreed upon and included, would likely resolve the IRS's other objections:

> **Internal Revenue Service**. Nothing in the Plan, this Order, or the related Plan Documents discharges or releases the Debtors, the Reorganized Debtors or any non-debtor from any claim, liability or cause of action of the Internal Revenue Service ("**IRS**") or impairs the ability of the IRS to pursue any claim, liability, or cause of action against any Debtor, Reorganized Debtor, or non-debtor. All claims, liabilities (including with respect to refund claims made by the Debtors), or causes of action of or to the IRS, if any, shall survive the bankruptcy case as if the case had not been commenced and be determined in the manner and by the administrative or judicial tribunals in which such rights or claims would have been resolved or adjudicated if the bankruptcy case had not been commenced. Without limiting the foregoing, for the avoidance of doubt: (i) IRS Administrative Expense Claims that are Allowed pursuant to section 503 of the Bankruptcy Code shall accrue interest and penalties as provided by non-bankruptcy law until paid in full; (ii) nothing shall affect or impair the exercise of IRS' police and regulatory powers against the Debtors and/or the Reorganized Debtors; (iii) nothing shall affect or impair the United States' rights to assert setoff and recoupment against the Debtors and/or the Reorganized Debtors and such rights are expressly preserved; and (iv) the Debtors shall comply with applicable nonbankruptcy law in the payment of their income taxes.

118. For the reasons stated above, it is clear that the IRS's objections are without legal or factual basis and should be overruled.

B. The United States Trustee's Objection

119. The United States Trustee for Region 3 (the "**U.S. Trustee**") has filed the U.S. Trustee's Objection asserting that (1) definition of "Exculpated Parties" in the Plan is impermissibly broad; (2) the Liquidating Debtors are not entitled to a discharge under section 1141(d)(3) of Bankruptcy Code; and (3) the Unofficial Noteholders' Committee have not

provided a substantial contribution to the Debtors' estates, and as such, should not have their Professionals' Fees paid pursuant to the Plan. For the reasons set forth below, the Debtors respectfully submit that the Court should overrule the U.S. Trustee's Objection in its entirety.

1. The Exculpation Provisions are Not Impermissibly Broad

120. The U.S. Trustee asserts that the Exculpated Parties as set forth in the Plan is overly broad because it includes entities that are not estate fiduciaries. In response to the U.S. Trustee's Objection, the Debtors have more narrowly tailored the scope of Exculpated Parties in accordance with the standard in the Third Circuit as set forth below:

> ***Exculpated Parties*** means, collectively, and in each case in their capacities as such: (a) the Debtors; (b) the Disbursing Agent; (c) the U.K. Administrators; (d) Deloitte; (e) the Creditors' Committee; (f) the Professional Persons; and (g) with respect to ~~clauses (a) through (e)~~the foregoing, such entities' postpetition predecessors ~~(other than the Non-Released Parties)~~, professionals, successors, assigns, subsidiaries, affiliates, ~~managed accounts and funds, current and former~~ officers and directors ~~(other than the Non-Released Parties)~~, principals, shareholders, members, partners, managers, employees, ~~subcontractors, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants,~~agents, and representatives~~, management companies, fund advisors, and other professionals, and such entities' respective heirs, executors, estates, servants, and nominees~~, in each case solely in their capacity as such~~.~~ and whether currently serving or having previously served postpetition. For the avoidance of doubt, Exculpated Parties shall not be defined to include the Non-Released Parties in any capacity.

121. As a result of these modifications and continuing discussions with the U.S. Trustee, two issues primarily remain unresolved, specifically, whether (1) Exculpated Parties may include (i) ordinary course professionals employed by the Debtors during the Chapter 11 Cases and (ii) certain related parties of the Debtors, specifically predecessors, successors, assigns, non-Debtor subsidiaries and affiliates and (2) Exculpation Provision with respect to Deloitte may include post-Effective Date actions in connection with implementation of the Plan

and property to be distributed under the Plan.[59] The Debtors and the U.S. Trustee have not yet been able to resolve the U.S. Trustee's remaining objections.

