Docket #0465 Date Filed: 5/22/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
STARRY GROUP HOLDINGS, INC., *et al.*,[1]	:	Case No. 23-10219 (KBO)
Debtors.	:	(Jointly Administered)

DEBTORS' (A) MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE THIRD AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF STARRY GROUP HOLDINGS, INC. AND ITS DEBTOR AFFILIATES UNDER CHAPTER 11 OF THE BANKRUPTCY CODE AND (B) OMNIBUS REPLY TO OBJECTIONS TO CONFIRMATION

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[1] The debtors in these cases, along with the last four digits of each debtor's federal tax identification number, are: Starry Group Holdings, Inc. (9355); Starry, Inc. (9616); Connect Everyone LLC (5896); Starry Installation Corp. (7000); Starry (MA), Inc. (2010); Starry Spectrum LLC (N/A); Testco LLC (5226); Starry Spectrum Holdings LLC (9444); Widmo Holdings LLC (9208); Vibrant Composites Inc. (8431); Starry Foreign Holdings Inc. (3025); and Starry PR Inc. (1214). The debtors' address is 38 Chauncy Street, Suite 200, Boston, Massachusetts 02111.

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PRELIMINARY STATEMENT

1. Approximately three months after entering chapter 11, the Debtors are prepared, with substantial support from their major constituents, to confirm the *Third Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 459] (as may be amended, supplemented or modified from time to time, the "**Plan**").[2] The Plan has been overwhelmingly approved by both of the Debtors' voting Classes, and is supported by the Committee. Additionally, the Debtors have resolved all outstanding issues with the United States Trustee. Combined with the Debtors' months-long work to maximize value and resolve disputes, the Debtors are pleased to report that there are no remaining objections to confirmation of the Plan.[3]

2. The Debtors filed the Chapter 11 Cases with a Restructuring Support Agreement (as defined below) executed by Prepetition Lenders holding 100% of the Debtors' Prepetition Term Loan Claims, pursuant to which Class 3 (Prepetition Term Loan Claims) has voted unanimously to accept the Plan. During the Chapter 11 Cases, and as contemplated by the Restructuring Support Agreement, the Debtors proceeded down a dual-track path, simultaneously pursuing both a standalone Restructuring and a Sale Transaction to maximize the value of the Estates. After a robust postpetition marketing process that followed months of prepetition marketing, the value-maximizing transaction proved to be the Restructuring, through which the Prepetition Lenders will equitize their Prepetition Term Loan Claims and become the owners of the Reorganized Debtors. Following the Petition Date, the Debtors, their management team and

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[2] Capitalized terms used but not defined in this Memorandum of Law have the meanings set forth in the Plan.

[3] There are outstanding objections with respect to the assumption of certain Executory Contracts, which have been adjourned and the Debtors expect will be consensually resolved.

board of directors, the Prepetition Agent, Prepetition Lenders, DIP Agent, and DIP Lenders (such lender parties collectively, the "**Lenders**") diligently pursued both the Restructuring and the Sale Transaction. The Debtors ultimately did not receive any actionable bids toward the Sale Transaction, other than a credit bid from the Lenders, intended as a back-up to the Restructuring, but they now stand ready to effectuate the Restructuring. The Restructuring represents the best option available to the Debtors, and will preserve jobs, result in the assumption of numerous contracts, provide for payment of administrative and priority Claims, preserve a counterparty for vendors and service providers, provide a recovery for general unsecured creditors, and mitigate other potential Claims against the Estates.

3. During the Chapter 11 Cases, the Debtors, along with the Lenders, engaged in ongoing negotiations with the Committee, resulting in a settlement memorialized in the Plan. As a result, the Plan is supported by the Committee,[4] and Class 4 (General Unsecured Claims) voted by significant margins to accept the Plan.

4. The Debtors now seek confirmation of the Plan. This Memorandum of Law presents an analysis of the issues regarding Confirmation pursuant to section 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "**Bankruptcy Code**"). As provided in detail

[4] *See Notice of Filing of Form of Updated Letter of the Official Committee of Unsecured Creditors Regarding Second Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and its Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 411] (the "**Committee Letter**").

below, in the Voting Report,[5] and in the Confirmation Declarations,[6] the Plan satisfies the applicable requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

5. In connection with Confirmation, certain parties filed objections with the Court, while others provided informal comments to the Debtors (collectively, the "**Confirmation Objections**"). For the convenience of the Court, the Debtors have attached as **Exhibit A** to this Memorandum of Law a response chart (the "**Response Chart**"), summarizing the main thrust of each Confirmation Objection and the Debtors' responses thereto, as well as all formal and informal objections the Debtors have received to assumption of, or proposed Cure Costs for, certain Executory Contracts. The Debtors have consensually resolved all objections and comments they have received in respect of Confirmation.

BACKGROUND[7]

A. Prepetition Restructuring Efforts and Restructuring Support Agreement

6. The Debtors (and before the Petition Date, the "**Company**"), are a fixed wireless broadband internet service provider. As a growth-stage company, the Company invested significant capital to developing its technology and achieving greater penetration in established

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[5] *Declaration of Darlene S. Calderon with Respect to the Tabulation of Votes on the Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 458] (the "**Voting Report**").

[6] As used herein, the *Declaration of Chaitanya Kanojia in Support of Confirmation of Third Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 462] ("**Kanojia Declaration**") and the *Declaration of Heath C. Gray in Support of Confirmation of Third Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 461] (the "**Gray Declaration**" and, collectively, the "**Confirmation Declarations**").

[7] The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the *Declaration of Chaitanya Kanojia Inc. in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 41] (the "**First Day Declaration**").

markets. As a result, it has generated losses and negative cash flows from operating activities since inception.

7. The Company went public through a de-SPAC transaction in March 2022 (the "**de-SPAC**"). Although the Company raised approximately $156.5 million in net proceeds in connection with the de-SPAC, this amount was significantly less than originally anticipated due to substantial redemptions by FirstMark Horizon Acquisition Corp. ("**Firstmark**") stockholders in connection with the consummation of the de-SPAC. As a result of such a high level of redemptions, FirstMark's trust account was substantially depleted, and the Company received only $36.2 million in cash from FirstMark's trust account.[8]

8. To address ongoing liquidity needs, the Company pursued a broad range of additional strategic transactions starting in the first half of 2022. These transactions included a potential refinancing of their funded indebtedness and/or a private placement sale of equity, and a potential sale transaction in the form of an acquisition of the Company by a third party. Although the Company received responses from several parties potentially interested in participating in a refinancing transaction, no such transaction was ultimately consummated. Similarly, while the Debtors engaged in significant diligence, discussions, and negotiations with one party that had expressed interest in a sale transaction, which the Debtors believed likely to result in a transaction as talks progressed, such party ultimately terminated discussions with the Debtors in the fourth quarter of 2022.

9. Promptly following the termination of discussions regarding the above-referenced transactions, the Company implemented internal cost reductions and carefully considered a

[8] *See* Disclosure Statement at 29-30 (The Disclosure Statement contains a scriveners' error incorrectly listing the cash received as $3.62 million instead of $36.2 million); First Day Declaration ¶ 9; Starry Group Holdings, Inc., Annual Report (Form 10-K) (March 31, 2022).

number of potential alternatives to address liquidity needs. In connection therewith, the Company retained PJT Partners LP ("**PJT**") and FTI Consulting, Inc. ("**FTI**") in October 2022 to assist with strategic planning. In October 2022, PJT commenced another marketing process aimed at identifying potential buyers for the Company, which involved broad outreach to both strategic and financial sponsor candidates. Ultimately, the Company received no actionable proposals.

10. Over the course of several months in late 2022 and early 2023, the Company and the Lenders negotiated the terms of a restructuring transaction, which discussions culminated in the entry into that certain Restructuring Support Agreement (as amended, supplemented, or otherwise modified from time to time, the "**Restructuring Support Agreement**"). The Restructuring Support Agreement set forth a dual-track process pursuant to which the Lenders collectively agreed to backstop and assume control of the Debtors' business under a chapter 11 plan, subject to superior bids for the Debtors' assets or reorganized equity under a Sale Transaction.

11. As it became apparent that the Debtors would potentially be required to restructure through a chapter 11 proceeding, the Debtors, through their counsel Young Conaway Stargatt & Taylor, LLP ("**Young Conaway**"), conducted an in-depth review of possible Causes of Action against parties that would potentially be released in connection with a chapter 11 plan, including, without limitation, the Lenders as well as the Company's current and former directors and officers, as further discussed in section V.G of the Disclosure Statement. This investigation was overseen by an independent board member who is also Chair of the Nominating & Governance Committee and included an in-depth review of the Debtors' books and records, board presentations and other corporate governance documents, and interviews with the Debtors' senior management, as well

current and former members of the Debtors' board of directors. Young Conaway's investigation concluded that there were no colorable Claims being released.[9]

B. The Chapter 11 Cases and Solicitation Process

12. On February 20, 2023 (the "**Petition Date**"), the Debtors entered into the Restructuring Support Agreement and immediately thereafter filed voluntary petitions in the Court commencing the Chapter 11 Cases. The Debtors continue to manage and operate their business as debtors in possession under sections 1107 and 1108 of the Bankruptcy Code.[10]

13. By an order dated March 31, 2023 (the "**Disclosure Statement Order**") [Docket No. 271], the Court approved the *Disclosure Statement for Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 273] (the "**Disclosure Statement**") and certain solicitation procedures (the "**Solicitation Procedures**") in connection with the *Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 272] (the "**Solicited Plan**").

14. On May 8, 2023, as contemplated by the Disclosure Statement Order, the Debtors filed the Plan Supplement [Docket No. 408]. The Plan Supplement contains the Assumed Contracts List and the Rejected Contracts List, a list of retained Causes of Action, disclosures regarding the individuals proposed to serve as directors and officers of the Reorganized Debtors,

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[9] *See* Kanojia Decl. ¶ 51; Committee Letter. Upon completion of Young Conaway's investigation, and upon recommendation of the independent director overseeing the investigation, the Debtors' board of directors concluded, in the exercise of its business judgment, to continue to support confirmation and consummation of the Plan, including the Debtor Release contained therein. *See* Kanojia Decl. ¶ 51.

