Docket #0895 Date Filed: 7/11/2013

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
THQ INC., ***et al.,***	Case No. 12-13398 (MFW)
Debtors.[1]	(Jointly Administered)

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE AMENDED CHAPTER 11 PLAN OF LIQUIDATION OF THQ INC. AND ITS AFFILIATED DEBTORS

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[1] The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: THQ Inc. (1686); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); Volition, Inc. (4944); and Vigil Games, Inc. (8651). The Debtors' principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

OTHER AUTHORITIES

THQ Inc. ("THQI") and its above-captioned debtor affiliates, as debtors and debtors in possession (each a "Debtor," and collectively, the "Debtors"), respectfully represent:

INTRODUCTION

1. This Memorandum of Law is submitted on behalf of the Debtors in support of confirmation of the *Amended Chapter 11 Plan of Liquidation of THQ Inc. and Its Affiliated Debtors*, dated May 28, 2013 [D.I. 709] (as may be further modified, supplemented, or restated, the "Plan"), pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code").[2]

2. The Debtors have proposed a plan of liquidation that generally provides for: (i) the substantive consolidation of the Debtors; (ii) the liquidation of the Debtors' remaining assets; (iii) satisfaction of all Allowed Administrative Claims, Allowed Priority Tax Claims, Allowed Secured Tax Claims, Allowed Other Secured Claims, and Allowed Priority Non-Tax Claims; (iv) Cash Distributions to holders of Allowed Convenience Claims and Allowed General Unsecured Claims; (v) exculpations, releases, and injunctions; and (vi) the wind-down and dissolution of the Debtors. The Plan represents the culmination of the tremendous cooperative good faith efforts of the Debtors and the Committee.

3. As discussed herein, and as will be further demonstrated at the Confirmation Hearing, the Plan satisfies all applicable requirements of the Bankruptcy Code for confirmation.

PLAN SOLICITATION AND VOTING

4. On May 30, 2013, the Court entered an order [D.I. 720] (the "Solicitation Procedures Order") (i) approving the Disclosure Statement pursuant to section 1125 of the Bankruptcy Code, (ii) establishing procedures for the solicitation and tabulation of votes to accept or reject the Plan, (iii) scheduling the Confirmation Hearing to commence on July 16, 2013, and (iv) establishing July 2, 2013

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Plan or the *Disclosure Statement for the First Amended Chapter 11 Plan of Liquidation of THQ Inc. and Its Affiliated Debtors,* dated May 28, 2013 [D.I. 710] (the "Disclosure Statement"). The relevant facts regarding the Debtors' Chapter 11 Cases and the Plan are set forth in the Disclosure Statement and the Plan.

as the deadline for parties in interest to (a) vote to accept or reject the Plan (the "Voting Deadline") and (b) object to confirmation of the Plan (the "Plan Objection Deadline").

5. On June 21, 2013, the Debtors filed a motion [D.I. 773] (the "Motion to Subordinate") to (i) equitably subordinate each of the Foreign Subsidiaries Claims (as defined in the Motion to Subordinate) and to treat such Claims under the Plan as Class 6 Subordinated Claims or, in the alternative, (ii) allow the Foreign Subsidiaries Claims, for the purposes of voting on the Plan, in the amount of $0 and establish the amount that the Debtors must deposit into the Disputed Interim Distributions Reserve on account of the Foreign Subsidiaries Claims at $0, or such other amount as the Court deems fair and equitable under all of the facts and circumstances. Absent equitable subordination, the Foreign Subsidiaries Claims are General Unsecured Claims in Class 5 in any amount estimated by the Court.

6. The Motion to Subordinate was originally scheduled to be heard at the Confirmation Hearing. However, in order to allow the Debtors and the Foreign Subsidiaries additional time to obtain necessary approvals of a proposed resolution, the parties have agreed to adjourn the hearing on the Motion to Subordinate until August 19, 2013 and the Foreign Subsidiaries have withdrawn their Class 5 votes to reject the Plan.[3]

7. As set forth in the Voting Certification (defined below), the Plan has been overwhelmingly accepted by Holders of Claims in Class 4 (Convenience Claims) and Class 5 (General Unsecured Claims) – the only Classes of creditors entitled to vote on the Plan (together, the "Voting Classes"). Holders of Claims in Class 6 (Subordinated Claims) and Class 7 (Securities Law Claims) and Holders of Equity Interests in Class 8 (Equity Interests) are deemed to have rejected the Plan. Holders of Claims in Class 1 (Secured Tax Claims), Class 2 (Other Secured Claims), and Class 3 (Priority Non-Tax Claims) are deemed to have accepted the Plan.

[3] The Foreign Subsidiaries (as defined in the Motion to Subordinate), with one exception, voted to reject the Plan Absent a settlement the Motion to Subordinate would determine whether those votes count as Class 5 votes. Under the agreed upon resolution the Foreign Subsidiaries have agreed that the votes will not count as Class 5 votes.

8. On June 25, 2013, the Debtors filed the *Notice of Filing of Plan Supplement* [D.I. 780], which included the list of contracts and leases to be assumed pursuant to the Plan and the corresponding cure amounts ("Schedule 5.01(a)"), and on June 26, 2013, the Debtors filed the *Notice of Filing of Additional Plan Supplement Documents* [D.I. 797], which included a form of the Litigation Trust Agreement and the Stock Trust Agreement (collectively, the "Plan Supplement").

9. On July 1, 2013, the Debtors filed a non-exhaustive list of Causes of Action [D.I. 827] (the "List of Preserved Causes of Action") to be preserved by THQI pursuant to Section 9.01 of the Plan and the Litigation Trustee Disclosures and the Stock Trustee Disclosures [D.I. 835].

10. Contemporaneously with the filing of this Memorandum of Law, the Debtors filed the *Notice of Proposed Findings of Fact, Conclusions of Law, and Order Confirming Amended Chapter 11 Plan of Liquidation of THQ Inc. and Its Affiliated Debtors*, attaching a proposed form of order confirming the Plan (the "Proposed Confirmation Order"). The Proposed Confirmation Order clarifies several provisions of the Plan that were questioned by parties that filed objections, as noted in this Memorandum of Law.

11. In addition, prior to or contemporaneously with the filing of this Memorandum of Law, the following documents were filed or will be filed in support of the confirmation of the Plan:

- The affidavits of service evidencing the timely service of the Solicitation Packages in accordance with the Solicitation Procedures Order [D.I. 749, 775] (the "Solicitation Affidavits");

- *Declaration of Jason Kay in Support of the Debtors' General Release of Certain Members of Management Pursuant to the Plan* (the "Kay Declaration"), filed contemporaneously herewith;

- *Declaration of Amir Agam in Support of Confirmation of the Amended Chapter 11 Plan of Liquidation of THQ Inc. and Its Affiliated Debtor* (the "Agam Declaration"), filed contemporaneously herewith;

- *Certification of James J. Lee With Respect to the Tabulation of Votes on the Amended Chapter 11 Plan of Liquidation of THQ Inc. and Its Affiliated Debtors* (the "Voting Certification"), filed contemporaneously herewith; and

- The certification of publication [D.I. 777], evidencing publication of the Confirmation Hearing Notice in *The New York Times* on June 3, 2013.

OBJECTIONS TO PLAN

12. The Debtors received four formal objections to confirmation of the Plan, two of which have been consensually resolved, as well as informal comments from certain of the Foreign Subsidiaries.[4]

Resolved Objections

13. SAP America, Inc. ("SAP") withdrew its objection to the Plan. *See* D.I. 839, 875.[5]

14. The Debtors have resolved the objection of MediaVest Worldwide and Starcom Worldwide, Inc. (together, "Starcom") through the inclusion of language in the Proposed Confirmation Order that is acceptable to Starcom. *See* Proposed Confirmation Order, ¶ 28.

Unresolved Objections

15. Zuffa, Inc. ("Zuffa") objects to the Plan [D.I. 837] to ensure that the Debtors fund the Administrative Claims Reserve with sufficient funds to pay all Administrative Claims and, specifically, that the Debtors deposit $1,913,017.75 on account of Zuffa's alleged Administrative Claim. Zuffa also objects to the manner in which the Debtors purport to preserve Causes of Action under the Plan. The Debtors address these issues, respectively, in Sections XI and I(C)(iii)(2), below.

16. The Michigan State Department of Treasury (the "State of Michigan") objects to the "exculpation and injunction language" of the Plan "to the extent that these provisions are an attempt to limit or enjoin the collection of tax debts due [to] the State of Michigan from non-debtors." *See* D.I. 797 (the "Michigan Objection"), ¶ 3. The State of Michigan has filed two Claims (claim numbers 202 and 203) against the Debtors for amounts allegedly owed to it as of the Petition Date, which total less

[4] The Debtors received comments from THQ International GmbH, T.HQ (Holdings) Limited, THQ (UK) Limited, THQ Entertainment Germany GmbH, THQ France S.a.r.l., THQ Interactive Entertainment Espana S.L.U., and THQ Italy S.r.l. Going forward, all references to issues raised by the "Foreign Subsidiaries" are to the foregoing entities.

[5] The Debtors have agreed to (i) cease use of all software and other proprietary information of SAP and (ii) certify as to their compliance with all duties under Section 5.4 of that certain Software End-User License Agreement dated May 28, 1999 entered into between SAP and THQI by no later than the Effective Date.

than $1,000. Nothing in the Plan limits the ability of the State of Michigan to collect prepetition tax debts due to it from non-debtors and the State of Michigan has not identified a particular Plan provision of concern.