122. The scope of Exculpated Parties as defined in the Plan is a critical feature of the "fresh start" the Debtors are entitled to under the Bankruptcy Code. Absent the exculpation of certain related parties of the Debtors, the door is left open for creditors to pursue discharged claims against the Debtors by commencing litigation against certain related parties of the Debtors for actions taken during the Chapter 11 Cases. As explained below, these related parties are entitled to exculpation under the standard in the Third Circuit and should be included within the definition of Exculpated Parties.

a. Ordinary Course Professionals Employed by the Debtors During the Chapter 11 Cases Are Entitled to Exculpation

123. Notwithstanding the established standard in the Third Circuit, the U.S. Trustee attempts to carve out ordinary course professionals and impose new restrictions on exculpation of the Debtors' professionals, *to wit*, the U.S. Trustee asserts that exculpation is limited to professionals retained pursuant to sections 327, 328, 330, 503(b), or 1103 of the Bankruptcy Code.[60]

124. Following form over substance, the U.S. Trustee's position overlooks the plain language of the Court's Order Pursuant to Sections 105(a), 327, 328, and 330 of the Bankruptcy Code Authorizing the Debtors to Employ Professionals Used in the Ordinary Course Of Business, entered on April 6, 2016 (D.I. 235) (the "**OCP Order**"). Specifically, the OCP Order expressly authorized the Debtors pursuant to "Sections 105(a), 327, 328, and 330 of the

[59] The Debtors believe that they have narrowed the U.S. Trustee's objection regarding the inclusion of Deloitte in the definition of Exculpated Parties. To the extent the U.S. Trustee objects to the inclusion of Deloitte, the Debtors intend to address the exculpation of Deloitte at the confirmation hearing.

[60] *See In re PWS Holding Corp.,* 228 F.3d 224, 246 (3d Cir. 2000) (approving exculpation clause in plan which included "professionals" employed by the debtor without imposing a separate retention application requirement).

Bankruptcy Code," to retain ordinary course professionals under streamlined retention procedures approved by the Court and save the Debtors' estates the expenses associated with preparing, filing, and prosecuting a separate retention application for each ordinary course professional. Accordingly, ordinary course professionals retained pursuant to the OCP Order are estate professionals entitled to exculpation.

125. Adopting the U.S. Trustee's additional restrictions may also have the unintended consequence of reducing the cost savings to the Debtors' estates from the streamlined retention procedures under the OCP Order and incentivizing professionals, at the Debtors' expense, to file individual retention and fee applications to receive exculpation under the Plan. Moreover, contrary to the U.S. Trustee's assertions, it is not necessary to analyze the substantive role of each ordinary course professional to determine whether they are entitled to exculpation. Specifically, the Exculpation Provision and Exculpated Parties as set forth in the Plan comply with the Third Circuit standard and include the appropriate limitations in scope—covering only actions taken in connection with the "administration of the Chapter 11 Cases; the negotiation and pursuit of any disclosure statements, including the Disclosure Statement, the Restructuring Transactions, any plans of reorganization, including this Plan, and all related agreements, instruments, and other documents (including the Plan Supplement), or the solicitation of votes for, or pursuit of confirmation of any plans of reorganization, including this Plan; the funding of this Plan; the occurrence of the Effective Date; the administration of this Plan or the property to be distributed under this Plan; the issuance of securities under or in connection with this Plan; or the transactions in furtherance of any of the foregoing" and excepting criminal acts and acts or omissions that are determined in a final order to have constituted intentional fraud, gross negligence, or willful misconduct.

126. Furthermore, courts in this and other jurisdictions in the Third Circuit have approved exculpation provisions which broadly covered estate professionals without imposing the restrictions set forth in the U.S. Trustee's Objection.[61]

b. Certain Related Parties of the Debtors Are Also Entitled to Exculpation

i. Non-Debtor subsidiaries and Non-Debtor affiliates

127. Paragon Parent, and its Debtor and non-Debtor subsidiaries, belong to the same corporate structure which serves as the framework for the Chapter 11 Cases and the Plan. With the exception of certain Liquidating Subsidiaries that are non-Debtors, the Plan contemplates that non-Debtor subsidiaries will remain part of the corporate structure subsequent to the Restructuring Transactions. Accordingly, as the Reorganized Debtors will include Debtor and non-Debtor subsidiaries within the same corporate structure, it is necessary and appropriate to include these entities within the definition of Exculpated Parties. Absent such relief, the Reorganized Debtors may not receive the entire benefit of the "fresh start" and be forced to defend claims brought by third parties against non-Debtor subsidiaries for actions taken during the Chapter 11 Cases that would otherwise be covered under the Exculpation Provisions.

ii. Predecessors, Successors and Assigns

128. Similarly, predecessors, successors and assigns of the Debtors should also be included within the definition of Exculpated Parties. In connection with the Restructuring Transactions, assets and liabilities of Debtor and non-Debtor entities within the Paragon corporate structure may be transferred or assigned to existing or newly formed entities that will comprise the Reorganized Debtors. Absent the inclusion of these entities as Exculpated Parties,

[61] *See, e.g.*, *In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del. 2011) (noting that exculpation appropriately provided to "estate professionals"); *In re Washington Mutual, Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) ("The exculpation clause must be limited to the fiduciaries who have served during the chapter 11 case: estate professionals, the Committees and their members, and the Debtors' officers and directors.") (citing *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)).

