IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
WELDED CONSTRUCTION, L.P., *et al.*,[1]	)	Case No. 18-12378 (CSS)
	)	(Jointly Administered)
Debtors.	)	
	)	**Ref. Docket No. 1363**

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF AMENDED CHAPTER 11 PLAN OF WELDED CONSTRUCTION, L.P. AND WELDED CONSTRUCTION MICHIGAN, LLC

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Welded Construction, L.P. (5008) and Welded Construction Michigan, LLC (9830). The mailing address for each of the Debtors is P.O. Box 470, Perrysburg, OH 43552-0470.

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Welded Construction, L.P. and Welded Construction Michigan, LLC (together, the "**Debtors**"), the debtors and debtors-in-possession in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), hereby submit this memorandum of law (this "**Memorandum**") in support of confirmation, pursuant to section 1129 of the Bankruptcy Code, of the *Amended Chapter 11 Plan of Welded Construction, L.P. and Welded Construction Michigan, LLC* (together with all exhibits thereto, and as may be amended, modified or supplemented, the "**Plan**").[2] In support thereof, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. Following the sale of substantially all of the Debtors' assets, the Debtors, the official committee of unsecured creditors (the "**Committee**"), and other key stakeholders, including the Partner Settlement Parties and Federal Insurance Company, engaged in extensive, good-faith, and arms' length negotiations regarding the terms of a settlement and related chapter 11 plan that would provide for the distribution of the proceeds realized from the liquidation and sale of the Debtors' assets and the compromise of claims and causes of action that would enable the Debtors to promptly and efficiently wind-down the Debtors' Estates and bring finality to the Chapter 11 Cases.

2. During the course of the discussions, the Committee and the Debtors each conducted a thorough investigation of potential claims and causes of action regarding certain transactions and events in the Debtors' recent corporate history. Upon the conclusion of the investigation, the Debtors, the Committee, and the Partner Settlement Parties (collectively, the "**Plan Settlement Parties**") extensively negotiated and ultimately agreed to the terms of a

[2] Capitalized terms used but not defined herein have the meanings ascribed to them in the Plan [Docket No. 1363] and in the *Amended Disclosure Statement for the Amended Chapter 11 Plan of Welded Construction, L.P. and Welded Construction Michigan, LLC* [Docket No. 1364] (the "**Disclosure Statement**"), as applicable.

settlement that represents a fair and reasonable resolution of all disputes that may give rise to potential claims or causes of action (collectively, the "**Potential Claims**"). The Plan and the Plan Settlement Agreement pave the way for the consensual resolution of the Chapter 11 Cases and confirmation of the Plan with support from the Plan Settlement Parties, Federal Insurance Company, and an overwhelming number of the Holders of Claims, as evidenced by the *Certification of Andrew W. Henchen with Respect to the Tabulation of Votes on the Amended Chapter 11 Plan of Welded Construction, L.P. and Welded Construction Michigan, LLC* [Docket No. 1477] (the "**Voting Declaration**"). The following table summarizes the Plan voting results:

CLASS	RECEIVED BALLOTS			
	Accept		***Reject***	
	AMOUNT (% of Amount Voted)	**NUMBER (% of Number voted)**	**AMOUNT (% of Amount Voted)**	**NUMBER (% of Number Voted)**
Class 3 – Surety Bond Claims	$580,776,278.46 (100%)	2 (100%)	$0.00 (0%)	$0.00 (0%)
Class 4 – General Unsecured Claims	$14,380,083.23 (95.80%)	13 (81.25%)	$630,831.43 (4.20%)	3 (18.75%)
Class 5 – Convenience Claims	$1,957,388.52 (98.42%)	69 (97.18%)	$31,385.75 (1.58%)	2 (2.82%)

3. On June 17, 2020, the Central States, Southeast and Southwest Areas Pension Fund (the "**Central States**") and the Williams Parties (as defined herein) each filed an objection [Docket Nos. 1457 & 1460] (respectively, the "**Central States Objection**" and the "**Williams Objection**") to confirmation of the Plan, as discussed further below. Additionally, on June 18, 2020, Sunbelt Equipment Marketing, Inc., Sunbelt Tractor & Equipment Company, Cross Country Infrastructure Services, Inc., and Outlaw Padding Company (collectively, the "**Contract Rejection Parties**") filed an objection (the "**Contract Rejection Objection**") [Docket No. 1463] to confirmation of

the Plan. On June 22, 2020, counsel for the Contract Rejection Parties withdrew the Contract Rejection Objection [Docket No. 1474]; *provided*, *however*, that the Contract Rejection Parties have not withdrawn such parties' election to opt out of the third party releases provided for under Section 11.11(b) of the Plan. Other than as set forth herein, the Debtors are unaware of any other objections to confirmation of the Plan.

4. As set forth below, the Plan satisfies the requirements for confirmation as provided in section 1129 of the Bankruptcy Code. For the reasons set forth herein, the Plan should be confirmed.

FACTS

5. The pertinent facts relating to the Chapter 11 Cases and the Plan are set forth in the Disclosure Statement, the Plan, the Voting Declaration, and the *Declaration of Frank Pometti in Support of Confirmation of the Amended Chapter 11 Plan of Welded Construction, L.P. and Welded Construction Michigan, LLC* (the "**Pometti Declaration**," and together with the Voting Declaration, the "**Declarations**").

THE PLAN MEETS THE REQUIREMENTS FOR CONFIRMATION UNDER SECTION 1129 OF THE BANKRUPTCY CODE

6. To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[3] This Memorandum, the record of the Chapter 11 Cases, the Declarations, and any additional evidence that may be presented at the Confirmation Hearing, will demonstrate, by a preponderance of the evidence, that all applicable subsections of section 1129 of the Bankruptcy Code have been satisfied with respect to the Plan. Accordingly, the Plan should be confirmed.

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[3] *See In re Tribune Co.,* 464 B.R. 126, 151–52 (Bankr. D. Del. 2011) (explaining that the plan proponent bears the burden of establishing the plan's compliance with section 1129 of the Bankruptcy Code) (internal citations omitted).

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

7. Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) of the Bankruptcy Code indicates that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing the classification of claims and contents of a chapter 11 plan, respectively.[4] As demonstrated below, the Plan complies with sections 1122, 1123, and all other applicable provisions of the Bankruptcy Code.

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

8. Section 1122 of the Bankruptcy Code provides that the claims or interests within a given plan class must be "substantially similar." 11 U.S.C. § 1122(a). Section 1122 of the Bankruptcy Code, however, does not require that all substantially similar claims or equity interests must be classified together. Instead, courts have recognized that similar claims may be classified separately, provided there is a reasonable basis for doing so.[5] Courts also are afforded broad discretion in approving a plan proponent's classification structure, and should consider the specific facts of each case when making such a determination.[6] Additionally, section 1122(b) of the Bankruptcy Code expressly permits separate classification of certain claims for purposes of administrative convenience. 11 U.S.C. § 1122(b) ("A plan may designate a separate class of claims

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[4] H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; *see also In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008).

[5] *See, e.g.*, *Aetna Cas. & Sur. Co. v. Clerk, U.S. Bankr. Court N.Y., N.Y. (In re Chateaugay Corp.)*, 89 F.3d 942, 949 (2d Cir. 1996).

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

consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.").

9. The Plan provides for separate classification of Claims against and Interests in the Debtors based upon differences in the legal nature, priority and other distinguishing characteristics of such Claims and Interests. The Plan designates the following seven Classes: Class 1 (Secured Claims); Class 2 (Priority Claims); Class 3 (Surety Bond Claims); Class 4 (General Unsecured Claims); Class 5 (Convenience Claims); Class 6 (Subordinated Claims); and Class 7 (Interests). Classes 1 through 6 constitute Classes of Claims and Class 7 constitutes a Class of Interests. *See* Plan, Article III.

10. This classification scheme complies with section 1122(a) because each Class contains only Claims or Interests that are substantially similar to each other. Furthermore, the classification scheme used by the Plan is based on the similar nature of Claims or Interests contained in each Class, and not on any impermissible classification factor. Finally, similar Claims and Interests have not been placed into different Classes to affect the outcome of the vote on the Plan.

11. The Debtors submit that it is appropriate to separately classify the Surety Bond Claims because such claims are of a legally different nature than, and have other distinguishing characteristics from, other General Unsecured Claims. As set forth in that certain *Litigation Funding and Cooperation Agreement* dated May 3, 2019 (the "**Surety Cooperation Agreement**"), and approved by the Court on May 22, 2019 [Docket No. 745], the Surety has certain indemnification and equitable subrogation rights, and in recognition of that, pursuant to the Surety Cooperation Agreement Order and the Plan, will receive the Surety Bond Share and a Pro Rata share of the General Unsecured Claim Distribution on account of its claim and in consideration of

the Surety Cooperation AGreement. Accordingly, the Surety Bond Claims are properly classified as Class 3.

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

12. Section 1123(a) of the Bankruptcy Code sets forth eight requirements. 11 U.S.C. § 1123(a). As shown below, the Plan complies with each of these requirements, to the extent applicable to Confirmation.

(a) Section 1123(a)(1): Designation of Classes of Claims and Interests

13. Section 1123(a)(1) of the Bankruptcy Code requires that a chapter 11 plan designate classes of claims and equity interests, subject to section 1122 of the Bankruptcy Code. As discussed above, the Plan designates six Classes of Claims and one Class of Interests, subject to section 1122 of the Bankruptcy Code. *See* Plan, Article III. Thus, the Plan satisfies section 1123(a)(1) of the Bankruptcy Code.

(b) Section 1123(a)(2): Classes that Are Not Impaired by the Plan

14. Section 1123(a)(2) of the Bankruptcy Code requires that a chapter 11 plan specify which classes of claims or equity interests are unimpaired under such plan. The Plan specifies that Class 1 (Secured Claims) and Class 2 (Priority Claims) are Unimpaired. *See* Plan, Article III. Therefore, the Plan satisfies section 1123(a)(2) of the Bankruptcy Code.

(c) Section 1123(a)(3): Treatment of Classes that Are Impaired by the Plan

15. Section 1123(a)(3) of the Bankruptcy Code requires that a chapter 11 plan specify how the classes of claims or equity interests that are impaired under such plan will be treated. The Plan designates Class 3 (Surety Bond Claims), Class 4 (General Unsecured Claims), Class 5 (Convenience Claims), Class 6 (Subordinated Claims), and Class 7 (Interests) as Impaired and specifies the treatment of Claims and Interests in such Classes. *See* Plan, Article III. As a result, the Plan satisfies section 1123(a)(3) of the Bankruptcy Code.

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

16. Section 1123(a)(4) of the Bankruptcy Code requires that a chapter 11 plan provide the same treatment for each claim or interest within a particular class, unless the holder of a claim or interest 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, unless the Holder has agreed to receive less favorable treatment than other members in such Class. *See* Plan, Article III. Thus, the Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

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

17. Section 1123(a)(5) of the Bankruptcy Code requires that a chapter 11 plan provide "adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Article V of the Plan provides a detailed description of the transactions that are contemplated by the Plan. Specifically, the Plan provides adequate means for implementation of the Plan through, among other things: (i) the substantive consolidation of the Debtors' estates for plan purposes; (ii) the appointment of the Plan Administrator; (iii) the creation of the Plan Oversight Committee; (iv) the making of Distributions by the Plan Administrator in accordance with the Plan; and (v) the dissolution and wind-down of the Debtors and the termination of their officers and managers on the Effective Date. *See* Plan, Article V. As a result, the Plan satisfies section 1123(a)(5) of the Bankruptcy Code.

(f) Section 1123(a)(6): Prohibitions on Issuance of Non-Voting Securities

18. The Plan does not provide for the issuance of any securities, including non-voting securities, and the Debtors are being dissolved on or after the Effective Date as provided for in the Plan. *See* Plan, § 5.4. In light of this, section 1123(a)(6) of the Bankruptcy Code is not applicable.

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

19. Section 1123(a)(7) of the Bankruptcy Code requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). Here, the Debtors' existing officers and managers are being terminated on the Effective Date without any further action of any party. *See* Plan § 5.3.1. The Committee, in consultation with the Debtors and Federal Insurance Company, selected Cullen D. Speckhart, Esq. to serve as the Plan Administrator, and the initial members of the Plan Oversight Committee will be Federal Insurance Company, Ohio Machinery Company, d/b/a Ohio CAT, and IUOE and Pipe Line Employers Health and Welfare Fund, all of which was disclosed in the Plan Supplement.

20. Accordingly, the Plan's provisions related to the selection of directors, officers, or trustees are consistent with the interests of Holders of Claims and Interests and with public policy, thereby satisfying section 1123(a)(7) of the Bankruptcy Code.

(h) Section 1123(a)(8): Provisions Regarding Treatment of Earnings and Future Income

21. Section 1123(a)(8) of the Bankruptcy Code applies to cases where the debtor is an individual and, accordingly, is inapplicable to the Debtors and the Plan.

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

22. Section 1123(b) of the Bankruptcy Code sets forth certain permissive provisions that may be incorporated into a chapter 11 plan. *See* 11 U.S.C. § 1123(b). Each provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code.

(a) Impairment/Unimpairment of Claims and Interests

23. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). As discussed above, Claims and Interests in Classes 3 through 7 are impaired under the Plan, and Claims in Classes 1 and 2 are unimpaired under the Plan. Thus, the Plan is consistent with section 1123(b)(1) of the Bankruptcy Code.

(b) Assumption/Rejection of Executory Contracts and Leases

24. Section 1123(b)(2) of the Bankruptcy Code allows a chapter 11 plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases. *See* 11 U.S.C. § 1123(b)(2). Section 6.1 of the Plan provides that, on the Effective Date, all executory contracts and unexpired leases of the Debtors that have not been assumed, assumed and assigned, or rejected prior to the Effective Date shall be deemed rejected, pursuant to the Confirmation Order, as of the Effective Date, other than the Plan Settlement Agreement, the Indemnity Agreement, the Surety Cooperation Agreement and the Insurance Contracts, including without limitation those identified in the Plan Supplement.[7] *See* Plan § 6.1.