[10] The Debtors or Reorganized Debtors, as applicable, subject to the Definitive Document Consent Rights, reserve the right to amend or supplement the Rejected Contracts List in their discretion on or before the Confirmation Date, provided that the Debtors may remove any Executory Contract or Unexpired Lease from the Rejected Contract List in their discretion on or before the Effective Date. *See* Plan Art. V.A.

the Exit Facility documentation, and the Restructuring Memorandum. On May 22, 2023, the Debtors filed an updated Plan Supplement [Docket No. 463] containing further updated versions of the Assumed Contracts List and Rejected Contracts List, updated disclosures regarding the individuals proposed to serve as directors and officers of the Reorganized Debtors, and the New Organizational Documents.[11]

C. The Voting Results

15. On May 22, 2023, the Notice and Claims Agent filed the Voting Report. As set forth more fully in the Voting Report, 100% of voting Holders in Class 3 voted to accept the Plan, and 87.84% of voting Holders in Class 4 (holding 73.19% of the Class 4 Claims) voted to accept the Plan[12]:

Class	Class Description	%Members Accepted	%Members Rejected	Total Dollars Voted	Dollars Accepted	Dollars Rejected	% of Dollars Accepted	% of Dollars Rejected	Class Accepted or Rejected
3	Prepetition Term Claims	100%	0%	$287,509,059.22	$287,509,059.22	$0.00	100%	0%	Accepted
4	General Unsecured Claims	87.84%	12.16%	$20,270,282.99	$14,836,225.68	$5,434,057.31	73.19%	26.81%	Accepted

16. The remaining Classes under the Plan were either deemed to accept or deemed to reject the Plan. Holders of Claims in Class 1 are Unimpaired and conclusively presumed to have accepted the Plan and, therefore, were not entitled to vote to accept or reject the Plan. Holders of Claims and Interests in Classes 5 and 7 either are Unimpaired, in which case they are conclusively deemed to have accepted the Plan, or Impaired and not entitled to any recovery, in which case they are conclusively deemed to have rejected the Plan, and therefore, were not entitled to vote to accept or reject the Plan. Holders of Claims and Interests in Classes 6 and 8 (together with Holders of

[11] Consistent with the Plan, the Debtors reserve the right to amend, modify, or supplement the Plan Supplement. *See* Plan Art. I.A.

[12] *See* Voting Report Ex. A.

Claims in Class 5 and 7, to the extent Impaired under the Plan, the "**Deemed Rejecting Classes**" are Impaired under the Plan, are entitled to no recovery under the Plan, and are therefore conclusively deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. As discussed below, the Debtors satisfy section 1129(b)'s "cramdown" requirements with respect to the Deemed Rejecting Classes, and the Debtors request that the Court confirm the Plan notwithstanding any such deemed rejection.

17. On May 8, 2023 and May 22, 2023, the Debtors filed amendments to the Solicited Plan, which incorporated the holistic settlement with the Committee, resolved certain informal objections raised by the United States Trustee, and included certain other technical modifications.[13] None of the modifications to the Solicited Plan will materially adversely affect the treatment of those Classes of Claims that accepted the Solicited Plan.[14] Thus the modifications do not require the Debtors to resolicit acceptances for the Plan.[15]

THE PLAN SHOULD BE CONFIRMED

18. To confirm the Plan, the Court must find that the applicable provisions of section 1129 of the Bankruptcy Code have been satisfied by a preponderance of the evidence.[16]

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[13] The Debtors filed the *Second Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and its Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 407] on May 8, 2023.

[14] *See* 11 U.S.C. § 1127(a) ("The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.").

[15] *See* Fed. R. Bankr. P. 3019(a); *In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988) ("[I]f a modification does not 'materially' impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.").

[16] *See, e.g.*, *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006). Preponderance of the evidence has been described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true. *See Grogan* v. *Garner*, 498 U.S. 279, 286 (1991) ("[T]he preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants . . . ." (citations omitted)).

The Debtors submit that based on the record of the Chapter 11 Cases, the Voting Report, the Confirmation Declarations, and the Debtors' arguments set forth herein, the applicable burden is clearly met and the Plan complies with all relevant sections of the Bankruptcy Code, the Bankruptcy Rules, and applicable non-bankruptcy law. In particular, the Plan fully complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code.

I. The Plan Complies with the Applicable Provisions of the Bankruptcy Code in Accordance with Section 1129(a)(1).

19. Section 1129(a)(1) of the Bankruptcy Code requires that a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. A principal objective of section 1129(a)(1) is to ensure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan. Consequently, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of sections 1122 and 1123 of the Bankruptcy Code.[17]

A. The Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code.

20. The Plan satisfies the classification requirements of section 1122 of the Bankruptcy Code. Section 1122 provides as follows:

> (a) 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.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to

[17] *See In re Aspen Limousine Serv. Inc.*, 193 B.R. 325, 340 (Bankr. D. Colo. 1996) ("[P]aragraph (a)(1) 'requires that the plan comply with the applicable provisions of chapter 11, such as sections 1122 and 1123, governing classification and contents of plan.'" (quoting S. Rep. No. 95-989, at 126 (1978))); *In re Texaco Inc.*, 84 B.R. 893, 905 (Bankr. S.D.N.Y. 1988).

> an amount that the court approves as reasonable and necessary for administrative convenience.[18]

21. Claims or interests in a given class need not be identical but should be substantially similar in nature to each other.[19] The Third Circuit has recognized that plan proponents have significant flexibility in placing similar claims into different classes if there is a rational basis to do so.[20] Courts have identified grounds justifying separate classification, including where members of a class possess different legal rights[21] and where there are good business reasons for separate classification.[22]

22. The Plan's classification of Claims and Interests[23] satisfies the requirements of section 1122 because (a) each Class contains only Claims or Interests that are substantially similar to the other Claims or Interests in such Class and (b) there are valid business, factual, or legal

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[18] 11 U.S.C. § 1122.

[19] *See In re Coastal Broad. Sys., Inc.*, 570 F. App'x 188, 193 (3d Cir. 2014); *see also In re Idearc Inc.*, 423 B.R. 138, 160 (Bankr. N.D. Tex. 2009) ("[A] plan may provide for multiple classes of claims or interests so long as each claim or interest within a class is substantially similar to other claims or interests in that class.").

[20] *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (explaining that a classification is proper as long as each class represents a voting interest "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed").

[21] *In re Kaiser Aluminum Corp.*, No. 02-10429, 2006 WL 616243, at *5–6 (Bankr. D. Del. Feb. 6, 2006) (permitting a classification scheme after consideration of the characteristics of each class and creditors' legal rights); *In re Coram Healthcare Corp.*, 315 B.R. 321, 348 (Bankr. D. Del. 2004) (noting that "Section 1122 . . . provides that claims that are not 'substantially similar' may not be placed in the same class; it does not expressly prohibit placing 'substantially similar' claims in separate classes").

[22] *See Aetna Cas. & Sur. Co. v. Clerk of U.S. Bankr. Court (In re Chateaugay Corp.)*, 89 F.3d 942, 949 (2d Cir. 1996) (finding that the debtor must have a legitimate reason supported by credible proof to justify separate classification of similar, unsecured claims); *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 956–57 (2d Cir. 1993) (finding separate classification appropriate because the classification scheme had a rational basis; separate classification based on bankruptcy court-approved settlement); *In re Magnatrax Corp.*, No. 03-11402, 2003 WL 22807541, at *4 (Bankr. D. Del. Nov. 17, 2003) (permitting separate classification based on valid business, factual, and legal reasons).

[23] The Plan contains eight (8) Classes of Claims and Interests. *See* Plan Art. III.

reasons for the separate classifications under the Plan. The classifications are based largely on the different rights and attributes of the respective Claims and Interests, including their security and relative priority under the Bankruptcy Code, and the Plan classifies all general unsecured creditors in a single Class.[24] Thus, the Plan satisfies section 1122 of the Bankruptcy Code.

B. The Plan Satisfies the Seven Applicable Requirements of Section 1123(a).

23. The Plan also meets the seven (7) requirements of section 1123(a) of the Bankruptcy Code applicable to corporate debtors. Specifically, section 1123(a) requires that a plan:

> (a) designate classes of claims and interests;
>
> (b) specify unimpaired classes of claims and interests;
>
> (c) specify treatment of impaired classes of claims and interests;
>
> (d) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;
>
> (e) provide adequate means for implementation of the plan;
>
> (f) provide for the prohibition of the issuance of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and
>
> (g) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors.[25]

1. Section 1123(a)(1): Designation of Classes

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[24] *See id.*

[25] 11 U.S.C. § 1123(a).