17. The State of Michigan also objects to the proposed Administrative Claim Bar Date "because it does not allow sufficient time to allow for timely filing of claims." *See* Michigan Objection, ¶ 7. This objection, however, is based on an incorrect reading of the Plan. Section 1.04 of the Plan states that Administrative Claim Bar Date is the date that is twenty (20) days after the Effective Date, which is at least fourteen (14) days after the Confirmation Date. Thus, the Administrative Claim Bar Date will not be earlier than thirty-four (34) days following the Confirmation Date. The Debtors submit that this is ample time for parties to file Administrative Claims, especially considering the Plan and Disclosure Statement have been on file since April 18, 2013, and the State of Michigan has provided no authority to the contrary. Thus, the Michigan Objection should be overruled.

18. The Debtors have provided express language in the Proposed Confirmation Order to address the informal comments of the Foreign Subsidiaries, as noted throughout this Memorandum of Law. The Confirmation Order provides an exception to Section 8.12 to allow for the transfer of Claims by operation of law or as a dividend from a subsidiary to its parent in order to address the Foreign Subsidiaries' concern that the Plan's prohibition on the transfer of Claims after the Confirmation Hearing may prejudice the Foreign Subsidiaries. *See* Proposed Confirmation Order, ¶ 12. The Debtors have also included language in the Proposed Confirmation Order that expressly preserves the 14-day stay under Bankruptcy Rule 3020(e). *See* Proposed Confirmation Order, ¶ 47.

THE PLAN SHOULD BE CONFIRMED BECAUSE IT COMPLIES WITH THE REQUIREMENTS OF SECTION 1129 OF THE BANKRUPTCY CODE

19. Section 1129 of the Bankruptcy Code sets forth the requirements that must be satisfied in order for a plan to be confirmed. As proponents of the Plan, the Debtors bear the burden of

establishing that all elements necessary for confirmation of the Plan under section 1129(a) of the Bankruptcy Code have been met by a preponderance of the evidence.[6]

20. Through this Memorandum of Law, the record of these Chapter 11 Cases, the declarations submitted in support of confirmation of the Plan, and any evidence that may be presented at the Confirmation Hearing, the Debtors will demonstrate, by a preponderance of the evidence, that the Plan complies with the requirements of section 1129(a) of the Bankruptcy Code. Accordingly, the Plan should be confirmed.

I. The Plan Complies with Applicable Provisions of the Bankruptcy Code — 11 U.S.C. Section 1129(a)(1)

21. Section 1129(a)(1) of the Bankruptcy Code provides that a court may confirm a chapter 11 plan only if "[t]he plan complies with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1).[7] A principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan. Accordingly, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of its compliance with sections 1122 and 1123 of the Bankruptcy Code. The Plan complies fully with the requirements of both sections, as well as all other applicable provisions of the Bankruptcy Code.

A. The Classification of Claims and Equity Interests in the Plan Satisfies the Requirements of Section 1122 of the Bankruptcy Code

22. Section 1122 of the Bankruptcy Code provides that the claims or interests within a given class must be "substantially similar." 11 U.S.C. § 1122(a). It also allows for for the designation of a class for administrative convenience that consists only of unsecured claims that are less than or

[6] *See In re Tribune Co.*, 464 B.R. 126, 151-52 (Bankr. D. Del. 2011) (explaining that the plan proponent bears the burden of establishing the plan's compliance with section 1129(a) of the Bankruptcy Code) (citing *In re Exide Tech.*, 303 B.R. 48, 58 (Bankr. D. Del. 2003)).

[7] The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123, which govern the classification of claims under the plan and the contents of the plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008).

reduced to a court-approved amount. Additionally, "[a] plan proponent is afforded significant flexibility in classifying claims under § 1122(a) if there is a reasonable basis for the classification scheme and if all claims within a particular class are substantially similar."[8] Courts also are afforded broad discretion in approving a plan proponent's classification structure and should consider the specific facts of each case when making such a determination.[9]

23. The Plan classifies eight (8) Classes of Claims and Equity Interests based upon differences in the legal nature and/or priority of such Claims and Equity Interests, which are described more fully in the Plan and Disclosure Statement. The classes are designated as follows: Class 1 (Secured Tax Claims); Class 2 (Other Secured Claims); Class 3 (Priority Non-Tax Claims); Class 4 (Convenience Claims); Class 5 (General Unsecured Claims); Class 6 (Subordinated Claims); Class 7 (Securities Law Claims); and Class 8 (Equity Interests). *See* Plan, Art III.

24. The Plan's classification scheme complies with section 1122 of the Bankruptcy Code because each Class of Claims or Equity Interests contains only Claims or Equity Interests that are substantially similar to the other Claims or Equity Interests within such Class. Indeed, the Claims and Equity Interests in each Class differ from the Claims and Equity Interests in each other Class in a legal or factual nature or based on other relevant criteria.

25. Consistent with section 1122(b) of the Bankruptcy Code, for administrative convenience, General Unsecured Claims against the Debtors of less than or reduced to $10,000 are separately classified as Convenience Claims. The inclusion of the Convenience Class will permit the Debtors to make a single distribution on account of Convenience Claims and avoid the administrative burden of repeating the calculations of the distributions to Holders of such Claims, providing notices to Holders of such Claims, and preparing and mailing or wiring multiple distributions to Holders of such

[8] *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992).

[9] *See, e.g.*, *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060-61 (3d Cir. 1987) (observing that "Congress intended to afford bankruptcy judges broad discretion [under section 1122] to decide the propriety of plans in light of the facts of each case").

Claims. There are approximately 300 Convenience Claims. Eliminating future notices and distributions to these Holders is cost-effective. The definition of Convenience Claim is reasonable and necessary for administrative convenience. Thus, based upon the foregoing, the Debtors submit that the Plan satisfies the requirements of section 1122 of the Bankruptcy Code.

B. The Plan Complies With Section 1123(a) of the Bankruptcy Code

26. The Plan complies with section 1123(a) of the Bankruptcy Code, which sets forth seven (7) requirements.[10] 11 U.S.C. § 1123(a).

i. Section 1123(a)(1): Classes of Claims and Equity Interests

27. Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes of claims and classes of equity interests subject to section 1122 of the Bankruptcy Code. As discussed above, the Plan designates Classes of Claims and Equity Interests. *See* Plan, Art. III.

ii. Section 1123(a)(2) and (3): Classes that are Not Impaired by the Plan

28. The Plan specifies whether each Class of Claims and Equity Interests is Impaired or Unimpaired under the Plan and the treatment of each such Impaired Class, as required by sections 1123(a)(2) and 1123(a)(3), respectively. *See* Plan, Arts. III and IV.

iii. Section 1123(a)(4): Equal Treatment Within Class

29. Except as otherwise agreed to by a Holder of a particular Claim or Equity Interest, the treatment of each Claim or Equity Interest in each particular Class is the same as the treatment of each other Claim or Equity Interest in such Class, as required by section 1123(a)(4). *See* Plan, Art. IV.

iv. Section 1123(a)(5): Adequate Means of Implementation

30. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). The Plan provides adequate means for implementation of the Plan through, among other things: (i) the substantive consolidation of the Debtors; (ii) the establishment of the Stock Trust and the Litigation Trust and the appointment of the

[10] An eighth requirement, set forth in 11 U.S.C. § 1123(8), only applies in a case in which the debtor is an individual.

Stock Trustee and the Litigation Trustee with the duties and responsibilities set forth in Sections 6.13 and 6.14, respectively; (iii) the provisions governing Distributions under the Plan; (iv) the dissolution or wind-down of certain of the Debtors in accordance with applicable law and consistent with the implementation of the Plan; and (vi) the procedures governing the allowance of Claims under the Plan. *See* Plan, Arts. VI, VIII, IX, and X.

v. Section 1123(a)(6): Prohibition on the Issuance of Non-Voting Securities

31. The Plan provides that, on the Effective Date, among other things, the Equity Interests in THQI shall be cancelled and a single share of stock in THQI shall be issued to the Stock Trust. Pursuant to the Plan and the Stock Trust Agreement, all voting power with respect to such single share of stock is vested in the Stock Trustee as of the Effective Date. *See* Plan, Art. VI; Stock Trust Agreement, Art. V. Thus, there is no issue as to the distribution of voting power. Moreover, the Plan does not provide for the issuance of nonvoting equity securities and the Proposed Confirmation Order expressly prohibits the issuance of non-voting securities. *See* Proposed Confirmation Order, ¶ 8. The Plan, therefore, satisfies section 1123(a)(6).

vi. Section 1123(a)(7): Provisions Regarding Directors and Officers

32. Section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). Mark E. Holliday has been selected to serve as the Stock Trustee and the Litigation Trustee. *See* D.I. 835. Pursuant to the Plan and Stock Trust Agreement, the Stock Trustee may opt to serve as the sole director of THQI or may designate one or more other individuals to serve as directors of THQI. The Plan contains no provisions regarding the selection of directors, officers, or trustees that are contrary to the interests of Holders of Claims or Equity Interests or to public policy, and therefore, satisfies section 1123(a)(7) of the Bankruptcy Code. *See* Plan, Section 6.13(e); Stock Trust Agreement, Arts. V and VII; and Litigation Trust Agreement, Art. VII.

