IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
VALERITAS HOLDINGS, INC., *et al.*,[1]	:	Case No. 20-10290 (LSS)
Debtors.	:	(Jointly Administered)
	:	**Re: Dkt. No. 383**

PREPETITION LENDERS' REPLY TO THE OBJECTION OF THE UNITED STATES TRUSTEE TO CONFIRMATION OF THE PLAN

Plan proponents CRG Servicing LLC, Capital Royalty Partners II L.P., Capital Royalty II Partners – Parallel Fund "A" L.P., Capital Royalty Partners II (Cayman) L.P., Capital Royalty Partners II – Parallel Fund "B" (Cayman) L.P., and Parallel Investment Opportunities Partners II L.P. (collectively, the "Prepetition Lenders"), by and through undersigned counsel, hereby submit this reply (the "Reply") to the objection [D.I. 383] (the "Objection") of the United States Trustee (the "UST") to the *First Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation Proposed by Valeritas Holdings, Inc. and its Affiliated Debtors, the Official Committee of Unsecured Creditors, and the Prepetition Lenders* [D.I. 309] (together with all schedules, exhibits, annexes and related documents, as any of the foregoing may be amended, modified, or supplemented, the "Plan"),[2] and in support thereof, respectfully state as follows:

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Valeritas Holdings, Inc. (8907); Valeritas, Inc. (1056); Valeritas Security Corporation (9654); Valeritas US, LLC (0007). The corporate headquarters and the mailing address for the debtors is c/o DLA Piper LLP (US), 1251 Avenue of the Americas, 27th Floor, New York, New York 10020.

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the Plan.

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REPLY

1. The Prepetition Lenders, plan proponents, fully support confirmation of the Plan for all the reasons set forth in the *Memorandum of Law in Support of Confirmation of the Plan* [D.I. 388] (the "Confirmation Brief"), incorporated herein by reference, the *Declaration of Steven Fleming in Support of Confirmation of the Plan* [D.I. 389] (the "Fleming Declaration"), and this Reply.

2. The purpose of this Reply is solely to address the Objection of the UST to the proposed exculpation of the Prepetition Lenders, their Affiliates and their counsel, Venable LLP (the "PPL Parties"), set forth in section 8.5 of the Plan.

3. As permitted by section 1123(b) and applicable Third Circuit precedent, Section 8.5 of the Plan is narrowly tailored to exculpate, and limit the liability of, the Exculpated Parties, including the PPL Parties. Plan at §§ 8.5, 1.58, 1.97. The Prepetition Lenders are plan proponents and have provided substantial contributions in preparation of, and during, these Chapter 11 Cases, including to the plan process, and, under the facts and circumstances of these cases, are entitled to exculpation.

4. Section 8.5 of the Plan limits liability of the PPL Parties to any Entity for any claim or cause of action arising on or before the Effective Date in connection with, or related to, the preparation and filing of the Chapter 11 Cases, formulating, negotiating, preparing, disseminating, implementing, administering, confirming or effecting the confirmation or consummation of the Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document created or entered into in connection with the Plan or any other post-petition act taken or omitted to be taken in connection with the liquidation of the Debtors, the CRG Settlement, the Amended Settlement, the Disclosure Statement, or confirmation or consummation of the Plan. *Id.*

Consistent with Third Circuit precedent, the proposed exculpation provision does not affect, among other things, any liability that is determined to have constituted gross negligence, fraud or willful misconduct. *Id.*; *see In re PWS Holding Corp.*, 228 F.3d 224, 245-46 (3d. Cir. 2000) ("*PWS*") (holding that an exculpation provision must not eliminate liability arising from willful misconduct or gross negligence).

5. Consistent with statutory and Third Circuit precedent, the Court should approve the exculpation provision in section 8.5 of the Plan because (a) the PPL Parties have provided substantial contributions in the Chapter 11 Cases and to the plan process; (b) the provision is consistent with section 1125(e) of the Bankruptcy Code; (c) the failure to do so would be inconsistent with the findings required by the Court under section 1129 of the Bankruptcy Code for confirmation of the Plan, and (d) the failure to do so would be inconsistent with the releases of the PPL Parties provided in and required by the Amended Settlement (as defined herein), which was approved by this Court pursuant to the Amended Settlement Order (as defined herein).