24. Section 1123(a)(1) requires that a plan must designate classes of claims and classes of equity interests, subject to section 1122 of the Bankruptcy Code. As discussed above, the Plan designates six (6) Classes of Claims and two (2) Classes of Interests, subject to section 1122. Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

2. Section 1123(a)(2): Classes That Are Not Impaired by the Plan

25. Section 1123(a)(2) requires a plan to specify which classes of claims or interests are unimpaired by the plan. Article III of the Plan specifies that (a) Class 1 (Other Priority Claims) and Class 2 (Other Secured Claims) are Unimpaired and (b) Class 5 (Intercompany Claims) and Class 7 (Intercompany Interests) may be Unimpaired under the Plan. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

3. Section 1123(a)(3): Treatment of Classes Impaired by the Plan

26. Section 1123(a)(3) requires a plan to specify how classes of claims or interests that are impaired by the plan will be treated. Article III of the Plan sets forth the treatment of Impaired Claims in Class 3 (Prepetition Term Loan Claims), Class 4 (General Unsecured Claims), Class 5 (Intercompany Claims), Class 6 (Subordinated Claims), Class 7 (Intercompany Interests), and Class 8 (Equity Interests). Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

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

27. Section 1123(a)(4) requires that a plan provide the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members. Pursuant to the Plan, the treatment of each Claim against or Interest in the Debtors, in each respective Class, is the same as the treatment of each other Claim or Interest in such Class. That includes Class 4 (General Unsecured Claims), in which the Holders of General Unsecured Claims each have the same opportunity to be a Participating

GUC Holder and share in the contemplated distribution to such parties.[26] Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

5. Section 1123(a)(5): Adequate Means for Implementation

28. Article IV and various other provisions of the Plan and Plan Supplement provide adequate means for the Plan's implementation, thus satisfying section 1123(a)(5) of the Bankruptcy Code.[27] These provisions include, without limitation, (a) the establishment of a Professional Fee Escrow Account to secure the payment of certain Professional Fee Claims; (b) the good-faith compromise and settlement of Claims, Interests, Causes of Action, and controversies relating thereto; (c) the effectuation of the transactions included as part of the Restructuring; (d) the vesting of certain of the Debtors' property in the Reorganized Debtors; (e) the cancellation of certain financial instruments and Interests; (f) the specification of sources of consideration for distributions under the Plan; (g) the approval of the terms of the Exit Facility and associated agreements; (h) the acquisition of the Reorganized Starry Holdings Equity by New Starry; (i) specification of the tax treatment and reporting in connection with the transactions contemplated by the Plan; (j) the appointment of the New Board and deemed resignation of the Debtors' directors as of the Effective Date; (k) the provision of authority to the Reorganized Debtors to pursue, settle, or abandon retained Causes of Action; (l) the provision of authority to undertake corporate actions necessary to effectuate the Plan; and (m) the provision of authority to the reject or assume Executory Contracts and Unexpired Leases.

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[26] *See In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013) ("What matters, then, is not that claimants recover the same amount but that they have equal opportunity to recover on their claims."); *In re Dana Corp.*, 412 B.R. 53, 62 (Bankr. S.D.N.Y. 2008) ("The key inquiry under § 1123(a)(4) is not whether all of the claimants in a class obtain the same thing, but whether they have the same opportunity").

[27] *See* 11 U.S.C. § 1123(a)(5); Plan Art. IV.

29. Accordingly, the Plan, together with the documents and agreements contemplated by the Plan and the Plan Supplement, provides the means for implementation of the Plan as required by and in satisfaction of section 1123(a)(5) of the Bankruptcy Code.

6. Section 1123(a)(6): Amendment of the Reorganized Debtors' Charters

30. In accordance with section 1123(a)(6) of the Bankruptcy Code, the organizational documents of each Debtor have been or will be amended on or before the Effective Date to prohibit the issuance of non-voting equity securities. Specifically, the New Organizational Documents set forth in the Plan Supplement, as applicable, contain such a prohibition and will be adopted by the Reorganized Debtors on the Effective Date. Accordingly, the Plan satisfies section 1123(a)(6).

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

31. The seventh requirement of section 1123(a) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan."[28] Article IV.P of the Plan provides that the New Board will be appointed as of the Effective Date in accordance with the respective New Organizational Documents. The Plan also provides that officers and the overall management structure of the Reorganized Debtors will be subject to the required approvals and consents set forth in the New Organizational Documents. Further, each director, officer, or manager of each Reorganized Debtor will be appointed and serve pursuant to the terms of its respective charters and bylaws or other formation and constituent documents, and the New Organizational Documents, and applicable laws of the respective Reorganized Debtor's jurisdiction of formation. The Debtors have also disclosed, as part of the Plan Supplement, the identity and affiliations of all individuals or entities proposed to serve on or after the Effective

[28] 11 U.S.C. § 1123(a)(7).

Date as directors or officers of the Reorganized Debtors, to the extent known. Because the manner of selecting the New Board and the officers of the Reorganized Debtors is consistent with Delaware corporate law and has been fully disclosed to all stakeholders in the Chapter 11 Cases, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

C. The Discretionary Contents of the Plan Are Appropriate.

32. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan. For example, a plan may impair or leave unimpaired any class of claims or interests, provide for the assumption or rejection of executory contracts or unexpired leases,[29] provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate" or "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest,"[30] provide for the sale of substantially all of the property of the estate and for the distribution of the proceeds of any such sale,[31] "modify the rights of holders of secured claims . . . or . . . unsecured claims, or leave unaffected the rights of holders of any class of claims"[32] and may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[33]

33. Here, the Plan includes various provisions pursuant to section 1123(b)'s discretionary authority. For example, the Plan provides for treatment of Executory Contracts and

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[29] *Id.* § 1123(b)(1), (2).

[30] *Id.* § 1123(b)(3)(A), (B).

[31] *Id.* § 1123(b)(4).

[32] *Id.* § 1123(b)(5).

[33] *Id.* § 1123(b)(6).

Unexpired Leases,[34] provides a structure for allowance and disallowance of Claims,[35] and sets forth a process for distributions under the Plan to holders of Allowed Claims.[36]

34. Additionally, Article IX of the Plan provides for releases by the Debtors and certain other parties in interest, as well as discharge, exculpation, and injunction provisions prohibiting parties from pursuing Claims and Causes of Action discharged or released under the Plan. The Plan also provides for the settlement of all Claims, Interests, Causes of Action, and controversies resolved under its terms. These provisions are proper because, among other things, they are the product of arm's-length negotiations, are supported by substantial consideration provided by or on behalf of the beneficiaries thereof, have been critical to obtaining the support of the various constituencies for the Plan, and, as part of the Plan, have received overwhelming support from the creditors that voted for the Plan. The releases, exculpation, injunction, and settlement provisions of the Plan are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and their Estates. None of these provisions, the principal terms of which are discussed below, are inconsistent with the Bankruptcy Code, and therefore, they are permitted under section 1123(b) of the Bankruptcy Code.

1. Debtor Release

35. When considering releases by a debtor of non-debtor third parties pursuant to section 1123(b)(3)(A), the appropriate standard is whether the release is a valid exercise of the

[34] *See* Plan Art. V.

[35] *See* Plan Art. VII.A.

[36] *See* Plan Art. VI.

debtor's business judgment and is fair, reasonable, and in the best interests of the estate.[37] A debtor's decision to release claims against third parties under a plan is afforded deference as a matter of business judgment.[38]

36. In considering whether a debtor's release of claims is appropriate, some courts in this district have also examined the following list of non-exclusive and disjunctive factors (the "***Zenith* Factors**"):[39] (a) an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (b) substantial contribution by the non-debtor of assets to the reorganization; (c) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success; (d) an agreement by a substantial majority of creditors to support the injunction, specifically if the impaired class or classes "overwhelmingly" votes to accept the plan; and (e) a provision in the plan for payment of all or substantially all of the claims

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[37] *See In re Abeinsa Holding, Inc.*, 562 B.R. 265, 282 (Bankr. D. Del. 2016) ("A debtor may release claims under § 1123(b)(3)(A) if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."); *see also In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *20 (Bankr. D. Del. May 13, 2010) (finding that where a debtor release is "an active part of the plan negotiation and formulation process, it is a valid exercise of the debtor's business judgment to include a settlement of any claims a debtor might own against third parties as a discretionary provision of a plan"); *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." (footnote omitted)).

[38] *See, e.g.*, *In re Hercules Offshore, Inc.*, 565 B.R. 732, 757 (Bankr. D. Del. 2016) ("The Court need only determine that the Debtors exercised sound business judgment in deciding to accept the settlement integral to the proposed plan."); *Marvel Entm't Grp., Inv. v. MAFCO Holdings, Inc. (In re Marvel Entm't Grp., Inc.)*, 273 B.R. 58, 78 (D. Del. 2002) ("[U]nder the business judgment rule . . . a court will not interfere with the judgment of a board of directors unless there is a showing of gross and palpable overreaching. Thus, under the business judgment rule, a board's decisions will not be disturbed if they can be attributed to any rational purpose and a court will not substitute its own notions of what is or is not sound business judgment." (second alteration in original) (internal quotation marks and citations omitted)).

[39] These factors were first articulated as the standard for approving a third-party release. *See In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994).

of the class or classes affected by the injunction.[40] As a disjunctive list, these factors provide a way of "weighing the equities of the particular case after a fact-specific review."[41]

37. The Debtor Release represents a sound exercise of the Debtors' business judgment and is also appropriate under each of the *Zenith* Factors. First, an identity of interest exists between the Debtors and the Released Parties because each of the Released Parties shares the common goal of, and are integral parties to, confirming the Plan and implementing the transactions thereunder. This unified interest in formulating and confirming the Plan establishes an identity of interest under applicable law.[42] The indemnification rights of certain of the Released Parties, including directors and officers, pursuant to, among other things, the Debtors' existing corporate governance documents, also establishes an identity of interest between the Debtors and such parties.[43] Under the Plan, the Reorganized Debtors will assume all liability on account of such indemnification rights, further strengthening this identity of interest.

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[40] *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999); *see also In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013) ("These factors are neither exclusive nor are they a list of conjunctive requirements.").

[41] *Indianapolis Downs*, 486 B.R. at 303. Not each factor is relevant in every case, and releases may be approved where only one or two factors are present. *See, e.g.*, *In re Abeinsa Holding, Inc.*, 562 B.R. 265 (Bankr. D. Del. 2016) (approving release where the released parties were actively involved in negotiating the plan and four impaired creditor classes voted overwhelmingly in favor).

[42] *See, e.g.*, *Zenith*, 241 B.R. at 110 (finding an identity of interest with debtor where certain released parties who "were instrumental in formulating the Plan" shared an identity of interest with debtor "in seeing that the Plan succeed and the company reorganize"); *In re 710 Long Ridge Rd. Operating Co., II*, No. 13-13653 (DHS), 2014 WL 886433, at *15 (Bankr. D.N.J. Mar. 5, 2014) (finding identity of interest where both debtor and non-debtor released parties shared a common goal of "confirming [a plan] and implementing the transactions contemplated thereunder").