33. To eliminate concerns of the Foreign Subsidiaries relating to post Effective Date corporate governance under the Plan, the Debtors have expressly provided in the Proposed Confirmation Order that applicable nonbankruptcy corporate law shall control any duties of THQI as the sole shareholder of THQ International GmbH, as well as any duties of the Stock Trustee, as the sole shareholder and/or director of THQI. *See* Proposed Confirmation Order, ¶ 8.

C. The Plan Complies with the Requirements of Section 1123(b) of the Bankruptcy Code

34. The Plan is consistent with section 1123(b) of the Bankruptcy Code, which sets forth permissive provisions that may be incorporated into a chapter 11 plan.

i. Section 1123(b)(1): Impairment/Unimpairment of Claims and Equity Interests

35. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). As discussed above, Articles III and IV of the Plan describe the treatment for the Unimpaired and Impaired Classes of Claims and Equity Interests and, accordingly, the Plan is consistent with section 1123(b)(1) of the Bankruptcy Code.

ii. Section 1123(b)(2): Assumption, Assumption and Assignment, and Rejection of Executory Contracts and Unexpired Leases

36. Section 1123(b)(2) of the Bankruptcy Code allows a Plan to provide for the assumption, assumption and assignment, or rejection of executory contracts or unexpired leases pursuant to section 365 of the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(2). Article V of the Plan provides for the deemed rejection of all executory contracts and unexpired leases of the Debtors as of the Confirmation Date, except for any executory contract or unexpired lease: (i) that has previously been assumed and/or assigned pursuant to an Order of the Bankruptcy Court entered prior to the Effective Date; (ii) as to which a motion for approval of the assumption and/or assignment of such executory contract or unexpired lease has been filed and served prior to the Confirmation Date; or (c) that is specifically designated as a contract or lease to be assumed and/or assigned or retained on Schedule 5.01(a).

Article V of the Plan and Schedule 5.01(a) thereto satisfy the requirements of section 365(a) of the Bankruptcy Code and, accordingly, are consistent with section 1123(b)(2) of the Bankruptcy Code.

iii. Section 1123(b)(3): Debtor Releases, Exculpation, and Preservation of Causes of Action and Derivative Actions

37. Section 1123(b)(3) of the Bankruptcy Code allows a plan to provide for the "settlement or adjustment of any claim or interest belonging to the debtor or to the estate" or "the retention and enforcement by the debtor, the trustee, or by a representative of the estate appointed for such purpose, of any . . . claim or interest." 11 U.S.C. § 1123(b)(3). As permitted by section 1123(b) of the Bankruptcy Code, Article XI of the Plan provides for certain releases and exculpations **by the Debtors** and Article IX provides for the preservation of Causes of Action and Derivative Actions. These provisions are proper because, among other reasons, they are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and their Estates and creditors.

1. Debtor Releases and Exculpation

38. The following five facts justify the Plan's exculpation and release provisions: (1) the exculpation in Section 11.06 and the release provision in Section 11.07 are standard limitations on the liability of fiduciaries to the Estates for acts taken in connection with the Chapter 11 Cases, with appropriate exclusions for intentional misconduct; (2) the Debtors are not aware of any causes of action against any party that will actually be released by them and no party has alleged such causes of action presently exist; (3) the Management Release was negotiated at arm's-length with the Committee; (4) members of senior management provided services that generated more than $3 million in additional value for creditors in exchange for the Management Release; and (5) the Plan does not provide any third-party releases or bar any third-party from pursuing any claim belonging to it.

39. There are three relevant exculpation and release provisions. Sections 11.06 and 11.07 provide for exculpation and a release of claims held by the Estates, which are parallel with one another. They do not release any claims owned by any party other than the Estates and they release

only causes of action that arose after the Petition Date or that relate to administration of these Cases. The Management Release, which is incorporated into Section 11.02 of the Plan, was negotiated at the time of the sale of most of the Debtors' assets and is unique to the facts and history of these Cases.

40. Section 11.06 of the Plan (the "Exculpation Provision") provides for customary exculpations for the Debtors, the Committee, any of their respective current or former members, partners, officers, directors, employees, advisors, professionals, or agents (including the professionals retained by such persons), but solely in their capacities as such (collectively, the "Exculpated Parties"), of liability for:

> any act or omission **on or after the Petition Date and on or before the Effective Date** in connection with, related to, or arising out of the Chapter 11 Cases, the Estates, the sale of the Debtors' Assets, the negotiation and execution of the Plan, the Disclosure Statement, the solicitation of votes for and the pursuit of Confirmation of the Plan, the consummation of the Plan, or the administration of the Plan, and the property to be distributed under the Plan on or before the Effective Date, including all documents ancillary thereto, all decisions, actions, inactions and alleged negligence or misconduct relating thereto and all postpetition activities leading to the promulgation and Confirmation of the Plan except in case of fraud, willful misconduct, intentional misconduct or gross negligence by such Exculpated Party as determined by a Final Order.

Plan, Section 11.06 (emphasis added). The Exculpation Provision does not provide a release of any entity's fraud, gross negligence, intentional misconduct, or willful misconduct.

41. Section 11.07 of the Plan (the "Section 11.07 Release") provides a parallel limited release:

> On the Effective Date, the Debtors, on behalf of or derivative of themselves and their Estates, shall be deemed to release unconditionally (a) all of their respective officers, current directors, employees, partners, advisors, attorneys, financial advisors, accountants, and other professionals, (b) the members of the Committee and all of their respective officers, current directors, employees, partners, advisors, attorneys, financial advisors, accountants, and other professionals, and (c) officers, directors, principals, members, employees, partners, subsidiaries, affiliates, advisors, attorneys, financial advisors, accountants, and other professionals of the Committee (collectively the "Released Parties," and each a "Released Party") from any and all claims, obligations, suits, judgments, damages, rights, causes of action and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, **based in whole or in part upon actions taken solely in their respective capacities described above or any omission, transaction, event or other occurrence taking place on or**

> **prior to the Effective Date in any way relating to the Chapter 11 Cases, the Estates, the sale of any assets in the Chapter 11 Cases, the Disclosure Statement or the Plan**, except that (i) no individual shall be released from any act or omission that constitutes gross negligence or willful misconduct, (ii) the Debtors, the Stock Trustee and the Litigation Trustee, as applicable, shall not relinquish or waive the right to assert any of the foregoing as a legal or equitable defense or right of set-off or recoupment against any Claims of any such persons asserted against the Debtors, (iii) the foregoing release applies to the Released Parties solely in their respective capacities described above and (iv) notwithstanding any of the other provisions of the Plan, the foregoing release shall not affect the creation of the Stock Trust and the Litigation Trust.

Plan, Section 11.07 (emphasis added). The Section 11.07 Release is limited to claims of the Debtors against the Released Parties, solely in their respective capacities described in the Section 11.07 Release, arising from or related to the Chapter 11 Cases. The Section 11.07 Release excludes any act or omission that constitutes gross negligence or willful misconduct. The Debtors submit that the Section 11.07 Release is no broader than the Exculpation Provision.

42. Section 11.02 of the Plan provides for the general release for individuals who were members of the Debtors' senior management at the time when the Management Release (which is attached to the Plan as Exhibit 1) was negotiated (collectively, the "Management Releasees"). The Management Release is narrower than the Exculpation Provision and the Section 11.07 Release in that the parties being released are limited to members of senior management at the time the Management Release was negotiated, but it releases a broader range of potential claims of the Debtors because it was intended to address specific allegations made by the Committee relating to the auction process for some or substantially all of the Debtors' operating assets (the "Auction"). The facts supporting the Management Release are set forth in detail in the Kay Declaration and incorporated fully herein.

43. Prior to the Auction, the Committee had alleged in pleadings it submitted in connection with the Debtors' motion for approval of a sale of substantially all of the Debtors' assets [D.I. 19] (the "Sale Motion") that members of management had purportedly conspired with Clearlake Capital Group, L.P. ("Clearlake") to orchestrate a fire-sale that would not maximize the value of the Debtors' assets.

This Court stated at the hearing to consider the Sale Motion on January 4, 2013 that the Court did not accept the Committee's conspiracy theory.[11]

44. During the auction sale process, Clearlake asked members of management to provide information to enable Clearlake to submit a higher competing bid. Members of management were faced with a dilemma: if they did not provide Clearlake with the requested assistance Clearlake said it would not increase its bid, but if they did provide the requested information the Committee might again allege they were conspiring with Clearlake. Faced with this dilemma and wanting to maximize the chances that Clearlake would increase its bid and creditors would thereby receive enhanced value, members of management agreed to provide the requested assistance only if they were granted a release of the Debtors' alleged claims against them. Management and the Debtors did not believe valid claims existed, but the Committee had raised the specter of such claims. Members of management were unwilling to create exposure for themselves personally by conferring with Clearlake based on management's concern that the Committee could allege that this was somehow evidence of a conspiracy among them and Clearlake.