25. Assumption or rejection of an executory contract or unexpired lease of a debtor is subject to judicial review under the business judgment standard.[8] This standard is satisfied when a debtor determines that assumption or rejection will benefit the estate.[9] Here, as the Debtors are liquidating and winding down their affairs through the Chapter 11 Cases, the Debtors have exercised appropriate business judgment in their decision to reject the Debtors' remaining

[7] For the avoidance of doubt, any post-petition consulting agreements shall not be deemed rejected as of the Effective Date.

[8] *See, e.g., Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39–40 (3d Cir. 1989).

[9] *See, e.g., id.*

executory contracts and unexpired leases, and to assume a limited number of executory contracts and unexpired leases, in connection with the Plan.

26. Accordingly, the treatment of executory contracts and unexpired leases in the Plan is consistent with section 1123(b)(2) of the Bankruptcy Code.

(c) Compromises and Settlements Under and in Connection with the Plan

27. Section 1123(b)(3) of the Bankruptcy Code allows a Plan to provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate" or "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest." 11 U.S.C. § 1123(b)(3).

(i) Compromises and Settlements

28. The Plan reflects and incorporates settlements and compromises, including, without limitation, the Plan Settlement Agreement, as permitted by section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019. Compromises are favored in bankruptcy because they minimize the costs of litigation and further the parties' interests in expediting administration of a bankruptcy estate.[10] In deciding whether to approve a compromise under Bankruptcy Rule 9019, the Bankruptcy Court must determine if the settlement is fair, reasonable, and in the interests of the estate.[11] Additionally, the Third Circuit applies a four-factor balancing test for considering motions to approve settlements under Bankruptcy Rule 9019, weighing:

a) the probability of success in litigation;
b) the likely difficulties in collection;
c) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and

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

[11] *See, e.g., In re Key3Media Grp., Inc.*, 336 B.R. 87, 92 (Bankr. D. Del. 2005) (citation omitted)).

d) the paramount interest of the creditors.[12]

29. The compromises and settlements pursuant to and in connection with the Plan, including, without limitation, the Plan Settlement, are each fair, reasonable and in the best interests of the Debtors, their Estates and their creditors for the reasons set forth at length in the Plan, the Disclosure Statement, and the Pometti Declaration. In particular, the Plan Settlement, which is a necessary component of the Plan, represents a fair and reasonable resolution of any and all disputes between the Debtors, the Committee, and the Partner Settlement Parties.

30. Moreover, the *Martin* test strongly favors approving the Plan Settlement. After extensive good faith, arm's-length negotiations, the Plan Settlement Parties executed the Plan Settlement, resolving significant litigation issues between the Debtors and the Partner Settlement Parties. Absent the Plan Settlement, the litigation would be complicated and fact-intensive, consuming a significant portion of the Debtors' limited resources with no assurances of a successful result. Litigating these disputes to completion would be a complex, lengthy, expensive, and burdensome process, a process that the Plan Settlement obviates, in full, in a fair and reasonable manner. Indeed, in contrast to the uncertainty and inherent risk in litigating these matters, and the unavoidable expenditures related thereto, the Plan Settlement allows the Chapter 11 Cases to move forward towards completion in a timely and efficient manner, to the benefit of all interested parties.

31. In addition: (a) the Plan Settlement reflects a reasonable balance between the possible success of litigation with respect to each of the settled claims and disputes, on the one hand, and the benefits of fully and finally resolving such claims and disputes, and allowing the Debtors to liquidate and distribute their Assets and wind down the Chapter 11 Cases, in a timely

[12] *In re Martin*, 91 F.3d at 393.

and efficient manner, on the other hand; (b) absent the Plan Settlement, there is a significant likelihood of complex and protracted litigation, with the attendant expense, inconvenience, delay and risk that has a possibility to derail the Debtors' liquidation and wind-down efforts, which have been overwhelmingly successful to date; (c) the Plan Settlement provides significant value to the Debtors' Estates, favorably resolves and avoids potential litigation, and enables the prompt and efficient wind-down of the Debtors' Estates, and absent such settlement and the Plan Settlement Payment (*i.e.*, $2,000,000), there is a significant likelihood that substantially less value would be available for Allowed Claims; (d) the Plan Settlement is the product of extensive arm's-length and good faith negotiations between sophisticated parties represented by counsel; and (e) the Plan Settlement is in the best interests of the Debtors, their Estates, holders of Claims and Interests, and other parties-in-interest, and is fair, equitable, and reasonable, as attested to in the Pometti Declaration and demonstrated by the almost unanimous acceptance of the Plan. Similarly, the releases under the Plan Settlement are necessary and vital to the Plan, as the Partner Settlement Parties would not have agreed to the Plan Settlement Agreement but for such releases.

32. The Plan Settlement, including the agreed-upon treatment of the Partner Settlement Party Claims and payment of the Plan Settlement Payment, represents a valid compromise and settlement of claims. The Plan Settlement conserves estate resources; paves the way for the Debtors' exit from the Chapter 11 Cases; adds substantial value to the Debtors' Estates; avoids costly, complex and potentially unsuccessful litigation; provides for releases which are customary and necessary to Plan confirmation; and increases recoveries to the Debtors' creditors while avoiding potentially costly, complex, and uncertain litigation.

33. Accordingly, the resolutions embodied in the Plan Settlement: (a) are fair and equitable; (b) obviate the expense, delay, inconvenience, and uncertainty that would necessarily

be associated with the litigation of these complex issues; and (c) advance the paramount interest of creditors. The Court should thus approve the Plan Settlement under section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019.

(ii) Causes of Action

34. Section 1123(b)(3)(B) provides that a plan may "provide for the retention and enforcement . . . by a representative of the estate appointed for such purpose, of any . . . claim or interest [belonging to the debtor or to the estate]." 11 U.S.C. § 1123(b)(3)(B). The Plan provides that the Retained Causes of Action vest in and will be retained by the Post-Effective Date Debtors. In addition, the Plan sets forth how the Preference Actions will be analyzed. *See* Plan, Article V. The provisions governing the retention of the Retained Causes of Action are consistent with, and supported by, section 1123(b)(3)(B) of the Bankruptcy Code.

(d) Releases, Exculpations, and Injunction

35. As is customary, the Plan includes certain release, exculpation, and injunction provisions. *See* Plan §§ 11.10–11.13. These provisions are proper because, among other things, they are the product of arms' length negotiations, have been critical to obtaining the support of the various constituencies for the Plan, have received support from the Holders of General Unsecured Claims who voted for the Plan, and perhaps most importantly, with limited exceptions, have not been objected to by any party in interest in the Chapter 11 Cases. Such release, exculpation, and injunction provisions are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and their Estates. These provisions are consistent with the Bankruptcy Code and, thus, section 1123(b) of the Bankruptcy Code is satisfied.

(i) Releases of Debtors' and Estates' Claims and Causes of Action

36. Under the Plan, the Debtors propose to release certain parties—the Released Parties[13]—from certain Claims or Causes of Action. *See* Plan § 11.11(a). A plan that proposes to release a claim or a cause of action belonging to a debtor's estate is a "settlement" within the scope of section 1123(b)(3)(A) of the Bankruptcy Code.

37. Bankruptcy courts consider the *Master Mortgage* factors to determine whether a release by a debtor should be approved: (a) whether there is an identity of interest between the debtor and the third party, such that a such against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (b) whether the non-debtor has made a substantial contribution; (c) the essential nature of the release to the extent that, without the release, there is little likelihood of success; (d) an agreement by a substantial majority of creditors to support the release, specifically if the impacted class or classes "overwhelmingly" vote to accept the plan; and (e) whether there is a provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the release.[14] Importantly, a court need not find that all of these factors apply to approve a debtor's release of claims.[15] Rather, such factors are "helpful in weighing the equities of the particular case after a fact-specific review."[16]

38. An analysis of these factors demonstrates that the proposed releases granted by the Debtors, outlined in section 11.11(a) of the Plan (the "**Debtors' Release**"), in favor of the Released

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[13] The Plan defines the "Released Parties" as: "Each solely in their capacities as such, (a) the Debtors and their Estates, (b) the Debtors' current and former officers and managers, (c) the Partner Settlement Parties, and (d) to the extent not included in the foregoing, each of the preceding entities' respective Related Parties." Plan § 1.100.

[14] *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)).

[15] *See, e.g.*, *In re Wash. Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011).

[16] *In re Indianapolis Downs, LLC, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013).

Parties are fair, reasonable, in the best interests of the Debtors and their Estates, and are appropriate under the circumstances of the Chapter 11 Cases.

39. *First*, there is an identity of interest between the Debtors and the Released Parties because such parties all "share the common goal" of confirming the Plan and implementing the Plan Settlement.[17] The Plan is the result of extensive negotiations among, and efforts by, the Debtors and the Released Parties, the compromise of the Released Parties' claims, and the Released Parties' support of the Plan. Each of the Released Parties, as a critical participant in the Plan process, shares a common goal with the Debtors in seeing the Plan succeed and ensuring that the Chapter 11 Cases can be wound down in a timely and efficient manner. Like the Debtors, these parties seek to confirm the Plan and implement the transactions contemplated thereunder.[18]

40. *Second*, the Released Parties are providing necessary contributions in exchange for the Plan Releases, including by contributing value necessary to consummate the Plan, agreeing to compromise or otherwise waive substantive rights to effectuate the Plan Settlement, and providing other material support to the Debtors' overall restructuring.[19] Among other things, the released officers and managers have continued to operate the Debtors' businesses throughout the Chapter 11 Cases, helped to develop and implement the Debtors' chapter 11 strategy, and otherwise navigate the Debtors through a complex chapter 11 process. Additionally, the Partner Settlement Parties have made various significant contributions throughout the Chapter 11 Cases, including by agreeing to the $2,000,000 Plan Settlement Payment, releasing the Debtors and their Estates from

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[17] *See In re Tribune Co.*, 464 B.R. 126, 187 (Bankr. D. Del. 2011) (finding an identity of interest existed between the debtors and the released parties because they "share[d] the common goal of confirming" the plan and implementing the global settlement).

[18] *See Zenith Elecs.*, 241 B.R. at 110 (concluding that certain releases who "were instrumental in formulating the Plan" shared an identity of interest with the debtor "in seeing that the Plan succeed").

[19] *See In re W.R. Grace*, 446 B.R. 96, 138 (Bankr. D. Del. 2011).

claims, and participating in the negotiation and development of the Plan. Accordingly, the value contributed by the Released Parties is more than sufficient to support the Debtors' Release.

41. *Third*, the Debtors' Release is an essential component of the Plan, and constitutes a sound exercise of the Debtors' business judgment, as attested to in the Pometti Declaration. During the course of negotiations regarding the Plan, it was clear that the Debtors' Release would be a necessary condition to consummation of the transactions embodied in the Plan, including the Plan Settlement. Without the Debtors' Release, the Debtors and their stakeholders would neither have been able to secure the significant benefits provided by the Plan, nor build consensus around the Plan. The Debtors' Release was a material inducement to the concessions and contributions received by the Debtors and their Estates under the Plan. Furthermore, the Debtors' Release is in partial exchange for the Plan Settlement Payment and the compromises and settlements provided in the Plan Settlement. Absent Confirmation of the Plan and the Debtors' Release, the Plan Settlement could not be effectuated, and parties in interest would likely be mired in extensive and costly litigation that would potentially provide only minimal recoveries, if any, for parties in interest. Accordingly, the Debtors' Release is essential to Plan consummation and to preserving and maximizing the value of the Debtors' Estates for the benefit of stakeholders.

42. *Fourth*, as evidenced by the Voting Report and noted herein, the Debtors' stakeholders overwhelmingly support the Plan. Holders of Class 3 Claims representing 100% in number and amount voted to accept the Plan. Holders of Class 4 Claims representing over 81% by number and over 95% by amount voted to accept the Plan. Holders of Class 5 Claims representing over 97% by number and over 98% by amount voted to accept the Plan. Additionally, the Committee and Federal Insurance, the largest creditor in the Chapter 11 Cases, support the Plan

and the releases provided for therein. Given the critical nature of the Debtors' Release, this degree of consensus evidences the Debtors' stakeholders' support for the Debtors' Release and the Plan.

43. *Fifth*, the Plan provides meaningful recoveries for all Classes affected by the Debtors' Release. Without the Plan, and the Debtors' Release which made it possible, the Debtors and their stakeholders would not have been able to obtain such enhanced creditor recoveries, which recoveries, as demonstrated by the Liquidation Analysis (as defined below), would not be available if the Chapter 11 Cases were converted to chapter 7.[20] Moreover, fair consideration is being exchanged for the Debtors' Release.[21]

44. The Debtors' Release represents a valid settlement of any claims the Debtors and their Estates may have against the Released Parties, pursuant to section 1123(b)(3)(A) and Bankruptcy Rule 9019. The Debtors, in consultation with the Committee and other constituencies, have proposed the Debtors' Release based on their sound business judgment.[22] Indeed, as set forth in the Pometti Declaration, the Debtors believe that pursuing claims or causes of action against the Released Parties would not be in the best interest of the Debtors' various stakeholders, because the costs involved would likely outweigh any potential benefit to the Estates from pursuing such claims. Moreover, the Debtors' Release and the efforts of the Released Parties were integral to the success of the Chapter 11 Cases and the distributions to be made to Holders of Claims under the Plan. The Debtors' Release is a key component of the consensual Plan process, and no constructive

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[20] *See Zenith Elecs.*, 241 B.R. at 111 (explaining that the fifth factor was met because "the Plan does provide a distribution to the creditors in exchange for the Releases" and supporting that conclusion by explaining that creditors received more under the plan than they would have in a liquidation).

[21] *See, e.g., In re United Artists Theatre Co.*, 315 F.3d 217, 227 (3d Cir. 2003) (indicating releases should be "given in exchange for fair consideration").

[22] *See In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010) ("[A] debtor may release claims in a plan pursuant to Bankruptcy Code § 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").

purpose would be served by preserving or seeking to prosecute any of the Estates' claims against the Released Parties.