[43] *See Master Mortg.*, 168 B.R. at 937 (noting that an indemnity relationship may satisfy the identity of interest factor); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2007) (considering the "identity of interest" factor in the context of a third-party release and stating that "[t]o the extent that the third party releases are congruent with the indemnification obligations, and the [d]ebtor[] would be liable for any liability imposed on such person[]" an identity of interest is established).

38. Second, many of the Released Parties have made a substantial contribution to the Chapter 11 Cases. For example, the Released Parties include entities that, among other things, were active in the complex negotiations resulting in the Plan, agreed to compromise or waive their own rights and Claims, and/or helped to facilitate the holistic settlement with the Committee. Notably, the Lenders contributed by, among other things, agreeing to backstop and support the Plan, consenting to the use of cash collateral, equitizing their Claims, providing DIP Financing and exit financing, and facilitating a distribution from their collateral to Class 4, while the Debtors' board and management worked tirelessly to achieve a successful, value-maximizing reorganization in addition to their regular duties.[44] Without these and other contributions from the Released Parties, the Debtors would not be poised to successfully reorganize and emerge from chapter 11 on a fully consensual basis.

39. Third, the Debtor Release is essential to the success of the Plan. Without providing the Debtor Release, the Debtors do not believe they would have been able to secure the substantial benefits provided by the Plan, as contemplated by the Restructuring Support Agreement, including a deleveraged balance sheet, a meaningful opportunity to emerge from the Chapter 11 Cases and operate a more efficient business, and recoveries for Holders of Allowed General Unsecured Claims, which otherwise would not have been possible.[45] In short, had the Debtor Release not been provided, the Debtors' chances of reorganizing and maximizing value for the benefit of all stakeholders would have been diminished.

[44] *See* Kanojia Decl. ¶ 50

[45] *See id.* ¶ 52.

40. Fourth, a substantial majority of creditors support the Debtor Release. Significantly, the Debtor Release, as a critical piece of the Plan, is supported by both Classes of Claims entitled to vote on the Plan, as well as the Committee after a thorough investigation.[46] This is a significant endorsement of the Debtor Release. It reinforces and affirms the Debtors' determination that the Debtor Release is a valid exercise of their business judgment and is in the best interests of the Estates. Indeed, there could be no better evidence as to the reasonableness and fairness of the Debtor Release than the support of those creditors most affected by a release of the Debtors' Claims and Causes of Action against the Released Parties.[47]

41. In addition to the reasons set forth above, the Debtor Release is also appropriate because the released Claims and Causes of Action have no material value to the Debtors and the Estates, 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. Indeed, the releases proposed to be granted by and on behalf of the Debtors and the Estates result from the review and analysis completed by Young Conaway at the direction of one of the Debtors' independent board members, who is also Chair of the Nominating & Governance Committee, regarding potential Claims the Debtors might hold against their directors, officers, employees, lenders, stockholders,

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[46] As part of the Debtors' global settlement with the Committee, the Plan now also releases all Avoidance Actions against Holders of Allowed General Unsecured Claims, the proceeds of which constitute DIP Collateral securing the DIP Liens and Adequate Protection Liens (each as defined in the DIP Orders). *See* Plan Art. IV.R.

[47] *See Master Mortg.*, 168 B.R. at 938 (stating that creditor approval of a release is "the single most important factor" to determine whether a release is appropriate); *see also Key3Media Grp., Inc. v. Pulver.Com, Inc. (In re Key3Media Grp., Inc.)*, 336 B.R. 87, 97–98 (Bankr. D. Del. 2005) (granting a settlement of estate causes of action over a creditor's objection because, among other things, a majority of creditors approved of the settlement), *aff'd*, No. 03-10323 (MFW), 2006 WL 2842462 (D. Del. Oct. 2, 2006).

or advisors. That review determined that the Debtors did not hold colorable Claims subject to the Debtor Release.[48]

42. Accordingly, for the reasons set forth above, the Debtor Release is a reasonable exercise of the Debtors' business judgment, satisfies the *Zenith* Factors, and should be approved under section 1123(b)(3)(A) of the Bankruptcy Code.

2. Third-Party Release

43. Pursuant to Article IX.C of the Plan, the Debtors seek a consensual Third-Party Release from the following Persons (and any other Persons that might seek to claim under or through such Persons):

(a) all Holders of Claims that vote to accept the Plan;

(b) all Holders of Claims that vote to reject the Plan but do not "opt out" of the releases set forth in Article IX.C of the Plan by checking the box on their respective Ballot;

(c) the DIP Agent and the Prepetition Agent;

(d) the DIP Lenders and the Prepetition Lenders;

(e) any Successful Bidder, if applicable; and

(f) all other Released Parties (other than (1) any Debtor Releasing Party and (2) any Related Person of any Released Parties, except to the extent such Released Party is legally entitled to bind such Related Person to the releases contained in the Plan under applicable non-bankruptcy law).

44. As noted above, the Third-Party Release applies only to parties that have taken an affirmative action in respect of Confirmation and therefore manifested consent.[49] Importantly, each party was provided with the opportunity to manifest consent to or opt-out of the Third-Party

[48] *See* Kanojia Decl. ¶ 51.

[49] *In re Emerge Energy Servs. LP*, No. 19-11563 (KBO), 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (striking down third party release only as to those parties who took no affirmative act).

Release. In particular, the Third-Party Release as to Holders of Claims that voted to reject the Plan but did not opt out is appropriate and consistent with decisions in this jurisdiction and the Court's decision in *Emerge* because such parties were clearly informed of the Third-Party Release and the consequences of choosing not to opt out.[50] Nevertheless, as noted in the Response Chart, the Debtors have agreed to exclude the single rejecting creditor who failed to opt out of the Third-Party Release from the effect of that section as part of a global resolution of issues raised by the United States Trustee. In this case, the Confirmation Hearing Notice and the Ballots provided clear notice of, among other things, the Third-Party Release and instructions for how relevant parties could opt out.

45. Numerous courts have recognized that a chapter 11 plan may include a release of non-debtors by other non-debtors when such release is consensual.[51] Consensual releases are permissible on the basis of general principles of contract law.[52] Here, all parties in interest had ample opportunity to evaluate and exercise their right to manifest consent to the Third-Party Release. The Ballots quoted the entirety of the Third-Party Release provision in the Plan and clearly informed such of parties of the steps they should take if they disagreed with the scope of the Third-Party Release. Thus, affected parties were on notice of the Third-Party Release and of their ability to opt out. Tellingly, that 12 of the 103 voting parties opted out of the Third-Party Release illustrates that parties were in fact adequately put on notice of their ability to opt out. As

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[50] *See In re Bluestem Brands Inc.,* Case No. 20-10566 (MFW) at 25:13-26:9 (finding returning of a ballot without checking the opt-out does constitute consent to the releases where the ballot and notice was clear); *see also Indianapolis Downs*, 486 B.R. at 305-06 (approving ballots that had an opt-out mechanism).

[51] *See, e.g.*, *Indianapolis Downs*, 486 B.R. at 305 (collecting cases).

[52] *In Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004).

such, the Third-Party Release is consensual as to all Claims and Interest Holders who decided not to affirmatively opt out of the Third-Party Release.

46. Based on the foregoing, the Debtors have established that the Third-Party Release is consensual, and there is no need to consider the factors governing non-consensual third-party releases under *Continental*[53] and its progeny. Accordingly, the Debtors submit that the Third-Party Release is clearly consensual as to all parties to be bound and should therefore be approved.

3. Exculpation

47. In addition to the releases discussed above, the Exculpation in Article IX.D exculpates the Exculpated Parties[54] for any liability that may otherwise arise out of or relate to, among other things, the Debtors' restructuring process, the Chapter 11 Cases, solicitation of the Plan, and the negotiations and agreements made in connection therewith. The Exculpation is appropriately limited and does not exculpate acts or omissions that are determined by a Final Order to have constituted actual fraud, willful misconduct, or gross negligence.[55] The Debtors believe that the Exculpation is critical because the Exculpated Parties have participated in the Chapter 11 Cases in good faith, and such provision is necessary to protect them from collateral attacks related

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[53] *See Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 213-14 (3d Cir. 2000).

[54] "**Exculpated Party**" means (a) the Debtors; (b) the Debtors' directors and officers who served at any time between the Petition Date and the Effective Date of the Plan; (c) the Committee; (d) the members of the Committee, and the individuals who served on the Committee on behalf of each member; (e) the Retained Professionals; (f) as to all Debtors who are limited liability companies, their managing members; and (g) with respect to each of the foregoing in clauses (a) and (c), solely to the extent they are estate fiduciaries, and without duplication of parties otherwise set forth above, each such Entity's current and former affiliates, and each such Entity's and its current and former affiliates' current and former subsidiaries, officers, directors (including any sub-committee of directors), managers, principals, members (including ex officio members and managing members), employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such on or after the Petition Date and before or on the Effective Date.

[55] *See* Kanojia Decl. ¶ 56.

to any good-faith acts or omissions in connection with, or related to, among other things, the marketing process, acts in furtherance of the Restructuring Support Agreement, the Chapter 11 Cases, and the Plan.[56] Moreover, the Debtors are unaware of any claims against any Exculpated Party that would be subject to the Exculpation under the Plan.[57] Accordingly, the Debtors believe that the exculpation provision is consistent with applicable law and should be approved.

4. Injunction

48. The Injunction in Article IX.E is necessary to, among other things, enforce the Debtor Release, the Third-Party Release, and the Exculpation. Importantly, the Injunction implements the same by permanently enjoining all persons and entities from commencing or continuing in any manner any claim that was released or exculpated pursuant to such provisions. The Debtors believe that the Injunction is narrowly tailored to achieve that purpose and therefore should be approved.

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

II. The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code in Accordance with Section 1129(a)(2).

50. The Debtors have satisfied section 1129(a)(2), which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. No party

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[56] *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (observing that the debtors and certain other parties, such as the unsecured creditors' committee members and the professionals retained by such committee, who provided services to assist in the reorganization, are entitled to a "limited grant of immunity . . . for actions within the scope of their duties").

