Docket #0943 Date Filed: 10/16/2012

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	)	**Chapter 11**
	)	
CGLA LIQUIDATION, INC., f/k/a Cagle's, Inc.,	)	**Case No. 11-80202-PWB**
CF LIQUIDATION, INC., f/k/a Cagle's Farms, Inc.	)	
	)	
Debtors.	)	**Jointly Administered**
	)	

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE DEBTORS' AMENDED AND RESTATED PLAN OF LIQUIDATION

CGLA Liquidation, Inc. (f/k/a Cagle's, Inc.) and CF Liquidation, Inc. (f/k/a Cagle's Farms, Inc.) (collectively, the "Debtors") file this Memorandum of Law (this "Memorandum of Law") in support of confirmation of the *Amended and Restated Plan of Liquidation for Cagle's, Inc. and Cagle's Farms, Inc., Dated the 6th day of September, 2012* [Docket No. 847] (as amended and modified to date, the "Plan").[1]

I. BACKGROUND

A. The Debtors' Chapter 11 Cases

On October 19, 2011 (the "Petition Date"), each of the Debtors filed a voluntary petition with the Court under chapter 11 of the Bankruptcy Code. The Debtors' chapter 11 cases have been consolidated for procedural purposes only.

[1] All capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Plan.

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The factual background relating to the Debtors' commencement of these cases is set forth in detail in the *Declaration of Mark M. Ham IV in Support of First Day Motions and Applications* [Docket No. 14] filed on the Petition Date and incorporated herein by reference.

As of the date of this Memorandum of Law, no request has been made for the appointment of a trustee or examiner. An official committee of unsecured creditors (the "Committee") was appointed in these cases on October 27, 2011, and the Committee retained counsel and a financial advisor.

B. Structure of the Debtors and Operations

CGLA Liquidation, Inc. and CF Liquidation, Inc. are Georgia corporations with their corporate headquarters located at 1385 Collier Road NW, Atlanta, GA 30318. CF Liquidation, Inc. is a wholly-owned subsidiary of CGLA Liquidation, Inc.

On the Petition Date, the Debtors were engaged in the business of producing, marketing, and distributing a variety of fresh and frozen poultry products. The Debtors' operations consisted of breeding, hatching and growing chickens; feed milling; and processing, further processing and marketing poultry products. During the Bankruptcy Cases, the Debtors marketed and sold substantially all of their Assets and ceased conducting ordinary course business operations. A more detailed discussion of the sale of the Debtors' Assets is provided below.

As of the date of this Memorandum of Law, the Debtors continue to own one real property location, a closed plant located at 2125 7th Street, Macon, Georgia 31206.

Prior to the filing of these Bankruptcy Cases, the Debtors financed the operation of their businesses pursuant to: (1) a financing arrangement entered into by and between the Debtors and AgSouth Farm Credit, ACA, an agricultural credit association ("AgSouth"); and (2) a financing arrangement entered into by and between the Debtors and Metropolitan Life Insurance Company

("MetLife"). A description of those financing arrangements is set forth in the *Amended and Restated Disclosure Statement for Amended and Restated Plan of Liquidation filed by Cagle's, Inc. and Cagle's Farms, Inc., dated September 6, 2012* [Docket No. 846] (as amended and modified to date, the "Disclosure Statement").

C. Sale of Substantially All of the Debtors' Assets

In November 2011, the Debtors commenced a sale process, pursuant to which the Debtors exposed their Assets to the market to determine whether the interests of the Estates would be best served by selling some or all of the Debtors' business operations. In connection with this sale process, on or about November 30, 2011, the Debtors retained Lazard Middle Market LLC ("Lazard") as their investment banker to market their assets. Lazard contacted approximately 112 potential buyers, including 53 "strategic" buyers and 59 "financial" buyers. Approximately 32 parties entered into confidentiality agreements with the Debtors and conducted due diligence regarding a potential purchase of or investment in the Debtors. Four parties submitted written indications of interest to the Debtors, and the Debtors and their legal and financial advisors reviewed the terms and conditions of these proposals (including the consideration offered) and evaluated the financial capabilities of the submitting parties to identify the strongest transaction proposals.

Following the submission of indications of interest, the Debtors entered into detailed discussions and negotiations with two different bidders. After consulting with their legal and financial advisors, the Debtors determined that an offer made by JCG Foods LLC ("JCG"), an entity that is affiliated with Koch Foods, Inc. ("Koch Foods"), presented the highest recovery for all stakeholders.

The Debtors entered into a "stalking horse" Asset Purchase Agreement with JCG dated as of March 22, 2012 (as further amended, restated and modified) (the "Asset Purchase Agreement"), whereby JCG agreed to purchase substantially all of the Debtors' Assets for $37 million, plus the value of the Debtors' inventory and accounts receivable, minus the aggregate amount of the Debtors' post-petition accounts payable and accrued expenses assumed by JCG (subject to a post-closing purchase price adjustment).

On March 23, 2012, the Debtors filed a motion seeking the entry of orders (a) authorizing and scheduling an auction at which the Debtors would solicit the highest or best bid for the sale of the substantially all of their Assets; (b) approving bidding procedures related to conduct of auction; (c) approving break-up fee; (d) approving the form and manner of notices of (i) proposed sale of the Debtors' Assets, the auction and the approval hearing, and (ii) proposed assumption and assignment of executory contracts and leases; (e) approving the sale of the Assets to the party submitting the highest or best bid; and (f) granting related relief. The Bankruptcy Court entered an order (the "Bid Procedures Order") on or about April 4, 2012 approving a portion of the relief sought by the Debtors and, among other things, scheduling an auction with respect to the sale of substantially all of the Debtors' Assets for May 10, 2012 (the "Auction").

Pursuant to the Bid Procedures Order, the Debtors received one conforming Initial Overbid prior to the Bid Deadline (as such terms are defined in the Bid Procedures Order). Accordingly, an auction was conducted on May 10, 2012 and resulted in competitive bidding between JCG and a joint venture comprised of Continental Grain Company and Industrias Bachoco, S.A.B. de C.V. At the conclusion of the auction, JCG submitted the winning bid with a purchase price of $49.7 million plus (i) the value of the Debtors' inventory and the book value

of the acquired accounts receivable of the Debtors, minus (ii) the aggregate dollar amount of the post-petition payables and the accrued expenses assumed by JCG in connection with the transaction. On May 11, 2012, the Bankruptcy Court entered its *Order (A) Approving Asset Purchase Agreement and Authorizing the Sale of Assets of the Debtors Outside the Ordinary Course of Business, (B) Authorizing the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances and Interests, (C) Authorizing the Assumption and Sale and Assignment of Certain Executory Contracts and Unexpired Leases, and (D) Granting Related Relief* [Docket No. 439], whereby the Bankruptcy Court approved the Asset Purchase Agreement with JCG and approved the assignment and assumption of certain of the Debtors' executory contracts and unexpired leases to JCG. On June 15, 2012 (the "Closing Date"), the Debtors closed the transaction with JCG related to the sale of substantially all of their Assets (the "Sale"). The Cash portion of the purchase price, in an amount equal to $69,500,000, was paid by JCG at the closing; the balance of the purchase price, in an amount equal to approximately $18,249,388.96, was evidenced by an unsecured promissory note (the "Purchase Note") bearing interest at eight percent (8%) per annum and payable in four (4) equal quarterly installments of principal (plus accrued interest to the date of each payment). Payment on the Purchase Note was deferred until February 1, 2013, whereupon all such deferred payments (with interest accrued thereon) are due and payable. The remaining quarterly installments are to continue and be payable on the first (1st) day of the calendar month of the applicable quarter. The Purchase Note is subject to certain agreements entered into on the Closing Date including: (i) an intercreditor and subordination agreement (the "Intercreditor Agreement") between the Debtors and Rabobank Nederland, New York Branch ("Rabobank") (JCG's secured lender), pursuant to which the Purchase Note was subordinated to the loan made by Rabobank to JCG to fund a portion of the purchase price; (ii) a

guaranty agreement executed by Mr. Joseph C. Grendys for the benefit of the Debtors, pursuant to which Mr. Grendys guaranteed all of the indebtedness evidenced by the Purchase Note; and (iii) a guaranty agreement executed by Koch Foods for the benefit of the Debtors, pursuant to which Koch Foods guaranteed an amount equal to $5 million of the indebtedness evidenced by the Purchase Note.