45. Accordingly, as set forth above, the Debtors' Release represents a valid exercise of the Debtors' business judgment, and should be approved.

(ii) Third-Party Releases

46. Section 11.11(b) of the Plan also provides for third-party releases (the "**Third-Party Releases**") of the Released Parties by the Releasing Parties.[23] Courts in this jurisdiction approve both consensual and non-consensual releases. The Debtors believe that the Third-Party Releases are consensual, because such releases apply only to (a) Holders of General Unsecured Claims deemed under the Plan to have accepted the Plan (i.e., Holders of Claims in Unimpaired Classes of Claims under the Plan) that have not objected to the release, and (b) Holders of Claims in Classes 4 and 5 that (i) voted to accept or reject the Plan and did not timely submit a Release Opt-Out indicating such Holder's decision to not participate in the releases set forth in Section 11.11(b) of the Plan, or (ii) did not vote to accept or reject the Plan and did not submit an opt-out or file an objection to the release. *See* Plan §§ 1.102, 11.11(b) and 11.11(d).

47. In addition, section 11.11(e) of the Plan provides for third-party releases of the Released Parties by Federal Insurance Company or any of its Related Parties, except for the direct claims against the Debtors, which are preserved, and except for any claims arising under or relating to (a) bonds issued on behalf of entities other than Welded Construction, L.P., and associated

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[23] The Plan defines such "Releasing Parties" as: "(a) all Holders of Claims deemed hereunder to have accepted this Plan (i.e., Holders of Claims in Unimpaired Classes of Claims) that have not Filed an objection to the release in Section 11.11(b) of this Plan prior to the deadline to object to Confirmation of this Plan; and (b) all Holders of Claims in Classes 4 and 5 that (i) vote to accept or reject this Plan and do not timely submit a Release Opt-Out indicating such Holder's decision to not participate in the releases set forth in Section 11.11(b) of this Plan, or (ii) do not vote to accept or reject this Plan, <u>and</u> either do not timely submit a Release Opt-Out, <u>or</u> do not File an objection to the releases in Section 11.11(b) of this Plan prior to the deadline to object to Confirmation of this Plan." Plan § 1.102.

indemnity agreements, (b) insurance contracts and related agreements pertaining to the Released Parties, and (c) any other contract to which a Released Party is a direct party. *See* Plan § 11.11(e).

48. The Third-Party Releases are subject to a standard carve out for actual fraud, willful misconduct, and gross negligence.

49. Courts have repeatedly recognized that similarly constructed third-party releases are consensual and appropriate where holders of claims or interests are provided with detailed instructions on how to opt out of providing the releases, as they were here, but nevertheless do not opt out, either by abstaining from voting on the plan, or by voting against the plan and failing to opt out of the releases.[24] Here, the Plan solicitation materials provided clear conspicuous notice of both the Third-Party Releases and the process for opting out of the same. Thus, the voting creditors were free to choose whether to grant the third-party releases or not.

50. Similarly, courts in this jurisdiction have found that third-party releases are consensual where the affected claimants are unimpaired and deemed to accept the plan.[25] Thus, the Plan's inclusion of creditors conclusively deemed to accept the Plan in the definition of "Releasing Parties" is appropriate.

51. Finally, interested parties received sufficient notice of the Third-Party Releases provided for in the Plan, had ample time to raise any objections thereto, and, with limited exceptions, no such objections were filed.

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[24] *See, e.g., Indianapolis Downs*, 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third Party Releases may be properly characterized as consensual and will be approved.").

[25] *Id*. (finding third-party releases consensual that bind unimpaired creditors who are deemed to accept the plan because "[those] creditors [were] being paid in full and have therefore received consideration for the releases"); *Spansion*, 426 B.R. at 145 (Bankr. D. Del. 2010) (finding that deemed acceptance of the releases by unimpaired classes was not "over-reaching" because the unimpaired classes were being paid in full and received adequate consideration for the release).

52. Here, the Third-Party Releases under the Plan are the product of extensive negotiations with, among other key constituents, the Committee and the Partner Settlement Parties. Absent the Third-Party Releases in favor of the Partner Settlement Parties, such parties, among other things, would not: (a) have been willing to make a $2,000,000 payment to the estates; (b) indemnify the Debtors and Post-Effective Date Debtors for liability associated with the Central States Claim; and (c) agree to waive any and all claims and/or requests for payment that could have been or could be asserted by the Partner Settlement Parties.

53. Therefore, the Third-Party Releases should be approved as consensual third-party releases.

(iii) Exculpation and Limitation of Liability

54. The Plan provides for the exculpation of, and limitation of liability for, the Exculpated Parties, which parties have fiduciary obligations to the Estates. *See* Plan § 11.12.[26] The exculpation and limitation of liability is subject to a standard carve out for actual fraud, willful misconduct, and gross negligence. *Id*.

55. It is well established that exculpation is appropriate for fiduciaries of a bankruptcy estate, including the debtor, its directors, officers and professionals, and the creditors' committee, and its members and professionals.[27] The Exculpated Parties played critical roles in and made significant contributions to the Chapter 11 Cases, and participated in good faith in formulating and negotiating the Plan and, as such, they are entitled to protection from exposure to claims against

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[26] The Plan defines "Exculpated Parties" as: "Each of, solely in their capacities as such, and solely in connection with Section 11.12 of this Plan: (a) the Debtors, the Estates and the Post-Effective Date Debtors; (b) the Debtors' officers, general partners (Bechtel GP and McCaig LP), limited partners (Bechtel LP and McCaig LP) and managers; (c) the Professionals retained by the Debtors pursuant to an Order of the Bankruptcy Court, including Zolfo Cooper Management, LLC and AlixPartners, LLP (as applicable); (d) the Committee; (e) the present and former members of the Committee, but solely in their capacity as members of the Committee (including ex officio members); and (f) the Professionals retained by the Committee pursuant to an Order of the Bankruptcy Court." Plan § 1.45.

[27] *In re PWS Holding Corp.*, 228 F.3d 224, 245–47 (3d Cir. 2000).

them relating to their participation in the Chapter 11 Cases, consistent with section 1125(e) of the Bankruptcy Code. *See* 11 U.S.C. § 1125(e). Furthermore, interested parties received sufficient notice of the exculpation provision and had ample time to raise any objections thereto, and, with few exceptions, no such objections were filed. As a result, the exculpation provision set forth in Section 11.12 of the Plan is appropriate, consistent with applicable law and should be approved.

(iv) Injunction

56. Finally, Section 11.10 of the Plan contains an injunction provision (the "**Injunction**") that the Debtors believe is necessary to enforce and preserve the release and exculpation provisions provided for in Article XI, and should, therefore, be approved. Furthermore, in compliance with Bankruptcy Rule 3016, the Disclosure Statement, and the Plan, filed with the Bankruptcy Court identify acts to be enjoined by, and all entities that would be subject to, the Injunction. The Injunction is therefore appropriate and should be approved.

(e) Other Appropriate Provisions Not Inconsistent with the Applicable Provisions of the Bankruptcy Code

57. Section 1123(b)(6) of the Bankruptcy Code is a "catchall" provision which permits a chapter 11 plan to include any appropriate provision as long as such provision is not inconsistent with applicable sections of the Bankruptcy Code.

(i) Substantive Consolidation

58. Section 5.2 of the Plan provides for the substantive consolidation of the Debtors for plan purposes only. The Debtors believe that such substantive consolidation is fair, equitable and in the best interest of the Estates. Moreover, no party has objected to substantive consolidation. Far from opposing substantive consolidation, the voting creditors have accepted the Plan.

59. "Substantive consolidation . . . emanates from equity. It treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save

for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph into claims against the consolidated survivor."[28]

60. It is well established that bankruptcy courts may use their equitable powers under section 105 of the Bankruptcy Code to substantively consolidate.[29] Moreover, section 1123(a)(5)(C) of the Bankruptcy Code expressly contemplates that a plan may merge or consolidate debtors as a means for the implementation of the plan. A species of merger and consolidation of debtors under a plan is substantive consolidation.[30] Finally, as noted above, section 1123(b)(3)(A) of the Bankruptcy Code provides that chapter 11 plans may provide for the settlement or adjustment of claims, which would include the settlement of claims between estates over their respective assets that is resolved by way of substantive consolidation.

61. Here, substantive consolidation is appropriate and justified. Absent the substantive consolidation proposed under the Plan, the process of winding down the Estates and administering Distributions could be more time consuming and costly. Furthermore, as permitted by section 1123(a)(5)(C) of the Bankruptcy Code, a vote of the Voting Classes of Claims in favor of such treatment is a basis for substantive consolidation in these Chapter 11 Cases. The Plan does not propose substantive consolidation to deprive a specific Creditor or group of Creditors of their rights while providing a windfall to other Creditors. Rather, given the expense involved in winding down the Debtors' Estates and administering Distributions, recoveries by Creditors should be maximized by consolidating the Assets and liabilities of the Debtors as provided for in the Plan.

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[28] *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005) (internal quotation marks and citation omitted).

[29] *See, e.g.*, *In re Stone & Webster, Inc.*, 286 B.R. 532, 539 (Bankr. D. Del. 2002); *Bruce Energy Ctr. Ltd. v. Orfa Corp. of Am. (In re Orfa Corp. of Phila.)*, 129 B.R. 404, 413–14 (Bankr. E.D. Pa. 1991) ("[T]he court's power to substantively consolidate cases is derived from its general equitable powers under 11 U.S.C. § 105.").

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

62. The Debtors believe that substantive consolidation of the Debtors' estates in connection with the Plan is fair, equitable, and in the best interest of the Estates and parties in interest. In addition, no party has objected to the proposed substantive consolidation. Accordingly, substantive consolidation should be approved.

(ii) Retention of Jurisdiction

63. Article X of the Plan provides that, among other things, the Bankruptcy Court will retain jurisdiction over matters in connection with, arising out of, or related to the Chapter 11 Cases and the Plan. The post-confirmation retention of jurisdiction by the Bankruptcy Court is permitted by the Bankruptcy Code.[31] The continuing jurisdiction of the Bankruptcy Court, as set forth in Article X of the Plan, is appropriate and wholly consistent with applicable law.

(iii) Central States Claim Estimation

64. Section 8.4.1 of the Plan provides that the Central States Claim shall be estimated at $0.00 solely for purposes of determining the General Unsecured Claim Distribution and any related reserve. Estimation of the Central States Claims is necessary to avoid undue delay in the administration of the Chapter 11 Cases and is supported by, without limitation, the indemnity contained in the Plan Settlement Agreement and a guarantee provided by Bechtel Corporation. Moreover, all parties' rights are preserved with respect to the allowance, liquidation, or determination of liability of the Central States Claim. Thus, estimation is an appropriate means by which to avoid the undue delay in the administration of the Chapter 11 Cases that will inevitably occur as the liability of the parties is determined in arbitration and related proceedings.

[31] *See, e.g., Gruen Mktg. Corp. v. Asia Commercial Co. (In re Jewelcor Inc.),* 150 B.R. 580, 582 (Bankr. M.D. Pa. 1992) ("There is no doubt that the bankruptcy court's jurisdiction continues post confirmation to protect its confirmation decree, to prevent interference with the execution of the plan and to aid otherwise in its operation.") (internal citations omitted).

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

65. Section 1129(a)(2) of the Bankruptcy Code requires that the "proponent of the plan comply with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). Whereas section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, section 1129(a)(2) is concerned with the activities of the plan proponent.[32] In determining whether the plan proponent has complied with this section, courts focus on whether the proponent has adhered to the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy Code.[33]

66. The Debtors have complied with all disclosure and solicitation requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. The Disclosure Statement, the Plan, the Ballots, the notice of the Confirmation Hearing, and all other related documents were distributed to parties in accordance with the Disclosure Statement Order. *See* Docket Nos. 1394, 1405, and 1434. Accordingly, section 1129(a)(2) of the Bankruptcy Code has been satisfied.

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

67. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Good faith is generally interpreted to mean that there exists a reasonable likelihood that the "plan will fairly

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[32] *See* 7 *Collier on Bankruptcy* ¶ 1129.02[2] (16th ed. 2016).

[33] *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d at 248.

achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[34] Good faith is to be viewed in light of the particular facts and circumstances of the case.[35]

68. The Debtors have proposed the Plan in good faith. Throughout the Chapter 11 Cases, the Debtors worked to build consensus among the various creditor constituencies. The Plan and the process leading up to its formulation (including the Plan Settlement) are the result of extensive arms' length negotiations among the Debtors, the Partner Settlement Parties, the Committee, and other key stakeholders in the Chapter 11 Cases. Accordingly, section 1129(a)(3) of the Bankruptcy Code has been satisfied.

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

69. Section 1129(a)(4) of the Bankruptcy Code requires that any payments by a debtor "for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case," either be approved by the court as reasonable or subject to approval of the court as reasonable. 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) has been construed to require that all payments on account of professional fees and expenses from estate assets be subject to the Bankruptcy Court's review and approval.[36]

70. In accordance with section 1129(a)(4) of the Bankruptcy Code, no payments will be made on account of Professional Fee Claims by the Debtors other than payments that are authorized by order of the Bankruptcy Court. Pursuant to Section 11.2 of the Plan, all final requests for payment of Professional Fee Claims must be filed with the Bankruptcy Court and served upon

[34] *Id.* at 242 (internal quotation marks and citation omitted).

[35] *See, e.g., In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002); *In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 347 (Bankr. D. Del. 1998).

[36] *See, e.g., Lisanti Foods, Inc. v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 503 (D.N.J. 2005); *Resorts Int'l, Inc.*, 145 B.R. 412, 476 (Bankr. D.N.J. 1990).

all parties required to receive notice within thirty (30) days after the Effective Date, and such Professional Fee Claims are payable only to the extent approved by the Bankruptcy Court. *See* Plan § 11.2. The Plan also provides that the Bankruptcy Court shall retain jurisdiction to "hear and determine all applications for compensation and reimbursement of expenses of Professionals under this Plan or under sections 327, 328, 330, 331, 503(b), 1103 and 1129(a)(4) of the Bankruptcy Code." *Id.* § 10.1(b). Accordingly, section 1129(a)(4) of the Bankruptcy Code has been satisfied.