(i) This Court has authority to approve exculpation for non-estate fiduciaries.

6. This Court may, and should, approve exculpation for non-estate fiduciaries when the circumstances warrant, as they do here.

7. The Third Circuit has held that non-consensual third-party releases are permitted when fair and necessary to the reorganization. *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000); *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 139 (3d Cir. 2019) *cert. denied sub nom. ISL Loan Trust, et al. v. Millennium Lab Holdings, et al.*, No. 19-1152, 2020 WL 2621797 (U.S. May 26, 2020). The Third Circuit has also held that the Bankruptcy Code does not prohibit exculpation of the official committee of unsecured creditors and its members, so long as there is no release for willful misconduct or gross negligence. *PWS*, 228 F.3d at 245-46. The

Third Circuit has never specifically addressed the propriety of non-estate fiduciary exculpation, but, as discussed herein, there is no reason to believe that it would prohibit such releases, and this Court should approve the proposed exculpation in section 8.5 of the Plan as it relates to the PPL Parties.

(a) *Statutory Authority*

8. The authority of bankruptcy courts to issue injunctions and grant releases in a Chapter 11 plan is rooted in sections 1123(b)(6), 1123(b)(3)(A) and 105(a) of the Bankruptcy Code.

9. Specifically, section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title", 11 U.S.C. § 1123(b)(6), and section 105(a) provides that "[t]he court may issue any order, process or judgment that is necessary to carry out the provisions of this title", *id.* at § 105(a). In *In re Millennium Lab Holdings, II, LLC*, this court explicitly recognized that "[c]ourts that permit releases in appropriate circumstances [like those in the Third Circuit] often look to §§ 1129(a)(1), 1123(b)(6) and 105 [of the Bankruptcy Code]", prior to opining that it had core jurisdiction to determine the propriety of the proposed third-party releases at issue. 575 B.R. 252, 271–72 (Bankr. D. Del. 2017), *aff'd*, 591 B.R. 559 (D. Del. 2018) (internal citations omitted), *aff'd sub nom. In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019) *cert. denied sub nom. ISL Loan Trust, et al. v. Millennium Lab Holdings, et al.*, No. 19-1152, 2020 WL 2621797 (U.S. May 26, 2020).

10. Indeed, no provision in the Bankruptcy Code prohibits the granting of releases/exculpation to third-party, non-estate fiduciaries, especially if such third-party is a plan proponent. To the contrary, section 1125(e) of the Bankruptcy Code contains a "safe harbor" that limits the liability of plan proponents, including creditors, in connection with the good faith

solicitation of a plan. *See id.* § 1125(e). Accordingly, this Court has the authority to approve non-estate fiduciary exculpation under section 1123(b)(6) of the Bankruptcy Code. *Id.* at § 1123(b)(6); *see In re Airadigm Communications, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008) (holding that bankruptcy court had authority to approve non-consensual exculpation (labeled a "release" by the court) of third-party lender pursuant to sections 1123(b)(6) and 105 of the Bankruptcy Code). As such, it would be contradictory to the Bankruptcy Code for the court to conclude that non-estate fiduciary exculpation is unavailable as a matter of law.

11. Further, section 1123(b)(3)(A) provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate[.]" 11 U.S.C. § 1123(b)(3)(A). This section provides statutory authority for the court to approve a settlement—with related releases—pursuant to a plan.[3]

(b) *Conflicting Case Law*

12. Nevertheless, beginning with *In re Washington Mutual, Inc.*, some courts within this district have adopted a bright-line prohibition against exculpation for non-estate fiduciaries. 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) ("*WAMU*"); *see In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del. 2011) (citing *WAMU*, the court held that exculpation is unavailable to non-estate fiduciaries). To get to this conclusion, the *WAMU* court (and its progeny) rely on the Third Circuit's decision in *PWS*. *Id. citing PWS*, 228 F.3d at 246-47. But the *PWS* case did ***not*** address exculpation in the context of non-estate fiduciaries. *PWS*, 228 F.3d at 246-47. To the contrary, at issue in *PWS* was whether section 524(e) of the Bankruptcy Code precluded exculpation of the official committee of unsecured creditors and its members. *Id.* Determining that it did not, the

[3] As discussed in more detail below, the exculpation of the PPL Parties in section 8.5 of the Plan does just that by implementing the terms of the Amended Settlement (as defined herein), which was approved by the Amended Settlement Order (as defined herein).

