Docket #0546 Date Filed: 10/24/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
EMERGE ENERGY SERVICES LP, *et al.*,[1]	:	Case No. 19-11563 (KBO)
	:	
Debtors.	:	Jointly Administered

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF FIRST AMENDED JOINT PLAN OF REORGANIZATION FOR EMERGE ENERGY SERVICES LP AND ITS AFFILIATE DEBTORS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

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Dated: October 24, 2019

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Emerge Energy Services LP (2937), Emerge Energy Services GP LLC (4683), Emerge Energy Services Operating LLC (2511), Superior Silica Sands LLC (9889), and Emerge Energy Services Finance Corporation (9875). The Debtors' address is 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 3

A. Prepetition Restructuring Efforts and Restructuring Support Agreement 3

B. The Chapter 11 Cases and Solicitation Process 6

C. The Voting Results 9

OUTSTANDING OBJECTIONS 10

A. The Plan is Fair and Equitable: The Aggregate Value of the Debtors' Assets is Substantially Less than the Face Amount of their Secured Debt 10

B. The Plan Satisfies the "Best Interest of Creditors" Test: The Debtors' Unencumbered Assets Have No Value to Class 6 General Unsecured Creditors, Whether Under Chapter 11 or Chapter 7 12

C. The Debtor Releases Contained in the Plan Are Customary and Appropriate 15

D. The Plan is Proposed in Good Faith. 18

BASIS FOR RELIEF 22

A. The Plan Satisfies the Requirements for Confirmation Under Section 1129(a) of the Bankruptcy Code, Other Than Section 1129(a)(8) 23

1. Section 1129(a)(1): The Plan Complies with Applicable Provisions of the Bankruptcy Code 23

2. Section 1129(a)(2): The Debtors, as Plan Proponents, Have Complied with Applicable Provisions of the Bankruptcy Code 38

3. Section 1129(a)(3): The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law 39

4. Section 1129(a)(4): The Payment for Certain Services or for Certain Costs and Expenses Is Subject to Court Approval 40

5. Section 1129(a)(5): Necessary Information Regarding Directors and Officers of the Debtors Under the Plan Has Been Disclosed 41

6. Section 1129(a)(6) of the Bankruptcy Code Is Not Applicable 42

7. Section 1129(a)(7): The Plan Is in the Best Interests of Creditors and Equity Interest Holders 42

8. Section 1129(a)(8): Acceptance by All Impaired Classes 45

9. Section 1129(a)(9): The Plan Provides for Payment in Full of Allowed Administrative and Priority Claims 46

10. Section 1129(a)(10): The Plan Has Been Accepted by at Least One Impaired Class That Is Entitled To Vote 46

11. Section 1129(a)(11): The Plan Is Feasible 46

12. Section 1129(a)(12): The Plan Provides for Full Payment of Statutory Fees 49

13. Sections 1129(a)(13) through 1129(a)(16) Do Not Apply 50

B. Section 1129(b): Confirmation of the Plan Over Nonacceptance of Impaired Classes 50

1. The Plan Does Not Discriminate Unfairly with Respect to Classes 6, 8, and 9 51

2. The Plan Is Fair and Equitable with Respect to Classes 6, 8, and 9 52

CONCLUSION 54

TABLE OF AUTHORITIES

Page(s)

CASES

In re 11,111, Inc.,
117 B.R. 471 (Bankr. D. Minn. 1990) 50

In re Adelphia Business Solutions, Inc.,
341 B.R. 415 (Bankr. S.D.N.Y. 2003) 47

In re Armstrong World Indus., Inc.,
348 B.R. 111 (D. Del. 2006) 22, 50

In re Armstrong World Indus., Inc.,
348 B.R. 136 (Bankr. D. Del. 2006) 24, 46

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999) 42

In re Barney and Carey Co.,
170 B.R. 17 (Bankr. D. Mass 1994) 50

In re Buttonwood Partners, Ltd.,
111 B.R. 57 (Bankr. S.D.N.Y. 1990) 51

In re Chaparral Energy, Inc.,
Case No. 16-11144 (LSS) (Bankr. D. Del. Mar. 10, 2017) 16, 22

In re Claire's Stores, Inc.,
Case No. 18-10584 (MFW) (Bankr. D. Del. Sept. 21, 2018) 15

Clarkson v. Cooke Sales & Serv. Co. (*In re Clarkson*),
767 F.2d 417 (8th Cir. 1985) 46

In re Coram Healthcare Corp.,
315 B.R. 321 34

CoreStates Bank, N.A. v. United Chem. Tech., Inc.,
202 B.R. 33 (E.D. Pa. 1996) 46

In re Drexel Burnham Lambert Group Inc.,
138 B.R. 723 (Bankr. S.D.N.Y. 1992) 48

In re EV Energy Partners,
Case No. 18-10814 (CSS) 34

In re Exide Techs.,
303 B.R. 48 (Bankr. D. Del. 2003) 52

Gillman v. Continental Airlines (*In re Continental Airlines*),
203 F.3d 203 (3d. Cir. 2000)....15, 30

Heartland Fed. Savs. & Loan Ass'n v. Briscoe Enters., Ltd. II (*In re Briscoe Enters., Ltd. II*),
994 F.2d 1160 (5th Cir. 1993) 22, 46, 47

In re Horsehead Holding Corp.,
Case No. 16-10287 (CSS) (Bankr. D. Del. Sep. 9, 2016)....34

Internal Revenue Serv. v. Kaplan (*In re Kaplan*),
104 F.3d 589 (3d Cir. 1997)....46

In re Ion Media Networks, Inc.,
419 B.R. 585 (Bankr. S.D.N.Y. 2009)....52

John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.,
987 F.2d 154 (3d Cir. 1993)....24

In re Johns-Manville Corp.,
68 B.R. 618 (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 sub nom., Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636 (2d Cir. 1988)....23, 38, 51

In re Johns-Manville Corp.,
843 F.2d at 649 ....39, 50

In re K & L Lakeland, Inc.,
128 F.3d 203 (4th Cir. 1997) 15

In re Machne Menachem, Inc.,
371 B.R. 63 (Bankr. M.D. Pa. 2006) 48

In re Matter of CD Elec. Co., Inc.,
146 B.R. 786 (Bankr. N.D. Ind. 1992)....15

In re Mayer Pollack Steel Corp.,
174 B.R. 414 (Bankr. E.D. Pa. 1994) 46

In re Molycorp, Inc.,
562 B.R. 67 (Bankr. D. Del. 2017) 14

N.L.R.B. v. Bildisco & Bildisco,
465 U.S. 513 (1984)....40

In re NII Holdings,
288 B.R. 356 (Bankr. D. Del. 2002) 46

Norwest Bank Worthington v. Ahlers,
485 U.S. 197 (1988)....52

In re Nutritional Sourcing Corp.,
2008 WL 5396491 (Bankr. D. Del. Dec. 23, 2008)....23

Olympia & York Florida Equity Corp. v. Bank of N.Y. (*In re Holywell Corp.*),
913 F.2d 873 (11th Cir. 1990)....24

In re Pacific Sunwear of California, Inc.,
Case No. 16-10882 (LSS) (Bankr. D. Del. Sept. 6, 2016)....16

In re Panda Temple Power, LLC,
Case No. 17-10839 (LSS) (Bankr. D. Del. Jan. 23, 2018) [Docket Nos. 559 & Docket No. 224, Exhibit B]....21

In re Paragon Offshore PLC,
Case No. 16-10386 (CSS)....16

In re Rivera Echevarria,
129 B.R. 11 (Bankr. D.P.R. 1991)....51

In re SGL Carbon Corp.,
200 F.3d 154 (3d Cir. 1999)....39

In re Southeastern Grocers, LLC,
Case No. 18-10700 (MFW)....34

In re Sun Country Dev., Inc.,
764 F.2d 406 (5th Cir. 1985)....39

In re T-H New Orleans Ltd. P'ship,
116 F.3d 790 (5th Cir. 1997)....46

In re Texaco, Inc.,
84 B.R. 893 (Bankr. S.D.N.Y. 1988)....46

In re The Leslie Fay Cos.,
207 B.R. 764 (Bankr. S.D.N.Y. 1997)....46, 48

In re TK Holdings Inc., et al.,
Case No. 17-11375 (BLS) (Bankr. D. Del. Feb. 14, 2018) [Docket No. 2050]....35

In re Toy & Sports Warehouse, Inc.,
37 B.R. 141 (Bankr. S.D.N.Y. 1984)....23, 38

U.S. Bank. N.A. v. Wilmington Trust Co. (In re Spansion),
426 B.R. 114 (Bankr. D. Del. 2010)....15, 30

In re U.S. Truck Co., Inc.,
47 B.R. 932 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986) 46

United States v. Energy Res. Co., Inc.
495 U.S. 545 (1990)..46

United States v. Reorganized CF&I Fabricators, Inc.,
518 U.S. 213 (1996)..42

In re Verso Corporation,
Case No. 16-10163 (KG) (Bankr. D. Del. June 23, 2016)..16

In re Westwood Plaza Apartments, Ltd.,
154 B.R. 916 (Bankr. E.D. Tex. 1993) 15

In re WorldCom, Inc.,
2003 Bankr. LEXIS 1401 (Bankr. S.D.N.Y. 2003) 40, 47

In re Zenith Elecs. Corp.,
241 B.R. 92 (Bankr. D. Del. 1999) 15, 20, 30

STATUTES & RULES

11 U.S.C. § 105..41

11 U.S.C. § 331..41

11 U.S.C. § 365..5, 28

11 U.S.C. § 507..48

11 U.S.C. § 1114..49

11 U.S.C. § 1122...23, 24, 25, 38

11 U.S.C. § 1123.. *passim*

11 U.S.C. § 1125..38

11 U.S.C. § 1126..38

11 U.S.C. § 1129... *passim*

11 U.S.C. § 1145..36, 37

Fed. R. Bankr. P. 2016(a)...41

Federal Mine Safety and Health Act of 1977 Section 103(k), 30 U.S.C. § 801 et
seq. 6

Bankr. D. Del. L.R. 2016-2 41

Rule 144 of the Securities Act 37

Securities Act Section 4(a)(1) 37

OTHER AUTHORITIES

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 412 (1977) 23, 38

S. Rep. No. 95-989, 95th Cong., 2d Sess. 126 (1978) 38

Emerge Energy Services LP and the above-captioned debtors and debtors-in-possession (collectively, "**Emerge**" or the "**Debtors**") hereby submit this memorandum of law (this "**Memorandum**") in support of confirmation of the *First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* (as amended, modified, or supplemented from time to time, the "**Plan**") [Docket No. 362].[2] This Memorandum presents the legal support for confirmation of the Plan pursuant to section 1129 of the Bankruptcy Code.[3]

PRELIMINARY STATEMENT

1. Since its appointment on July 31, 2019, the Creditors Committee has obsessively pushed its narrative that the Debtors abdicated their obligations and duties and allowed HPS Investment Partners, LLC ("**HPS**"), agent to the prepetition secured noteholders and DIP lenders, to engage in improper and inequitable conduct with the Debtors. And this story continues in its objection to plan confirmation [Docket No. 495] with its multitude of references to HPS as a "lender-in-possession" and words of similar import (many in the very first paragraph of its objection).

2. But after months of accusations and millions of dollars of fees incurred by the Creditors Committee investigating the Debtors and HPS for potential bad acts (reviewing approximately 26,000 documents representing approximately 240,000 pages produced to the Creditors Committee in these cases), the Creditors Committee recently filed its long-awaited

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[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan or Disclosure Statement (as defined below).

[3] The Debtors reserve all rights to supplement this Memorandum at a later date given the deposition of Mr. Rodrigue of Miller Buckfire, financial advisor to the UCC, occurred only the day before this Memorandum was due to be filed.

standing motion and related adversary proceeding with this Court [Docket No. 520] (the "**Standing Motion**").

3. And what did the Creditors Committee uncover pursuant to its inquisition? Nothing. No allegations that the Debtors did not uphold their obligations and duties or that the Prepetition Noteholders controlled the Debtors directly or indirectly through the Special Restructuring Committee or the Chief Restructuring Officer; no allegations that the Debtors were prevented from pursuing any alternative transactions or asset sales; and no allegations that the prepetition secured claims of the Prepetition Noteholders should be equitably subordinated because of harmful or inequitable conduct (or for any reason whatsoever). Just a simple Standing Motion that alleges the liens of the Prepetition Noteholders are unperfected in only a handful of the Debtors' assets.[4] The Creditors Committee's repeated assertions against the Prepetition Noteholders in their confirmation objection should be seen for exactly what they are—nothing more than unsubstantiated and unfounded aspersions and disparaging innuendo.

4. In reality, what actually did occur prior to and during these Chapter 11 Cases was simply the classic negotiation repeated in workout after workout and bankruptcy after bankruptcy between the principal creditors of a debtor and its equity holders over the future of the debtor, who would own it, and on what terms—exactly as the Debtors have been saying all along. It took months of intense, arms' length negotiations among the Debtors, the Prepetition Noteholders, and Insight Equity (and their respective professionals) to reach agreement on a global restructuring as memorialized in the Restructuring Support Agreement and the Chapter 11 Plan that is (notwithstanding the Creditors Committee's rhetoric) typical and customary in

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[4] The Standing Motion and related adversary proceeding only challenge whether HPS holds perfected liens against three particular items of collateral (the Kingfisher real property, business interruption insurance, and commercial tort claims). The Debtors reserve all rights on such matters and intend to file an objection to the Standing Motion in advance of the Confirmation Hearing.

distressed scenarios by contemplating (i) a debt-for-equity conversion by the Debtors' vastly under-secured noteholders and (ii) consensual global releases that are typical and standard in this district (in particular by excluding causes of action arising from willful misconduct, actual fraud, or gross negligence, which the Creditors Committee frequently fails to disclose when complaining about the releases).

5. As will be discussed in greater detail below, in the Response Charts attached hereto as Exhibits A - C, and in the Confirmation Declarations to be filed in advance of the Confirmation Hearing, the Debtors' assets are worth substantially less than the face amount of the secured debt of the Prepetition Noteholders, with an estimated recovery to them of only 38-55%. With respect to assets that may not be subject to the prepetition liens of the Prepetition Noteholders, the Debtors will establish at the Confirmation Hearing that such assets still have no value to Class 6 general unsecured creditors (whether under the Plan in chapter 11 or the "best interest tests" under chapter 7) because they are subject to, among other things, approximately $30 million of adequate protection liens and claims of the Prepetition Noteholders pursuant to the Final DIP Order [Docket No. 209, ¶ 18]. For the reasons set forth herein and in the Confirmation Declarations, the Plan satisfies all applicable requirements under Section 1129 of the Bankruptcy Code and should be confirmed by this Court.

BACKGROUND

A. Prepetition Restructuring Efforts and Restructuring Support Agreement

6. The Debtors are engaged in the business of mining, processing, and distributing silica sand proppant, a key component in the hydraulic fracturing ("fracking") of oil and gas wells. Due to a multitude of factors—including, but not limited to, a softening of the market for frac sand, a decline in demand for northern white sand, increased production from in-basin frac sand competitors, and entry into a significant number of uneconomical railcar lease

agreements—in mid-2018 the Debtors began to experience revenue, cash flow, and liquidity challenges.[5] The increasing strain on the Debtors' operations prevented them from meeting certain financial covenants and complying with certain other terms under their Prepetition Credit Agreement and Prepetition Notes Agreement.

7. As a result of these events of default, the Debtors entered into a series of monthly forbearance agreements with the Prepetition Credit Agreement Lenders and Prepetition Noteholders beginning on December 31, 2018, in order to, among other things, allow time for the Debtors to explore various strategic alternatives. Pursuant to these forbearance agreements, the Debtors retained, Ankura Consulting Group, LLC ("**Ankura**") to provide a Chief Restructuring Officer, Restructuring Officer and interim management services to the Debtors. The Debtors also engaged Houlihan Lokey Capital Inc, ("**Houlihan**") as financial advisor and investment banker, and Latham & Watkins LLP ("**LW**") as restructuring counsel. Similarly, the Debtors' private equity sponsor, Insight Equity Management Company LLC ("**Insight Equity**") , obtained various indications of interest, but all were significantly lower than the Debtors' outstanding secured debt.

