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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
PHILIPPINE AIRLINES, INC.,[1]	Case No. 21-11569 (SCC)
Debtor.	

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF CHAPTER 11 PLAN OF REORGANIZATION

Dated: December 15, 2021
New York, NY

[1] The Debtor in this chapter 11 case, along with its registration number in the Philippines, is Philippine Airlines, Inc. Philippine Securities and Exchange Commission Registration No. PW 37. The Debtor's corporate headquarters is located at PNB Financial Center, President Diosdado Macapagal Avenue, CCP Complex, Pasay City 1300, Metro Manila, Philippines.

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Philippine Airlines, Inc., as debtor and debtor in possession in the above-captioned chapter 11 case (the "**Debtor**"), hereby submits this memorandum of law (the "**Memorandum**") in support of confirmation of the *Chapter 11 Plan of Reorganization of Philippine Airlines, Inc.* [ECF No. 290-1] (together with all appendices, exhibits, schedules, and supplements thereto, and as the same may be amended, supplemented, or modified from time to time, the "**Plan**"),[2] pursuant to section 1129 of chapter 11 of title 11 of the United States Code 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**"). The Debtor respectfully represents as follows:

Preliminary Statement

1. The Debtor's reorganization has been a consensual process every step of the way. Following over a year of good faith arm's-length prepetition negotiations with key stakeholders, the Debtor entered into numerous Restructuring Support Agreements with almost all of its key aircraft creditors, pursuant to which the Debtor would implement the transactions set forth in the Plan. The Debtor is now pleased to present the Court with a request for confirmation of a fully consensual Plan—one that is supported by the 100% of the voting creditors, and satisfies the requirements of the Bankruptcy Code. This Plan is the culmination of significant efforts and negotiations among the Debtor and multiple creditor constituencies, and is a huge success for the company. Through the Plan, the Debtor will substantially reduce its financial obligations, optimize its fleet, and revitalize its business plan, which will save jobs and will preserve and maximize the value of its assets.

2. More specifically, the Plan, which incorporates and builds upon the 42 Restructuring Support Agreements that the Debtor negotiated with key counterparties, represents a collective achievement for the Debtor and its stakeholders, who overwhelmingly support the

[2] Capitalized terms used but not otherwise defined herein have the meaning ascribed to such terms in the Plan or the Disclosure Statement Order (as defined herein), as applicable.

Plan. The Plan allows the Debtor to achieve its key restructuring goals: reducing costs by optimizing its fleet size and redesigning its network, restructuring its balance sheet, and obtaining access to additional liquidity and long-term financing provided by the DIP Facility and its conversion to the Unsecured Exit Facility. While providing these benefits to the Debtor, the Plan is also the best available option for maximizing recoveries for the Debtor's stakeholders, as demonstrated by the stakeholders' overwhelming support for the Plan and the unimpaired treatment of most of the Debtor's creditors. The restructuring is an even greater success and accomplishment when considering the unprecedented impact of the COVID-19 pandemic had on the aviation industry in general, and the Debtor in particular.

3. Further, as recent discoveries of new variants of COVID-19 have proved, there is still uncertainty for both short and long-term outlooks in the aviation industry. In light of that continuing uncertainty, the Debtor's and its creditors' commitment to restructuring in a way that preserves and strengthens its most important creditor and industry relationships cannot be understated. Upon confirmation of the Plan, these relationships, coupled with the Debtor's fortified capital structure and optimized fleet, will position the Debtor to be a resilient and competitive airline going forward that will be able to overcome the persisting uncertainty for the aviation industry as a whole.

4. The Debtor has reached the final juncture in the Chapter 11 Case, and has managed to do so approximately three months after filing this case. Given the complexities of the Debtor's business and organizational and capital structure, coupled with the challenges inherent in restructuring a global enterprise during a pandemic, this is a tremendous accomplishment. It is a testament to the hard work by, and cooperation among, the management, the Debtor's advisors, and the Debtor's key creditors and their advisors in seeking to resolve all

issues consensually for the benefit of the overall organization. The Debtor believes the success of the Chapter 11 Case exemplifies this Court's maxim that "Compromise and settlement are the heart and soul of every successful chapter 11 proceeding." *In re NII Holdings*, 536 B.R. 61, 65 (Bankr. S.D.N.Y. 2015). The Debtor looks forward to confirmation of the Plan so that it can quickly emerge from the Chapter 11 Case as a viable and healthy airline.

5. For the reasons set forth herein and in the *Declaration of Nilo Thaddeus Rodriguez in Support of Confirmation of the Chapter 11 Plan of Reorganization of Philippine Airlines, Inc.* (the "**Rodriguez Declaration**"), the *Declaration of Doug Walker in Support of Confirmation of the Chapter 11 Plan of Reorganization of Philippine Airlines, Inc*. (the "**Walker Declaration**"), and the *Certification of P. Joseph Morrow IV with Respect to the Tabulation of Votes on the Chapter 11 Plan of Reorganization of Philippine Airlines, Inc.* [ECF No. 307] (the "**Voting Certification**" and, together with the Rodriguez Declaration and the Walker Declaration, the "**Supporting Declarations**"), each filed contemporaneously herewith, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code. Accordingly, the Debtor respectfully requests that the Court confirm the Plan.

Background[3]

6. On September 3, 2021, the Debtor commenced this Chapter 11 Case in order to implement the final stages of a comprehensive restructuring that the Debtor has negotiated with its constituencies for over a year.

[3] Relevant facts in support of Plan confirmation are set forth in the Plan, the Disclosure Statement, the Plan Supplement, the First Day Declaration, the Supporting Declarations, and the record of this Chapter 11 Case. Such facts are incorporated herein as if fully set forth herein.

7. On October 1, 2021, the Court entered an order granting the Debtor's motion to assume the Restructuring Support Agreements [ECF No. 130], which serve as the foundation for the Debtor's comprehensive restructuring, and the Plan in particular.

8. On October 13, 2021, in accordance with the Restructuring Support Agreements, the Debtor filed the Plan, the Disclosure Statement and the *Motion for Entry of an Order (A) Approving the Disclosure Statement; (B) Approving Solicitation and Voting Procedures; (C) Approving Forms of Ballots; (D) Scheduling a Confirmation Hearing; and (E) Establishing Notice and Objection Procedures* [ECF No. 197] (the "**Disclosure Statement Motion**").

9. Upon entry of the order approving the Disclosure Statement Motion [ECF No. 259] (the "**Disclosure Statement Order**"), and in accordance with its terms, the Debtor, through its solicitation agent, KCC LLC, caused solicitation packages to be transmitted to and served on the holders of Claims in Class 3 (General Unsecured Claims). *See Certificate of Service of Anna McDermott re: Solicitation Materials Served on November 15, 2021* [ECF No. 269]. In addition, the Debtor caused the notices of non-voting status annexed as Exhibits 3 and 4 to the Disclosure Statement Order to be transmitted to and served on the applicable holders of Claims in Class 1 (Priority Non-Tax Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Trade Claims), Class 5 (Employee Claims), Class 6 (Customer Claims), Class 7 (Intercompany Claims), and Class 8 (Existing Equity Interests). See *id*. Further, in addition to causing the notice of confirmation hearing annexed as Exhibit 6 to the Disclosure Statement Order (the "**Confirmation Hearing Notice**") to be transmitted to and served on various parties in interest, *see id*., the Debtor published the Confirmation Hearing Notice in the national and international editions of the *New York Times*, *USA Today*, and *Philippine Daily Inquirer*.

10. The deadline for all holders of Claims entitled to vote on the Plan was December 10, 2021 at 4:00 p.m. (prevailing Eastern Time) (the "**Voting Deadline**").[4] As set forth in the Voting Certification and detailed in paragraph 11 below, the Plan has been accepted by the only Impaired Class entitled to vote to accept or reject the Plan.

11. Votes cast with respect to the Plan are summarized below:

Class	% Number Accepted	% Amount Accepted	% Number Rejected	% Amount Rejected	Accept / Reject
Votes Received on the Debtor's Plan					
Class 3 General Unsecured Claims	57 (100.00%)	$1,748,397,825.83 (100.00%)	0 (0.00%)	$0.00 (0.00%)	**Accept**

Argument

12. As set forth herein and as will be demonstrated at the Confirmation Hearing, the Plan satisfies all of the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

I. The Plan Satisfies The Bankruptcy Code's Mandatory Requirements For Confirmation And Should Be Approved

13. The Court must find that the Debtor has satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence in order to confirm the Plan. *See In re Stearns Holdings, LLC*, 607 B.R. 781, 793 (Bankr. S.D.N.Y. 2019) (confirming a chapter 11 plan upon finding that "all of the requirements for confirmation . . . under sections 1129(a) and 1129(b) of the Bankruptcy Code . . . have been satisfied"); *see also JPMorgan Chase Bank, N.A.* v. *Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 243 (Bankr. S.D.N.Y. 2009) ("As Plan proponent, Charter bears the burden of establishing compliance with

[4] Except as such deadline may be extended by the Debtor in its discretion pursuant to the solicitation and voting procedures approved by the Disclosure Statement Order.

the factors set forth in Bankruptcy Code section 1129."). A preponderance of the evidence has been described as just enough evidence to make it more likely than not that the fact that the claimant seeks to prove is true. *See Bryant v. Thomas*, 274 F. Supp. 3d 166, 184 (S.D.N.Y. 2017), *aff'd*, 725 F. App'x 72 (2d Cir. 2018) ("To establish by a preponderance of the evidence means very simply to prove that something is more likely than not so.").