45. The Committee agreed that the value available to creditors would be enhanced if Clearlake would continue bidding and, therefore, agreed to support the granting of the Management Release, if and only if, Clearlake submitted a higher competing bid that enhanced the recovery to the Debtors' estates after conferring with members of management. Relying on the Committee's commitment to support the Management Release, management provided Clearlake with the requested assistance. Clearlake submitted several competing bids for less than substantially all of the Debtors' assets. The piecemeal bidders increased their bids in response to Clearlake's bids. Although Clearlake was not a successful bidder, the additional bids submitted in response to Clearlake's increased bids increased the total cash received by the Debtors' estates by more than $3 million. Thus, the pre- and postpetition efforts of the beneficiaries of the Management Release resulted in the Debtors receiving

[11] *See* Hr'g Tr., D.I. 19, at 238:24-239:2, *In re THQ, Inc.*, et al. No. 12-13398 (Jan. 4, 2013).

multiple higher and better offers, which, in turn, resulted in General Unsecured Creditors receiving a greater distribution under the Plan than they would have otherwise received.

46. The Exculpation Provision, the Management Release, and the Section 11.07 Release should each be approved under the facts and circumstances of these Chapter 11 Cases.

47. The Exculpation Provision is consistent with other chapter 11 plans confirmed in this District.[12] In effect, the Debtors are asking the Court to find that the Exculpated Parties have participated in good faith with respect to formulating and negotiating the Plan and are entitled to protection from lawsuits from disgruntled creditors or any other parties in interest. The scope of the Exculpation Provision is targeted and has no effect on liability that is determined to have constituted gross negligence or willful misconduct.

48. An exculpation provision is not a mandatory release of all liability, but instead establishes the appropriate standard of liability with respect to the parties exculpated.[13] The Exculpation Provision effectively flows from the conclusions of law that follows inevitably from findings of fact that the Court must reach in confirming the Plan.

49. First, this Court must find, under section 1129(a)(2) of the Bankruptcy Code, that the Debtors complied with the applicable provisions of the Bankruptcy Code. Additionally, the Court must find, under section 1129(a)(3), that the Plan has been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtors, which are Exculpated Parties, and, by extension, to the Debtors' members, officers, directors, employees and professionals. Further, these findings imply that the Plan was negotiated at arm's-length and in good faith. Insofar as the Debtors

[12] *See e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000) (approving similar exculpation clause); *In re Rubicon U.S. REIT, Inc.*, 434 B.R. 168, 189 (Bankr. D. Del. 2010) (same).

[13] *See PWS Holding*, 228 F.3d 246-47 (reasoning that the exculpation provision "does not affect the liability of third parties, but rather sets forth the appropriate standard of liability"); *In re Wash. Mut., Inc.*, 442 B.R. 314, 348 (Bankr. D. Del. 2011); *see also In re Enron Corp.*, 326 B.R. 497, 501 (S.D.N.Y. 2005) (in finding creditors' appeal of confirmation based on the plan's exculpation provision moot, the court specifically noted that the bankruptcy court addressed the exculpation provision and found it appropriate because it excluded gross negligence and willful misconduct).

negotiated the terms of the Plan with the other Exculpated Parties, the Court's good faith findings with respect to the Debtors' Chapter 11 Cases should extend to them.

50. Second, it is well established that the liability of statutory committees and their professionals under section 1103 of the Bankruptcy Code is limited to acts of gross negligence and willful misconduct.[14] Also, exculpation for parties participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability.[15] All of the Exculpated Parties played a key role in making it possible to present a viable chapter 11 plan for the Court's consideration and the Exculpation Provision played a role in bringing these parties to the table. Accordingly, the Debtors submit that the Court should approve the Exculpation Provision.

51. The Management Release and the Section 11.07 Release are also appropriate whether this Court applies the five factors enunciated in *In re Master Mortgage Investment Fund, Inc.*, 168 B.R. 930 (Bankr. W.D. Mo. 1994), which approved an injunction in favor of non-debtor parties, or under the standard adopted by courts applying Bankruptcy Rule 9019 ("Rule 9019").

52. The *Master Mortgage* court identified the following five factors considered by the majority of courts in dealing with third-party injunction requests (the "*Master Mortgage* Factors"):

> (1) There is an identity of interest between the debtor and the [released party], usually an indemnity relationship, such that a suit against the [released party] is, in essence, a suit against the debtor or will deplete assets of the estate.
>
> (2) The [released party] has contributed substantial assets to the reorganization.
>
> (3) The injunction is essential to reorganization. Without it, there is little likelihood of success.

[14] *See PWS Holding*, 228 F.3d at 246-47 (holding that the appropriate standard of liability under section 1103 is "willful misconduct or ultra vires acts," and approving an exculpation of the creditors committee and its professionals subject only to liability for willful misconduct or gross negligence); *In re Wash. Mut., Inc.*, 442 B.R. at 348 (finding that it is acceptable to provide exculpations for statutory committees and their members for the role they play in the bankruptcy process).

[15] *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *Enron Corp.*, 326 B.R. at 503 (excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition.").

> (4) A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has "overwhelmingly" voted to accept the proposed plan treatment.
>
> (5) The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

Id. at 934-35 (footnotes omitted).[16] The *Master Mortgage* court noted that these factors were not a rigid "factor test" to be applied in every circumstance, nor did they constitute an "exclusive list of considerations" or a "list of conjunctive requirements." *Id.* at 935. Rather, the factors were "balanced" by the courts, after engaging in a "fact specific review, weighing the equities of each case." *Id.*

53. The present case does not involve a third-party injunction barring the pursuit of claims owned by non-debtors, like *Master Mortgage*. Some courts have, however, considered the *Master Mortgage* factors in deciding whether to approve releases of potential claims that belong to the debtor's estate.[17]

54. Courts have also examined releases of claims by the debtor in a plan (as distinguished from third-party releases) as a settlement of estate claims against the released parties pursuant to § 1123(b)(3)(A) and Rule 9019, which provides for bankruptcy court approval of a "compromise or settlement" by the debtor in possession after notice and a hearing. FED. R. BANKR. P. 9019(a). Settlements under Rule 9019 are favored in bankruptcy, and will be approved so long as if they are "fair and equitable."[18] This "fairness" inquiry looks to "the fairness of the settlement to other persons, i.e., the parties who did not settle." *Id.*

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[16] *See also Tribune*, 464 B.R. at 186 (applying *Master Mortgage* to Plan Injunctions); *In re Wash. Mut., Inc.*, 442 B.R. at 345-46 (same); *In re Genesis Health Ventures*, 266 B.R. 591, 606-07 (Bankr. D. Del. 2001) (same); *Cf. In re 15375 Mem'l Corp.*, 382 B.R. 652, 694 (applying *Master Mortgage* to proposed § 105(a) injunction in favor of non-debtor outside of a Plan), *rev'd on other grounds*, 400 B.R. 420 (D. Del. 2009).

[17] *See e.g., In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (applying the *Master Mortgage* Factors to a debtor's release of prepetition unsecured noteholders and preferred shareholders); *In re Wash. Mut.*, 442 B.R. 314 (approving debtor releases in part under *Master Mortgage*); *Tribune*, 464 B.R. at 186 (noting that courts have considered the *Master Mortgage* Factors when deciding "whether a plan may include a debtor's release of non-debtor third parties, notwithstanding section 524(e)").

[18] *Wheeler v. Nw. Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006).

55. Beyond general considerations of fairness and equity, settlements under Rule 9019 are evaluated in light of the following four criteria: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors" (the "*Martin* Factors").[19] Using the *Martin* Factors, the bankruptcy court must "assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal."[20] Under normal circumstances, the court will defer to the judgment of the debtor in possession so long as there is a legitimate business justification for the settlement,[21] and a settlement will be approved if it falls above the lowest point in the range of reasonable litigation outcomes.[22] Deferring to the business judgment of the Debtors is particularly appropriate where, as here, the Committee supports the settlement.

56. Whether this Court applies the *Master Mortgage* Factors or the section 1123(b)(3)(A)/Rule 9019 standard, the Section 11.07 Release and the Management Release should each be approved. Each of these provisions satisfies three of the four *Master Mortgage* Factors applicable to releases by the debtor. The fifth factor should apply only to injunctions barring third-parties from asserting claims.[23]

57. First, there is an identity of interest between the Debtors and the Released Parties. Courts, including this Court, have interpreted broadly the "identity of interest" between a released party and a debtor, finding it satisfied by the settling parties' "common goal" or "common interest" in confirmation of the Plan and reorganization of the debtor, even in the absence of a demonstrable indemnity relationship whereby a claim against the released party would constitute a claim against the

[19] *Id.* at 645 (quoting *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996)).
[20] *Martin*, 91 F.3d at 393.
[21] S*ee id.* at 395.
[22] S*ee In re Penn Cent. Transp. Co.*, 596 F.2d 1102, 1114 (3d Cir. 1979).
[23] The fifth factor is "The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction." There is no such injunction and, therefore, no "class or classes affected by the injunction."

debtor.[24] Here, all of the Released Parties, as fiduciaries or professionals of the Debtors or the Committee who administered the Chapter 11 Cases and formulated and negotiated the Plan, shared an identity of interest with the Debtors in successfully winding down and liquidating the Debtors' estates.