claimants may circumvent the Exculpation Provision and pursue actions against the Reorganized Debtors by commencing litigation against predecessors, successors or assignees within the Reorganized Debtors' corporate structure.

c. Deloitte May be Appropriately Exculpated for Actions Taken in Connection With Implementation of the Plan and Property to be Distributed under the Plan

129. Pursuant to Section 10.7 of the Debtors' Plan, the Exculpation Provision includes actions taken in connection with, among other things, "the administration of this Plan or the property to be distributed under this Plan; the issuance of securities under or in connection with this Plan; or the transactions in furtherance of any of the foregoing." Plan § 10.7. Notwithstanding the U.S. Trustee's assertions that exculpations should be limited solely to actions that occurred between the Petition Date and the Effective Date chapter 11 plans approved in the Third Circuit may provide exculpation for certain post-effective date actions in connection with plan implementation and distribution of property to creditors.[62]

130. However, the U.S. Trustee overlooks the fact that Deloitte has played an integral role in the Chapter 11 Cases, and may be involved in post-Effective Date activities that are required to implement the Plan and distribute property to creditors. Failure to consider the post-Effective Date actions taken by Deloitte to implement a complex global restructuring by arbitrarily limiting the exculpation period would jeopardize the Reorganized Debtors ability to obtain a "fresh start" and create an opportunity for disgruntled creditors to lodge frivolous claims

[62] *See, e.g., In re PWS Holding Corp.,* 228 F.3d 224, 246 (3d Cir. 2000) (approving exculpation clause in plan which included actions taken in connection with "the Administration of the Plan or the property to be distributed under the Plan."); *In re Tribune Co.*, No. 08-13141 (KJC) (Bankr. D. Del. July 20, 2012 (D.I. 12072) (exculpation clause in confirmed plan included actions taken in connection with "the administration, consummation and implementation of the Plan or the property to be distributed under the Plan"); *In re Washington Mutual, Inc.*, No. 08-12229 (MFW) (Bankr. D. Del. February 24, 2012) (D.I. 9759) (exculpation clause in confirmed plan included actions taken in connection with implementation of the Plan and restructuring transactions under the Plan).

arising from post-Effective Date by Deloitte actions taken to implement the Plan and effectuate distributions.

131. Based on the foregoing, the Court should overrule the U.S. Trustee's Objection in its entirety.

2. The Liquidating Debtors are Entitled to a Discharge under Section 1141

132. Contrary to the U.S. Trustee's assertions, the Liquidating Debtors are entitled to a discharge under section 1141 of the Bankruptcy Code. Section 1141(d)(3) only prevents the discharge of a debtor under a plan if (i) the plan provides for the liquidation of all or substantially all of the property of the estate *and* (ii) the debtor does not engage in business after consummation of the plan. 11 U.S.C. § 1141(d)(3). Notably, both of these factors must be met for the discharge to be prevented.[63]

133. None of the Liquidating Debtors are liquidating pursuant to the Plan. Instead, they are being reorganized pursuant to the Plan in accordance with the Corporate Restructuring. Under this reorganized corporate structure, the Liquidating Debtors, which will remain under Paragon Parent after the Effective Date, will continue to exist until they are eventually wound down or dissolved in accordance with the applicable law of the jurisdiction in which they are incorporated or organized. *See* Plan § 5.13(c). Indeed, the same applies to Paragon Parent. Paragon Parent will eventually dissolve after the Effective Date; this will take a number of years. Additionally, in some instances, certain of the other Liquidating Debtors could take over a decade to wind-down pursuant to applicable local law. Moreover, the Liquidating Debtors' dissolution will not occur under the auspices of the Plan or the supervision of this Court, but, in relation to Paragon Parent, under the auspices of the U.K. Administration, under

[63] *In re Revstone Indus., LLC*, 2016 WL 1271462, at *2 (D. Del. Mar. 30, 2016).

the jurisdiction of the English Court and the supervision of the Joint Administrators, who shall also coordinate the winding down of the other Liquidating Debtors, pursuant to local law and under the supervision of local judicial authorities.[64] This is the key framework behind the overall restructuring of the Debtors' corporate enterprise as contemplated by the Consenting Creditors when they agreed to support the Plan and the Plan Settlement.

