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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

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In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	Case No. 19-34054
L.P., <sup>1</sup>	§	Chapter 11
	§	
Debtor.	§	
	§	

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**DEBTOR’S MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION  
OF THE FIFTH AMENDED CHAPTER 11 PLAN OF REORGANIZATION OF  
HIGHLAND CAPITAL MANAGEMENT L.P.**

<sup>1</sup> The Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



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The above-captioned debtor and debtor in possession (the “Debtor”) files this memorandum of law (this “Memorandum”) in support of confirmation of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (as Modified) (the “Plan”).<sup>2</sup> Concurrently herewith, the Debtor has filed its *Omnibus Reply to Objections to Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management L.P.* (the “Omnibus Reply”), which addresses and responds to the each of objections to confirmation of the Plan.<sup>3</sup>

### **Preliminary Statement**

1. After fourteen long months in a chapter 11 process that has often times been contentious between the Debtor, the Committee, and the estate’s largest creditors, the Debtor seeks confirmation of its Plan that enjoys the support of the Committee and virtually all of its non-affiliated creditors. As the Debtor told the Court when it approved the installation of the Independent Board on January 9, 2020, the new Board intended to change the culture of litigation that was the Debtor's trademark prepetition. While the negotiations have been difficult and testy at times, the Debtor successfully resolved its disputes with the Redeemer Committee, Acis and HarbourVest and has reached settlements in principal with UBS—an accomplishment that seemed impossible a few months ago. In fact, the Plan is supported by the holders of approximately 95% of creditors who collectively hold \$345 million in claims against the estate that voted on the Plan. In accomplishing these goals, the Independent Board has resolved litigation that has been pending in some cases for over a decade and in several courts, including

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<sup>2</sup> Unless otherwise noted, capitalized terms used in this Memorandum have the meanings ascribed in the Plan.

<sup>3</sup> To the extent that a party has raised a specific objection to the statutory provisions set forth in 1123 and 1129 of the Bankruptcy Code, those objections are addressed herein as part of the Debtor’s *prima facie* showing that it has satisfied the statutory requirements to confirm the Plan.

this Court in the Acis bankruptcy case, has positioned the Debtor to be able to put contentious litigation with legitimate creditors behind it and promptly monetize its assets and make distributions to general unsecured creditors. The Debtor worked extremely hard during the bankruptcy case to develop a “grand bargain” plan that would achieve a global resolution of all disputes between the Debtor, its creditors and Mr. Dondero. Unfortunately, such a plan was not attainable.

2. What stands in the Debtor’s way to confirmation of the Plan is a series of objections filed by Mr. Dondero and entities owned and/or controlled by him (collectively, the “Dondero Entities”) and certain of the Debtor’s current and ex-employees, two of whom the Debtor recently terminated for cause and others whose blind fealty to Mr. Dondero led them to vote against the Plan for no apparent economic reason. The common theme in all of the objections is not a desire for better treatment of creditors, which is not surprising since the objectors’ economic interests in the Debtor are tenuous at best. Rather, the focus of the objections are challenges to Plan provisions, including the injunction, release and exculpation provisions, which will limit the Dondero Entities’ ability to continue their litigation crusade against anyone who dared stand in Mr. Dondero’s way long after the Plan has been confirmed. As the Court is aware from its experience, according to Mr. Dondero, no claim is too frivolous to be brought, no appeal too impossible to succeed and no court too far away in which to commence litigation. As will be discussed herein, the Court has the authority and jurisdiction to approve provisions in the Plan which will minimize the Dondero Entities’ ability to harass parties with vindictive litigation designed to interfere with post-confirmation efforts. For the



Court's convenience, attached as **Exhibit A** hereto is a chart that sets for the relationships between the various Dondero Entities.

3. As more fully set forth in the Omnibus Reply, and as summarized on **Exhibit B** hereto, the Dondero Entities' interests in this case arise primarily from their direct and indirect equity interests in the Debtor. While certain of the Dondero Entities assert claims against the Debtor, those claims either arise out of their equity interests that the Debtor will seek to subordinate under Section 510 of the Bankruptcy Code or are frivolous claims that target certain conduct of the Independent Directors. Other Dondero Entities object to the Debtor's attempt to assume certain executory contracts to which they are not a party and lack standing to do so. Accordingly any objections to the Plan based upon the treatment of claims or the manner in which assets are proposed to be monetized post-confirmation are a smokescreen.

4. Moreover, any argument that the Dondero Entities are seeking to protect the value of their equity interests is specious. Mr. Dondero has told the Court on numerous occasions that his so-called "pot plan" proposal to acquire substantially all of the assets of the Debtor for \$160 million (which is really \$130 million because the proposal acquires approximately \$30 million of the Debtor's cash) fairly values the Debtor's assets. Accordingly, under Mr. Dondero's own assumptions, equity is out of the money as the total amount of allowed claims in this case exceeds Mr. Dondero's valuation by a factor of more than two. The only way creditors in the Debtor's estate will receive full payment on account of their claims—a prerequisite to any distributions to the Dondero Entities' indirect equity interests and related claims arising from such interests—would be for the Estate to monetize its multiple claims against the Dondero

Entities for well in excess of \$100 million. It is through this lens that the Court should view the Dondero Entities' confirmation objections.

5. The hard-fought victories obtained by the Debtor in negotiating the settlement of substantially all of the litigation that has plagued it for years should not be singularly undone by the Dondero Entities and his army of loyal employees and ex-employees. Mr. Dondero should not be allowed to use this Court and his frivolous litigation to upend the settlements achieved to date by the Debtor. The Plan should be confirmed to allow the Reorganized Debtor and the Claimant Trustee to complete the process of winding down the Debtor's assets, satisfying creditor claims, and implementing the other wind-down provisions of the Plan without interference by the Dondero Entities.

## **Background**

### **I. Procedural Background**

6. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

7. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court.

8. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's bankruptcy case to this Court [Docket No. 186].<sup>4</sup>

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<sup>4</sup> All docket numbers refer to the docket maintained by this Court.

9. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case. However, on January 9, 2020, the Court entered its *Order Approving Settlement With Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [D.I. 339] pursuant to which the Court approved the appointment of an Independent Board of Directors for Strand Advisors, Inc., the general partner of the Debtor (the “Settlement Order”). On July 16, 2020, the Court entered its *Order Approving Debtor’s Motion Under Bankruptcy Code Sections 105(A) and 363(B) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* [D.I. 854], pursuant to which James Seery, Jr., was approved as the Debtor’s Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative.

10. On November 24, 2020, the Bankruptcy Court entered the *Order (A) Approving the Adequacy of the Disclosure Statement, (B) Scheduling a Hearing to Confirm the Fifth Amended Plan of Reorganization; (C) Establishing Deadline for Filing Objections to Confirmation of Plan; (D) Approving Form of Ballots, Voting Deadline and Solicitation Procedures; And (E) Approving Form and Manner of Notice* [D.I. No. 1476] (the “Disclosure Statement Order”). The Disclosure Statement Order approved the Disclosure Statement as containing “adequate information” within the meaning of section 1125 of the Bankruptcy Code

and also approved, among other things, the proposed procedures for solicitation of the Plan and related notices, forms, and ballots (collectively, the “Solicitation Packages”).

11. The deadline for all Holders of Claims and Equity Interests entitled to vote on the Plan to cast their ballots and the deadline to file objections to confirmation of the Plan was January 5, 2021, at 5:00 p.m. (prevailing Central Time) subject to extension by the Debtor, in its discretion (the “Voting Deadline”). On January 19, 2021, the Debtor filed the Voting Report, which is summarized below. The hearing on confirmation of the Plan (the “Confirmation Hearing”) is scheduled for January 26, 2021, at 9:30 a.m. (prevailing Central Time).<sup>5</sup>

## **II. Solicitation and Notification Process.**

12. In compliance with the Bankruptcy Code and the Disclosure Statement Order, only Holders of Claims and Equity Interests in Impaired Classes receiving or retaining property on account of such Claims or Equity Interests were entitled to vote to accept or reject the Plan.<sup>6</sup> Holders of Claims and Equity Interests were not entitled to vote if their rights are Unimpaired under the Plan (in which case such Holders were conclusively presumed to accept the Plan pursuant to section 1126(f) of the Bankruptcy Code).<sup>7</sup> The voting results, as reflected in the Voting Report, are summarized as follows:

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<sup>5</sup> The Confirmation Hearing was initially scheduled to take place on January 13, 2021, but was continued by the Bankruptcy Court at the Debtor’s request.

<sup>6</sup> See 11 U.S.C. § 1126.

<sup>7</sup> There were no Impaired Classes of Claims or Equity Interests conclusively deemed to reject the Plan pursuant section 1126(g) of the Bankruptcy Code.

CLASSES	TOTAL BALLOTS RECEIVED			
	Accept		Reject	
	AMOUNT (% of Amount/Shares Voting)	NUMBER (% of Number Voting)	AMOUNT (% of Amount/Shares Voting)	NUMBER (% of Number Voting)
Class 2 Frontier Secured Claim	\$5,209,963.62 (100%)	1 (100%)	\$0 (0%)	0 (0%)
Class 7 Convenience Claims	\$2,765,906.51 (100%)	14 (100%)	\$0 (0%)	0 (0%)
Class 8 General Unsecured Claims <sup>8</sup>	\$301,826,418.36 (93.54%)	12 (27.9%)	\$20,833,059.67 (6.46%)	31 (72.10%)
Class 9 Subordinated Claims	\$35,000,000 (100%)	6 (100%)	\$0 (0%)	0 (0%)
Class 10 B/C Limited Partnership Interests	None	None	None	None
Class 11 Class A Limited Partnership Interests	0%	0%	\$100%	100%

13. Class 2. Class 2 consists of one member (Frontier Secured Claim) and this creditor voted to accept the Plan.

14. Class 7. Class 7 consists of the Convenience Claims. 100% of the fourteen valid members of Class 7 each voted to accept the Plan.<sup>9</sup> The votes of the Senior Employees—Mr. Ellington and Mr. Leventon—who attempted to partially vote certain Claims in Class 7 and

<sup>8</sup> The Debtor recently settled the objections filed by Senior Employees Thomas Surgent and Frank Waterhouse, who previously were included in the Senior Employee Objection. Msrs. Surgent and Waterhouse have each agreed to execute the Senior Employee Stipulation and to vote their Class 7 and Class 8 Claims to accept the Plan. This chart reflects the results of the voting report filed with Court on January 19, 2021 [D.I. 1772] and does not reflect the subsequent settlements with Msrs. Surgent and Waterhouse and their acceptance of the Plan.

<sup>9</sup> In accordance with the Voting Procedures Order, the Debtor accepted the late vote of Siepe Systems (which was cast on the Voting Deadline, but after the 5:00 Central Time cut off). The Debtor also accepted the late votes of each of: (i) Stinson Leonard Street, who also voted to accept the Plan on January 14, 2021, and (ii) the HarbourVest entities, who were entitled to both Class 8 General Unsecured Claims and Class 9 Subordinated Claims pursuant to the Court's allowance of these claims at a hearing conducted on January 14, 2021 [D.I. 1788] with respect to the compromise of HarbourVest's claims against the Debtor, as explained below.

other Claims in Class 8—should be disallowed for the reasons more specifically addressed in the Omnibus Reply. However, regardless of the invalid votes cast by the Senior Employees are counted, Class 7 Convenience Claims have accepted the Plan in both requisite dollar amount and voting number. First, each of these two “Senior Employees”<sup>10</sup> filed unliquidated proofs of claim with the Bankruptcy Court, yet are attempting to split their claims between Class 7 and Class 8 without having executed the Senior Employee Stipulation and in violation of the Plan, the Voting Procedures Order, and applicable law. Second, even if the Senior Employees were deemed to hold separate, liquidated claims on account of their asserted annual bonus and deferred compensation claims that could be split from their Class 8 Claims, the Plan’s Convenience Class Election does not morph a Class 8 Claim into a Class 7 Claim for voting purposes. A valid election of the Convenience Class Election would only entitle the electing creditor to receive the treatment under Class 7, not to vote its claim in that class. *See* Plan, §1.B.43.

15. Class 8. Over 93% of the dollar amount of Class 8 Claims voted to accept the Plan. However, more than 50% of the holders of Class 8 Claims did not accept the Plan as a result of the votes cast by approximately 27 employees holding contingent claims (including the split Class votes cast by Msrs. Ellington and Leventon<sup>11</sup>) to reject the Plan. The contingent claims of the Debtor’s other employees that voted against the Plan are (i) in respect to the

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<sup>10</sup> As the Court is aware, the Debtor terminated the employment of both Msrs. Ellington and Leventon on January 5, 2021 and these individuals are no longer employees of the Debtor.

