IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

In re:	Chapter 11
AFH AIR PROS, LLC, *et al.*,[1]	Case No. 25-10356 (PMB)
Debtors.	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF THE DISCLOSURE STATEMENT AND CONFIRMATION OF SECOND AMENDED CHAPTER 11 PLAN OF LIQUIDATION OF AFH AIR PROS, LLC AND ITS DEBTOR AFFILIATES

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[1] The last four digits of AFH Air Pros, LLC's tax identification number are 1228. Due to the large number of debtor entities in these chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the claims and noticing agent at https://www.veritaglobal.net/AirPros. The mailing address for the debtor entities for purposes of these chapter 11 cases is: 150 S. Pine Island Road, Suite 200, Plantation, Florida 33324.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this memorandum of law in support of confirmation of the *Second Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* [Docket No. 478] (as modified, amended, or supplemented the "Plan").[1] In support of confirmation of the Plan, and in response to objections thereto (collectively, the "Objections"), the Debtors respectfully state as follows.[2]

PRELIMINARY STATEMENT

1. As described and set forth in the Disclosure Statement and Plan, on May 19, 2025, the Court approved the Debtors' sale of substantially all of their operating assets through six separate sales. The Debtors subsequently consummated all of the sales. [*see* Docket Nos. 437, 438, 446, 447, 454, and 507].

2. After arms'-length negotiations among the Debtors, the Prepetition Lenders and DIP Lenders, and the Creditors' Committee, the parties reached an agreement with respect to the terms of a plan of liquidation, as embodied in the Plan and described in the Disclosure Statement, including the Committee Settlement Term Sheet attached thereto as Exhibit C. As described in greater detail herein and in the Committee Settlement Term Sheet, the Creditors' Committee Settlement provides for the establishment of a litigation trust (the "Litigation Trust") for the benefit of Holders of Allowed General Unsecured Claims, including the Prepetition Lender Deficiency Claim. The Litigation Trust will be funded with $1 million plus the unused portion of the DIP

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan or Disclosure Statement, as applicable.

[2] Additional facts and circumstances supporting confirmation of the Plan are set forth in: (i) the *Declaration of Andrew D.J. Hede in Support of Confirmation of Second Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (the "Hede Declaration") filed contemporaneously herewith; and (ii) the *Declaration of Sydney Reitzel, on Behalf of Kurtzman Carson Consultants LLC d/b/a Verita Global, Regarding Solicitation and Tabulation of Ballots Cast on the Second Amended Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* [Docket No. 607] (the "Voting Declaration"), each of which is incorporated herein by reference.

Budget allocated for payment of the Committee's professionals. Certain Causes of Action of the Debtors and their Estates, as described in the Plan and the Schedule of Assigned Causes of Action filed with the Plan Supplement, will be transferred to the Litigation Trust.

3. As described herein, two parties timely filed formal objections to confirmation of the Plan: (a) Continental Casualty Company and National Fire Insurance Company of Hartford [Docket No. 593] (the "CNA Objection") and (b) the U.S. Trustee [Docket No. 594] (the "UST Objection"). The Debtors believe that they have resolved the CNA Objection in the proposed order confirming the Plan (the "Confirmation Order"), which will be submitted to the Court prior contemporaneously with this memorandum. No party filed an objection to approval of the Disclosure Statement on a final basis.

4. The United States Trustee asserts in its objection that the Third-Party Release is an impermissible, non-consensual third-party release. However, as this Court has recently held, where parties in interest have been provided clear and conspicuous notice of the Third-Party Release and the ability to opt out of such releases, there is a rebuttable presumption that the Third-Party Release is consensual. Indeed, the Third-Party Release in the Plan specifically provides for such a presumption and the method by which parties may subsequently seek to rebut the presumption. Accordingly, the Third-Party Release under the Plan is consensual and should be approved.

5. Additionally, as more fully described herein, the Plan satisfies all applicable requirements for confirmation under the Bankruptcy Code and all applicable law and has the overwhelming support of the Debtors' creditors, including the Prepetition Lenders, DIP Lenders, and the Creditors' Committee. It embodies a good-faith compromise of rights and interests of the parties in interest that was the product of arms'-length negotiations among the Debtors' key

constituents. As a result, and for the reasons set forth more fully in this memorandum, the Court should confirm the Plan and overrule any outstanding objections.