134. Moreover, even if section 1141(d)(3) of the Bankruptcy Code were applied, the Debtors respectfully submit that it is not satisfied as applied to the Liquidating Debtors. First, many of the Liquidating Debtors will continue to hold all or substantially all of its property. For example, Paragon Parent is only transferring some of its property to Reorganized Paragon pursuant to the U.K. Sale Transaction. This transfer will only consist of certain assets of the Debtors, including the Transferred Subsidiaries; the Liquidating Subsidiaries will remain and continue to be held and maintained by Paragon Parent. Similarly, many other Liquidating Debtors will retain all or substantially all of their assets post-reorganization, including cash, receivables, and other assets.

135. Second, many of the Liquidating Debtors will continue their businesses after the Effective Date, including all the Debtors whose prepetition business was serving as a holding company. Paragon Parent, like many of the Liquidating Debtors, is currently a holding company, and will continue as a holding company after the Effective Date. As Paragon Parent and the applicable Liquidating Debtors are continuing in the same line of business, the

[64] *See In re Solyndra LLC*, Case No. 11-12799 (MFW), at 67:9 to 67:17 (Bankr. D. Del. Oct. 22, 2012) (overruling U.S. Trustee's objection based on section 1141(d)(3) of the Bankruptcy Code because the holding company would be pursuing litigation under a litigation trust, the proceeds of which would be used to pay creditors).

management of corporate assets, this does not meet the second factor of section 1141(d)(3) of the bankruptcy Code.[65]

136. Finally, given that the Corporate Restructuring is a fundamental feature of the Plan and that the U.K. Administration is necessary to implement the U.K. Sale Transaction, a discharge under section 1141 for each of the Debtors is necessary for the successful implementation of the Plan. Without such discharge, stakeholders will be able to pursue litigation of unreleased Claims and Interests against Paragon Parent in the English Court, or against other Liquidating Debtors in other jurisdictions, outside of the confines of the Plan, which is contrary to the purpose of reorganizing the Debtors. This kind of adverse outcome could materially affect the winding down of Paragon Parent and the U.K. Administration, and could hamper the success of the Corporate Restructuring. To allow stakeholders a "second bite at the apple" outside the confines of the Plan is inapposite to a plan of reorganization, which is what Paragon Parent and its Debtor-affiliates are accomplishing to achieve a "fresh start."

137. Moreover, those creditors who voted in favor of the Plan or who abstained from voting and did not opt out of the Non-Debtor Releases all did so in the context of a plan of reorganization that provided for the discharge of all Debtors, and especially of Paragon Parent. Only 3 out of 278 voting creditors elected to opt out of the Non-Debtor Releases under the Plan. *See* Voting Certification, Exs. A to C. As such, those creditors that provided Non-Debtor

[65] *See In re Revstone Indus.*, 2016 WL 1271462, at *2 ("With respect to the 'ongoing business' of Revstone, it is a holding company with principal assets comprised of its interests in operating non-debtor subsidiaries. Pursuant to the Plan, Revstone must engage in business after plan consummation by administering its assets in a manner that will optimize their value. Until the assets can be monetized within the parameters agreed to by the parties, Revstone will be engaged in managing its assets in much the same manner as it did pre-confirmation. Therefore, under the totality of the circumstances, the bankruptcy court did not err in confirming a plan of reorganization rather than a plan of liquidation."); *In re River Capital Corp.*, 155 B.R. 382, 387 (Bankr. E.D. Va. 1991) (discharge granted where company would continue in business after consummation of the plan, which business consisted of current management's liquidation of a portfolio of assets including loans and investments in closely-held and financially fragile businesses); *see also In re Um*, 2016 WL 7714141, at *3 to *4 (W.D. Wash. Aug. 18, 2016) (citing *In re Grausz*, 63 Fed. Appx. 647, 650 (4th Cir. 2003)) (court finding that continuation of "business" means "prepetition business").

Releases no doubt would not have expected that a plan of reorganization which provided for the discharge of all Claims would suddenly allow for those creditors who opted out of releases to pursue their Claims against certain Reorganized Debtors.

138. Accordingly, for the reasons set forth above, the Debtors submit that this Court should overrule the U.S. Trustee's objection and to allow a discharge for all Reorganized Debtors as required under section 1141 of the Bankruptcy Code.

3. The Ad Hoc Group of Noteholders have Provided a Substantial Contribution to the Debtors' Estates

139. The Debtors are seeking authority to pay the Noteholders' Professional Fees[66] in accordance with the terms of the Plan and the Plan Settlement. *See* Plan §§ 4.4(a), 5.17. As discussed above and in the Ahlstrom Declaration, entering into the Plan Settlement is supported by sound business justifications and is in the Debtors' best interests. *See* Ahlstrom Declaration at ¶¶ 39–45. Payment of the Noteholders' Professional Fees was negotiated during the settlement discussions and is an integral part of the Plan Settlement. *Id*. at ¶ 38. In the absence of including payment of such fees in the Plan Settlement, the Debtors may not have been able to achieve consensus with the Creditors' Committee and Secured Lenders on the terms of the Plan. *Id*. at ¶ 39–40.