14. The Debtor respectfully submits that, based on the record of this Chapter 11 Case, the Supporting Declarations, and the arguments set forth herein, the Debtor has satisfied its burden for Confirmation because the Plan complies with all relevant sections of the Bankruptcy Code. Each requirement is discussed individually below, along with the significant permissive elements of the Plan.

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

15. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of chapter 11, including rules governing classification of claims and interests and the contents of a plan. *See In re Aegerion Pharms., Inc.*, 605 B.R. 22, 30 (Bankr. S.D.N.Y. 2019) (stating that a "court may confirm a chapter 11 plan only if '[t]he plan complies with the applicable provisions of [the Bankruptcy Code].' The phrase 'applicable provisions' has been interpreted to include sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and interests and the contents of a chapter 11 plan."); *In re Ditech Holding Corp.*, 606 B.R. 544, 577 (Bankr. S.D.N.Y. 2019). Accordingly, determining whether the Plan complies with section 1129(a)(1) of the Bankruptcy Code requires review of the Plan's compliance with sections 1122 and 1123 of the Bankruptcy Code. As explained below, the Plan complies with these sections in all respects.

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

16. Bankruptcy Code section 1122 provides that:

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C. § 1122(a).[5]

17. Courts in the Second Circuit have determined that:

> Under § 1122(a), the relevant inquiry is whether all claims of a class have substantially similar rights to the debtor's assets. 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. . . . Courts have found that the Bankruptcy Code only prohibits the identical classification of dissimilar claims. It does not require that similar classes be grouped together, but merely that any groups be homogenous or share some attributes.

In re Drexel Burnham Lambert, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992). "A debtor in bankruptcy has considerable discretion to classify claims and interests." *In re Aegerion*, 605 B.R at 30. Courts generally permit separate classification of similar claims, so long as the separate classification is not used to gerrymander the vote on plan confirmation. *See In re GMG Capital Partners III, L.P.*, 503 B.R. 596, 602 (Bankr. S.D.N.Y. 2014) (citing *Boston Post Rd. Ltd. P'ship* v. *FDIC (In re Boston Post Rd. Ltd. P'ship)*, 21 F.3d 477, 483 (2d Cir. 1994)).

18. The Plan provides for eight Classes of Claims against and Interests in the Debtor, which are summarized as follows:[6]

[5] In accordance with section 1122(b) of the Bankruptcy Code, the Debtor is permitted to designate a class consisting of unsecured creditors with Claims against the Debtor for less than a certain specified amount. See 11 U.S.C. § 1122(b) (permitting a debtor to "designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience"). However, the Debtor's Plan does not contemplate the creation of such a class, and therefore section 1122(b) of the Bankruptcy Code is inapplicable to the Debtor's Plan

- Class 1 (Priority Non-Tax Claims).
- Class 2 (Other Secured Claims).
- Class 3 (General Unsecured Claims).
- Class 4 (General Unsecured Trade Claims).
- Class 5 (Employee Claims).
- Class 6 (Customer Claims).
- Class 7 (Intercompany Claims).
- Class 8 (Existing Equity Interests).

19. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because each of the Claims or Interests in a particular Class is substantially similar to the other Claims or Interests in such Class and each Class differs from the other Classes based on legal attributes or other relevant and objective criteria. (*See* Rodriguez Decl. at ¶ 8-10.). Specifically, the unsecured creditors making up classes 3, 4, 5 and 6 are properly classified in separate classes based on appropriate legal and business considerations. Among other things, the Supporting Creditors, who comprise over 90% of Class 3, agreed to the separate classification and reduced distributions pursuant to the Restructuring Support Agreements in order to allow Classes 4, 5 and 6 to be unimpaired. Further, differences in legal attributes of the claims held by each of the classes comprised of unsecured trade creditors (Class 4), employees (Class 5), and customer creditors (Class 6) justify the separate classification of those claims. *See e.g., In re Aegerion*, 605 B.R. at 31 (approving separate classification of ongoing trade creditors and other unsecured creditors); *Hargreaves v. Nuverra Envtl. Sols., Inc. (In re Nuverra Envtl. Sols., Inc.)*, 2017 WL 3326453 (D. Del. Aug. 3, 2017) (same).

[6] DIP Facility Claims, Administrative Expenses, and Priority Tax Claims are not required to be classified pursuant to section 1123(a)(1) of the Bankruptcy Code.

20. Accordingly, the Debtor submits that the Plan fully complies with and satisfies the requirements of section 1122 of the Bankruptcy Code.

2. Section 1123(a): The Plan's Contents Satisfy the Mandatory Plan Requirements of 11 U.S.C. §§ 1123 (a)(1)–(a)(7)

21. Section 1123(a) of the Bankruptcy Code sets forth seven requirements that the proponent of a chapter 11 plan must satisfy.[7] *See* 11 U.S.C. § 1123(a). The Plan fully complies with each such requirement, and no party has objected to confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

- The Plan designates Classes of Claims and Interests as required by section 1123(a)(1) of the Bankruptcy Code. *See* Plan, Art. III.
- The Plan specifies whether each Class of Claims and Interests is Impaired or Unimpaired under the Plan, as well as the treatment of each Impaired Class, as required by sections 1123(a)(2) and 1123(a)(3) of the Bankruptcy Code, respectively. *See* Plan, Art. IV.
- Except as otherwise agreed to by a Holder of a particular Claim or Interest, the treatment of each Claim or Interest in each Class is the same as the treatment of each other Claim or Interest in such Class, as required by section 1123(a)(4) of the Bankruptcy Code. *See* Plan, Art. IV.[8]
- As required by section 1123(a)(5) of the Bankruptcy Code, the provisions of Article V, and various other provisions of the Plan, provide adequate means for the Plan's implementation.
- In accordance with section 1123(a)(6) of the Bankruptcy Code, the organizational documents of the Debtor have been or will be amended on or prior to the Effective Date to prohibit the issuance of non-voting equity securities and set forth an appropriate distribution of voting power among classes of equity securities possessing voting power. *See* New Stockholders Agreement, Section 3.2.

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[7] Section 1123(a)(8) of the Bankruptcy Code only applies in a case in which the debtor is an individual and, thus, is inapplicable to the Debtor's Chapter 11 Case.

[8] Courts in this district have interpreted section 1123(a)(4) to require "equality of treatment, not equality of result. It is satisfied if claimants in the same class have the same opportunity for recovery." *See In re Breitburn Energy Partners, LP*, 582 B.R. 321, 358 (Bankr. S.D.N.Y. 2018).

- The Plan and Plan Supplement provisions governing the manner of selection of any officer, director, or manager are consistent with the interests of creditors and equity security holders and with public policy in accordance with section 1123(a)(7) of the Bankruptcy Code. In particular, the Plan Supplement provides that the directors and officers of the Debtor immediately before the Effective Date will serve as the initial directors and officers of the Reorganized Debtor on and after the Effective Date.

22. Therefore, the Plan satisfies the mandatory plan requirements set forth in section 1123(a) of the Bankruptcy Code.

B. Section 1123(b): The Plan's Contents Comply with the Permissive Bankruptcy Code Requirements.

23. Section 1123(b) of the Bankruptcy Code sets forth permissive provisions that may be incorporated into a chapter 11 plan, and no party has objected to confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code. Each provision of the Plan is consistent with section 1123(b):

- As permitted by section 1123(b)(1) of the Bankruptcy Code and pursuant to section 1124 of the Bankruptcy Code, Article IV of the Plan describes the treatment of Unimpaired Classes and Impaired Classes.

- As permitted by section 1123(b)(2) of the Bankruptcy Code, and as further discussed *infra* Section I.R, Article VIII of the Plan provides for the procedures governing the rejection, assumption, and assumption and assignment of Executory Contracts and Unexpired Leases.