The Rabobank loan to JCG is secured by substantially all of JCG's assets, and the Purchase Note is subordinated to the Rabobank debt pursuant to the terms of the Intercreditor Agreement, which provides that the aggregate principal amount of the Rabobank debt subject to the Intercreditor Agreement may not exceed $59.8 million. The guaranties of the Purchase Note by Mr. Grendys and Koch Foods are guaranties of payment and not of collection. The Intercreditor Agreement does not restrict or prevent the Debtors from making demand or filing suit on the guaranties in the event of a default under the Purchase Note. Upon information and belief, Mr. Grendys is the owner of Koch Foods and Koch Foods had annual revenue exceeding $2 billion during its most recent fiscal year. The Liquidating Agent intends to take appropriate steps to ensure that all amounts due from JCG under the Purchase Note are paid in a timely manner.

D. Description of the Plan[2]

The Plan provides for equitable and early Distributions to creditors of the Debtors and preserves the value of the Estates. The Debtors and the Committee believe that the Plan represents the best opportunity to distribute the Estates' cash to creditors at the earliest possible

[2] The following is a brief description of certain provisions of the Plan and is not intended to be comprehensive. To the extent that anything in this description is contrary to the terms of the Plan, the Plan governs and controls.

date, and the Debtors anticipate that all of their creditors will be paid in full, in cash, and that holders of common stock in Cagle's will receive substantial cash distributions.

The Plan classifies all Claims against and Interests in the Debtors into five (5) separate Classes. The Plan generally provides for unsecured creditors of the Debtors to receive pro rata Distributions of any Liquidation Proceeds that remain in the Debtors' Estates after the payment and satisfaction of Allowed Administrative Expense Claims, Allowed Tax Claims, Allowed Miscellaneous Secured Claims in Class 1, Allowed Priority Claims in Class 2 and Allowed Unsecured Convenience Claims in Class 4. As set forth in the unaudited liquidation and distribution analysis attached as Exhibit B to the Disclosure Statement (the "Liquidation Analysis"), the Debtors currently anticipate that each Holder of an Allowed Class 3 General Unsecured Claim will receive total Distributions aggregating 100% of such Claim (plus postpetition interest at the rate of 5% per annum). With respect to the timing of such Distributions, the Debtors anticipate that each Holder of an Allowed Class 3 General Unsecured Claim will receive (i) a Distribution equal to no less than 80% of its Allowed Class 3 General Unsecured Claim (plus postpetition interest) on the Initial Distribution Date under the Plan, and (ii) aggregate Distributions equal to 100% of its Allowed Class 3 General Unsecured Claim (plus postpetition interest) no later than February 1, 2013. Nevertheless, various factors outside of the Debtors' control could result in Holders of Class 3 General Unsecured Claims receiving total Distributions less than the 100% recovery projected in the Liquidation Analysis. Such factors include, but are not limited to (a) whether the Debtors receive the balance of the purchase price payable under the Asset Purchase Agreement, (b) the amounts (if any) realized from the future sales of the Debtors' remaining Assets, (c) the amount realized, if any, from the Debtors'

prosecution of Causes of Action, (d) the amount realized from the Debtors' other residual assets, and (e) the outcome of various Claims Litigation.

Unsecured creditors of the Debtors with Allowed Claims equal to or less than $10,000.00 (Class 4 under the Plan) shall receive, in full and final satisfaction of such Allowed Claims, Cash equal to the full amount of such Allowed Claims (plus postpetition interest at the rate of 5% per annum) on or as soon as reasonably practicable after the later of (a) the Initial Distribution Date, or (b) the first Distribution Date after the date such Claim becomes Allowed.

Each Holder of Interests in Cagle's (Class 5 under the Plan) shall, on each Distribution Date, receive a pro rata Distribution of any Liquidation Proceeds that remain in the Debtors' Estates after the payment and satisfaction of Allowed Administrative Expenses Claims and Allowed Tax Claims and all amounts owed to Allowed Claims in Class 1, Class 2, Class 3 and Class 4.

The Plan also, among other things, provides for the following: (a) the substantive consolidation of the Debtors; (b) the rejection of certain executory contracts and unexpired leases; (c) the release by the Debtors and their Estates of certain causes of action; (d) the retention of jurisdiction by the Bankruptcy Court; (e) procedures for treating and resolving Disputed Claims; (f) the appointment of a Liquidating Trustee; (g) the establishment of a Creditor Oversight Committee; and (h) the appointment of an Equity Oversight Representative.

E. Disclosure Statement and Plan Solicitation

Following a hearing on September 6, 2012 to consider the adequacy of the Disclosure Statement, the Court entered the *Order Approving (I) the Disclosure Statement; (II) Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan; and (III) Related Notice and Objection Procedures* [Docket No. 848] (the "Disclosure Statement Approval

Order"). The Disclosure Statement Approval Order, among other things: (i) approved the Disclosure Statement as containing "adequate information" pursuant to Section 1125 of the Bankruptcy Code; (ii) approved the solicitation procedures for the solicitation of votes on the Plan; (iii) fixed October 11, 2012 as the date by which all ballots to accept or reject the Plan must be received; (iv) fixed October 11, 2012 as the last day for creditors and other parties in interest to file objections to confirmation of the Plan; (v) scheduled a hearing to consider confirmation of the Plan for October 18, 2012; and (vi) prescribed the form and manner of notice with respect to the foregoing. As set forth in the various affidavits of service that are on file with this Court, the Debtors have fully complied with each of the directives of the Disclosure Statement Approval Order. In addition, Ballots were supplied to each person requesting a Ballot who did not otherwise receive a Ballot.

II. THE PLAN SHOULD BE CONFIRMED BECAUSE IT COMPLIES WITH THE STANDARDS OF THE BANKRUPTCY CODE

Section 1129 of the Bankruptcy Code governs confirmation of a Chapter 11 plan and sets forth a number of requirements that must be satisfied for a plan to be confirmed. Pursuant to Section 1129(a), a plan must be confirmed if:

1. The plan complies with the applicable provisions of the Bankruptcy Code (11 U.S.C. § 1129(a)(1));

2. The plan proponents have complied with the applicable provisions of the Bankruptcy Code (11 U.S.C. § 1129(a)(2));

3. The plan has been proposed in good faith and not by any means forbidden by law (11 U.S.C. § 1129(a)(3));

4. Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses incurred in, or in connection with, the case or the plan has been approved by, or is subject to the approval of, the court as reasonable (11 U.S.C. § 1129(a)(4));

5. The plan proponents have disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor; the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and the plan proponents have disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider (11 U.S.C. § 1129(a)(5));

6. To the extent that the debtor is subject after confirmation of the plan to the jurisdiction of any regulatory commission, any rate change provided in the plan has been approved by, or is subject to the approval of, such regulatory commission (11 U.S.C. § 1129(a)(6));

7. With respect to each impaired class of claims or interests: (a) each holder of a claim or interest in such class has either 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 of the plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under Chapter 7; or (b) if Section 1111(b)(2) of the Bankruptcy Code applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims (11 U.S.C. § 1129(a)(7));

8. Each class of claims or interests has either accepted the plan or is not impaired under the plan (11 U.S.C. § 1129(a)(8));

9. The treatment of administrative expense claims, priority claims, and certain tax claims under the plan complies with the provisions of Section 1129(a)(9) of the Bankruptcy Code (11 U.S.C. § 1129(a)(9));

10. If a class of claims is impaired under the plan, at least one impaired class of claims has accepted the plan, determined without including acceptances by any insiders holding claims in such class (11 U.S.C. § 1129(a)(10));

11. Confirmation 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));

12. The plan provides for payment on or prior to the effective date of all fees payable under 28 U.S.C. § 1930 (11 U.S.C. § 1129(a)(12));

13. The plan provides for the continued payment after the effective date of retiree benefits, as defined in Section 1114 of the Bankruptcy Code, at the level established pursuant to Section 1114(e)(1)(B) or (g), at any time prior to the

confirmation of the plan, for the duration of the period that the debtor has obligated itself to provide such benefits (11 U.S.C. § 1129(a)(13));

14. If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition (11 U.S.C. § 1129(a)(14));

15. If the debtor is an individual and an unsecured creditor objects to confirmation of the plan: (a) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (b) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in Section 1325(b)(2) of the Bankruptcy Code) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer (11 U.S.C. § 1129(a)(15)); and

16. All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation trust (11 U.S.C. § 1129(a)(16)).

11 U.S.C. § 1129(a).

As demonstrated below, the Plan satisfies each of the applicable requirements of Section 1129(a).