140. The U.S. Trustee is incorrect that the Noteholders' Professional Fees may only be paid if it is demonstrated that the Ad Hoc Group of Noteholders have made a substantial contribution to these Chapter 11 Cases in accordance with section 503 of the Bankruptcy Code.[67]

[66] "**Noteholders' Professional Fees**" means the reasonable and documented fees and expenses incurred by Paul, Weiss, Rifkind, Wharton & Garrison LLP, Young Conaway Stargatt & Taylor, LLP, and Ducera Partners LLC in their capacities as counsel and financial advisors, respectively, to an ad hoc group of Senior Noteholders as provided in that certain Plan Support Agreement (including all exhibits thereto), dated as of February 12, 2016, by and among the Debtors and the Consenting Creditors (as defined in the agreement).

[67] The Debtors' request for approval of the Plan Settlement is subject to the standard for obtaining approval of a settlement under Bankruptcy Rule 9019 (*i.e.* the *Martin* factors analyzed in Section I) and, accordingly, section 503(b) is inapplicable. *See In re Martin*, 91 F.3d at 393. The Debtors also are seeking authority to pay the Senior

See UST Obj. ¶¶ 32–34. Nevertheless, should the Court require the Ad Hoc Group of Noteholders to satisfy the standards set forth in 503(b)(3)(D), the Debtors believe that the Ad Hoc Group of Noteholders' contribution to these Chapter 11 Cases satisfies such standards. As provided in the Ahlstrom Declaration, having been involved in these Chapter 11 Cases since the Petition Date, the Ad Hoc Group of Noteholders utilized their knowledge of the Debtors' business and the unique challenges presented in these Chapter 11 Cases to quickly bring the Creditors' Committee up to speed, resulting in a more streamlined plan negotiation process and, ultimately, a global deal. *See* Ahlstrom Declaration at ¶ 39. Therefore, the Ad Hoc Group of Noteholders' role in settlement negotiations provided a substantial contribution to the Debtors' estates.

C. The Unofficial Equity Committee Objection

141. The Unofficial Equity Committee (the "**Shareholders**") has filed the Shareholders' Objection asserting that the Plan (i) cannot be confirmed because the Court lacks subject matter jurisdiction, (ii) fails to satisfy the requirements for confirmation pursuant to section 1129 of the Bankruptcy Code, specifically, the good faith requirement, "best interests of

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Noteholders' Professional Fees pursuant to Article 4.4 of the Plan as a reasonable exercise of the Debtors' business judgment. *See In re Bethlehem Steel Corp.*, Case No. 02 Civ. 2854, 2003 WL 21738964, at *11 (S.D.N.Y. July 28, 2003) ("[S]ubsections 503(b)(3)(D) and (b)(4) do not bar a bankruptcy court from allowing a debtor in possession to reimburse a creditor for professional fees—provided, of course, that the standard for allowing transactions under § 363(b) has been met."); *see also In re Adelphia Commc'ns Corp.*, 441 B.R. 6, 12-22 (Bankr. S.D.N.Y. 2010) (approving payment of creditors' professional fees without the need for submitting substantial contribution applications because "section 503(b) does not provide, in words or substance, that it is the *only* way by which fees of this character may be absorbed by an estate. Thus the Court is free to look to other provisions of the Code that might also authorize a payment," and finding that section 1129(a)(4) permits payment of reasonable fees of certain creditors where, as here, "the provision for fees is an element of a chapter 11 reorganization plan") (emphasis in original); *In re AMR Corp.*, 497 B.R. 690, 694-96 (Bankr. S.D.N.Y. 2013) (following reasoning of *Adelphia* and concluding that professional fees for individual committee members provided for in a plan were permitted under sections 1129(a)(4) and 1123(b)(6) and would be approved); *Cf. Energy Future Holdings, Corp., et al.*, Case No. 14-10979 (CSS) (Bankr. D. Del. December 3, 2015), H'ring Transcript at 36-2:12 (citing to *Adelphia* and noting that "[t]here is an argument to be made that the Court could authorize these fees outside of Section 503" but ultimately determining that it was appropriate in that case to require compliance with section 503); *but see Davis v. Elliot Mgmt. Corp. (In re Lehman Bros. Holdings Inc.*), 508 B.R. 283, 290-91 (S.D.N.Y. 2014) (finding that section 503(b) is the sole source of authority to pay post-petition professional fees on an administrative basis).

creditors" test, and fair and equitable requirement, (iii) violates the fraudulent transfer laws in the United States and United Kingdom, and (iv) contains impermissible release and exculpation provisions. The underlying premise of the Shareholders' assertions is the contention that the Plan is defective in the absence of a recovery to equity holders. *See* Shareholders' Objection at ¶55 ("Under the Debtors' Fifth Plan, the shareholders will receive nothing, despite the fact that if a proper market test was held for the Debtor and Non-Debtor assets, and the Noble Settlement was pursued, the shareholders would surely receive a monetary recovery."). These assertions misconstrue the requirements of the Bankruptcy Code in an attempt to recoup investment losses at the expense of general unsecured creditors. Accordingly, the Court should overrule the Shareholders' Objection in its entirety.