58. Second, the material contributions of the Released Parties to the Debtors' Chapter 11 Cases and/or to the Plan justify granting the Section 11.07 Release. The Debtors' officers, current directors, and employees made significant personal sacrifices of time and effort by actively participating in these Chapter 11 Cases and in the Plan process, while simultaneously managing and winding-down the Debtors' businesses, overseeing two auctions that resulted in eight separate sales of substantially all of their operating assets to eight different buyers for over $78.5 million, and reviewing and reconciling over 700 claims that have been filed against the Debtors. They also actively participated in the marketing of the Debtors' assets by engaging potential bidders and purchasers and providing them with financial statements and other information. The efforts of such parties directly resulted in the Debtors receiving multiple higher and better offers, which enabled the Debtors to maximize the value of their estates for the benefit of their creditors. Similarly, the advisors, attorneys, financial advisors, accountants as well as other professionals of both the Debtors and the Committee have been essential to the maximization of the value of the Debtors' assets throughout these Chapter 11 Cases. The Debtors and the Committee have accomplished a great deal in a short amount of time as a result of the tremendous cooperative efforts of their professionals. Thus, the release of these parties is appropriate.

59. Third, the Plan, including the Exculpation Provision and the Section 11.07 Release, has been overwhelmingly accepted by Holders of Claims entitled to vote on the Plan and no party has objected to either provision. The Debtors submit that for the reasons set forth above, the Section 11.07 Release and the Exculpation Provision satisfy the *Master Mortgage* factors. Importantly, where debtor

[24] *See, e.g., Tribune*, 464 B.R. at 187; *In re Zenith Elecs Corp.*, 241 B.R. 92, 110-11 (Bankr. D. Del. 1999).

releases have been denied in this District, it was typically either because of a failure of the evidence[25] or because the releases appeared gratuitous and unrelated to the essential consideration underlying the settlement.[26] That is not the case here.

60. The fourth factor may not be satisfied under the facts of these Chapter 11 Cases as the Section 11.07 Release may not be "essential" to the reorganization. It is, however, fair and equitable and should cause no negative impact while expediting the completion of the administration of the Chapter 11 Cases and no third-party is being enjoined.

61. The Exculpation Provision and the Section 11.07 Release also satisfy the section 1123(b)(3)(A)/Rule 9019 standard. The Exculpation Provision and the Section 11.07 Release meet the first *Martin* Factor (probability of success in litigation) because the Debtors are not aware of any claims they may have against any of the beneficiaries and, therefore, do not believe they are "giving up" any claim on which they have a high probability of success litigating. Similarly, the Exculpation Provision and the Section 11.07 Release satisfy the second *Martin* Factor (the complexity of litigation involved, and the expense, inconvenience and delay necessarily attending it) because the Debtors and the Committee agree that spending resources investigating or pursuing any claims or causes of action against the beneficiaries would not be in the interest of the Debtors' various stakeholders in that the costs involved likely would outweigh any potential benefit from pursuing such claims. The Exculpation Provision and the Section 11.07 Release are also in the paramount interest of creditors, thereby satisfying the third *Martin* Factor. The Exculpated Parties and the Released Parties provided substantial contributions to these Chapter 11 Cases that resulted in the maximization of the value of the Estates for the benefit of the Debtors' creditors. The fourth factor, the likely difficulties in collection, is not relevant here. Based on the foregoing, the Debtors submit that the Exculpation Provision and the

[25] *See, e.g., Tribune*, 464 B.R. at 188 (finding no evidence of any contribution made by D&Os) and 189 (suggesting that an estimate as to the value of released causes of action may have provided an evidentiary basis for the Court to find the release of employees "fair"); *Exide*, 303 B.R. at 73 (rejecting debtors' enterprise valuation, and as a result concluding the settlement consideration was insufficient).

[26] *See, e.g., In re Wash. Mutual*, 442 B.R. at 350 (striking Debtor Releases for which there was "no explanation").

Section 11.07 Release satisfy the *Martin* Factors and are fair, reasonable, and in the best interests of the Debtors' estates and should be approved.

62. The Management Release also satisfies the *Master Mortgage* Factors and the section 1123(b)(3)(A)/Rule 9019 standard. First, there is an identity of interest between the Debtors and the Management Releasees. All of the Management Releasees shared an identity of interest with the Debtors in successfully consummating the sale of substantially all of the Debtors' assets for the highest possible value for the benefit of the Debtors' creditors.

63. Second, the Management Releasees also provided substantial contributions to these Chapter 11 Cases. As set forth in more detail in the Kay Declaration, and at ¶¶ 43-45 above, members of senior management generated more than $3 million in additional value at the Auction in exchange for the Management Release.

64. Third, the Management Release is a critical component of the Plan and is the product of arm's-length negotiations by the Debtors, the Committee, the Management Releasees, and their respective representatives. The Management Release resulted in a total increase in the amount received by the Debtors at the Auction of more than $3 million to the benefit of the Debtors' estates and creditors.

65. Finally, as stated above, the Plan has been overwhelmingly accepted by the Voting Classes. Moreover, no creditors objected to the Management Release. Thus, the Management Release satisfies the *Master Mortgage* Factors and should be approved.

66. The Management Release also satisfies the section 1123(b)(3)(A)/Rule 9019 standard. The Debtors are not aware of any claims they may have against any of the Releasees. While the Committee previously alleged there might be a "conspiracy," it agreed to support the Management Release in order to maximize the amounts of the bids at the Auction. The commitment of the Debtors and the Committee to seek this Court's approval of the Management Release in fact increased the

bidding at the auction by more than $3 million. Accordingly, the Debtors submit that the Management Release meets the first Factor.

67. The Management Release satisfies the second *Martin* Factor because it permits resolution of any alleged "conspiracy" without any litigation expenses and a much faster resolution than could be achieved through any potential litigation. There is no evidence of any basis for claims against members of management or of any "conspiracy." Accordingly, this *Martin* Factor weighs in favor of approving the Management Release.

68. The increase of the aggregate bids at the Auction benefited the Debtors' estates and creditors. That increase resulted from the efforts of the Management Releasees in exchange for, and in reliance on, the commitment of the Debtors and the Committee to seek this Court's approval of the Management Release. The Debtors respectfully submit that the speculation by the Committee at the Sale Hearing was unfounded. Thus, the third *Martin* Factor is satisfied. The fourth *Martin* Factor is not relevant under the facts of the Chapter 11 Cases.

2. Preservation of Causes of Action and Derivative Actions

69. The Plan provides that, as of the Effective Date, THQI shall retain all rights on behalf of the Debtors and the Estates to commence, pursue, and settle, as appropriate, any and all Causes of Action (including Avoidance Actions), whether arising before or after the Petition Date, in any court or other tribunal, including, without limitation, an adversary proceeding filed in the Cases. *See* Plan, Section 9.01(a). On July 1, 2013, the Debtors filed the List of Preserved Causes of Action. *See* D.I. 827. The failure to explicitly list any Causes of Action and other potential or existing claims of the Debtors or Estates, however, does not limit the rights of THQI to pursue any Causes of Action and claims not so identified. *See* Plan, Section 9.01(a). The Plan also provides that, as of the Effective Date, the Litigation Trust shall be deemed to have received a transfer of all rights on behalf of the Debtors and the Estates to commence, pursue, settle, as appropriate, any and all Derivative Actions, whether arising before or after the Petition Date, in any court or other tribunal, including, without

limitation, an adversary proceeding in the Chapter 11 Cases. *Id.* at 9.01(b). Finally, unless a Cause of Action or Derivative Action has been expressly waived and released in the Plan, Section 9.01(c) provides for the preservation of all other Causes of Action and Derivative Actions of the Debtors. *Id.* at 9.01(c). The retention of such claims, Causes of Action, and Derivative Actions, is supported by and consistent with section 1123(b)(3) of the Bankruptcy Code.

70. Zuffa objects to the manner in which the Debtors preserve Causes of Action against third parties (including Zuffa) under the Plan. See Zuffa Objection, ¶ 7. Specifically, Zuffa claims that by filing the List of Preserved Causes of Action a day prior to the Plan Objection Deadline and the Voting Deadline, the Debtors failed to provide parties with sufficient notice of the Causes of Action that the Debtors are preserving under the Plan to allow creditors named on the list of potential litigation targets adequate time to consider how to vote on the Plan or whether to object to the Plan.

71. These arguments should be rejected for the following three distinct and independently sufficient reasons: (1) the timing to which Zuffa belatedly objects was proposed in the original Plan and Disclosure Statement filed with this Court on April 18, 2013, and has never changed, but Zuffa did not object to that timing until July 2, 2013; (2) Zuffa cannot have had any doubt about the fact that it would be included on the List of Preserved Causes of Action because more than a month before the Voting Deadline the Debtors unequivocally told Zuffa's counsel that the Debtors could not stipulate to the allowance of Zuffa's alleged Claim precisely because Zuffa would be included as a potential target defendant; and (3) Zuffa cannot have been prejudiced by the knowledge which it alleges it did not have (despite the foregoing communications) because it voted no and objected to confirmation precisely because it knew it would be on the List of Preserved Causes of Action.[27]

[27] Zuffa cannot object on behalf of others who did not object. *See In re Johns-Manville Corp.*, 68 B.R. 618, 623 (Bankr. S.D.N.Y. 1986) ("[N]o party may successfully prevent the confirmation of a plan by raising the rights of third parties who do not object to confirmation."), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 644 (2d Cir. 1988); *see also Farmers & Merchants State Bank v. Ault (In re Ault)*, 1987 Bankr. LEXIS 2460, 3-4 (Bankr. C.D. Ill. Apr. 20, 1987) (same).