[57] *See* Kanojia Decl. ¶ 58.

has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

51. Section 1129(a)(2) incorporates the disclosure and solicitation requirements of section 1125 of the Bankruptcy Code.[58] Section 1125 prohibits the solicitation of acceptances or rejections of a plan "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 . . . by the court as containing adequate information."[59] The Court approved the Disclosure Statement and found that it contained adequate information within the meaning of section 1125.[60] In addition, the Court considered and approved, among other things, (a) all materials to be transmitted to those creditors entitled to vote on the Plan;[61] (b) the timing and method of delivery of the Solicitation Packages;[62] (c) the deadline for voting and the rules for tabulating votes to accept or reject the Plan;[63] and (d) the timing and method of publication of notice of the Confirmation Hearing and related matters.[64]

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[58] *See* H.R. Rep. No. 95–595, at 412 (1977) ("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."); *see also PWS Holding Corp.*, 228 F.3d at 248 ("We agree with the District Court's conclusion that § 1129(a)(2) requires that the plan proponent comply with the adequate disclosure requirements of § 1125.").

[59] 11 U.S.C. § 1125(b).

[60] *See* Disclosure Statement Order ¶ 2 ("[T]he Amended Disclosure Statement . . . contain[s] adequate information within the meaning of section 1125(a) of the Bankruptcy Code.").

[61] *See id.* ¶¶ 12-20.

[62] *See id.* ¶¶ 20-21.

[63] *See id.* ¶¶ 26-38.

[64] *See id.* ¶¶ 23-24.

52. Thereafter, the Debtors and the Notice and Claims Agent transmitted Solicitation Packages to Holders of Claims in Class 3 (Prepetition Term Loan Claims) and Class 4 (General Unsecured Claims). The Solicitation Packages were distributed promptly after the entry of the Disclosure Statement Order and in accordance with the Court's instructions.[65] In addition, the Debtors caused the Publication Notice to be published in the *Wall Street Journal* in accordance with the Disclosure Statement Order.[66] Following the distribution of the Solicitation Packages, all Ballots complying with the Solicitation Procedures were duly tabulated.[67] Class 3 (Prepetition Term Loan Claims) voted unanimously to accept the Solicited Plan, and Class 4 (General Unsecured Claims) voted by over 87.84% in number and 73.19% in amount to accept the Solicited Plan.[68] Pursuant to section 1127(a) of the Bankruptcy Code and applicable precedent, those votes are treated as votes to accept the Plan.[69]

53. The Debtors thus have complied with the applicable provisions of the Bankruptcy Code, including section 1125, and have therefore satisfied section 1129(a)(2).

III. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law in Accordance with Section 1129(a)(3).

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[65] *See Certificate of Service* [Docket No. 339]; *Supplemental Certificate of Service* [Docket Nos. 418, 430 & 431].

[66] *See Affidavit of Publication of the Notice of (A) Approval of Disclosure Statement, (B) Plan Confirmation Hearing and (C) Deadline to Vote on and Object to Confirmation of Plan in The Wall Street Journal* [Docket No. 364].

[67] *See* Voting Report ¶ 12.

[68] *See* Voting Report Ex. A.

[69] *See* Fed. R. Bankr. P. 3019(a); *In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988) ("[I]f a modification does not 'materially' impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.").

54. Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law."[70] No party has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

55. The Third Circuit has found that "good faith" requires that "there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code."[71] To satisfy this, the plan proponent must establish that the plan "(1) fosters a result consistent with the Bankruptcy Code's objectives; (2) has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected, and (3) exhibited a fundamental fairness in dealing with the creditors."[72] The good faith requirement must be viewed in light of the totality of the circumstances surrounding the establishment of the chapter 11 plan.[73]

56. In assessing good faith, courts should look to a chapter 11 plan itself to determine whether it seeks relief in good faith and is otherwise consistent with the Bankruptcy Code.[74] Failure to satisfy the section, on the other hand, generally requires a finding of "misconduct in bankruptcy proceedings, such as fraudulent misrepresentations or serious nondisclosures of material facts to the court."[75] Accordingly, where the plan satisfies the purposes of the Bankruptcy

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[70] 11 U.S.C. § 1129(a)(3).

[71] *In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 347 (Bankr. D. Del. 1998) (quotation omitted), *aff'd*, 324 F.3d 197 (3d Cir. 2003); *see also PWS Holding Corp.*, 228 F.3d at 242 ("[F]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." (alterations in original) (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986))).

[72] *In re W.R. Grace & Co.*, 475 B.R. 34, 88 (D. Del. 2012), *aff'd sub nom. In re W.R. Grace & Co.*, 729 F.3d 332 (3d Cir. 2013).

[73] *In re T-H New Orleans L.P.*, 116 F.3d 790, 802 (5th Cir. 1997).

[74] *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984).

[75] *In re River Vill. Assocs.*, 161 B.R. 127, 140 (Bankr. E.D. Pa. 1993), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995).

Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) is satisfied.[76] The Plan clearly meets the Third Circuit standard for satisfying good faith.

57. First, the Plan clearly fosters a result consistent with two of the Bankruptcy Code's primary objectives: reorganization and value maximization.[77] Among other things, the Plan eliminates more than $195 million[78] in funded debt, enables the Debtors to maintain relationships with key vendors, and provides the Debtors with an appropriate level of operational capital post-emergence.

58. Second, the Plan was proposed, and its confirmation pursued with honesty, good intentions, and a reasonable hope of success. Whether a plan is proposed for honest and good reasons depends on "whether the debtor intended to abuse the judicial process, whether the plan was proposed for ulterior motives, or if no realistic probability for effective reorganization exists."[79] Here, the Debtors filed for chapter 11 protection with the legitimate intent to delever their capital structure and reorganize as a going concern.[80] The Plan offers the Debtors the best chance to effectively reorganize and achieve this goal.

59. The Debtors have acted in good faith and within the letter and spirit of the Bankruptcy Code. As described above, before the Petition Date, the Debtors considered a range

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[76] *In re Century Glove, Inc.*, Nos. 90–400–SLR, 90–401–SLR, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) (citing *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985)).

[77] *In re W.R. Grace & Co.*, 475 B.R. 34, 88 (D. Del. 2012) ("The Supreme Court of the United States has specifically identified two purposes of Chapter 11 as: (1) preserving going concerns; and (2) maximizing property available to satisfy creditors." (citing *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship (In re LaSalle)*, 526 U.S. 434, 453 (1999))).

[78] *See* Gray Decl. ¶ 16.

[79] *W.R. Grace & Co.*, 475 B.R. at 88 (citing *In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988), *aff'd in part, remanded in part*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990) (unpublished table decision)).

[80] *See* Gray Decl. ¶ 12; Kanojia Decl. ¶¶ 4-5.

of strategic alternatives to address their liquidity needs and ensure value maximization and pursued multiple marketing processes to raise debt or equity financing or a sale involving the acquisition of the Debtors by a third party. Throughout this period, the Debtors engaged with the Lenders, who had long supported them, on the terms of a restructuring transaction, which resulted in the Restructuring Support Agreement that formed the cornerstone for the Plan and, now, a fully consensual Confirmation. The Restructuring Support Agreement provided for the Restructuring transaction that the Debtors now seek to effectuate, which will right-size the Debtors' capital structure and provide them with adequate financing to operate their business post-emergence, as well as a parallel track Sale Process to ensure that value was maximized (although no actionable bids were received). The Plan, including the Plan Supplement and the other documents necessary to effectuate the Plan, were negotiated in good faith and at arm's-length by all parties involved, including the Committee.[81]

60. Third, the Plan exhibits a fundamental fairness in dealing with creditors. Whether a plan exhibits a fundamental fairness in dealing with creditors depends on whether the plan treats creditors fairly and its confirmation comports with due process.[82] As a matter of process, the Debtors have extended and adhered to a confirmation schedule that was negotiated with the Lenders and the Committee and approved by the Court. The Debtors also have complied with applicable noticing requirements under the Bankruptcy Rules and Local Rules relating to the Plan, ensuring that all stakeholders receive a fair opportunity to participate in the Confirmation process. As further evidence of the Plan's fairness, the Committee fully supports the Plan and sent a letter

[81] *See* Kanojia Decl. ¶¶ 4-5.

[82] *W.R. Grace & Co.*, 475 B.R. at 89.

expressing that full support to Holders of General Unsecured Claims, and both Classes of Claims entitled to vote on the Plan have in fact voted in favor.

61. Indeed, creditors' overwhelming support provides additional evidence of the Plan and plan proponents' good faith. Such level of support was not a given when the Debtors experienced distress in late 2022. The overwhelming support for the Plan is the direct result of the Debtors' extensive negotiations with their key creditor constituencies and estate fiduciaries regarding a plan structure and confirmation timeline that would minimize the Debtors' time in chapter 11 and maximize value.

62. Accordingly, the "good faith" requirement of section 1129(a)(3) is satisfied.[83]

IV. The Plan Provides for Court Approval of Certain Administrative Payments in Accordance with Section 1129(a)(4).

63. Section 1129(a)(4) of the Bankruptcy Code requires bankruptcy court approval of certain professional fees and expenses paid by the plan proponent, by the debtor, or by a person issuing securities or acquiring property under the plan. This section of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval by the bankruptcy court as to their reasonableness.[84] No party

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[83] *See In re Chemtura Corp.*, 439 B.R. 561, 608–09 (Bankr. S.D.N.Y. 2010) (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").