8. Concurrently with the efforts described above, the Debtors, Ankura, Houlihan, and LW engaged in extensive discussions and negotiations with the Prepetition Credit Agreement Lenders, the Prepetition Noteholders and Insight Equity, in its capacity as the General Partner of Emerge, regarding a potential restructuring of the Debtors' balance sheet and business operations. As a result of such extensive negotiations, the parties entered into that certain Restructuring Support Agreement, dated as of April 18, 2019 (as amended from time to

[5] For additional information regarding the Debtors' business and the events leading up to the Chapter 11 Cases, please refer to the *Declaration of Bryan M. Gaston Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 14] (the "**First Day Declaration**").

time, the "**Restructuring Support Agreement**"), by and among the Debtors, the Prepetition Credit Agreement Lenders, the Prepetition Noteholders and Insight Equity, pursuant to which the parties agreed on a restructuring transaction for the Debtors.[6]

9. The Restructuring Support Agreement included both an out-of-court and in-court restructuring of the Debtors. Among other things, the Restructuring Support Agreement also established a special restructuring committee of the Debtors' board of directors (the "**Special Restructuring Committee**") in order to approve and implement the terms of the restructuring consistent with the terms set forth in the Restructuring Support Agreement (or such other terms that the Special Restructuring Committee determined, in good faith, to be necessary in order to confirm a chapter 11 plan). The Restructuring Support Agreement also caused Insight Equity to grant a standstill and voting proxy to the Special Restructuring Committee, which controlled certain voting powers of the General Partner. Specifically, pursuant to the standstill and voting proxy, the Special Restructuring Committee maintained the power to determine whether the Debtors were to pursue an out-of-court or in-court process restructuring transaction.

10. After the signing the Restructuring Support Agreement, the Debtors (with the support of the Prepetition Credit Agreement Lenders and the Prepetition Noteholders) continued to pursue consummation of the out-of-court restructuring. Notwithstanding these efforts, it became clear that there were no viable out-of-court restructuring options for the Debtors to pursue as compared to the benefits that chapter 11 would provide—most importantly the ability to reject burdensome contracts and leases under section 365 of the Bankruptcy Code. In addition, on June 21, 2019, a berm breach occurred at the Debtors' sand mining and processing facility in San Antonio, Texas. As a result of this berm breach, the U.S. Mining Safety and

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[6] A copy of the Restructuring Support Agreement is attached as Exhibit B to the First Day Declaration.

Health Administration issued an order preventing the Debtors from accessing any part of the impacted mine, and the Debtors were forced to shut down their mining and wet plant operations at that facility.[7]

11. Accordingly, when faced with a lack of viable restructuring options, dwindling liquidity, and significant operational disruptions, and after extensive discussions with their advisors, the Debtors determined that filing for chapter 11 and seeking confirmation of the Plan consistent with the Restructuring Support Agreement was in their best interest and in the best interest of their creditors and other stakeholders.

B. The Chapter 11 Cases and Solicitation Process

12. On July 15, 2019 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code and commenced these Chapter 11 cases (the "**Chapter 11 Cases**").

13. On July 31, 2019, the United States Trustee filed the *Notice of Appointment of Committee of Unsecured Creditors* [Docket No. 111], appointing the Official Committee of Unsecured Creditors (the "**Committee**") in connection with the Chapter 11 Cases.

14. On September 11, 2019, the Debtors filed the Plan and their *Disclosure Statement for the First Amended Joint Plan of Reorganization for Emerge Energy Services LP and Its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [Docket No. 363] (the "**Disclosure Statement**").

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[7] Section 103(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. provides that "in the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary [of Health and Human Services], when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal."

15. On September 11, 2019, the Court entered an *Order (I) Approving the Disclosure Statement, (II) Establishing the Voting Record Date, Voting Deadline and Other Dates, (III) Approving Procedures for Soliciting, Receiving and Tabulating Votes on the Plan and for Filing Objections to The Plan, (IV) Approving the Manner and Forms of Notice and Other Related Documents, (V) Approving Procedures for Assumption of Contracts and Leases and Form and Manner of Assumption Notice, and (VI) Granting Related Relief* [Docket No. 361] (the "**Disclosure Statement Order**"). Pursuant to the Disclosure Statement Order, the Bankruptcy Court, among other things, approved the Disclosure Statement and established certain solicitation and voting procedures. Specifically, (i) October 11, 2019 was established as the objection deadline for confirmation of the Plan, and (ii) October 17, 2019 was established as the deadline by which all ballots to accept or reject the Plan and to opt-out of the third party releases must be completed and received by the Voting and Claims Agent. In addition, a hearing to consider confirmation of the Plan was scheduled for October 24, 2019 (the "**Confirmation Hearing**").[8]

16. Following the entry of the Disclosure Statement Order, the Debtors distributed their solicitation package containing, among other things, the Disclosure Statement and applicable Ballot to vote to accept or reject the Plan to all Holders of Claims in Classes 5 (Prepetition Notes Claims) and 6 (General Unsecured Claims).[9]

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[8] The Confirmation Hearing was later rescheduled to commence on October 30, 2019. *See* Notice of Rescheduled Confirmation Hearing, dated September 21, 2019 [Docket No. 533].

[9] *See* Affidavit of Service of Solicitation Materials, dated September 20, 2019 [Docket No. 390].

17. The Debtors also distributed their solicitation package containing, among other things, the Disclosure Statement and applicable Opt-Out Form to all Holders of Equity Interests in Class 8 (Old Emerge GP Equity Interests) and Class 9 (Old Emerge LP Equity Interests).[10]

18. On September 20, 2019, the Debtors published the Confirmation Hearing Notice in *The Wall Street Journal*.[11]

19. On September 27, 2019 the Debtors filed the *Notice of Cure Amounts in Connection with Contracts and Leases* [Docket No. 412] (the "**Cure Notice**") which provided notice of the proposed cure claim amounts associated with the Debtors' executory contracts and unexpired leases listed therein.

20. On October 4, 2019, the Debtors filed their *Plan Supplement for the First Amended Joint Prepackaged Plan of Reorganization for Emerge Energy Services LP and Its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [Docket No. 449] (as amended, the "**Plan Supplement**").

21. In connection with the filing of this Memorandum, and in further support hereof and of confirmation of the Plan, the Debtors expect to file the following declarations prior to the commencement of the Confirmation Hearing: (i) the *Declaration of Bryan M. Gaston in Support of Confirmation of the First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* (the "**Gaston Declaration**"), (ii) the *Declaration of Adam Dunayer in Support of Confirmation of the First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* (the "**Dunayer Declaration**"), and (iii) the *Declaration of William L. Transier in Support of Confirmation of the First Amended Joint Plan*

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[10] *See* Affidavit of Service of Solicitation Materials, dated September 20, 2019 [Docket No. 390].

[11] *See* Affidavit of Publication, dated September 17, 2019 [Docket No. 380].

of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code (the "**Transier Declaration**" and, together with the Gaston Declaration, and the Dunayer Declaration, the "**Confirmation Declarations**").

C. The Voting Results

22. On October 23, 2019, the Debtors filed the *Declaration of Michael Paque of Kurtzman Carson Consultants LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors* [Docket No. 542] (the "**Voting Report**"). The Voting Report sets forth the dollar amounts of Claims and number of Holders voting in favor of the Plan in each Class, with respect to the votes actually cast, which is summarized in the charts below:

Dollars Actually Voted

Class	Class Description	Total Dollars Voted	Dollars Accepted	Dollars Rejected	Dollars Abstained	% of Dollars Accepted	% of Dollars Rejected
5	Prepetition Notes Claims	$208,512,307.81	$208,512,307.81	$0.00	$0.00	100%	0%
6	General Unsecured Claims	$419,729,806.94	$16,219,545.16	$403,510,261.78	$13,684.78	3.86%	96.14%

Numbers Actually Voted

Class	Class Description	Total Number Voted	Number Accepted	Number Rejected	Number Abstained	% of Voters Accepted	% of Voters Rejected
5	Prepetition Notes Claims	18	18	0	0	100%	0%
6	General Unsecured Claims	81	37	44	8	45.68%	54.32%

23. Accordingly, the Plan is overwhelmingly supported by Holders of Class 5 Prepetition Note Claims. Holders of Class 6 General Unsecured Claims voted to reject the Plan. Notwithstanding this rejection, the Debtors believe the Plan may nevertheless be confirmed because the Plan satisfies section 1129(b) of the Bankruptcy Code with respect to such rejecting Class 6 Claims as described more fully below.

OUTSTANDING OBJECTIONS

24. In connection with confirmation of the Plan, certain parties filed objections with this Court, while others provided informal comments to the Debtors (collectively, the "**Confirmation Objections**"). For the convenience of the Court, the Debtors have attached three response charts to this Memorandum (together, the "**Response Charts**"), with each Response Chart summarizing the material arguments of each Confirmation Objection and the Debtors' response thereto. The first Response Chart attached hereto as Exhibit A responds only to the objection of the Creditors Committee. The second Response Chart attached hereto as Exhibit B responds to the other Confirmation Objections. Finally, the third Response Chart attached hereto as Exhibit C responds only to objections in connection with the proposed cure claim amounts included in the Cure Notice. With respect to the objection of the Creditors Committee only, the Debtors have summarized their responses to certain arguments below:[12]

A. The Plan is Fair and Equitable: The Aggregate Value of the Debtors' Assets is Substantially Less than the Face Amount of their Secured Debt

25. As described in the Disclosure Statement and as will be detailed in the Dunayer Declaration, the Prepetition Noteholders hold allowed claims of approximately $217 million and are significantly under-secured. In particular, the Debtors estimate the aggregate value of the Reorganized Debtors to range from $180 million to $220 million, with a midpoint aggregate value of $200 million. After paying in full, among other things, the DIP Credit Agreement Claims and the Prepetition Credit Agreement Claims (both of which are senior in lien priority to the Prepetition Notes Claims), the Debtors estimate that only between $82.5 million and $119.4 million (with a mid-point of $100.9 million) in net value remains to satisfy the

[12] For the avoidance of doubt, the Debtors reserve the right to respond to any and all objections asserted in the Confirmation Objections in connection with confirmation of the Plan, whether or not contained or listed in this Memorandum or in the Response Charts.

Prepetition Notes Claims of approximately $217 million, leaving a substantial unsecured deficiency claim of between $97.6 million and $134.5 million (with a mid-point of $116.1 million). This, in turn, means the recovery to the Prepetition Noteholders ranges from 38%-55% (with a mid-point of 47%)─a far cry from payment in full.

26. The Creditors Committee attacks many of the assumptions used by Houlihan Lokey in its valuation analysis, but even a cursory review of their alleged corrections shows how misguided they are in reality. For example, when determining which companies to include in its Comparable Company Analysis, the Creditors Committee argues that Houlihan Lokey improperly excluded U.S. Silica Holdings and Covia Holdings Corporation because "both are cited as competitors of the Debtors in their 2018 Form 10-K filed with the Securities and Exchange Commission." *See* Objection, ¶ 57 (chart on page 24). This is a nonsensical argument because many entities can qualify as a competitor without also being a comparable company for valuation purposes.[13] Instead, Houlihan Lokey properly excluded U.S. Silica Holdings and Covia Holdings Corporation from its Comparable Company Analysis because of their substantially greater scale and geographic coverage of assets and operations and significant business diversification away from oil and gas end-markets. Further, (i) Covia is effectively an operating subsidiary of SCR-Sibelco N.V., a European industrial minerals company with a total enterprise value of approximately $4.5 billion, with over 10,000 employees and operations in 35 countries; and (ii) U.S. Silica Holdings has significant logistical assets and operations to provide

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[13] A simple example will show the fallacy of this argument, of confusing competitors with comparable for valuation purposes: Mr. Dunayer decides to resign from Houlihan Lokey and instead operate a hamburger stand on the corner of 3rd Avenue and 53rd Street in New York City to serve lunch to hungry attorneys from Latham & Watkins. Mr. Dunayer competes with McDonalds, Burger King, and Wendy's for lunch business, but none of those companies are comparable to the Dunayer hamburger stand for valuation purposes.

last-mile solutions, a high-growth segment, to its customers including trucking to and storage of proppant at the wellsite.

27. As another example of a wrong correction, the Creditors Committee argues that Houlihan Lokey improperly used the market value of debt when calculating total enterprise value, rather than using the face amount of debt. *See* Objection, ¶ 57 (chart on page 24). Again, this argument is without merit when calculating the value of a distressed company like the Debtors and in a distressed industry such as frac sand, where market value of debt is the proper starting point. These are but a few of the errors made by the Creditors Committee in their valuation methods which the Debtors will show at the Confirmation Hearing.

B. The Plan Satisfies the "Best Interest of Creditors" Test: The Debtors' Unencumbered Assets Have No Value to Class 6 General Unsecured Creditors, Whether Under Chapter 11 or Chapter 7

28. In their objection, the Creditors Committee asserts that HPS does not have a valid and perfected lien on either (1) the Debtors' real property and partially developed plant facility located in Kingfisher County, Oklahoma (the "**Kingfisher Property**") or (2) any payments under the Debtors' business interruption insurance related to the June 21, 2019 berm breach that occurred at the Debtors' San Antonio, Texas facility (the "**Insurance Payments**," and together with the Kingfisher Property, the "**Unencumbered Assets**"). *See* Objection, ¶ 7. The Creditors Committee further asserts that these alleged Unencumbered Assets have significant value to the Debtors and, in turn, to Holders of Class 6 General Unsecured Claims. *See* Objection, ¶¶ 8-11.

29. These arguments are without merit. As an initial matter and as will be set forth in detail in the Debtors' objection to the Standing Motion, the Prepetition Noteholders unquestionably have valid and perfected prepetition liens in and against the Debtors' business interruption insurance and any payments made thereunder, including in connection with the June

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21, 2019 berm breach. Thus, the Insurance Payments constitute the collateral of the Prepetition Noteholders and are not unencumbered.

30. Second, even assuming the Kingfisher Property is an Unencumbered Asset, the Debtors will show at the Confirmation Hearing that is has minimal value as of the date hereof since, among other things, the Debtors' sand facilities located there still require several months and millions of dollars of capital expenditures to complete construction, and the Debtors neither have current customers nor any binding contracts for the purchase of sand at the Kingfisher Property.

31. Moreover, even if the Kingfisher Property had more than nominal value (and ignoring the potential $8.0 million of mechanics liens filed against it), the value of the Kingfisher Property is nowhere near the approximately $30 million of adequate protection liens and claims held by the Prepetition Noteholders against the Kingfisher Property pursuant to the Final DIP Order [Docket No. 209, ¶ 18]. As will be shown in the Gaston Declaration to be filed in connection with the Confirmation Hearing, the Debtors expect the aggregate principal amount of the DIP Loan to equal $15 million as of the Effective Date and to have spent another approximately $15 million of the cash collateral of the Prepetition Noteholders during the Chapter 11 Cases, thereby bringing the aggregate diminution in value of the collateral of the Prepetition Noteholders to $30 million. Pursuant to paragraph 18 of the Final DIP Order, the Prepetition Noteholders receive adequate protection liens and claims on a dollar-for-dollar basis for such diminution in value against all assets of the Debtors, including the Unencumbered Assets. There is simply no reasonable basis to conclude that value from the Kingfisher Property would make its way to Class 6 General Unsecured Creditors, whether in Chapter 11 or Chapter 7.

32. In a last ditch attempt to show that the Kingfisher Property has material value, the Creditors Committee argues that "the Debtors received an unsolicited offer to purchase the Oklahoma Facility (inclusive of a credit bid of the alleged mechanics' liens) for approximately $11.2 million, which is $2.2 million more than the high end of Houlihan's Valuation." *See* Objection, ¶ 45. This purchase offer, however, does not establish the market value of anything since it is not a binding offer (or even close to one). Among other things, it is expressly conditioned on due diligence and documentation. *See* Pownall Objection [Docket No. 466], Exhibit A, ¶¶ 1, 3, & 4 ("this letter is not intended to create or constitute a legally binding obligation between the parties"). Moreover, even if it were a binding offer, it still would not establish the value of the Kingfisher Property because the offer contemplates the acquisition of an extensive list of assets that go well beyond the unencumbered Kingfisher Property. *See* Pownall Objection [Docket No. 466], Exhibit A, ¶ 1 (the term "Assets" includes equipment, vehicles, inventories, signage, licenses, permits, computer software and hardware, telephone numbers, email addresses, websites, accounts and other receivables, documents, records, fixtures, supplies, goodwill, customer lists, trademarks and tradenames, trade secrets, know-how and other intellectual property, and certain contract rights and leases).

33. Finally, the Creditors Committee fails to mention that the cash portion of this non-binding offer is only $1.0 million at most. *See* Pownall Objection [Docket No. 466], Exhibit A, ¶ 2.B(i). Thus, even assuming that the full $1.0 million was unencumbered cash, it would be exhausted quickly to pay for the administration of the Chapter 11 Cases, leaving no recovery to Class 6 General Unsecured Claims. *See In re Molycorp, Inc.*, 562 B.R. 67, 75 (Bankr. D. Del. 2017) (stating that "as a general rule, administrative expenses must be satisfied from assets of the estate not subject to liens. A secured creditor's interest in its collateral is a substantive property

right created by non-bankruptcy law, which may not be substantially impaired when bankruptcy intervenes."); *see also In re K & L Lakeland, Inc.*, 128 F.3d 203, 207 (4th Cir. 1997) ("[g]enerally, administrative expenses are paid from the unencumbered assets of a bankruptcy estate rather than from secured collateral"); *In re Westwood Plaza Apartments, Ltd.*, 154 B.R. 916, 921 (Bankr. E.D. Tex. 1993) (same); *In re Matter of CD Elec. Co., Inc.*, 146 B.R. 786, 789 (Bankr. N.D. Ind. 1992) (same).