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

71. Section 1129(a)(5) of the Bankruptcy Code requires (a) that the proponent of a plan disclose the identity and affiliations of the proposed directors, officers or voting trustees of the debtors, an affiliate of a debtor participating in a joint plan with a debtor, or a successor to the debtor under the plan, (b) that the appointment or continuance of such individuals be consistent with the interests of creditors and equity security holders and with public policy, and (c) that there be disclosure of the identity and nature of the compensation of any insiders to be retained or employed by the reorganized debtors. *See* 11 U.S.C. § 1129(a)(5).

72. Section 5.4 of the Plan provides that, on or after the Effective Date, the Debtors shall be dissolved as provided for in the Plan. Section 5.3 of the Plan, in addition, provides that on the Effective Date, the Debtors' officers and managers shall be terminated automatically. The Plan Administrator and the initial members of the Plan Oversight Committee were selected by the Committee in consultation with the Debtors and Federal Insurance Company, and, among other things, their identities are set forth in the Plan Supplement. The appointment of these parties is consistent with the interests of the Debtors' creditors and public policy. Accordingly, section 1129(a)(5) of the Bankruptcy Code has been satisfied.

VI. Section 1129(a)(6): The Plan Does Not Contain Any Rate Changes Subject to the Jurisdiction of Any Governmental Regulatory Commission

73. Section 1129(a)(6) of the Bankruptcy Code requires that any governmental regulatory commission having jurisdiction over the rates charged by the debtor in the operation of its business approve any rate change provided for in a plan of reorganization. *See* 11 U.S.C. § 1129(a)(6). The Plan does not provide for the change of any rate that is within the jurisdiction of any governmental regulatory commission after the occurrence of the Effective Date. Therefore, section 1129(a)(6) is inapplicable.

VII. Section 1129(a)(7): The Plan Is in the Best Interest of All Creditors

74. Section 1129(a)(7) of the Bankruptcy Code requires that holders of impaired claims or interests which do not vote to accept the chapter 11 plan at issue "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date." 11 U.S.C. § 1129(a)(7)(A). Section 1129(a)(7) of the Bankruptcy Code is often referred to as the "best interests test." This test focuses on individual creditors' claims rather than classes of claims.[37]

75. As demonstrated by the Liquidation Analysis attached as Exhibit C to the Disclosure Statement (the "**Liquidation Analysis**"), the best interests test is satisfied as to each Holder of an Impaired Claim or Interest, and no party in interest has argued otherwise. As set forth in the Liquidation Analysis, conversion of the Chapter 11 Cases would have a negative impact on the ultimate proceeds available for distribution to creditors in the Chapter 11 Cases, including, without limitation, as a result of: (i) the increased costs of liquidation under chapter 7, which

[37] *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999).

would include, among others, the fees payable to a chapter 7 trustee, and the fees that would be payable to additional attorneys and other professionals that such a trustee may engage; (ii) the establishment of a new claims bar date, which could result in new General Unsecured Claims being asserted against the Estates, thereby diluting the recoveries of other Holders of Allowed General Unsecured Claims; and (iii) the various asset and liability allocation and intercompany reconciliation issues that a chapter 7 trustee would face in a case that has not been substantively consolidated.

76. Furthermore, the Voting Declaration and the Liquidation Analysis indicate that each Holder of a Claim or Interest in an Impaired Class has accepted the Plan, or will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Effective Date, that is not less than the amount that such Holder would so receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date. As set forth more fully in the Pometti Declaration, the Debtors believe that the estimated liquidation values set forth in the Liquidation Analysis are fair and reasonable estimates of the value of the Debtors Assets' upon a hypothetical liquidation under chapter 7 of the Bankruptcy Code and that, based on those estimates, each Class of Claims and Interests under the Plan will receive under the Plan at least as much as that Class would receive in a hypothetical chapter 7 liquidation.

77. In addition, the Plan Settlement Agreement is contingent upon the Plan being confirmed and the occurrence of the Effective Date. As a result, if the Chapter 11 Cases were converted to chapter 7, as noted in the Liquidation Analysis, the Debtors' Estates would lose the $2,000,000 Plan Settlement Payment and indemnity for the Central States Claim, among other consideration.

78. In sum, conversion of the Chapter 11 Cases to chapter 7 would likely prolong these proceedings, delay distributions to creditors, and result in far greater costs and expenses. Accordingly, section 1129(a)(7) of the Bankruptcy Code has been satisfied.

VIII. Section 1129(a)(8): The Plan Complies with Section 1129(a)(8) of the Bankruptcy Code, with the Exception of Class 6 and Class 7

79. Section 1129(a)(8) of the Bankruptcy Code requires that each class of impaired claims or interests accepts the plan, as follows: "With respect to each class of claims or interests – (A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8).

80. As set forth above, Holders of Claims in Classes 1 and 2 are unimpaired under the Plan and, pursuant to section 1126(f) of the Bankruptcy Code, are conclusively presumed to have voted to accept the Plan. Thus, section 1129(a)(8) has been satisfied as to Class 1 and 2.

81. As set forth above, and as reflected in the Voting Declaration, the Plan has been accepted by creditors in Impaired Class 3 (Surety Bond Claims), Class 4 (General Unsecured Claims) and Class 5 (Convenience Claims) holding well in excess of two-thirds in amount and one-half in number of allowed claims for voting purposes. Thus, as to those Impaired and accepting Classes, section 1129(a)(8) likewise has been satisfied.

82. Holders of Claims in Class 6 (Subordinated Claims) and Holders of Interests in Class 7 (Interests) are not entitled to receive or retain any property under the Plan on account of their Claims and Interests and, therefore, are deemed not to have accepted the Plan pursuant to section 1126(g) of the Bankruptcy Code.[38] *See* 11 U.S.C. § 1126(g). The Plan nonetheless may

[38] In addition, to the extent that there are no such claims as of the Confirmation Hearing, section 4.6 of the Plan provides that any Class of Claims that does not contain, as of the date of the commencement of the Confirmation Hearing, a Holder of a Claim allowed for purposes of Plan voting pursuant to the Disclosure Statement Order shall be deemed eliminated from the Plan for purposes of determining acceptance of the Plan by such Class under section 1129(a)(8) of the Bankruptcy Code.

be confirmed under the "cram down" provisions of section 1129(b) of the Bankruptcy Code, as discussed below.

IX. Section 1129(a)(9): The Plan Provides for Payment in Full of All Allowed Administrative Claims, Professional Fee Claims, and Priority Tax Claims

83. Section 1129(a)(9) of the Bankruptcy Code requires that entities holding allowed claims entitled to priority under section 507(a)(1)–(8) of the Bankruptcy Code receive specified cash payments under a plan.

84. Here, the Plan provides the treatment required by section 1129(a)(9) for each of the various Claims specified in sections 507(a)(1)–(8) of the Bankruptcy Code.

85. Specifically:

(a) Section 3.1.1 of the Plan provides that, unless otherwise agreed, each Holder of an Administrative Claim will receive Cash equal to the unpaid portion of the Face Amount of such Allowed Administrative Claim on, or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) thirty (30) days following the date on which such Claim becomes an Allowed Administrative Claim;

(b) Section 3.1.3 of the Plan provides that, unless otherwise agreed, each Holder of a Priority Tax Claim will receive, at the Post-Effective Date Debtors' discretion, either (i) Cash equal to the unpaid portion of the Face Amount of such Allowed Priority Tax Claim on the later of the Effective Date or thirty (30) days following the date on which such Priority Tax Claim becomes an Allowed Priority Tax Claim, or (ii) in regular installment payments in Cash over a period not exceeding five (5) years after the Petition Date, plus interest on the unpaid portion thereof at the rate determined under applicable non-bankruptcy law as of the calendar month in which the Confirmation Date occurs;

(c) Section 3.2.2 provides that, unless otherwise agreed, each Holder of a Priority Claim will receive Cash equal to the unpaid portion of the Face Amount of such Priority Claim on, or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) thirty (30) days following the date on which such Priority Claim becomes an Allowed Priority Claim; and

(d) Section 11.2 of the Plan provides that all Professional Fee Claims shall be paid to the extent approved by Order of the Bankruptcy Court within five (5) Business Days from entry of such Order. Accordingly, section 1129(a)(9) of the Bankruptcy Code has been satisfied.

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

86. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). As set forth above and in the Voting Declaration, Class 3 (Surety Bond Claims), Class 4 (General Unsecured Claims), and Class 5 (Convenience Claims) are Impaired Classes of Claims that voted to accept the Plan, determined without including any acceptance of the Plan by any insider. Therefore, section 1129(a)(10) of the Bankruptcy Code has been satisfied.

XI. Section 1129(a)(11): The Plan Provides for the Liquidation of the Debtors

87. Section 1129(a)(11) of the Bankruptcy Code requires that:

> [c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11).

88. The Plan is a plan of liquidation and provides that the Debtors will be dissolved on or after the Effective Date. To implement the dissolution and wind-down of the Debtors, the Plan provides for the appointment of the Plan Administrator and the Plan Oversight Committee to,

among other things, oversee the Distributions to Holders of Allowed Claims and the pursuit of the Retained Causes of Action. *See* Plan, Article V. Also, the Debtors believe that the Debtors' Cash and any additional proceeds from the liquidation of the Debtors' remaining Assets, including the Retained Causes of Action, will be sufficient to allow the Plan Administrator to make all payments required to be made under the Plan. Accordingly, section 1129(a)(11) of the Bankruptcy Code has been satisfied.

XII. Section 1129(a)(12): All Statutory Fees Have Been or Will Be Paid

89. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the Plan." 11 U.S.C. § 1129(a)(12). In accordance with section 1129(a)(12), Section 11.3 of the Plan provides that all fees payable pursuant to section 1930 of title 28 of the United States Code shall be paid on or before the Effective Date. As a result, the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

XIII. Sections 1129(a)(13) Through 1129(a)(16) Do Not Apply to the Plan Sections 1129(a)(13)–(16) of the Bankruptcy Code are inapplicable to the Debtors and the Plan, as the Debtors: (i) do not provide "retiree benefits," as defined in section 1114(a) of the Bankruptcy Code (*see* 11 U.S.C. § 1129(a)(13)); (ii) have no domestic support obligations (*see* 11 U.S.C. § 1129(a)(14)); (iii) are not individuals (*see* 11 U.S.C. § 1129(a)(15)); and (iv) are not nonprofit corporations (*see* 11 U.S.C. § 1129(a)(16)).

XIV. The Plan Satisfies the "Cram Down" Requirements of Section 1129(b) of the Bankruptcy Code

91. Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a chapter 11 plan in circumstances where not all impaired classes of claims and equity interests vote to accept the plan. This mechanism is known colloquially as "cram down."

92. Under section 1129(b) of the Bankruptcy Code, the Bankruptcy Court may "cram down" a plan as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to unimpaired classes that did not vote to accept the plan.[39]

93. Here, as noted above, only two impaired Classes—Class 6 (Subordinated Claims) and Class 7 (Interests)—did not accept the Plan.[40] Accordingly, the Debtors invoke section 1129(b) to "cram down" the Plan with respect to Classes 6 and 7.

A. The Plan Does Not Discriminate Unfairly

94. The unfair discrimination standard of section 1129(b) of the Bankruptcy Code requires that a chapter 11 plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly-situated classes.[41] Generally, a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar classes are treated differently without a reasonable basis for the disparate treatment.[42] Accordingly, as between two classes of claims or two classes of equity

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[39] *See, e.g., In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512 (3d Cir. 2005); *In re Dura Auto. Sys., Inc.*, 379 B.R. 257, 271–72 (Bankr. D. Del. 2007); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 660 (D. Del. 2003).

[40] To the extent that there are no claims in a Class as of the Confirmation Hearing, section 4.6 of the Plan provides that such Class shall be deemed eliminated from the Plan for purposes of determining acceptance of the Plan by such Class under section 1129(a)(8) of the Bankruptcy Code.

[41] *See, e.g., In re Barney & Carey Co.*, 170 B.R. 17, 25 (Bankr. D. Mass. 1994).

[42] *See, e.g., In re Rubicon U.S. REIT, Inc.*, 434 B.R. 168, 175 (Bankr. D. Del. 2010) (noting that courts generally look to whether "[v]alid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan"); *In re Lernout*, 301 B.R. at 660 ("The hallmarks of the various [unfair

interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests,[43] or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment.[44]

95. Here, the Plan does not "discriminate unfairly" with respect to Class 6 (Subordinated Claims) or Class 7 (Interests) as there are no similarly-situated Classes receiving more favorable treatment. The Plan treatment of Holders of Claims in Class 6 is based on the statutory mandate of section 510 of the Bankruptcy Code. *See* 11 U.S.C. § 510. Indeed, in order to comply with section 1129(a)(1) of the Bankruptcy Code, which requires that a chapter 11 plan comply with applicable provisions of the Bankruptcy Code, section 510 must be enforced. Thus, the Plan does not "discriminate unfairly" with respect to any impaired Classes of Claims or Interests under the Plan that did not accept the Plan.

B. The Plan Is Fair and Equitable

96. Section 1129(b)(2)(C) defines the phrase "fair and equitable" as to impaired classes of equity interest holders as follows:

> As to equity interest holders: Either (i) each holder of an interest will receive or retain under the plan property of a value, as of the effective date of the plan, equal to the greatest of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of the interest, or (ii) the holder of any interest that is junior to the non-accepting class will not receive or retain any property under the plan on account of their its interest.

11 U.S.C. § 1129(b)(2)(C).[45]

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discrimination] tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination").

[43] *See, e.g., In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds,* 78 B.R. 407 (S.D.N.Y. 1987), *aff'd, In re Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

[44] *See, e.g., In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990).