A. The Plan Satisfies the Confirmation Requirements of Section 1129(a)(1).

Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Legislative history and subsequent case law indicate that this provision embodies and incorporates the claim classification requirements of Section 1122 of the Bankruptcy Code and the mandatory and permissive provisions concerning the contents of a plan set forth in Section 1123 of the Bankruptcy Code. *See* H. R. Rep. No. 95–595, at 412 (1977); S. Rep. No. 95–989, at 126 (1978); *see also In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd subnom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir.

1988). As demonstrated below, the Plan complies fully with the requirements of Sections 1122 and 1123 and, therefore, satisfies Section 1129(a)(1).

1. The Plan Satisfies the Classification Requirements of Section 1122.

Section 1122(a) of the Bankruptcy Code provides that a plan may place a claim or interest in a particular class if such claim or interest is "substantially similar" to the other claims or interests of such class. 11 U.S.C. § 1122(a). Although the Bankruptcy Code does not define "substantially similar," these words have generally been interpreted to mean similar in legal character to other claims against a debtor's assets or to other interests of the debtor. *See* 7 *Collier on Bankruptcy* ¶ 1122.03[3] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.).

Section 1122(a) does not require that all substantially similar claims or interests be placed in the same class, but rather that all claims or interests within a class be substantially similar to one another. *See In re Lafayette Hotel P'ship*, 227 B.R. 445, 449 (S.D.N.Y. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1999); *In re 11,111, Inc.*, 117 B.R. 471 (Bankr. D. Minn. 1990). A plan proponent is afforded significant flexibility in classifying claims and interests under Section 1122(a) so long as there is a reasonable basis for the classification structure. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992).

Courts are also afforded broad discretion in approving a plan proponent's classification scheme and may properly consider the specific facts of each case when making such determination. *See Jersey City Med. Ctr.*, 817 F.2d at 1060–61 ("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."); *In re U.S. Truck Co.*, 800 F.2d 581, 586 (6th Cir. 1986) (noting the "broad discretion" courts are given to determine proper classification).

In the present case, the Plan's classification structure is proper and in accordance with Section 1122(a). The Plan segregates the various Claims and Interests of the Debtors into the following classes:

- Class 1 provides for the separate classification of all Miscellaneous Secured Claims.
- Class 2 provides for the separate classification of all Priority Claims.
- Class 3 provides for the separate classification of all General Unsecured Claims.
- Class 4 provides for the separate classification of all Unsecured Convenience Claims.
- Class 5 provides for the separate classification of all Interests in Cagle's.

(*See* Plan § 2.1.)[3]

A reasonable and justifiable basis exists for each separate classification of Claims and Interests under the Plan. The separate classification of creditors under the Plan was not for the improper purpose of gerrymandering an affirmative vote of an impaired class. *See In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990). All Claims or Interests within each Class are substantially similar to the other Claims or Interests in each such Class, thus satisfying the express mandate of Section 1122. *See Lafayette Hotel P'ship*, 227 B.R. at 449. Furthermore, no party in interest has objected to the classification structure set forth in the Plan. The classification structure set forth in the Plan is proper and satisfies the requirements of Section 1122(a).

Section 1122(b) of the Bankruptcy Code is an elective, not mandatory, provision relating to the designation of a class of claims for administrative convenience. The Plan classifies any

[3] In accordance with Section 1123(a)(1) of he Bankruptcy Code, Administrative Claims and Tax Claims have not been classified. (*See* Plan § 4.1.)

Unsecured Claim in an amount that is equal to or less than $10,000 as an "Unsecured Convenience Claim."

2. The Plan Complies with the Mandatory Requirements Set Forth in Section 1123.

Section 1123(a) of the Bankruptcy Code sets forth several mandatory requirements with which every Chapter 11 plan must comply. 11 U.S.C. § 1123(a). As set forth below, the Plan complies fully with each such requirement.

a. The Plan Designates Classes of Claims and Interests – 11 U.S.C. § 1123(a)(1).

Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes of claims and interests, other than claims of a kind specified in Section 507(a)(2) (administrative expense claims), Section 507(a)(3) (claims arising during the "gap" period in an involuntary case), and Section 507(a)(8) (tax claims). *See* 11 U.S.C. § 1123(a)(1). As required, Article II of the Plan designates five Classes of Claims and Interests. Tax Claims and Administrative Expense Claims are not classified. Thus, the Plan complies with Section 1123(a)(1).

b. The Plan Specifies Unimpaired Classes – 11 U.S.C. § 1123(a)(2).

Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Article II of the Plan specifies that Class 1 and Class 2 are unimpaired and conclusively presumed to have accepted the Plan. Article II of the Plan also specifies that Class 3, Class 4, and Class 5 are impaired under the Plan. Thus, the Plan complies with Section 1123(a)(2).

c. The Plan Adequately Specifies the Treatment of Impaired Classes – 11 U.S.C. § 1123(a)(3).

Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Article III of the Plan specifies the treatment afforded to all Classes of Claims and Interests under the Plan, including impaired Classes 3, 4, and 5. Thus, the Plan complies with the requirements of Section 1123(a)(3).

d. The Plan Provides for the Same Treatment of Claims or Interests within the Same Class – 11 U.S.C. § 1123(a)(4).

Section 1123(a)(4) of the Bankruptcy Code requires that the plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). Article III of the Plan provides for all holders of Claims and Interests within a particular Class to receive identical treatment under the Plan on account of such Claims and Interests, unless the Claim Holder or Interest Holder has expressly consented to less favorable treatment. Thus, the Plan complies with the requirements of Section 1123(a)(4).

e. The Plan Provides Adequate Means for Its Implementation – 11 U.S.C. § 1123(a)(5).

Section 1123(a)(5) of the Bankruptcy Code requires that a plan "provide adequate means for [its] implementation" and lists certain examples, including, among other things: (a) the retention by the debtor of all or any part of the property of the estate; (b) the transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan; (c) the merger or consolidation of the debtor with one or more persons; (d) the sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an

interest in such property of the estate; and (e) the amendment of the debtor's charter. *See* 11 U.S.C. § 1123(a)(5); *see also In re Stuart Glass & Mirror, Inc.*, 71 B.R. 332, 334 (Bankr. S.D. Fla. 1987) (stating that the proper test is whether the plan provides adequate means for its execution, as required by Section 1123(a)(5), not whether alternative means might or might not be available).

Article VI and other provisions of the Plan provide adequate means for implementation of the Plan. They include: (a) substantive consolidation of the Debtors and their respective Estates for all purposes relating to the Plan, including for purposes of voting, confirmation, and Distributions; (b) the continued corporate existence of the Debtors; (c) the vesting of all property of the Debtors and their Estates in the Debtors; (d) the appointment of a Liquidating Agent and the designation of the powers of the Liquidating Agent; (e) the authorization of the billing and collection of the Debtors' accounts receivable by the Liquidating Agent; (f) the cancellation of existing securities of the Debtors; (g) the authorization of necessary and appropriate corporate action; and (h) the preservation of certain Causes of Action. Article VIII of the Plan also specifies the procedures by which Distributions will be made to Holders of Allowed Claims and Allowed Interests.

Accordingly, for the foregoing reasons, the Plan provides adequate means for its implementation and, therefore, satisfies Section 1123(a)(5).

f. The Plan Provides for Required Charter Provisions – 11 U.S.C. § 1123(a)(6).

With respect to corporate debtors, Section 1123(a)(6) of the Bankruptcy Code requires that a plan must:

> provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting

> equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends.

11 U.S.C. § 1123(a)(6).

This provision does not apply here because the Debtors have sold substantially all of their assets and none of the Debtors' stakeholders will receive new equity in consideration for their claims. Nonetheless, out of an abundance of caution, Section 7.1 of the Plan provides for the amendment of the Debtors' charters to prohibit the issuance of nonvoting equity securities. Accordingly, the Plan complies with Section 1123(a)(6).

g. The Plan Contains Appropriate Provisions for the Selection of Officers and Directors – 11 U.S.C. § 1123(a)(7).

Section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7).

Pursuant to Section 7.2 of the Plan, on the Effective Date: (a) the authority, power and incumbency of the persons then acting as officers and directors of the Debtors shall be terminated and such officers and directors shall be deemed to have resigned, and (b) the Liquidating Agent shall be deemed the sole officer and sole director of each Debtor and shall be deemed to have succeeded to such powers as would have been previously exercisable by the shareholders of each Debtor. Moreover, Section 6.4 of the Plan establishes the procedures for appointing a successor Liquidating Agent.