C. The Debtor Releases Contained in the Plan Are Customary and Appropriate

34. Section 1123(b)(3)(A) of the Bankruptcy Code states 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). The Bankruptcy Code, thus, clearly contemplates that the Debtors are permitted to settle or release any claim or cause of action that they might otherwise have against a third party. In this district, courts have generally found that chapter 11 debtors are generally allowed to release claims pursuant to section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank. N.A. v. Wilmington Trust Co. (In re Spansion)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also Gillman v. Continental Airlines* (*In re Continental Airlines*), 203 F.3d 203, 214 (3d. Cir. 2000) (holding that the hallmarks of permissible releases are fairness and necessity to the reorganization). In addition, courts in this district have held that a plan may provide for the release by a debtor of non-debtor third parties if appropriate based on the facts and equities of each case. *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999).

35. Notwithstanding the repeated assertions of the Creditors Committee that the Plan contains exceedingly broad releases, it is undeniable that the terms and scope of the Debtor Release contained in Article X.B.1 of the Plan (with its exclusions for gross negligence, actual

fraud, and willful misconduct) are typical, customary, and routinely approved by courts in this district. *See In re Claire's Stores, Inc.*, Case No. 18-10584 (MFW) (Bankr. D. Del. Sept. 21, 2018) [Docket No. 1040]; *In re Paragon Offshore PLC*, Case No. 16-10386 (CSS) [Docket No. 1614]; *In re Chaparral Energy, Inc.*, Case No. 16-11144 (LSS) (Bankr. D. Del. Mar. 10, 2017) [Docket No. 958]; *In re Pacific Sunwear of California, Inc.*, Case No. 16-10882 (LSS) (Bankr. D. Del. Sept. 6, 2016) [Docket No. 861]; *In re Verso Corporation*, Case No. 16-10163 (KG) (Bankr. D. Del. June 23, 2016) [Docket No. 1223].

36. As an initial matter, the Debtors do not believe that any valid claims or causes of action exist against any of the Released Parties. Moreover, despite the extensive and wide-ranging investigation conducted by the Creditors Committee, they still have yet to identify with any particularity a single valuable claim or cause of action that is actually being released by the Debtors under the Plan, especially since the Debtor Release excludes claims and causes of action related to the June 2019 berm breach,[14] as well as any claims and causes of action arising from gross negligence, actual fraud, or willful misconduct. It is telling that in their 45-page confirmation objection, after spending millions of dollars in their investigation, the Creditors Committee still cannot specifically identify the valuable causes of cation that are being released, but instead continues to rely on innuendo and speculation.

37. But regardless, HPS and the other Prepetition Noteholders have clearly provided valuable consideration in exchange for the Debtor Releases by, among other things, providing up to $35 million of DIP loan financing, committing to provide the $100 million exit loan facility,

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[14] In particular, the Debtor Release in Article X.B.1 of the Plan expressly excludes any Causes of Action relating to the "MSHA Action" which, in turn is defined in Article I.C of the Plan as "that certain mud retaining pond wall breach, which occurred on June 21, 2019 at the San Antonio, Texas facility of the Debtors, the related 103(k) order issued by the Mine Safety and Health Administration affecting the entire mine area at the San Antonio Texas facility, and all related matters affecting the condition of the mine at the San Antonio Texas Facility.

permitting the use of their cash collateral, and converting their Prepetition Note Claims into equity. Likewise, Insight Equity has also provided valuable consideration in exchange for the Debtor Releases by, among other things, foregoing potential litigation and other control rights it has as sole owner of the General Partner. This cooperation has, in turn, helped to greatly minimize the costs and duration of the Chapter 11 Cases.

38. In addition, because the scope of the "Related Persons" that are the beneficiaries of the Debtor Release is expressly limited to those "acting in such capacity at any time on or after the date of the Restructuring Support Agreement," it necessarily means that each of the Released Parties has participated in the consensual restructuring process, contributed to the Restructuring Transactions consistent with the Restructuring Support Agreement, and/or otherwise provided value to the Estates by, for example, assisting in the consensual prosecution of the Chapter 11 Cases or confirmation or consummation of the Plan. And if the Debtor Release did not include the "Related Persons", then the release itself would be almost meaningless as parties could easily circumvent the release by simply litigating with related affiliates, subsidiaries, members, officers or directors.

39. Finally, it cannot be ignored that HPS and the other Prepetition Noteholders are experienced and highly sophisticated entities that are no strangers to the chapter 11 process. Their initial restructuring proposal to the Debtors in February 2019 contemplated mutual releases as they are beyond customary in consensual restructurings. As the future majority owners of the Reorganized Debtors (and perhaps future sole owners) that are receiving substantially less than payment in full, they have every economic incentive to ensure that no valuable claims or causes of action are released against Insight Equity or other third parties, and they are certainly not

required to fund litigation against themselves ever or against Insight Equity that they believe is futile.

40. Rather than dwelling on the past, the Debtors (with the support of the Prepetition Noteholders) would like to emerge from chapter 11 keenly focused on the future. Allowing litigation overhang to remain will only cloud the Debtors' pursuit of their business objectives after the Effective Date. The Debtor Release is not only fair, equitable, and necessary to the Debtors' prompt reorganization, but it is also appropriate under prevailing Third Circuit case law.

D. The Plan is Proposed in Good Faith.

41. In its objection, the Creditors Committee raises four separate arguments as to why they believe the Plan is not proposed in good faith. *See* Objection, ¶¶ 60-66. All of these arguments are without merit for the reasons set forth below.

42. *Failure to Conduct a Market Test*. The Creditors Committee argues that the Debtors' failure to conduct a marketing process for their assets proves they are not maximizing the value of their estates. *See* Objection, ¶¶ 60 -62. Not surprisingly, the Creditors Committee does not cite to a single case that holds a marketing and sale process is required to maximize value, and they conveniently fail to acknowledge that Section 1123(b)(4) of the Bankruptcy Code states that asset sales are only a permissive term of a chapter 11 plan rather than a mandatory term under Section 1123(a) of the Bankruptcy Code.

43. As the Debtors have stated repeatedly, they did not run a sale process because it would have been a futile exercise. With the value of their assets substantially below the face amount of their secured debt, there is no method to force the Prepetition Noteholders to release their liens in a free and clear sale. Instead, as is typical in distressed scenarios, the Debtors properly focused on negotiating a consensual debt-for-equity restructuring with the Prepetition

Noteholders (as their major creditor constituents) with terms and conditions that are usual and customary in this district.

44. Finally, the Creditors Committee's repeated accusation that the Debtors negotiated with only one creditor (HPS) belies the reality again. As the Creditors Committee is keenly aware, the Debtors spent months negotiating new railcar lease agreements with their railcar lessors, which resulted in material savings to the Debtors and is a key component of the Reorganized Debtors' go-forward business operations.

45. *Negotiation of the Plan and RSA*. In paragraphs 63 and 64 of their objection, the Creditors Committee regurgitates their favorite catchphrase that HPS "handpicked" both members of the Special Restructuring Committee (Mr. Davis and Mr. Transier), and then questions the integrity of Mr. Davis and Mr. Transier in a cynical, passive-aggressive manner by referring to them in quotations as "independent". *See* Objection, ¶¶ 63-64.

46. As the Debtors said in support of their Disclosure Statement, it is axiomatic and non-controversial that the independent directors to the Special Restructuring Committee would be acceptable to the Debtors' under-secured lenders. What would the Creditors Committee expect to happen here – that the independent directors be unacceptable to the secured lenders? Mr. Davis and Mr. Transier are independent from and have no prior affiliation with HPS, and they are unquestionably qualified to fulfill their responsibilities as members of the Special Restructuring Committee.

47. To repeat, the Creditors Committee conducted an extensive investigation of the Debtors, the Special Restructuring Committee, and HPS. They obviously found nothing in terms of lender control or lender liability because the Standing Motion is silent as to these matters. Moreover, even as of this late date and notwithstanding their sarcasm, the Creditors Committee

still has never actually articulated what realistic alternatives existed for the Debtors given their liquidity position, or what other realistic restructurings options existed that the Special Restructuring Committee improperly ignored. The simple fact is that the Debtors had no other sources of funding besides the Prepetition Noteholders, and the face amount of their secured debt greatly exceeds the value of their assets. The bottom line is that all restructuring paths lead through the Prepetition Noteholders, no matter how hard the Creditors Committee clings to their false narrative about the integrity and independence of the Special Restructuring Committee.

48. *The Combined Death Trap/Equity Recovery*. The Creditors Committee argues that nothing could be a more blatant violation of good faith than a chapter 11 plan that conditions unsecured creditors' recovery upon acceptance by that class while also proposing a recovery to equity holders. *See* Objection, ¶ 65. This objection is curious at best since both provisions are perfectly in accord with bankruptcy law. First, it has been held in this district that chapter 11 plans may propose different treatment to a class depending on whether it is an accepting or rejecting class. *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999) ("[t]here is no prohibition in the Code against a Plan proponent offering different treatment to a class depending on whether it votes to accept or reject the Plan.") (citing *In re Drexel Burnham Lambert Group, Inc.*, 140 B.R. 347, 350 (Bankr. S.D.N.Y. 1992).

49. Second, the proposed nominal recovery to Class 9 equityholders under the Plan was expressly conditioned upon and subject to Class 6 creditors voting to accept the Plan as required by the "absolute priority" rule. The Debtors did not attempt to "gift" any recovery to equity holders around the rejection vote of their creditor classes. As Class 6 creditors have now voted to reject the Plan, the Class 9 equityholders will receive no property or distributions under the Plan on account of such interests, exactly as required by applicable law.

50. *Improper Post-Emerge Release in the RSA*. Finally, the Creditors Committee argues that the Plan has not been proposed in good-faith because Section 5(b) of the Restructuring Support Agreement provides that the Reorganized Debtors will provide the same releases as contemplated by the Plan, even if such releases are not approved by this Court as part of the Plan. *See* Objection, ¶ 66. This argument is without merit and misguided for several reasons.

51. First, regardless of what the Restructuring Support Agreement provides or requires, there is no debate that the Debtor Releases contained in the Plan are usual and customary in terms of scope and are routinely approved in this district. *See* paragraphs 34–40 above. The Debtor Releases are in the Plan because they are appropriate and universal in consensual restructurings.

52. Second, as explained by counsel to the Debtors at the Disclosure Statement Hearing, the reason that Section 5(b) of the Restructuring Support Agreement was included is to merely minimize the risk of a windfall to the Prepetition Noteholders. In particular, the Prepetition Noteholders agreed to provide these exact same releases in an out-of-court transaction and to support such releases as part of the Plan. If the releases are nonetheless removed from the Plan, then the Prepetition Noteholders (as the future majority owners of the Reorganized Debtors) should not then benefit from the exact same causes of action that they were willing to forgo. This is not a situation where the Debtor Release is being forced upon an unknowing or unsuspecting new owner, but is instead the essence of the consensual bargain that was reached between the parties.

53. Third, HPS is not engaging in an end-run around this Court. If the Court determines not to approve the Debtor Releases, then they will not be granted during the Chapter

11 Cases. The Court is not opining on whether releases given after the Effective Date are appropriate or approving it in any way. Rather, the New Board will make that decision independent of the Plan.

54. And finally, courts in this district have previously approved restructuring support agreements that have contained nearly identical provisions as contained here. See *In re Panda Temple Power, LLC*, Case No. 17-10839 (LSS) (Bankr. D. Del. Jan. 23, 2018) [Docket Nos. 559 & Docket No. 224, Exhibit B]; *See In re Chaparral Energy, Inc.*, Case No. 16-11144 (LSS) (Bankr. D. Del. Dec. 14, 2016) [Docket No. 652, Exhibit 1].[15] Rather than being controversial, courts understand that sophisticated parties are free to contract with each other, including with respect to mutual releases to be given after the Effective Date.

BASIS FOR RELIEF

55. 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. *See Heartland Fed. Savs. & Loan Ass'n v. Briscoe Enters., Ltd. II* (*In re Briscoe Enters., Ltd. II*), 994 F.2d 1160, 1165 (5th Cir. 1993) (stating that "the combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof under both § 1129(a) and in a cramdown."); s*ee also In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006).

56. Through filings with the Bankruptcy Court, the Confirmation Declarations, and the testimonial evidence that may be adduced at the Confirmation Hearing, the Debtors will

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[15] The Debtors will have copies of these restructuring support agreements at the Confirmation Hearing. For ease of reference, the relevant sections are Section 6 of the restructuring support agreement for Panda Temple [Docket No. 224, Exhibit B] and the last paragraph of Section 6 of the restructuring support agreement for Chaparral Energy [Docket No. 652, Exhibit 1].

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.

A. The Plan Satisfies the Requirements for Confirmation Under Section 1129(a) of the Bankruptcy Code, Other Than Section 1129(a)(8)

57. As addressed in detail herein and in the Response Charts attached hereto, the Plan satisfies all of the applicable requirements of section 1129(a) of the Bankruptcy Code, other than section 1129(a)(8). However, as described more fully below and in the Response Charts attached hereto, the Plan may be confirmed notwithstanding the fact that not all Classes of Claims and Equity Interests, as applicable, have accepted the Plan pursuant to section 1129(b) of the Bankruptcy Code.

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

58. Section 1129(a)(1) of the Bankruptcy Code provides 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) informs that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification of claims and contents of a plan, respectively. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 412 (1977); *see also In re Nutritional Sourcing Corp.*, 2008 WL 5396491, at *5 (Bankr. D. Del. Dec. 23, 2008); *In re Johns-Manville Corp.*, 68 B.R. 618, 629 (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 sub nom., Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636 (2d Cir. 1988); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984).

59. As demonstrated below, the Plan fully complies with the requirements of sections 1122 and 1123 and all other applicable provisions of the Bankruptcy Code.

(a) Section 1122: The Plan Complies with Section 1122 of the Bankruptcy Code

60. Section 1122(a) of the Bankruptcy Code provides in pertinent part as follows:

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

11 U.S.C. § 1122(a).

61. 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). For a classification structure to satisfy section 1122 of the Bankruptcy Code, it is not necessary that all substantially similar claims or interests be designated to the same class, but only that all claims or interests designated to a particular class be substantially similar to each other. *In re Armstrong World Indus., Inc.*, 348 B.R. 136, 159 (Bankr. D. Del. 2006).

62. The Plan provides for the separate classification of Claims and Equity Interests based upon differences in the legal nature and/or priority of such Claims and Equity Interests. The Plan designates the following classes of Claims and Equity Interests: Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 3 (Secured Tax Claims), Class 4 (Prepetition Credit Agreement Claims), Class 5 (Prepetition Notes Claims), Class 6 (General Unsecured Claims), Class 7 (Intercompany Claims), Class 8 (Old Emerge GP Equity Interests), Class 9 (Old Emerge LP Equity Interests), and Class 10 (Old Affiliate Equity Interests).

63. Each of the Claims or Equity Interests in each Class is substantially similar to the other Claims or Equity Interests in such Class. Accordingly, the Debtors' classification of Claims and Equity Interests does not prejudice the rights of Holders of such Claims and Equity Interests, is consistent with the requirements of the Bankruptcy Code and, thus, is appropriate. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 159 (3d Cir.

1993) (explaining that the determination of whether a classification scheme is reasonable "must be informed by the two purposes that classification serves under the Code: voting to determine whether a plan can be confirmed and treatment of claims under the plan") (internal citation omitted); *Olympia & York Florida Equity Corp. v. Bank of N.Y.* (*In re Holywell Corp.*), 913 F.2d 873, 880 (11th Cir. 1990) (plan proponent allowed considerable discretion to classify claims and interests according to facts and circumstances of case so long as classification scheme does not violate basic priority rights or manipulate voting).

(b) Section 1123(a): The Plan Complies with All Requirements of Section 1123(a) of the Bankruptcy Code

64. Section 1123(a) of the Bankruptcy Code sets forth seven requirements with which every chapter 11 plan must comply. *See* 11 U.S.C. § 1123(a). As demonstrated herein, the Plan fully complies with each enumerated requirement.