<sup>11</sup> As noted above, the Debtor has agreed to a settlement of the Senior Employee Objection with respect to Mr. Surgent and Mr. Waterhouse, each of whom will vote their claims to accept the Plan.

unvested claims under the Debtor's deferred compensation bonus plan<sup>12</sup> for amounts that would not be payable, if at all, until May 2021 and May 2022 and would only be payable if such employees were employed as of those vesting dates, which they will not be; and (ii) PTO Claims, which are unimpaired and treated by either Class 4 (PTO Claim) or Class 6 (Priority Non-Tax Claims).

16. Class 9. Class 9 consists of the subordinated claims of HarbourVest that were allowed pursuant to the Court's granting of the *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion") at a hearing conducted on January 14, 2021, pursuant to which HarbourVest was granted both allowed Class 9 Claims in the aggregate amount of \$35 million and Allowed Class 8 Claims in the amount of \$45 million with respect to the claims filed by HarbourVest.<sup>13</sup> The HarbourVest Subordinated Claims are the only current members of Class 9. Although Class 9 has unanimously accepted the Plan, the Debtor is not asserting that Class 9 constitutes the accepting impaired class of claims,

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<sup>12</sup> On January 14, 2021, the Debtor terminated its annual bonus plan. The Debtor's employees previously held contingent claims under the annual bonus plan for amounts that would have vested in February 2021 and August 2021 (subject to the employee remaining employed as of those dates and other conditions) and replaced it with a proposed retention plan that is subject of the Debtor's *Motion of the Debtor for Entry of an Order Authorizing the Debtor to Implement a Key Employee Retention Plan with Non-Insider Employees and Granting Related Relief* filed on January 20, 2021. These employees (except for Mssrs. Surgent, Waterhouse, Ellington and Leventon, who were not paid any postpetition amounts with respect to either bonus plan) were paid the vested amounts owed to them under the annual bonus plan and deferred bonus plan, as applicable, in the ordinary course of business and in accordance with the *Order Authorizing the Debtor to Pay and Honor Ordinary Course Obligations Under Employee Bonus Plans and Granting Related relief* [D.I. 380] entered on January 22, 2020. Thus, the Debtor's non-Senior Employees no longer have any contingent claims under the now-terminated annual bonus plan because they have already been paid their vested amounts.

<sup>13</sup> The \$345 million claims estimate includes the claim of UBS Securities, LLC which has been allowed in the amount of \$94,761,076 for voting purposes only. As the Debtor has informed the Court, the Debtor has reached an agreement in principal with UBS to resolve its claims which agreement is subject to internal approvals at UBS and documentation.

exclusive of insiders, required to cram down the Plan pursuant to section 1129(b) of the Bankruptcy Code, as discussed below in the cramdown section of the Memorandum.

17. Several objections address the mechanics of how Class 9 Claims may be subordinated and the scope of any such subordination. Mr. Dondero, Dugaboy, NexBank, and NexPoint each argue that section III.J of the Plan provides “no mechanism, hearing requirement or deadline” to subordinate claims. Dondero Objection, at IV; NexPoint Objection, at 7; NexBank Objection at II.A.

18. Section III.J of the Plan does not categorically subordinate claims. Rather, Class 9 provides that holders of Subordinated Claims will receive the treatment provided to General Unsecured Claims unless they are subordinated either pursuant to an order of the Court upon notice to the relevant party or otherwise consensually. In other words, the Debtor, Reorganized Debtor or Claimant Trustee must obtain an order from the Bankruptcy Court subordinating the subject Claim. To the extent the Bankruptcy Court orders subordination of the Claim, it will receive the treatment provided for Class 9 Subordinated Claims. If no subordination order is obtained, then the Claim will receive the treatment afforded to Class 8 General Unsecured Claims. To illustrate this point, the vote cast by Raymond Joseph Dougherty as a Class 9 Subordinated Claim should be tabulated in Class 8 because there is no order or agreement with this creditor to subordinate his claims to those of Class 8 General Unsecured Claims. As discussed below, the Plan is being amended to clarify this treatment. Thus, the Plan does not afford the Debtor (or any other party) with the discretion to subordinate claims on their own. This determination will be made by the Court.



19. In order to clarify the treatment and procedure to subordinate claims, the Debtor has made the following amendments to the Plan. Section III.J of the Plan has been amended with the bolded language below to clarify the requirement of an opportunity for a hearing with respect to any proceeding to subordinate any claims:

Under section 510 of the Bankruptcy Code, upon written notice **and hearing**, the Debtor the Reorganized Debtor, and the Claimant Trustee reserve the right to **seek entry of an order by the Bankruptcy Court** to re-classify or to ~~seek to~~ subordinate any Claim in accordance with any contractual, legal, or equitable subordination relating thereto, and the treatment afforded any Claim under the Plan.

20. In addition, the Debtor has amended the treatment of Subordinated Claims in Section III.H.9 of the Plan to only treat claims that are or have been subordinated under section 510 of the Bankruptcy Court order entered by the Bankruptcy Court and which fall within the Plan definition of Subordinated Claims:

*Treatment:* On the Effective Date, Holders of Subordinated Claims shall receive either (i) their Pro Rata share of the Subordinated Claimant Trust Interests or, (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee may agree upon in writing.

~~*Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 9 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive either (i) the treatment provided to Allowed Class 8 Claims or (ii) if such Allowed Class 9 Claim is subordinated to the Convenience Claims and General Unsecured Claims pursuant to 11 U.S.C. § 510 or Final Order of the Bankruptcy Court, its Pro Rata share of the Subordinated Claimant Trust Interests or (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing.~~

21. In response to Mr. Dondero's objection asserting the lack of a time period to commence proceedings to subordinate Claims, the Debtor has amended the Plan to clarify that the timing by which parties in interest may object to the allowance of a potentially Subordinated

Claim and seek to have the claim treated as a Class 9 Subordinated Claim is now included in the Claims Objection Deadline by the addition of the bolded language to Section VII.B of the Plan.

Following the Effective Date, each of the Reorganized Debtor or the Claimant Trustee, as applicable, may File with the Bankruptcy Court an objection to the allowance of any Disputed Claim or Disputed Equity Interest, **request the Bankruptcy Court subordinate any Claims to Subordinated Claims**, or any other appropriate motion or adversary proceeding with respect thereto which shall be litigated to Final Order to the foregoing by the Claims Objection Deadline, or, at the discretion of the Reorganized Debtor or Claimant Trustee, as applicable, compromised, settled, withdrew or resolved without further order of the Bankruptcy Court...

22. Finally, the limited objection to the Plan filed by Jack Yang and Brad Borud [D.I. 1666] and joined by Deadman, Travers and Kaufmann [D.I. 1674, 1679] also objects to the Plan definition of “Subordinated Claims” and asserts that the Plan is not permissible under Bankruptcy Code section 510 to the extent it intends to subordinate any and all claims of partners of the Debtor, including claims “solely in respect of compensation owed to such person for their services as an employee.” The Plan does not intend to categorically subordinate these claims or expand the reach of section 510 of the Bankruptcy Code. However, in order to clarify this treatment and address the concerns raised by these individuals, the Plan has been amended as set forth below.

“Subordinated Claim” means any claim that ~~(i) is or may be~~ subordinated to the Convenience Claims and General Unsecured Claims pursuant to 11 U.S.C. § 510 or order entered by ~~Final Order of the Bankruptcy Court or (ii) arises from a Class A Limited Partnership Interest or a Class B/C Limited Partnership Interest.~~

23. Class 10 and Class 11. Class 10 and 11 consist of the separate classes of Equity Interests in the Debtor owned by affiliates of Mr. Dondero. Class 10 did not cast a vote to accept or reject the Plan. Class 11 voted to reject the Plan.

24. As explained more fully below, the Debtor may confirm the Plan pursuant to the cram down provisions of 1129(b) of the Bankruptcy Code notwithstanding the rejection and/or non-acceptance of the Plan by Classes 8, 10 and 11.

### Argument

25. To confirm the Plan, the Bankruptcy Court must find that the Debtor has satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.<sup>14</sup> As described in detail below, the Plan complies with all relevant provisions of the Bankruptcy Code and all other applicable law. The Plan is supported by voting creditors holding \$345 million in claims consisting of approximately 95% of the claims in this case. As set forth in this Memorandum and based upon the evidence that will be presented at the Confirmation Hearing, the Debtor will satisfy the evidentiary requirements necessary to confirm the Plan. The Debtor thus respectfully requests that the Bankruptcy Court confirm the Plan.

### **III. The Plan Satisfies Each Requirement for Confirmation.**

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

26. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code.<sup>15</sup> The principal goal of this provision is to ensure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan of reorganization.<sup>16</sup> Accordingly, the determination of

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<sup>14</sup> See *In re Cypresswood Land Partners, I*, 409 B.R. 396, 422 (Bankr. S.D. Tex. 2009); *In re J T Thorpe Co.*, 308 B.R. 782, 785 (Bankr. S.D. Tex. 2003).

<sup>15</sup> 11 U.S.C. § 1129(a)(1).

<sup>16</sup> See S. Rep. No. 95-989, 95th Cong., 2d Sess. 126 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 412 (1977), reprinted in 1978 U.S.C.C.A.N. 5936, 6368.

whether the Plan complies with section 1129(a)(1) of the Bankruptcy Code requires an analysis of sections 1122 and 1123 of the Bankruptcy Code.

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

27. Section 1122 of the Bankruptcy Code provides that “a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.” Because claims only need to be “substantially” similar to be placed in the same class, plan proponents have broad discretion in determining how to classify claims.<sup>17</sup>

28. The Plan’s classification of Claims and Equity Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places Claims and Equity Interests into a number of separate Classes, with each Class differing from the Claims and Equity Interests in each other Class in a legal or factual nature or based on other relevant criteria.<sup>18</sup> Specifically, the Plan provides for the separate classification of Claims and Equity Interests into the following Classes:

Class 1: Jefferies Secured Claim;

Class 2: Frontier Secured Claim

Class 3: Other Secured Claims;

Class 4: Priority Non-Tax Claims;

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<sup>17</sup> See *In re Sentry Operating Co. of Tex., Inc.*, 264 B.R. 850, 860 (Bankr. S.D. Tex. 2001) (recognizing that section 1122 is broadly permissive of any classification scheme that is not specifically proscribed, and that substantially similar claims may be separately classified where separate classification has a basis independent of the plan proponent’s efforts to secure a class of claims that will accept the plan).

<sup>18</sup> Plan, Art. III.

Class 5: Retained Employee Claims;

Class 6: PTO Claims;

Class 7: Convenience Claims;

Class 8: General Unsecured Claims;

Class 9: Subordinated Claims;

Class 10: Class B/C Limited Partnership Interests; and

Class 11: Class A Limited Partnership Interests.

29. Claims and Equity Interests assigned to each particular Class described above are substantially similar to the other Claims or Equity Interests in such Class. Valid business, legal, and factual reasons justify the separate classification of the particular Claims or Equity Interests into the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Equity Interests. For example, the PTO Claims in Class 6 relate solely to claims of the Debtor's employees for unpaid paid time off in excess of the \$13,650 statutory cap amount under sections 507(a)(4) and (a)(5) of the Bankruptcy Code and are dissimilar from other unsecured claims. The treatment of the unsecured Convenience Claims in Class 7 is to allow holders of eligible and liquidated claims (below a certain threshold dollar amount) to receive a cash payout of the lesser of 85% of the Allowed amount of the creditor's claim or such holders *pro rata* share of the Convenience Claims Cash Pool. The Plan also provides for reciprocal "opt out" mechanisms to allow holders of Class 7 Claims to elect to receive the treatment for Class 8 Claims.

30. Section III.C of the Plan provides for the elimination of classes that do not have a least one holder of a Claim or Equity Interest that is Allowed in an amount greater than zero for purposes “of voting to accept or reject the Plan, and disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class.” Plan, § III.D. The purpose of this provision is to provide that a Class that does not have voting members shall not be included in the tabulation of whether that Class has accepted or rejected the Plan.