Sean Harding, a Managing Director of FTI Consulting, Inc. and the Debtors' Vice President of Restructuring, has been selected as the Liquidating Agent by the Debtors, with the agreement of the Committee. Accordingly, to the extent Section 1123(a)(7) is applicable, the selection of the Liquidating Agent was consistent with the interests of the Debtors' stakeholders and comports with public policy, and the requirements of Section 1123(a)(7) are satisfied. *See, e.g.*, *In re McCommas LFG Processing Partners, LP*, Nos. 07-32219, 07-032222, 2007 WL 4234139, at *14 (Bankr. N.D. Tex. Nov. 29, 2007) (finding Section 1123(a)(7) satisfied because no officer or director was selected for debtor and plan provided for selection of liquidating trustee).

h. Section 1123(a)(8) is Inapplicable Because the Debtors are not Individuals – 11 U.S.C. § 1123(a)(8).

Section 1123(a)(8) of the Bankruptcy Code requires, in a case in which the debtor is an individual, that a plan provides for "the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary [to pay] for the execution of the plan." 11 U.S.C. § 1123(a)(8). This provision is inapplicable because the Debtors are not individuals.

In sum, as demonstrated by the foregoing, the Plan satisfies all of the mandatory requirements contained in Section 1123(a).

3. The Permissive Provisions Contained in the Plan are Appropriate Pursuant to Section 1123(b) of the Bankruptcy Code.

Section 1123(b) of the Bankruptcy Code specifies certain permissive provisions that can be included in a Chapter 11 plan. The Plan contains certain of the provisions specifically contemplated by Section 1123(b). Moreover, Section 1123(b)(6) permits a plan to include other provisions not inconsistent with the applicable provisions of the Bankruptcy Code.

a. The Provisions of the Plan Regarding Impairment of Claims are Proper – 11 U.S.C. § 1123(b)(1).

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, Article III of the Plan impairs certain classes and leaves certain classes unimpaired in accordance with Section 1123(b)(1).

b. The Provision in the Plan Rejecting Executory Contracts and Unexpired Leases is Appropriate – 11 U.S.C. § 1123(b)(2).

Section 1123(b)(2) of the Bankruptcy Code permits a plan to "provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected." 11 U.S.C. § 1123(b)(2). Pursuant to Article V of the Plan, the Debtors have exercised sound business judgment in determining that all executory contracts and unexpired leases of the Debtors shall be deemed rejected by the Debtors as of the Effective Date, except for any executory contract or unexpired lease that: (a) has been previously rejected or assumed by either Debtor pursuant to an order of the Bankruptcy Court (including all Sale Order Assumed Contracts), or (b) is the subject of a motion to assume filed by either Debtor which is pending on the Effective Date.

The Debtors respectfully submit that their decisions regarding the assumption and rejection of executory contracts and unexpired leases are authorized by Sections 365 of the Bankruptcy Code, represent a reasonable exercise of sound business judgment, and are in the best interests of the Debtors and their Estates. Therefore, the Plan complies with Section 1123(b)(2).

c. The Release of Certain Causes of Action Set Forth in the Plan is Appropriate – 11 U.S.C. § 1123(b)(3)(A).

Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). Consistent with this provision, the following releases and limitations of liability will be implemented by the Plan and the Confirmation Order:

i. Releases by the Debtors of Certain Parties (Plan § 10.3)

> Except as otherwise specifically provided in the Plan, pursuant to section 1123(b)(3) of the Bankruptcy Code, as of the Effective Date, each Debtor, in its individual capacity and as a debtor in possession for and on behalf of its Estate, shall release and discharge and be deemed to have conclusively, absolutely, unconditionally, irrevocably and forever released and discharged all Released Parties[4] for and from any and all claims (including derivative claims) or Causes of Action existing as of the Effective Date in any manner arising from, based on or relating to, in whole or in part, the Debtors. The Debtors, the Committee, the Liquidating Agent, the Creditor Oversight Committee, the Equity Oversight Representative and any potential representatives of the Estates shall be bound, to the same extent the Debtors are bound, by the releases set forth above.

ii. Exculpation and Limitation of Liability (Plan § 10.5)

> The Debtors, the Estates, the Committee, the members of the Committee in their capacities as such, and any of such parties' respective current and/or post-Filing Date and pre-Effective Date members, officers, directors, employees, advisors, attorneys, representatives, financial advisors, investment bankers, or agents and any of such parties' successors and assigns, shall not have or incur, and are hereby released from, any claim, obligation, cause of action, or liability to one another or to any Holder of any Claim or Interest, or any other party-in-interest, or any of their respective agents, employees, representatives, financial advisors, attorneys, or Affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of the Bankruptcy Cases, the negotiation, formulation and filing of the Plan, the filing of the Bankruptcy Cases, the pursuit of confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the Estates and the property to be distributed under the Plan, except for their willful misconduct or gross negligence, and in all respects shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities under the Plan. No Holder of any

[4] The Plan defines "Released Parties" as: "the current and former officers and directors of each of the Debtors, in each case in their capacity as such." (Plan § 1.1.70.)

> Claim or Interest, or other party in interest, none of their respective agents, employees, representatives, financial advisors, attorneys, or Affiliates, and no successors or assigns of the foregoing, shall have any right of action against the parties listed in this provision for any act or omission in connection with, relating to, or arising out of the Bankruptcy Cases, the pursuit of confirmation of the Plan, the consummation of the Plan, the administration of the Plan or the property to be distributed under the Plan. Nothing in [Section 10.5 of the Plan] relieves any Person from complying with the applicable provisions of the federal securities laws.
>
> *iii. Waiver of Certain Avoidance Actions (Plan § 10.7)*
>
> On and as of the Effective Date, each Debtor, in its individual capacity and as a debtor in possession for and on behalf of its Estate, shall waive, and be deemed to have conclusively, absolutely, unconditionally, irrevocably and forever waived, the Waived Avoidance Actions.[5] The Debtors, the Committee, the Liquidating Agent, the Creditor Oversight Committee, the Equity Oversight Representative and other potential representatives of the Estates shall be bound, to the same extent the Debtors are bound, by the waiver set forth above.

As discussed below in Section VI, these provisions are permissible under Section 1123(b)(3)(A).

d. The Provisions of the Plan Regarding the Pursuit of Rights of Action are Appropriate – 11 U.S.C. § 1123(b)(3)(B).

Section 1123(b)(3)(B) of the Bankruptcy Code provides that a plan may provide for "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)(B). Section 6.9 of the Plan provides that, the Debtors will retain and may (but are not required to) enforce all Causes of Action. The Plan also provides that after the Effective Date, the Liquidating Agent, in its sole and absolute discretion (except as provided in Sections 10.3 and 10.7 of the Plan), shall have the right to bring, settle, release, compromise, or enforce such Causes of Action (or decline

[5] The Plan defines "Waived Avoidance Actions" as: "(i) any Avoidance Action against any Holder of an Allowed Claim arising out of or maintainable pursuant to any state fraudulent conveyance laws or sections 544, 547, 548, 550 or 553(b) of the Bankruptcy Code; and (ii) any Avoidance Action against any Holder of an Allowed Claim arising out of or maintainable pursuant to section 549 of the Bankruptcy Code relating to the payment of valid pre-petition obligations of the Debtors." (Plan § 1.1.81.)

to do any of the foregoing), without further approval of the Bankruptcy Court. The Liquidating Agent, in the exercise of its sole discretion, is permitted to pursue such Causes of Action so long as it is the best interests of the Debtors or any successors holding such rights of action. Pursuant to Section 6.9 of the Plan, the failure of the Debtors to specifically list any claim, right of action, suit, proceeding or other Cause of Action in the Plan does not, and will not be deemed to, constitute a waiver or release by the Estates, the Liquidating Agent or the Debtors of such claim, right of action, suit, proceeding or other Cause of Action, and the Liquidating Agent (on behalf of the Debtors) will retain the right to pursue such claims, rights of action, suits, proceedings and other Causes of Action in its sole discretion and, therefore, no preclusion doctrine, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable or otherwise) or laches will apply to such claim, right of action, suit, proceeding or other Cause of Action upon or after the confirmation or consummation of the Plan.

The provisions of Section 6.9 of the Plan comply with and are consistent with Section 1123(b)(3)(B).

e. Other Provisions in the Plan are Appropriate and are not Inconsistent with the Provisions of the Bankruptcy Code – 11 U.S.C. § 1123(b)(6).

Section 1123(b)(6) of the Bankruptcy Code is a broad "catchall" provision stating that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."