[84] *See In re TCI 2 Holdings, LLC*, 428 B.R. 117, 145 (Bankr. D.N.J. 2010) ("Under its clear terms, 'any payment' made or to be made by the plan proponent or the debtor for services 'in or in connection with' the plan or the case must be approved by or 'subject to the approval of' the bankruptcy court as 'reasonable.'"); *accord Lisanti v. Lubektin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 503 (D.N.J. 2005) ("Pursuant to § 1129(a)(4), a Plan should not be confirmed unless fees and expenses related to the Plan have been approved, or are subject to the approval, of the Bankruptcy Court.").

has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

64. All payments made or to be made by the Debtors or Reorganized Debtors for services rendered and expenses incurred in connection with the Chapter 11 Cases have been approved by, or are subject to approval of, the Court. In particular, Article II of the Plan provides for the payment only of *Allowed* Administrative Claims and Professional Fee Claims.[85] Finally, the Court will retain jurisdiction after the Effective Date to grant or deny applications for allowance of compensation or payment of expenses authorized pursuant to the Bankruptcy Code or the Plan.[86] Thus, the Plan complies fully with the requirements of section 1129(a)(4).

V. The Debtors Have Disclosed the Identity of Proposed Management, Compensation of Insiders and Consistency of Management Proposals with the Interests of Creditors and Public Policy in Accordance with Section 1129(a)(5).

65. Section 1129(a)(5)(A) of the Bankruptcy Code provides that a court may confirm a plan only if the plan proponent discloses "the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan."[87] In general, "[t]he [d]ebtor should have first choice of its management, unless compelling cause to the contrary exists."[88] No party has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

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[85] *See* Plan Art. II (emphasis added); *see also In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (holding that the requirements of section 1129(a)(4) were satisfied where the plan provided for payment of only "allowed" administrative expenses).

[86] *See* Plan Art. X.

[87] 11 U.S.C. § 1129(a)(5)(A).

[88] *See In re Sherwood Square Assocs.,* 107 B.R. 872, 878 (Bankr. D. Md. 1989).

66. The Debtors have disclosed in the Plan Supplement all necessary information, to the extent known, regarding the directors and officers of the Reorganized Debtors. The officers and directors or managers are highly qualified, and their appointment is consistent with the interests of creditors and equity security holders and with public policy.[89] Accordingly, the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

VI. The Plan Does Not Require Governmental Regulatory Approval in Accordance with Section 1129(a)(6).

67. The Bankruptcy Code permits confirmation of a plan only if any regulatory commission that will have jurisdiction over the debtor subsequent to confirmation has approved any rate change provided for in the debtor's plan.[90] Because the Plan does not provide for any rate changes, section 1129(a)(6) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases.

VII. The Plan Is in the Best Interests of Creditors and Interest Holders in Accordance with Section 1129(a)(7).

68. Section 1129(a)(7) of the Bankruptcy Code requires that, with respect to each class, each holder of a claim or an equity interest in such class either:

> (a) has accepted the plan; or
>
> (b) 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 so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code].[91]

No party has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

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[89] *See* Kanojia Decl. ¶ 15, 30.

[90] 11 U.S.C. § 1129(a)(6).

[91] *Id.* § 1129(a)(7)(A).

69. The "best interests" test applies to individual dissenting holders of claims and interests, rather than classes[92] and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of the debtor's estate against the estimated recoveries under the debtor's plan of reorganization.[93] As the language of section 1129(a)(7) makes clear, the best interests test applies only to non-accepting impaired claims or interests; if a class of claims or interests is deemed to accept or unanimously approves a plan, the best interests test is deemed satisfied for all members of that class.[94] Here, the best interests test must at most be satisfied with respect to Holders in Class 4 (General Unsecured Claims), Class 5 (Intercompany Claims), Class 6 (Subordinated Claims), Class 7 (Intercompany Interests), and Class 8 (Equity Interests).[95]

70. To find that a plan satisfies the best interests test, the Court must: (a) estimate the cash liquidation proceeds that a chapter 7 trustee would generate if each of the Debtors' Chapter 11 Cases were converted to a chapter 7 case and the assets of such Debtors' estates were liquidated; (b) determine the liquidation distribution that each non-accepting holder of a claim or an equity interest would receive from such liquidation proceeds under the priority scheme dictated in

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[92] *203 N. LaSalle*, 526 U.S.at 441-42 n.13 ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan.").

[93] *See Adelphia*, 368 B.R. at 251 (Section 1129(a)(7) was satisfied where an impaired holder of a claim would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

[94] *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992).

[95] As noted above, Class 5 (Intercompany Claims) and Class 7 (Intercompany Interests) are either Unimpaired or Impaired under the Plan. There are no Allowed Claims in Class 6 (Subordinated Claims) and such Class may therefore be deemed eliminated from the Plan. *See* Disclosure Statement Order ¶ 35.

chapter 7; and (c) compare such holder's liquidation distribution to the distribution under the Plan that such holder would receive if the Plan were confirmed and consummated.[96]

71. To calculate the probable distribution to rejecting Holders if the Debtors were liquidated under chapter 7, a bankruptcy court must first determine the aggregate dollar amount that would be generated from the debtors' assets if their chapter 11 cases were converted to chapter 7 cases.[97] In a liquidation scenario, recovery values on the Debtors' assets would likely be depressed relative to their values in the context of a reorganization. Distributions available to unsecured creditors are then reduced by (a) the claims of any secured creditors to the extent of the value of their collateral, (b) the costs and expenses of liquidation, and (c) other administrative expenses and costs of both the chapter 7 case and the chapter 11 case, such as the compensation of a trustee, counsel and other professionals retained by the trustee,[98] asset disposition expenses, and all unpaid administrative expenses incurred by the debtor in the chapter 11 case. Once these costs and expenses have been calculated, the bankruptcy court must determine the probable distribution to remaining stakeholders from the available proceeds in such liquidation. Unless the probable distribution in a liquidation has a value greater than the distributions to be received by dissenting stakeholders under the plan, the plan satisfies the best interests test as to such stakeholders.

72. The Plan meets the requirements of section 1129(a)(7). Attached as **Exhibit E** to the Disclosure Statement is a liquidation analysis (the "**Liquidation Analysis**"), which shows

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[96] *See Adelphia*, 368 B.R. at 251-52.

[97] *See id.* at 251-54.

[98] *See id.* at 254 ("[T]he chapter 7 trustee's advisors would be entitled to reasonable compensation for services rendered and related expenses incurred, which would be entitled to treatment as administrative expense claims. Given the amount of time such professionals would be required to devote to become familiar with the Debtors and the issues related to these cases, such fees and costs would reduce overall recoveries." (footnote omitted)).

(a) the expected recoveries if these cases were converted to chapter 7 and (b) the expected recoveries under the Plan. Based upon the Liquidation Analysis, and explained in further detail in the Gray Declaration, the Debtors calculate that expected recoveries to each nonaccepting Holder in an Impaired Class are greater than or equal to the expected recoveries to such Holders in a chapter 7 liquidation. Indeed, the aggregate consideration to Class 4 (General Unsecured Claims) is now 6.5 times greater under the Plan than it was at the time the Liquidation Analysis was filed and showed that the best interest test was even then satisfied. Accordingly, the best interests test of section 1129(a)(7) of the Bankruptcy Code is satisfied.

VIII. Acceptance of Impaired Classes in Accordance with Section 1129(a)(8).

73. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan.[99] Pursuant to section 1126(c), a class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the allowed claims in that class that actually submit ballots vote to accept the plan.[100] A class that is not impaired under a plan, and each holder of a claim or interest in such class, is conclusively presumed to have accepted the plan.[101] Conversely, a class is deemed to have rejected a plan if the plan provides that the holders of claims or interests of such class are Impaired and are not accorded any property under the plan on account of such claims or interests.[102]

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[99] 11 U.S.C. § 1129(a)(8).

[100] *Id.* § 1126(c).

[101] *Id.* § 1126(f); *see also In Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 290 (2d Cir. 1992) ("If the claimholder's interests are unimpaired, the claimholder is conclusively presumed to have accepted the plan, and his participation in or approval of the reorganization plan is not necessary for the plan to gain confirmation by the bankruptcy court." (internal quotation marks omitted)).

[102] 11 U.S.C. § 1126(g).

74. As set forth in the Voting Report, Class 3 (Prepetition Term Loan Claims) and Class 4 (General Unsecured Claims) each voted to accept the Plan. Thus, the only Impaired Classes not voting to accept the Plan are the Deemed Rejecting Classes. Section 1129(a)(8) is not satisfied. Nevertheless, as discussed more fully above and below, the Plan may nevertheless be confirmed because the Debtors have satisfied section 1129(a)(10) of the Bankruptcy Code—at least one Impaired Class accepted the Plan—and section 1129(b), which allows the Debtors to "cram down" any rejecting classes under certain conditions that are satisfied here.

IX. The Plan Complies with Statutorily Mandated Treatment of Administrative and Priority Claims in Accordance with Section 1129(a)(9).

75. Section 1129(a)(9) of the Bankruptcy Code generally requires that persons holding claims entitled to priority under section 507(a) receive payment in full in cash unless the holder of a particular claim agrees to different treatment. No party has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

76. Under the Plan, unless the Debtors and the Holders of the following Claims agree to less favorable treatment, (a) Holders of Allowed General Administrative Claims will be paid the full unpaid amount of such Allowed General Administrative Claim in Cash; (b) Holders of Allowed Professional Fee Claims will be paid in Cash and, to the extent that the funds held in the Professional Fee Escrow Account are not sufficient to satisfy all Allowed Professional Fee Claims in full, the Reorganized Debtors will use Cash on hand to increase the size of the Professional Fee Escrow Account as necessary to do so; (c) Holders of Allowed DIP Facility Claims have agreed that such Claims will be converted on a dollar-for-dollar basis into Rollover Exit Facility Loans and such Holders will receive Exit Facility Equity, as reflected in the final Plan Documents; (d) Holders of Allowed Priority Tax Claims will receive, at the option of the Debtors, (i) the full unpaid amount of such Allowed Priority Tax Claim in Cash or (ii) equal annual installment

payments in Cash, of a total value equal to the Allowed amount of such Priority Tax Claim, over a period ending not later than five (5) years after the Petition Date; and (e) Holders of Allowed Other Priority Claims will receive payment in full in Cash or other treatment rendering such Claim Unimpaired.

77. Therefore, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

X. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders, in Accordance with Section 1129(a)(10).