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

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

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

66. Section 1123(a)(2) requires a plan to specify which classes of claims or interests are unimpaired by the plan. Article III of the Plan specifies that Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 3 (Secured Tax Claims), Class 4 (Prepetition Credit Agreement Claims), Class 7 (Intercompany Claims) and Class 10 (Old Affiliate Equity Interests)

are Unimpaired. While the Debtors are aware that certain Holders of Class 2 Other Secured Claims argue that they are impaired under the Plan, the Debtors believe these arguments are without merit as set forth in the Response Chart attached hereto as **Exhibit B**. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

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

67. Section 1123(a)(3) requires a plan to specify how classes of claims or interests that are impaired by the plan will be treated. Article III of the Plan sets forth the treatment of Impaired Claims in Class 5 (Prepetition Notes Claims), Class 6 (General Unsecured Claims), Class 8 (Old Emerge GP Equity Interests), and Class 9 (Old Emerge LP Equity Interests). Accordingly, the Plan satisfies the requirements of section 1123(a)(3) of the Bankruptcy Code.

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

68. Section 1123(a)(4) requires that a plan provide the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members. Pursuant to the Plan, the treatment of each Claim against or Equity Interest in the Debtors, in each respective Class, is the same as the treatment of each other Claim or Equity Interest in such Class. Accordingly, the Plan satisfies the requirements of section 1123(a)(4) of the Bankruptcy Code.

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

69. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means for the plan's implementation." Article V of the Plan provides adequate and proper means for the implementation of the Plan, including, without limitation, the issuance of the New Second Lien Notes (if any), the Preferred Interests, the New Limited Partnership Interests, the

New Warrants, and the consummation of the Exit Facility Credit Agreement and the Amended/New Organizational Documents of the Reorganized Debtors.

70. The transactions contemplated by the Plan are designed to maximize the value of the Debtors' business and assets. Accordingly, the Plan, together with the documents and agreements contemplated by the Plan and the Plan Supplement, provide the means for implementation of the Plan as required by and in satisfaction of section 1123(a)(5) of the Bankruptcy Code.

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

71. Section 1123(a)(6) prohibits the issuance of non-voting equity securities, and requires amendment of a debtor's charter to so provide. It also requires that a corporate charter provide an appropriate distribution of voting power among the classes of securities possessing voting power. Other than with respect to the Perpetual Preferred Interests being issued solely to the Prepetition Noteholders, the Plan does not provide for the issuance of non-voting equity securities, and the form of amended and restated organizational documents for the New General Partner and Reorganized Emerge LP, which was filed on October 4, 2019, prohibits the issuance of non-voting equity securities. Accordingly, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.[16]

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

72. 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

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[16] Section 1123(a)(6) is satisfied pursuant to Section L in the Plan. However, the fact that the Perpetual Preferred Interests are prohibited from voting does not violate section 1123(a)(6) due to the fact that the Perpetual Preferred Interests are being issued by a partnership, and section 1123(a)(6) refers specifically to corporations.

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." Article V.M of the Plan provides that the New Board shall be identified in the Plan Supplement and shall be subject to approval of the Bankruptcy Court pursuant to section 1129(a)(5) of the Bankruptcy Code. The New Board shall be selected by the Majority Noteholders and is expected to be identified at or prior to the Confirmation Hearing. The manner of selecting the New Board of the New General Partner is consistent with Delaware corporate law, the Bankruptcy Code, the interests of creditors and equity security holders, and public policy. Therefore, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

(c) Section 1123(b): The Plan Incorporates Certain Permissible Provisions

73. Section 1123(b) of the Bankruptcy Code sets forth certain permissive provisions that may be incorporated into a chapter 11 plan. The contents of the Plan are consistent with these provisions.

(1) Section 1123(b)(1): Impairment of Claims and Interests

74. 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). In the cases at hand, Claims in Class 5 (Prepetition Notes Claims), Class 6 (General Unsecured Claims), Class 8 (Old Emerge GP Equity Interests), and Class 9 (Old Emerge LP Equity Interests) are Impaired, and Claims in Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 3 (Secured Tax Claims), Class 4 (Prepetition Credit Agreement Claims), Class 7 (Intercompany Claims) and Class 10 (Old Affiliate Equity Interests) are Unimpaired by the Plan. Accordingly, the Plan is consistent with section 1123(b)(1) of the Bankruptcy Code.

(2) Section 1123(b)(2): Assumption or Rejection of Executory Contracts and Unexpired Leases

75. Section 1123(b)(2) of the Bankruptcy Code allows a plan to provide for assumption, assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code. Article VI.A of the Plan provides that, as of the Effective Date, the Debtors shall be deemed to have rejected each Executory Contract and Unexpired Lease to which it is a party except for those Executory Contracts and Unexpired Leases that (i) have been assumed or rejected by the Debtors by prior order of the Bankruptcy Court, (ii) previously expired or terminated pursuant to its own terms or by agreement of the parties thereto; (iii) are the subject of a motion to assume filed by the Debtors pending on the Effective Date; (iv) are identified by the Debtors (with the consent of the Majority Noteholders) for assumption in the Plan Supplement, which may be amended by the Debtors (with the consent of the Majority Noteholders) to add or remove Executory Contracts and Unexpired Leases prior to the Effective Date; or (v) are assumed by the Debtors pursuant to the terms of the Plan. These provisions of the Plan are permitted by section 1123(b)(2) of the Bankruptcy Code.

(3) Section 1123(b)(3): Retention of Claims or Interests by the Debtors

76. 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" any claim or interest. 11 U.S.C. 1123(b)(3)(B) (emphasis added). In this case, the Plan preserves the Reorganized Debtors' rights to enforce any claims, rights, or causes of action that the Debtors may hold against any person or entity, except those causes of action that are explicitly released under the Plan. *See* Plan, Art. X.F. These provisions of the Plan are expressly permitted by section 1123(b)(3) of the Bankruptcy Code and, for the reasons discussed more fully below, appropriate in this case.

(4) Section 1123(b)(6): Provisions Not Inconsistent with the Bankruptcy Code

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

(d) Releases, Exculpation, and Injunction.

78. In accordance with section 1123(b)(6) of the Bankruptcy Code, Article X of the Plan contains certain release, exculpation, and injunction provisions that are consistent with the applicable provisions of the Bankruptcy Code and conform to the requirements of Third Circuit case law. The release, exculpation, and injunction provisions are the product of good-faith, arms' length negotiations between the Debtors, Prepetition Credit Agreement Lenders, the Prepetition Noteholders and Insight Equity. These provisions enable the Debtors to emerge from chapter 11 with a clean slate and focus on their business operations going forward. The Debtors believe that this Court should approve them because they are fair and reasonable under the circumstances, supported by consideration, and essential to the reorganization in the Chapter 11 Cases.

79. *Releases by the Debtors*. Section 1123(b)(3)(A) of the Bankruptcy Code states 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). The Bankruptcy Code, thus, clearly contemplates that the Debtors are permitted to settle or release any claim or cause of action that they might otherwise have against a third party. In this district, courts have generally found that chapter 11 debtors are generally allowed to release claims pursuant to section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank. N.A. v. Wilmington Trust Co. (In*

re Spansion), 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also Gillman v. Continental Airlines* (*In re Continental Airlines*), 203 F.3d 203, 214 (3d. Cir. 2000) (holding that the hallmarks of permissible releases are fairness and necessity to the reorganization). In addition, courts in this district have held that a plan may provide for the release by a debtor of non-debtor third parties if appropriate based on the facts and equities of each case. *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999).

80. The Plan provides for a release of the Released Parties, their respective Related Persons, and their respective assets and properties, by the Debtors and Reorganized Debtors, in their respective individual capacities and as debtors-in-possession, as more fully set forth in Article X.B.1 of the Plan (the "**Debtor Release**"). Under the Plan, the terms "Released Parties" and "Related Persons" are defined in Article I.C as follows:

> "*Released Party*" means, collectively: (a) the Debtors; (b) the Reorganized Debtors; (c) the Committee and the members thereof in their capacity as such; (d) the Prepetition Credit Agreement Agent and the Releasing Prepetition Credit Agreement Lenders; (e) the DIP Credit Agreement Agent and the DIP Credit Agreement Lenders; (f) the Prepetition Notes Agent and the Releasing Prepetition Noteholders; (g) the Releasing Old Emerge LP Equity Holders, and (h) each Specified Railcar Lessor, so long as the applicable New Railcar Lease Agreement(s) between the Debtors and the applicable Specified Railcar Lessor is in full force and effect as of the Effective Date; and in each case the respective Related Persons of each of the foregoing Entities.
>
> "*Related Persons*" means, with respect to any Person, such Person's predecessors, successors, assigns and present and former Affiliates (whether by operation of law or otherwise) and subsidiaries, and each of their respective current and former officers, directors, principals, employees, shareholders, members (including ex officio members and managing members), managers, managed accounts or funds, management companies, fund advisors, advisory or subcommittee board members, partners, agents, financial advisors, attorneys, accountants, investment bankers, investment advisors, consultants, representatives, and other professionals, **in each case acting in such capacity at any time on or after the date of the Restructuring Support**

> **Agreement**, and any Person claiming by or through any of them, including such Related Persons' respective heirs, executors, estates, servants, and nominees; provided, however, that no insurer of any Debtor shall constitute a Related Person.

Plan, Art. I.C (emphasis added)

81. As described in detail above in paragraphs 34–40, the Debtor Release was the product of comprehensive and arms' length negotiations among the Debtors, the Prepetition Credit Agreement Lenders, the Prepetition Noteholders, and Insight Equity, the results of which were memorialized in Restructuring Support Agreement. The Debtors, in their business judgment, determined that the Debtor Release was necessary to reach consensus on the Plan and was critical to the Debtors' successful reorganization.

82. Pursuant to the Debtor Release, the Debtors have determined to release their own Causes of Action, Claims and Litigation Claims (and any derivative actions and claims) against the Released Parties. Most importantly, however, the Debtor Release expressly excludes "any Causes of Action arising from gross negligence, actual fraud, or willful misconduct of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction." Plan, Art. X.B.1.

83. As previously stated above in paragraph 36, the Debtors do not believe that any valid claims or causes of action exist against any of the Released Parties, and the Creditors Committee has not specifically identified any such claims or causes of action either (especially given the exclusion for gross negligence, actual fraud, and willful misconduct, as well as all causes of action related to the June 2019 berm breach). Moreover, given that these causes of action belong to the Debtors themselves, it is plainly within the purview of the Debtors to release their own causes of action. Additionally, the Plan, including the Debtor Releases, was vigorously negotiated by sophisticated entities that were represented by able counsel and

advisors. Accordingly, the Debtor Releases are fair, equitable, justified, in the best interests of the Debtors' estates.

84. Finally, because the scope of Related Persons is expressly limited to the applicable Person "acting in such capacity at any time on or after the date of the Restructuring Support Agreement," it necessarily means that each of the Released Parties has participated in the Plan process, contributed to the Restructuring Transactions consistent with the Restructuring Support Agreement, or otherwise provided value to the Estates by, for example, assisting in the consensual prosecution of the Chapter 11 Cases or confirmation or consummation of the Plan. And if the Debtor Release did not include the "Related Persons", then the release itself would be almost meaningless as parties could easily circumvent the release by simply litigating with related affiliates, subsidiaries, members, officers or directors.

85. In sum, the Debtors have determined, in a proper exercise of their business judgment, that they will not pursue any of these causes of action, as among other things, they have no value and the Debtors' future owners (the Prepetition Noteholders) have agreed with this assessment. Rather than dwelling on the past, the Debtors would like to emerge from chapter 11 keenly focused on the future. Allowing litigation overhang to remain will only cloud the Debtors' pursuit of their business objectives after the Effective Date. The Debtor Release is not only fair, equitable, and necessary to the Debtors' reorganization, but it is also appropriate under prevailing Third Circuit case law.

86. *Release by Third Parties*. In addition to the releases granted by the Debtors in Article X.B.1 of the Plan, Article X.B.2 of the Plan provides for the release of the Released Parties, their respective Related Persons, and their respective assets and properties, from any

Causes of Action, Claims and Litigation Claims held by each Non-Debtor Releasing Party[17] that does not affirmatively opt out of such release on its respective ballot (the "**Third Party Release**"). Absent the Third Party Release, the Debtors believe that the parties in interest that both negotiated for, and relied upon the prospect of the releases in negotiations, would not have committed to the result reflected in the Plan. The Third Party Release is narrowly tailored to reflect the arms'-length, good faith negotiations that resulted in the Plan and global settlement with the Prepetition Noteholders, both in the best interest of the Debtors and their estates.

87. A plan may provide for a release of third-party claims against a non-debtor from parties who submitted their ballot in favor of the Plan. *See In re Remington Outdoor Co., Inc.*, Hr'g Trans. at 72:14–25; 73:1–6 (finding the releases appropriate for (i) unimpaired claims (deemed to accept) and (ii) those claimants voting to reject the plan or abstaining from voting who failed to check the opt-out box on the ballot); *In re Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004 (finding that voting in favor of a plan of reorganization that provides for a third-party release indicates consent to the release, even without an explicit election option to accept the third-party release). Further, courts have routinely recognized that third party releases are consensual and appropriate where holders of claims or interests are provided with detailed instructions on how to opt out of the releases, as they were here, but nevertheless do not opt out, either because they abstained from voting or they voted against the plan and failed to opt out. *See In re Horsehead Holding Corp.*, Case No. 16-10287 (CSS) (Bankr. D. Del. Sep. 9, 2016) [Docket No. 1695] (confirming plan and approving third party releases by creditors who

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[17] The Plan defines a "**Non-Debtor Releasing Party**" as, collectively: "(a) the Committee and the members thereof in their capacity as such; (b) the Prepetition Credit Agreement Agent and the Releasing Prepetition Credit Agreement Lenders; (c) the DIP Credit Agreement Agent and the DIP Credit Agreement Lenders (d) the Prepetition Notes Agent and the Releasing Prepetition Noteholders; (e) the Releasing Old Emerge LP Equity Holders; (f) those Holders of General Unsecured Claims or Old Emerge LP Equity Interests that do not affirmatively opt out of the Third-Party Release as provided on their respective Ballots; and (g) each Specified Railcar Lessor (to the extent it is a Released Party)."

had consented by not opting out of the release, either by abstaining from voting or by voting against the plan without affirmatively electing to opt out); *In re EV Energy Partners*, Case No. 18-10814 (CSS) Hr'g Trans. at 212:1–25; 214:6–25 – 215:1 (finding that those claimants in classes deemed to reject received notice and an opportunity to object); *In re Southeastern Grocers, LLC*, Case No. 18-10700 (MFW) Hr'g Trans. at 37:1–25 (concluding that releases were consensual because unimpaired claimants received notice and were afforded the opportunity to file an objection to the release, thus constituting consent); *In re Remington Outdoor Co., Inc.*, Hr'g Trans. at 72:14–25; 73:1–6 (finding the releases appropriate for (i) unimpaired claims (deemed to accept) and (ii) those claimants voting to reject the plan or abstaining from voting who failed to check the opt-out box on the ballot); *see also In re TK Holdings Inc., et al.*, Case No. 17-11375 (BLS) (Bankr. D. Del. Feb. 14, 2018) [Docket No. 2050] (order confirming plan and approving third party releases by creditors who had consented by not opting out of the release, either by abstaining from voting or by voting against the plan without affirmatively electing to opt out).

88. Importantly, the Third Party Release in this case is consensual. Each of the Ballots to vote to accept or reject the Plan and the Opt-Out form specifically advise creditors and interest holders in bold type that "BY NOT CHECKING THE [OPT OUT] BOX BELOW YOU ELECT TO GRANT THE THIRD-PARTY RELEASE . . . YOU MUST AFFIRMATIVELY CHECK THE BOX BELOW IN ORDER TO OPT-OUT OF THE THIRD-PARTY RELEASE." Further, each ballot and Opt-Out form restates the Third-Party Release set forth in the Plan in its entirety. Thus, any creditor and equity holder was both clearly advised of the opportunity to vote "no" to the Third Party Release and provided with a clear opportunity to act accordingly.

Accordingly, the Debtors believe that the Third Party Release is appropriate and should be approved by this Court.

89. *Exculpation*. As noted in the Response Charts, the Debtors intend to modify the Plan to limit the exculpation in Article X.E to only estate fiduciaries and for postpetition actions and omissions. By requesting that the Court approve the exculpation in Article X.E of the Plan as modified, the Debtors are essentially asking the Court to make a finding of fact that the Exculpated Parties have participated in good faith with respect to the Chapter 11 Cases, the formulation, negotiation, or implementation of the Plan, the solicitation of acceptances of the Plan, the pursuit of Confirmation of the Plan, the Confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan.

90. The Debtors believe that the Exculpated Parties have and will continue to participate in all of the foregoing in good faith. Further, the scope of the exculpation is targeted and has no effect on liability resulting from gross negligence, actual fraud, or willful misconduct, as determined by a Final Order. Thus, the Debtors believe that the exculpation provision is consistent with applicable law and should be approved in connection with the Confirmation of the Plan.