The Plan provides that, among other things, subsequent to the Effective Date, this Court will have or retain jurisdiction for the various matters set forth in Article XII of the Plan. This retention of jurisdiction is consistent with the Bankruptcy Code. *See In re Dilbert's Quality Supermarkets, Inc.*, 368 F.2d 922, 924 (2d Cir. 1966) ("The contention that adoption of the

reorganization plan ousted the court of jurisdiction must be rejected. The reorganization court may retain jurisdiction of the debtor until the final decree."); *In re Joint E. & S. Dists. Asbestos Litig.*, 120 B.R. 648, 657 (E.D.N.Y. 1990) (rejecting the "contention that adoption of [a] reorganization plan oust[s] the [bankruptcy] court of jurisdiction."); *In re Leeds Bldg. Prods., Inc.*, 160 B.R. 689, 691 (Bankr. N.D. Ga. 1993) (stating that "bankruptcy court does not lose all jurisdiction once a chapter 11 plan has been confirmed"); *In re Johns-Manville Corp.*, 97 B.R. 174, 180 (Bankr. S.D.N.Y. 1989) ("Courts have relied on § 1142(b) to supply a basis for general post-confirmation jurisdiction"). Nothing in the Plan purports to or will extend the Bankruptcy Court's jurisdiction beyond those matters vested in the Bankruptcy Court by Congress in Title 28 of the United States Code. Accordingly, the continuing jurisdiction of the Bankruptcy Court contemplated in Article XII of the Plan is appropriate and complies with applicable law.

The Plan's other provisions are likewise appropriate and consistent with the Bankruptcy Code, including, without limitation, provisions for: (a) distributions to Holders of Claims and Holders of Interests; (b) the treatment and resolution of Disputed Claims; (c) the rejection of certain executory contracts and unexpired leases; (d) the appointment of a Liquidating Trustee; (e) the establishment of a Creditor Oversight Committee; and (f) the appointment of an Equity Oversight Representative.

B. The Plan Satisfies the Confirmation Requirements of Section 1129(a)(2)–(16).

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

Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The legislative history of Section 1129(a)(2) indicates that this provision embodies the disclosure and solicitation requirements set forth under the Bankruptcy Code and Bankruptcy Rules. H.R. Rep.

No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *Johns-Manville Corp.*, 68 B.R. at 630.

The Debtors have fully complied with the provisions of Sections 1125 and 1126 of the Bankruptcy Code and with Bankruptcy Rules 3017 and 3018 regarding disclosure and notice. In particular, on September 7, 2012, this Court entered the Disclosure Statement Approval Order, specifically finding, after a duly noticed hearing, that the Disclosure Statement contained "adequate information" within the meaning of Section 1125(a)(1). Indeed, the information contained in the Disclosure Statement was the subject of extensive negotiation among the various constituencies in these cases.

Moreover, pursuant to the Disclosure Statement Approval Order, the Disclosure Statement with all exhibits annexed thereto, the Plan, appropriate ballots, and the confirmation hearing notice were timely distributed to all parties designated in the Disclosure Statement Approval Order. An Affidavit of Service regarding the distribution of the Disclosure Statement, the mailing of the confirmation hearing notice, and related matters has been filed with the Court. [Docket No. 907.]

Section 1126 of the Bankruptcy Code specifies that only holders of allowed claims and allowed equity interests in impaired classes that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject the plan. 11 U.S.C. § 1126. The Debtors solicited acceptances of the Plan from Class 3 (General Unsecured Claims), Class 4 (Unsecured Convenience Claims), and Class 5 (Interests in Cagle's). Class 1 (Miscellaneous Secured Claims) and Class 2 (Priority Claims) are unimpaired under the Plan and, as a result, pursuant to Section 1126(f), Holders of Claims in those Classes are conclusively presumed to have accepted the Plan. Thus, the Debtors have complied with the provisions of the

Bankruptcy Code and, in particular, the provisions of Sections 1125 and 1126 of the Bankruptcy Code.

2. The Plan Was Proposed in Good Faith as Required by Section 1129(a)(3).

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). Although the term "good faith" is left undefined in the Bankruptcy Code, "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirements of section 1129(a)(3) are satisfied." *In re McCormick*, 49 F.3d 1524, 1526 (11th Cir. 1995); *see also In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999). Furthermore, the requirement of good faith must be viewed in light of the totality of the circumstances surrounding the proposal of a Chapter 11 plan. *See McCormick*, 49 F.3d at 1526. Section 1129(a)(3) "requires only that the *plan's proposal*, as opposed to the contents of the plan, be in good faith and in compliance with all nonbankruptcy laws." *In re Gen. Dev. Corp.*, 135 B.R. 1002, 1007 (Bankr. S.D. Fla. 1991).

Here, the Plan was proposed in good faith and not by any means forbidden by law. The Plan was proposed by the Debtors with the intent to realize the maximum benefit for the Debtors' Estates. The Plan was the product of extensive arms-length negotiations among the Debtors, the Committee, and certain other parties, and the Plan is consistent with the interests of all the Estates' constituencies. The Plan, therefore, satisfies the "good faith" requirement of Section 1129(a)(3).

3. The Plan Provides for Court Approval of Payment for Services and Expenses Pursuant to Section 1129(a)(4).

Section 1129(a)(4) of the Bankruptcy Code requires that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services

> or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). This section has been construed to require that all payments of professional fees that are made from estate assets be subject to bankruptcy court review and approval as to their reasonableness. *See Johns-Manville Corp.*, 68 B.R. at 632.

In this case, agreements made by the Debtors and the Committee to retain professional persons to provide services to the Debtors and the Committee in, or in connection with, these cases have been disclosed to the Court in the Disclosure Statement or in applications to employ such professionals.

Furthermore any payments made or to be made by the Debtors for services or for costs and expenses in or in connection with the Bankruptcy Cases, or in connection with the Plan and incident to the Bankruptcy Cases, have, to the extent required by the Bankruptcy Code, the Bankruptcy Rules, or the various orders of the Court, been approved by, or are subject to the approval of, the Court as reasonable. Therefore, the Plan satisfies the requirements of Section 1129(a)(4).

4. The Debtors Have Disclosed all Necessary Information Regarding Directors, Officers, and Insiders Pursuant to Section 1129(a)(5).

Section 1129(a)(5) of the Bankruptcy Code requires that:

> (A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
>
> (ii) the appointment to, or continuance in, such office of such individual is consistent with the interests of creditors and equity security holders and with public policy; and

> (B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

11 U.S.C. § 1129(a)(5).

As discussed above, on the Effective Date the Liquidating Agent shall be deemed the sole officer and sole director of each Debtor and shall be deemed to have succeeded to such powers as would have been previously exercisable by the shareholders of each Debtor. (*See* Plan § 7.2.) The Debtors and the Committee have agreed to the designation, as set forth in the Plan, of Sean M. Harding as the Liquidating Agent. Mr. Harding, as disclosed earlier in the Bankruptcy Cases and in the Disclosure Statement, is currently serving as the Debtors' Vice President of Restructuring and is employed by FTI Consulting, Inc. FTI Consulting, Inc. shall be compensated at a flat rate of $500 per hour for the services performed by Mr. Harding and at the same rate for each other employee of FTI Consulting, Inc. that provides services to the Debtors from and after confirmation. No insiders are currently or shall be employed by the Debtors. The Plan, therefore, satisfies the requirements of Section 1129(a)(4).

5. Section 1129(a)(6) is Inapplicable because the Plan Does Not Contain Any Rate Changes Subject to the Jurisdiction of Any Governmental Regulatory Commission.

Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission having jurisdiction over the rates charged by a debtor in operation of its business approve any rate change provided for in the debtor's plan, or that such rate change be expressly conditioned on such approval. Because the Plan does not provide for any rate change over which a governmental regulatory commission will have jurisdiction, Section 1129(a)(6) is not applicable to the Debtors.

6. The Plan is in the "Best Interests" of Claim Holders and Interest Holders as Required by Section 1129(a)(7).

Section 1129(a)(7) of the Bankruptcy Code, the so-called "best interests" test, requires that any holder of a claim or interest that is impaired by a plan and that has not accepted the plan:

> 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 this title on such date . . . .