78. Bankruptcy Code section 1129(a)(10) requires that "at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."[103] No party has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

79. "The Plan provides for consolidation of the Debtors solely for purposes of voting, Confirmation, and distribution, but not for any other purpose."[104] As set forth in the Voting Report, Class 3 (Prepetition Term Loan Claims) has voted to accept the Plan. Likewise, Class 4 (General Unsecured Creditors) has voted to accept the Plan. Thus, the Plan satisfies section 1129(a)(10).

XI. The Plan Is Feasible in Accordance with Section 1129(a)(11).

80. Section 1129(a)(11) requires the bankruptcy court to find that a plan is feasible as a condition precedent to confirmation. Specifically, the bankruptcy court must determine that:

> [c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the

[103] 11 U.S.C. § 1129(a)(10).

[104] *See* Plan Introduction; Disclosure Statement Order ¶ 29 ("Ballots shall be tabulated as if the Debtors' estates had been substantively consolidated; that is, Ballots shall not be tabulated on a Debtor-by-Debtor basis.").

> debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.[105]

No party has objected to Confirmation on the basis that the Plan fails to satisfy feasibility.

81. For a plan to satisfy the feasibility standard under section 1129(a)(11), the evidence presented must show that the proposed plan offers a "reasonable assurance of success."[106] To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success; rather, only a reasonable assurance that the provisions of a plan can be performed is required.[107] "This is a low threshold."[108] A court may find that a plan is feasible if "[t]he information in the [d]isclosure [s]tatement, the [s]upporting [d]eclaration, and the evidence proffered or adduced at the Confirmation Hearing (i) is persuasive and credible, (ii) has not be controverted by other evidence, and (iii) establishes that the . . . [p]lan is feasible and that there is a reasonable prospect of the [r]eorganized [d]ebtors" being able to meet their financial obligations.[109]

82. Based on all evidence in the record, on the Effective Date, the Reorganized Debtors will have sufficient operating cash and liquidity to meet their financial obligations under the Plan and fund ongoing business operations. The financial projections for the Reorganized Debtors, annexed to the Disclosure Statement as **Exhibit D** (the "**Financial Projections**"), demonstrate

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[105] 11 U.S.C. § 1129(a)(11).

[106] *See Indianapolis Downs*, 486 B.R. at 298.

[107] *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *IRS v. Kaplan (In re Kaplan)*, 104 F.3d 589, 597 (3d Cir. 1997); *Clarkson v. Cooke Sales & Serv. Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985) ("[T]he feasibility test contemplates 'the probability of actual performance of the provisions of the plan. . . . The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts.'" (quoting *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir. 1978)).

[108] *Emerge Energy Servs*., 2019 WL 7634308, at *15.

[109] *In re Elec. Components Int'l*, No. 10-11054 (KJC), 2010 WL 3350305, at *9 (Bankr. D. Del. May 11, 2010).

that the Reorganized Debtors should have sufficient cash flow to fund Plan-related obligations and ongoing business operations through at least the end of 2028.[110] The Gray Declaration similarly supports a finding of feasibility based on FTI's analysis and work with the Debtors.[111]

83. Further, under the Restructuring Support Agreement, the Lenders (who are also providing the Exit Facility) will be the owners of and lenders to the Reorganized Debtors and will have every incentive to ensure the Reorganized Debtors succeed.[112] Additionally, the Debtors have been implementing an operational pivot toward a business plan that is less dependent on growing into new markets and more focused on building out the Debtors' core markets that is designed to place them on stable footing.[113] The Exit Facility, these operational changes, and other factors, as evidenced by the Kanojia Declaration, the Gray Declaration, and the Financial Projections, demonstrate that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the" Debtors or Reorganized Debtors. The feasibility threshold of section 1129(a)(11) is therefore satisfied.

XII. Statutory Fees Will Be Paid in Accordance with Section 1129(a)(12).

84. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930.

85. Pursuant to Article II.D of the Plan, all fees pursuant to 28 U.S.C. § 1930(a)(6) and any interest assessed pursuant to 31 U.S.C. § 3717 ("**U.S. Trustee Fees**") that are due and owing as of the Effective Date will be paid by the Debtors in full in Cash on the Effective Date. After

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[110] *See In re Maremont Corp.*, No. 19-10118 (KJC) (Bankr. D. Del. May 17, 2019) [Docket No. 241] (finding plan feasible based on three-year projections); *TCI 2 Holdings, LLC*, 428 B.R. at 151 (same).

[111] *See* Gray Decl. ¶¶ 13-18.

[112] *See* Kanojia Decl. ¶40.

[113] *See id*.

the Effective Date, the Reorganized Debtors will pay any and all U.S. Trustee Fees in full in Cash when due and payable. The Debtors and Reorganized Debtors remain obligated to pay U.S. Trustee Fees until the earliest of the closure, dismissal, or conversion to a case under Chapter 7 of the Bankruptcy Code of the case of that particular Debtor for whom the Debtors or Reorganized Debtors, as set forth in the Plan, is responsible. The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code.

XIII. The Plan Provides for Continued Payment of Any Retiree Benefits in Accordance with Section 1129(a)(13).

86. Section 1129(a)(13) of the Bankruptcy Code provides that a plan must provide for continued, post-confirmation payments of all retiree benefits at the levels established in accordance with section 1114 of the Bankruptcy Code. No party has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

87. The Debtors do not provide "retiree benefits" within the meaning of section 1129(a)(13).[114] Article V.F of the Plan nevertheless provides that, subject to the provisions of the Plan, all Compensation and Benefits Programs—which are defined to include retirement benefits, if any—will be treated as Executory Contracts under the Plan and, with the consent of the DIP Agent and Prepetition Agent, will be deemed assumed on the Effective Date pursuant to the provisions of sections 365 and 1123 of the Bankruptcy Code. Accordingly, even if the Debtors provided retiree benefits before the Effective Date, such benefits would be maintained in satisfaction of section 1129(a)(13) of the Bankruptcy Code.

XIV. Sections 1129(a)(14), (a)(15), and (a)(16) of the Bankruptcy Code are Inapplicable.

[114] *See* Kanojia Decl. ¶ 42.

88. None of the Debtors are (a) required to pay any domestic support obligations, (b) individuals, or (c) nonprofit corporations or trusts. Accordingly, sections 1129(a)(14) through (16) of the Bankruptcy Code are not applicable.[115]

XV. The Plan Satisfies the "Cramdown" Requirements of 11 U.S.C. § 1129(b).

89. All Impaired Classes entitled to vote (Class 3 (Prepetition Term Loan Claims) and Class 4 (General Unsecured Claims)) have voted to accept the Plan. Class 6 (Subordinated Claims) and Class 8 (Equity Interests) and, to the extent Impaired under the Plan, Class 5 (Intercompany Claims) and Class 7 (Intercompany Interests) were deemed to reject the Plan, requiring the Debtors to "cram down" these Classes pursuant to section 1129(b) of the Bankruptcy Code.[116] Section 1129(b) provides that if all applicable requirements of section 1129(a), other than section 1129(a)(8), are met, a plan may be confirmed so long as it does 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.[117] The Debtors' satisfaction of these conditions is discussed in detail below. No party has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code.

A. The Plan Does Not Discriminate Unfairly.

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[115] *See In re Sea Launch Co.*, No. 09-12153 (BLS), 2010 Bankr. LEXIS 5283, at *41 (Bankr. D. Del. July 30, 2010) ("Section 1129(a)(16) by its terms applies only to corporations and trusts that are not moneyed, business, or commercial.").

[116] As noted above, there are no Allowed Claims in Class 6 (Subordinated Claims) and such Class may therefore be deemed eliminated from the Plan. *See* Disclosure Statement Order ¶ 35.

[117] *See* 11 U.S.C. § 1129(b); *see John Hancock Mut. Life*, 987 F.2d at 157 n.5 ("Under [Section 1129(b)], the plan must also satisfy all of the requirements of [Section 1129(a)] except for subsection (a)(8) . . . and must not 'discriminate unfairly' against and must be 'fair and equitable' with respect to all impaired classes that do not approve the plan.").

90. The Plan does not discriminate unfairly with respect to Deemed Rejecting Classes. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists.[118] Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.[119] At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so.[120] In other words, section 1129(b)(1) does not prohibit discrimination between classes; it prohibits only discrimination that is unfair.[121] Accordingly, between two classes of claims or two classes of interests, there is no unfair discrimination if (a) the claims or interests in each such class are dissimilar from those in the other class,[122] or (b) taking into account the particular facts and circumstances of the case, there is a reasonable basis for disparate treatment of otherwise similar claims or interests.[123]

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[118] *See In re 203 N. LaSalle St. L.P.*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"), *rev'd on other grounds sub nom. Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999).

[119] *See In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) (explaining that "whether or not a particular plan does [unfairly] discriminate is to be determined on a case-by-case basis"); *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (finding that determination of unfair discrimination requires court to "consider all aspects of the case and the totality of all the circumstances").

[120] *See In re Ambanc La Mesa L.P.*, 115 F.3d 650, 654-55 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

[121] *In re 11,111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990).

[122] *See, e.g., Johns-Manville Corp.*, 68 B.R. at 636.

[123] *See, e.g.*, *In re Buttonwood Partners*, 111 B.R. 57, 63 (Bankr. S.D.N.Y.); *In re Rivera Echevarria*, 129 B.R. 11, 13 (Bankr. D.P.R. 1991).

91. Here, no Deemed Rejecting Class is similarly situated to another Class, given their distinctly different legal character from all other Claims and Interests. The unfair discrimination prong of the cramdown test is thus satisfied.