[45] *See also LaSalle,* 526 U.S. at 441–42 ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), 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,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

97. In the instant case, the "fair and equitable" requirement is satisfied as to Class 6 (Subordinated Claims) and Class 7 (Interests) because (a) no Claims or Interests junior to either Class 6 or Class 7 will receive or retain any property under the Plan on account of such junior Claims or Interests, and (b) no Holder of a Claim senior to Classes 6 and 7 will receive more than payment in full on account of its Claim. Therefore, the Plan is "fair and equitable" with respect to the impaired Class of Interests under the Plan that did not accept the Plan.

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

98. The Plan is the only pending plan on file in the Chapter 11 Cases and, as such, section 1129(c) of the Bankruptcy Code is satisfied. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933, and no party in interest has alleged otherwise. In light of this, section 1129(d) of the Bankruptcy Code is inapplicable. Finally, the Chapter 11 Cases are not "small business cases" and, therefore, section 1129(e) of the Bankruptcy Code is inapplicable.

THE UNRESOLVED OBJECTIONS SHOULD BE OVERRULED

I. The Central States Objection Should Be Overruled

99. Under Section 8.4.1 of the Plan, the Central States Claim shall be estimated at $0.00 solely for purposes of determining the General Unsecured Claim Distribution and any related reserve. Plan, § 8.4.1. Estimation of the Central States Claim is necessary to avoid undue delay in the administration of the Chapter 11 Cases and is supported by, without limitation, the Indemnity Agreement, provided by Bechtel Global Corporation ("**Bechtel Global**") and a parent guarantee (together with the Indemnity Agreement, the "**Bechtel Indemnity and Guaranty Agreements**") provided by Bechtel Corporation—one of the largest construction companies in the United States, which has been privately owned by a single family for more than a century, and has been involved,

in various capacities, in some of the world's largest construction projects.[46] In addition, under Section 8.4.1 of the Plan, all parties' rights are preserved with respect to the allowance, liquidation, or determination of liability of the Central States Claim.

A. Preliminary Statement

100. On June 17, 2020, Central States filed the Central States Objection, objecting to Confirmation on the basis that the Plan purportedly discriminates against Central States vis-à-vis other holders of general unsecured claims in violation of Sections 1123(a)(4) and 1129(a)(1) of the Bankruptcy Code. *See* Central States Objection, at ¶ 3. Central States is wrong. Under the Plan, the Central States Claim is treated exactly the same as any other Holder of a General Unsecured Claim: (i) it is classified under the Plan as a General Unsecured Claim with all other similarly situated creditors; (ii) as with any other contingent or unliquidated claim, it is subject to dispute and estimation; and (iii) as with any other Disputed Claim, Central States is not entitled to a Distribution from the Estates unless and until it becomes an Allowed Claim. *See* Plan, §§ 8.2, 8.3, and 8.4. Moreover, as discussed above, Central States' rights are expressly preserved under the language of the Plan. Plan, § 8.4.1. Thus, the Plan does not discriminate between the Central States Claim and other General Unsecured Claims.

101. To the extent that the Central States Objection attacks the propriety of estimating the Central States Claim, Central States is wrong. Far from violating the Bankruptcy Code, estimation of the Central States Claim is permitted under the Bankruptcy Code and required under the circumstances of the Chapter 11 Cases as it is a contingent claim that is likely to delay the

[46] Such projects include, among others: the Hoover Dam, the "Chunnel," several Olympics, confinement of the Chernobyl Nuclear Power Plant, and the construction of various international airports and public transportation systems. *See* https://www.bechtel.com/about-us/.

administration of the Chapter 11 Cases. Thus, estimation of the Central States Claim at $0.00 is warranted.

B. Background

The Parties

102. Central States is a multiemployer pension fund established under Sections 1002(37) and 1301(a)(3) of the Employee Retirement Income Security Act of 1973 ("**ERISA**").

103. Prior to December 2, 2015, the Partnership's limited partner was Bechtel Oil, Gas and Chemicals, LLC and its general partner was Ohio Welded Company, LLC (collectively, the "**Partners**"), each owning 98% and 2% of partner units, respectively. On December 2, 2015, McCaig Welded GP, LLC and McCaig U.S. Holdings, Inc., entities wholly unrelated to the Partners, effectuated an arm's-length transaction for partnership units in the Partnership (the "**Capital Contribution**"). As a result of the Capital Contribution, Bechtel Oil, Gas and Chemicals, LLC and McCaig U.S. Holdings, Inc. each owned 73.5% and 24.5% of limited partner units, respectively. Ohio Welded Company, LLC and McCaig Welded GP, LLC, each own 1.5% and 0.5% of general partner units, respectively.

104. Thus, since December 2, 2015, neither of the Partnership's limited or general partners has had an 80% controlling interest in the Partnership. Accordingly, the Partnership and the Bechtel Entities are not considered a single employer (i.e., part of a common controlled group) for purposes of withdrawal liability triggered on or after December 2, 2015. Therefore, for the Partnership to be jointly and severally liable for the Bechtel Entities' alleged withdrawal, any such alleged withdrawal liability would have had to take place in the approximately one-month period between November 2015 and the ownership transfer on December 2, 2015.

The Central States Claim

105. Central States filed the Central States Claim (No. 534) in the Chapter 11 Cases on February 26, 2019 in the disputed, liquidated amount of $38,813,994.99.

106. The Central States Claim relates to unfunded vested pension benefits purportedly allocable to the Partnership in connection with the alleged complete withdrawal from Central States of one or more of certain of the Debtors' affiliates (collectively, the "**Bechtel Entities**").

The Partnership's Pension Fund Contribution History

107. Prior to 2011, the Partnership contributed to Central States on behalf of the teamsters it employed on various pipeline construction projects.

108. In 2011, the Debtors entered into an agreement with the Pipe Line Contractors Association (the "**PLCA**"). The PLCA is a pipeline industry group that negotiates and administers collective bargaining labor agreements ("**CBAs**") with the four "International Unions" recognized within the pipeline construction industry (the "**International Unions**").[47] In connection with their membership in the PLCA, the Debtors entered into CBAs with the International Unions. The CBA among the International Brotherhood of Teamsters (the members of which will be referred to herein as "**Teamsters**") and the Debtors required the Debtors to make contributions to the Teamsters National Pipeline Pension Fund (the "**TNPP Fund**"), instead of Central States, on behalf of the Teamsters that the Debtors employed on each of their pipeline construction projects.

109. Thereafter, the Debtors' obligation to contribute to Central States ceased completely.[48] However, the Debtors continued to employ Teamsters on their construction projects

[47] The four recognized unions are the (i) Laborers International Union of North America; (ii) International Brotherhood of Teamsters; (iii) United Association of Plumbers and Pipefitters; and (iv) International Union of Operating Engineers.

[48] *Settlement Agreement and Release*, ¶ I.

in the same jurisdiction for which they had previously contributed to Central States.[49] These circumstances effectuated a "partial withdrawal" from Central States, as described in ERISA § 1385, which triggered withdrawal liability.[50] To resolve the Partnership's withdrawal liability to Central States (the "**Partial Withdrawal Liability**"), the Debtors, the Bechtel Entities, and Central States entered into that certain *Settlement Agreement and Release*, attached to the Central States Objection as Exhibit A (the "**2011 Partial Withdrawal Settlement**"), which resolved the Partial Withdrawal Liability for an aggregate amount of approximately $18.6 million.[51] Pursuant to the 2011 Partial Withdrawal Settlement and the subsequent payment of the stipulated liability thereunder, ***the Partnership's obligations to Central States were fully satisfied***.

110. As discussed in the Pometti Declaration, on February 27, 2019, the Debtors substantially ceased operations. The Debtors continued to employ Teamsters until May 18, 2019. All pension contributions made on behalf of Teamsters after 2011 were paid to the TNPP Fund.

<u>Contesting the Central States Claim</u>

111. On April 24, 2019, Central States sent the Bechtel Parties a notice and demand for payment of withdrawal liability (the "**Notice and Demand**"). Pursuant to the Notice and Demand, Central States issued an installment schedule for the payment of withdrawal liability. Under the schedule and in accordance with Section 4219 of ERISA, the Bechtel Entities must make monthly installment payments in the amount of $378,436.74—notwithstanding that the withdrawal liability is disputed—commencing on May 1, 2019 and ending on December 1, 2031, with a final payment in the amount of $32,931.48 due on January 1, 2032. ERISA § 4219, 29 U.S.C. § 1399. Upon information and belief, the Bechtel Entities have timely paid each installment payment. Since May

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[49] *Id*.

[50] *Id*.

[51] *Id*. at Art. 1.

1, 2019, the Bechtel Entities have paid Central States in excess of $5,000,000. If the Bechtel Entities did not continue to timely make such payments, Central States could seek to accelerate the remaining outstanding balance plus delinquency charges. *See* ERISA § 4219(c)(5), 29 U.S.C. § 1399(c)(5).

112. As required under the statutory framework for contesting a demand for withdrawal liability, the Partnership and the Bechtel Parties each petitioned Central States to review the assessment of withdrawal liability. *See* ERISA § 4219(b)(2)(A), 29 U.S.C. § 1399(b)(2)(A).

113. When Central States failed to respond within the statutory review period, the Partnership and the Bechtel Parties demanded arbitration to contest the assessment of withdrawal liability (collectively, the "**Arbitration Proceedings**"). The Partnership's arbitration proceeding has been stayed pending further advice to proceed.

The Bechtel Indemnity and Guaranty Agreements

114. As discussed in the Pometti Declaration, the Plan is the culmination of months of extensive investigations, discussions and negotiations with each of the Debtors' key constituencies in the Chapter 11 Cases, which culminated in the Plan Settlement supported by, in large part, the Bechtel Indemnity and Guaranty Agreements. The Bechtel Indemnity and Guaranty Agreements backstop any liability incurred as a result of the Central States Claim and limit, in large part, the administrative expense and burden to the Estates of litigating multiemployer pension fund withdrawal liability in protracted arbitrations, appeals, and related proceedings for an indefinite—and presumably lengthy—period of time.[52] Thus, the Bechtel Indemnity and Guaranty

[52] The Indemnity Agreement provides that Bechtel Global agrees to reimburse the Welded Indemnitees for reasonable costs and expenses incurred by the Welded Indemnitees (as defined in the Indemnity Agreement) for work Bechtel Global requests pursuant to paragraph 5 of the Indemnity Agreement in connection with the Bechtel Arbitration and/or the Welded Arbitration (as such terms are defined in the Indemnity Agreement); provided, however, that Bechtel shall not be obligated to reimburse the Welded Indemnitees for any costs and expenses related to (i) estimation of the Central States Claim or (ii) the first $200,000 of reasonable fees and expenses incurred by Welded from and after the

Agreements provide the Debtors with finality and certainty so that they may continue to administer the Chapter 11 Cases without delay, particularly given the amount of the Central States Claim, which would have an outsized impact on the amount and timing of Distributions.

C. Argument

(a) The Plan Does Not Discriminate Between Central States and Other General Unsecured Creditors

115. Section 1123(a)(4) of the Bankruptcy Code requires that a chapter 11 plan provide the same treatment for each claim or interest within a particular class, unless the holder of a claim or interest agrees to receive less favorable treatment than other class members. 11 U.S.C. § 1123(a)(4). Section 1123(a)(4) "does not require precise equality, only approximate equality." *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013). Moreover, "[c]ertain procedural differences . . . do[ ] not alone constitute unequal treatment." *Id.*

116. 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, unless the Holder has agreed to receive less favorable treatment than other members in such Class. *See* Plan, Article III. As discussed above, the Central States Claim is treated exactly the same as any other Holder of a General Unsecured Claim under the Plan. *See* Plan, §§ 8.2, 8.3, and 8.4. Thus, the Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

117. Central States argues that the Plan does "not provide Central States with the same opportunity to recover on its general unsecured claim that Debtors provide all other general unsecured creditors." Central States Objection, at § 3. But, that is not accurate. Under the Plan, all contingent and unliquidated claims are subject to dispute and estimation, not only the Central

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date of the Indemnity Agreement for work Bechtel Global requests in connection with the Bechtel Arbitration and/or the Welded Arbitration.

States Claim. *See* Plan, §§ 8.2, 8.3, and 8.4. In addition, the Plan expressly provides that all of Central States' rights with respect to the allowance, liquidation, or determination of liability are fully preserved. *See* Plan, §§ 8.4.1. Therefore, nothing in the Plan erodes Central States' ability to prosecute its claim and seek a judgment from the Debtors, and Central States possesses the "same opportunities" to recover from the Estates as do all Holders of Disputed General Unsecured Claims. *See In re Enron Corp.*, No. 01-16034 (AJG), 2006 WL 544463, at *8 (Bankr. S.D.N.Y. Jan. 17, 2006) (rejecting an argument that estimation of a claim at zero resulted in disparate treatment of claims in violation of Section 1123(a)(4)). Rather, Central States takes issue with the *source* of its hypothetical Distribution, which is not the same as being denied an opportunity to recover. The Debtors, to the great benefit of their creditor constituency, obtained an additional source of proceeds to satisfy Central States' contingent $38,813,994.99 Claim. The fact that the payment of the Central States Claim will be made by a third party does not mean that Central States will receive disparate treatment on account of its Claim as compared to any other Holder of a General Unsecured Claim.

118. Central States asserts that the Indemnity Agreement provides "illusory" indemnification. The value of the Indemnity Agreement to the Estates is simply not illusory. As Central States noted in the Central States Objection, there is no common or statutory law providing for contribution or indemnity as between co-defendants. Thus, without the Indemnity Agreement, the Debtors could not recover against Bechtel for the Bechtel Entities' purported withdrawal liability, which would require the Debtors' creditor constituency to bear the cost of the Bechtel Entities' unfunded pension benefit contributions, if any. Nothing in the Plan prevents Central States from seeking to enforce any judgment against the Estates. However, pursuant to the Indemnity Agreement, it will be Bechtel that pays the bill—not the Debtors' creditors. That there

is no common law or statutory right to contribution or indemnification among co-defendants in withdrawal liability matters does not preclude the parties from contractually agreeing to allocate liability amongst themselves.