91. Injunction. Article X.G of the Plan provides that Confirmation of the Plan shall have the effect of permanently enjoining all entities from (i) commencing or continuing any suit, action or other proceeding; (ii) enforcing, attaching, collecting, or recovering any judgment, award, decree, or order; (iii) creating, perfecting, or enforcing any lien or encumbrance; (iv) asserting a setoff or right of subrogation of any kind; or (v) commencing or continuing any action or other proceeding, in each case on account of or with respect to any claims or causes of action released, exculpated, settled, or discharged pursuant to the Plan or the Confirmation Order

against any entity released, discharged, or exculpated party under the Plan. The injunction is necessary to preserve and enforce the releases and exculpation granted by the Plan, and it is narrowly tailored to achieve that purpose.

(e) Section 1123(b)(6): Securities Law Exemptions

92. Article V.J of the Plan addresses the securities laws exemptions for the securities to be provided or issued under and in accordance with the Plan. Section 1145(a)(1) of the Bankruptcy Code provides:

> Except with respect to an entity that is an underwriter as defined in subsection (b) of this section, section 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker dealer in, a security do not apply to . . . the offer or sale under a plan of a security of the debtor, of an affiliate participating in a joint plan with the debtor, or of a successor to the debtor under the plan . . . in exchange for a claim against, interest in, or a claim for an administrative expense in the case concerning, the debtor or such affiliate.

11 U.S.C. § 1145(a)(1).

93. Each of the Debtors, the Reorganized Debtors, the Prepetition Noteholders, and their respective Affiliates is relying on section 1145(a)(1) of the Bankruptcy Code to exempt the offer and delivery of the Plan Securities from the registration requirements of the Securities Act and state securities and "blue sky" laws insofar as: (i) the securities are issued by a debtor, an affiliate of a debtor, or a successor to a debtor under a plan approved by a Bankruptcy Court; (ii) the recipients of securities hold a claim against, an interest in, or a claim for administrative expense in the case concerning the debtor or such affiliate; and (iii) the securities are issued entirely in exchange for the recipient's claim against or interest in the debtor, or are issued "principally" in such exchange and "partly" in exchange for cash or property.

94. Accordingly, such securities may be resold without registration under the Securities Act or other federal securities laws pursuant to the exemption provided by section 4(a)(1) of the Securities Act, unless the holder of such securities is an "underwriter" with respect to such securities, as that term is defined in section 1145(b) of the Bankruptcy Code (such holder, a "**Restricted Holder**"). Restricted Holders would, however, be permitted to resell such securities without registration if they are able to comply with the provisions of Rule 144 under the Securities Act, or if such securities are registered with the Securities and Exchange Commission pursuant to a registration statement or otherwise. In addition, subject to applicable law, such securities generally may be resold without registration under state securities laws pursuant to various exemptions provided by the respective laws of the several states.[18]

95. Based upon the foregoing, the Plan fully complies with the requirements of sections 1122 and 1123, as well as with all other provisions of the Bankruptcy Code, and thus satisfies the requirement of section 1129(a)(1) of the Bankruptcy Code.

2. Section 1129(a)(2): The Debtors, as Plan Proponents, Have Complied with Applicable Provisions of the Bankruptcy Code

96. 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) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 412 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 126 (1978) ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan

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[18] Notwithstanding the foregoing, Section VIII of Disclosure Statement urges any Persons who receive securities under the Plan to consult their own counsel with respect to restrictions applicable under the Securities Act and any appropriate rules and the circumstances under which securities may be sold in reliance upon any such rules.

comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Johns-Manville Corp.*, 68 B.R. at 630; *In re Toy & Sports Warehouse, Inc.*, 37 B.R. at 149. The Debtors have complied with section 1129(a)(2) of the Bankruptcy Code by distributing the Disclosure Statement and soliciting acceptances of the Plan through the Voting and Claims Agent, in accordance with the procedures approved by this Court pursuant to the Disclosure Statement Order. Furthermore, pursuant to the Disclosure Statement Order, this Court approved the content of the Disclosure Statement as containing adequate information in compliance with section 1125 of the Bankruptcy Code. Based upon the foregoing, the Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.

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

97. 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). The Third Circuit has found that good faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11. *See In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999); s*ee also In re Johns-Manville Corp.*, 843 F.2d at 649 (citing *Koelbl v. Glessing* (*In re Koelbl*), 751 F.2d 137, 139 (2d Cir. 1984) (interpreting the standard as requiring a showing that "the plan was proposed with honesty and good intentions.")). Moreover, "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied." *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *Id*.

98. The Debtors have met their good faith obligation under the Bankruptcy Code. The Plan, Plan Supplement and all documents necessary to effect the Plan were developed after months of analysis and negotiations between the Debtors and other key constituents and were proposed with the legitimate and honest purpose of maximizing the value of the Debtors' estates and effectuating a successful reorganization of the Debtors. The various arguments of the Creditors Committee to the contrary are without merit for the reasons discussed above in paragraphs 41–54.

99. Moreover, the Plan addresses all Claims against the Debtors and enables the Debtors to emerge from chapter 11 as going concern entities. Given that the Plan is the product of negotiations among the Debtors' key constituents and provides for reorganization of the Debtors' operations, it is clear that the Plan has been proposed in good faith as interpreted under the Bankruptcy Code. Additionally, the Plan will achieve a result consistent with the overall objectives and purposes of the Bankruptcy Code. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."). Inasmuch as the Plan promotes the rehabilitative objectives and purposes of the Bankruptcy Code, the Plan and the related documents have been filed in good faith and the Debtors have satisfied their obligations under section 1129(a)(3).

4. Section 1129(a)(4): The Payment for Certain Services or for Certain Costs and Expenses Is Subject to Court Approval

100. Section 1129(a)(4) of the Bankruptcy Code states 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 of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval of the Bankruptcy Court as to their reasonableness. *See In re WorldCom, Inc.*, 2003 Bankr. LEXIS 1401, at *159 (Bankr. S.D.N.Y. 2003).

101. Here, all payments made or to be made by the Debtors on account of Professional Fee Claims are subject to Bankruptcy Court approval. Pursuant to Article II.A.2 of the Plan, Professionals and other Entities asserting Professional Fee Claims must file with the Bankruptcy Court an application for final allowance of such Professional Fee Claim. Furthermore, all monthly and interim compensation of Professionals by the Debtors prior to final allowance of such Professional Fee Claims have been or will be approved by the Court and paid in accordance with the procedures established by the *Order under 11 U.S.C. §§ 105(a) and 331, Fed. R. Bankr. P. 2016(a) and Del. Bankr. L.R. 2016-2 Establishing Procedures for Interim Compensation and Reimbursement of Professionals* [Docket No. 155].

5. Section 1129(a)(5): Necessary Information Regarding Directors and Officers of the Debtors Under the Plan Has Been Disclosed

102. Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtor; that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy, and that there be disclosure of the identity and compensation of any insiders to be retained or employed by the reorganized debtor.

103. The members of the New Board are expected to be identified by the Prepetition Noteholders at or prior to the Confirmation Hearing. In addition, to the extent applicable, the

Debtors will disclose the identity and affiliations of any Person proposed to serve on the New Board or as an officer of each of the Reorganized Debtors, and, to the extent such Person is an insider other than by virtue of being a director, managing member or an officer, will disclose the nature of any compensation for such Person. Each such director, manager, managing member and/or officer shall serve from and after the Effective Date pursuant to applicable law and the terms of the Amended/New Organizational Documents and the other constituent and organizational documents of the applicable Reorganized Debtors. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

6. Section 1129(a)(6) of the Bankruptcy Code Is Not Applicable

104. Section 1129(a)(6) of the Bankruptcy Code requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). Section 1129(a)(6) is inapplicable because after confirmation of the Plan, the Debtors' businesses will not involve rates established or approved by, or otherwise subject to, any governmental regulatory commission.

7. Section 1129(a)(7): The Plan Is in the Best Interests of Creditors and Equity Interest Holders

105. Section 1129(a)(7) of the Bankruptcy Code is often referred to as the "best interests test" or the "liquidation test," and provides, in relevant part:

> With respect to each impaired class of claims or interests –
>
> (A) each holder of a claim or interest of such class –
>
> (i) has accepted the plan; or
>
> (ii) 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 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).

106. The best interests test focuses on individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 (1999). Under the best interests test, the court "must find that each [non-accepting] creditor will receive or retain value that is not less than the amount he would receive if the debtor were liquidated [under chapter 7 of the Bankruptcy Code]." *Id.* at 442; *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 228 (1996). As section 1129(a)(7) makes clear, the liquidation analysis applies only to non-accepting impaired claims or equity interests.

107. As described more fully in the Gaston Declaration to be filed, the Debtors completed their Liquidation Analysis after extensive due diligence and it includes a detailed description of the assumptions, analysis, and result of a hypothetical chapter 7 liquidation of the Debtors. The Liquidation Analysis, including a complete description of the process and the results of the Liquidation Analysis, is set forth in Exhibit D to the Disclosure Statement.

108. As stated in the Liquidation Analysis, subject to the assumptions and limitations described therein, the proceeds from a hypothetical chapter 7 liquidation would yield between approximately $57.8 million to $82.7 million in net proceeds (after taking into account liquidation expenses). Thus, as set forth in the Liquidation Analysis, after subtracting liquidation expenses, the proceeds from a hypothetical chapter 7 liquidation would provide each impaired class with the estimated recoveries set forth in the table below. As shown therein, none of these estimated chapter 7 recoveries is more than the estimated recoveries as set forth in the Plan.

Class	Claim	Low End Chapter 7 Recovery	High End Chapter 7 Recovery	Plan Recovery
1	Other Priority Claims	0%	0%	100%
2	Other Secured Claims	2.5%	22.9%	100%
3	Secured Tax Claims	100%	100%	100%
4	Prepetition Credit Agreement Claims	0%	27.1%	100%
5	Prepetition Notes Claims	0%	0%	38-55%
6	General Unsecured Claims	0%	0%	0.4-1.3% if Plan accepted 0% if Plan rejected
7	Intercompany Claims	0%	0%	100%
8	Old Emerge GP Equity Interests	0%	0%	0%
9	Old Emerge LP Equity Interests	0%	0%	0%
10	Old Affiliate Equity Interests	0%	0%	100%

109. As demonstrated by the foregoing estimates, if the Chapter 11 Cases were converted to cases under chapter 7 of the Bankruptcy Code, the value that creditors would recover would significantly diminish (except, of course, for those classes receiving no distribution under the Plan).

110. Moreover, for the reasons set forth above in paragraphs 28–33, the arguments of the Creditors Committee are without merit, with the most obvious reason being they totally ignore the approximately $30 million in adequate protection claims that would need to be satisfied in full before Class 6 creditors could receive any recovery under a chapter 7 liquidation. The Debtors, therefore, submit that the best interests test established pursuant to section 1129(a)(7) of the Bankruptcy Code is satisfied.

8. Section 1129(a)(8): Acceptance by All Impaired Classes

111. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept the plan or not be impaired by a plan. Class 5 (Prepetition Notes Claims) is an Impaired Class of Claims that was entitled to vote on, and has accepted, the Plan. Class 6 (General Unsecured Claims) is an Impaired Class of Claims that was entitled to vote on, but has rejected, the Plan. In addition, Class 8 (Old Emerge GP Equity Interests) and Class 9 (Old Emerge LP Equity Interests) are Impaired Classes of Claims that were deemed to reject the Plan. Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 3 (Secured Tax Claims), Class 4 (Prepetition Credit Agreement Claims), Class 7 (Intercompany Claims), and Class 10 (Old Affiliate Equity Interests) are unimpaired and deemed to accept the Plan. The Plan, therefore, does not satisfy section 1129(a)(8) of the Bankruptcy Code with respect to such rejecting Classes 6, 8, and 9. Nevertheless, the Plan is confirmable because, as discussed below and in the Response Charts and Confirmation Declarations to be filed, the Plan satisfies section 1129(b) of the Bankruptcy Code with respect to such the rejecting Classes.

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

112. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) of the Bankruptcy Code requires a plan to satisfy administrative claims, priority unsecured claims and priority tax claims in full in cash. The Plan satisfies these requirements. *See* Plan, Art. II.A & B, Art. III.B.1 & B.3.

10. Section 1129(a)(10): The Plan Has Been Accepted by at Least One Impaired Class That Is Entitled To Vote

113. Section 1129(a)(10) of the Bankruptcy Code is an alternative requirement to the section 1129(a)(8) requirement that each class of claims or interests must either accept the plan or be unimpaired under a plan. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, excluding acceptance by any insider. 11 U.S.C. § 1129(a)(10). Here, the Debtors have met this standard because the Holders of Prepetition Notes Claims (Class 5) have voted to accept the Plan, as determined without including any acceptance of the Plan by any insider holding a Claim in those Classes. *See* Voting Report Ex. A. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

11. Section 1129(a)(11): The Plan Is Feasible

114. Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition to confirmation, the Bankruptcy Court determine that a plan is feasible. Specifically, the Bankruptcy Court must determine 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).

115. The statute requires the Bankruptcy Court to determine whether a plan is workable and has a reasonable likelihood of success. *See In re Armstrong World Indus., Inc.*, 348 B.R. 136, 167 (D. Del. 2006); *In re NII Holdings*, 288 B.R. 356, 364 (Bankr. D. Del. 2002); *In re The Leslie Fay Cos*., 207 B.R. 764, 788 (Bankr. S.D.N.Y. 1997).

116. To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success. *See Internal Revenue Serv. v. Kaplan* (*In re Kaplan*), 104 F.3d 589, 597 (3d Cir. 1997); *United States v. Energy Res. Co*., *Inc.* 495 U.S. 545, 549 (1990); *see also In re U.S. Truck Co., Inc.,* 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd*, 800 F.2d 581 (6th Cir. 1986). Rather, a debtor must provide only a reasonable assurance of success. *Clarkson v. Cooke Sales & Serv. Co.* (*In re Clarkson*), 767 F.2d 417, 420 (8th Cir. 1985) ("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 under the facts.'") (citing *Chase Manhattan Mortg. & Realty Trust v. Bergman* (*In re Bergman*), 585 F.2d 1171, 1179 (2d Cir. 1978)); *In re Texaco, Inc*., 84 B.R. 893, 910 (Bankr. S.D.N.Y. 1988) ("[a]ll that is required is that there be a reasonable assurance of commercial viability").

117. While the debtor bears the burden of proving plan feasibility, the applicable standard is by a preponderance of the evidence, which means presenting proof that a given fact is "more likely than not." *See In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 801 (5th Cir. 1997); *In re Briscoe Enters., Ltd.*, 994 F.2d at 1164; *CoreStates Bank, N.A. v. United Chem. Tech., Inc*., 202 B.R. 33, 45 (E.D. Pa. 1996). Further, a number of courts have held that this constitutes a "relatively low threshold of proof." *In re Mayer Pollack Steel Corp.*, 174 B.R. 414, 423 (Bankr. E.D. Pa. 1994) (stating that the debtors "have established that they meet the requisite

low threshold of support for the plan as a viable undertaking"); *see also Briscoe Enters.* Ltd., 944 F.2d at 1116 (upholding the bankruptcy court's ruling that reorganization that had only a "marginal prospect of success" was feasible because only "a reasonable assurance of commercial viability" was required).

118. Courts have also made clear that "speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds." *See WorldCom*, 2003 Bankr. LEXIS 1401, at *170; *see also In re Adelphia Business Solutions, Inc.*, 341 B.R. 415, 421 (Bankr. S.D.N.Y. 2003) ("However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds.").

119. Applying the foregoing standards of feasibility, courts have identified the following factors as probative:

(a) the adequacy of the capital structure;

(b) the earning power of the business;

(c) economic conditions;

(d) the ability of management;

(e) the probability of the continuation of the same management;

(f) the availability of prospective credit, both capital and trade;

(g) the adequacy of funds for equipment replacements;

(h) the provisions for adequate working capital; and

(i) any other related matters which will determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

In re Leslie Fay, 207 B.R. at 789; *see also In re Machne Menachem, Inc.*, 371 B.R. 63, 71 (Bankr. M.D. Pa. 2006). The foregoing list is neither exhaustive nor exclusive. *In re Drexel Burnham Lambert Group Inc*., 138 B.R. 723, 763 (Bankr. S.D.N.Y. 1992).

120. Applying the foregoing legal standards, the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code. In this regard, the Debtors and their advisors have analyzed the ability of the Reorganized Debtors to meet their obligations under the Plan and to retain sufficient liquidity and capital resources to conduct their businesses based on the Financial Projections, attached as Exhibit C to the Disclosure Statement.