31. Mr. Dondero objects to the elimination of the “vacant” Class provision in Article III.C because such elimination would not provide for treatment of a Claim that may be later classified in vacant class. Dondero Objection, at IV.14. However, the reference to vacant Classes in Article III.C refers only to the tabulation of votes cast to accept or reject the Plan, not to the treatment of claims that may later be classified in a class even if there were no voting members as of the Confirmation Hearing. For example, Class 5 (Retained Employee Claims) does not have any voting members because the existence of any Claims in this Class would not arise except for any current employees of the Debtor who will be employed on the Effective Date. Plan, § I.B.116. Thus, Class 5 is disregarded solely for purposes of determining whether or not the Plan has been accepted or rejected under Section 1129(a)(8) of the Bankruptcy Code because there are no current members in that Class. However, the Plan may treat Claims that may eventually become members of Class 5 post-confirmation.

32. The Debtor submits that the Plan fully complies with and satisfies section 1122 of the Bankruptcy Code. Each of these categories of Claims and Equity Interests have distinct

rights under the Plan (and applicable non-bankruptcy law), and the Debtor has a valid business justification for the respective treatments of the Classes of Claims and Equity Interests. The Plan's classifications not only serve the purpose of facilitating ease of distributions on the Effective Date but also acknowledge the fundamental differences between those types of Claims and Equity Interests. For the foregoing reasons, the Plan satisfies section 1122 of the Bankruptcy Code.

**2. The Plan Satisfies the Seven Mandatory Plan Requirements of Section 1123(a) of the Bankruptcy Code.**

33. The applicable requirements of section 1123(a) of the Bankruptcy Code generally relate to the specification of claims treatment and classification, the equal treatment of claims within classes, and the mechanics of implementing a plan. The Plan satisfies each of these requirements.

34. Specification of Classes, Impairment, and Treatment. The first three requirements of section 1123(a) are that a plan specify (a) the classification of claims and interests, (b) whether such claims and interests are impaired or unimpaired, and (c) the precise nature of their treatment under the plan.<sup>19</sup> The Plan sets forth these specifications in detail in satisfaction of these three requirements in Article III.<sup>20</sup>

35. Equal Treatment. The fourth requirement of section 1123(a) is that a plan must “provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment.” The Plan meets this

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<sup>19</sup> 11 U.S.C. § 1123(a)(1)-(3).

<sup>20</sup> Plan, Art. III.A–B.

requirement because Holders of Allowed Claims or Equity Interests in each Class will receive the same rights and treatment as other Holders of Allowed Claims or Equity Interests within such Holders' respective Class. Thus, the Plan satisfies section 1123(a)(4).<sup>21</sup>

36. Mr. Daugherty and the Senior Employees each argue that the Plan does not satisfy Bankruptcy Code section 1123(a)(4). Mr. Daugherty asserts that the Plan provides for different treatment of Disputed Claims versus Allowed Claims, and therefore provides disparate treatment in violation of Section 1123(a)(4) of the Bankruptcy Code. This is not correct because the Plan provides for the same treatment of claims within a particular class. The Disputed Claims Reserve shall reserve funds for the potential allowance of Claims that are not allowed at the time the Claimant Trustee makes distributions.<sup>22</sup> The Disputed Claims Reserve also does not allow the Debtor to unilaterally determine the amount of any reserve; that will be decided by the Bankruptcy Court absent agreement by the relevant parties. The Debtor—or any holder of a Disputed Claim—may file a motion with the Bankruptcy Court and request that the Claimant Trustee set aside a specific amount in the Disputed Claims Reserve pending the ultimate allowance/disallowance of the Claim.

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<sup>21</sup> See *In re Quigley Co., Inc.*, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) (“[s]ection 1123(a)(4) does not require precise equality, only approximate equality”; and”); *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d. Cir 2013) (same); see also *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 749 (2d Cir. 1992) (“[T]he ‘same treatment’ standard of section 1123(a)(4) does not require that all claimants within a class receive the same amount of money.”).

<sup>22</sup> The Plan provides that the Disputed Claims Reserve amount is either (1) the amount set forth on either the Schedules or applicable Proof of Claim; (2) the amount agreed by the Holder of the Disputed Claim and the Reorganized Debtor or Claimant Trustee; (3) the amount ordered by the Bankruptcy Court if it enters an order disallowing, in whole or in part, a Disputed Claim, or (4) as otherwise ordered by the Bankruptcy Court, including an order estimating the Disputed Claim. See Plan, § 1.B.49.



37. Mr. Daugherty's suggestion that the Bankruptcy Court's estimation of disputed claims for purposes of establishing a Disputed Claims Reserve somehow constitutes disparate treatment of similarly classified claims is also devoid of merit. Mr. Daugherty's argument would effectively mean that the Debtor would have to set aside the asserted amount of any Disputed Claim, regardless of how specious it may be, until the claim is ultimately resolved pursuant to a final order. Such a requirement would essentially provide a creditor with a stay pending appeal of the ultimate of allowance of the claim. Moreover, such a requirement would effectively prevent the Debtor from distributing any portion of the reserved funds to holders of Allowed Claims until the Disputed Claim is litigated to final order of the Supreme Court or such other applicable court of last resort—a process that could take years, and as evidenced by the length of time of the pending litigation in this case already waged by Mr. Daugherty, Mr. Dondero and others. If Mr. Daugherty—or any creditor—believes the Debtor's proposed estimate for its Disputed Claim is insufficient, Mr. Daugherty has an adequate remedy under the Plan and can request that the Bankruptcy Court estimate a sufficient amount for deposit into the Disputed Claims Reserve to satisfy his Claim to the extent it is ultimately Allowed.

38. The Senior Employees argue that the Plan violates section 1123(a)(4) because the Senior Employees are treated differently than other employees in that they are required to sign the Senior Employee Stipulation in order to obtain the benefit of the Debtor's release provided in Section IX.D. This assertion is patently false and conflates treatment of claims within a Class with the Debtor's voluntary release of its own claims and causes of action. First, the treatment of all Class 8 Claims for the Debtor's employees is the same and nothing in the Plan provides for

any disparate or different treatment. Any affirmative claims that belong to the Debtor against the Senior Employees (and other parties) are irrelevant to the claims held by creditors against the Debtor and treated by the Plan. The Plan provides that in order to obtain the benefit of the Debtor release, the Debtor's employees must provide sufficient consideration to obtain this release. They do not get it for free—this issue was substantially argued before this Court at prior hearings.<sup>23</sup> One of the conditions of obtaining the Debtor release for the Senior Employees is that they would be required to execute the Senior Employee Stipulation (in addition to the fulfilling the other Plan requirements of the Debtor's release of employee claims) to provide consideration for the release of claims against these high level Senior Employees, two of whom were recently terminated for cause. As the Debtor's counsel explained at the Disclosure Statement Hearing conducted on November 23, 2020, the decision to purchase the Debtor release and execute the Senior Employee Stipulation (or not) rested with each Senior Employee, but has no nexus to the treatment of claims of the Senior Employee against the Debtor.<sup>24</sup>

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<sup>23</sup> The limitations on the release of all Employees (including the Senior Employees) is also intended to address the Bankruptcy Court's concerns on this issue articulated at the first Disclosure Statement Hearing on October 27, 2020, and at a hearing held on October 28, 2020.

“With regard to these releases—and they are, I'll just be clear, Debtor releases, not third parties releasing third parties. But nevertheless, you know, I think there's an issue thereof they would need to be fair and equitable, in the best interest of creditors, and in the paramount interest of creditors would be something the Court would focus on there . . . This is not your normal case where this is the type of provision you see in many, many, many Chapter 11 plans.” Transcript of Proceedings Conducted on October 27, 2020; pg 32, lines 10-20.

<sup>24</sup> As explained at the Disclosure Statement Hearing by Debtor's counsel:

“With respect to senior employees—who include Scott Ellington, Isaac Leventon, Frank Waterhouse, and Thomas Surgent—if they want to obtain a release, and there's no requirement that they agree, they must also execute what we refer to as the Senior Employee Stipulation, which is included in the supplement, in order to receive their release. If they execute that stipulation, they would receive their release. If they don't execute that stipulation, they wouldn't.” Transcript of Proceedings Conducted on November 23, 2021, pg 9, lines 12-19.

39. Thus, there is no disparate treatment of Claims within each Class and the Plan does not violate section 1123(a)(4) of the Bankruptcy Code.

40. Adequate Means for Implementation. The fifth requirement of section 1123(a) is that a plan must provide adequate means for its implementation.<sup>25</sup> The Plan, together with the documents and forms of agreement included in the Plan Supplements, provides a detailed blueprint for the transactions contemplated by the Plan. Essentially, the Plan's various mechanisms provide for the Debtor's continued operation after the Effective Date, the monetization of the Debtor's remaining assets, and payment of the Claims of the Debtor's creditors. Upon full payment of Allowed Claims, any residual value would then flow to the Debtor's equity security holders in accordance with the Bankruptcy Code's priority scheme.

41. Article IV of the Plan, in particular, sets forth the means for implementation of the Plan with the establishment of: (i) the Claimant Trust, (ii) the Litigation Sub-Trust; and (iii) the Reorganized Debtor. The Claimant Trust Agreement provides for the management of the Reorganized Debtor, including the utilization of a Sub-Servicer, with the Claimant Trust serving as the managing member of New GP LLC (a wholly-owned subsidiary of the Claimant Trust and which will manage the Reorganized Debtor).<sup>26</sup> The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets and the management of the

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<sup>25</sup> 11 U.S.C. § 1123(a)(5). Section 1123(a)(5) specifies that adequate means for implementation of a plan may include: retention by the debtor of all or part of its property; the transfer of property of the estate to one or more entities; cancellation or modification of any indenture; curing or waiving of any default; amendment of the debtor's charter; or issuance of securities for cash, for property, for existing securities, in exchange for claims or interests or for any other appropriate purpose. *Id.*

As Mr. Ellington and Mr. Leventon are no longer employed by the Debtor they are no longer eligible to execute the Senior Employee Stipulation.

<sup>26</sup> For the avoidance of doubt, the Reorganized Debtor's general partner will not be named "New GP LLC." That name is simply a placeholder.

Reorganized Debtor (through the Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will all be managed and overseen by the Claimant Trust Oversight Committee.

42. The Claimant Trust will administer the Claimant Trust Assets as provided under the Plan and the Claimant Trust Agreement contained in the Plan Supplements. The Litigation Trustee is charged with pursuing any Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan. Finally, the Reorganized Debtor will administer the Reorganized Debtor Assets, which includes managing the wind down of the Managed Funds. The precise terms governing the execution of these transactions are set forth in greater detail in the applicable definitive documents included in the Plan Supplements, including the Claimant Trust Agreement, the Litigation Sub Trust Agreement, and the Schedule of Retained Causes of Action.<sup>27</sup> Thus, the Plan satisfies section 1123(a)(5).

43. Non-Voting Stock. The sixth requirement of section 1123(a) is that, with respect to a corporate debtor, a plan must contemplate a provision in the reorganized debtor's corporate charter that prohibits the issuance of non-voting equity securities or, with respect to preferred stock, adequate provisions for the election of directors upon an event of default. The Debtor is a limited partnership and there not a corporation.<sup>28</sup>

44. Selection of Officers and Directors. Finally, section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity

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<sup>27</sup> See Notices of Filing Plan Supplements [Docket Nos. 1389, 1606, 1656 and on January 22, 2021] (as modified, amended, or supplemented from time to time, the "Plan Supplements").

<sup>28</sup> See 11 U.S.C. § 101(9) (B) ("The term 'corporation' . . . does not include limited partnerships").

security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan.”<sup>29</sup> The disclosure of the individuals to provide services to the Reorganized Debtor and entities created under the Plan and qualifications of these individuals is discussed below in section I.E of this Memorandum in conjunction with the Debtor’s satisfaction of the provisions of section 1125(a)(5) of the Bankruptcy Code which overlap and address similar issues.

**B. The Debtor Has Complied with the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(2)).**

45. Section 1129(a)(2) of the Bankruptcy Code requires that plan proponents comply with the applicable provisions of the Bankruptcy Code. Case law and legislative history indicate this section principally reflects the disclosure and solicitation requirements of section 1125 of the Bankruptcy Code,<sup>30</sup> which prohibits the solicitation of plan votes without a court-approved disclosure statement.<sup>31</sup>

**1. The Debtor Complied with Section 1125 of the Bankruptcy Code.**

46. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan of reorganization “unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.”<sup>32</sup> Section

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<sup>29</sup> 11 U.S.C. § 1123(a)(7).

<sup>30</sup> See *Cypresswood*, 409 B.R. at 424 (“Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125.”).

<sup>31</sup> 11 U.S.C. § 1125(b).