119. Even if the indemnification protections are, as a practical matter, illusory—which they are not—the Debtors are not required to provide complete indemnity for the Central States Claim. Rather, the Debtors are required to provide Central States with "reasonable assurance" that it will receive the same treatment under the Plan as other similarly situated Holders. *Weiss-Wolf, Inc.*, 59 B.R. 653, 655 (Bankr. S.D.N.Y. 1986). A speculative "possibility" that a claim may not be paid at some future point in time is simply insufficient to establish disparate treatment among Holders of Claims in the same Class. *See W.R. Grace*, 729 F.3d at 328 (rejecting an argument that a plan discriminated among holders of claims where there was a possibility that a trust would have insufficient funds to compensate future claimants).

120. Moreover, none of the cases cited by Central States stand for the proposition that a plan violates Section 1123(a)(4) either because it provides for (i) estimation of claims or (ii) the payment of a claim from a third party source. Most of the cases that Central States cites in support of its position are factually dissimilar to the present circumstances or are otherwise inapposite. *See, e.g., In re New Century TRS Holdings, Inc.*, 407 B.R. 576, 592 (D. Del. 2009) (finding a violation of Section 1123(a)(4) where a plan actually provided disparate recoveries to holders of claims and the issue on appeal was whether claimants consented to such treatment). Rather than support Central States' argument, the cases, *In re Motors Liquidation, Co.,* 447 B.R. 198, 215 (Bankr. S.D.N.Y. 2011) and *In re Weiss-Wolf, Inc.*, 59 B.R. 653, 655 (Bankr. S.D.N.Y. 1986) stand for the unremarkable position that "reasonable measures must be taken to ensure that the required same treatment is received if and when [disputed claims are] allowed." *Motors Liquidation Co.*,

447 B.R. at 215; *see also Weiss-Wolf*, 59 B.R. at 655 (a debtor must make provision for payment of disputed claims so that if and when allowed the claims have reasonable assurance that they will receive identical treatment."). As indicated above, the Debtors' entry into the Bechtel Indemnity and Guaranty Agreements to secure funding for the Central States Claim is a reasonable mechanism by which to ensure payment of the Central States Claim, to the extent it is allowed, while alleviating other creditors of the costs and burdens that the Estates would otherwise incur. Thus, the Central States Objection is baseless and should be overruled.

(b) Estimation of the Central States Claim Is Required Under the Circumstances

121. Estimation of the Central States Claim at $0.00 is required to avoid unduly delaying creditor distributions given that (i) the Central States Claim is contingent and (ii) Central States would be entitled to a distribution in only the most remote of circumstances after some unknown and potentially significant period of time. Estimation of a claim by a bankruptcy court under Section 502(c) is a mandatory rather than a permissive duty when (1) the claim is contingent or unliquidated and (2) the time to liquidate the claim will unduly delay the administration of the bankruptcy estate. *See In re RNI Wind Down Corp.*, 369 B.R. 174, 191 (Bankr. D. Del. 2007).

122. Under section 502(c) of the Bankruptcy Code, the Court shall estimate "any contingent . . . claim, the fixing of which . . . would unduly delay the administration of the case." 11 U.S.C. § 502(c). Although section 502(c) refers to the estimation of claims for allowance purposes, courts have estimated claims for other purposes, including establishing reserves. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 279 (Bankr. S.D.N.Y. 2007) (estimating a creditor's claim for future expenses for purposes of establishing a reserve); *In re Enron Corp.*, 2006 WL 544463, at *8 (approving the debtor's motion to estimate claims for purposes of establishing reserves and setting the reserve amount as the maximum amount of recovery); *In re*

Thomson McKinnon Sec., Inc., 143 B.R. 612, 619 (Bankr. S.D.N.Y. 1992) ("The estimation process is an expedient method for setting the amount of a claim that may receive a distributive share from the estate").

123. Courts have also expressly recognized the ability to estimate disputed claims under section 502(c). *See In re Adelphia Bus. Sols., Inc.*, 341 B.R. 415, 422-23 (Bankr. S.D.N.Y. 2003) (estimating the disputed unliquidated amount of an administrative claim under section 502(c)); *In re Wallace's Bookstores, Inc.*, 317 B.R. 720, 724 (Bankr. E.D. Ky. 2004) (holding that a liquidating supervisor had the right under section 502(c) to seek estimation of disputed claims pursuant to a plan of reorganization).

124. Additionally, section 105 of the Bankruptcy Code authorizes the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 105 grants the "bankruptcy courts . . . broad authority to modify creditor-debtor relationships." *United States v. Energy Res.*, 495 U.S. 545, 549 (1990).

125. The Central States Claim is a contingent claim because the Debtors will have no obligation to make a distribution to Central States unless, as discussed in the Pometti Declaration and below: (i) Central States prevails on a disputed legal theory before an arbitrator and in connection with any subsequent appeals and (ii) both (a) Bechtel Global and (b) Bechtel Corporation (together, "**Bechtel**") default on the Bechtel Indemnity and Guaranty Agreements. *See RNI Wind Down*, 369 B.R. at 182 (stating that a claim is contingent "where it 'has not yet accrued and . . . is dependent upon some future event that may never happen.'").

126. Moreover, even if Central States were to prevail and Bechtel were to default, Central States would only be entitled to the amount set forth in the Central States Claim if Central States establishes both that (i) it has correctly computed liability and (ii) no limitation on liability

exists under ERISA § 4225(b), 29 U.S.C. § 1405(b). *See, e.g.*, *New York Times Co. v. Newspaper & Mail Deliverers'-Publishers' Pension Fund*, 303 F. Supp. 3d 236, 255 (S.D.N.Y. 2018) (rejecting the actuarial method used by Central States to assess withdrawal liability); *Local 478 Trucking & Allied Indus. Pension Fund v. Jayne*, 778 F. Supp. 1289 (D. N.J. 1981) (reducing the withdrawal liability of an insolvent debtor by 50% under the insolvency limitation set forth in section 4225 of ERISA).

127. Not only is the Central States Claim contingent, but the time to liquidate the Central States Claim would unduly delay the administration of the Estates. As discussed further below, the Central States Claim relates to unfunded vested pension benefits purportedly allocable to the Partnership. Such "withdrawal liability" is governed by section 4203 of the Employee Retirement Income Security Act of 1973 ("**ERISA**"). ERISA § 4203, 29 U.S.C. § 1383. ERISA provides a statutory framework for resolving withdrawal liability claims, which includes first litigating the alleged liability in arbitration proceedings. ERISA § 4221, 29 U.S.C. § 1401(a). While the Debtors initiated arbitration to preserve their rights under the statutory mandate of ERISA, the arbitration proceeding is in its infancy. The parties have not selected an arbitrator, discovery has not commenced, and the parties have not discussed a scheduling order.[53] Even after the commencement of discovery, the presentation of the matter to an arbitrator, and the issuance of a decision, the parties may appeal such decision for a *de novo* review to federal district court. *Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc.*, 444 F. App'x 571, 573 (3d Cir. 2011) ("We review the arbitrator's legal conclusions de novo."). Consequently, it may—and

[53] Contrary to Central States' wildly inaccurate assertion, the Debtors do not intend, nor believe that "they can delay prosecution of the arbitration . . . until the conclusion of the Bechtel arbitration[.]" Central States Objection, at ¶ 22. The Debtors simply did not believe it was prudent to expend estate resources to prosecute an arbitration while it was simultaneously negotiating an indemnification agreement, which included a duty to defend such arbitration. Indeed, on many occasions, the Debtors told Central States that they believed a stay of the arbitration was appropriate *pending Confirmation of the Plan*.

likely will—require several years to liquidate the Central States Claim. *See id*. (affirming a district court's decision to deny an assessment of withdrawal liability four and a half years after the employer demanded arbitration). It seems that Central States agrees. *See* Central States Objection, at ¶ 2 (discussing the length of time it may take to resolve the Central States Claim).

128. In sum, there is simply no way of determining in any reasonable timeframe (a) whether the Debtors would incur liability in connection with the Central States Claim, or (b) when, if ever, Bechtel will default on the Bechtel Indemnity and Guaranty Agreements. Given that the Central States Claim is contingent and the time to liquidate such claim would unduly delay the administration of the Estates, estimation of the Central States Claim is required.

(c) The Central States Claim Should be Estimated at $0.00 for Distribution and Reserve Purposes

129. The Court has discretion to select the valuation model that best suits the circumstances of the case at hand when estimating the value of claims. "[W]hen estimating claims, bankruptcy courts may use whatever method is best suited to the contingencies of the case, so long as the procedure is consistent with the fundamental policy of Chapter 11 that a reorganization must be accomplished quickly and efficiently." *Adelphia Commc'ns*, 368 B.R. at 278. *See also Thomson McKinnon*, 143 B.R. at 619 ("In estimating the claim, the bankruptcy court should use whatever method is best suited for the circumstances."); *In re Seaman Furniture Co.*, 160 B.R. 40, 41 (S.D.N.Y. 1993) (same); *In re Federal Press Co.*, 116 B.R. 650, 653 (Bankr. N.D. Ind. 1989) (noting that bankruptcy courts estimating claims may use whatever method is best suited to the case, including "accepting claimant's claim at face value, estimating claim at zero and waiving discharge of claim, [or] arriving at court's independent estimation of claim").

(i) Estimation of the Central States Claim at $0.00 Is Appropriate As a Non-Debtor Source Will Fund the Defense of and Any Liability Related to the Central States Claim

130. As discussed above and in the Pometti Declaration, as part of the Plan Settlement, Bechtel Corporation entered into the Indemnity Agreement and is obligated to defend the Central States Claim and indemnify the Partnership for any withdrawal liability that may be assessed. The Indemnity Agreement provides significant benefits to the Estates: (i) obviating the need for the Estates to either (a) reserve funds for the Central States Claim or (b) make distributions to Central States; (ii) alleviating the administrative burden and expense to the Estates of litigating the Central States Claim; and (iii) mitigating delay in the administration of the Chapter 11 Cases and in making Distributions to other creditors. In addition, Bechtel Corporation provided a parent guarantee to backstop the Indemnity Agreement.

131. As a result, even, as discussed below, in the unlikely scenario that Central States were to be successful on the merits of its claim, the risk of default under the Indemnity Agreement and the guarantee is a remote possibility. Indeed, as Central States concedes, for the past fourteen months, Bechtel has continued, without fail, to make timely, monthly payments of $378,436.74. Central States Objection, at ¶ 4. Bechtel has already paid Central States in excess of $5,000,000. Moreover, there is ample incentive for Bechtel to continue to make such payments as, under Section 4219(c)(5) of ERISA, failure to do so could result in the acceleration of the full amount of the Central States Claim. *See* ERISA § 4219(c)(5), 29 U.S.C. § 1399(c)(5). Central States has not substantiated—and cannot substantiate—its concern that the Bechtel Indemnity and Guaranty Agreements will be left unfulfilled. *See* Central States Objection, at ¶ 4. Therefore, for these reasons alone, estimation of the Central States Claim at $0.00 is appropriate.

(ii) The Central States Claim Is Unlikely To Result In a Determination of Withdrawal Liability Against the Estates

132. Not only have the Debtors entered into the Bechtel Indemnity and Guaranty Agreements requiring Bechtel to satisfy any withdrawal liability incurred as a result of the Central States Claim, but the Central States is unlikely to result in liability for the Partnership. As an initial matter, upon information and belief, as of December 2, 2015, the Bechtel Entities had not triggered any withdrawal liability. Thus, there was no withdrawal liability for which Welded could be jointly and severally liable.

133. Central States has not articulated its legal theory of withdrawal liability, although it asserts that the Bechtel Entities withdrew from Central States at the time of its last contribution to the fund. *See* Central States Claim. According to the assessment of liability attached to the Central States Claim, the Bechtel Entities last contributed to Central States in November 2015.

134. However, for certain industries, a mere pause in contributions does not trigger withdrawal liability. *Ceco Concrete Const., LLC v. Centennial State Carpenters Pension Tr.*, 821 F.3d 1250, 1254 (10th Cir. 2016) ("Th[e] generous treatment under § 1383(b)(2) accounts for the temporary nature of construction projects and allows construction employers to stop contributing to pension plans in certain circumstances without incurring withdrawal liability."). Section 4203(b) of ERISA provides for an exception to withdrawal liability for employers in the building and construction industry. ERISA § 4203(b), 29 U.S.C. § 1383(b). Such employers trigger a withdrawal from a multiemployer pension plan only where they cease having an obligation to contribute under the plan yet: (i) continue to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or (ii) resume such work within five years after the date on which the obligation to contribute under the plan

ceases without renewing its obligation to contribute (the "**Building and Construction Industry Exception**"). ERISA § 4203(b), 29 U.S.C. § 1383(b).

135. Under ERISA § 4203(b)(1), 29 U.S.C. § 1383(b)(1), an employer is in the building and construction industry if "substantially all" of its employees for which it has an obligation to contribute under the plan perform work in the building and construction industry. Such term has been interpreted as 85% or more of an employer's applicable employees. *See, e.g., Cont'l Can Co., Inc. v. Chicago Truck Drivers, Helpers, and Warehouse Workers Pension Fund*, 916 F.2d 1154, 1160 (7th Cir. 1990) (interpreting the term, "substantially all" in connection with the trucking industry exception to withdrawal liability). Upon information and belief, all of the teamsters for which the Bechtel Entities were required to contribute to Central States performed work in the building and construction industry. In addition, upon information and belief, the Bechtel Entities hired teamsters under a pre-hire agreement under section 8(f) of the National Labor Relations Board, which agreements are permitted only in the building and construction industry. Accordingly, the Bechtel Entities are employers in the building and construction industry for purposes of ERISA and may avail itself of the Building and Construction Industry Exception.