72. Courts have held that a debtor may be estopped from asserting claims against creditors that were duped into voting for or supporting a plan with no disclosure that post-confirmation the same creditor might be sued. In this case there can be no estoppel because Zuffa had actual knowledge it would be on the list of potential defendants and it actually voted to reject the Plan and objected to confirmation, apparently in an attempt to leverage the Debtors into removing Zuffa from the List of Preserved Causes of Action.

iv. Section 1123(b)(4): Sale of Substantially All Assets

73. Section 1123(b)(4) of the Bankruptcy Code provides that a plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. § 1123(b)(4). Pursuant to Sections 6.11 and 6.12 of the Plan, on the Effective Date, all Revested assets shall be revested in THQI free and clear of Liens, Claims, encumbrances, charges, interests of Holders of Claims and Equity Interests, and other interests, and THQI shall be authorized to liquidate such Assets and distribute the proceeds thereof in accordance with the Plan. This is consistent with section 1123(b)(4) of the Bankruptcy Code.

v. Section 1123(b)(6): Other Appropriate Provisions Not Inconsistent with the Applicable Provisions of the Bankruptcy Code

74. Section 1123(b)(6) of the Bankruptcy Code provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the] Bankruptcy Code." 11 U.S.C. § 1123(b)(6). The following provisions of the Plan are consistent with applicable sections of the Bankruptcy Code and applicable precedent in the Third Circuit and, accordingly, they are consistent with section 1123(b)(6) of the Bankruptcy Code.

1. Injunctions

75. As more fully described in the Plan and Disclosure Statement, the Plan provides for certain injunction provisions prohibiting parties from pursuing Claims or Causes of Action released under the Plan. *See* Plan, Sections 11.03, 11.04, 11.05, 11.08.

76. The injunction provisions are customary in this District and merely seek to assure that parties do not interfere with the consummation and implementation of the Plan and all the transactions contemplated thereby.[28] Accordingly, the injunction provisions are consistent with section 1123(b)(6) of the Bankruptcy Code and should be approved.

77. In response to concerns of the Foreign Subsidiaries, the Debtors have included language in the Proposed Confirmation Order expressly providing that nothing in the Plan or the Confirmation Order (a) gives the Bankruptcy Court jurisdiction over the liquidation of the Foreign Subsidiaries or (b) enjoins or otherwise prohibits the Foreign Subsidiaries from proceeding with their liquidations, although the Debtors do not believe that any of the provisions of the Plan could have interfered with any foreign liquidation proceeding. *See* Proposed Confirmation Order, ¶ 46.

2. Substantive Consolidation

78. Section 6.01 of the Plan provides for the substantive consolidation of the Debtors and their respective estates for all purposes, including voting, confirmation, and distributions. The Debtors believe that such substantive consolidation is fair, appropriate and necessary and should be approved.

79. "Substantive consolidation . . . emanates from equity [and] treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities."[29] Although the power to substantively consolidate bankruptcy estates is not explicitly authorized by any provision of the Bankruptcy Code, it is well established that bankruptcy courts may use their equitable powers under section 105 of the Bankruptcy Code to consolidate cases involving related debtors.[30] Moreover, section 1123(a)(5)(C) of the Bankruptcy Code expressly contemplates plan provisions that

[28] *See, e.g., In re Hawkeye Renewables, LLC*, 2010 WL 2745975, at *12 (Bankr. D. Del. June 2, 2010) (approving similar injunction provisions).
[29] *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005) (citations omitted).
[30] *See In re Stone & Webster, Inc.*, 286 B.R. 532, 539 (Bankr. D. Del. 2002).

provide for a merger or consolidation of the debtor with one or more persons as a means for the implementation of the Chapter 11 plan.[31]

80. Under the circumstances of these Chapter 11 Cases, substantive consolidation is appropriate. The Debtors are separate legal entities and, while management of the Debtors' operations was coordinated and shared certain aspects of their cash management system, the various Debtors generally observed corporate formalities. Nonetheless, the Debtors submit that substantive consolidation is appropriate here because observing the separate legal status of the individual Debtors could (a) add significant expenses to the estates and (b) result in inequitable treatment of creditors. Moreover, no creditor has objected to the substantive consolidation provided under the Plan. Accordingly, substantive consolidation is consistent with section 1123(b)(6) of the Bankruptcy Code and should be approved.

3. Retention of Jurisdiction

81. Article XII of the Plan provides that, among other things, this Court shall retain exclusive jurisdiction over all matters arising out of, or related to, the Chapter 11 Cases and the Plan, except as otherwise specifically stated therein. This provision is appropriate because the Court otherwise has jurisdiction over all of these matters during the pendency of the Chapter 11 Cases, and case law establishes that a bankruptcy court may retain jurisdiction over the debtor or the property of the estate following confirmation.[32] Accordingly, the continuing jurisdiction of the Court is consistent with applicable law and therefore permissible under section 1123(b)(2) of the Bankruptcy Code.

82. Based upon the foregoing, the Plan complies fully with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as well as with all other provisions of the Bankruptcy Code, and thus satisfies the requirement of section 1129(a)(1) of the Bankruptcy Code.

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[31] *See* 11 U.S.C. § 1123(a)(5)(B); *Stone & Webster*, 286 B.R. at 542 ("[S]ubstantive consolidation such as that proposed by the Plan is, by reason of § 1123(a)(5)(C), clearly an allowable provision in a Chapter 11 plan.").

[32] *See In re Resorts Int'l, Inc.*, 372 F.3d 154, 165 (3d Cir. 2004) ("Post-confirmation jurisdiction is assumed by statute and rule . . . .") (citing to section 1142(b) of the Bankruptcy Code and Rule 3020(d)).

II. The Debtors Have Complied with Applicable Provisions of the Bankruptcy Code — 11 U.S.C. § Section 1129(a)(2)

83. Section 1129(a)(2) of the Bankruptcy Code requires that the "proponent of the plan comply with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). Whereas section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, section 1129(a)(2) is concerned with the applicable activities of a plan proponent.[33] The legislative history to section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126.[34] In determining whether a plan proponent has complied with this section, courts focus on whether the proponent has adhered to the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code.[35]

84. The Debtors have complied with all have complied with all solicitation and disclosure requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Solicitation Procedures Order governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. The Disclosure Statement, the Plan, appropriate Ballots, notices, and all other related documents were distributed to parties in accordance with the Solicitation Procedures Order. *See* Solicitation Affidavits. Similarly, the date and time of the Voting Deadline and the Confirmation Hearing were timely published in *The New York Times* on June 3, 2013. *See* D.I. 777. Furthermore, the Debtors have complied with all orders of the Court entered during the pendency of these Chapter 11 Cases and with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules with respect to disclosure and solicitation of votes on the Plan.

85. As stated herein, the Proposed Confirmation clarifies and modifies several provisions of the Plan. Modifications made to the Plan since solicitation comply in all respects with Section 13.07

[33] *See* 7 *Collier on Bankruptcy* [1 1129.03[1] (15th ed. rev. 2007).
[34] H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("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 224.
[35] *Id.*

of the Plan and sections 1122 and 1123 of the Bankruptcy Code, as required under section 1127 of the Bankruptcy Rule and Bankruptcy Rule 3019. The Debtors submit that the disclosure of the modifications to the Plan in this Memorandum of Law and on the record at the Confirmation Hearing constitutes due and sufficient notice of such modifications and that such modifications are non-material and not adverse to any party-in-interest under the Plan who previously voted on the Plan. Accordingly, the Debtors are not required to re-solicit votes from any Class.[36]

III. The Plan Has Been Proposed In Good Faith and Not By Any Means Forbidden By Law — 11 U.S.C. § Section 1129(a)(3)

86. 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). Good faith is generally interpreted to mean that there exists a reasonable likelihood that a plan will achieve a result consistent with the "objectives and purposes of the Bankruptcy Code."[37] "In evaluating the totality of circumstances surrounding a plan a court has 'considerable discretion in finding good faith, with the most important feature being an inquiry into the fundamental fairness of the plan.'"[38]

87. The Plan has been proposed by the Debtors in good faith, with legitimate and honest purposes of allowing creditors to realize the highest possible recoveries under the circumstances of these Chapter 11 Cases. The Plan is the culmination of significant arm's-length, good faith negotiations among the Debtors and the Committee. The Debtors submit that the Plan is fundamentally fair to all stakeholders and has been proposed with the legitimate purpose of liquidating and winding down the affairs of the Debtors and expeditiously distributing value to creditors. Accordingly, the Plan has been filed in good faith and satisfies the requirements of section 1129(a)(3) of the Bankruptcy Code.

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[36] *See In re Century Glove, Inc.*, 1993 U.S. Dist. LEXIS 2286, *12-13 (D. Del. Feb. 10, 1993) (affirming bankruptcy court's order confirming a modified plan and holding that modifications that do not adversely impact any creditors who had previously voted in favor of the Plan do not require re-solicitation); *see also In re Century Glove, Inc.*, 74 B.R. 958, 962 (Bankr. D. Del. 1987) (a debtor may modify its Plan only if a creditor who had elected to be treated as secured was given an opportunity to change its election).

[37] *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001) (citations omitted).

[38] *Id.* at 234 (quoting *In re Am. Family Enters.*, 256 B.R. 377, 401 (D.N.J. 2000)).