- As permitted by section 1123(b)(3)(A) of the Bankruptcy Code, Section 5.1 of the Plan provides that, in consideration for the distributions and other benefits provided pursuant to the Plan, the Plan includes a good-faith compromise and settlement of Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that a holder of a Claim or Interest may have, or any distribution to be made on account of Allowed Claims or Interests. In accordance with section 1123(b)(3)(A) of the Bankruptcy Code, the Plan contains certain release provisions consistent with case law in the Second Circuit, which are discussed *infra* Section I(D)(1)(a-b). As permitted by section 1123(b)(3)(B), Section 10.8 of the Plan preserves the Retained Causes of Action and provides that the Reorganized Debtor will have the right to commence and pursue such Retained Causes of Action.

- As permitted by section 1123(b)(5) of the Bankruptcy Code, the Plan modifies the rights of holders of Claims and Interests in Class 3 (General Unsecured Claims) and Class 8 (Existing Equity Interests).

- Section 1123(b)(6) of the Bankruptcy Code is a "catchall" provision, which permits inclusion in a plan of any appropriate provision as long as such provision is not inconsistent with applicable provisions of the Bankruptcy Code. In accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan contains certain release, exculpation, and injunction provisions consistent with the applicable provisions of the Bankruptcy Code and case law in the Second Circuit, which are discussed *infra* Section I(B)(1). The Debtor submits that there are no provisions in the Plan that are inconsistent with the Bankruptcy Code.

1. The Plan Releases, Exculpation Provision, and Injunction Provision Should Be Approved.

24. The Plan provides for (i) the release of claims and Causes of Action held by (a) the Debtor and its estate as set forth in Section 10.6(a) thereof (the "**Debtor Releases**"), (b) certain non-Debtor third parties—the Releasing Parties[9]—against the Released Parties,[10] as set forth in Section 10.6(b) thereof (the "**Third-Party Releases**" and, together with the Debtor Releases, the "**Plan Releases**"), (ii) the exculpation provision set forth in Section 10.7 thereof (the "**Exculpation Provision**"), and (iii) the injunction provision set forth in Section 10.5 thereof (the "**Injunction Provision**"). The Plan Releases, Exculpation Provision, and Injunction Provision are integral components of the Plan and the transactions contemplated therein, are appropriate and necessary under the circumstances, are consistent with the Bankruptcy Code, and comply with applicable law. Accordingly, each should be approved.

a. Debtor Releases Are Appropriate and Should Be Approved.

[9] As defined in the Plan, "**Releasing Parties**" means "each of, and solely in its capacity as such, (a) the Debtor or the Reorganized Debtor, (b) the DIP Lenders, (c) the DIP Agent, (d) the Bridge Lender, (e) the Supporting Creditors, and (f) all Holders of Claims or Interests (i) who vote to accept the Plan, (ii) who are Unimpaired under the Plan and do not opt out of granting the releases herein, (iii) whose vote to accept or reject the Plan is solicited but do not vote either to accept or to reject the Plan and do not opt out of granting the releases herein, or (iv) who vote to reject the Plan but do not opt out of granting the releases herein."

[10] As defined in the Plan, "**Released Parties**" means "means each of, and solely in its capacity as such, (a) the Debtor or the Reorganized Debtor, (b) the DIP Lenders, (c) the DIP Agent, (d) the Bridge Lender and (e) the Related Parties for each of the foregoing (in each case only in their capacity as such)."

25. When considering releases by a debtor pursuant to section 1123(b)(3)(A), the appropriate standard is whether the release is a valid exercise of the debtor's business judgment and is fair, reasonable, and in the best interests of the estate. *See In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 309 (Bankr. S.D.N.Y. 2016) (approving a plan provision that released claims of the Debtors against Released Parties based on finding that "[the] release by the Debtors represents . . . a valid exercise of the Debtors' business judgment, and is in the best interests of the estates."); *In re Motors Liquidation Co.*, 447 B.R. 198, 220 (Bankr. S.D.N.Y. 2011) ("Releases by estates involve a give-up of potential rights that are owned by the estate, and are perfectly permissible in a plan, either as parts of plan settlements or otherwise, though the court must satisfy itself (at least if anyone raises the issue) that the give-up is an appropriate exercise of business judgment, and, possibly, in the best interests of the estate."). Further, a debtor's decision to release claims under a plan is afforded deference as a matter of business judgment. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 263 n.289 (Bankr. S.D.N.Y. 2007) ("The Debtors have considerable leeway in issuing releases of any claims the Debtors themselves own . . . .").

26. The Debtor Releases represent a sound exercise of the Debtor's business judgment. Each of the Released Parties has provided substantial contributions to the Debtor's restructuring in their own way. For example, among other things, the DIP Lenders and the Bridge Lender provided essential funding to the Debtor that allowed the Debtor to continue its operations during the prepetition negotiations and during the pendency of this Chapter 11 case. Crucially, the DIP Lenders agreed to provide funding on terms favorable to the Debtor, including a very favorable interest rate and the option to convert (at the Debtor's election, which it is exercising pursuant to the Plan) the financing into long-term unsecured debt and equity—rather

than repay it in cash—upon emergence from chapter 11. (*See* Rodriguez Decl. at ¶ 14). The Bridge Lenders, for their part, provided the essential prepetition funding that provided the Debtor additional time to complete negotiations related to the various Restructuring Support Agreements, which are the backbone of the Debtor's restructuring. *Id.* Relatedly, the Supporting Creditors agreed to the various concessions and settlements contained within the Restructuring Support Agreements, and further agreed to vote in favor of the Debtor's chapter 11 which provides for full recoveries to other unsecured creditors such as customers and employees. (*See* Rodriguez Decl. at ¶ 15). Lastly, the Debtor's current and former officers, directors, managers, employees, advisors, and their related parties also made substantial contributions to the Chapter 11 Case through their collective efforts in negotiating and reaching the various agreements contained within the Plan and managing the Debtor's restructuring on a day to day basis. (*See* Rodriguez Decl. at ¶ 17).

27. The Debtor does not believe that, absent the Debtor Releases, it would have been able to secure the substantial benefits provided by the Plan, including a deleveraged balance sheet, an optimized fleet, and the opportunity to emerge from chapter 11 as a stronger and more efficient airline.

28. Further, the Debtor Releases are also appropriate because the released claims and causes of action have no material value to the Debtor and its estate, and the *de minimis* value, if any, of such claims is outweighed significantly by the value and benefits provided by the Plan and the transactions contemplated therein. Courts have found that a debtor's release of claims are often in the best interests of the estate when "the costs involved [in pursuing the released claims] likely would outweigh any potential benefit from pursuing such claims." *In re Lear Corp.*, Case No. 09-14326 (ALG), 2009 WL 6677955, at *7 (Bankr. S.D.N.Y. Nov. 5, 2009);

accord In re Calpine Corp., Case No. 05-60200 (BRL), 2007 WL 4565223, at *9-10 (Bankr. S.D.N.Y. Dec. 19, 2007).

29. Accordingly, for the reasons set forth above and contained in the Supporting Declarations, the Debtor Releases reflect a reasonable exercise of the Debtor's business judgment and should be approved under section 1123(b)(3)(A) of the Bankruptcy Code.

b. Third-Party Releases Are Consensual and Should Be Approved.

30. Section 10.6(b) of the Plan provides for Third-Party Releases by (a) the Debtor or the Reorganized Debtor, (b) the DIP Lenders, (c) the DIP Agent, (d) the Bridge Lender, (e) the Supporting Creditors, and (f) all Holders of Claims or Interests (i) who vote to accept the Plan, (ii) who are Unimpaired under the Plan and do not opt out of granting the releases herein, (iii) whose vote to accept or reject the Plan is solicited but do not vote either to accept or to reject the Plan and do not opt out of granting the releases herein, or (iv) who vote to reject the Plan but do not opt out of granting the releases herein (collectively, the "**Releasing Parties**). The Third-Party Releases are necessary to secure the significant benefits embodied in the Plan for the Debtor and its stakeholders, and otherwise meets the requirements set forth by courts in this circuit.

31. Courts in this circuit have consistently held that chapter 11 plans may provide consensual third-party releases. *See Deutsche Bank AG* v. *Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005) ("Nondebtor releases may also be tolerated if the affected creditors consent."); *see also In re Avianca Holdings, S.A.*, 632 B.R. 124, 133 (Bankr. S.D.N.Y. 2021) ("If third-party releases are consensual or not objected to after proper notice, courts generally approve them unless they are truly overreaching on their face.") *quoting In re MPM Silicones, LLC,* No. 14-22503 (RDD), 2014 WL 4436335, at *32

(Bankr. S.D.N.Y. Sept. 9, 2014)); *In re Stearns Holdings, LLC*, 607 B.R. at 790 (overruling objection and approving plan with third party releases); *In re Sabine Oil & Gas Corp.*, 555 B.R. at 288 (same); *In re Genco Shipping & Trading Ltd*., 513 B.R. 233, 269 (Bankr. S.D.N.Y. 2014).