136. Upon information and belief, neither the Bechtel Entities nor Welded continued to perform work within the jurisdiction of any collective bargaining agreement to which the Bechtel entities ceased having an obligation to contribute. Welded may have continued to perform work, but such work was not within a jurisdiction of any of the agreements to which the Bechtel Entities ceased having an obligation to contribute. Thus, under the Building and Construction Industry Exception, no withdrawal could have been triggered, and neither Welded nor the Bechtel Entities are liable for withdrawal liability. Given that Welded is not liable for any withdrawal liability, estimation of the Central States Claim at $0.00 is appropriate.

137. In sum, the Debtors should not be required to establish reserves nor delay Distributions to the Debtors' creditors given that the Debtors would otherwise have Cash available to make Distributions, coupled with the lack of any basis to conclude that either (i) the Debtors have any actual liability with respect to the Central States Claim or (ii) that Central States would be entitled to a Distribution. Thus, the Debtors respectfully request that the Objection be overruled for the reasons set forth herein.

II. The Williams Objection Should Be Overruled

138. Transcontinental Gas Pipe Line Company, LLC ("**Transco**"), The Williams Companies, Inc., and Williams Partners Operating LLC (collectively, the "**Williams Parties**") make two primary objections to confirmation of the Plan in the Williams Objection [Docket No. 1460]. However, such objections fail as the Plan satisfies the requirements of the Bankruptcy Code and therefore should be confirmed.

139. First, the Williams Parties argue that the treatment of Surety Bond Claims violates section 1129(a)(1) of the Bankruptcy Code. As described more fully below, this objection is moot as a thinly veiled collateral attack on a final order, in addition to being flawed on substantive grounds as Federal Insurance Company (the "**Surety**") is not receiving a duplicative recovery under the Plan. Second, the Williams Parties raise a host of objections, amounting to a concern that their rights and defenses currently subsumed in the Williams Litigation should not be impaired by the Plan. The Williams' Parties rights and defenses in the Williams Litigation are not impaired by the Plan, but to address the concern, the Debtors included reservation of rights language in Paragraph 42 of the Confirmation Order (the "**Williams ROR**").[54]

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[54] The Williams ROR states as follows:

> Notwithstanding any of the releases, exculpations, injunctions or waivers set forth in the Plan, nothing in the Plan or this Confirmation Order shall modify or prejudice the respective rights, claims, defenses, or positions, including, without limitation, any rights of setoff and/or recoupment,

140. Section 3.3.1 of the Plan provides that the Holder of any Allowed Surety Bond Claim shall receive the Surety Bond Share and its Pro Rata share of the General Unsecured Claim Distribution, in accordance with the Surety Cooperation Agreement Order, annexed as Exhibit B to the Plan [Docket No. 745] (the "**Surety Cooperation Agreement Order**").

141. On May 3, 2019, the Williams Parties received notice (*see* KCC affidavit of service [Docket No. 709]) of the Debtors' motion pursuant to 11 U.S.C. §§ 105(a), 363(b) and 364(c) [Docket No. 704] requesting approval of the Surety Agreement Documents (the "**Cooperation Agreement Motion**"), and they did not object or otherwise comment. More than a year ago, on May 22, 2019, the Court entered the Surety Cooperation Agreement Order, which approved the Surety Cooperation Agreement annexed thereto as Exhibit A.

142. The Surety Cooperation Agreement was the culmination of extensive, arm's-length negotiations between the Debtors, the Committee, and the Surety (the "**Cooperation Agreement Parties**"). It resolved critical issues among the parties that paved the way for the Chapter 11 Cases, including the funding of the litigation against the Williams Parties, implementing protocols for claims administration and asset disposition among the Cooperation Agreement Parties, and treatment of the Surety's various indemnification, contribution, and equitable subrogation rights and/or claims. *See* Cooperation Agreement Motion, ¶ 15, p. 7–8 (describing that "[t]he Surety has asserted equitable subrogation rights in any [r]ecovery [in the Williams Litigation]. The Debtors and the Committee have engaged in lengthy, arm's-length negotiations with the Surety regarding the Surety's asserted rights, the path forward with the Williams Litigation, and the sharing of the

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of the Debtors, Post-Effective Date Debtors, Transcontinental Gas Pipe Line Company, LLC, The Williams Companies, Inc., and Williams Partners Operating LLC as between one another, with such rights, claims, defenses, and positions to be determined through the Williams Litigation.

Confirmation Order, ¶ 42.

[Williams Litigation] [r]ecovery."). "Notably, the Committee took a leading role in negotiating a sharing mechanism between the Estate and the Surety for the disposition of the Net Proceeds." *Id.* The following non-exhaustive list of issues were heavily resolved through the Surety Cooperation Agreement Order and the parties have been acting in accordance with, and implementing them, for the last thirteen months:

(a) Williams Litigation Costs, Funding and Reimbursement

(i) Federal Insurance Company was not contractually required to fund the Williams Litigation prior to their entry into the Surety Cooperation Agreement. *See* Surety Cooperation Agreement, ¶ 1–2. The surety agreed to do so on a no interest, no fee, and limited recourse basis. This was a significant benefit to the estates and creditors that de-risked the costs of a significant litigation.

(ii) The definition of "Litigation Funding Reimbursement" under section 1.63 of the Plan provides that such reimbursement of funds advanced shall be "in accordance with the Surety Cooperation Agreement Order." Thus, the Plan implements the litigation funding and reimbursement requirements of the final, non-appealable Surety Cooperation Agreement Order. *See* Surety Cooperation Agreement, ¶ 1–2. In order to come to agreement on litigation funding the parties necessarily discussed the nature, priority and sources of recovery for Federal Insurance Company, including good faith, arm's length negotiations.

(b) Nature, Priority and Sources of Recovery for Federal Insurance Company

(i) Any recovery in the Williams litigation beyond the reimbursement of the litigation costs is "Net Proceeds" to be shared in accordance with the Surety Cooperation Agreement. *Id.* at ¶ 3(a)–(c) (while the provision is more complex, it provides for a sharing of the Williams Litigation Proceeds with an approximate 10–20% share of net proceeds allocated to the Debtors' estates for the benefit of its creditors and the remainder to Federal Insurance). To the extent the ultimate allowance of the Surety Bond Claim is not satisfied from the Williams Litigation Proceeds, the Surety will share on an unsecured, non-priority basis with other general unsecured creditors. *Id.* at ¶ 3(d). There will be no duplicative recoveries with respect to the Surety Bond Claim.

(ii) The Plan implements these heavily negotiated provisions of the Surety Cooperation Agreement Order. *See* Plan, §§ 1.44 (Estates' Share); 1.110 (Surety Bond Share), and 3.3.1 (Class 3: Surety Bond Claims).

(c) Williams Litigation Cooperation and Settlement Authority

(i) In further consideration of the interests among the parties, the general terms of cooperation and settlement protocol in connection with the Williams Litigation were addressed as part of the overall agreement between the Debtors, the Committee and Federal Insurance Company. *See* Surety Cooperation Agreement, ¶ 4, p. 4.

(d) Federal Insurance Company Payment of Subcontractors and Vendors

(i) The parties also negotiated for the timely payment of the subcontractors and suppliers of the Williams project, including reporting and best efforts in the timely reconciliation and payment of claims. *Id.* at ¶ 3(e).

143. The Plan implements and is consistent with the terms of the Surety Cooperation Agreement Order and the Surety Cooperation Agreement (together, the "**Surety Agreement Documents**"). Since entry of the Surety Cooperation Agreement Order, the Cooperation Agreement Parties have relied on the Surety Agreement Documents. The Debtors have incurred litigation fees, the Surety has reimbursed such fees, and the parties have cooperated to reconcile subcontractor and supplier claims and other matters. Moreover, the treatment of the Surety's claims was an integral part of the development of the Plan.

A. The Objection Is a Collateral Attack on This Court's Order Approving Treatment of the Surety Bond Claims

144. The Williams Objection was filed on June 17, 2020, more than a year after entry of the Surety Cooperation Agreement Order, arguing, in part, that the Surety's receipt of both the Surety Bond Share and its Pro Rata share of the General Unsecured Claim Distribution violates

Sections 502 and 509 of the Bankruptcy Code. The Williams Objection is flawed in several ways, but it is unequivocally a collateral attack on a final order and moot.

145. The Surety Cooperation Agreement was approved pursuant to a final order on the merits, affording it the protections of the doctrine of *res judicata*:

> It is well-established that a final order may not be attacked in a collateral proceeding. The final order is *res judicata* and is no longer subject to challenge. "Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). This principle applies in bankruptcy proceedings. *See* 10 Collier on Bankruptcy ¶ 9019.01 (15th ed. rev.) ("Once it has become final, an order approving a settlement has the same res judicata effect as any other order of a court."); *see also Valley National Bank of Ariz. v. Needler (In re Grantham Bros.)*, 922 F.2d 1438, 1442 (9th Cir. 1991) ("The failure of the debtors to seek any review, reconsideration, or stay of the bankruptcy court's order precluded the collateral attack included in [the present motion].").[55]

146. It is well established that such collateral attacks are impermissible. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (ruling that collateral attacks of bankruptcy court orders cannot be allowed "without seriously undermining the orderly process of the law"); *In re Crestview Funeral Home, Inc.*, 294 B.R. 198 (Table), 2003 WL 21383005, at *8 (B.A.P. 10th Cir. June 16, 2003) (rejecting arguments raised regarding Trustee's disinterestedness as "an improper collateral attack on the [Bankruptcy Court's] final Orders" because they were "raised for the first time . . . nearly three years after the[] Orders were entered."); *In re TLFO, LLC*, 572 B.R. 391, 429 (Bankr. S.D. Fla. 2016) (denying a collateral attack by defendants on a final sale order where the defendants never appealed, objected to, or otherwise challenged the sale order which had been

[55] *In re Schumacher*, No. 2:03-27437-VZ, Adv. No. 2:04-02220-VZ, 2010 WL 11444287, at *5 (Bankr. C.D. Cal. Jan. 15, 2010); *see also In re Walker*, 356 B.R. 877, 896 (Bankr. S.D. Fla. 2006) (denying a motion to set aside a settlement order where "the Plaintiffs could have raised the fraud allegations in opposition to Trustee's Motion to Approve [the] Settlement but they did not. Plaintiffs having chosen not to timely raise the fraud allegations at the . . . hearing on Trustee's Motion to Approve [the] Settlement, are precluded from raising them now.").

entered two and a half years prior); *In re Am. Basketball League, Inc.*, 317 B.R. 121, 127 (Bankr. N.D. Cal. 2004) ("Final orders, of forfeiture or other relief, are not subject to collateral attack.").

147. Here, the Debtors and the Committee discussed "the equitable subrogation rights with the Surety and the [p]arties [] agreed to consent to such equitable subrogation rights" subject to the terms of the Surety Cooperation Agreement. *See* Surety Cooperation Agreement, Fourth WHEREAS clause, p. 1. As discussed above, the Surety Cooperation Agreement Order authorized a complex settlement between the Cooperation Agreement Parties with respect to the administration of significant claims and interests in the Chapter 11 Cases.[56] The Surety Cooperation Agreement Order approved the Surety Cooperation Agreement in its entirety, "including, without limitation, the estate sharing arrangement contained in paragraph 3" thereof (*See* Surety Cooperation Agreement Order, ¶ 2, p. 2), and authorized the Debtors to "take all actions necessary to carry out the terms of the [Surety] Cooperation Agreement." *Id.* at ¶ 3, p. 2. The terms of the Surety Cooperation Agreement Order are necessarily incorporated into the mechanics of the Plan and are consistent in all respects with 1129(a)(1).

148. In addition to the foregoing, the *Providence Hall Assocs. Ltd. Partnership v. Wells Fargo Bank, N.A.* is instructive here. 816 F.3d 273, 279–80 (4th Cir. 2016). There, the Fourth Circuit held that *res judicata* barred a debtor from challenging the propriety of certain loan transactions when the bankruptcy court had already entered sale orders directing sale proceeds to be used to pay the lender in connection with those transactions. *See id.* at 279–80. In *Providence Hall*, the debtor, Providence Hall Associates ("**PHA**"), entered into three transactions with Wells Fargo: (1) a $2.5 million loan, (2) a $500,000 line of credit, and (3) an interest-rate swap agreement

[56] To date, the Surety has paid approximately $75 million to satisfy claims made by subcontractors and suppliers under the Performance Bond No. 8219-24-58, and has paid or committed to reimburse up to $2.5 million with respect to litigation costs in the Williams Litigation. *See* Pometti Declaration, ¶ 75.

(collectively, the "**Loan Transactions**"). *Id.* PHA could not pay off the line of credit at maturity and was forced to file chapter 11. *See id.* After PHA failed to file its monthly financial reports and, allegedly, misused cash collateral, the bankruptcy court appointed a chapter 11 trustee. *Id.* The trustee brought a claim against PHA's principal. *See id.* at 276. The chapter 11 trustee also filed two motions to sell estate assets to pay down PHA's obligations on account of the Loan Transactions. *Id.* at 275–76. The bankruptcy court granted the motions, Wells Fargo was paid from the sale proceeds, and the chapter 11 case was dismissed. *Id.* at 276. More than a year later, however, PHA brought a lender-liability suit against Wells Fargo. *See id.* The district court granted Wells Fargo's motion to dismiss on the basis of *res judicata*, holding that the bankruptcy court's sale orders precluded PHA's claims. *Id.* PHA appealed, and the Fourth Circuit affirmed. *Id.* at 275. While PHA could have challenged the Loan Transactions in the bankruptcy proceedings, the chapter 11 trustee had "effectively conceded the validity of PHA's obligations to Wells Fargo, and the proceeds of the sales satisfied those obligations." *Id.* at 279. Moreover, "[i]n the final sale order," the bankruptcy court had "explicitly stated that sale proceeds should be paid to Wells Fargo 'up to the amount of the WFB Obligations,'" with "WFB Obligations" defined as PHA's debts arising from the Loan Transactions. *Id.* at 276. In sum, PHA could not challenge the propriety of the Loan Transactions because the bankruptcy court's final sale orders had already established the propriety of those transactions.

149. As with the transactions in *Providence Hall*, the Court has approved the "propriety" of the sharing arrangement transactions and litigation funding and cooperation mechanisms, and modifying those terms now is barred by the principles of *res judicata*.