B. The Plan Is Fair and Equitable with Respect to Each Deemed Rejecting Class.

92. Sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or interests if the plan provides that the holder of any claim or interest that is junior to the claims or interests of such class will not receive or retain any property under the plan on account of such junior claim or interest. This central tenet of bankruptcy law—the "absolute priority rule"—requires that, if the holders of claims or interests in a particular class that votes to reject a plan receive less than full value for their stakes, then no holder of claims or interests in a junior class may receive property under the plan on account of such claims or interests.[124] The absolute priority rule also requires that senior classes cannot receive more than a 100 percent recovery for their claims.[125]

93. The Plan satisfies the absolute priority rule with respect to all Deemed Rejecting Classes. No Holders of Claims and Interests junior to such Holders will receive or retain any property on account of their Claims and Interests,[126] and no Holders of Claims or Interests senior

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[124] *203 N. LaSalle*, 526 U.S. at 441-42 (explaining that, under the absolute priority rule, "a plan may be found to be 'fair and equitable' only if the allowed value of the claim [in a dissenting class of impaired unsecured creditors] 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'" (citations omitted)); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (stating that "the absolute priority rule provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan)," *rev'd on other grounds* (alteration in original) (internal quotation marks and citations omitted).

[125] *See In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 612 (Bankr. D. Del. 2001).

[126] To the extent Intercompany Claims in Class 5 or Intercompany Interests in Class 7 are Reinstated, such treatment is for the Reorganized Debtors' administrative convenience only and is not on account of such Holders' existing Claims or Interests. *See* Plan Art. III.H.

to Holders in Deemed Rejecting Classes are receiving more than full payment on account of the Claims in such senior Classes.[127] Accordingly, the Plan satisfies the requirements of sections 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) of the Bankruptcy Code and is fair and equitable with respect to all Deemed Rejecting Classes.

XVI. The Plan Is the Only Plan Currently on File.

94. Section 1129(c) of the Bankruptcy Code provides, as applicable, that a bankruptcy court may confirm only one plan. The Plan is the only chapter 11 plan filed by any party in the Chapter 11 Cases and the only one submitted to this Court for confirmation. Section 1129(c) therefore permits confirmation of the Plan.

XVII. The Purpose of the Plan Is Not the Avoidance of Taxes or Securities Laws.

95. "[O]n request of a party in interest that is a governmental unit, the court may not confirm a plan if the principle purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933."[128] The primary purpose of the Plan is not the avoidance of taxes or the avoidance of the application of the Securities Laws.[129] No party has objected to Confirmation on the basis that the Plan fails to satisfy this provision of the Bankruptcy Code. Accordingly, section 1129(d) likewise permits confirmation of the Plan.

XVIII. Section 1129(e) is inapplicable.

96. The provisions of section 1129(e) of the Bankruptcy Code apply only to "small business cases" as defined therein. The Chapter 11 Cases are not "small business cases." Accordingly, Section 1129(e) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

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[127] *See* Disclosure Statement at 27.

[128] 11 U.S.C. § 1129(d).

[129] *See* Kanojia Decl. ¶47.

CONCLUSION

For the reasons set forth in this Memorandum and in the Confirmation Declarations, the Debtors submit that the Plan fully satisfies all applicable requirements of the Bankruptcy Code and respectfully request that the Court confirm the Plan.

[*Remainder of page intentionally left blank.*]

Dated: May 22, 2023
Wilmington, Delaware

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Counsel for Debtors and Debtors in Possession

Exhibit A

Response Chart

In re Starry Group Holdings, Inc., *et al.*
Case No. 23-10219 (KBO)
Summary Chart of Objections[1]

Party	Objections / Comments	Response
Formal Confirmation Objections		
U.S. Securities and Exchange Commission [Docket No. 195]	Objected to Confirmation contending that the releases were inappropriate and requested the inclusion of certain language in the Plan and Confirmation Order.	**OBJECTION RESOLVED** Resolved through modifications reflected in the Plan and the inclusion of certain language in paragraph 119 of the Confirmation Order.
American Towers LLC, on behalf of itself and any of its applicable affiliates [Docket No. 421]	Objected to Confirmation contending that the Plan did not appropriately preserve certain alleged setoff rights.	**OBJECTION RESOLVED** Resolved through the inclusion of certain language in paragraph 115 of the proposed Confirmation Order.

[1] Capitalized terms used but not defined herein have the meanings ascribed to them in the *Third Amended Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code* [Docket No. 459] ((as may be amended, supplemented or modified from time to time, the "**Plan**").

Party	Objections / Comments	Response
Informal Confirmation Objections		
United States Department of Justice	Requested the inclusion of certain language in the Confirmation Order.	**DISPUTE RESOLVED** Resolved through the inclusion of certain language in paragraphs 116-118 of the Confirmation Order.
United States Trustee	Requested certain modifications to the Plan and the inclusion of certain language in the Confirmation Order.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Plan and the inclusion of certain language in paragraph 105 of the Confirmation Order.

Party	Objections / Comments	Response
Formal Contract Objections		
AEP Ventures, LLC [Docket No. 359]	Objected to the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations.	**OBJECTION WITHDRAWN** Objection withdrawn [Docket No. 422].
American Towers LLC, on behalf of itself and any of its applicable affiliates [Docket Nos. 378 & 421]	Objected to (1) the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations, and (2) requested clarification regarding Executory Contracts proposed to be assumed.	**OBJECTION RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 464].
Benchmark Electronics, Inc. [Docket No. 379]	Objected to the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations.	**OBJECTION RESOLVED** Resolved through the inclusion of the Executory Contracts in question on the Rejected Contracts List.
Comcast Cable Communications Management, LLC [Docket No. 377]	Objected to the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations.	**OBJECTION ADJOURNED** The Debtors are involved in ongoing discussions with this party regarding the basis for this objection. To the extent that the parties are not able to consensually resolve the issues, this objection will be set for a further hearing before the Bankruptcy Court at a date to be determined.
Crown Castle Fiber LLC f/k/a/ Lightower Fiber Networks I, LLC [Docket No. 376]	Objected to (1) the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations, and (2) the severability of certain allegedly integrated Executory Contracts.	**OBJECTION ADJOURNED** The Debtors are involved in ongoing discussions with this party regarding the basis for this objection. To the extent that the parties are not able to consensually resolve the issues, this objection will be set for a further hearing before the Bankruptcy Court at a date to be determined.

Party	Objections / Comments	Response
Oracle America, Inc., successor in interest to NetSuite, Inc. [Docket No. 372]	Objected to (1) the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations, (2) the alleged lack of adequate assurance, and (3) assumption of such Executory Contracts without the party's prior consent.	**OBJECTION RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 464].
Palantir Technologies Inc. [Docket No. 420]	Objected to the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations.	**OBJECTION ADJOURNED** The Debtors are involved in ongoing discussions with this party regarding the basis for this objection. To the extent that the parties are not able to consensually resolve the issues, this objection will be set for a further hearing before the Bankruptcy Court at a date to be determined.
701 Penhorn Avenue Associates Inc. [Docket Nos. 366, 381 & 383]	Objected to the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations.	**OBJECTION WITHDRAWN** Objection withdrawn [Docket No. 426].
SBA Site Management, LLC [Docket No. 415]	Objected to the proposed Cure Costs for certain Executory Contracts and the assumption thereof without payment in full of outstanding obligations.	**OBJECTION ADJOURNED** The Debtors are involved in ongoing discussions with this party regarding the basis for this objection. To the extent that the parties are not able to consensually resolve the issues, this objection will be set for a further hearing before the Bankruptcy Court at a date to be determined.

Party	Objections / Comments	Response
Informal Contract Objections		
1105 Massachusetts Ave. Condominium Association	Contacted the Debtors to confirm the treatment of certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through informal discussions.
Amazon Web Services	Contacted the Debtors to confirm the treatment of a certain Executory Contract.	**DISPUTE RESOLVED** Resolved through the inclusion of the Executory Contract in question on the Assumed Contracts List and the modifications reflected in the Debtors' supplemental cure schedule [Docket No. 464].
AMLI	Contacted the Debtors regarding the treatment of certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 464].
Callidus Software, Inc.	Contacted the Debtors regarding potential discrepancies in the proposed Cure Costs for certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 412].
Cisco Systems Capital, Inc.	Contacted the Debtors regarding potential discrepancies in the proposed Cure Costs for certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 412].
Concur Technologies, Inc.	Contacted the Debtors to confirm the treatment of certain Executory Contracts.	**DISPUTE ADJOURNED** The Debtors are involved in ongoing discussions with this party regarding the basis for this dispute. To the extent that the parties are not able to consensually resolve the issues, this dispute will be set for a further hearing

Party	Objections / Comments	Response
		before the Bankruptcy Court at a date to be determined.
Fairfield Kittridge, LLC	Contacted the Debtors regarding potential discrepancies in the proposed Cure Costs for certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 412].
Farley White Pawtucket LLC	Contacted the Debtors regarding removing a previously terminated contract from the Debtors' cure schedule.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 412].
Microsoft Corporation	Contacted the Debtors to confirm the treatment of certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through informal discussions.
Salesforce.com, Inc. and Slack	Contacted the Debtors regarding potential discrepancies in the proposed Cure Costs for certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 464].
Semiconductor Components Industries, LLC	Contacted the Debtors to confirm the treatment of certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through informal discussions.
Snowflake, Inc.	Contacted the Debtors regarding potential discrepancies in the proposed Cure Costs for certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 412].
The Boro I Residential Tower LLC	Contacted the Debtors to confirm the treatment of certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through informal discussions.

Party	Objections / Comments	Response
UL LLC	Contacted the Debtors regarding potential discrepancies in the proposed Cure Costs for certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through modifications reflected in the Debtors' supplemental cure schedule [Docket No. 412].
Verizon Services Corporation	Contacted the Debtors to confirm the treatment of certain Executory Contracts.	**DISPUTE RESOLVED** Resolved through informal discussions.
Zayo Group, LLC	Contacted the Debtors to confirm the treatment of certain Executory Contracts.	**DISPUTE ADJOURNED** The Debtors are involved in ongoing discussions with this party regarding the basis for this dispute. To the extent that the parties are not able to consensually resolve the issues, this dispute will be set for a further hearing before the Bankruptcy Court at a date to be determined.