JURISDICTION

6. The Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. Approval of the Disclosure Statement and confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b), and this Court has jurisdiction to enter a final order with respect thereto. The Debtors are eligible debtors under section 109 of the Bankruptcy Code and are proper plan proponents under section 1121(a) of the Bankruptcy Code.

BACKGROUND[3]

A. Chapter 11 Cases

7. On March 16, 2025 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with this Court.

8. On March 31, 2025, the United States Trustee for Region 21 (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Committee") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"). No request has been made for the appointment of a trustee or examiner.

B. Confirmation, Solicitation, and Notification Process

9. On June 23, 2025, the Bankruptcy Court entered the *Order (A) Approving the Disclosure Statement on an Interim Basis, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, (C) Approving the Form of Ballot and Solicitation*

[3] Further detail regarding the Debtors' businesses, capital structure, and the circumstances leading to the filing of these Chapter 11 Cases is set forth in the *Declaration of Andrew D.J. Hede in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 8] and the Disclosure Statement, which are fully incorporated herein by reference.

Materials, (D) Establishing Voting Record Date, (E) Fixing the Date, Time, and Place for the Hearing on Final Approval of the Disclosure Statement and Confirmation of the Plan and the Deadline for Filing Objections Thereto, and (F) Approving Related Notice Procedures and Deadlines [Docket No. 477] (the "Solicitation Procedures Order"). The Solicitation Procedures Order set the hearing on final approval of the Disclosure Statement and confirmation of the Plan (the "Combined Hearing") for August 6, at 1:00 p.m. (prevailing Eastern Time) and approved, among other things: (a) the proposed procedures for solicitation of the Plan; (b) related notices, forms, and ballots (collectively, the "Solicitation Packages"); and (c) the form and notice of the Combined Hearing (the "Combined Hearing Notice").

10. On June 30, 2025, the Debtors caused the Claims and Noticing Agent to serve the Solicitation Packages, the Combined Hearing Notice, and other related notices as set forth under the Solicitation Procedures Order.[4]

11. On July 14, 2025, the Debtors filed certain of the Plan Supplement Documents, including the identity and compensation of the Litigation Trustee, the form of Litigation Trust Agreement, and the Schedule of Assigned Causes of Action [Docket No. 557]. Further, on July 18, 2025, the Debtors filed the additional Plan Supplement Documents [Docket No. 562].

12. The deadline for all Holders of Claims entitled to vote on the Plan to cast their ballots was July 28, 2025, at 4:00 p.m. (prevailing Eastern Time) (the "Voting Deadline"). The deadline to file objections to the Plan was also July 28, 2025, at 4:00 p.m. (prevailing Eastern Time). Contemporaneous with the filing of this memorandum, the Debtors are filing the Voting

[4] *Certificate of Service* [Docket No. 564], dated July 21, 2025 (the "Solicitation Affidavit").

Declaration. As set forth in the Voting Declaration, Class 3 and Class 4 voted to accept the Plan. Accordingly, all Voting Classes accepted the Plan.

ARGUMENT

13. For the reasons set forth in the Hede Declaration, herein, and as will be presented at the Combined Hearing, the Debtors submit that the Disclosure Statement and the Plan each satisfy all applicable provisions of the Bankruptcy Code. No objections to approval of the Disclosure Statement on a final basis were filed. The Debtors request that the Court overrule all unresolved objections to the Plan by entering the Proposed Order approving the Disclosure Statement on a final basis and confirming the Plan.

A. The Disclosure Statement Should be Approved on a Final Basis

14. Pursuant to section 1125 of the Bankruptcy Code, a plan proponent must provide "adequate information" regarding that plan to holders of impaired claims and interests entitled to vote on the plan.[5] "Adequate information" is defined in the Bankruptcy Code as:

> "[I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan[.][6]

Thus, the disclosures must provide information that is "reasonably practicable" to permit an "informed judgment" by creditors and interest holders entitled to vote on the debtor's plan of

[5] 11 U.S.C. § 1125.