32. Notably, all Holders that are Releasing Parties were provided a Ballot or a Notice of Non-Voting Status that provided them with the opportunity to *opt out* of the Plan Releases by making such an election on their Ballot or Notice of Non-Voting Status. Unless Holders vote to accept the Plan, thereby consenting to the releases, or decline to opt out of the Third-Party Releases, Holders will not be, under any circumstances, Releasing Parties. Thus, the Debtor submits that the Third-Party Releases are fully consensual and consistent with the law in this circuit. *See In re Avianca Holdings, S.A.*, 632 B.R. at 137 (overruling the objection of the U.S. Trustee to the third-party releases contained in the Plan based on finding that "the opt-out structure is permissible provided that a clear and prominent explanation of the procedure is given as it has been here," that the solicitation materials circulated to the holders of Claims and Interests "clearly explain[] the required procedure" for opting out of granting the third-party releases, and that the "opt-out structure is consistent with the Supreme Court's authority on consent in the context of class action releases."); Tr. of Hr'g at 27–28, *In re Cumulus Media Inc*., No. 17-13381 (Bankr. S.D.N.Y. Feb. 5, 2018) [ECF No. 434] (approving an opt out structure for the third-party releases, stating that "[i]naction is action under appropriate circumstances. When someone is clearly and squarely told if you fail to act your rights will be affected, that person is then given information that puts them on notice that they need to do something else or else. That's not a trap.").

33. Further, courts in this district have permitted similar voluntary non-debtor releases obtained through the balloting process as they were here. *See, e.g., In re Avianca*

Holdings, S.A., 632 B.R. at 138 (overruling the objection of the U.S. Trustee and approving third-party releases where the ballots contained an option to opt-out of the releases); *In re Stearns Holdings*, 607 B.R. at 788 (approving the third-party releases where "each [releasing party] was given an opportunity to affirmatively reflect its consent or not to the Third-Party Releases. The ballots distributed to holders of Claims entitled to vote on the Amended Plan clearly informed holders of Claims entitled to vote of the steps required to take if they disagreed with the scope or the grant of the releases."); *In re Genco Shipping & Trading Ltd.*, 513 B.R. at 271 ("Court will permit releases with respect to any affected party that consented to grant the releases or may be deemed to have done so through its ability to 'check the box' on the Plan ballots"); *In re Lear Corp.*, 2009 Bankr. LEXIS 4426, at *21 (Bankr. S.D.N.Y. Nov. 5, 2009) (approving releases where ballots stated that a vote to accept or abstention from voting constitutes acceptance and assent to plan release and injunction).

34. These courts have held that third-party releases are considered consensual when adequate notice has been provided to stakeholders by, for example, bolding the language describing the third-party releases in the plan and disclosure statement and including language on the ballot and election form explaining the opt-in mechanism. The Ballots distributed to Holders entitled to vote on the Plan—in Class 3 (General Unsecured Claims)—and the Notices of Non-Voting Status distributed to Holders entitled to opt out of the Third-Party Releases—in Class 1 (Priority Non-Tax Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Trade Claims), Class 5 (Employee Claims), Class 6 (Customer Claims), and Class 7 (Intercompany Claims)—quoted the entirety of the release to be given in bold and clearly informed Holders of the steps they should take if they desired to opt out of the Plan Releases.

35. As described in the Rodriguez Declaration, the Third-Party Releases are an integral part of the implementation of the Plan and the comprehensive settlements reached with the DIP Lenders and the Supporting Creditors. These releases facilitated constructive participation in both the development of the Debtor's Plan and the progression of this Chapter 11 Case towards a quick and successful conclusion. The parties being released by the Third-Party Releases provided significant contribution and support to the Chapter 11 Case and the Plan. (*See supra* at ¶ 26). Additionally, the Third-Party Releases are sufficiently narrow, do not provide blanket immunity, and provide a specific carve-out for omissions that constitute gross negligence, willful misconduct, or intentional fraud. In light of all of these factors, the Debtor submits that the Third-Party Releases are appropriate and should be approved.

c. The Plan Exculpation Provision Should Be Approved.

36. In addition to the Plan Releases discussed above, the Exculpation Provision exculpates the Exculpated Parties[11] for claims arising out of or relating to, among other things, the Debtor's restructuring process, the Chapter 11 Case, solicitation of the Plan, and the negotiations and agreements made in connection therewith. The Exculpation Provision does not exculpate acts or omissions that are determined by a Final Order to have constituted intentional fraud, willful misconduct, or gross negligence. *See, e.g.*, *In re Stearns Holdings*, 607 B.R. at 791 (approving the exculpation provision "[i]n light of the exculpation provision's carve-out for gross negligence, intentional fraud, and willful misconduct").

[11] As defined in the Plan, "**Exculpated Parties**" means, "each of the following solely in their capacities as such: (a) the Debtor; (b) the Reorganized Debtor; (c) the DIP Lenders; (d) the DIP Agent; (e) the Bridge Lender and (f) with respect to each of (a) through (e), to the extent employed in such capacities on or after the Petition Date, each of their respective directors, officers, partners, managers, trustees, assigns, employees, agents, advisory board members, attorneys, financial advisors, investment bankers, accountants, consultants and other professionals or representatives."

37. Exculpation is appropriate for estate fiduciaries in a bankruptcy case, as well as non-fiduciaries in appropriate circumstances. *See, e.g., In re Ditech Holding Corp.*, 606 B.R. at 631 (approving exculpation provision for estate fiduciaries and non-fiduciaries); *In re Relativity Media, LLC*, Case No. 18-11358 (MEW) (Bankr. S.D.N.Y. Jan. 31, 2019) [ECF No. 6891] (same); *In re Pacific Drilling S.A.*, Case No. 17-13193 (MEW) (Bankr. S.D.N.Y. Nov. 2, 2018) [ECF No. 746] (finding that exculpation for both estate fiduciaries and non-fiduciaries was "consistent with prior case law, reasonable in scope, integral to the Plan, and appropriate"); *see also, e.g., In re Nine West Holdings, Inc.*, Case No. 18-10947 (SCC) (Feb. 27, 2019) [ECF No. 1308]; *In re BCBG Max Azria Global Holdings, LLC*, Case No. 17-10466 (SCC) (July 26, 2017) [ECF No. 591].

38. The scope of the Exculpation Provision is appropriately limited to the Exculpated Parties and their professionals and representatives, who have contributed significantly to the efforts in this Chapter 11 Case and will guide the successful consummation and implementation of the Plan. (*See* Rodriguez Decl. at ¶ 20). The Debtor believes that the Exculpated Parties have acted in good faith. (*Id.*) Moreover, the scope of the Exculpation Provision and the Exculpated Parties are consistent with exculpation provisions granted by courts in this circuit. *See, e.g., In re Ditech Holding Corp.*, 606 B.R. 544 (Bankr. S.D.N.Y. 2019), *In re LSC Communications, Inc.*, Case No. 20-10950 (SHL) (Feb. 23, 2021) [ECF No. 1243]; *In re Frontier Communications Corp.*, Case No. 20-22478 (RDD) (Aug. 27, 2020) [ECF No. 1005-1]; *In re Windstream Holdings, Inc.*, Case No. 19-22312 (RDD) (Bankr. S.D.N.Y. June 26, 2020) [ECF No. 2243]; *In re Hollander Sleep Products, LLC*, Case No. 19-11608 (MEW) (Sept. 3, 2019) [ECF No. 346]; *In re Nine West Holdings, Inc.*, Case No. 18-10947 (SCC) (Feb. 27, 2019) [ECF No. 1308].

39. Lastly, exculpation for parties participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability. *See In re Drexel Burnham Lambert Group, Inc*., 960 F.2d 285, 293 (2d Cir. 1992); *In re Enron Corp*., 326 B.R. 497, 503 (S.D.N.Y. 2005) (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").

40. Accordingly, the Debtor submits that the Exculpation Provision should be approved.

d. The Plan Injunction Provision Should Be Approved.

41. Section 10.5 of the Plan provides for a permanent injunction preventing certain Persons and Entities from bringing any action that is released pursuant to the Plan or the Confirmation Order (the "**Injunction**"). (*See* Plan, § 10.5). The Injunction is necessary to effectuate the Plan's releases and to protect the Reorganized Debtor from the potential of barred litigation from prepetition stakeholders as the Reorganized Debtor implements the provisions of the Plan following the Effective Date. Such litigation would increase the costs and hinder the efforts of the Reorganized Debtor to effectively fulfill its responsibilities as contemplated in the Plan and thereby maximize recovery for all Holders. (*See* Rodriguez Decl. at ¶ 21). The Injunction is narrowly tailored to achieve its purpose, and similar injunctions have been approved by courts in other chapter 11 cases in this district. *See, e.g., In re Stearns Holdings, LLC*, Case No. 19-12226 (SCC) (Oct. 24, 2019) [ECF No. 432]; *In re Hollander Sleep Products, LLC*, Case No. 19-11608 (MEW) (Sept. 3, 2019) [ECF No. 346]; *In re BCBG Max Azria Global Holdings, LLC,* Case No. 17-10466 (SCC) (July 26, 2017) [ECF No. 591]. Accordingly, the Injunction should be approved.