Third Circuit held that the proposed exculpation provision did not affect liability of third parties, rather, it merely set forth the appropriate standard of liability. *Id.* Since the committee and its members were specifically at issue, that standard was reviewed through the prism of section 1103 of the Bankruptcy Code, which addresses the powers and duties of an official committee appointed under section 1102. *Id.* Nowhere in *PWS* did the Third Circuit hold that exculpation is unavailable to non-estate fiduciaries as a matter of law. *Id.* Indeed, the decision is devoid of any discussion (dicta or otherwise) concerning the Court's authority under sections 1123(b) or 105 to confirm a plan that exculpates a non-estate fiduciary. Conversely, the *PWS* court explicitly recognized that (i) non-consensual third-party releases are permitted in the Third Circuit when fair and necessary to the reorganization, and (ii) section 524(e) is not treated "as a per se rule barring any provision in a reorganization plan limiting the liability of third parties." *Id.* at 247 *citing In re Continental Airlines*, 203 at 214. A determination that exculpation (a type of release) is unavailable to non-estate fiduciaries as a matter of law would, without any precedent, statutory authority or compelling rationale, improperly expand the holding in *PWS* to the point where it would appear to be at odds with the Third Circuit's decision in *Continental* and that court's holding that non-consensual third-party releases are appropriate in certain circumstances. *Continental* remains good law in the Third Circuit and was explicitly recognized by the court in *PWS*.

13. Post-*WAMU*, there have been courts within this district that have approved non-estate fiduciary exculpation on a contested basis. *See, e.g., In re WR Grace and Co.*, 446 B.R. 96, 132-33 (Bankr. D. Del. 2011) (approving an exculpation provision that included non-estate fiduciaries over the objection of a creditor that the provision was over broad, the court found that the standard of liability set forth in the proposed exculpation provision, which carved out liability for gross negligence and willful misconduct, was in accord with the standards for releases set forth

in *PWS*).[4] Courts in other jurisdictions have also approved plan provisions exculpating non-estate fiduciaries. *See, e.g., In re South Edge LLC,* 478 B.R. 403, 415-16 (D. Nev. 2012) (citing *PWS* for the proposition that the proposed exculpation provision merely stated the standard of care to be applied in a bankruptcy proceeding—a matter which lies within the bankruptcy court's exclusive jurisdiction—the court approved exculpation of the debtor's prepetition lender and settling builders); *In re Stearns Holdings, LLC,* 607 B.R. 781, 790 (Bankr. S.D.N.Y. 2019) (approving exculpation of non-estate fiduciaries that provided substantial contribution to the chapter 11 cases); *In re Residential Capitals, LLC,* Case No. 12-12020 (MG) (Bankr. S.D.N.Y. Dec. 11, 2013) [Dkt. No. 6066, ¶ 291] (approving exculpation of certain prepetition lenders who "played a meaningful role… in the mediation process and through negotiation and implementation of the Global Settlement and Plan"); *In re Airadigm*, 519 at 657 (approving exculpation (labeled "third-party release" by the court) of third-party lender who provided substantial contribution).

14. As noted, the Third Circuit has not yet addressed whether exculpation is limited to estate fiduciaries, although it has endorsed non-consensual third-party releases under appropriate circumstances. *WAMU* is non-binding on this Court and it should decline to adopt the bright-line rule adopted by it (and its progeny) and, instead, embrace a more flexible approach that permits non-estate fiduciary exculpation in the appropriate but limited circumstances.