IV. The Plan Provides That Professional Fees and Expenses Are Subject to Court Approval — 11 U.S.C. § 1129(a)(4)

88. Section 1129(a)(4) of the Bankruptcy Code requires that any payments by a debtor "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," either be approved by the court as reasonable or subject to 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 for professional fees and expenses be subject to the Court's review and approval. [39]

89. In accordance with section 1129(a)(4) of the Bankruptcy Code, no payment for services or costs and expenses in or in connection with the Chapter 11 Cases, or in connection with the Plan and incidental to the Chapter 11 Cases, including Professional Fee Claims, has been or will be made by the Debtors other than payments that have been authorized by order of the Bankruptcy Court. Section 2.05 of the Plan provides for the payment of Professional Fee Claims, which are subject to Bankruptcy Court approval and the standards of the Bankruptcy Court. Accordingly, the provisions of the Plan comply with section 1129(a)(4) of the Bankruptcy Code.

V. The Debtors Have Disclosed the Identity of Directors and Officers and the Nature of Compensation of Insiders — 11 U.S.C. § 1129(a)(5)

90. Section 1129(a)(5)(A) requires the proponent of any plan to disclose the "identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan," and requires a finding that "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(i)-(ii). Additionally, section 1129(a)(5)(B) requires the proponent of a plan to disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." 11 U.S.C. § 1129(a)(5)(B).

[39] *See Resorts Int'l, Inc.*, 145 B.R. 412, 476 (Bankr, D.N.J. 1990).

91. The Debtors have fully satisfied the requirements of section 1129(a)(5) of the Bankruptcy Code. The Debtors and the Committee have identified the proposed Stock Trustee. *See* D.I. 835. The appointment of the proposed Stock Trustee is consistent with the best interest of the Holders of Claims and Equity Interests. The proposed Stock Trustee is not an insider, as that term is defined in section 101(31) of the Bankruptcy Code. As a result, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

VI. The Plan Does Not Contain Any Rate Changes Subject to the Jurisdiction of Any Governmental Regulatory Commission — 11 U.S.C. § 1129(a)(6)

92. Section 1129(a)(6) of the Bankruptcy Code requires any governmental regulatory commission having jurisdiction over the rates charged by the post-confirmation debtor in the operation of its business to approve any rate change provided for in the plan. The Debtors do not have rates subject to the jurisdiction of any governmental regulatory commission.

VII. The Plan is in the Best Interests of All Creditors — 11 U.S.C. § 1129(a)(7)

93. Section 1129(a)(7) of the Bankruptcy Code requires that holders of impaired claims or interests which do not vote to accept the chapter 11 plan at issue "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date."[40]

94. The best interests test is satisfied as to each Holder of an Impaired Claim or Equity Interest and no party in interest has argued otherwise. The Debtors' liquidation analysis, which is attached as Exhibit C to the Disclosure Statement, demonstrates that creditors would not receive more value in a hypothetical chapter 7 liquidation than they will under the Plan. The Plan provides for the orderly liquidation of the Debtors' remaining assets and for the distribution of the proceeds in accordance with the priority scheme established by the Bankruptcy Code and applicable law. The

[40] 11 U.S.C. § 1129(a)(7)(A); *see also In re Century Glove, Inc.*, 1993 U.S. Dist. LEXIS 2286, at *23.

present value of the distributions to creditors would be less in a hypothetical chapter 7 liquidation than they will under the Plan for two primary reasons: (i) the increased costs and expenses of a liquidation under chapter 7 arising from fees payable to a chapter 7 trustee and its professionals, and (ii) the substantial delay in distributions under chapter 7. Based on the foregoing, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

VIII. The Requirements of Section 1129(a)(8) of the Bankruptcy Code Have Been Satisfied — 11 U.S.C. § 1129(a)(8)

95. Section 1129(a)(8) of the Bankruptcy Code requires that, with respect to each class of claims or interests, such class has accepted the plan or is not impaired under the plan. 11 U.S.C. § 1129(a)(8). As reflected in the Voting Certification, the Plan has been accepted by creditors holding well in excess of two-thirds in amount and one-half in number in Class 4 (Convenience Claims) and in Class 5 (General Unsecured Claims). Thus, as to those Impaired and accepting Classes, the requirements of section 1129(a)(8) have been satisfied.

96. Holders of Claims in Class 6 (Subordinated Claims) and Class 7 (Securities Law Claims) and Holders of Equity Interests in Class 8 (Equity Interests) are not entitled to receive or retain any property under the Plan and, therefore, are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. As to Classes 6, 7 and 8, the Plan may be confirmed over their dissent under the "cram down" provisions of section 1129(b)(2) of the Bankruptcy Code, as discussed below. Class 1 (Secured Tax Claims), Class 2 (Other Secured Claims), and Class 3 (Priority Non-Tax Claims) are unimpaired and have accepted the Plan. *See* 11 U.S.C. § 1126(f).

IX. The Plan Provides for Payment in Full of All Allowed Priority Claims — 11 U.S.C. § 1129(a)(9)

97. Section 1129(a)(9) of the Bankruptcy Code requires that persons holding allowed claims entitled to priority under section 507(a) receive specified cash payments under the plan. The Plan provides that Holders of Allowed Unclassified Claims, including Allowed Administrative Claims, Allowed Professional Fee Claims, and Allowed Priority Claims, shall receive Cash in an amount equal

to the amount of such Claim. *See* Plan, Arts. II and IV. The Plan, therefore, satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

X. At Least One Class of Impaired Claims Has Accepted the Plan — 11 U.S.C. § 1129(a)(10)

98. 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 in the Voting Certification, two Class of Impaired Claims—Classes 4 and 5—have accepted the Plan, without including the acceptance of the Plan by insiders in those Classes. Thus, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

XI. The Plan Is Feasible — 11 U.S.C. § 1129(a)(11)

99. Section 1129(a)(11) of the Bankruptcy Code requires that the Court determine 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 Court to determine whether the Plan may be implemented and has a reasonable likelihood of success.[41] In the context of a liquidating plan, feasibility is established by demonstrating that the debtor is able to satisfy the conditions precedent to the Effective Date and otherwise has sufficient funds to meet its post-Confirmation Date obligations to pay for the costs of administering and fully consummating the Plan and closing the Chapter 11 Cases.[42]

100. The Agam Declaration demonstrates that the Debtors have far more cash than they need to (a) pay all Allowed Priority Claims, Allowed Administrative Priority Claims, and Allowed Secured Claims, (b) reserve for all Disputed Priority Claims, Disputed Administrative Priority Claims, and Disputed Secured Claims, and (c) reserve for future expenses to be incurred in completing the administration of the Debtors' assets. Thus, the Debtors have proven that THQI will have sufficient

[41] *See U.S. v. Energy Res. Co.*, 495 U.S. 545, 549 (1990).
[42] *See, e.g., In re Journal Register Co.*, 407 B.R. 520, 539 (Bankr. S.D.N.Y. 2009) (explaining that the feasibility test is "whether the things which are to be done after confirmation can be done as a practical matter under the facts") (internal quotations omitted).

assets to administer and consummate the Plan, satisfy post-Confirmation Date obligations, and close the Chapter 11 Cases, thereby satisfying the feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

101. Zuffa argues that the Debtors have submitted no evidence that the Debtors will be able to fund the required amounts under the Plan, but the Debtors had not yet submitted evidence demonstrating their ability to do so. *See* Zuffa Objection, ¶ 5. The Agam Declaration does just that.

102. Zuffa also argues, disingenuously, that the Court should require the Debtors to reserve for Zuffa's purported Administrative Claim in the amount of $1,913,017.75. Zuffa has filed a General Unsecured Claim (claim number 417) and an Administrative Claim (claim number 671). Zuffa attached the Addendum (as defined in the Zuffa Objection) to both Claims. In Paragraph 9 of the Addendum, Zuffa alleges that its General Unsecured Claim is in the amount of $1,913,017.75. In Paragraph 10 of the Addendum, Zuffa alleges the right to an Administrative Claim for "all sums due and owing to Claimant under the Agreement that arose on or after the Petition date" and alleges that, as of the date its Administrative Claim was filed, it "has not received any Royalty Statement form THQ covering the post-Petition Date period." As set forth in the Agam Declaration, THQI has since provided Zuffa with a royalty statement showing that Zuffa's remaining unpaid postpetition royalties held in reserve by the Debtors were approximately $47,900. In addition, during a final analysis of postpetition sales, the Debtors have identified additional potential royalties to Zuffa of approximately $311,731. Therefore, Zuffa's maximum Administrative Claim for royalties based on postpetition sales would be no more than $359,631, subject to reduction as a result of customers credits based on valid discounts, write-offs, and price protection programs. For purposes of establishing the proposed Administrative Claims Reserve, the Debtors have used the full $359,631 without any such reductions.

103. If the Court does not grant the *Debtors' Objection to Claim No. 417 and Request for Administrative Expense Claim Assigned Claim No. 671 to the Extent They Assert Constructive Trust Rights* [D.I. 825], the Debtors could increase the amount reserved for Disputed Secured Claims (or for

Administrative Claims, if Zuffa is really now alleging it has an Administrative Claim based on sales made pre-petition) by the $1,913,017.75 for which Zuffa has asserted a constructive trust. As demonstrated in the Agam Declaration, doing so would not impair the Debtors' ability to fulfill their obligations under the Plan, but would reduce the Initial Class 5 Distribution by this same sum.