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

C. Section 1129(a)(2): The Debtor, as a Plan Proponent, Has Complied with the Applicable Provisions of the Bankruptcy Code.

43. The Debtor has satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponents of a plan comply with the applicable provisions of the Bankruptcy Code. No party has objected to confirmation on the basis that the Plan fails to satisfy section 1129(a)(2).

44. The legislative history of section 1129(a)(2) indicates that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. See H.R. Rep. No. 95–595, at 412 ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *accord Drexel Burnham Lambert Grp.*, 138 B.R. at 759 ("The legislative history to § 1129(a)(2) explains that this provision embodies the disclosure and solicitation requirements under §§ 1125 and 1126."). The Debtor has complied with these provisions, as well as Bankruptcy Rules 3017 and 3018, by distributing the Disclosure Statement and soliciting votes on the Plan through its Notice and Claims Agent in accordance with the Solicitation Procedures Order. (*See* Voting Certification at ¶¶4-8).

1. Section 1125: Disclosure Statement and Solicitation.

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

> An acceptance or rejection of a plan may not be solicited after the commencement of [a] case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is

> transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. . . .

11 U.S.C. § 1125(b).

46. The Debtor has satisfied section 1125 of the Bankruptcy Code. By entry of the Disclosure Statement Order on November 12, 2021, the Court approved the Disclosure Statement as containing "adequate information" pursuant to section 1125(b) of the Bankruptcy Code. The Disclosure Statement Order specified the contents of the Solicitation Packages and notices of non-voting status that the Debtor provided to Holders, as well as the timing and method of delivery for the same. As detailed further in the Voting Certification, the Debtor complied in all respects with the content and delivery requirements as outlined in the Disclosure Statement Order.

47. Specifically, as evidenced by the Voting Certification, the Solicitation Package approved by this Court in the Disclosure Statement Order were transmitted to and served on all Holders in Class 3 (General Unsecured Claims), the only class entitled to vote to accept or reject the Plan, and the notices of non-voting status were transmitted to and served on the other Classes in this Chapter 11 Case, all in compliance with section 1125 of the Bankruptcy Code, the Disclosure Statement Order, the Solicitation and Voting Procedures, the Bankruptcy Rules, and the Local Rules.

2. Section 1126: Acceptance of the Plan.

48. Section 1126 of the Bankruptcy Code sets forth the procedures for soliciting votes on a chapter 11 plan and determining acceptance thereof. Pursuant to section 1126 of the Bankruptcy Code, only holders of Allowed Claims or Interests that are Impaired and will receive

or retain property under the Plan on account of such Claims or Interests may vote to accept or reject the plan. See 11 U.S.C. § 1126.

49. As set forth in the Voting Certification, the Debtor solicited acceptances of the Plan from holders of Claims in Class 3 (General Unsecured Claims) in accordance with section 1126 of the Bankruptcy Code.

50. In accordance with section 1126(f) of the Bankruptcy Code, the Debtor did not solicit acceptances of the Plan from holders of Claims and Interests in Class 1 (Priority Non-Tax Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Trade Claims), Class 5 (Employee Claims), Class 6 (Customer Claims), or Class 7 (Intercompany Claims) because such Claims and Interests are Unimpaired under the Plan and thus their holders are conclusively presumed to have accepted the Plan.

51. In accordance with section 1126(g) of the Bankruptcy Code, the Debtor did not solicit acceptances of the Plan from Holders of Interests in Class 8 (Existing Equity Interests) because the holders of such Interests by virtue of being diluted to 0.001% of their Existing Equity Interests will receive no distribution on account of their Claims and Interests and thus are deemed to have rejected the Plan.

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

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

11 U.S.C. § 1126(c).

53. As set forth in the Voting Certification, the Plan has been unanimously accepted, well in excess of two-thirds in amount and one-half in number of the holders of Claims in Class 3 (General Unsecured Claims).

54. Based upon the foregoing, the Debtor submits that the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

D. Section 1129(a)(3): The Plan has been Proposed in Good Faith.

55. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." "The plan proponent bears the burden of establishing 'good faith' under section 1129(a)(3)." *In re Ditech*, 606 B.R. at 578. No party has objected to confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

56. To demonstrate that a plan was proposed in good faith, a debtor must show "that the plan was proposed with honesty and good intentions and with a basis for expecting that a reorganization can be effected." *In re Sabine Oil & Gas Corp.*, 555 B.R. at 312 (internal quotations omitted). *See also Argo Fund Ltd. v. Bd. of Directors of Telecom Argentina, S.A (In re Bd. of Directors of Telecom Argentina, S.A)*, 528 F.3d 162, 174 (2d Cir. 2008). "Good faith is 'generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'" *In re Chemtura Corp.*, 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010) (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984)). When analyzing whether a plan was proposed in good faith under section 1129(a)(3) of the Bankruptcy Code, "[c]ourts generally hold that 'good faith'

should be evaluated in light of the totality of the circumstances surrounding confirmation." *In re Sabine Oil & Gas Corp.*, 555 B.R. at 312, 13.

57. Here, the Debtor has proposed the Plan in good faith with good intentions in order to effectuate a consensual reorganization that maximizes value for all stakeholders, while minimizing impact on the Debtor's employees and customers. The Plan is not proposed for a purpose forbidden by law, but rather is consistent with the letter and policy of the Bankruptcy Code and the fiduciary duties of the Debtor and its directors and officers. Prior to the Petition Date and continuing during this Chapter 11 Case, the Debtor, the Supporting Creditors, the DIP Lenders, and other parties-in-interest engaged in good-faith, arm's-length negotiations that ultimately resulted in the Debtor's Chapter 11 Plan, which provides recoveries to holders of general unsecured claims that otherwise would not have been available. The Debtor believes that the Plan, which is fully consensual and incorporates the Restructuring Support Agreements, will allow it to emerge from chapter 11 on a going-concern basis as a stronger and more efficient airline with a deleveraged balance sheet, thereby positioning the Reorganized Debtor for long-term success. In other words, consistent with the objectives of the Bankruptcy Code, the Plan provides for preserving the Debtor's going concern value and maximizing value for both the Debtor and its creditors. *See Bank of Am. Nat.'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (noting the "two recognized policies underlying Chapter 11" are "preserving going concerns and maximizing property available to satisfy creditors.").

58. Accordingly, the "good faith" requirement of section 1129(a)(3) is satisfied. *See In re Chemtura*, 439 B.R. at 608–09 (finding that the good faith requirement was met because, among other things, the debtor negotiated and reached agreements with several parties in interest to put forward a chapter 11 plan that, "in the aggregate[,] demonstrate[d] a good faith effort on

the part of the debtor to consider the needs and concerns of all major constituencies in this case").

E. Section 1129(a)(4): The Plan Provides that Fee Claims are Subject to Court Approval.

59. Section 1129(a)(4) requires that "[a]ny payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable." Section 1129(a)(4) "has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval by a bankruptcy court for reasonableness." *In re Sabine Oil & Gas Corp.*, 555 B.R. at 312–13. No party has objected to confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

60. Pursuant to the Plan, all payments for professional services provided to the Debtor during the Chapter 11 Case will be subject to approval by the Court as reasonable in accordance with section 1129(a)(4) of the Bankruptcy Code. Specifically, Section 2.2 of the Plan provides that all final applications for the payment of Professional Fee Claims must be submitted to and approved by the Bankruptcy Court. Further, the Plan provides that the Bankruptcy Court will retain jurisdiction to "hear and determine all Professional Fee Claims and any disputes related to Restructuring Expenses." Plan, Section 11.1(h). Therefore, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

F. Section 1129(a)(5): The Debtor Has Disclosed All Necessary Information Regarding Directors, Officers, and Insiders to the Extent Known.

61. Section 1129(a)(5) of the Bankruptcy Code requires (a) that the plan proponent disclose the identity and affiliations of the proposed officers and directors of the debtor(s) as

reorganized; (b) that the appointment or the continued appointment of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and (c) to the extent there are any insiders that will be retained or employed by the reorganized debtor(s), that the identity and nature of any compensation of any such insiders be disclosed. *See* 11 U.S.C. § 1129(a)(5). No party has objected to confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

62. Section 5.10 of the Plan describes the manner in which the members of the New Board will be selected. In addition, the Plan Supplement provides that the directors and officers of the Debtor immediately before the Effective Date will serve as the initial directors and officers of the Reorganized Debtor on and after the Effective Date. The continuance in such positions of such persons is consistent with the interests of holders of Claims and Interests and public policy. Accordingly, section 1129(a)(5) of the Bankruptcy Code is satisfied.