11 U.S.C. § 1129(a)(7)(A)(ii).

The best interests test focuses on individual creditors rather than classes of claims. Under the best interests test, the Court should examine whether each Claim Holder or Interest Holder that has not accepted or is deemed not to have accepted the Plan will receive or retain value under the Plan that is not less than the amount such Holder would receive if the debtor were liquidated. *See Drexel Burnham Lambert*, 138 B.R. at 761; *In re Victory Constr. Co.*, 42 B.R. 145, 151 (Bankr. C.D. Cal. 1984). In essence, the best interests test contemplates a comparison of distributions under a proposed plan with those that would be realized in a hypothetical Chapter 7 liquidation. *See In re Jartran, Inc.*, 44 B.R. 331, 390 (Bankr. N.D. Ill. 1984).

The best interests test is satisfied with respect to each rejecting creditor or interestholder in these Bankruptcy Cases. The Debtors have prepared the "Liquidation Analysis" attached to the Disclosure Statement as Exhibit B. The Liquidation Analysis projects an estimate of what creditors and stockholders will receive in the event that the Plan is confirmed. The Liquidation Analysis is based upon assumptions that the Debtors believe to be reasonable.

The Debtors have analyzed whether a liquidation of their remaining Assets by a Chapter 7 trustee would result in a higher return to the Holders of Allowed Claims and Holders of Allowed Interests than an orderly liquidation by the Debtors and the Liquidating Agent. Conversion to Chapter 7 would likely delay the Distributions to Holders of Claims and Interests

under the Plan. In a Chapter 7 case, a trustee would be appointed or elected and would require additional time to become familiar with the Debtors' financial affairs. Moreover, a new bar date would be set for the filing of Claims against the Debtors. Under Section 326(a) of the Bankruptcy Code, a Chapter 7 trustee would be entitled to compensation based upon a percentage of all funds distributed in the case to parties in interest. In addition, the Chapter 7 trustee would be authorized to hire professionals to assist the trustee in the administration of the chapter 7 estates and the costs and expenses of such professionals that are Allowed would be additional Administrative Expense Claims against the Estate. Accordingly, the Debtors believe that a Chapter 7 liquidation would result in substantial diminution in the value to be realized by Holders of Allowed Claims and Holders of Allowed Interests because:

1. any successor Chapter 7 trustee will not have the relevant knowledge of the Debtors' remaining Assets that will be necessary to maximize the proceeds therefrom;
2. the delay in making Distributions to Holders of Allowed Claims would result in an increase in the accrued interest that would be due and payable with respect to those Claims; and
3. substantial additional Administrative Expenses will be required in order to compensate the Chapter 7 trustee and for a Chapter 7 trustee to retain new attorneys, accountants, and other professionals who are unfamiliar with the Bankruptcy Cases and for such new professionals to familiarize themselves with the Claims against the Estates.

Consequently, the Debtors believe that the Plan, which provides for collection, marshaling and liquidation of the Debtors' remaining Assets by individuals familiar with the Debtors and their Bankruptcy Cases, provides a substantially greater return to Holders of Claims and Holders of Interests than would liquidation by a new Chapter 7 trustee who is unfamiliar with these Bankruptcy Cases or the Debtors.

With respect to each Class of impaired Claims against and Interests in the Debtors, each holder of a Claim or Interest of such class either (a) has accepted (or is deemed to have accepted)

the Plan, or (b) will 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 receive or retain if the Debtors were liquidated on such date under Chapter 7 of the Bankruptcy Code. The Plan, therefore, satisfies the requirements of Section 1129(a)(7).

7. All Impaired Classes have Accepted the Plan as Required by Section 1129(a)(8).

Section 1129(a)(8) of the Bankruptcy Code requires, with respect to each class of claims or interests, that (a) such class has accepted the plan, or (b) such class is not impaired under the plan. *See* 11 U.S.C. § 1129(a)(8). A class of claims accepts a plan if the holders of at least two-thirds in dollar amount and more than one-half in the number of claims vote to accept the plan—counting only those claims whose holders actually vote. *See* 11 U.S.C. § 1126(c). "A class of interests has accepted a plan if such plan has been accepted by holders of such interests . . . that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests . . . that have accepted or rejected such plan." 11 U.S.C. § 1126(d). Under the Plan, Class 1 and Class 2 are unimpaired, and are thus conclusively deemed to have accepted the Plan. As set forth in the *Certification of Angela M. Nguyen with Respect to the Tabulation of Votes on the Amended and Restated Plan of Liquidation Filed by Cagle's, Inc. and Cagle's Farms, Inc.* [Docket No. 941] (the "Ballot Declaration"), Holders of Claims and Holders of Interests in the impaired classes entitled to vote on the Plan voted as follows:

CGLA Liquidation, Inc., *et al.*,				
VOTING CLASS	**TOTAL BALLOTS COUNTED**			
	ACCEPT		**REJECT**	
	AMOUNT	**NUMBER**	**AMOUNT**	**NUMBER**
Class 3 (General Unsecured Claims)	$8,025,681.04 **100%**	70 **100%**	$0.00 **0%**	0 **0%**
Class 4 (Unsecured Convenience Claims)	$383,332.48 **100%**	115 **100%**	$0.00 **%**	0 **0%**
Class 5 (Interests in Cagle's)	3,948,619 **100%**	93 **98.94%**	2 **0.00%**	1 **1.06%**

As evidenced by the Ballot Declaration, Classes 3, 4, and 5 voted to accept the Plan, and no Class voted to reject the Plan. Accordingly, the Plan satisfies Section 1129(a)(8).

8. The Plan Provides for Payment in Full of All Allowed Administrative Expenses, Priority Claims, and Tax Claims Pursuant Section 1129(a)(9).

Section 1129(a)(9) of the Bankruptcy Code generally requires that, unless a holder agrees otherwise, persons holding claims entitled to priority under Section 507(a) of the Bankruptcy Code receive specified cash payments under the Plan.

a. The Plan Provides for Payment in Full of All Allowed Administrative Expense Claims – 11 U.S.C. § 1129(a)(9)(A).

Section 1129(a)(9)(A) of the Bankruptcy Code requires a plan to provide that, unless a holder agrees to a different treatment: "with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will

receive on account of such claim cash equal to the allowed amount of such claim." 11 U.S.C. § 1129(a)(9)(A).[6] Section 4.2.1 of the Plan provides:

> Subject to the provisions of sections 328, 330(a) and 331 of the Bankruptcy Code, each Holder of an Allowed Administrative Expense Claim will be paid the full unpaid amount of such Allowed Administrative Expense Claim in Cash on the latest of (i) the Effective Date, (ii) as soon as practicable after the date on which such Claim becomes an Allowed Administrative Expense Claim, (iii) upon such other terms as may be agreed upon by such Holder and the Liquidating Agent, or (iv) as otherwise ordered by the Bankruptcy Court.

The Plan, therefore, satisfies Section 1129(a)(9)(A).[7]

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

Section 1129(a)(9)(B) of the Bankruptcy Code requires a plan to provide that, unless a holder agrees to a different treatment:

> with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—
>
> (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim.

11 U.S.C. § 1129(a)(9)(B). Section 3.2.2 of the Plan provides:

> Unless the Holder of such Claim and the Debtors agree to a different treatment, each Holder of an Allowed Class 2 Priority Claim shall receive, in full and final satisfaction of such Allowed Class 2 Priority Claim, Cash equal to the full amount of such Allowed Priority Claim on or as soon as

[6] Section 507(a)(3) of the Bankruptcy Code affords priority to certain claims filed in an involuntary bankruptcy case. Because these Bankruptcy Cases are not involuntary cases, the Plan need not address claims of a kind specified in Section 507(a)(3).

[7] In the Plan, the term "Administrative Expense Claim" does not include claims arising under Section 503(b)(9) of the Bankruptcy Code ("503(b)(9) Claims"). However, all 503(b)(9) Claims have already been paid pursuant to orders of this Court.

> reasonably practicable after the later of (a) the Effective Date, or (b) the date such Priority Claim becomes Allowed.

A "Priority Claim" is defined in the Plan as "a Claim entitled to priority under the provisions of section 507(a) of the Bankruptcy Code other than an Administrative Expense Claim or a Tax Claim." The Plan, therefore, satisfies Section 1129(a)(9)(B).

c. The Plan Provides for Payment in Full of All Allowed Tax Claims – 11 U.S.C. § 1129(a)(9)(C).

Section 1129(a)(9)(C) of the Bankruptcy Code requires a plan to provide that, unless a holder agrees to a different treatment:

> with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—
>
> (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;
>
> (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and
>
> (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)) . . . .