[4] Notably, Judge Walrath, in a post-*WAMU* oral decision, confirmed a plan that provided exculpation to, among others, the debtors' lenders "who were, in fact, involved in drafting and negotiating the plan of reorganization." Confirmation Hr'g Tr. 28:22-29:7, *In re HSH Del. GP LLC*, Case No. 10-10187 (MFW) (Bankr. D. Del. Jan. 18, 2011). In many other oral rulings of import, courts within this district have declined to adopt a bright-line rule against non-fiduciary exculpation in favor of a more flexible standard, approving such exculpation where the third-party to be exculpated provided substantial contribution to the case or the plan process. *See, e.g.*, Confirmation Hr'g Tr. at 26:21-27:18, *In re FAH Liquidating Corp. (f/k/a Fisker Auto. Holdings, Inc.)*, Case No. 13-13087 (KG) (Bankr. D. Del. July 28, 2014) (overruling U.S. Trustee's objection based on WAMU and confirming plan providing for exculpation to purchaser of the debtors' assets and the debtors' secured lender); Confirmation Hr'g Tr. at 35:23-36:4, *In re Laboratory Partners, Inc.*, Case No. 13-12769 (PJW) (Bankr. D. Del. July 10, 2014) (overruling U.S. Trustee's objection relying on WAMU and confirming plan that included provision exculpating the debtors' secured lender); Confirmation Hr'g Tr. 54-55, *In re Nassau Broad Partners L.P.*, Case No. 11-12934 (KG) (Bankr. D. Del. July 31, 2013) (confirming plan with exculpation of non-estate fiduciaries and stating that "I just want to be very clear that it's my opinion that exculpation is not limited to fiduciaries, that the Third Circuit has not addressed that matter and has not so held at this point.").

(c) *Public Policy Considerations*

15. Exculpation for plan participants and proponents is entirely consistent with the goals and the spirit of the Bankruptcy Code. Importantly, the existence of an exculpation provision encourages third-parties to become involved in the plan development process without fear of later liability. This involvement can either foster consensual plan negotiations (as it has here) or, perhaps, prompt the emergence of a competing plan once a debtor's exclusivity has expired, either of which will likely expedite the conclusion of the debtor's case. The Court should be wary of a per se rule prohibiting non-estate fiduciary exculpation and avoid discouraging third-party plan participation and the benefits associated therefrom.

16. The circumstances of these Chapter 11 Cases present a factual scenario of why a more flexible approach is preferable and when approval of non-estate fiduciary exculpation is clearly warranted. First, the Prepetition Lenders are plan proponents that have provided substantial contribution to the Chapter 11 Cases and the plan process. Second, the proposed exculpation provision comports with section 1125(e) of the Bankruptcy Code. Third, the failure to approve the proposed exculpation provision would be inconsistent with the findings that this Court must make under section 1129 of the Bankruptcy Code to confirm the Plan. Fourth, the failure to approve the proposed exculpation provision would be inconsistent with the releases of the PPL Parties provided in and required by the Amended Settlement (as defined herein), which was approved by the Amended Settlement Order (as defined herein).[5]

[5] It is noteworthy that it appears to the Prepetition Lenders that none of the courts that prohibited non-estate fiduciary exculpation as a matter of law, including the courts in *WAMU* and *Tribune*, were presented with, or decided, arguments related to the Court's authority under section 1123(b)(6) to provide such releases or the inconsistencies that would result by denying a non-estate fiduciary plan proponent exculpation in light of the findings the court must make under section 1129 to confirm a plan.

(ii) The Prepetition Lenders are entitled to exculpation because they have provided substantial contributions in the Chapter 11 Cases and the plan process.

17. By any measure, the PPL Parties have made substantial contributions in the Chapter 11 Cases and the plan process that warrant the exculpation set forth in section 8.5 of the Plan. *See, e.g., In re Stearns,* 607 B.R. at 790 (approving exculpation of non-estate fiduciaries that provided substantial contribution to the debtor's reorganization, including playing an integral role in building plan consensus). Among other things, the Prepetition Lenders consented to the priming of their first-priority prepetition liens and use of their cash collateral, which facilitated the DIP Lender's willingness to provide the DIP Facility, which, in turn, facilitated the Purchaser's willingness to enter in into the Stalking Horse Agreement. Stated simply, the Debtors' Chapter 11 Cases would have never gotten off the ground but for the Prepetition Lenders' concessions and contributions. After the Committee was appointed, the Debtors, the PPL Parties and the Committee engaged in good faith, arms-length negotiations that resulted in a global settlement that, among other things, resolved the Committee's objections to the Final DIP Financing Order and the sale process—eventually leading to a successful, timely sale, the preservation of the Debtors' ongoing business and jobs and patients' access to the V-Go device—and provided the foundation for a consensual plan. Specifically, the parties agreed to sharing mechanisms pursuant to which a portion of the Allowed Claims of the Prepetition Lenders' and their entitlement to sale proceeds would (i) ensure payment in full of Allowed Administrative Expense Claims, Allowed cure costs (not paid by the Purchaser as part of the Sale) and Allowed Priority Claims, (ii) provide a meaningful recovery to Holders of Allowed General Unsecured Claims, and (iii) fund the creation of a Creditors' Trust for the benefit of general unsecured creditors and the Prepetition