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

63. Section 1129(a)(6) of the Bankruptcy Code requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." The Plan does not provide for any rate changes by the Debtor, and, therefore, section 1129(a)(6) is inapplicable.

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

64. Section 1129(a)(7) of the Bankruptcy Code, which is commonly referred to as the "best interests" test, requires that a plan be in the best interests of creditors and holders of equity

interests in the Debtor. No party has objected to confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

65. The best interests test requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest of such class has either accepted the plan or will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or retain if the debtor liquidated under chapter 7 of the Bankruptcy Code. This test applies if a class of claims or interests does not vote unanimously to accept a plan, even if the class as a whole votes to accept the plan. *See Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. at 441 n.13. Under the best interests test, "the court must measure what is to be received by rejecting creditors in the impaired classes under the plan against what would be received by them in the event of liquidation under chapter 7," and "[i]n doing so, the court must take into consideration the applicable rules of distribution of the estate under chapter 7, as well as the probable costs incident to such liquidation." *In re Adelphia Commc'ns, Corp.*, 368 B.R. at 252. Section 1129(a)(7) of the Bankruptcy Code and case law make clear that the best interests test applies only to each non-accepting holder of impaired claims or interests. *See id.* at 251; *In re Drexel Burnham Lambert*, 138 B.R. at 761 ("[T]he liquidation analysis applies only to non-accepting impaired claims or interests.").

66. Thus, the best interests test does not apply to the holders of Claims or Interests in Class 1 (Priority Non-Tax Claims), Class 2 (Other Secured Claims), Class 4 (General Unsecured Trade Claims), Class 5 (Employee Claims), Class 6 (Customer Claims), and Class 7 (Intercompany Claims) because the Claims and Interests in these Classes are Unimpaired under the Plan (as they will either be Reinstated or their holders will receive payment in full in Cash, be paid in the ordinary course, or otherwise receive treatment such that such holder's legal,

equitable, or contractual rights will not be altered) and their holders are conclusively presumed to accept the Plan). Accordingly, the holders of the Claims or Interests in these Classes are receiving or retaining under the Plan the maximum recovery to which they are entitled and, as a result, could not receive greater recovery under a chapter 7 liquidation.

67. As set forth in the Walker Declaration and the liquidation analysis annexed as Exhibit E to the Disclosure Statement (the "**Liquidation Analysis**"), the best interests test is also satisfied as to every holder of a Claim or Interest in Class 3 (General Unsecured Claims) and Class 8 (Existing Equity Interests). Pursuant to the Liquidation Analysis, holders of Claims in Class 3 and Class 8 are each expected to receive a 0% recovery in a hypothetical chapter 7 liquidation, which is equal to or less than the recoveries that such holders will receive under the Plan. (*See* Walker Decl., ¶ 10–13). Therefore, the Plan satisfies the best interests test under section 1129(a)(7) of the Bankruptcy Code.

I. Section 1129(a)(8): Accepted by Impaired Classes Entitled to Vote.

68. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept the plan or not be impaired thereby. Pursuant to section 1126(c) of the Bankruptcy Code, a class of claims accepts a plan if holders of at least two-thirds in amount and more than one-half in number of the allowed claims in that class vote to accept the plan. Pursuant to section 1126(d) of the Bankruptcy Code, a class of interests accepts a plan if holders of at least two-thirds in amount of the allowed interests in that class vote to accept the plan. In addition, where a class is not impaired under a plan each holder of a claim or interest in such class is conclusively presumed to have accepted the plan. *See* 11 U.S.C. § 1126(f); *see also* S. Rep. No. 95-989, at 123 (stating that section 1126(f) of the Bankruptcy Code "provides that no

acceptances are required from any class whose claims or interests are unimpaired under the Plan or in the order confirming the Plan").

69. As set forth in the Voting Certification, the Plan has been accepted by 100% of the Holders of Claims in Class 3 who were entitled to, and did, vote to accept or reject the Plan. Class 8 is Impaired and Holders in such Class are deemed to have rejected the Plan because they will not receive any distribution. Nevertheless, as discussed more fully below, the Debtor meets the alternative requirement of section 1129(b) with respect to Class 8 and the Plan may be confirmed over the presumed rejection of the holders of the Existing Equity Interests in that Class under the alternative "cram down" requirements of section 1129(b) of the Bankruptcy Code

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

70. Section 1129(a)(9) of the Bankruptcy Code requires that claims entitled to priority under section 507(a) of the Bankruptcy Code be paid in full in cash, unless the holder thereof agrees to a different treatment with respect to such claims. In accordance therewith, the Plan provides that:

- Except to the extent that a holder of an Allowed Administrative Expense Claim (other than a Professional Fee Claim or DIP Claim) agrees to less favorable treatment, each holder of an Allowed Administrative Expense Claim (other than a Professional Fee Claim or DIP Claim) shall receive, in full and final satisfaction, settlement, release, and discharge of, and in exchange for, such Claim, Cash in an amount equal to such Allowed Administrative Expense Claim on, or as soon thereafter as is reasonably practicable, the later of (a) the Effective Date, and (b) the first Business Day after the date that is 30 calendar days after the date such Administrative Expense Claim becomes an Allowed Administrative Expense Claim; *provided* that any Allowed Administrative Expense Claims representing liabilities incurred in the ordinary course of business by the Debtor shall be paid by the Debtor or the Reorganized Debtor, as applicable, in the ordinary course of business, consistent with past practice and in accordance with the terms and subject to the conditions of any course of dealing or agreements governing,

instruments evidencing, or other documents relating to such transactions. (Plan, Section 2.1).

- Allowed Professional Fee Claims shall be paid in full, in Cash, in such amounts as are Allowed by the Bankruptcy Court (a) upon the later of (i) the Effective Date, and (ii) the date upon which an order relating to any such Allowed Professional Fee Claim is entered, in each case, as soon as reasonably practicable, or (b) upon such other terms as may be mutually agreed upon between the holder of such an Allowed Professional Fee Claim and the Debtor or the Reorganized Debtor, as applicable. (Plan, Section 2.2).

- Except to the extent that a holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, in full and final satisfaction, settlement, release, and discharge of, and in exchange for each Allowed Priority Tax Claim, each holder of such Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code and, for the avoidance of doubt, holders of Allowed Priority Tax Claims will receive interest on such Allowed Priority Tax Claims after the Effective Date in accordance with sections 511 and 1129(a)(9)(C) of the Bankruptcy Code. To the extent any Allowed Priority Tax Claim is not due and owing on the Effective Date, such Claim shall be paid in accordance with the terms of any agreement between the Debtor and the holder of such Claim, or as may be due and payable under applicable non-bankruptcy law, or in the ordinary course of business. (Plan, Section 2.3).

- In full and final satisfaction, settlement, release, and discharge of, and in exchange for, each Allowed DIP Tranche A Claim, on the Effective Date in connection with the Debtor's election to exercise the Tranche A Conversion Election pursuant to Section 5.3 hereunder, each Allowed DIP Tranche A Claim shall be converted, on a cashless basis to unsecured loans in an amount equal to such DIP Tranche A Claim, which unsecured loans shall be deemed outstanding as of the Effective Date under the Unsecured Exit Facility. (Plan, Section 2.4(a)).

- In full and final satisfaction, settlement, release, and discharge of, and in exchange for, each Allowed DIP Tranche B Claim, on the Effective Date in connection with the Debtor's election to exercise the Tranche B Conversion Election pursuant to Section 5.3 hereunder each DIP Tranche B Lender who is a holder of an Allowed DIP Tranche B Claim shall receive its pro rata share of 79.5% of the New Common Stock issued under this Plan. (Plan, Section 2.4(b)).

- Except to the extent that a holder of a DIP Reimbursement Claim agrees to less favorable treatment of such Claim, in full and final satisfaction, settlement, release, and discharge of each DIP Reimbursement Claim and in exchange therefor, each Holder of a DIP Reimbursement Claim shall receive payment in full in Cash on the Effective Date or as soon as reasonably practicable thereafter. (Plan, Section 2.4(c)).

71. Accordingly, the Debtor submits that the Plan satisfies all of the requirements of section 1129(a)(9) of the Bankruptcy Code, and no party has objected to confirmation on the basis of this section.