11 U.S.C. § 1129(a)(9)(C). Section 4.3 of the Plan provides:

> Except to the extent that the Holder of a particular Tax Claim has agreed to a different treatment of such Claim, each Holder of an Allowed Tax Claim shall receive Cash on the Effective Date (or as soon thereafter as is reasonably practicable) in an amount equal to such Allowed Tax Claim. The Debtors shall pay each Tax Claim that becomes Allowed following the Effective Date in Cash in full as soon as reasonably practicable after the date such Claim becomes Allowed.

A "Tax Claim" is defined in the Plan as "any Claim entitled to priority under section 507(a)(8) of the Bankruptcy Code." The Plan, therefore, satisfies Section 1129(a)(9)(C).

d. There are No Governmental Units that Hold Secured Claims Against the Debtors – 11 U.S.C. § 1129(a)(9)(D).

Section 1129(a)(9)(D) of the Bankruptcy Code requires a plan to provide that, unless a holder agrees to a different treatment:

> with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in [11 U.S.C. § 1129(a)(9)(C)].

11 U.S.C. § 1129(a)(9)(D). This provision is inapplicable to the Plan because there are no governmental units that hold secured claims against the Debtors. Moreover, Section 3.1.2 of the Plan provides that Miscellaneous Secured Claims will receive the following treatment:

> The legal, equitable and contractual rights of the Holders of Class 1 Miscellaneous Secured Claims are unaltered by this Plan. Unless the Holder of such Claim and the Debtors agree to a different treatment, on or as soon as reasonably practicable after the later of (i) the Effective Date, and (ii) the date such Miscellaneous Secured Claim becomes Allowed, each Holder of an Allowed Class 1 Miscellaneous Secured Claim shall receive, in full and final satisfaction of such Allowed Class 1 Miscellaneous Secured Claim, either:
>
> (a) Cash in an amount equal to such Allowed Miscellaneous Secured Claim, including any interest on such Allowed Miscellaneous Secured Claim required to be paid pursuant to applicable law;
>
> (b) the proceeds of the sale or disposition of the collateral securing such Allowed Miscellaneous Secured Claim to the extent of the value of the Holder's interest in such collateral; or
>
> (c) the collateral securing such Allowed Miscellaneous Secured Clam.

Accordingly, to the extent that Section 1129(a)(9)(D) is applicable in these Bankruptcy Cases, it is satisfied by the Plan.

9. The Plan has been Accepted by an Impaired Class that was Entitled to Vote Pursuant to Section 1129(a)(10).

Section 1129(a)(10) of the Bankruptcy Code requires that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). Excluding the votes of insiders, both Classes of impaired Claims (i.e., Classes 3 and 4) voted to accept the Plan. The Plan, therefore, satisfies Section 1129(a)(10).

10. The Plan is Feasible as Required by Section 1129(a)(11).

Section 1129(a)(11) of the Bankruptcy Code requires the Court to find that confirmation 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).

For this requirement, courts look to see whether the debtor can realistically carry out provisions of the plan and whether the plan offers reasonable prospects of success. *See In re IPC Atlanta Ltd. P'ship*, 142 B.R. 547, 559–60 (Bankr. N.D. Ga. 1992); *see also In re Lakeside Global II, Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989) (citations omitted) ("This definition [of feasibility] has been slightly broadened and contemplates whether the debtor can realistically carry out its plan, . . . and whether the plan offers a reasonable prospect of success and is workable."). The court in *In re Clarkson*, 767 F.2d 417 (8th Cir. 1985), characterized the feasibility test as follows:

> The Second Circuit has declared that the feasibility test contemplates "the probability of actual performance of the provisions of the plan. . . . The

> test is whether the things which are to be done after confirmation can be done as a practical matter . . . ."

In re Clarkson, 767 F.2d at 420 (quoting *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir. 1978)).

The purpose of the feasibility test is to protect against wholly speculative plans:

> The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.

7 *Collier on Bankruptcy* ¶ 1129.02[11] (quoting *Travelers Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.)*, 779 F.2d 1456, 1460 (10th Cir. 1985)). Just as speculative prospects of success cannot sustain a finding of feasibility, speculative prospects of failure cannot defeat a finding of feasibility. *See IPC Atlanta Ltd. P'ship*, 142 B.R. at 559.

On its face, Section 1129(a)(11) is seemingly inapplicable to plans—like the Plan—that provide for a liquidation of the debtor's assets. *See, e.g.*, *In re Machne Menachem, Inc.*, 371 B.R. 63, 71–72 (Bankr. M.D. Pa. 2006) ("In light of the fact [that proponent's] plan leaves the Debtor with no continuing business (only funds and the ability to litigate pending actions), the Court finds the usual feasibility factors inapplicable to the instant case."). To the extent Section 1129(a)(11) is applicable, the Debtors submit that the Plan satisfies the requirements thereof and is feasible because the implementation of the Plan and the wind-down of the Debtors' affairs will be administered by the Liquidating Agent and funded by proceeds from the Sale. Moreover, the Debtors believe that they have more than sufficient cash to cover all administrative and other priority obligations due to be paid pursuant to the Plan on or after the Effective Date.

The information in the Disclosure Statement and the evidence that will be proffered or adduced at the Confirmation Hearing is persuasive and credible, has not been controverted by other evidence, and establishes that the Plan is feasible and that confirmation of the Plan will be

followed by liquidation as such liquidation is provided for in the Plan. The Plan, therefore, satisfies Section 1129(a)(11).

11. All Statutory Fees Will Be Paid As Required by Section 1129(a)(12).

Section 1129(a)(12) of the Bankruptcy Code requires that all "fees payable under section 1930 of title 28, 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). Section 10.8.3 of the Plan provides that: "The Debtors shall . . . pay all fees required by the Bankruptcy Code, Bankruptcy Rules, U.S. Trustee guidelines, and the rules and orders of the Bankruptcy Court." Moreover, as discussed above, Section 4.2.1 of the Plan provides for the payment in full of all Allowed Administrative Expense Claims. The Plan defines "Administrative Expense Claim" to include "all fees and charges assessed against the Estates under chapter 123 of title 28 of the United States Code." (*See* Plan § 1.1.1.) Accordingly, the Plan satisfies the requirements of Section 1129(a)(12).

12. Section 1129(a)(13) is Inapplicable because the Debtors are not Obligated to Pay Retiree Benefits.

Section 1129(a)(13) of the Bankruptcy Code requires that the Plan provide "for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of [the Bankruptcy Code], at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 [of the Bankruptcy Code], at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). The Debtors are not (and, as of the Petition Date, were not) obligated to provide any retiree benefits as that term is defined pursuant to Section 1114 of the Bankruptcy Code. Section 1129(a)(13) is, therefore, inapplicable.

13. Section 1129(a)(14) is Inapplicable because the Debtors are Not Required to Pay Any Domestic Support Obligations.

Section 1129(a)(14) of the Bankruptcy Code requires that individual debtors be current on all domestic support obligations. The Debtors are not individuals and they have no domestic support obligations. Section 1129(a)(14) is, therefore, inapplicable.

14. Section 1129(a)(15) is Inapplicable because the Debtors are Not Individuals.

Section 1129(a)(15) of the Bankruptcy Code only applies to cases in which the debtor is an individual. The Debtors are not individuals, and Section 1129(a)(15) is, therefore, inapplicable.

15. Section 1129(a)(16) is Inapplicable because the Debtors are For-Profit Corporations.

Section 1129(a)(16) of the Bankruptcy Code provides that:

> All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

11 U.S.C. § 1129(a)(16). This provision is applicable to nonprofit entities. *See Collier on Bankruptcy* ¶ 1129[16]. The Debtors are not nonprofit entities. Section 1129(a)(16) is, therefore, inapplicable.

III. ONLY ONE PLAN IS BEING CONFIRMED AS REQUIRED BY SECTION 1129(c)

Section 1129(c) of the Bankruptcy Code provides that a court may confirm only one plan. 11 U.S.C. § 1129(c). In the instant case, the Plan is the only plan that has been proposed. Therefore, the requirements of Section 1129(c) have been satisfied.

IV. THE PRINCIPAL PURPOSE OF THE PLAN IS NOT TAX AVOIDANCE OR AVOIDANCE OF SECURITIES LAWS AS REQUIRED BY SECTION 1129(d)

Section 1129(d) of the Bankruptcy Code provides that a court shall, upon request of a party in interest that is a governmental unit, not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of application of Section 5 of the Securities Act of 1933. 11 U.S.C. § 1129(d). As noted above, the Plan has been proposed with an honest intent. Moreover, no party in interest that is a governmental unit has objected to the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act of 1933. Accordingly, the Debtors submit that Section 1129(d) is satisfied.