<sup>32</sup> *Id.*

1125 of the Bankruptcy Code ensures that parties in interest are fully informed regarding the debtor's condition so they may make an informed decision whether to approve or reject a plan.<sup>33</sup>

47. Section 1125 of the Bankruptcy Code is satisfied here. Before the Debtor solicited votes on the Plan, the Bankruptcy Court entered the Disclosure Statement Order.<sup>34</sup> The Bankruptcy Court also approved the contents of the Solicitation Packages provided to Holders of Claims and Equity Interests entitled to vote on the Plan, the notices provided to parties not entitled to vote on the Plan, and the deadlines for voting on and objecting to the Plan.<sup>35</sup> The Debtor, through the Solicitation Agent, complied with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code. The Debtor also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. The Debtor caused the same Disclosure Statement to be transmitted to all holders of Claims and Equity Interests entitled to vote on the Plan.<sup>36</sup>

48. Based on the foregoing, the Debtor has complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order.

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<sup>33</sup> See *Matter of Cajun Elec. Power Co-op., Inc.*, 150 F.3d 503, 518 (5th Cir. 1998) (finding that section 1125 of the Bankruptcy Code obliges a debtor to engage in full and fair disclosure that would enable a hypothetical reasonable investor to make an informed judgment about the plan).

<sup>34</sup> See Disclosure Statement Order [Docket No. 576].

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

## 2. The Debtor Complied with Section 1126 of the Bankruptcy Code.

49. Section 1126 of the Bankruptcy Code provides that only holders of allowed claims and equity interests in impaired classes that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject a plan.<sup>37</sup> Accordingly, the Debtor did not solicit votes on the Plan from the following Classes:

Class	Claim or Interest	Status	Voting Rights
1	Jefferies Secured Claim	Unimpaired	Deemed to Accept
3	Other Secured Claims	Unimpaired	Deemed to Accept
4	Priority Non-Tax Claims	Unimpaired	Deemed to Accept
5	Retained Employee Claims	Unimpaired	Deemed to Accept
6	PTO Claims	Unimpaired	Deemed to Accept

50. The Debtor solicited votes only from Holders of Allowed Claims in Classes 2, 7, 8 and 9 and Equity Interests in Classes 10 and 11 (collectively, the “Voting Classes”) because each of these Classes is Impaired and entitled to vote to accept or reject the Plan.<sup>38</sup> The Voting Report reflects the results of the voting process in accordance with section 1126 of the Bankruptcy Code.<sup>39</sup> Based on the foregoing, the Debtor has satisfied the requirements of section 1129(a)(2).

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<sup>37</sup> See 11 U.S.C. § 1126.

<sup>38</sup> See Plan, Art. III. A–B.

<sup>39</sup> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of section 1126, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of section 1126, that have accepted or rejected such plan. 11 U.S.C. § 1126(c). A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan. 11 U.S.C. § 1126(d).

Class	Claim or Interest	Status	Voting Rights
2	Frontier Secured Claim	Impaired	Entitled To Vote
7	Convenience Claims	Impaired	Entitled To Vote
8	General Unsecured Claims	Impaired	Entitled To Vote
9	Subordinated Claims	Impaired	Entitled To Vote
10	Class B/C Limited Partnership Interests	Impaired	Entitled To Vote
11	Class A Limited Partnership Interests	Impaired	Entitled To Vote

**C. The Debtor Proposed the Plan in Good Faith and Not by Any Means Forbidden by Law (Section 1129(a)(3)).**

51. Section 1129(a)(3) of the Bankruptcy Code requires that the proponent of a plan propose the plan “in good faith and not by any means forbidden by law.”<sup>40</sup> In assessing the good faith standard, courts in the Fifth Circuit consider whether the plan was proposed with “the legitimate and honest purpose to reorganize and has a reasonable hope of success.”<sup>41</sup> A plan must also achieve a result consistent with the Bankruptcy Code.<sup>42</sup> The purpose of chapter 11 is to enable a distressed business to reorganize and achieve a fresh start.<sup>43</sup> Whether a plan is proposed in good faith must be determined in light of the totality of the circumstances of the case.<sup>44</sup>

52. During the last several months, the Debtor has negotiated extensively with the Committee regarding all aspects of the Plan. Such negotiations have been hard fought and intense. As the Court will recall, the Committee objected to approval of the Disclosure Statement

<sup>40</sup> 11 U.S.C. § 1129(a)(3).

<sup>41</sup> See *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985).

<sup>42</sup> See *In re Block Shim Dev. Company-Irving*, 939 F.2d 289, 292 (5th Cir. 1991).

<sup>43</sup> See *Sun Country Dev.*, 764 F.2d at 408 (“The requirement of good faith must be viewed in light of the totality of circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code to give debtors a reasonable opportunity to make a fresh start.”).

<sup>44</sup> See *id.*; see also *Pub. Fin. Corp. v. Freeman*, 712 F.2d 219 (5th Cir. 1983); *Cypresswood*, 409 B.R. at 425.



at the initial Disclosure Statement hearing which objection resulted in a continuance of that hearing. In the subsequent weeks the Debtor and the Committee continued their negotiations and ultimately reached substantial agreement on the terms of the Plan prior to the November 23, 2020 Disclosure Statement hearing. The parties continued their negotiations over the subsequent weeks which resulted in the Plan currently before the Court for confirmation. This history conclusively demonstrates that the Plan is being proposed in good faith within the meaning of Section 1129(a)(3).

53. Moreover, the mechanical distributions contemplated under the Plan were proposed in good faith, are not prohibited by applicable law, and were crafted to efficiently monetize the Debtor's assets and pursue Causes of Action while bestowing the Claimant Trustee Oversight Committee with ultimate oversight over this process. The Plan provides for the transfer of the majority of the Debtor's Assets to the Claimant Trust. The balance of the Debtor's Assets, including the management of the Managed Funds, will remain with the Reorganized Debtor. The Reorganized Debtor will be managed by New GP LLC—a wholly-owned subsidiary of the Claimant Trust. This structure will allow for continuity in the Managed Funds and an orderly and efficient monetization of the Debtor's Assets. The Claimant Trust, the Litigation Sub-Trust, or the Reorganized Debtor, as applicable, will institute, file, prosecute, enforce, abandon, settle, compromise, release, or withdraw any and all Causes of Action without any further order of the Bankruptcy Court, and the Claimant Trust and Reorganized Debtor, as applicable, will sell, liquidate, or otherwise monetize all Claimant Trust Assets and Reorganized Debtor Assets and resolve all Claims, except as otherwise provided in the Plan, the Claimant

Trust Agreement, or the Reorganized Limited Partnership Agreement. The Plan also provides for the reconciliation and potential objection to Claims filed against the Debtor and a procedure to administer Disputed Claims. Thus, the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

**D. The Debtor is Seeking to Pay Certain Professional Fees and Expenses Subject to Bankruptcy Court Approval (Section 1129(a)(4)).**

54. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be approved by the Bankruptcy Court as reasonable or subject to approval by the Bankruptcy Court as reasonable. The Fifth Circuit has held this is a “relatively open-ended standard” that involves a case-by-case inquiry and, under appropriate circumstances, does not necessarily require that a bankruptcy court review the amount charged.<sup>45</sup> As to routine legal fees and expenses that have been approved as reasonable in the first instance, “the court will ordinarily have little reason to inquire further with respect to the amount charged.”<sup>46</sup>

55. In general, the Plan provides that the Claims held by professionals retained by the Debtor or the Committee (the “Professionals”) for their services and related expenses are subject to prior Court approval and the reasonableness requirements under sections 328 or 330 of the Bankruptcy Code. Moreover, Article II.B of the Plan provides that Professionals shall file all final requests for payment of Professional Fee Claims no later than 60 days after the Effective

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<sup>45</sup> See *Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 517-18 (5th Cir. 1998) (“What constitutes a reasonable payment will clearly vary from case to case and, among other things, will hinge to some degree upon who makes the payments at issue, who receives those payments, and whether the payments are made from assets of the estate.”).

<sup>46</sup> *Id.* at 517.

Date, thereby providing an adequate period of time for interested parties to review such Professional Fee Claims.<sup>47</sup> The Plan also provides for the establishment of the Professional Fee Escrow Account by the Claimant Trustee to provide sufficient funds to satisfy in full unpaid Allowed Professional Fee Claims. Plan, § I.B.101. For the foregoing reasons, the Debtor submits that the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

**E. The Debtor Has Complied with the Bankruptcy Code’s Governance Disclosure Requirement (Section 1129(a)(5)).**

56. The Bankruptcy Code requires the proponent of a plan to disclose the identity and affiliation of any individual proposed to serve as a director or officer of the debtor or a successor to the debtor under the plan.<sup>48</sup> It further requires 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.<sup>49</sup> Lastly, it requires that the plan proponent has disclosed the identity of insiders to be retained by the reorganized debtor and the nature of any compensation for such insider.<sup>50</sup> Courts have held that these provisions ensure that the post-confirmation governance of a reorganized debtor is in “good hands.”<sup>51</sup>

57. The Plan provides that James P. Seery, Jr., the Debtor’s current Chief Executive Officer, Chief Financial Officer and Foreign Representative, shall serve as the Claimant Trustee

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<sup>47</sup> Plan. Art. II.B.

<sup>48</sup> 11 U.S.C. § 1129(a)(5)(A)(i).

<sup>49</sup> 11 U.S.C. § 1129(a)(5)(A)(ii).

<sup>50</sup> 11 U.S.C. § 1129(a)(5)(B).

<sup>51</sup> See *In re Landing Assocs., Ltd.*, 157 B.R. 791, 817 (Bankr. W.D. Tex. 1993) (“In order to lodge a valid objection under § 1129(a)(5), a creditor must show that a debtor’s management is unfit or that the continuance of this management post-confirmation will prejudice the creditors”).

and Marc S. Kirschner shall serve as the Litigation Trustee. *See* Plan Supplement at Exhibits M and O. Mr. Seery currently serves as the Debtor’s Chief Executive Officer and Chief Restructuring Officer and also serves as one of the Independent Directors. Mr. Seery shall be paid \$150,000 per month, for services rendered after the Effective Date and for his services as Claimant Trustee, plus a success fee that shall be the subject of negotiation between him and the Claimant Trust Oversight Committee post-Effective Date, which negotiation shall take place within forty-five (45) days after the Effective Date. Finally, the Claimant Trust Agreement discloses the five members of the Claimant Trust Oversight Committee, which consists of: (1) Eric Felton, as representative of the Redeemer Committee; (2) Josh Terry, as representative of Acis; (3) Elizabeth Kozlowski, as representative of UBS; (4) Paul McVoy, as representative of Meta-e Discovery; and (5) David Pauker. *See* Plan Supplement at Exhibits A, M, and N.

58. HCMFA’s objection asserts that “neither the identity nor the compensation of the people who control and manage the Reorganized Debtor is provided, much less as to who may be a Sub-Servicer.” HCMFA Objection ¶ 74. The identity of the individuals who will manage the Reorganized Debtor, the Claimant Trust, and Litigation Sub-Trust are set forth above, along with the proposed compensation for any insider. Moreover, the Claimant Trust Agreement provides that the Claimant Trustee “shall engage professionals from time to time in conjunction with the services provided hereunder. Claimant Trustee’s engagement of such professionals shall be approved by a majority of the Oversight Committee as set forth in Section 3.3(b) [of the Claimant Trust Agreement].” Claimant Trust Agreement, § 3.13(b).

59. In addition to satisfying the disclosure requirements of Bankruptcy Code section 1125(a)(5), the appointment of Messrs. Seery, Kirschner and the members of the Claimant Trust Oversight Committee is consistent with the interests of creditors and equity security holders and with public policy pursuant to section 1123(a)(7) of the Bankruptcy Code. As noted above, Mr. Seery has served as an Independent Board member since January 2020, and as the Chief Executive Officer and Chief Restructuring Officer since July 2020. As set forth in the CEO/CRO Motion, Mr. Seery has extensive management and restructuring experience. Mr. Seery recently served as a Senior Managing Director at Guggenheim Securities, LLC, where he was responsible for helping direct the development of a credit business. Prior to joining Guggenheim, Mr. Seery was the President and a senior investing partner of River Birch Capital, LLC, where he was responsible for originating, executing, and managing stressed and distressed credit investments. Mr. Seery is also a long-time attorney licensed to practice in New York who has run corporate reorganization groups and numerous restructuring matters. He also served as a Commissioner of the *American Bankruptcy Institute's Commission to Study the Reform of Chapter 11*. Mr. Seery was also a Managing Director and the Global Head of Lehman Brothers' Fixed Income Loan business where he was responsible for managing the firm's investment grade and high yield loans business, including underwriting commitments, distribution, hedging, trading and sales (including CLO manager relationships), portfolio management and restructuring. From 2000 to 2004, Mr. Seery ran Lehman Brothers' restructuring and workout businesses with responsibility for the management of distressed corporate debt investments and was a key member of the small team that successfully sold Lehman Brothers to Barclays in 2008.