121. While the Bankruptcy Court must independently determine the feasibility of the Plan, it should be noted that the Plan was unanimously supported by the Prepetition Noteholders which are sophisticated financial institutions or investment funds that meticulously evaluated, and by their vote endorsed, the likelihood of the Plan's success as the future owners of the Reorganized Debtors. In general, as illustrated by the Financial Projections and as to be discussed more fully in the Dunayer Declaration, the Debtors believe that the Plan is feasible and satisfies the requirement of section 1129(a)(11) of the Bankruptcy Code.

12. Section 1129(a)(12): The Plan Provides for Full Payment of Statutory Fees

122. 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." 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses. 11 U.S.C. § 507 (a)(1). In accordance with these provisions, Article XII.B of the Plan provides that all fees payable pursuant to section 1930 of title 28 of the United States Code shall be paid when due.

All such fees payable after the Effective Date shall be paid in the ordinary course of business. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

13. Sections 1129(a)(13) through 1129(a)(16) Do Not Apply

123. Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(13). No retiree benefits existed in the Chapter 11 Cases. As such, the Debtors are not obligated to pay any such benefits, and Section 1129(a)(13) is not applicable. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations, and, as such, this section of the Bankruptcy Code does not apply. Section 1129(a)(15) applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). None of the Debtors is an "individual." Finally, section 1129(a)(16) of the Bankruptcy Code provides that property transfers by a corporation or trust that is not a moneyed, business or commercial corporation or trust be made in accordance with applicable provisions of non-bankruptcy law; however, as the Debtors are moneyed, business, or commercial corporations, this section is not applicable.

B. Section 1129(b): Confirmation of the Plan Over Nonacceptance of Impaired Classes

124. Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances in which the plan is not accepted by all impaired classes of claims and equity interests. This mechanism is known colloquially as "cram down." Section 1129(b) provides in pertinent part:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of

> the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

125. Thus, under section 1129(b) of the Bankruptcy Code, the Bankruptcy Court may "cram down" a plan over rejection by impaired classes of claims or equity interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes. *See, e.g., In re Johns-Manville Corp.*, 843 F.2d at 650.

126. Class 6 (General Unsecured Claims) is Impaired under the Plan and have rejected the Plan. Similarly, Class 8 (Old Emerge GP Equity Interests) and Class 9 (Old Emerge LP Equity Interests) are Impaired under the Plan and are deemed to reject the Plan. The Plan may nonetheless be confirmed over the rejection by such Classes pursuant to section 1129(b) of the Bankruptcy Code because the Plan does not discriminate unfairly and is fair and equitable with respect to all non-accepting Impaired Classes. The Plan is confirmable because the Debtors have satisfied the requirements of section 1129(a)(10) and 1129(b) of the Bankruptcy Code: at least one Impaired Class of Claims has accepted the Plan (Class 5); and the Debtors have met the requirements to "cram down" as to Classes 6, 8, and 9.

1. The Plan Does Not Discriminate Unfairly with Respect to Classes 6, 8, and 9

127. The unfair discrimination standard of section 1129(b) of the Bankruptcy Code ensures that a 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. *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006); *In re Barney and Carey Co.*, 170 B.R. 17, 25 (Bankr. D. Mass 1994). Section 1129(b)(1) does not prohibit discrimination between classes; it prohibits only discrimination that is unfair. *In re 11,111, Inc.*,

117 B.R. 471, 478 (Bankr. D. Minn. 1990). The weight of judicial authority holds that 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. *See In re Buttonwood Partners, Ltd.*, 111 B.R. 57 (Bankr. S.D.N.Y. 1990). Accordingly, as between two classes of claims or two classes of equity interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests, *see, e.g.*, *Johns-Manville Corp.*, 68 B.R. at 636, or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment. *See, e.g.*, *Buttonwood Partners*, 111 B.R. at 63; *In re Rivera Echevarria*, 129 B.R. 11, 13 (Bankr. D.P.R. 1991).

128. In this case, the Plan's treatment of Class 6 General Unsecured Claims is proper. There is no Class of Claims that is similarly situated to Class 6 because the only Classes of Claims are secured or compromise Class of structurally subordinated Equity. Thus, the Plan does not unfairly discriminate with respect to the Impaired Class who voted to reject the Plan, and the Plan satisfies the "unfair discrimination" prong of the cram down test.

129. Further, the Plan's treatment of Class 8 Old Emerge GP Equity Interests and Class 9 Old Emerge LP Equity Interests is proper. There is no Class of Equity Interests that is similarly situated to Classes 8 and 9 because the only other class of Equity Interests (Class 10 – Old Affiliate Equity Interests in any Emerge LP Subsidiary) is structurally senior to the Classes 8 and 9 Equity Interests. Thus, the Plan does not unfairly discriminate with respect to the Impaired Classes who are deemed to reject the Plan, and the Plan satisfies the "unfair discrimination" prong of the test.

2. The Plan Is Fair and Equitable with Respect to Classes 6, 8, and 9

130. Section 1129(b)(2)(B)(ii) and section 1129(b)(2)(C)(ii) of the Bankruptcy Code provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or

interests if the plan provides that the holder of any claim or interest that is junior to the claims or interests of such class will not receive or retain any property under the plan on account of such junior claim or interest. *See* 11 U.S.C. § 1129(b)(2)(B)(ii), (C)(ii). This central tenet of bankruptcy law is a codification of established law known as the "absolute priority rule." Sections 1129(b)(2)(B)(ii) and C(ii) require that if the holders of claims in a particular class receive less than full value for their claims, no holders of claims or interests in a junior class may receive property under the plan on account of such junior claim or interest. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988). The corollary of the absolute priority rule is that senior classes cannot receive more than a 100% recovery for their claims. *See In re Exide Techs*., 303 B.R. 48, 61 (Bankr. D. Del. 2003).

131. As set forth above in paragraphs 25–27 and to be described in the Confirmation Declarations, the Plan satisfies the absolute priority rule with respect to Classes 6, 8, and 9 because the holder of any interest that is junior to the interests of such class will not receive or retain any property under the Plan on account of such junior interest,[19] and no holder of a Claim senior to Classes 6, 8, and 9 will receive more than full value on account of its Claim. The Debtors will establish these matters at the Confirmation Hearing.

132. For these reasons, the Debtors believe that the Plan satisfies the "fair and equitable" requirement of section 1129(b) of the Bankruptcy Code.

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[19] The Debtors note that Class 10 (Old Affiliate Equity Interests) is junior to Class 6 Claims, but are being preserved. This is merely a technical preservation of Old Affiliate Equity Interests that is solely a means to preserve the corporate and organizational structure of the Debtors. It is being done in order to avoid the unnecessary cost of reconstituting that exact same structure in connection with the consummation of the Plan. *See In re Ion Media Networks, Inc.*, 419 B.R. 585, 601 (Bankr. S.D.N.Y. 2009). The Plan's treatment of these Old Affiliate Equity Interests has no economic substance and does not enable any junior creditor or interest holder to retain or recover any property of value under the Plan.

CONCLUSION

For the foregoing reasons, the Debtors submit that the Plan fully satisfies all applicable requirements of the Bankruptcy Code and respectfully requests that the Bankruptcy Court enter an order confirming the Plan and granting such other and further relief as is just and proper.

Dated: October 24, 2019
Wilmington, Delaware

/s/ John H. Knight

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Exhibit A

Response Chart – Creditors Committee

EXHIBIT A

CREDITORS COMMITTEE OBJECTION: SUMMARY AND DEBTORS' RESPONSES[1]

Objection	Debtors' Response
A. THE PLAN IS "FAIR AND EQUITABLE" UNDER SECTION 1129(B)(1) OF THE BANKRUPTCY CODE	
1. The Plan is not fair and equitable because the Class 5 Prepetition Noteholders are receiving more than a 100% recovery under the Plan. *See* Objection, ¶¶ 6, 53–58.	This is false. The Plan is fair and equitable because the Class 5 Prepetition Noteholders are receiving approximately a 47% recovery at the mid-point, which is substantially less than payment in full. The Debtors will establish valuation at the Confirmation Hearing and pursuant to the Dunayer Declaration. *See* Confirmation Brief, ¶¶ 25–27, 130-131.
2. Houlihan Lokey's valuation analysis is premised upon many inherent flaws and their valuation conclusions are unreliable. *See* Objection, ¶¶ 4 & 57.	This is false. As will be proven at the Confirmation Hearing, the Houlihan Lokey valuation analysis is reliable and is based on assumptions and inputs that are reasonable and appropriate based on the facts of these Chapter 11 Cases.

[1] Capitalized terms used and not otherwise defined herein shall have the meaning ascribed to such terms in the relevant Plan Objection or the Confirmation Brief, as applicable. For the avoidance of doubt, the Debtors reserve the right to respond to any and all objections asserted in the Objections in connection with confirmation of the Plan, whether or not argued in the Confirmation Brief or listed in this summary chart.

Objection	Debtors' Response
B. THE PLAN SATISFIES THE "BEST INTEREST OF CREDITORS" TEST UNDER SECTION 1129(A)(7) OF THE BANKRUPTCY CODE	
1. The Plan fails this test because unsecured creditors would receive materially larger recoveries in a liquidation under chapter 7 than they would under the Plan. *See* Objection, ¶ 41.	This is false. As stated in the liquidation analysis attached to the Disclosure Statement and as will be set forth in the Gaston Declaration, Holders of Class 6 General Unsecured Claims would not receive any recovery or property on account of such claims in a chapter 7 liquidation.
2. Any unencumbered assets rightfully belong to general unsecured creditors and should not be given to HPS under the Plan. *See* Objection, ¶¶ 1, 2, 10 & 42.	This is incorrect as a matter of law because unencumbered assets belong to the Estate, not to general unsecured creditors. And to the extent any unencumbered assets exist, the proceeds thereof must first be used to pay for the administration of these Chapter 11 Cases, including adequate protection claims of the Prepetition Noteholders under the Final DIP Order which the Debtors estimate to be approximately $30 million. *See In re Molycorp, Inc.*, 562 B.R. 67, 75 (Bankr. D. Del. 2017) (stating that "as a general rule, administrative expenses must be satisfied from assets of the estate not subject to liens. A secured creditor's interest in its collateral is a substantive property right created by non-bankruptcy law, which may not be substantially impaired when bankruptcy intervenes."). *See* Confirmation Brief, ¶¶ 31 & 33.
3. HPS does not have a valid and perfected lien on the Debtors' real property and partially developed plant facility located in Kingfisher County, Oklahoma (the "**Kingfisher Property**"), and such property has material value. *See* Objection, ¶¶ 43–45.	Even assuming the Kingfisher Property is an Unencumbered Asset, the Debtors will show at the Confirmation Hearing that is has minimal value as of the date hereof since, among other things, the Debtors' sand facilities located there still require several months and millions of dollars of capital expenditures to complete construction, and the Debtors neither have current customers nor any binding contracts for the purchase of sand at the Kingfisher Property. Moreover, even if the Kingfisher Property had more than nominal value (and ignoring the potential $8.0 million of mechanics liens filed against it), the

Objection	Debtors' Response
	value of the Kingfisher Property is nowhere near the approximately $30 million of adequate protection liens and claims held by HPS against the Kingfisher Property pursuant to the Final DIP Order [Docket No. 209, ¶ 18]. *See* Confirmation Brief, ¶¶ 30–31.
4. Houlihan Lokey's valuation of the Kingfisher Property is clearly flawed because the Debtors received an unsolicited offer to purchase it for approximately $11.2 million (inclusive of a credit bid of the alleged mechanics' liens), which is $2.2 million more than the high-end of Houlihan's Lokey's valuation. *See* Objection, ¶ 45.	This purchase offer does not establish the market value of anything since it is not a binding offer (or even close to one). Among other things, it is expressly conditioned on due diligence and documentation and contemplates the acquisition of an extensive list of assets that go well beyond the unencumbered Kingfisher Property. *See* Confirmation Brief, ¶ 32.
5. HPS does not have a valid and perfected lien on any payments under the Debtors' business interruption insurance related to the June 21, 2019 berm breach that occurred at the Debtors' San Antonio, Texas facility (the "**Insurance Payments**"). *See* Objection, ¶¶ 46–48.	This is false. As will be set forth in detail in the Debtors' objection to the Standing Motion, the Prepetition Noteholders unquestionably have valid and perfected prepetition liens in and against the Debtors' business interruption insurance and any payments made thereunder, including in connection with the June 21, 2019 berm breach. Thus, the Insurance Payments constitute the collateral of the Prepetition Noteholders and are not unencumbered.

Objection	Debtors' Response
C. THE PLAN IS PROPOSED IN GOOD FAITH UNDER SECTION 1129(A)(3) OF THE BANKRUPTCY CODE	
1. The Debtors' failure to conduct a marketing process for their assets proves they are not maximizing the value of their estates, which shows a lack of good faith. *See* Objection, ¶¶ 60–62.	A marketing process is not required, and the Creditors Committee does not cite to a single case to the contrary. Moreover, Section 1123(b)(4) of the Bankruptcy Code states that asset sales are only a permissive term of a chapter 11 plan rather than a mandatory term under Section 1123(a) of the Bankruptcy Code. *See* Confirmation Brief, ¶¶ 42–44, 97–99.
2. The process through which the Restructuring Support Agreement and the Plan were negotiated and proposed reflects anything but fundamental fairness in dealing with creditors. *See* Objection, ¶ 64.	Notwithstanding the rhetoric of the Creditors Committee, the Restructuring Support Agreement and the Plan are both typical and customary in distressed scenarios by contemplating (i) a debt-for-equity conversion by the Debtors' vastly under-secured lenders and (ii) consensual global releases that are typical and standard in this district (in particular by excluding causes of action arising from willful misconduct, actual fraud, or gross negligence). *See* Confirmation Brief, ¶¶ 4, 45–47.
3. The Plan is not proposed in good faith because it conditions unsecured creditors' recovery upon acceptance by that class while also proposing a recovery to equity holders. *See* Objection, ¶ 65	Both provisions are perfectly in accord with bankruptcy law. First, it has been held in this district that chapter 11 plans may propose different treatment to a class depending on whether it is an accepting or rejecting class. *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999) ("[t]here is no prohibition in the Code against a Plan proponent offering different treatment to a class depending on whether it votes to accept or reject the Plan.") (citing *In re Drexel Burnham Lambert Group, Inc.*, 140 B.R. 347, 350 (Bankr. S.D.N.Y. 1992). Second, the proposed nominal recovery to Class 9 equityholders under the Plan was expressly conditioned upon and subject to Class 6 creditors voting to accept the Plan as required by the "absolute priority" rule. The Debtors did not attempt to "gift" any recovery to equity holders around the rejection vote

Objection	Debtors' Response
	of their creditor classes. As Class 6 creditors have now voted to reject the Plan, the Class 9 equityholders will receive no property or distributions under the Plan on account of such interests, exactly as required by applicable law. *See* Confirmation Brief, ¶¶ 48–49.
4. HPS is circumventing this Court by giving releases after the Effective Date, even if not approved by this Court. *See* Objection, ¶ 66.	This argument is without merit as detailed in the Confirmation Brief. But most importantly, HPS is not engaging in an end-run around this Court. If the Court determines not to approve the Debtor Releases, then they will not be granted during these Chapter 11 Cases. The Court is not opining on whether releases given after the Effective Date are appropriate or approving it in any way. Rather, the New Board will make that decision independent of the Plan. Moreover, courts in this district have previously approved restructuring support agreements that have contained nearly identical provisions as contained here. *See In re Panda Temple Power, LLC*, Case No. 17-10839 (LSS) (Bankr. D. Del. Jan. 23, 2018) [Docket No. 559 & Docket No. 224, Exhibit B]; *In re Chaparral Energy, Inc.*, Case No. 16-11144 (LSS) (Bankr. D. Del. Dec. 14, 2016) [Docket No. 652, Exhibit 1]. Rather than being controversial, courts understand that sophisticated parties are free to contract with each other, including with respect to mutual releases to be given after the Effective Date. *See* Confirmation Brief, ¶¶ 50–54.
D. THE DEBTOR RELEASES ARE APPROPRIATE	
1. The Debtor Release is overly broad and impermissible. *See* Objection, ¶¶ 69–71.	The terms and scope of the Debtor Release contained in Article X.B.1 of the Plan (with its exclusions for gross negligence, actual fraud, and willful misconduct) are typical, customary, and routinely approved by courts in this district. *See In re Claire's Stores, Inc.*, Case No. 18-10584 (MFW) (Bankr. D. Del. Sept. 21, 2018) [Docket No. 1040]; *In re Paragon Offshore PLC*, Case No. 16-10386 (CSS) [Docket No. 1614]; *In re Chaparral Energy, Inc.*, Case No. 16-11144 (LSS) (Bankr. D. Del. Mar. 10, 2017) [Docket No. 958];