1. The Court Has Jurisdiction Over the Chapter 11 Cases Pursuant to 28 U.S.C. §§ 157 and 1334 and the Allegations Regarding English Law and the U.K. Administration Are Unsupported

142. Contrary to the Shareholders' assertions, the Court has jurisdiction over the Debtors' Chapter 11 Cases pursuant to 28 U.S.C. §§ 157 and 1334. Specifically, pursuant to 28 U.S.C. § 157(a), bankruptcy judges "may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(a). Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b) and, thus, this Court has jurisdiction to enter a final order with respect thereto. 28 U.S.C. § 157(b) ("Core proceedings include, but are not limited to . . . confirmations of plans").

143. The Shareholders' various allegations regarding English law and the U.K. Administration are similarly misguided. Pursuant to the Insolvency Act 1986, directors of Paragon Parent had the power to apply to the English Court for an administration order. *See* Paragraph 12(1)(b) of Schedule B1 to the Insolvency Act 1986 ("An application to the court for an administration order in respect of a company . . . may be made only by – . . . (b) the directors

of the company"). This is a statutory power that is distinct from any power conferred on the directors generally by English Law or by Paragon Parent's articles of association and, contrary to the Shareholders' assertions, there is no provision in the articles of association or under English Law which required consent of the equity holders.

144. In addition, the U.K. Administrators have broad statutory power to, among other matters, implement the restructuring transactions contemplated under the Plan. *See* Administration Order at 4-6 (Schedule 1 of the Insolvency Act 1986 grants the U.K. Administrators with "Power to establish subsidiaries of the company," "Power to transfer to subsidiaries of the company the whole or any part of the business and property of the company," "Power to make any arrangement or compromise on behalf of the company," "Power to sell or otherwise dispose of the property of the company by public auction or private contract," and general powers to "do anything necessary or expedient for the management of the affairs, business and property of the company"). Accordingly, the various allegations asserted by the Shareholders regarding the U.K. Administration and the Debtors' ability to implement the restructuring transactions contemplated under the Plan are without merit and should be dismissed.

2. The Requirements for Confirmation Under Section 1129 of the Bankruptcy Code Are Satisfied

a. The Plan Has Been Proposed in Good Faith

145. For the reasons stated in Section II.F. above, the Debtors have satisfied the good faith requirements of section 1129(a)(3) of the Bankruptcy Code. Notwithstanding the Shareholders' assertions, good faith, as required by section 1129(a)(3), does not require that a plan permit shareholders to exercise their rights, or even receive a recovery under a plan.[68]

[68] Indeed, such a requirement would directly conflict with the absolute priority rule. *See* 11 U.S.C. § 1129(b).

Instead, all that is required to make a showing of good faith was outlined above: that the plan must have been proposed with "a valid reorganizational purpose,"[69] that "there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code,"[70] and that the plan is "not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Plan meets all of these factors, and, thus, the Shareholders' various assertions to the contrary should be dismissed.

b. The Plan Is in the Best Interests of All Creditors and Equity Interest Holders

146. For the reasons stated in Section II.J. above, the Debtors respectfully submit that the Plan satisfies the best interests of all creditors and equity interest holders, including the holders of Class 8 (Parent Interests), under section 1129(a)(7) of the Bankruptcy Code. As stated above, to satisfy the best interests test, each holder of a claim or equity interest must either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. The Plan amply meets that standard.

147. The holders of Interests in Class 8 (Parent Interests), who do not retain or recover any value under the Plan, are not estimated to recover anything in a hypothetical liquidation. *See* Liquidation Analysis; Disclosure Statement at 8; *see also* Brown Declaration at

[69] *In re SGL Carbon*, 200 F.3d at165.

[70] *See In re PWS Holding Corp.*, 228 F.3d at 242 ("[F]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code."); *see also In re PPI Enters.*, 228 B.R. at 347 (quoting *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984)), *aff'd,* 324 F.3d 197 (3d Cir. 2003); *In re Chemtura Corp.*, 439 B.R. at 608 (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984)) ("Whether a [chapter 11] plan has been proposed in good faith must be viewed in the totality of the circumstances, and the requirement of [s]ection 1129(a)(3) speaks more to the process of plan development than to the content of the plan." (internal quotations and citations omitted)).