150. The Williams Parties received ample notice of the treatment of the Surety's claims under the Surety Cooperation Agreement Order. The Williams Parties featured prominently in the

Surety Cooperation Agreement and the Debtors attached as Exhibit B to the Cooperation Agreement Motion the *Complaint and Objection to Claims* that the Debtors filed against the Williams Parties to commence the Williams Litigation. Having sat on their rights for more than a year while the parties acted in good faith to carry out the terms of the Court-approved Surety Cooperation Agreement—including, *inter alia*, the prosecution and funding of the Williams Litigation—the Williams Parties cannot now, on the eve of confirmation, object to such terms by collaterally attacking their implementation through the Plan.

151. The Surety Cooperation Agreement enabled the Debtors and their Estates to avoid months of costly and complex litigation. The Surety Cooperation Agreement was and continues to be essential to the success of the Chapter 11 Cases, including the maximization of recoveries to creditors and the prompt and efficient wind-down of the Estates. The parties have been faithfully operating under those terms for more than a year. The claims treatment and sharing protocol were negotiated, settled, described in a motion upon proper notice to the Williams Parties, and approved on a final, non-appealable basis. The Williams Parties never objected.

152. Finally, even if this Court were inclined to reconsider its order approving the Surety Cooperation Agreement, the liens and rights granted to the Surety in exchange for funding the Williams Litigation would continue in effect unaltered under section 364(e) of the Bankruptcy Code as the Surety has continued to provide such funding for the past thirteen months in good faith and on favorable terms for the Estates.

153. In sum, the Plan confirmation hearing cannot be used by the Williams Parties to raise a collateral attack on a final order that was entered into by this Court with the consent and support of key stakeholders in the Chapter 11 Cases, including the Committee and the Debtors' largest creditor. The Williams Parties could have and should have raised issues to the Surety

Cooperation Agreement in May 2019. However, they failed to do so. Accordingly, the Williams Parties' objection to confirmation on the grounds of the treatment of the Surety Bond Claims is in fact a belated objection to the Surety Cooperation Agreement Order and should be overruled as a moot, collateral attack on a final order that has been relied upon by the Cooperation Agreement Parties for more than a year.

B. Even If Such Assertions Were Not Barred, the Surety's Treatment Under the Plan Does Not Violate § 1129(a)(1)

154. The Williams Parties' assertion that the Surety's treatment violates sections 502 and 509 of the Bankruptcy Code is also flawed. Sections 502 and 509 operate in conjunction "to prevent the filing of duplicate claims by a contingent claimant and the indemnitor or contributor."[57] The treatment of the Surety here *does not* provide the Surety with duplicative recovery and is entirely reasonable and consistent with the many issues that were resolved through the extensively negotiated Surety Cooperation Agreement.[58] Indeed, the Surety Cooperation Agreement ensures that the Surety—rather than the unsecured creditors who made claims under the Surety Bond—is the sole creditor to recover on such claims "to the extent that the Surety has satisfied claims made by subcontractors and suppliers under the Bond . . . ."

155. Moreover, none of the cases cited by the Williams Parties are controlling, nor do they involve circumstances comparable to those present in the Chapter 11 Cases. The Williams Parties' reliance on *In re Richardson* is misguided because in that case, the bankruptcy court had not already approved an agreement expressly providing for the surety's reimbursement or

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[57] The Law of Debtors and Creditors § 14:36 (2d ed. 1991); *see also In re Touch Am. Holdings, Inc.*, 381 B.R. 95, 109 (Bankr. D. Del. 2008) ("The purpose of Bankruptcy Code § 502(e)(1)(b) is 'to preclude redundant recoveries on identical claims against insolvent estates in violation of the fundamental Code policy of fostering equitable distribution among all creditors of the same class.'" (quoting *In re Hemingway Transport, Inc.*, 993 F.2d 915, 923 (1st Cir. 1993))).

[58] *See, e.g., Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 831 (8th Cir. 1997) (concluding that an insurance company's contingent claim for reimbursement was not disallowed under section 502(e)(1)(B) because the case involved neither "competing claims or redundant recoveries").

contribution and subrogation. 193 B.R. 378, 380 (D.D.C. 1995). Further, the court in *Richardson* emphasized that the surety's proof of claim unequivocally asserted only subrogation rights; whereas, here, the Surety's proofs of claim assert claims for both subrogation and indemnification/reimbursement. *See* Claim Nos. 522, 529, and 551. Additionally, in *In re Trasks' Charolais*, also cited by the Williams Parties, the court in fact allowed subrogation under section 502, in addition to a fixed-price option under a "contract of guaranty." 84 B.R. 646, 650–51 (Bankr. D.S.D. 1988).

156. Here, the Court has already approved an agreement with its detailed framework for addressing the sharing of the Williams Litigation Proceeds, the funding of that litigation, and the Surety's assertion of equitable subrogation and other claims. Additionally, the Surety Cooperation Agreement was specifically negotiated and drafted to preclude duplicative recovery by the Surety and the creditors who made claims under the Surety Bond. Accordingly, the cases upon which the Williams Parties rely are both unpersuasive and easily distinguishable from the Chapter 11 Cases.

157. Furthermore, the Williams Objection fails to recognize that equitable subrogation is "distinct from subrogation under § 509(a)."[59] As this Court has stated, "the Third Circuit recognizes both equitable subrogation and state subrogation laws in a bankruptcy context."[60] The statutory subrogation scheme described in section 509(a) does not address the interplay between equitable subrogation and section 502. Delaware recognizes the doctrine of equitable subrogation for reimbursement to one "who met the obligation of another or paid the money or the compensation owed by another."[61]

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[59] *In re Cornmesser's, Inc.*, 264 B.R. 159, 162 (Bankr. W.D. Pa. 2001).

[60] *In re LTC Holdings, Inc.*, 597 B.R. 565, 574 (Bankr. D. Del. 2019).

[61] *Southern Track & Pump, Inc. v. Terex Corp.*, 852 F. Supp. 2d 456, 468 (D. De. 2012); *see also In re Am. Appliance*, 272 B.R. 587, 598 (Bankr. D.N.J. 2002) ("The principle of equitable subrogation is recognized in the state of Delaware.").

158. The Williams Parties do not address this issue, nor the fact that these issues would have required heavy, costly and uncertain litigation that was avoided through the benefits of the complex settlement of issues under the Surety Cooperation Agreement Order. In fact, the cases upon which the Williams Parties rely expressly acknowledge that section 509 does not apply to equitable subrogation. *See, e.g.*, *In re Medicine Shoppe*, 210 B.R. 310, 314 (Bankr. N.D. Ill. 1997); *Fiberboard Corp. v. The Celotex Corp.*, No. 803CV1479T23MSS, 2005 WL 2429508 (M.D. Fla. Sept. 30, 2005).

159. A key distinction between subrogation under section 509 and equitable subrogation is that section 509(a) governs an entity's right to subrogate a creditor's claim; whereas, equitable subrogation grants broader subrogation rights, allowing a surety to subrogate itself to the bond obligee's rights. *See Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135–35 (1962). The Williams Objection fails to recognize that the Surety is being *equitably* subrogated to the rights of the bond obligee, Transco, rather than of another creditor pursuant to section 509. Accordingly, the Plan's treatment of the Surety Bond Claims does not violate section 1129(a)(1) and the Williams Parties' objection to such treatment should be overruled.

C. Williams Parties' Miscellaneous Objections

(i) The Plan Properly Grants the Plan Administrator—the Estate Fiduciary—the Right to Object to Claims

160. The Plan expressly vests the Plan Administrator and the Post-Effective Date Debtors with authority to evaluate claims, including the Surety Bond Claims, due to their superior position to evaluate such claims with the requisite documentation. The Debtors assert that this right should be exclusive to the Plan Administrator and the Post-Effective Date Debtors to avoid duplicative proceedings and the inefficient administration of the Chapter 11 Cases. *See* 4 COLLIER ON BANKRUPTCY ¶ 502.02[2][d] (Alan N. Resnick & Henry J. Sommer eds., 16th

ed. 2018) ("[I]t is the trustee who acts as the primary spokesman for all the creditors in the discharge of the trustee's duty. . . . [T]he right of individual creditors to object to the claim of another creditor is restricted. While a creditor may object before a trustee is qualified or when there is no trustee, once the trustee has been duly appointed it is the duty of the trustee to examine and take action concerning the disallowance of claims."). Moreover, section 502 of the Bankruptcy Code does not grant a party standing to object to the claims of another party and such standing should not be granted to the Williams Parties here. *Id.* at ¶ 502.02[2][e] ("For the same reason that the chapter 7 debtor and creditors usually may not object to the allowability of another creditor's claim when there is an appointed trustee, the debtor's stockholders are not parties in interest within the meaning of section 502(a) and, therefore, lack the standing to object to the allowability of the claims of creditors of the debtor."). Any right that a creditor may possess to file objections to the claims of another creditor is, or would be, severely restricted by the Court to avoid judicial and administrative inefficiency. *See The Renco Grp., Inc. v. Wilmington Tr., Nat'l Assoc. et al. (In re Magnesium Corp. of Am.)*, 583 B.R. 637, 653 (Bankr. S.D.N.Y. 2018) ("[U]nder section 502(a), a creditor *may* have standing to object to claims . . . . However, the right of one creditor to object to another creditor's claim is not absolute and is subject to judicial limitation.") (emphasis in original) (citations omitted). As such, this objection should be overruled.

(ii) Transco's Rights to Amend Its Proofs of Claim Are Not Prejudiced by the Plan

161. Transco's rights to amend its proofs of claim is not prejudiced by the Plan. The Plan merely requires approval by the Court or the Post-Effective Date Debtors. To the extent that the Williams Parties have a right to amend their own proofs of claim, such right is not impaired by the Plan, and the Debtors, Plan Administrator, and Post-Effective Date Debtors reserve all rights and defenses with respect to any such purported amendment.

(iii) Issues Related to the Williams Litigation

162. In addition to the above-described objections regarding the Surety Bond Claims, the Williams Objection raises baseless concerns pertaining to the Williams Parties' rights, defenses, and counterclaims. As expounded herein, the Plan *does not* impair the Williams Parties' rights with respect to the Williams Litigation, but to address this phantom concern the Debtors have included the Williams ROR in the Confirmation Order.

(iv) The Exculpation Is Essential to Confirmation of the Plan and Does Not Impair the Williams Parties' Rights or Defenses

163. Section 11.12 of the Plan provides for a standard exculpation of the Exculpated Parties, who are parties with fiduciary obligations to the Estates. It is both customary and appropriate for a chapter 11 plan to include an exculpation clause for fiduciaries of a bankruptcy estate, including the debtor, its officers and professionals, the creditors' committee, and its members and professionals.[62] As described herein and in the Pometti Declaration, the Exculpated Parties have conducted themselves in good faith, made substantial contributions to the benefit of all stakeholders, and have been critical to the success of the Chapter 11 Cases. Thus, such parties are entitled to the standard of review provided in the exculpation related to their participation in the Chapter 11 Cases. *See* 11 U.S.C. § 1125(e); Pometti Declaration ¶ 31. Moreover, courts routinely hold that such exculpation clauses are "essential" to implementation of a chapter 11 plan.[63]

[62] *In re PWS Holding Corp.*, 228 F.3d 224, 245–47 (3d Cir. 2000).

[63] *See, e.g.*, *In re U.S. Concrete, Inc.*, No. 10-11407 (PJW), 2010 WL 3493066, at *22 (Bankr. D. Del. July 29, 2010) (finding that section 105(a) of the Bankruptcy Code permits exculpation clauses, and further finding that a standard exculpation clause was "essential"); *In re Stallion Oilfield Servs. Ltd.*, No. 09-13562 (BLS), 2010 WL 5093096, at *22 (Bankr. D. Del. Jan. 20, 2010) (finding exculpation clause "essential" and releasing the exculpated parties from liability related to implementation of the Plan).

164. The standard exculpation clause included in the Plan does not impair the Williams Parties' rights, defenses, or counterclaims as asserted in the Williams Litigation – including the claims asserted as administrative expense claims. To the extent of any lingering concern, the Williams ROR should alleviate the Williams Parties' concerns. Therefore, the Williams Objection should be overruled.

(v) Vesting of the Williams Litigation in the Post-Effective Date Debtors

165. Contrary to the Williams Parties assertions, the vesting of the Williams Litigation (a Retained Cause of Action) in the Post-Effective Date Debtors does not strip the Williams Parties of their rights and defenses in that action. The provision is a standard Plan implementation measure to ensure that the rights that existed pre-Effective Date exist following the Effective Date. It defies credibility to suggest that the Debtors are, under the terms of the Plan, retaining all rights to Retained Causes of Action, while stripping counterparties of their defenses to the extent such party properly preserved them. To be clear, the Plan is also not expanding any rights that a party has failed to preserve. As with the prior objection, the Williams ROR should provide the Williams Parties with the requisite comfort on this point.

166. The Debtors acknowledge the Williams Parties' choice to opt out of the Third-Party Releases and respectfully request that the balance of the Williams Objection be overruled for the reasons set forth herein.

WAIVER OF BANKRUPTCY RULES REGARDING STAY OF CONFIRMATION ORDER

167. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 3020(e). Given that the Plan has been overwhelmingly accepted, the Debtors respectfully request that the 14-day stay imposed by operation of Bankruptcy Rule 3020(e) be waived, and that

the Confirmation Order be effective immediately upon its entry. For the same reason, the Debtors additionally request that the Confirmation Order be effective immediately upon its entry notwithstanding any other provision of the Bankruptcy Rules, including Bankruptcy Rule 6004(h), or otherwise.

CONCLUSION

168. The Plan complies with and satisfies all applicable requirements of section 1129 of the Bankruptcy Code. Therefore, the Debtors request that the Bankruptcy Court (i) confirm the Plan and (ii) grant the Debtors such other and further relief as is just and proper.

Dated: June 22, 2020
Wilmington, Delaware

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