Objection	Debtors' Response
	In re Pacific Sunwear of California, Inc., Case No. 16-10882 (LSS) (Bankr. D. Del. Sept. 6, 2016) [Docket No. 861]; *In re Verso Corporation*, Case No. 16-10163 (KG) (Bankr. D. Del. June 23, 2016) [Docket No. 1223]. *See* Confirmation Brief, ¶¶ 34–40, 79–85.
2. The Debtor Release applies to the June 2019 berm breach. Mr. Davis testified incorrectly that it was excluded from the release. *See* Objection, ¶ 71.	The plain language of the Debtor Release contained in Article X.B.1 of the Plan expressly excludes "any Causes of Action relating to the MSHA Action (other than against a member of the Special Restructuring Committee)". And "MSHA Action" is, in turn, defined in Article I.C of the Plan as "that certain mud retaining pond wall breach, which occurred on June 21, 2019 at the San Antonio, Texas facility of the Debtors, the related 103(k) order issued by the Mine Safety and Health Administration affecting the entire mine area at the San Antonio Texas facility, and all related matters affecting the condition of the mine at the San Antonio Texas Facility." *See* Confirmation Brief, ¶ 36.
3. The Special Restructuring Committee did not conduct an investigation to determine whether the Debtor Release was appropriate. *See* Objection, ¶ 71.	As will be detailed in the Transier Declaration, the Debtors do not believe that any valid claims or causes of action exist against any of the Released Parties (especially by excluding causes of action related to the berm breach and arising from willful misconduct, actual fraud, or gross negligence), and the terms and scope of the Debtor Release are beyond customary in consensual restructurings. Moreover, despite the extensive and wide-ranging investigation conducted by the Creditors Committee, they still have yet to identify with any particularity a single valuable claim or cause of action that is actually being released by the Debtors under the Plan. *See* Confirmation Brief, ¶¶ 36 & 83.
4. Neither HPS nor Insight Equity provided value in exchange for the Debtor Release. *See* Objection, ¶¶ 72–73.	This is false. HPS and the Prepetition Noteholders have clearly provided valuable consideration in exchange for the Debtor Releases by, among other things, providing up to $35 million of DIP loan financing, committing to

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Objection	Debtors' Response
	provide the $100 million exit loan facility, permitting the use of their cash collateral, and converting their Prepetition Note Claims into equity. Likewise, Insight Equity has also provided valuable consideration in exchange for the Debtor Releases by, among other things, foregoing potential litigation and other control rights it has as sole owner of the General Partner. This cooperation has, in turn, helped to greatly minimize the costs and duration of these Chapter 11 Cases. *See* Confirmation Brief, ¶ 37.
5. The Debtor Release should not apply to former directors and officers. *See* Objection, ¶ 68.	The Debtor Release is expressly limited to former directors and officers to those acting in such capacity at any time "on or after the date of the Restructuring Support Agreement". Thus, it necessarily means that each of the Released Parties has participated in the consensual restructuring process, contributed to the Restructuring Transactions consistent with the Restructuring Support Agreement, and/or otherwise provided value to the Estates by, for example, assisting in the consensual prosecution of these Chapter 11 Cases or confirmation or consummation of the Plan. *See* Confirmation Brief, ¶¶ 38 & 84.
6. The list of "Related Persons" that are included in the Debtor Release is too broad. *See* Objection, ¶ 68.	As noted above, the terms and scope of the Debtor Release contained in Article X.B.1 of the Plan are typical, customary, and routinely approved by courts in this district. And if the Debtor Release did not include the "Related Persons", then the release itself would be almost meaningless as parties could easily circumvent the release by simply litigating with related affiliates, subsidiaries, members, officers or directors. *See* Confirmation Brief, ¶¶ 38 & 84.

Objection	Debtors' Response
E. THE THIRD PARTY RELEASES ARE CONSENSUAL	
1. The third party release is non-consensual because creditors are required to affirmatively opt out of the third party release. *See* Objection, ¶ 80.	The third party release is fully consensual because each creditor is free to opt out in its sole and absolute discretion (and it also contains exclusions for any Causes of Action arising from willful misconduct, actual fraud, or gross negligence regardless of the opt out). Other courts in this district have approved similar opt out mechanisms for debtors. *See* Confirmation Brief, ¶¶ 86–88.
2. Creditors have no incentive to pay postage to vote on the Plan, let alone opt-out of the Third Party Releases. *See* Objection, ¶ 80.	The Debtors' claims agent provided pre-paid business reply envelopes to Class 6 creditors so they were not required to pay for postage.
F. ADDITIONAL CONFIRMATION OBJECTIONS	
1. The Plan exculpation is improper because it applies to non-estate fiduciaries and is not limited to postpetitipon acts only. *See* Objection, ¶ 83-84.	The Debtors will propose clarifying language to the Plan regarding these matters. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.
2. Avoidance Actions should not be pursued for the exclusive benefit of a secured creditor. Accordingly, such actions should be transferred to a trust and preserved for the benefit of unsecured creditors. *See* Objection, ¶ 86.	Avoidance Actions belong to the Debtors' estates (not general unsecured creditors) and Section 1123(b)(3)(B) of the Bankruptcy Code expressly permits a chapter 11 a plan to retain such actions. Moreover, to the extent any unencumbered assets exist, the proceeds thereof must first be used to pay for the administration of these Chapter 11 Cases (even though proceeds of avoidance actions are excluded from the adequate protection claims of the Prepetition Noteholders). *See In re Molycorp, Inc.*, 562 B.R. 67, 75 (Bankr. D. Del. 2017) (stating that "as a general rule, administrative expenses must be satisfied from assets of the estate not subject to liens."). Thus, the avoidance actions do not belong to Class 6 General

Objection	Debtors' Response
	Unsecured Creditors.
3. The Plan should provide that, notwithstanding the Committee's dissolution, the Committee shall continue to exist and be compensated for: (i) fees and expenses incurred in connection with requests for payment of Professional Fee Claims and reimbursement of expenses of members of the Committee; and (ii) any appeals of the Confirmation Order or other appeal to which the Committee is a part. *See* Objection, ¶ 86.	This is not required. The Reorganized Debtors and the Prepetition Noteholders are not required to fund the fees and expenses of the Creditors Committee incurred after the Effective Date.
4. The Committee submits that the Debtors should disclose the identity and affiliations (and compensation, if appropriate) of all new Board Members at or prior to the Confirmation Hearing. *See* Objection, ¶ 86.	The Debtors expect that the Prepetition Noteholders will make sure disclosure at or prior to the Confirmation Hearing.

Exhibit B

Response Chart – Other Confirmation Objections

EXHIBIT B

OTHER PLAN OBJECTIONS: SUMMARY AND DEBTORS' RESPONSES[1]

Group 1: Other Secured Claims & Secured Tax Claims

Objection	Debtors' Response
A. Pownall Services (objection filed, Docket No. 466)	
1. Pownall Services is a Holder of an Other Secured Claim in Class 2. Although the Debtors agree that HPS does not have a prepetition mortgage lien on the Kingfisher real estate, they both filed answers in the Pownall adversary proceeding generally denying Pownall's request for a declaratory judgment. If this issue is not resolved prior to confirmation, Pownall will be prepared to ask the Court to rule on this issue at the confirmation hearing. *See* Objection, ¶¶ 1, 2 & 14.	While the Debtors agree that HPS does not have a prepetition mortgage lien on the Kingfisher real estate, that does not mean that the alleged claims and liens of Pownall Services (and other third parties) are valid, allowed and perfected. The allowance, priority, and validity of the claims and liens of Pownall Services are distinct from plan confirmation and should instead be determined as part of the Pownall adversary proceeding or in connection with the normal claims resolution process, which routinely occurs after plan confirmation.
2. The Debtors will likely argue that the value of the Kingfisher property is substantially less than the $11.2M in face amount of mechanics liens filed against the property. *See* Objection, ¶¶ 3 & 12.	The Debtors may dispute whether the Kingfisher property is worth the face amount of mechanics liens filed against the property and that deficiency claims exist pursuant to Section 506(a) of the Bankruptcy Code. To the extent applicable, the Debtors will establish valuation of the Kingfisher property after confirmation of the Plan.

[1] Capitalized terms used and not otherwise defined herein shall have the meaning ascribed to such terms in the relevant Plan Objection or the Confirmation Brief, as applicable. For the avoidance of doubt, the Debtors reserve the right to respond to any and all objections asserted in the Objections in connection with confirmation of the Plan, whether or not argued in the Confirmation Brief or listed in this summary chart.

Objection	Debtors' Response
3. A low valuation of the Kingfisher property is improper because the recent purchase offer by Yansa Silica, LLC (an affiliate of Pownall Services) in the amount of $11.2M ($1M cash, plus $10.2M credit bid) establishes the market value of the Kingfisher property. *See* Objection, ¶¶ 3, 13, 16–18.	The purchase offer by Yansa Silica does not establish the market value of anything since it is not a binding offer (or even close to one). Among other things, it is expressly conditioned on due diligence and documentation. *See* Objection, Exhibit A, ¶¶ 1, 3 & 4 ("this letter is not intended to create or constitute a legally binding obligation between the parties"). Moreover, even if it were a binding offer, it still would not establish the value of the Kingfisher property because the offer contemplates the acquisition of an extensive list of assets beyond those subject to any alleged mechanic lien. See Objection, Exhibit A, ¶ 1 (the term "Assets" includes equipment, vehicles, inventories, signage, licenses, permits, computer software and hardware, telephone numbers, email addresses, websites, accounts and other receivables, documents, records, fixtures, supplies, goodwill, customer lists, trademarks and tradenames, trade secrets, know-how and other intellectual property, and certain contract rights and leases).
B. RB Scott Company (objection filed, Docket No. 468) – joinder to objection of Pownall Services	
1. RBS is a Holder of an Other Secured Claim in Class 2. For the reasons set forth in the Pownall Services objection (which RBS joins), RBS submits that the Plan should not be confirmed. The credit bid offer by Yansa Silica decisively rejects the valuation asserted by the Debtors, and no plan should be confirmed that does not compensate Other Secured Claims at least at the level of what would have been achieved through such credit bid. *See* Objection, ¶ 12.	For the reasons set forth above as to Pownall Services, the purchase offer by Yansa Silica does not establish the market value of anything since it is not a binding offer and includes material assets in addition to the Kingfisher property. Moreover, unless the applicable creditor agrees otherwise, Holders of Allowed Other Secured Claims in Class 2 will get paid in full in cash or the return of their respective collateral, which is all they are entitled to under applicable law. *See* Plan, Article III.B.2.b.

Objection	Debtors' Response
2. The Debtors did not comply with the Disclosure Statement Order because RBS did not receive the proper ballot for its potential unsecured deficiency claim in Class 6. *See* Objection, ¶ 13.	This argument is without merit. When dealing with potentially under-secured claims, it is typical to provide the general unsecured claim ballot after the deficiency claim is determined by the Court or agreed to by the parties. Regardless, Class 6 Claims voted to reject the Plan as a class so this argument is moot.
C. B & B Electric (objection filed, Docket No. 470) - joinder to objection of RB Scott Company	
1. B&B Electric is a Holder of an Other Secured Claim in Class 2. The Debtors did not comply with the Disclosure Statement Order because B & B Electric did not receive the proper ballot for its potential unsecured deficiency claim in Class 6. *See* Objection, ¶ 7.	This argument is without merit for the same reasons as set forth above for RB Scott Company.
D. Market and Johnson, et. al. (objection filed, Docket No. 477)	
1. M&J is a Holder of an Other Secured Claim in Class 2. Other Secured Claims in Class 2 are not unimpaired because the Plan fails to address the retention of liens. This failure regarding lien retention likewise means the Plan fails to satisfy the "best interest test". *See* Objection, ¶¶ 37 & 42.	The Debtors believe that the Plan already provides such treatment for Other Secured Claims in Class 2. *See* Plan, Article III.B.2.b. Nonetheless, the Debtors will propose additional clarifying language to the Plan regarding the retention of such liens. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.
2. The Plan fails to propose a specific mechanism to establish the secured amount of the Other Secured Claims pursuant to Section 506(a) of the Bankruptcy Code, which might occur after plan confirmation. *See* Objection, ¶¶ 39 & 40.	As is normal and customary in large, complex chapter 11 cases, these matters will be determined as part of the claims reconciliation process to occur after confirmation of the Plan. The objectors have not cited a single authority for the proposition that claims reconciliation must occur prior to plan confirmation, and the Debtors are not aware of any such requirement.

Objection	Debtors' Response
3. The Plan is not feasible because the Debtors are not required to reserve any amounts for disputed Class 2 Claims. *See* Objection, ¶¶ 44 & 46.	This argument is without merit, and the Debtors will prove feasibility in connection with confirmation of the Plan. In addition to not being required as a legal matter, there is no practical need to establish cash reserves for Holders of Other Secured Claims because they retain their liens on their respective collateral until paid in full in cash or Disallowed by order of the Court.
4. Under the Plan, the Debtors may return the applicable collateral to the Holders of Other Secured Claims. The Plan fails to specify how such return will occur and that liens will be retained. *See* Objection, ¶¶ 45.	The Debtors will propose additional clarifying language to the Plan regarding the retention of such liens and that any return of collateral will be pursuant to further notice and hearing before this Court. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.
E. Minnesota Commercial Railway Company (objection filed, Docket No. 498)	
1. MCR has a possessory lien on certain stored railcars of the Debtors and is, therefore, a Holder of an Other Secured Claim in Class 2. Other Secured Claims are not unimpaired because the Plan fails to address the retention of such liens. This likewise means the Plan fails to satisfy the "best interest test". *See* Objection, ¶¶ 21 & 23.	The Debtors believe that the Plan already provides such treatment for Other Secured Claims in Class 2. *See* Plan, Article III.B.2.b. Nonetheless, the Debtors will propose additional clarifying language to the Plan regarding the retention of such liens. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.
2. The Plan fails to provide any valuation of these stored railcars. *See* Objection, ¶ 22.	These types of valuation matters will be determined after confirmation of the Plan and as part of the claims reconciliation process. But as noted above, Holders of Other Secured Claims will retain their liens on their respective collateral until paid in full in cash or Disallowed by order of the Court.

Objection	Debtors' Response
F. Texas Taxing Authorities (objection filed, Docket No. 386)	
1. The Texas Taxing Authorities are Holders of Secured Tax Claim in Class 3. They object to the Plan to the extent that it does not provide that they retain the liens that secure all base tax, penalties and interest that may accrue on their secured claims. *See* Objection, ¶¶ 4 & 5.	The Debtors believe that the Plan already provides such treatment for Secured Tax Claims in Class 3. *See* Plan, Article III.B.3.b. Nonetheless, the Debtors will propose additional clarifying language to the Plan regarding the retention of such tax liens. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.
G. Sunoco (objection filed, Docket No. 489)	
1. Sunoco has asserted claims against certain escrow accounts arising from a prepetition asset sale with the Debtors. These claims would be Other Secured Claims in Class 2. A number of arguments are made in the objection. 2. Sunoco also filed a motion to lift stay regarding these escrow accounts.	**Resolved** by adding language to the Confirmation Order that is specific to Sunoco only to be filed with the Court. This likewise resolves the lift stay motion of Sunoco.

Group 2: Environmental and Other Regulatory Matters

Objection	Debtors' Response
A. The United States Environmental Protection Agency (informal comments)	
1. The Plan might be construed to release and/or discharge the Debtors inappropriately from environmental liabilities that do not fall within the definition of "claim" under 11 U.S.C. § 101(5). 2. The release, discharge and injunction provisions of the Plan might be contended to discharge or release the Debtors from claims based on any act or omission prior to the Effective Date even though courts have held that environmental claims for which there is an insufficient relationship to be fairly contemplated at the time of confirmation are not dischargeable. Specifically, environmental claims arising post-confirmation. 3. Article XI of the Plan should not provide the Bankruptcy Court with "exclusive" jurisdiction over any disputes relating to the Plan and police and regulatory cases pending in other jurisdictions.	**Resolved** by adding the below language to the Confirmation Order: "Nothing in this Order or the Plan discharges, releases, precludes, or enjoins: (i) any liability to any governmental unit as defined in 11 U.S.C. § 101(27) ("Governmental Unit") that is not a "claim" as defined in 11 U.S.C. § 101(5) ("Claim"); (ii) any Claim of a Governmental Unit arising on or after the Effective Date: (iii) any police or regulatory liability to a Governmental Unit that any entity would be subject to as the owner or operator of property after the Effective Date; or (iv) any liability to a Governmental Unit on the part of any Person other than the Debtors or Reorganized Debtors. Nor shall anything in this Order or the Plan enjoin or otherwise bar a Governmental Unit from asserting or enforcing, outside this Court, any liability described in the preceding sentence. Notwithstanding any provision of the Plan, this Order, or any implementing or supplementing plan documents, the United States' setoff rights under federal law as recognized in section 553 of the Bankruptcy Code, and recoupment rights, shall be preserved and are unaffected. Nothing in this Order divests any tribunal of any jurisdiction it may have under police or regulatory law to interpret this Order or the Plan or to adjudicate any defense asserted under this Order or the Plan."