60. In addition to his ample qualifications, as the Court is aware from the numerous times Mr. Seery has testified before the Court, Mr. Seery has made substantial demonstrative contributions to the success of this chapter 11 case through both the resolution of the Debtor's pending litigation claims and the development of the Plan. In his roles with the Debtor, he is familiar with the Debtor's operations and its business as well as the Claims that will be treated under the Plan. Accordingly, it is reasonable to continue his employment post-emergence as the Claimant Trustee, subject to the supervision of the Claimant Trust Oversight Committee, which is comprised of several of the largest creditors of the Debtor, including UBS, Redeemer Committee and Acis, as well as Meta-e, all of whom currently serve on the Committee.

61. Mr. Kirschner has been practicing law since 1967 and has substantial experience in bankruptcy litigation matters, particular with respect to his prior experience as a litigation trustee. He serves as the trustee for: the Tribune Litigation Trust; Millennium Health Corporate Claim and Lender Claims Trusts; and the Nine West Trust. He is currently a Senior Managing Director at Goldin Associates, LLC specializing, among other things in, restructuring advisory, valuation, solvency/fraudulent conveyance issues. He is also a member of the American College of Bankruptcy. Mr. Kirschner was also a partner and the former head of the New York Restructuring of the global law firm of Jones Day. Mr. Kirschner shall be paid \$40,000 per month for the first three months and \$20,000 per month thereafter.<sup>52</sup> In addition, Mr. Kirchner

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<sup>52</sup> Mr. Kirschner will receive support services from his consulting firm, Teneo. Teneo will provide services at a 10% discount from their rates. Teneo has agreed to freeze their rates in effect for 2021 through the end of 2022. Teneo shall also be entitled to reimbursement of expenses.

will receive a 1.50% fee of any “Net Litigation Trust Proceeds”<sup>53</sup> up to \$100 million, and an additional 2% fee of any Net Litigation Trust Proceeds in excess of \$100 million.

62. As noted above, four of the members of the Claimant Trust Oversight Committee are the holders of most of the largest Claims against the Debtor and current members of the Committee. Each of these creditors have actively participated in the Debtor’s case both through their roles as Committee members and in their separate capacities as individual creditors. They are therefore familiar with the Debtor, its operations and assets.

63. The fifth member of the Claimant Trust Oversight Committee, David Pauker, is a restructuring advisor and turnaround manager with more than 25 years of experienced advising public and private companies and their investors. Mr. Pauker is a fellow of the American College of Bankruptcy. Mr. Pauker has substantial experience overseeing, advising or investigating troubled companies in the financial services industry and has advised or managed such companies on behalf of boards or directors, court-appointed trustees, examiners and special masters, government agencies and private investor parties, including Lehman Brothers, Monarch Capital, Government Development Bank Debt Recovery Authority of Puerto Rico, MCorp, Refco, and Residential Capital. Mr. Pauker, who will be the only paid member of the initial Claimant Trust Oversight Board, will be paid \$250,000 for the first year of his service and \$150,000 per year thereafter. The Plan therefore satisfies the requirements of Bankruptcy Code

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<sup>53</sup> Net Litigation Trust Proceeds is defined as gross Litigation Trust proceeds, less Teneo and Litigation Trust counsel hourly fees, expert witness, e-discovery, court and discovery expenses. Gross recoveries are not to be reduced by the cost of insurance, tax accounting work which would be outsourced, potential contingency fees, or litigation funding financing and/or related contingent fee charges.

sections 1129(a)(5) and 1123(a)(7) with respect to the individuals responsible for the post-confirmation administration and oversight of the Reorganized Debtor.

**F. The Plan Does Not Require Government Regulatory Approval of Rate Changes (Section 1129(a)(6)).**

64. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has approved any rate change provided for in the Plan. No such rate changes are provided for in the Plan. Thus, section 1129(a)(6) of the Bankruptcy Code is inapplicable to this chapter 11 case.

**G. The Plan Is in the Best Interests of Holders of Claims and Interests (Section 1129(a)(7)).**

65. The best interests of creditors test requires that, “[w]ith respect to each impaired class of claims or interests,” members of such class that have not accepted the plan will receive at least as much as they would in a hypothetical chapter 7 liquidation.<sup>54</sup> The best interests test applies to each non-consenting member of an impaired class, and is generally satisfied through a comparison of the estimated recoveries for a debtor’s stakeholders in a hypothetical chapter 7 liquidation of that debtor’s estate against the estimated recoveries under that debtor’s plan of reorganization.<sup>55</sup>

66. As demonstrated in the liquidation analysis and financial projections attached to the Disclosure Statement as Exhibit C (the “Liquidation Analysis”), which was prepared by the

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<sup>54</sup> 11 U.S.C. § 1129(a) (7).

<sup>55</sup> *Bank of Am. Nat’l Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 442 n.13 (1999) (“The ‘best interests’ test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan.”); *In re Tex. Extrusion Corp.*, 844 F.2d 1142, 1159 n. 23 (5th Cir. 1988) (stating that under section 1129(a)(7) of the Bankruptcy Code a bankruptcy court was required to determine whether impaired claims would receive no less under a reorganization than through a liquidation).



Debtor with the assistance of its advisors, all Holders of Claims and Equity Interests in all Impaired Classes will recover at least as much under the Plan as they would in a hypothetical chapter 7 liquidation.<sup>56</sup> Specifically, the projected recoveries under the Plan and the results of the Liquidation Analysis for Holders of Claims estimates a 92.51% distribution to holders of general unsecured claims under the Plan compared to an estimated 66.14% distribution under a hypothetical liquidation of the Debtor.<sup>57</sup>

67. Mr. Dondero argues that the Plan fails to satisfy the requirements of Bankruptcy Code section 1129(a)(7) due to “lack of appropriate sale procedures for post-confirmation operations” and because there is no oversight or predetermined procedures to ensure that the liquidation of the Debtor’s assets is both value maximizing and transparent. *See* Dondero Objection, ¶10. Dugaboy—Mr. Dondero’s family trust—filed a similar objection and asserts that the absence of reporting requirements to the beneficial holders of Claimant Trust, lack of oversight on the Claimant Trustee’s ability to liquidate assets violates section 1129(a)(7) and that a chapter 7 trustee would require to obtain court approval to effect the same sales. Dugaboy also argues that the Claimant Trustee’s limitation of liability only applies to gross negligence and willful misconduct, so that the Claimant Trustee cannot be held liable for breach of fiduciary duty and, therefore, derives great protections than a hypothetical chapter 7 trustee would have.

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<sup>56</sup> *See* Disclosure Statement Ex. C.

<sup>57</sup> *See* Disclosure Statement Ex. C. With respect to the other impaired classes of Claims and Equity Interests, the Liquidation Analysis projects a 100% distribution on account of the Class 2 Frontier Secured Claim under either scenario and projects no distributions holders of Class 9 Subordinated Claims, Class 10 Class B/C Limited Partnership Interests and Class 11 Class A Limited Partnership Interests either under the Plan or under a hypothetical liquidation of the Debtor.

68. This objection is being made by parties with virtually no economic interest in the Debtor. Neither Dugaboy nor Mr. Dondero have any legitimate claims against the Debtor and based upon Mr. Dondero's "pot plan" proposal their equity is completely out of the money. Moreover, as discussed below, the argument that increased reporting obligations to creditor beneficiaries (who they are not), a requirement to seek Court approval of sales and the establishment of a standard of care for the Claimant Trustee somehow translates into creditors doing better in a chapter 7 makes no sense, and, in any event, is not an argument supported by any creditor not related to Mr. Dondero..

69. As set forth above, the Liquidation Analysis filed with the Disclosure Statement provides a side by side comparison of distributions to creditors under a hypothetical chapter 7 liquidation and under the Plan and clearly demonstrates that creditors will receive at least as much under the Plan as they would in a chapter 7 proceeding. None of the objectors provide any arguments to refute the analysis in the Liquidation Analysis or how a hypothetical chapter 7 trustee would liquidate the Debtor's remaining assets that would definitively provide a greater distribution to creditors in chapter 7 liquidation rather than in chapter 11. To the contrary, Mr. Dondero suggests (without any factual basis) that the Debtor's creditors and equity holders "could receive a higher recovery from the liquidation of the Debtor under Chapter 7 of the Bankruptcy Code in which sale procedures are governed by the Bankruptcy Court to ensure maximization or value through auction or other market-testing means." Dondero Objection ¶ 11.

70. Nothing in the opposition suggests that the Claimant Trustee (subject to supervision by the Claimant Trust Oversight Committee) will not undertake the same value

maximizing measures suggested by Mr. Dondero in order to maximize the value of the Reorganized Debtor's assets. The only difference is that the Claimant Trustee would be able to consummate these sales in the ordinary course of business compared to a trustee, who would have to negotiate (and presumably discount) every sale with the caveat that it is subject to court approval and a period of time by which parties, such as Mr. Dondero has throughout this case, can object and potentially frustrate any proposed sale. Mr. Dondero also assumes that the chapter 7 trustee could operate the Debtor's business in chapter 7.<sup>58</sup> Aside from the complete lack of institutional knowledge of the Debtor and its business, it is doubtful that a chapter 7 trustee would be able to operate the Debtor's business without the benefit of the executory contracts and unexpired leases that the Reorganized Debtor seeks to assume in order to monetize the remaining assets. There is no factual basis to conclude that a hypothetical chapter 7 trustee could monetize the Debtor's remaining assets any better than the Claimant Trustee, who has both the expertise and institutional knowledge of the Debtor and who is subject to an oversight committee consisting of the largest creditors in the Debtor's case.

71. Second, it is standard for a chapter 11 plan to allow the post confirmation administrators (in this case, the Claimant Trustee, the Litigation Trustee, and Reorganized Debtor) to monetize a debtor's assets without having to first obtain court approval or otherwise condition any sales on the consent to the holders of claims or interests. It is neither novel nor unusual for chapter 11 plans to allow the post-confirmation vehicle to sell assets, compromise

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<sup>58</sup> Even if a hypothetical trustee were appointed under Mr. Dondero's argument, the trustee would be subject to election pursuant 11 U.S.C. § 702. The largest creditors of the Debtor (most of whom are serving on the Claimant Trust Oversight Committee) would control the selection of the trustee of the Debtor after conversion. Yet these creditors support confirmation of the Plan and the structure by which they, as members of the Claimant Trust Oversight Committee, will oversee the Claimant Trustee's monetization of assets.

controversies and employ professionals without mandatory application to the Court to approve these standard post-confirmation transactions, including chapter 11 cases confirmed by this Court. *See, e.g. In re Acis Capital Management*, 2019 Bankr. LEXIS 294, \*116 (Bankr. N.D. Tex. January 31, 2019) (plan providing “[o]n and after the Effective Date, the Reorganized Debtor may operate its business and may use, acquire or dispose of property without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules, other than those restrictions expressly imposed by the Plan or the Confirmation Order.”); *In re Wilson Metal Fabricators*, No. 19-31452,\*\*9-10 (Bankr. N.D. Tex. SGJ May 18, 2020), ECF No. 92 (Order confirming plan providing that reorganized debtor “may deal with its assets and property and conduct its affairs without any supervision by, or permission from, the Court or the Office of the United States Trustee, and free of any restriction imposed on the Debtor by the Bankruptcy Code or by the Court during the case.”).

72. Finally, Dugaboy’s argument that the standard of liability for the Claimant Trustee provided in the Claimant Trust Agreement is not appropriate and confers greater protections those applicable to a chapter 7 trustee is wrong. This objection is yet another example of the Dondero Entities’ efforts to place as many roadblocks as possible to halt post-confirmation asset sales and maintain the ability to litigate (or threaten to litigate) against the entities charged with implementing the monetization of assets required under the Plan.