¶¶ 11-12. This amount does not change, contrary to the Shareholders' allegations, if a recovery on the Noble Claims were factored into such liquidation. In fact, the value of the Noble Claims is highly unlikely to provide a recovery large enough to benefit the holders of Class 8 (Parent Interests) in a hypothetical chapter 7 liquidation.

148. Based upon the current valuation the Debtors used in connection with the Plan, there is a gap of approximately $1.59 billion at the high point and $1.47 billion at the low point—where any recovery must be distributed to the Debtors' creditors—before the holders of Class 8 (Parent Interests) could receive any recovery on account of the Noble Claims. *See* Valuation Declaration at ¶¶ 16-19. In a hypothetical chapter 7 liquidation, this recovery gap significantly increases. Under such a scenario, there is a gap of $2.28 billion at the high point and $2.31 billion at the low point before the holders of Class 8 (Parent Interests) receive any recovery on account of the Noble Claims. *See* Brown Declaration at ¶ 13-14.

149. This large recovery gap, in either scenario, is highly unlikely to be overcome by any recovery on the Noble Claims, either through litigation or settlement. *See* Strickler Statement at ¶¶ 81-84. Indeed, when the costs of pursuing such litigation, vis-à-vis the costs of delaying emergence from these Chapter 11 Cases is taken into account, it is highly unlikely that a recovery on the Noble Claims would reach even the estimated low point of $1.47 billion under the Plan's valuation.[71] Moreover, there is no certainty that Noble would find value in settling any claims against it for even the low point of $1.47 billion, and Noble may determine, under such circumstances, that it would be more economical and beneficial to allow litigation to proceed on the Noble Claims. The Shareholders have put forward no evidence,

[71] *See* Strickler Declaration at ¶¶ 35-42, 51, 64; *see also In re Paragon Offshore plc*, 2016 WL 6699318, at *12 (Bankr. D. Del. Nov. 15, 2016) (citing June 22, 2016 Hr'g Tr. at 7:12-17, 8:5 to 9:2 (Stilley Test.) and June 23, 2016 Hr'g Tr. at 33:21-25 (Stilley Test.)) (such litigation "[would] be expensive and time consuming" and could have "cost the Debtors approximately $105 million").

either in their objection, the exhibits they have attached to their objection, or in any of their other papers, which refutes this plain fact. The Shareholders are out of the money, under the Plan and in a hypothetical liquidation, and litigation against Noble will not change that.

150. Thus, like all other holders of Claims and Interests which are Impaired under the Plan, the Shareholders would not receive a recovery under the Plan less than what they would receive under a hypothetical chapter 7 liquidation.

c. The Plan Is Fair and Equitable

151. Finally, for the reasons stated in Section II.R.2. above, the Debtors respectfully submit that the Plan is fair and equitable under section 1129(b) of the Bankruptcy Code. In short, nothing that the Shareholders have argued has any bearing on whether a Plan is fair and equitable. This provision, as discussed, relies on compliance with the absolute priority rule, and the Shareholders have provided no evidence to justify a waiver from this fundamental principle of bankruptcy law.

3. The Shareholders' Fraudulent Transfer Allegations Are Without Merit and Should Be Dismissed

152. The Shareholders ostensibly assert fraudulent transfer allegations, which, upon further review, are simply restatements of their mistaken contention that the Debtors are solvent and equity holders are entitled to a recovery under the Plan. *See* Shareholders' Objection at ¶48 ("the most recently filed financial statement shows $2.7B in assets and the Creditors will exchange their claims of $2.4B in order to take possession of those assets. [sic] $1.1B which are unencumbered and not a guarantor of the Creditors agreements.").

153. As discussed in the Valuation Declaration, the Debtors are insolvent, and there is a $1.47 billion gap at the low point between the Distributable Value and the aggregate of the Senior Lender Claims and Senior Notes Claims before equity holders could begin to realize a recovery. *See* Valuation Declaration at ¶¶16-19. In addition, the valuation analysis in the

Disclosure Statement which was performed by Lazard based upon the discounted cash flow ("**DCF**") and comparable companies ("**Comparable Companies**") methodologies demonstrates there is no reasonable prospect of equity holders receiving any recovery. *Id.* at ¶6. Furthermore, neither the Debtors' secured creditors nor unsecured creditors are receiving a full recovery under the Plan. *Id.* at ¶14. Accordingly, it is clear from the Debtors' valuation analysis and the Valuation Declaration that no residual value is available for equity holders under the Plan.