K. Section 1129(a)(10): The Plan Has Been Accepted by at Least One Impaired Class

72. Section 1129(a)(10) of the Bankruptcy Code requires that, if a class of claims is impaired under a plan, then at least one such impaired class of claims has accepted the plan, "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). No party has objected to confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

73. Here, the only Impaired class entitled to vote on the Plan, Class 3, has voted to accept the Plan. There is no indication that insiders hold Claims in Class 3 sufficient to alter that voting result. Therefore, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

L. Section 1129(a)(11): The Plan is Feasible.

74. To satisfy the feasibility standard, a debtor need not warrant, or prove to a mathematical certainty, the future success of the plan. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988). Rather, a plan is feasible if it "offers a reasonable assurance of success," and "[s]uccess need not be guaranteed." *Id.*; *see also In re WorldCom Inc.*, 2003 WL 23861928, at *57 (Bankr. S.D.N.Y. Oct. 31, 2003). No party has objected to confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

75. In evaluating feasibility, courts have identified the following nonexclusive probative factors:

- the prospective earnings of the business or its earning power;
- the soundness and adequacy of the capital structure and working capital for the business which the debtor will engage in post-confirmation;
- the prospective availability of credit;
- whether the debtor will have the ability to meet its requirements for capital expenditures;
- economic and market conditions;
- the ability of management, and the likelihood that the same management will continue; and
- any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

See, e.g., id. at *58; *In re Texaco Inc.*, 84 B.R. 893, 910 (Bankr. S.D.N.Y. 1988); *In re Prudential Energy Co.*, 58 B.R. 857, 862-63 (Bankr. S.D.N.Y. 1986).

76. Application of these factors here indicates that the Plan is feasible. The Plan leaves the Debtor with a sustainable capital structure that is significantly deleveraged. (*See* Rodriguez Decl., ¶ 31–32). The Reorganized Debtor will emerge from chapter 11 with adequate liquidity and working capital to support a strong balance sheet. (*Id.*) Significantly, the Debtor will emerge with a re-optimized fleet structure and a redesigned network that will better position it for long-term success in the highly competitive industry it operates in. The Debtor and its advisors have prepared financial projections for the calendar years 2022 through 2024 based on a number of assumptions with respect to the future performance of the Reorganized Debtor's operations (the "**Financial Projections**"). (*See* Disclosure Statement, Exhibit D). As set forth in the Financial Projections, an analysis of these factors in the context of the Chapter 11 Case demonstrates that the Plan is feasible. (*See* Rodriguez Decl., ¶ 31–32).

77. The Debtor, together with its stakeholders—including the future owners of the Reorganized Debtor—has thoroughly analyzed the Reorganized Debtor's ability to meet its

obligations under the Plan post-emergence and the Debtor submits that Confirmation of the Plan is not likely to be followed by liquidation or the need for further reorganization. The Financial Projections for the Reorganized Debtor demonstrates that the Reorganized Debtor expects to be able to meet its obligations under the Plan while maintaining sufficient liquidity and capital resources. (*See* Rodriguez Decl., ¶ 32) For the foregoing reasons, the Debtor submits that the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code.

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

78. 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." Section 507(a)(2) 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. In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, Section 12.1 of the Plan provides that on the Effective Date, and thereafter as may be required, such fees will be paid by the Reorganized Debtor. No party has objected on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

N. Section 1129(a)(13): Retiree Benefits Will Be Continued

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

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

80. Pursuant to Section 5.13 of the Plan, all of the Debtor's "retiree benefits" and other employment obligations are being assumed or will "ride through" so they will continue without modification. Accordingly, the Plan satisfies the requirements of section 1129(a)(13).

O. Section 1129(a)(14), 1129(a)(15), 1129(a)(16): Inapplicable Provisions.

81. Sections 1129(a)(14) through 1129(a)(16) of the Bankruptcy Code are inapplicable to the Debtor. Section 1129(a)(14) relates to the payment of domestic support obligations. *See* 11 U.S.C. § 1129(a)(14). The Debtor is not subject to any domestic support obligations, and, thus, this subsection of section 1129(a) is inapplicable. Section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). *See* 11 U.S.C. § 1129(a)(15). The Debtor is not an "individual," and, accordingly, section 1129(a)(15) is inapplicable. Finally, section 1129(a)(16) of the Bankruptcy Code provides that property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust must be made in accordance with any applicable provisions of non-bankruptcy law. *See* 11 U.S.C. § 1129(a)(16). The Debtor is a moneyed, business, or commercial corporation; therefore, section 1129(a)(16) is inapplicable.

P. Section 1129(b): The Plan Satisfies the "Cram Down" Requirements with Respect to Non-Accepting Class.

82. As discussed above, the holders of Interests in Class 8 (Existing Equity Interests) are not receiving any distribution on account of their Interests[12] and, thus, are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. The Debtor submits that the Plan is nonetheless confirmable with respect to Class 8 pursuant to section 1129(b) of the Bankruptcy Code.

83. Section 1129(b) of the Bankruptcy Code provides that if a chapter 11 plan satisfies all applicable requirements of section 1129(a) except for the requirement in section 1129(a)(8) that all impaired classes accept the plan, the plan may be confirmed as long as it does

[12] Pursuant to the Plan, holders of Class 8 Existing Equity Interests will retain their Existing Equity Interests which will be diluted to 0.001% of the number and value of such Interests as of the Petition Date.

not discriminate unfairly, and is "fair and equitable" with respect to each class of claims and interests that is impaired and has not accepted the plan. 11 U.S.C. § 1129(b)(1); *see also In re Genco Shipping & Trading Ltd.*, 513 B.R. at 241 ("[I]f a plan meets all of the other confirmation criteria in Section 1129(a), it may still be confirmed over the rejection of a class of claims or interests, so long as 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.'"). As discussed above, the Impaired Class voted to accept the Plan; but Class 8 is presumed to reject, thereby implicating section 1129(b) of the Bankruptcy Code.

1. The Plan Does Not Discriminate Unfairly.

84. Section 1129(b)(1) does not prohibit discrimination between classes or claims or interests as long as such discrimination is not *unfair*. No party with standing has objected to Confirmation of the Plan on the basis that the Plan discriminates unfairly.

85. Under section 1129(b) of the Bankruptcy Code, a plan unfairly discriminates where similarly situated claims or interests are treated differently without a reasonable basis for the disparate treatment. *In re Sabine Oil & Gas Corp.*, 555 B.R. at 310–11 (finding that "[c]ourts generally will approve placement of similar claims in different classes provided there is a 'rational' or 'reasonable' basis for doing so"). As between two classes of claims or equity interests, a plan does not unfairly discriminate if (i) the classes are comprised of dissimilar claims or interests, *see, In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for disparate treatment, *see, e.g., Drexel Burnham Lambert Grp.*, 138 B.R. at 757 ("[c]ourts frequently interpret section 1122 to permit separate classification of different groups of unsecured claims where a reasonable basis existed for the classification").

86. Under the foregoing standards, the Plan does not "discriminate unfairly" with respect to any class of Claims or Interests. The Claims and Interests in each Class are legally distinct in nature from the Claims and Interests in any other Class. Specifically, differences in legal attributes of the claims held by each of the classes comprised of general unsecured creditors supporting the plan (Class 3), unsecured trade creditors (Class 4), employees (Class 5), and customer creditors (Class 6) justify the separate classification of those Claims. Further, the unique legal attributes of the intercompany claims that make up Class 7 justify those Claims being separately classified. Lastly, the Interests contained in Class 8 are properly classified, as there are no other Classes containing holders with Interests similar to those in Class 8.

87. Therefore, given that the Claims and Interests in all Classes are "dissimilar" from the Claims and Interests in all other Classes, and the Plan thus does not provide any distributions on account of any similarly situated Claims or Interests, the Plan does not discriminate unfairly with respect to any Class. Accordingly, the Plan meets the first requirement of section 1129(b)(1).

2. The Plan is Fair and Equitable.

88. For a plan to be "fair and equitable" with respect to an impaired class of unsecured claims or interests that rejects a plan (or is deemed to reject a plan), the plan must follow the "absolute priority" rule and satisfy the requirements of section 1129(b)(2). 11 U.S.C. § 1129(b)(2)(B)(ii); 11 U.S.C. § 1129(b)(2)(C)(ii); *see also Bank of Am. Nat'l Trust & Sav. Ass'n*, 526 U.S. at 441–42 ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior

claim or interest any property.'") (alteration in original) (citation omitted). Generally, this requires that the impaired rejecting class of claims or interests either be paid in full or that any class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest. *See id.*

89. The proposed treatment of Class 8 under the Plan satisfies the absolute priority rule, and no party has objected to Confirmation of the Plan on the basis that it does not. Section 1129(b)(2)(C)(ii) of the Bankruptcy Code provides that a plan satisfies the absolute priority rule with respect to a class of interests that is not receiving full value where: "(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property." 11 U.S.C. § 1129(b)(2)(C)(ii).