Lenders. The Plan—filed jointly by the Debtors, the Committee and the Prepetition Lenders—embodies these agreements and concessions and would not have been possible without them.

18. The Debtors (as borrowers or guarantors) and Prepetition Lenders are parties to that certain *Second Amended and Restated Term Loan Agreement*, dated May 24, 2013 (as amended from time to time, the "Prepetition Term Loan"). *See* Dkt. No. 4 (*First Day Declaration of John E. Timberlake*), ¶ 15. The Prepetition Term Loan is a senior secured loan that is secured by substantially all of the Debtors' assets. *Id.*

19. The Debtors and Prepetition Lenders amended the Prepetition Term Loan for a second time on September 30, 2019 (the "Second Amendment"). *Id.* at ¶ 17. The Second Amendment provided for, among other things, a $3.0 million back-end facility fee (the "Back-End Facility Fee") on the outstanding principal balance immediately following the Conversion Transaction (as defined herein) in addition to any new PIK interest, payable upon completion of the Prepetition Term Loan. *Id.* In connection with the Second Amendment, the Prepetition Lenders exchanged over $22 million in principal amount of the Prepetition Term Loan for 15,575,586 shares of Series B Preferred Stock (the "Conversion Transaction"). *Id.*

20. Prior to the Petition Date, the Prepetition Lenders alleged that certain Events of Default occurred and were continuing under the Prepetition Term Loan (collectively, the "Designated Defaults"). *See id.* at ¶ 19. The Prepetition Lenders also alleged certain claims and causes of action against the Debtors related to the Conversion Transaction. *Id.* The Debtors disputed the Designated Defaults and the validity of the claims and causes of action. Dkt. No. 46 (*Declaration of John E. Timberlake in Support of Motion to Approve CRG Settlement*), at ¶ 5.

21. Upon entering Chapter 11, the Debtors required additional funding to continue operating their business in the ordinary course and preserve the value of their assets through a

going concern sale. To that end, the Debtors needed the Prepetition Lenders' consent to (i) the priming of their liens by the DIP Lender, and (ii) the use of their cash collateral. *Id.* at ¶ 8. In exchange for such consent and other agreements, the Debtors and the Prepetition Lenders entered into a settlement (the "CRG Settlement") that, among other things, (a) settled the Prepetition Lenders' claims by (a) reinstating approximately $4 million of the asserted $22 million claim as an Allowed Secured Claim (increasing their Secured Claim from approximately $16 million (under the Prepetition Term Loan) to $20 million), (b) allowing approximately $18 million of their asserted claim as a General Unsecured Claim, and (c) cancelling the Series B Preferred Stock issued to the Prepetition Lenders as part of the Conversion Transaction; (ii) memorialized the Prepetition Lenders' consent to having their liens primed and to the use of their cash collateral in exchange for the provisions and protections contained in the CRG Settlement; (iii) provided treatment of the Prepetition Lenders' sales proceeds collateral that would pay certain of the Debtors' administrative expenses and provide a "Plan Escrow," and (iv) contained a waiver of the Back-End Facility Fee upon entry of an order approving the CRG Settlement. *Id.* at ¶ 7; *see generally* Dkt. No. 42, Ex. 2 (CRG Settlement).