73. The standard of liability imposed on the Claimant Trustee pursuant to the Claimant Trust Agreement is appropriately limited to gross negligence and willful misconduct and Dugaboy and the Dondero Entities do not describe how the standard of liability has any impact

on the distributions creditors will receive under the Plan. First, the Claimant Trustee does have fiduciaries duties to the trust beneficiaries under the terms of the Claimant Trust Agreement, but claims against the Claimant Trustee are limited to acts of gross negligence and willful misconduct.<sup>59</sup> Second, Dugaboy misstates the standard of liability that would otherwise be imposed on a chapter 7 trustee. A chapter 7 trustee would actually have a more relaxed standard of liability than that imposed on the Claimant Trustee because it is well established that trustees have qualified immunity for acts taken within the scope of their appointment. *Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 1981) (“The question in this case is whether a trustee acting at the direction of a bankruptcy judge is clothed with absolute immunity against tort actions grounded on his conduct as trustee .... In the instant case, the court-approved trustee was acting under the supervision and subject to the orders of the bankruptcy judge. We hold that since [the trustee], as an arm of the Court, sought and obtained court approval of his actions, he is entitled to derived immunity.”) Thus, a chapter 7 trustee’s qualified immunity would protect it from heightened negligent breach of fiduciary duty claims whereas the Claimant Trust Agreement provides that the Claimant Trustee is only protected from simple negligent breach of fiduciary claims.

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<sup>59</sup> See, e.g. Claimant Trust Agreement Section 2.3(b)(vii). “The Claimant Trust shall be administered by the Claimant Trustee, in accordance with this Agreement, for the following purpose ... (viii) to oversee the management and monetization of the Reorganized Debtor Assets pursuant to the terms of the Reorganized Limited Partnership Agreement, in its capacity as the sole member and manager of New GP LLC pursuant to the terms of the New GP LLC Documents, all with a view toward maximizing value in a reasonable time in a manner consistent with the Reorganized Debtor’s fiduciary duties as investment adviser to the Managed Funds. The Debtor has amended the Plan to conform with the Claimant Trust Agreement.

74. Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code and the best interests test.<sup>60</sup>

**H. The Plan Complies with the Requirements of Section 1129(a)(8) of the Bankruptcy Code.**

75. The Bankruptcy Code generally requires that each class of claims or interests must either accept the plan or be unimpaired under the plan.<sup>61</sup> Each of the non-Voting Classes that were not entitled to vote on the Plan are Unimpaired and conclusively deemed to accept the Plan.

**I. The Plan Complies With Statutorily Mandated Treatment of Administrative and Priority Tax Claims (Section 1129(a)(9)).**

76. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments. In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative claims allowed under section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims. Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in section 507(a)(1) or (4) through (7) of the Bankruptcy Code—which generally include domestic support obligations, wage, employee benefit, and deposit claims entitled to priority—must

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<sup>60</sup> See *In re Neff*, 60 B.R. 448, 452 (Bankr. N.D. Tex. 1985) aff'd, 785 F.2d 1033 (5th Cir. 1986) (stating that “best interests” of creditors means “creditors must receive distributions under the Chapter 11 plan with a present value at least equal to what they would have received in a Chapter 7 liquidation of the Debtor as of the effective date of the Plan”); *In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) (“Section 1129(a)(7)(A) requires a determination whether ‘a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization.’”) (internal citations omitted).

<sup>61</sup> 11 U.S.C. § 1129(a) (8).

receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan), or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). Finally, section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—i.e., priority tax claims—must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim

77. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. First, Article II.A of the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because it provides that each Holder of an Allowed Administrative Claim will receive Cash equal to the amount of such Allowed Administrative Claim on the Effective Date, or as soon as reasonably practicable thereafter, or at such other time as defined in Article II.A of the Plan. Second, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no Holders of the types of Claims specified by 1129(a)(9)(B) are Impaired under the Plan.<sup>62</sup> Finally, Article II.C of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it specifically provides that each Holder of an Allowed Priority Tax Claim shall receive payment in an amount equal to the amount of the Allowed Priority Tax Claim unless otherwise agreed between such holder and the Debtor.<sup>63</sup> Thus, the Plan satisfies each of the requirements set forth in section 1129(a)(9) of the Bankruptcy Code.

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<sup>62</sup> See Plan, Art. III.B.

<sup>63</sup> As noted below in the discussion on Plan modifications, the Debtor has clarified the treatment of priority tax claims in accordance with 11 U.S.C. §1129(a)(9)(C) pursuant to the objection raised on this point by the Internal Revenue Service (“IRS”).

78. The IRS and certain Texas taxing authorities (the “Texas Taxing Authorities”) each filed objections to the Plan. The Debtor is in the process of negotiating “neutrality” language with the Texas Taxing Authorities concerning the application of the Plan injunction and other provisions to the claims asserted by this creditor. The Debtor expects to consensually resolve the Texas Taxing Authorities’ objection with agreeable language in the Confirmation Order. As more fully explained in the Omnibus Reply in response to the IRS’s plan objection, the IRS has rejected the Debtor’s Plan neutrality language and is insisting on the modification of the Plan to contain litany of provisions that are ambiguous, overbroad and, most importantly, attempt to pre-determine the IRS’s rights and remedies as opposed to having these issues determined in accordance with nonbankruptcy law with each parties’ rights and defenses preserved.

**J. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders (Section 1129(a)(10)).**

79. 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 “without including any acceptance of the plan by any insider.” As detailed herein and in the Voting Report, Class 2 (Frontier Secured Claim) and Class 7 (Convenience Claims) are impaired classes of claims and each voted to accept the Plan, exclusive of any acceptances by insiders. Accordingly, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code. However, as explained below, even though not all of the Voting Classes accepted the Plan, the Plan may still be confirmed by cram down because the requirements of section 1129(b) are satisfied.



**K. The Plan Is Feasible and Is Not Likely to Be Followed by the Need for Further Financial Reorganization (Section 1129(a)(11)).**

80. Feasibility refers to the Bankruptcy Code’s requirement that plan confirmation must not be “likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . unless such liquidation or reorganization is proposed in the plan.”<sup>64</sup> To satisfy this standard, the Fifth Circuit has held that a plan need only have a “reasonable probability of success.”<sup>65</sup> Indeed, a relatively low threshold of proof will satisfy section 1129(a)(11) so long as adequate evidence supports a finding of feasibility.<sup>66</sup> In particular, according to Fifth Circuit law, “[w]here the projections are credible, based upon the balancing of all testimony, evidence, and documentation, even if the projections are aggressive, the court may find the plan feasible.”<sup>67</sup>

81. The Plan provides for the Reorganized Debtor to manage the wind down of the Managed Funds as well as the monetization of the balance of the Reorganized Debtor Assets. As set forth in the Liquidation Analysis, the projections prepared by the Debtor show that it will be able to meet its obligations under the Plan. The Plan also does not provide any guaranty as to what holders of Class 8 General Unsecured Claims will receive; they will receive their *pro rata* payment of whatever net funds realized from the asset monetization process reflected in the projections. Therefore, the Plan is feasible. Thus, the Plan satisfies section 1129(a)(11) of the Bankruptcy Code under Fifth Circuit law.

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<sup>64</sup> 11 U.S.C. § 1129(a)(11).

<sup>65</sup> *In re T-H New Orleans Ltd. P’ship*, 116 F.3d 790, 801 (5th Cir. 1997) (quoting *In re Landing Assocs., Ltd.*, 157 B.R. 791, 820 (Bankr. W.D. Tex. 1993)).

<sup>66</sup> *In re Star Ambulance Service, LLC*, 540 B.R. 251, 266 (Bankr. S.D. Tex. 2015).

<sup>67</sup> *T-H New Orleans*, 116 F.3d at 802.

**L. The Plan Provides for the Payment of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12)).**

82. The Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930.<sup>68</sup> The Plan includes an express provision requiring payment of all such fees.<sup>69</sup> In addition, at the request of the United States Trustee, the Debtor has added language to the Confirmation Order that makes the Reorganized Debtor, the Claimant Trustee and Litigation Trustee jointly and severally liable for payment of statutory fees owed to the United States Trustee. The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code.

**M. The Plan Complies with Section 1129(a)(13) of the Bankruptcy Code.**

83. The Bankruptcy Code requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. Section 1114(a) of the Bankruptcy Code defines retiree benefits as medical benefits.<sup>70</sup> Article IV.K of the Plan provides for the assumption of the Pension Plan (to the extent that this plan is governed under section 1114 of the Bankruptcy Code) as well as additional language requested by the Pension Benefits Guaranty Corporation. Accordingly, the Plan complies with section 1129(a)(13) of the Bankruptcy Code.

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<sup>68</sup> 11 U.S.C. § 1129(a) (12).

<sup>69</sup> Plan, Art. XIII.D.

<sup>70</sup> Section 1114(a) defines “retiree benefits” as: “. . . payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.” 11 U.S.C. § 1114(e) (emphasis added).

**N. Sections 1129(a)(14) through Sections 1129(a)(16) of the Bankruptcy Code Do Not Apply to the Plan.**

84. A number of the Bankruptcy Code's confirmation requirements are inapplicable to the Plan. Section 1129(a)(14) of the Bankruptcy Code does not apply because the Debtor is not subject to any domestic support obligations.<sup>71</sup> Section 1129(a)(15) of the Bankruptcy Code is inapplicable because the Debtor is not an "individual" as defined in the Bankruptcy Code.<sup>72</sup> Section 1129(a)(16) of the Bankruptcy Code is inapposite because the Plan does not provide for any property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.<sup>73</sup>

**O. The Plan Satisfies the Cramdown Requirements (Section 1129(b)).**

85. If an impaired class has not voted to accept the plan, the plan must be "fair and equitable" and not "unfairly discriminate" with respect to that class.<sup>74</sup> The Plan has been accepted by Voting Classes 2, 7, and 9.<sup>75</sup> Voting Classes 8 (General Unsecured Claims) and Class 11 (Class A Limited Partnership Interests) voted to reject the Plan and Class 10 (Class B/C Limited Partnership Interests), did not vote. However, the Plan still satisfies the "cramdown" requirements with respect to non-accepting Classes of Claims and Equity Interests.

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<sup>71</sup> See 11 U.S.C. § 1129(a)(14).

<sup>72</sup> See 11 U.S.C. § 1129(a)(15).

<sup>73</sup> See 11 U.S.C. § 1129(a)(16).

<sup>74</sup> See 11 U.S.C. § 1129(b)(1).

<sup>75</sup> As noted below, Class 9 has also accepted the Plan, but the Debtor is not including Class 9 as one of the accepting impaired classes to satisfy the cram down requirements of section 1129(b)(1) of the Bankruptcy Code.

**3. The Plan Is Fair and Equitable.**

86. A plan is “fair and equitable” with respect to an impaired class of claims or interests that rejects the plan (or is deemed to reject the plan) if it follows the “absolute priority rule.”<sup>76</sup> This requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest.<sup>77</sup> The Plan satisfies section 1129(b) of the Bankruptcy Code. The objecting parties’ arguments that the Plan is not “fair and equitable” ignore this standard.

87. As explained earlier, all similarly situated holders of Claims and Equity Interests will receive substantially similar treatment and the Plan’s classification mechanics rests on a legally acceptable rationale. To the extent any impaired rejecting class of claims or interests is not paid in full, no class junior to the impaired rejecting class will receive any distribution under the Plan on account of its junior claim or interest. Therefore, the Plan satisfies the “fair and equitable” requirement.

**4. The Plan Does Not Unfairly Discriminate Against the Rejecting Classes.**

88. The Bankruptcy Code does not provide a standard for determining “unfair discrimination.” Rather, courts typically examine the facts and circumstances of the particular

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<sup>76</sup> *Bank of Am. Nat’l Tr. & Savings Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 441-42 (1999) ; *In re Mirant Corp.*, 348 B.R. 725, 738 (Bankr. N.D. Tex. 2006).

<sup>77</sup> *Id.*

case to determine whether unfair discrimination exists.<sup>78</sup> At a minimum, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so.<sup>79</sup> The unfair discrimination requirement, which involves a comparison of classes, is distinct from the equal treatment requirement of section 1123(a)(4), which involves a comparison of the treatment of claims within a particular class. A plan does not unfairly discriminate where it provides different treatment to two or more classes which are comprised of dissimilar claims or interests.<sup>80</sup> Likewise, there is no unfair discrimination if, taking into account the particular facts and circumstances of the case, there is a reasonable basis for the disparate treatment.<sup>81</sup>

89. The Plan's treatment of these Classes is proper because all similarly situated holders of Claims and Equity Interests will receive substantially similar treatment and the Plan's classification scheme rests on a legally acceptable rationale. Accordingly, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code.