90. Distributions under the Plan are made in the order of priority prescribed by the Bankruptcy Code and in accordance with the absolute priority rule. The "fair and equitable standard" is satisfied as to holders of Claims and Interests in Class 8 (Existing Equity Interests), because no Claims or Interests junior to the Claims or Interests in Class 8 will receive or retain any property under the Plan on account of such junior Claims or Interests. See *In re Sabine Oil & Gas Corp.*, 555 B.R. at 316. Accordingly, the Plan is "fair and equitable" with respect to Class 8, the lone rejecting Class, and thus, the Plan may be confirmed under section 1129(b) of the Bankruptcy Code.

Q. Sections 1121(a), 1129(c), 1129(d), and 1129(e) and Bankruptcy Rule 3016.

91. The Debtor is an eligible debtor under section 109 of the Bankruptcy Code and is a proper plan proponent under section 1121(a) of the Bankruptcy Code. The Plan is the only plan filed in this case, and accordingly, section 1129(c) of the Bankruptcy Code is satisfied. 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, as amended, and thus the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code. The Debtor's Chapter 11 Case is not a "small business case[s]," as that term is defined in the Bankruptcy Code, and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable. The Plan satisfies Bankruptcy Rules 3016(a) and (c) because the Plan is dated and identifies the proponents of the Plan as the Debtor and Section 10.5 of the Plan describes in specific and conspicuous bold language all acts to be enjoined and identifies the entities that would be subject to the injunction.

R. Procedures Relating to Assumption and Rejection of Executory Contracts and Unexpired Leases Are Appropriate

92. Article VIII of the Plan sets forth various procedures with respect to the assumption, assumption and assignment, and rejection of Executory Contracts and Unexpired Leases (the "**Assumption and Rejection Procedures**"), including the Debtor's right to designate Executory Contracts and Unexpired Leases for assumption through the Effective Date by amending the Schedule of Assumed Contracts and Leases through such date.[13] The Debtor submits that these procedures comply with the Bankruptcy Code and are appropriate under the circumstances. No party has objected to Confirmation of the Plan on the basis that the Assumption and Rejection Procedures are improper.

93. Although section 365(d)(2) of the Bankruptcy Code provides that the a chapter 11 debtor may assume or reject an executory contract or an unexpired lease "at any time before the confirmation of the plan," courts and commentators have found this language not to constitute a temporal limitation. *See 3 Collier on Bankruptcy* ¶ 365.05[2][d] (Alan N. Resnick & Henry J. Somer, 16th ed. 2016) ("Assumption or rejection is permitted post confirmation."). This is

[13] *See* Plan, Section 1.76 for the reservation of the right to amend the schedule through the Effective Date.

confirmed by similarly permissive language in section 1123(b)(2), which states that a chapter 11 plan "***may*** . . . subject to section 365 . . . ***provide for*** the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected." 11. U.S.C. § 1123(b)(2) (emphasis added). Interpreting section 365(d)(2) together with section 1123(b)(2), courts have observed that "two fundamental points emerge: (1) a trustee may, but is not required to, assume or reject an executory contract before plan confirmation; and (2) if a contract is not assumed or rejected pre-confirmation, the plan itself may provide for assumption or rejection." *DJS Props., L.P. v. Simplot*, 397 B.R. 493, 498 (D. Idaho 2008); *see also In re Triangle USA Petroleum Corp.*, No. 16-11566 (MFW), Hr'g Tr. at 111:22–23 (Bankr. D. Del. Mar. 10, 2017) (finding that sections "365(d)(2) and 1123 both use permissive language"). Because section 365(d)(2) and section 1123(b)(2) are permissive, "nothing expressly prohibits a plan from 'providing' for assumption or rejection by selecting a post-confirmation date for that action." *DJS Props.*, 397 B.R. at 498; *accord Triangle USA*, Hr'g Tr. at 111:24–112:1 ("Congress knows when to set an absolute deadline, and I don't think the language used by Congress in these two provisions is that.").

94. Thus, the Assumption and Rejection Procedures conform with the applicable provisions of the Bankruptcy Code. Numerous courts have confirmed chapter 11 plans that permit the debtor(s) to assume or reject executory contracts through the effective date of the plan. See, e.g., *In re Northwest Hardwoods, Inc.*, No. 20-13005 (Bankr. D. Del. 2020) [ECF No. 175] (confirming a plan that provided for assumption and rejection of executory contracts and unexpired leases prior to the effective date of the plan); *In re RentPath Holdings, Inc.*, No. 20-10312 (Bankr. D. Del. 2020) [ECF No. 900] (up to and including five calendar days prior to the effective date of the plan); *In re Diamond Offshore Drilling, Inc.*, No. 20-32307 (Bankr. S.D.

Tex. 2020) [ECF No. 1231-1] (up to and including the effective date of the plan); *In re J.C. Penney Co., Inc.*, No. 20-33801 (Bankr. S.D. Tex. 2020) [ECF No. 2190] (up to and including the effective date of the plan).

95. Accordingly, the Debtor submits that the Assumption and Rejection Procedures are appropriate and comply with section 1123(b)(2) of the Bankruptcy Code.

S. Section 1127: Modification of the Plan.

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

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

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

97. The Debtor has made certain technical modifications to the Plan to, among other things, resolve certain informal comments that the Debtor received from various parties in interest and to clarify certain provisions of the Plan, including with respect to exit financing. Notably, previous versions of the Plan included language concerning an optional secured exit facility. The Plan, which referred to the potential secured exit facility to provide additional

optionality and flexibility to the Debtor, has now been clarified to reflect that the Debtor is still engaging in additional negotiations with potential lenders and may elect to not to proceed with such financing prior to the Effective Date. In light of this secured exit facility always being contemplated as optional, under both the Restructuring Support Agreements and previous versions of the Plan, the Debtor clarifying these provisions concerning that facility in the Plan does not have any effect on any party's rights or recoveries under the Plan.

98. Therefore, as discussed above, the Plan, as modified, complies with sections 1122 and 1123 of the Bankruptcy Code, and the Debtor has complied with section 1125 of the Bankruptcy Code, and thus the requirements of section 1127 have been satisfied. Further, given that the modifications to the Plan were technical in nature and none of the modifications "adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification," the requirements of Bankruptcy Rule 3019(a) has been satisfied. Fed. R. Bankr. P. 3019(a).

II. IMMEDIATE EFFECTIVENESS.

99. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise." The Debtor respectfully submits that cause exists for waiving the stay of the entry of the Confirmation Order such that the Confirmation Order will be effective immediately upon its entry. The Debtor has undertaken great efforts to facilitate its restructuring to exit chapter 11 as soon as practicable. Many of the Debtor's key suppliers and contract counterparties, including the Supporting Creditors, have communicated that they expect an emergence date by the end of 2021. Further, each day that the Debtor remains in chapter 11 it incurs additional administrative and professional costs. Given the overwhelming support for the Plan, the Debtor submits that no

party will be prejudiced by the Debtor's swift emergence from chapter 11. The Debtor therefore respectfully requests a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

III. THE CURE RESPONSES HAVE BEEN OR WILL BE RESOLVED

100. The Debtor received three formal responses to the Plan's proposed assumption provisions. Importantly, none of these responses objected to confirmation of the Plan. Instead, these responses were each related to questions regarding the proposed Cure Amounts. See:

- *Anuvu Corp.'s Reservation of Rights Related to the Debtor's Notice of (A) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Plan, (B) Cure Amounts, if Any, and (C), Related Procedures in Connection Therewith* [ECF No. 302].
- *Oracle America, Inc. and Oracle (Philippine) Corporation's Cure Objection in Connection with the Chapter 11 Plan of Reorganization of Philippine Airlines, Inc.* [ECF No. 304].
- *Limited Objection and Reservation of Rights of Lufthansa Technik Philippines, Inc. and Lufthansa Technik AG to Proposed Cure Amounts with Respect to Executory Contracts* [ECF No. 309].

101. The Debtor is currently engaged in discussions with each of these creditors to address the creditors' concerns and the Debtor is optimistic that each will be resolved in the near term. In accordance with section 8.2 of the Plan, if the Debtor is unable to resolve an Assumption Dispute relating solely to the amount of a Cure Claim prior to the Confirmation Hearing, such Assumption Dispute may be scheduled to be heard by the Bankruptcy Court after the Confirmation Hearing, and not during the Confirmation Hearing.

IV. CONCLUSION

102. Based upon the foregoing, the Plan fully satisfies all applicable requirements of the Bankruptcy Code. Accordingly, the Debtor respectfully requests that the Court confirm the Plan pursuant to section 1129 of the Bankruptcy Code.

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