V. SUBSTANTIVE CONSOLIDATION OF THE DEBTORS IS APPROPRIATE

Pursuant to Sections 105(a) and 1123(a)(5)(C) of the Bankruptcy Code, Section 6.1 of the Plan provides for the substantive consolidation of the Debtors and their respective Estates for all purposes relating to the Plan, including purposes of voting, confirmation, and Distributions. The Debtors submit that substantive consolidation of the Debtors is appropriate and should be approved by the Court.

The proponent of substantive consolidation must show that (1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit. *Eastgroup Props. v. S. Motel Ass'n, Ltd.*, 935 F.2d 245, 249 (11th Cir. 1991). Although no single factor is determinative in the substantive consolidation analysis, the following factors are often used:

(1) the presence or absence of consolidated financial statements;

(2) the unity of interests and ownership between various corporate entities;

(3) the existence of parent and intercorporate guarantees on loans;

(4) the degree of difficulty in segregating and ascertaining individual assets and liabilities;

(5) the existence of transfers of assets without formal observance of corporate formalities;

(6) the commingling of assets and business functions; and

(7) the profitability of consolidation at a single physical location.

Id.

Substantive consolidation of the Debtors and their Estates is justified for the following reasons. First, the Debtors used the same employees and same physical facilities in connection with conducting their businesses. Second, the Debtors have commingled their assets and business functions. Third, there exists considerable confusion among some creditors regarding which Debtor entity is appropriately liable for the creditors' Claims. Fourth, Cagle's Farms is a wholly owned subsidiary of Cagle's. Fifth, the Debtors have disregarded many corporate formalities and have conducted business under each other's names. Sixth, separating the liabilities and claims of the Debtors would be time consuming, difficult and costly. Seventh, there will be considerable savings in administrative costs by having one Disclosure Statement and Plan instead of two. Finally, the Debtors have paid each other's liabilities.

The foregoing illustrates that (1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit. Accordingly, a presumption arises in favor of consolidation and the burden shifts to an objecting creditor to show that it has relied on the separate credit of one of the entities to be consolidated ***and*** that it will be prejudiced by substantive consolidation. *In re Reider*, 31 F.3d 1102, 1108 (11th Cir. 1994). No creditor has objected to the substantive consolidation of the Debtors.

Furthermore, no creditor can argue that it will be prejudiced by substantive consolidation because the Debtors propose to pay all Allowed Claims in full.

Because no creditor will be harmed by substantive consolidation and because substantive consolidation will decrease the administrative expenses of these cases, substantive consolidation is appropriate under Sections 105(a) and 1123(a)(5)(C) of the Bankruptcy Code, and it should be approved by the Court.

VI. THE WAIVER, RELEASE, AND EXCULPATION PROVISIONS CONTAINED IN THE PLAN ARE PERMISSIBLE

A. The Waiver by the Debtors of Certain Causes of Action is Reasonable and Permissible under Applicable Law.

Section 10.7 of the Plan provides for the waiver by each Debtor, in its individual capacity and as a debtor in possession for and on behalf of its Estate, of the Waived Avoidance Actions.[8] This provision of the Plan only waives claims and causes of action held by the Debtors and their Estates. This waiver was included in the Plan as a result of negotiations between the Debtors and the Committee and as part of an overall agreement regarding the Committee's support of the Plan. Furthermore, because these cases are solvent and it is anticipated that all creditors will be paid in full (plus interest), it would not be cost-effective or appropriate for the Debtors to pursue the Waived Avoidance Actions. Even if the Debtors had determined to pursue the Waived Avoidance Actions, any recovery received by such pursuit would likely be offset by an increase in the Claims against the Debtors in an amount equal to such recovery. For example, if the Debtors recovered amounts under Section 549 of the Bankruptcy Code relating to the payment of a valid prepetition obligation, the transferee would then hold a general unsecured claim against

[8] See footnote 5, above, for the definition of "Waived Avoidance Actions".

the Debtors in the amount of the recovered payment. Accordingly, the waiver provided for in Section 10.7 of the Plan is reasonable and is in the best interests of the Debtors and their Estates.

B. The Release by the Debtors of Certain Claims is Reasonable and Permissible under Applicable Law.

Section 10.3 of the Plan provides for the release by each Debtor, in its individual capacity and as a debtor in possession for and on behalf of its Estate, of the Released Parties (*i.e.*, the current and former officers and directors of each of the Debtors, in each case in their capacity as such) from any and all claims and causes of action relating to the Debtors. This provision of the Plan only releases claims and causes of action held by the Debtors and their Estates and is not a "third-party" release. The Debtors are not aware of any valid claims or causes of action that could be asserted against the Released Parties; this release was included as a result of negotiations between the Debtors and the Committee and as part of an overall agreement regarding the Committee's support of the Plan. Furthermore, because the Debtors are obligated to indemnify the Released Parties, if any claim or cause of action were to be asserted against the Released Parties, it is likely that the pursuit of such claim by the Debtors would (on a net basis) reduce the amount of funds available for distribution to the Debtors' stakeholders. Accordingly, the release provided for in Section 10.3 of the Plan is reasonable and is in the best interests of the Debtors and their Estates.

C. The Exculpation Provisions in the Plan are Reasonable and Permissible under Applicable Law

Section 10.5 of the Plan includes an exculpation and limitation of liability provision regarding "[t]he Debtors, the Estates, the Committee, the members of the Committee in their capacities as such, and any of such parties' respective current and/or post-Filing Date and pre-Effective Date members, officers, directors, employees, advisors, attorneys, representatives, financial advisors, investment bankers, or agents and any of such parties' successors and

assigns." As with the waiver and release provisions discussed above, this provision was included in the Plan as a result of negotiations between the Debtors and the Committee and as part of an overall agreement regarding the Committee's support of the Plan.

Generally, an exculpation provision is permissible if exculpation is reasonable under the circumstances and in the best interest of the debtor's estate. *See Murphy v. Weathers*, No. 7:07-CV-00027-HL, 2008 WL 4426080 at *4 (M.D. Ga., Sept. 25, 2008). Courts typically hold that exculpation provisions are reasonable so long as the provision does not purport to limit liability with respect to acts of willful misconduct or gross negligence. *See In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (finding that a clause exculpating the debtor, the creditor's committee and professionals had no practical effect and would not prevent confirmation of the plan because those parties remained liable for gross negligence and willful misconduct, which is the standard that would apply without the exculpation clause); *In re Firstline Corp.*, No. 06-70145-JDW, 2007 WL 269086 at *2 (Bankr. M.D. Ga., Jan. 25, 2007) (exculpation and indemnity provisions were not prohibited by the Bankruptcy Code, do not offend public policy and are not unreasonable because the clauses did not affect the exculpated parties' liability for gross negligence, willful misconduct, or breach of fiduciary duty).

As with the provisions at issue in the cases cited above, the exculpation provisions contained in the Plan do not limit or preclude liability for actions constituting willful misconduct or gross negligence. Moreover, the exculpation provisions are limited to claims for "any act or omission in connection with, relating to, or arising out of the Bankruptcy Cases, the negotiation, formulation and filing of [the] Plan, the filing of the Bankruptcy Cases, the pursuit of confirmation of [the] Plan, the consummation of [the] Plan, or the administration of [the] Plan . . . ." (*See* Section 10.5 of the Plan.) Accordingly, the exculpation provisions provided for in

Section 10.5 of the Plan are consistent with the applicable case law, reasonable, and in the best interests of the Debtors and their Estates.

VII. RESPONSE TO OBJECTION

On October 11, 2012, the Georgia Department of Revenue (the "Department") filed an objection to confirmation of the Plan [Docket No. 933]. Based upon discussions with the Department, the Debtors believe this objection has been resolved and will be withdrawn prior to the Confirmation Hearing. Moreover, the Debtors have agreed to amend Section 4.3 of the Plan to include the following provision: "To the extent an Allowed Tax Claim is not paid in full on the Effective Date, such Tax Claim shall be entitled to payment of interest on any unpaid amount at the rate required by law accruing from the later of: (i) the Effective Date; or (ii) the date such Tax Claim becomes Allowed." No other parties have objected to confirmation of the Plan.

VIII. CONCLUSION

The Plan, which was proposed with the support of the Committee, satisfies each confirmation standard enumerated in Sections 1122, 1123, and 1129 of the Bankruptcy Code. Based on the reasons and authorities set forth above, the Debtors respectfully request that this Court enter an Order: (i) overruling any objections to confirmation of the Plan; (ii) confirming the Plan; and (iii) granting such other or further relief as is just and proper.

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Respectfully submitted,

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