4. The Release and Exculpation Provisions In The Debtors' Plan are Permissible

154. For the reasons stated in Section II.D above, the release and exculpation provisions provided for under the Plan are reasonable, integral to the global settlement and, with respect to the releases, consensual. The Debtors have demonstrated that the release and exculpation provisions satisfy the standards established by the Third Circuit and, accordingly, should be approved. In contrast, the Shareholders fail to provide any evidence or cite a single case to support their objection to the release and exculpation provisions.

155. Specifically, the third-party release provisions were conspicuously disclosed in boldface type in the Plan, the Disclosure Statement and on the Ballots. All holders of Claims and Interests, regardless of voting status, were informed to review the Plan closely and were conspicuously advised that Article X of the Plan contained certain release, exculpation, and injunction provisions that would affect their rights vis-à-vis the Released Parties. Against this backdrop, parties entitled to vote on the Plan were invited to cast ballots accepting the Plan, including its integrated release provisions, or to reject the Plan, and either provide—or opt-out of providing—releases to the Released Parties.

156. Moreover, in *PWS Holding Corp.*, the Third Circuit held, *inter alia*, that fiduciaries of the estate and their professionals may be exculpated under a debtor's plan of

reorganization for their actions in the bankruptcy case except for willful misconduct or gross negligence.[72] The Exculpation Provision and Exculpated Parties as set forth in the Plan comply with the Third Circuit standard and include the appropriate limitations in scope—covering only actions taken in connection with the negotiation and implementation of the Plan and Definitive Documents and excepting criminal acts and acts or omissions that are determined in a final order to have constituted intentional fraud, gross negligence, or willful misconduct.

157. Based on the foregoing, the Court should overrule the Shareholders' Objection in its entirety.

IV. GOOD CAUSE EXISTS TO WAIVE ANY STAY OF THE CONFIRMATION ORDER

158. The Debtors respectfully request that the Bankruptcy Court direct that the Confirmation Order shall be effective immediately upon its entry, notwithstanding the 14-day stay imposed by operation of Bankruptcy Rule 3020(e). Bankruptcy Rule 3020(e) provides that: "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 3020(e). As such, and as the Advisory Committee notes to Bankruptcy Rule 3020(e) state, "the court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions made immediately." Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend.

159. Under the circumstances, it is appropriate for the Bankruptcy Court to exercise its discretion to order that Bankruptcy Rule 3020(e) is not applicable and permit the Debtors to consummate the Plan and commence its implementation without delay after the entry of the

[72] *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (holding that exculpation clause which provided that committee members and estate professionals had no liability to creditors or shareholders for their actions in the case except for willful misconduct or gross negligence conformed to the standard applicable to such fiduciaries and, therefore, did not violate the Bankruptcy Code.); *see also In re Washington Mutual, Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) (citing the Third Circuit's standard in *PWS Holding Corp.* and finding that exculpation is limited to estate fiduciaries and their professionals).

Confirmation Order. *See* Confirmation Declaration at ¶¶ 75-76. The Debtors have a number of actions and transactions that need to be accomplished or commenced promptly after entry of and pursuant to the Proposed Confirmation Order to timely implement the Plan prior to the proposed Effective Date. *Id.* Among other things, this includes (i) incorporating Reorganized Paragon; (ii) completion of the transactions necessary to implement the Corporate Restructuring; and (iii) establishing the Administration Account(s) and funding those accounts with the Operating Fund (each as defined in the U.K. Implementation Agreement), which shall form a part of the U.K. Administration Reserve..

160. Furthermore, each day that the Debtors remain in chapter 11 they incur significant administrative and professional costs. The Debtors' prompt emergence from chapter 11 will also assuage the concerns of key customers, critical vendors, and valuable employees regarding the sustainability and viability of the Debtors. For these reasons, the Debtors, their advisors, and other key constituents are working to expedite the Debtors' entry into and consummation of the documents and transactions necessary to effectuate the Plan so that the Effective Date may occur as soon as possible after the entry of the Confirmation Order. Based on the foregoing, the requested waiver of the 14-day stay will allow the Debtors to finalize the processes required for their reorganization in a timely manner, and is therefore in the best interests of the Debtors' estates and creditors and will not prejudice any parties in interest.

V. CONCLUSION

161. The Debtors submit that (i) the Plan Settlement satisfies the requirements of Bankruptcy Rule 9019 and should be approved, and (ii) the Plan complies with all of the requirements of section 1129 of the Bankruptcy Code and should be confirmed.

162. Accordingly, the Debtors respectfully request entry of the Proposed Confirmation Order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: June 5, 2017
Wilmington, Delaware

/s/ Mark D. Collins

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