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<sup>78</sup> See *In re Kolton*, No. 89-53425-C, 1990 WL 87007 at \*5 (Bankr. W.D. Tex. Apr. 4, 1990) (quoting *In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) (“[W]hether or not a particular plan does [unfairly] discriminate is to be determined on a case-by-case basis . . .”)); see also *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to “consider all aspects of the case and the totality of all the circumstances”).

<sup>79</sup> See *Idearc Inc.*, 423 B.R. at 171, (“[T]he unfair discrimination standard prevents creditors and equity interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so.”); *In re Ambanc La Mesa Ltd. P’ship*, 115 F.3d 650, 654 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff’d*, 78 B.R. 407 (S.D.N.Y. 1987), *aff’d sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

<sup>80</sup> See *In re Ambanc La Mesa Ltd. P’ship*, 115 F.3d 650, 655 (9th Cir. 1997) ; *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff’d*, 78 B.R. 407 (S.D.N.Y. 1987); *aff’d sub nom., Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

<sup>81</sup> *Aztec Co.*, 107 B.R. at 590.

**P. The Plan satisfies the “Cramdown” Requirements of the Bankruptcy Code.**

90. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) of the Bankruptcy Code, a plan may be confirmed so long as the requirements set forth in section 1129(b) of the Bankruptcy Code are satisfied. To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy Code), the plan proponent must show that the plan does not “discriminate unfairly” and is “fair and equitable” with respect to the non-accepting impaired classes.<sup>82</sup>

91. A plan is “fair and equitable” with respect to an impaired class of claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the “absolute priority” rule.<sup>83</sup> This requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired accepting class not receive any distribution under a plan on account of its junior claim or interest.<sup>84</sup> The Debtor submits that the Plan satisfies the “fair and equitable” requirement notwithstanding the non-acceptance of the Plan by Classes 8, 10 and 11.

92. With respect to Class 8 General Unsecured Claims, there is no Class of equal priority receiving more favorable treatment and no classes that are junior to Class 8 will receive or retain any property under the Plan unless Class 8 creditors receive or retain, on account of

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<sup>82</sup> See *John Hancock*, 987 F.2d at 157 n.5; *In re Ambanc La Mesa L.P.*, 115 F.3d 650, 653 (9th Cir. 1997) (“the [p]lan satisfies the ‘cramdown’ alternative . . . found in 11 U.S.C. § 1129(b), which requires that the [p]lan ‘does not discriminate unfairly’ against and ‘is fair and equitable’ towards each impaired class that has not accepted the [p]lan.”).

<sup>83</sup> See *Bank of Amer.*, 526 U.S. at 441-42 (“As to a dissenting class of impaired unsecured creditors, such a plan may be found to be ‘fair and equitable’ only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if ‘the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,’ § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the ‘absolute priority rule.’”).

<sup>84</sup> See *id.*

their claims, a value as of the Effective Date equal to the amount of such Claim, plus interest as provided under the Plan. Thus, Holders of Class 9 Subordinated Claims will not receive any distributions unless and until Class 8 Claims are fully paid pursuant to section 1129(b)(2)(B) of the Bankruptcy Code. Holders of Equity Interests in Class 10 and 11 will not receive any distributions absent full payment to holders of Allowed Class 8 General Unsecured Claims and Allowed Class 9 Subordinated Claims. There are no Claims or Equity Interests junior to the Equity Interests in Class 10 and Class 11. Therefore, the Plan is fair and equitable as to Equity Interests in Class 10 and 11 because no class junior to equity will receive or retain any property under the Plan. 11 U.S.C. § 1129(b)(2)(C).

93. Moreover, while Class 8 did not accept the Plan, requiring the Debtor to resort to “cram down” under Section 1129(b), over 93% of the dollar amount of claims in Class 8 voted to accept the Plan. Those votes included the votes of Redeemer, Acis, UBS, and the HarbourVest entities. Similarly, the Committee, as the fiduciary for all Class 8 General Unsecured Claims, also enthusiastically supports the Plan. As discussed above, the only reason Class 8 General Unsecured Claims voted to reject the Plan was because of (i) 24 employees holding contingent \$1.00 claims with respect to unvested amounts under the Debtor’s deferred compensation program voted against the Plan;<sup>85</sup> yet these employees ultimately will not have any General Unsecured Claims because the Debtor will terminate their employment before their entitlement to such amounts will vest, thereby eliminating the contingent claims and (ii) certain other employees, including Scott Ellington and Isaac Leventon who are loyal to Mr. Dondero and who

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<sup>85</sup> As noted above, the Debtor resolved the confirmation objection of Mr. Surgent and Mr. Waterhouse, each of whom voted to reject (Waterhouse) or voted to abstain (Surgent) with respect the Plan.

also rejected the Plan. Based upon the foregoing, the Plan may satisfy the cram down requirements and can be confirmed notwithstanding the non-acceptance of the Plan by Class 8, Class 10 and Class 11.

94. NPA argues that Plan violates the absolute priority rule with respect to unsecured creditors to the extent that it provides equity in the Reorganized Debtor to existing equity holders. NPA Objection, ¶ 92. This assertion is incorrect. As explained above, Equity Interests in Class 10 and 11 will neither receive nor retain any property under the Plan until Allowed Claims in Class 8 and Class 9 are paid in full (with appropriate interest) pursuant to the terms of the Plan. The Contingent Claimant Trust Interests granted to Equity Interests in Classes 10 and 11 will not vest unless and until the Claimant Trustee files a certification that all Holders of Allowed unsecured claims have been indefeasibly paid, inclusive of interest. *See* Plan, § I.B.44. Thus, the absolute priority rule is not violated by because the treatment of Class 8 and Class 9 Claims satisfies section 1129(b)(2)(B).<sup>86</sup> Indeed, the failure to provide a mechanism for the potential distribution of Equity Security Interests after payment of all senior Claims would violate the treatment of the equity security interests in the Debtor because such senior Claims would be receiving more than the full amount of their Claims. *See* 11 U.S. § 1129(b) (2)(C)(i).

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<sup>86</sup> The absolute priority rule is also satisfied with respect to Class 7 Convenience Claims. First, Class 7 has accepted the Plan. Second, even if Class 7 were not to have accepted the Plan, the members of Class 7 were afforded the option on their ballots to accept the treatment provided under Class 8 if they so elected.



**Q. The Plan Complies with the Other Provisions of Section 1129 of the Bankruptcy Code (Sections 1129(c)-(e)).**

95. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code. Section 1129(c) of the Bankruptcy Code, which prohibits confirmation of multiple plans, is not implicated because there is only one proposed Plan.<sup>87</sup>

96. The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no governmental unit or any other party has requested that the Bankruptcy Court decline to confirm the Plan on such grounds. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

97. Lastly, section 1129(e) of the Bankruptcy Code is inapplicable because the Debtor's chapter 11 case is not a "small business case."<sup>88</sup>

98. In sum, the Plan satisfies all of the Bankruptcy Code's mandatory chapter 11 plan confirmation requirements.

**IV. The Plan's Release, Exculpation, and Injunction Provisions Are Appropriate and Comply with the Bankruptcy Code for the Reasons Articulated in the Omnibus Reply.**

99. The Bankruptcy Code identifies various additional provisions that may be incorporated into a chapter 11 plan, including "any other appropriate provision not inconsistent with the applicable provisions of this title."<sup>89</sup> Among other discretionary provisions, the Plan contains certain Debtor releases,<sup>90</sup> an exculpation provision, and an injunction provision.<sup>91</sup>

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<sup>87</sup> 11 U.S.C. § 1129(c).

<sup>88</sup> 11 U.S.C. § 1129(e). A "small business debtor" cannot be a member "of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$2,000,000 (excluding debt owed to 1 or more affiliates or insiders)." 11 U.S.C. § 101 (51D)(B)(i).

<sup>89</sup> 11 U.S.C. § 1123 (b)(1)-(6).

<sup>90</sup> Plan, Art. IX

Notably, the Plan does not contain a mechanism typically included in chapter 11 plans, which contain broad third party releases by creditors or other parties in interest, unless they opt out of the release. While certain objectors argue that the Plan nonetheless contains inappropriate third party releases in disguise, such arguments lack merit as set forth in the Omnibus Reply. These provisions are the product of extensive good faith, arms'-length negotiations and comply with the Bankruptcy Code and prevailing law. The Debtor has separately responded to the objections filed by certain parties to these provisions in the Omnibus Reply, which also addresses the proposed modifications made to the Plan injunction provision. Accordingly, the Debtor respectfully requests that the Bankruptcy Court approve the Plan's Debtor release, exculpation, and injunction provisions for the reasons set forth in the Omnibus Reply.

**A. The Debtor Complied with Section 1129(d) of the Bankruptcy Code.**

100. The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code, and no party has asserted otherwise.

**B. Modifications to the Plan.**

101. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan. Bankruptcy Rule 3019 provides that modifications after a plan has been accepted will be deemed

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<sup>91</sup> *Id.*

accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder.<sup>92</sup>

102. The Senior Employees argue that the Debtor and the Committee seek “carte blanche to make amendments to the Plan post-confirmation without complying with § 1127 of the Bankruptcy Code.” Senior Employee Objection, at p. 15.

103. These arguments are baseless and are contradicted by Article XII of the Plan, which explicitly requires that modifications to the Plan be in compliance with section 1127.

After the entry of the Confirmation Order, the Debtor may, after notice and hearing and entry of an order of the Bankruptcy Court, amend or modify this Plan, in accordance with section 1127(b) of the Bankruptcy Code or remedy any defect or omission or reconcile any inconsistency in this Plan in such manner as may be necessary to carry out the purpose and intent of this Plan.

Plan, Art. XII.B.

104. Dugaboy objects that the Plan does not comply with section 1127(a) of the Bankruptcy Code and asserts that the Plan is not “final” and “as of the writing of this Objection and possibly even after the hearing on confirmation of the Debtor’s Plan, parties in interest will not have seen the documents that will become an essential part of the Plan.” Dugaboy Objection, page 4.

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<sup>92</sup> See, e.g., *In re American Solar King Corp.*, 90 B.R. 808, 823 (Bankr. W.D. Tex. 1988) (finding that nonmaterial modifications that do not adversely impact parties who have previously voted on the plan do not require additional disclosure or resolicitation); *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 857 (Bankr. S.D. Tex. 2001) (same). See also *In re Global Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at \*4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation).

105. As noted earlier in the Memorandum, the Debtor has already filed three Plan Supplements and will file a fourth Plan Supplement prior to the Confirmation Hearing. The Plan Supplements filed to date already contain the Retained Causes of Action, the Claimant Trust Agreement, the Litigation Trust Agreement that Dugaboy complains are lacking. The Debtor has also filed three notices of executory contracts and unexpired leases to be assumed under the Plan. Thus, the Plan will be “final” will contain final version of all of the post-confirmation documents and executory contracts to be assumed in advance of the Confirmation Hearing, in compliance with section 1127(a) of the Bankruptcy Code. *See, e.g., In re Friendship Dairies*, 2012 Bankr. LEXIS 13, \*\*22-23 (Bankr. N.D. Tex. Jan. 3, 2014) (“Section 1127(a) of the Code allows a plan proponent, the Debtor here, to modify its plan at any time before confirmation. In addition, ‘[a]fter the proponent of a plan files a modification of such plan with the court, the plan as modified becomes *the plan*.’”) (quoting 11 U.S.C. §1127(a) emphasis in original); *Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners)*, 521 B.R. 134, 176 (Bankr. N.D. Tex 2014) (“As a modified plan becomes the confirmed plan pursuant to section 1127(a) of the Bankruptcy Code, this maxim applies equally to plans as modified”). As Dugaboy concedes, the Plan appropriately restates the standards for post-confirmation plan modifications under section 1127(b), which would require notice and a hearing, among other requirements. *See Plan*, §XII.B.