22. The Debtors' and Prepetition Lenders' entry into the CRG Settlement made it possible for the Debtors to sign the Stalking Horse APA they had negotiated with the Purchaser and to enter the DIP Facility with the DIP Lender. *Id.* at ¶ 8; Fleming Dec. at ¶¶ 30-31. Although not an express condition in the Stalking Horse APA, the Purchaser was not comfortable entering into the Stalking Horse APA without the DIP Facility being in place. *Id.*; Fleming Dec. at ¶¶ 30-31. And the DIP Lender was not willing to enter into the DIP Facility without the Prepetition Lenders' consent to priming. *Id.*; Fleming Dec. at ¶¶ 30-31. Thus, the CRG Settlement directly

facilitated the orderly and consensual commencement of the Chapter 11 Cases. *Id.*; Fleming Dec. at ¶¶ 30-31.

23. After the Committee was appointed, the Debtors and Prepetition Lenders worked diligently to provide information to the Committee and to meet and discuss with the Committee, among other things, issues it had with the CRG Settlement. Following good faith, arm's length negotiations, the parties entered into an amended settlement agreement (the "Amended Settlement"), which was approved by order of the Court dated March 20, 2020 [Dkt. No. 230] (the "Amended Settlement Order"). The Amended Settlement was the key building block toward a consensual chapter 11 plan. Dkt. No. 194 (*Declaration of John E. Timberlake in Support of Supplement to the Motion to Approve CRG Settlement*), at ¶ 5; Fleming Dec. at ¶¶ 30-31. It created certain sharing mechanisms (now embodied in the Plan) between the Prepetition Lenders and Holders of Allowed General Unsecured Claims with respect to the Prepetition Lenders' sale proceeds collateral that ensure that Holders of Allowed General Unsecured Claims will receive recoveries under the Plan. *Id.*; *see generally* Dkt. No. 193, Ex. 2. (Amended Settlement). Additionally, the Amended Settlement provides for the creation of the Creditors' Trust for the benefit of Holders of Allowed General Unsecured Claims and the Prepetition Lenders. *Id.*; *see generally* Amended Settlement. Further, the Amended Settlement was essential to resolving the Committee's objections to the Final DIP Financing Order and the sale process, paving the way for a successful sale that maximized value for all stakeholders, as well as preserved the Debtors' ongoing business, many jobs and patients' access to the V-Go device. *Id.* at ¶ 6; Fleming Dec. ¶¶ 30-31.

24. Accordingly, the PPL Parties have provided substantial contributions to the Chapter 11 Cases and the plan process that warrant entitlement to the exculpation provided for in section 8.5 of the Plan.

(iii) The proposed exculpation in section 8.5 of the Plan comports with section 1125(e) of the Bankruptcy Code.

25. Section 1125(e) of the Bankruptcy Code contains a "safe harbor" that limits the liability of plan proponents, including creditors, in connection with the good faith solicitation of a plan. 11 U.S.C. § 1125(e). It provides that:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities. *Id.*

26. The Prepetition Lenders are plan proponents. As such, the proposed exculpation provision in section 8.5 of the Plan should be approved because it encompasses the statutory limitation of liability provided to plan proponents in section 1125(e) of the Bankruptcy Code.

(iv) The failure to approve the proposed exculpation in section 8.5 of the Plan would be inconsistent with the findings that this Court is required to make under section 1129 of the Bankruptcy Code to confirm the Plan.

27. A consensual Chapter 11 plan of reorganization requires the plan proponent to demonstrate that the plan satisfies all elements of section 1129(a). *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 598–99 (Bankr. D. Del. 2001). A nonconsensual plan requires the proponent to prove all elements in section 1129(a) except section 1129(a)(8)—that all classes consent or are unimpaired—plus the additional requirements of section 1129(b)—that the plan does not unfairly discriminate against dissenting classes and that treatment of such

dissenting classes is fair and equitable. *Id.* at 599. The Bankruptcy Code imposes an independent duty upon the court to determine whether a plan satisfies each element of section 1129, regardless of the absence of objections to confirmation. *Id.*

28. The Plan's exculpation provision limits liability for plan proponents, including the PPL Parties, in connection with, or related to, "formulating, negotiating, preparing, disseminating, implementing, administering, confirming or effecting the confirmation or consummation of the Plan, the Disclosure Statement" or any document or agreement entered in connection with the Plan. Plan at § 8.5. The purpose of this exculpation is self-evident—to prevent disgruntled creditors from pursuing post-confirmation claims against the plan proponents related to the Plan. The appropriateness of this exculpation is inextricably tied to the confirmation requirements set forth in section 1129 of the Bankruptcy Code and the findings that the Court must make in connection therewith. To wit, section 1129 requires, among other things, that the Court find that:

- the plan complies with the applicable provisions of the Title 11, 11 U.S.C. § 1129(a)(1), *i.e.*, that the plan complies with, among other things, sections 1122 and 1123 of the Bankruptcy Code, governing classification and contents of the plan, respectively, *In re Genesis*, 266 B.R. at 600-09;

- the plan proponent complies with the applicable provisions of Title 11, *id.* at § 1129(a)(2), including the adequate disclosure requirements in section 1125 of the Bankruptcy Code, *PWS*, 228 F.3d at 248;

- the plan has been proposed in good faith by its proponents and not by any means forbidden by law, *id.* at §1129(a)(3), *i.e.*, that the plan be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code", *In re Hercules Offshore, Inc.*, 565 B.R. 732, 764 (Bankr. D. Del. 2016);

- that, with respect to each impaired class, that the plan be in the "best interests" of each holder of a claim or interest in such class, *id.* at § 1129(a)(7), *i.e.*, that such creditors receive at least as much under the

plan as they would in a hypothetical Chapter 7 proceeding, *In re W.R. Grace & Co.*, 475 B.R. 34, 141 (D. Del. 2012); and

- that, in a cramdown scenario, with respect to each class of claims and interests that is impaired and has not accepted the plan, the plan (i) is not "unfairly discriminatory", *id.* at § 1129(b), *i.e.*, that it does not provide materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so, *In re Hercules*, 565 B.R. at 766, and (ii) is fair and equitable, *id., i.e.*, that it provides that the holder of any claim or interest that is junior to the claims or interest of such class will not receive or retain any property under the plan on account of such junior claim or interest, *In re Hercules*, 565 B.R. at 766.

29. In sum and substance, the confirmation findings required by the court under section 1129 are intended to ensure that the plan complies with the Bankruptcy Code and was proposed in good faith. It is precisely these required findings that makes plan-related exculpation appropriate for plan proponents. And, since the court must make these findings regardless of the identity of the plan proponent, it is of no consequence whether the plan proponent is an estate fiduciary or not. Accordingly, any plan proponent, regardless of its fiduciary obligations, should be entitled to exculpation related to a confirmed plan, and the failure to approve the proposed exculpation in section 8.5 of the Plan as to the Prepetition Lenders, but not the Debtors or the Committee, would be inconsistent with the findings that this Court is required to make under section 1129.

(v) The failure to approve the proposed exculpation in section 8.5 of the Plan would be inconsistent with the releases provided in and required by the Amended Settlement and approved by this Court pursuant to the Amended Settlement Order.

30. Pursuant to the Amended Settlement, the Debtors and the Committee granted releases to the PPL Parties with respect to certain claims arising on or before March 6, 2020 (the date of the Amended Settlement). *See* Am. Settlement Ag. at § 10(a). Specifically, section 10(a) of the Amended Settlement Agreement provides, in pertinent part, that:

> Subject to entry of the [Amended Settlement Order], in exchange for the consideration provided hereunder, each Credit Party, its Affiliates, and the Committee hereby absolutely and unconditionally releases and forever discharges the Control Agent and each other Prepetition Lender, and any and all participants, parent corporations, subsidiary corporations, affiliated corporations, insurers, indemnitors, successors and assigns thereof, together with all of the present and former directors, officers, agents, attorneys, consultants, representatives and employees of any of the foregoing, including any individual that has previously served as director of Parent at the nomination or request of the Prepetition Lenders (each, a "Lender Released Party"), from any and all claims, demands, defenses or causes of action of any kind, nature or description relating to or arising out of or in connection with or as a result of any of the Obligations, the Credit Agreement, any other Loan Documents, the Conversion Transaction, any agreement related to any of the foregoing or any equity security, whether arising in law or equity or upon contract or tort or under any state or federal law or otherwise, which any Credit Party or the Committee has had, now has or has made claim to have against any such person for or by reason of any act, omission, matter, cause or thing whatsoever arising from the beginning of time to and including the date of this Amended Settlement Agreement, whether such claims, demands, defenses, and causes of action are matured or unmatured, known or unknown, contingent, liquidated, or otherwise, other than the Prepetition Lenders' obligations set forth in this Amended Settlement Agreement.