104. Zuffa's assertion that the Debtors have "unbridled discretion" to establish the amount of the Administrative Claim Reserve is incorrect. Section 8.13(h) of the Plan requires the Debtors to reserve for Disputed Administrative Claims, Disputed Priority Claims, and Disputed Secured Claims in the stated liquidated "face amount" of the Claim, unless the Claim is estimated to be a different amount by Order of the Court. If such Disputed Claim does not provide a stated liquidated "face amount," then the "face amount" shall be estimated by the Bankruptcy Court and such estimated amount must be used by the Debtors in calculating reserves for such claims. *See* Plan, Section 8.13(h). The Debtors have objected to Zuffa's Administrative Claim. As a result, the Debtors must reserve for such Claim in an amount determined by the Bankruptcy Court and, therefore, the Debtors have no discretion in determining the amount that must be reserved for Disputed Administrative Claims, such as Zuffa's.

105. The Administrative Claims Reserve will be used to pay Administrative Claims that have already been filed against the Debtors, as well Administrative Claims, including Professional Fee Claims, that will be filed after the Effective Date. Thus, Section 1.06 allows the Debtors to estimate the amount of the Administrative Claims Reserve in order to sufficiently reserve for Administrative Claims that have not yet been filed as of the Effective Date. *See* Plan, Section 1.06. As set forth in the Agam Declaration, the Debtors will be able to satisfy the conditions precedent to the Effective Date and otherwise have sufficient funds to meet post-Confirmation Date obligations to pay for the costs of administering and fully consummating the Plan and closing the Chapter 11 Cases. The Zuffa Objection, therefore, should be overruled. The Plan is "feasible."

XII. All Statutory Fees Will be Paid — 11 U.S.C. § 1129(a)(12)

106. 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. *Id.* § 507(a)(2). In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, Section 13.06 of the Plan provides that all fees payable pursuant to section 1930 of title 28 of the United States Code shall be paid on the earlier of when due or the Effective Date, or as soon thereafter as practicable. Accordingly, the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

XIII. Sections 1129(a)(13)-(a)(16) Are Inapplicable

107. Section 1129(a)(13) of the Bankruptcy Code requires that a chapter 11 plan provide for the continued payment of certain retiree benefits "for the duration of the period that the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). The Debtors have no obligations to provide any such retiree benefits. Nor are the Debtors (a) required to pay any domestic support obligations, (b) individuals, or (c) nonprofit corporations or trusts. Accordingly, the Debtors submit that sections 1129(a)(13) through (16) of the Bankruptcy Code are not applicable.[43]

XIV. The Plan Satisfies the "Cram Down" Requirements for Non-Accepting Classes — 11 U.S.C. § 1129(b)

108. Under section 1129(b), the court may confirm a plan over the dissenting vote of an impaired class of claims as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such dissenting class or classes. By its express terms, section 1129(b) of the Bankruptcy Code is only applicable to a class of creditors that rejects a plan.[44] Accordingly, a

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

[44] *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).

dissenting creditor in an accepting class lacks standing to object to the plan on the basis of unfair discrimination or absolute priority.[45] Cram down is only relevant to those Classes that are deemed to have rejected the Plan—Classes 6, 7 and 8. 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 because the Plan provides for a simple waterfall according to the priorities afforded to each Class.

A. The Plan Does Not Discriminate Unfairly

109. 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.[46] As between two classes of claims or two classes of equity interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests,[47] or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[48] In the perspective of the foregoing standards, the Plan does not "discriminate unfairly" with respect to any Class that is deemed to reject the Plan or has rejected the Plan and no Holder of a Claim or Interest contends that it does.

110. The Plan treatment of Holders of Allowed Claims in Classes 6 and 7 is based on the statutory mandates of sections 726(a)(4) and 510 of the Bankruptcy Code. Indeed, in order to comply with section 1129(a)(1) of the Bankruptcy Code, which requires that a chapter 11 plan comply with applicable provisions of the Bankruptcy Code, section 510 must be enforced. Moreover, the Claims in Class 6 and Class 7 are not similarly situated to any other Class and the disparate treatment of such Classes in comparison to other Classes of Claims that are not subordinated is not unfair.

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[45] *See In re Jersey City Med. Ctr.*, 817 F.2d at 1062.
[46] *See In re WorldCom Inc.*, 2003 WL 23861928, at *59 (citing *In re Buttonwood Partners, Ltd.*, 111 B.R 57, 63 (Bankr. S.D.N.Y. 1990)); *In re Johns-Manville Corp.*, 68 B.R. at 636.
[47] *See, e.g., In re Johns-Manville Corp.*, 68 B.R. at 636.
[48] *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. at 715 (separate classification and treatment was rational where members of each class "possess[ed] different legal rights").

111. The Plan also does not "discriminate unfairly" with respect to Class 8 (Equity Interests) because all Equity Interests are classified together and afforded the same treatment under the Plan. Moreover, Allowed Claims in Class 7 (Claims arising from the rescission of the purchase or sale of an equity security of THQI), are treated *pari passu* with Class 8 because this is required by section 510(b) of the Bankruptcy Code. As such, there is no discrimination, let alone unfair discrimination, among holders of Equity Interests. Thus, the Plan does not "discriminate unfairly" with respect to any impaired Classes of Claims or Equity Interests.

B. The Plan Is Fair and Equitable

112. Section 1129(b)(2) sets forth the "fair and equitable" standards for claims and interests. In determining whether a plan is "fair and equitable," courts consider additional factors to those set forth in section 1129(b). For example, courts look to whether the holders of claims that are senior to the claims of a dissenting class are receiving more than 100% of their claims.[49]

113. Distributions under the Plan are made in the order of priority mandated by the Bankruptcy Code and in accordance with the rule of absolute priority. Pursuant to the Plan, Holders of Allowed Claims in each Class that may have rejected the Plan must be paid in full before a distribution is made to a more junior class.

114. Holders of Allowed Securities Law Claims in Class 7 will be treated *pari passu* with Holders of Equity Interests in Class 8. On the Effective Date, the Equity Interests in THQI shall be cancelled and a single share of stock in THQI shall be issued to the Stock Trust and held for the benefit of the former holders of THQI stock, including Holders of Securities Law Claims. *See* Plan, Section 6.13(b). Providing Holders of Equity Interests and Securities Law Claims with a contingent right to residual recovery is consistent with section 1129(b)(2)(B) of the Bankruptcy Code and not in violation of the fair and equitable rule. No consideration will be provided to Holders of Securities Law Claims

[49] *See, e.g., United Sav. Ass'n v. Timbers of Inwood Forest Assocs. (In re Timbers of Inwood Forest Assocs.)*, 793 F.2d 1380, 1410 (5th Cir. 1986), *aff'd en banc*, 808 F.2d 363 (5th Cir. 1987), *aff'd*, 484 U.S. 365 (1988).

or Equity Interests under the Plan unless all Holders of Claims in Class 6 have been satisfied in full in accordance with such rule.

115. In order to address certain concerns of the Foreign Subsidiaries regarding the payment of interest to Holders of Class 5 Claims, the Debtors have amended the Plan interest provisions to provide as follows:

> (1) neither Class 5 nor Class 6 will receive any interest for the period between the Petition Date and the Effective Date;
>
> (2) to comply with 1129(b)(2)(B)(i), which requires payments "of a value, as of the effective date of the plan, equal to the allowed amount of such claim" Holders of Allowed Class 5 Claims will accrue interest from the Effective Date until paid at the rate of 7% per annum or such other rate as the Court determines is necessary to comply with 1129(b)(2)(B)(i), before any distribution is made to Class 6; and
>
> (3) in order to comply with the same requirement of 1129(b)(2)(B)(i), Holders of Allowed Class 6 Claims will accrue interest from the Effective Date until paid at the rate of 7% per annum or such other rate as the Court determines is necessary to comply with 1129(b)(2)(B)(i), before any distribution is made to Class 7 or Class 8.

116. These provisions eliminate any possibility that Holders of Claims in Class 5 will be paid more than 100% or that Class 7 or Class 8 will receive any distribution before Class 6 is paid in full. Because there is very little chance that Class 5 Claims will be paid all principal owing, these changes will not actually change the distributions to creditors in any way.

117. If Class 7 and Class 8 did not receive the surplus, if any, in the highly unlikely event that Class 6 is paid in full with interest from and after the Effective Date, then the Plan would violate 1129(b) by paying the Holders of Allowed Claims in Class 5 or Class 6 more than 100% of their Allowed Claims. Permitting the Holders of Claims and Interests in Classes 7 and 8 this right to a theoretical surplus does not violate the absolute priority rule because they receive the surplus only if Holders of Allowed Claims in both Class 5 and Class 6 receive cash payments "of a value, as of the effective date of the plan, equal to the allowed amount of such claim. . . ."

XV. The Plan Satisfies the Requirements of Section 1129(c), (d), and (e) of the Bankruptcy Code

118. The Plan is the only current plan on file in the Chapter 11 Cases and, as such, section 1129(c) of the Bankruptcy Code does not apply. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act of 1933, and no party in interest has alleged otherwise. The principal purpose of the Plan is to effectuate the Debtors' orderly liquidation through a Distribution mechanism that will maximize creditor recoveries. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code. Finally, these Chapter 11 Cases are not "small business cases" as defined in the Bankruptcy Code and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable.

CONCLUSION

The Plan complies with all of the requirements of section 1129 of the Bankruptcy Code and should be confirmed.

Dated: July 11, 2013
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