Objection	Debtors' Response
B. The Federal Communications Commission (informal comments)	
1. The Plan might be construed to permit the Debtors to assign or transfer a federal license in violation of the Communication Act of 1934 or related rules and regulations. 2. The Plan might be construed to limit the police and regulatory power of the Federal Communications Commission.	**Resolved** by adding the below language to the Confirmation Order: "No provision in the Plan or this Order relieves any Debtor or Reorganized Debtor from its obligation to comply with the Communications Act of 1934, as amended, and the rules, regulations, and orders promulgated thereunder by the FCC, to the extent applicable to the Debtors. No assignment or transfer of any federal license or authorization issued by the FCC or transfer of control of any entity that holds an FCC license or authorization shall take place prior to the issuance of any FCC regulatory approval for such assignment or transfer pursuant to applicable statute or FCC regulations. The FCC's rights and powers to take any action pursuant to its regulatory authority, including, but not limited to, imposing any regulatory conditions on any of the above-described assignments or transfers are fully preserved, and nothing in the Plan or this Order shall proscribe or constrain the FCC's exercise of such power or authority provided, however, that the Debtors' rights to challenge the foregoing are reserved."
C. Chippewa County Department of Land Conservation & Forest Management (objection filed, Docket No. 526)	
1. Article X of the Plan includes releases, waivers, discharges, exculpation, injunctions and related provisions which are in violation of the Bankruptcy Code to the extent they purport to apply to environmental liabilities claims, rights, controversies, obligations, cases, actions, disputes and the like. The retention of jurisdiction in Article XI of the Plan is too broad. *See* Objection, ¶¶ 13–20 & 23.	As discussed above, the EPA had a similar concern and its objections have been resolved by adding clarifying language to the Confirmation Order. The Debtors believe that this same language moots the objection of Chippewa County as to these matters. But in any event, the Debtors continue to dispute that there are environmental violations at these applicable mines.
2. Even if any of the Debtors' obligations owing to Chippewa County constitute a right of payment, the case law is clear that Chippewa County	This argument is without merit and premature as Chippewa County has not filed a proper request for payment of an administrative expense. The Debtors

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Objection	Debtors' Response
would be entitled to an allowed administrative expense claim. *See* Objection, ¶ 21.	reserve all rights to object to such request as, among other reasons, Chippewa County admits that the applicable mine is inactive and its request to increase the bonding requirements occurred months prior to the Petition Date. *See* Objection, ¶¶ 6 & 10.
3. The Plan is not feasible and lacks adequate means for implementation because it is silent about the Debtors' intention regarding the Chippewa Mine. For similar reasons, the Plan has not been proposed in good faith. *See* Objection, ¶¶ 24 & 30–31.	These arguments are without merit. The Debtors will prove feasibility in connection with confirmation of the Plan. In any event, there is no requirement for a chapter 11 plan to detail what a debtor will do with each particular asset. As noted above, the applicable mine is inactive and Chippewa County is fully protected by the same language that was acceptable to the EPA.
4. Chippewa County joins in the cure claim objection of Atlantic Specialty Insurance Company as it relates to these same bonding requirements as Chippewa County. *See* Objection, ¶¶ 22 & 33–36.	This aspect of the objection should be treated in the same manner as the cure claim objection of Atlantic Specialty Insurance Company, which is discussed in more detail in the Cure Claim Response Chart.
D. United States (objection filed, Docket No. 541)	
1. Article X and other provisions of the Plan includes releases, waivers, discharges, exculpation, injunctions and related provisions which are in violation of the Bankruptcy Code to the extent they purport to apply to governmental claims, rights, controversies, obligations, cases, actions, disputes and the like. The retention of jurisdiction in Article XI of the Plan is too broad. See Objection, ¶ 4-12.	The Debtors will propose additional clarifying language to the Plan regarding these matters. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.

Group 3: Releases, Exculpation, and Related Matters

Objection	Debtors' Response
A. The United States Securities and Exchange Commission (objection filed, Docket No. 424)	
1. The third party release by Class 9 Old Emerge LP Equity Interests is non-consensual because the Class is deemed to conclusively have rejected the Plan and is not entitled to vote, but is nonetheless required to affirmatively opt out of the third party release. *See* Objection, pages 2–4.	The third party release is fully consensual because each Class 9 Interest Holder is free to opt out in its sole and absolute discretion (and it also contains exclusions for any Causes of Action arising from willful misconduct, actual fraud, or gross negligence regardless of the opt out). Other courts in this district have approved similar opt out mechanisms for debtors. This analysis does not change simply because the Class is deemed to have rejected the Plan as the release is still consensual and not being forced upon any party that elects to opt out of it. *See* Confirmation Brief, ¶¶ 86–88.
2. A Class 9 member's silence (or failure to opt out) cannot establish affirmative consent to the Release. Indeed, there are many reasons that a Class 9 equity holder may not have returned an opt-out form. First, as many of the securities are held in street name, it is quite possible that the equity holder did not receive a beneficial holder ballot from its broker. Or, the equity holder may have received inadequate notice of the opt-out form from the broker. *See* Objection, page 2.	These arguments are without merit. This Court will retain jurisdiction to decide due process and notice issues to the extent relevant for a particular equity holder, but these generalized, hypothetical assertions cannot transform a fully consensual release into a non-consensual one. If a particular equity holder was not given a full and fair opportunity to opt out of the third party release, then this Court can determine that at a later time on notice and hearing by the allegedly harmed interest holder.
3. The Plan exculpation is improper because it applies to non-estate fiduciaries and is not limited to postpetitipon acts only. *See* Objection, page 4.	The Debtors will propose clarifying language to the Plan regarding these matters. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.
4. The third party release should be modified to exclude governmental units exercising their police and regulatory powers. *See* Objection, page 4.	The Debtors will propose clarifying language to the Plan regarding these matters. To the extent objections remain unresolved, the parties can raise

Objection	Debtors' Response
	them during the Confirmation Hearing.
B. The United States Trustee (objection filed, Docket No. 514)	
1. The third party release by the Class 9 Old Emerge LP Equity Interests is non-consensual because the Class is deemed to conclusively have rejected the Plan and is not entitled to vote, but is nonetheless required to affirmatively opt out of the third party release. *See* Objection, ¶¶ 1–3 & 37.	This is the same argument as made by the SEC above. *See* Confirmation Brief, ¶¶ 86–88.
2. A Class 9 member's silence (or failure to opt out) cannot establish affirmative consent to the Release. Such silence could be caused by factors such as the opt-out notice being wrongly addressed, misdelivered, or other mail failures or delays. The risk of mail errors should be borne by the beneficiaries of the releases, not by the Debtors' public shareholders. See Objection, ¶ 4-5 & 38.	This is the same argument as made by the SEC above.
3. Like the shareholders, silence from a Class 6 general unsecured creditor could simply mean the solicitation package never reached them. They should not be required to opt out of the third party release and any vote to reject the Plan should be deemed to have opted out of the third party release. *See* Objection, ¶¶ 6 & 39–40.	This argument should be overruled for the same reasons as set forth above as to Class 9 Interest Holders. This Court will retain jurisdiction to decide due process and notice issues to the extent relevant for a particular creditor, but these generalized, hypothetical assertions cannot transform a fully consensual release into a non-consensual one.
4. The Plan exculpation is improper because it applies to non-estate fiduciaries and is not limited to postpetitipon acts only. *See* Objection, ¶¶ 7 & 53–58.	The Debtors will propose clarifying language to the Plan regarding these matters. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.

Objection	Debtors' Response
5. The third party releases are non-consensual and do not satisfy the standards of *In re Continental*. *See* Objection, ¶¶ 41–49.	For the reasons set forth above and in the Confirmation Brief, the third party releases are fully consensual because no party is forced to give one—they can simply opt out of the release in their sole and absolute discretion by submitting an opt out election. Moreover, even without submitting an opt out form, the releases excluded Causes of Action arising from willful misconduct, actual fraud, or gross negligence. The scope of the third party releases is customary and routine for chapter 11 cases in this district. *See* Confirmation Brief, ¶¶ 86–88.
6. The Debtors have the burden of establishing whether the Debtor Release is appropriate. *See* Objection, ¶¶ 51–52.	The Debtors will prove this at the Confirmation Hearing, and their reasons are detailed in paragraphs 34–40 and 79–85 of the Confirmation Brief.
7. The Plan contains other terms and provisions that are inappropriate, such as with respect to (i) Rule 9019 settlements, (ii) discharge, (iii) the allowance and disallowance of claims, (iv) setoff, and (v) Section 1146(a) tax matters. *See* Objection, ¶¶ 59–78.	The Debtors will propose clarifying language to the Plan regarding these matters. To the extent objections remain unresolved, the parties can raise them during the Confirmation Hearing.

Exhibit C

Response Chart – Cure Claim Objections

EXHIBIT C

SUMMARY OF CURE CLAIM OBJECTIONS AND DEBTORS' RESPONSES[1]

Objection	Debtors' Response
A. Atlantic Specialty Insurance Company (objection filed, Docket No. 467)	
1. ASIC issued two bonds to the Debtor in connection with reclamation obligations at the Debtors' mining operations in Wisconsin. *See* ASIC Objection, ¶ 4. Both bonds are included on the Debtors' Cure Notice.	The Debtors are reviewing the bonds and indemnity agreements and continue to make a determination with respect to what (if any) collateral shortfall they may be required to provide and whether the agreements are integrated.
2. ASIC is also party to a certain Indemnity Agreement with certain Debtors and non-Debtor affiliates executed in connection with bonds, but such Indemnity Agreement was not listed on the Debtors' Cure Notice. *See* ASIC Objection, ¶¶ 6 & 20.	The Debtors are reviewing the bonds and indemnity agreements and continue to make a determination with respect to what (if any) collateral shortfall they may be required to provide and whether the agreements are integrated.

[1] Capitalized terms used and not otherwise defined herein shall have the meaning ascribed to such terms in the relevant Cure Objection.

Objection	Debtors' Response
3. There are two monetary defaults under the Bonds which must be cured in order for the Debtors to assume the Bonds: (i) the Debtors have not paid $74,196 in connection a renewal premium, and (ii) the Debtors have not posted a certain Collateral Shortfall of $5,097,796 necessary to continue providing financial assurances to the obligees under the Bonds. *See* ASIC Objection, ¶¶ 24-25.	(i) The Debtors have confirmed the outstanding amount of $74,196, which amount will be paid prior to the assumption of the Bonds so that portion is resolved. (ii) The Debtors are reviewing the bonds and indemnity agreements and continue to make a determination with respect to what (if any) collateral shortfall they may be required to provide and whether the agreements are integrated.
4. In order to assume the Bonds, the Debtors must also assume the Indemnity Agreement. *See* ASIC Objection, ¶ 29.	The Debtors are reviewing the bonds and indemnity agreements and continue to make a determination with respect to what (if any) collateral shortfall they may be required to provide and whether the agreements are integrated.
5. To the extent not cured, ASIC seeks adequate assurance of the Debtors' future ability to perform under the Bonds and the Indemnity Agreement in the amount of the Collateral Shortfall of $5,097,796. *See* ASIC Objection, ¶ 34.	The Debtors are reviewing the bonds and indemnity agreements and continue to make a determination with respect to what (if any) collateral shortfall they may be required to provide and whether the agreements are integrated.
B. Barron Electric (objection filed, Docket No. 446)	
1. The asserted cure amount of $75 is incorrect. The Debtors owe Barron Electric the amount of $26,064. *See* Barron Electric Objection, ¶¶ 3-4.	**Resolved**. The Debtors have confirmed the outstanding amount of $26,064, which amount will be paid prior to the assumption of the Electric Service Agreement.
C. Caterpillar Financial Services Corporation (objection filed, Docket No. 469)	
1. The Debtors listed $23,182 as the cure amount for various contracts with Caterpillar. However, Caterpillar's records indicate an outstanding	The Debtors will pay $23,183 in order to assume the contract. The remaining $139,424 constitutes a postpetition administrative expense, which has been

Objection	Debtors' Response
balance of $139,424. *See* CAT Financial Objection, ¶ 8.	paid in the ordinary course. This portion is resolved.
2. The Debtors' assumption notice lists some, but not all of the contracts with Caterpillar (which have a cure amounts of $3,277 and $3,393 respectively). These omitted contracts also need to be assumed. *See* CAT Financial Objection, ¶¶ 10-12.	The Debtors are reviewing the omitted contracts in order to make a determination with respect to assumption of such contracts. The Debtors will make a determination pursuant to the terms of the Plan and all parties reserve and retain all rights in connection with the assumption of the omitted contracts.
D. CIT Group/Equipment Financing (informal comments)	
1. The correct cure amount for CIT Schedule 4 is $6,527 (comprised of $5,890 due on July 1, 2019, $5,890 due on October 1, 2019, and a credit of $5,253).	**Resolved**. With respect to Schedule 4, after applying the credit of $5,253 to the $5,890 outstanding alleged cure amount, the Debtors will pay $637 in order to assume the contract. The remaining $5,890 constitutes a postpetition administrative expense, which has been paid in the ordinary course.
2. The correct cure amount for CIT Schedule 5 is $6,510 (comprised of $3,255 due on July 1, 2019, and $3,255 due on October 1, 2019).	**Resolved**. With respect to Schedule 5, $3,255 of the outstanding alleged cure amount will be paid prior to assumption of Schedule 5. The remaining $3,255 constitutes a postpetition administrative expense, which has been paid in the ordinary course.
3. There is another certain CIT schedule (Schedule 1) that the Debtors and CIT honor on a month-to-month basis. Should the Debtors seek to assume Schedule 1, the associated cure amount for Schedule 1 is $5,700 (comprised of $2,850 due on July 1, 2019 and $2,850 due on October 1, 2019).	The Debtors believe that Schedule 1 has expired pursuant to its terms. Notwithstanding that fact, the Debtors and CIT have been operating under Schedule 1 on a month-to-month basis, and the Debtors seek to continue to operate under Schedule 1 on month-to-month basis after the Effective Date.

Objection	Debtors' Response
E. Holt Texas (objection filed, Docket No. 451)	
1. The Debtors cannot assume its contract with Holt Texas because it is no longer executory. The parties have fully performed their respective obligations thereunder. *See* Holt Texas Objection, ¶ 8.	The Debtors agree with Holt Texas' that parties have fully performed their respective obligations under the listed contract, and the Debtors will no longer seek to assume the contract.
2. The asserted cure amount of $42,523 is incomplete because it fails to include $33,915 due in connection with the lease of certain equipment by the Debtors from Holt Texas pursuant to a separate contract (Contract #S9326301). *See* Holt Texas Objection, ¶¶ 7-8.	The Debtors are still determining whether to assume or reject the Contract #S9326301 related to the lease of certain equipment by the Debtors from Holt Texas. The Debtors will make a determination pursuant to the terms of the Plan and all parties reserve and retain all rights in connection with the assumption of Contract #S9326301
F. Marabou Energy Management & Marabou Superior Pipeline (informal comments)	
1. Marabou seeks confirmation of the agreements between the Debtors and Marabou listed on the Debtors' Cure Notice that are to be assumed.	**Resolved**. The Debtors will assume all agreements except for the Kingfisher agreement (Retail Natural Gas Sales Agreement – Kingfisher).
2. Marabou seeks confirmation with respect to outstanding amounts owed in connection with (i) the agreements that are to be assumed, and (ii) certain other agreements among the Debtors and Marabou that are not included on the Cure Notice.	**Resolved**. The Debtors will pay $289,507 relating to the Settlement Agreement and $9,020 relating to the Natural Gas Purchase and Sale Agreement, which amounts will be paid prior to the assumption of the agreements.
3. Marabou seeks payment of interest and attorney's fees in connection with the agreements that are to be assumed.	**Resolved**. The Debtors will pay $46,537.20 of interest and attorney's fees in connection with the agreements that are to be assumed

Objection	Debtors' Response
G. Monster Services (informal comments)	
1. Monster seeks a copy of a certain Services Agreement listed on the Debtors' Cure Notice, and backup with respect to any outstanding prepetition amounts owed in connection with the Services Agreement.	**Resolved**. The Debtors sent all relevant materials to Monster on October 14, 2019.
H. Ultimate Software Group (informal comments)	
1. The Debtors listed $0 as the cure amount for a certain Software Agreement between the Debtors and USG. However, USG's records indicate an outstanding balance of $16,476.	**Resolved**. The Debtors have confirmed the outstanding amount of $16,476, which amount will be paid prior to the assumption of the Software Agreement