Id.

31. The Amended Settlement Agreement also set forth Proposed Plan Terms (as defined therein) that included, *inter alia*, "a standard release by the Debtors and the Committee of any claims and causes of action they may have against the Prepetition Lenders or any director, whether former or current, of the Company that was nominated by the Prepetition Lenders substantially similar to the release contained in Section 10(a) [of the Amended Settlement]." *Id.* 8(d)(vi). The purpose of this provision was to provide the PPL Parties a release from March 6, 2020 (*i.e.*, the end date for the release in the Amended Settlement) through the Plan Effective Date. This Court approved the Amended Settlement and the provisions therein, including the releases for the benefit of the PPL Parties, by way of the Amended Settlement Order. *See* Dkt. No. 230. The exculpation in section 8.5 of the Plan encompasses the releases granted to the PPL

Parties set forth in section 10(a) of the Amended Settlement Agreement, among other things, and effectuates the Debtors' and Committee's agreement to provide releases to the PPL Parties through the Effective Date, as set forth in section 8(d)(vi) of the Amended Settlement Agreement. Stated simply, the Plan, as permitted by sections 1123(b)(3)(A) and 1123(b)(6) of the Bankruptcy Code, incorporates the Amended Settlement Agreement by including the exculpation provision in section 8.5.

32. Accordingly, the failure of the Court to approve the proposed exculpation in section 8.5 of the Plan as to the PPL Parties would be inconsistent with the Amended Settlement and its prior Amended Settlement Order.[6]

33. In conclusion, the Court should approve the exculpation provision in section 8.5 of the Plan as to the PPL Parties because they have provided substantial contributions in the Chapter 11 Cases and to the plan process; the exculpation provision is consistent with section 1125(e) of the Bankruptcy Code; the failure to do so would be inconsistent with the findings required by the Court under section 1129 of the Bankruptcy Code for confirmation of the Plan; the failure to do so would be inconsistent with the release granted to the PPL Parties by way of the Amended Settlement and Amended Settlement Order; and the exculpation provision, which

[6] In addition, a condition to confirmation of the Plan is that the Confirmation Order is reasonably acceptable to the each plan proponent, including the Prepetition Lenders, Plan at § 11.1(b), and a condition to the Effective Date is that the Confirmation Order, Plan and Plan exhibits are, in form and substance, reasonably acceptable to each plan proponent, including the Prepetition Lenders, *id.* at § 11.2(b). The Plan and Confirmation Order are reasonably acceptable to the Prepetition Lenders because, in part, of the proposed exculpation of the PPL Parties provided for in section 8.5 of the Plan and paragraph 19 of the Confirmation Order, which is warranted for all the reasons set forth herein. To the extent the Plan does not go effective because of the failure of a condition precedent, then the Prepetition Lenders' liens on, and security interests in, the Plan Escrow, Professional Reserves and the Revised Administrative are not released (and the sharing mechanisms in the Plan are of no effect). *Id.* at § 7.3. As such, exercise by the Prepetition Lenders of their rights under the Amended Cash Collateral Order and relevant documents may likely result in holders of Allowed General Unsecured Claims receiving nothing in a subsequent Chapter 7 liquidation, as set forth in the Liquidation Analysis attached as Exhibit B to the Plan. *Id.* at Ex. B. Accordingly, approval of the exculpation set forth in section 8.5 of the Plan (and paragraph 19 of the Confirmation Order) as to the PPL Parties is in the best interest of creditors.

explicitly carves-out gross negligence, fraud and willful misconduct, establishes a standard of care that is consistent with applicable law.

WHEREFORE, for all the reasons set forth in the Confirmation Memo, the Fleming Declaration and this Reply, the PPL Parties respectfully request that the Court (a) deny the Objection, (b) approve the exculpation of the PPL Parties, (c) confirm the Plan, and (b) grant such other relief as is just and proper.

Dated: June 1, 2020
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Daniel A. O'Brien, hereby certify that on the 1st day of June, 2020, a true and correct copy of the *Prepetition Lenders' Reply to the Objection of the United States Trustee to Confirmation of the Plan* was served on the parties below in the manners indicated.

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