106. As noted in this Memorandum, the Debtor has made certain modifications to the Plan in order to both (1) clarify language in response to certain of the objections raised by the Objectors and (2) additional modifications to the Plan. These modifications comply with section

1127(a) of the Bankruptcy Code and Bankruptcy Rule 3019. A summary of the Plan modifications is set forth in the chart below:

<b><u>Plan Modification and Applicable Plan Section</u></b>
<p><u>Treatment of Subordinated Claims Treatment Procedural Requirements.</u> Modifications that are responsive to the objections to the definition and treatment of Subordinated Claims, including (1) the definition of Subordinated Claims to eliminate categorical subordination of claims relating to limited partnership interests and replacement of Final Order to order entered by the Bankruptcy Court (Section I.B.129); (2) the classification and treatment of Subordinated Claims in Class 9 is only to the extent an order subordinating the claim is entered (Section III.H.9); (3) the addition of requirement of a hearing, in addition to notice, with respect to any subordination proceeding and subject to entry of order of the Bankruptcy Court (Section III.J); and (4) a requirement to bring subordination proceedings by Claims Objection Deadline and the ability to request that the Bankruptcy Court subordinate claims by the Claims Objection Deadline (Section VII.B).</p>
<p><u>Priority Tax Claims.</u> Modification in response to IRS Objection to provide that the payment of Allowed Priority Tax Claims to be in accordance with section 1129(a)(9)(C) unless such Allowed Claim is either paid in full on the Initial Distribution Date or otherwise agreed by the parties (Section II.C).</p>
<p><u>Assumption/Rejection of Executory Contracts.</u> Modifications in response to objections to require assumption/rejection of contracts to be determined by Confirmation Hearing, rather than the Effective Date (Section V.A-C).</p>
<p><u>Claimant Trust and Related Provisions.</u> Modification to permit Claimant Trustee to set aside a reserve for potential indemnification claims (Section IV.B.5); modification to conform Claimant Trustee's fiduciary duties to Claimant Trust Agreement (Section IV.B.5).</p>
<p><u>Issuance of New Partnership Interests.</u> Clarifications that Reorganized Limited Partnership Agreement not providing indemnification obligations (Section IV.C.3).</p>
<p><u>Conditions to Effective Date.</u> Modifications to conditions to effectiveness of Plan to require (1) Confirmation Order must be become a Final Order; (2) obtaining acceptable directors and officers insurance coverage which coverage is acceptable to the Debtor, Committee, the Oversight Committee Board, Claimant Trustee, and Litigation Trustee (Section VIII.A); (3) deletion of section VIII.C of Plan regarding effect of non-occurrence of conditions to effectiveness.</p>
<p><u>Retention of Jurisdiction.</u> Modification in response to objections to clarify existing language that provides that the Bankruptcy Court shall retain jurisdiction "to the maximum extent" legally permissible (Section XI).</p>
<p><u>Injunction and Related Provisions.</u> Modifications to the Plan injunction, term of injunction and continuance of January 9 Order provisions (Sections IX.F, G and H). Inclusion of additional Plan</p>

definitional changes/additions for “Affiliate” (Section I.B.5, “Enjoined Parties” (Section I.B.56) and “Related Entity” (Section I.B.110); “Related Entity List” (Section I.B.111) and “Related Persons” (Section I.B.112). Also, Injunction language highlighted pursuant to Bankruptcy Rule 3016 (Section IX.F).

107. Accordingly, the Debtor submits that no additional solicitation or disclosure is required on account of the Plan modifications, and that such modifications should be deemed accepted by all creditors that previously accepted the Plan.

### **Conclusion**

108. For the reasons set forth herein, the Debtor respectfully requests that the Bankruptcy Court confirm the Plan and enter the Confirmation Order.

Dated: January 22, 2021

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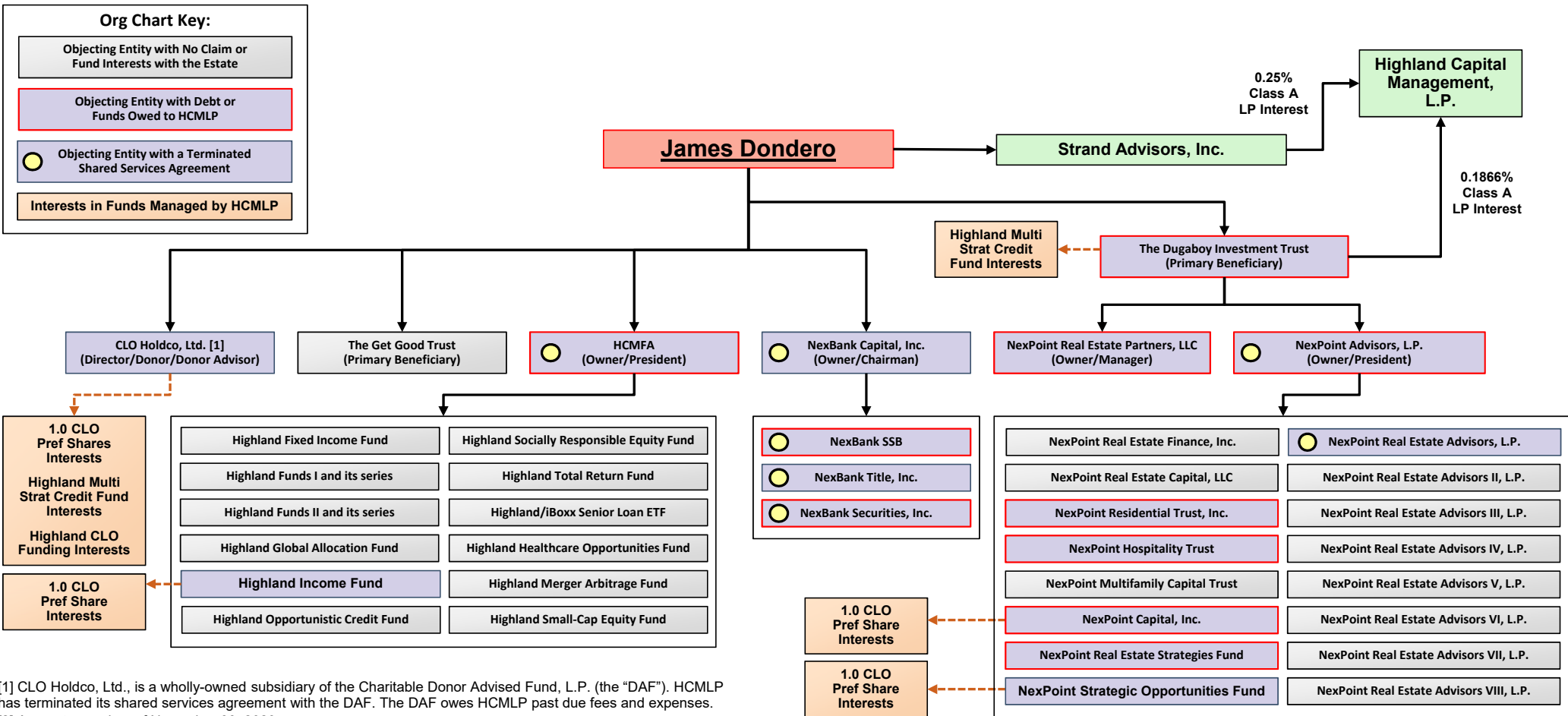
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**EXHIBIT A**



# Plan Objections from Dondero-Related Entities: Organizational Charts



[1] CLO Holdco, Ltd., is a wholly-owned subsidiary of the Charitable Donor Advised Fund, L.P. (the "DAF"). HCMLP has terminated its shared services agreement with the DAF. The DAF owes HCMLP past due fees and expenses.  
 [2] Amounts owed as of November 30, 2020.

**EXHIBIT B**

<u>Objector</u>	<u>Objection</u>	<u>Claim</u>	<u>Status</u>
James Dondero	D.I. 1661	Claim No. 138	Withdrawn with prejudice [D.I. 1510]
		Claim No. 141	Arises from equity; subject to subordination
		Claim No. 142	Arises from equity; subject to subordination
		Claim No. 145	Arises from equity; subject to subordination
		Claim No. 188	Withdrawn with prejudice [D.I. 1510]
	Indirect Equity Interest	Represents an indirect interest in Class A interests. Subordinated to Class B/C. Structurally subordinate. Represents 0.25% of total equity.	
Get Good Trust	D.I. 1667	Claim No. 120	Arises from equity; subject to subordination
		Claim No. 128	Arises from equity; subject to subordination
		Claim No. 129	Arises from equity; subject to subordination
Dugaboy Investment Trust	D.I. 1667	Claim No. 113	Arises from equity; subject to subordination
		Claim No. 131	Objection filed and in litigation. Seeks to pierce the veil and hold the Debtor liable for subsidiary debts. Debtor believes claim is frivolous.
		Claim No. 177	Objection filed and in litigation. Seeks damages for postpetition management of estate. Debtor believes claim is frivolous.
		Class A Interests	Subordinated to Class B/C. Represents 0.1866% of total equity.
Highland Capital Management Fund Advisors, L.P.	D.I. 1676	Claim No. 95	Expunged [D.I. 1233]
		Claim No. 119	Expunged [D.I. 1233]
Highland Fixed Income Fund	D.I. 1676	Claim No. 109	Expunged [D.I. 1233]
Highland Funds I and its series	D.I. 1676	Claim No. 106	Expunged [D.I. 1233]
Highland Funds II and its series	D.I. 1676	Claim No. 114	Expunged [D.I. 1233]
Highland Global Allocation Fund	D.I. 1676	Claim No. 98	Expunged [D.I. 1233]
Highland Healthcare Opportunities Fund	D.I. 1676	Claim No. 116	Expunged [D.I. 1233]
Highland Income Fund	D.I. 1676	Claim No. 105	Expunged [D.I. 1233]
Highland Merger Arbitrate Fund	D.I. 1676	Claim No. 132	Expunged [D.I. 1233]
Highland Opportunistic Credit Fund	D.I. 1676	Claim No. 100	Expunged [D.I. 1233]
Highland Small-Cap Equity Fund	D.I. 1676	Claim No. 127	Expunged [D.I. 1233]
Highland Socially Responsible Equity Fund	D.I. 1676	Claim No. 115	Expunged [D.I. 1233]
Highland Total Return Fund	D.I. 1676	Claim No. 126	Expunged [D.I. 1233]
Highland/iBoxx Senior Loan ETF	D.I. 1676	Claim No. 122	Expunged [D.I. 1233]
NexPoint Advisors, L.P.	D.I. 1676	Claim No. 104	Expunged [D.I. 1233]
		Claim No. 108	Expunged [D.I. 1233]
NexPoint Capital, Inc.	D.I. 1676	Claim No. 107	Expunged [D.I. 1233]
		Claim No. 140	Expunged [D.I. 1233]
NexPoint Real Estate Strategies Fund	D.I. 1676	Claim No. 118	Expunged [D.I. 1233]

NexPoint Strategic Opportunities Fund	D.I. 1676	Claim No. 103	Expunged [D.I. 1233]
CLO Holdco, Ltd.	D.I. 1675	Claim No. 133	Claim voluntarily reduced to \$0.00
		Claim No. 198	Claim voluntarily reduced to \$0.00
NexBank Title, Inc.	D.I. 1676	None	N/A
NexBank Securities, Inc.	D.I. 1676	None	N/A
NexBank Capital, Inc.	D.I. 1676	None	N/A
NexBank	D.I. 1676	Claim No. 178	Expunged [D.I. 1155]
NexPoint Real Estate Finance Inc.	D.I. 1677	None	N/A
NexPoint Real Estate Capital, LLC	D.I. 1677	None	N/A
NexPoint Residential Trust, Inc.	D.I. 1677	None	N/A
NexPoint Hospitality Trust	D.I. 1677	None	N/A
NexPoint Real Estate Partners, LLC	D.I. 1677	None	N/A
NexPoint Multifamily Capital Trust, Inc.	D.I. 1677	None	N/A
VineBrook Homes Trust, Inc.	D.I. 1677	None	N/A
NexPoint Real Estate Advisors, L.P.	D.I. 1677	None	N/A
NexPoint Real Estate Advisors II, L.P.	D.I. 1677	None	N/A
NexPoint Real Estate Advisors III, L.P.	D.I. 1677	None	N/A
NexPoint Real Estate Advisors IV, L.P.	D.I. 1677	None	N/A
NexPoint Real Estate Advisors V, L.P.	D.I. 1677	None	N/A
NexPoint Real Estate Advisors VI, L.P.	D.I. 1677	None	N/A
NexPoint Real Estate Advisors VII, L.P.	D.I. 1677	None	N/A
NexPoint Real Estate Advisors VIII, L.P.	D.I. 1677	None	N/A
NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC	D.I. 1673	Claim No. 146	Objection filed and in litigation. Debtor believes claim is frivolous.
Scott Ellington	D.I. 1669	Claim No. 187	Terminated for cause. Debtor exploring options.
		Claim No. 192	Terminated for cause. Debtor exploring options.
Isaac Leventon	D.I. 1669	Claim No. 184	Terminated for cause. Debtor exploring options.