[6] *Id.* § 1125(a)(1).

reorganization.[7] Essentially, a disclosure statement "must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution."[8]

15. Courts have broad discretion in determining whether a disclosure statement contains "adequate information," employing a flexible approach based on the unique facts and circumstances of each case.[9] Employing a flexible approach to approval of disclosure statements, courts have identified several categories of information which, based on the facts of a particular case, should typically be included in a disclosure statement, though disclosure of every factor is not necessary in every case.[10] Relevant factors for evaluating the adequacy of a disclosure statement may include:

a) the events which led to the filing of a bankruptcy petition;

b) a description of the available assets and their value;

c) the anticipated future of the company;

d) the source of information stated in the disclosure statement;

e) a disclaimer;

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[7] *In re New Power Corp.*, 438 F.3d 1113, 1118 (11th Cir. 2006).

[8] *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

[9] *See, e.g.*, *In re Ionosphere Clubs, Inc.*, 179 B.R. 24, 29 (S.D.N.Y. 1995) ("The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court.") (internal citation omitted); *In re Nw. Recreational Activities, Inc.*, 8 B.R. 10, 11 (Bankr. N.D. Ga. 1980) ("The quality of the Disclosure Statement which will qualify as 'adequate information' will vary with the circumstances. The kind and form of information is left to the judicial discretion of the court on a case by case basis."); *In re Brandon Mill Farms, Ltd.*, 37 B.R. 190, 191–92 (Bankr. N.D. Ga. 1984) ("Beyond the statutory guidelines described in the definition of 'adequate information,' the decision to approve or reject a disclosure statement is within the discretion of the Bankruptcy Court.").

[10] *See, e.g.*, *In re Metrocraft Pub. Serv., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (listing 19 factors that the court considered relevant in evaluating the adequacy of a disclosure statement).

f) the present condition of the debtor while in Chapter 11;

g) the scheduled claims;

h) the estimated return to creditors under a Chapter 7 liquidation;

i) the accounting method utilized to produce financial information and the name of the accountants responsible for such information;

j) the future management of the debtor;

k) the Chapter 11 plan or a summary thereof;

l) the estimated administrative expenses, including attorneys' and accountants' fees;

m) the collectability of accounts receivable;

n) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan;

o) information relevant to the risks posed to creditors under the plan;

p) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;

q) litigation likely to arise in a non-bankruptcy context;

r) tax attributes of the debtor; and

s) the relationship of the debtor with affiliates.[11]

16. The Debtors submit that the Disclosure Statement contains "adequate information" within the meaning of section 1125 of the Bankruptcy Code and should be approved on a final basis. Specifically, the Disclosure Statement contains descriptions and summaries of, among other things: (a) the business, corporate structure, and capital structure of the Debtors; (b) events leading up to the Chapter 11 Cases and significant events that have occurred therein, including the sales of the Debtors' assets; (c) estimates of the projected amount of Allowed Claims in each Class and the projected recoveries to be received by Holders of Allowed Claims; (d) treatment of

[11] *See Id*.

administrative, priority, and non-priority claims; (e) the terms of the Plan, including a chart describing the treatment of each Class; (f) the injunctions, releases, and exculpations provided by the Plan; (g) a liquidation analysis under a hypothetical chapter 7 case; (h) risk factors that may affect the Plan; and (i) appropriate disclaimers regarding the Court's approval of information only as contained in the Disclosure Statement and Plan.

17. Further, on July 14, 2025, and July 18, 2025, the Debtors filed the Plan Supplement, through which the Debtors made additional disclosures as contemplated by the Plan regarding, among other things, the form of Litigation Trust Agreement and form of Plan Administration Agreement, the identity and compensation of the Litigation Trustee and the Plan Administrator, the Schedule of Assigned Causes of Action that are Litigation Trust Claims, and the Wind Down Cash Amount to be used to fund the Wind Down Expense Fund.

18. Accordingly, the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code and should be approved on a final basis.

B. The Plan Satisfies Each Mandatory Requirement for Confirmation

19. To confirm the Plan, the Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[12] As described in detail below, the Debtors will establish, by a preponderance of the evidence, that the Plan complies with all relevant provisions of the Bankruptcy Code and all other applicable law.

[12] *See In re Holywell Corp.*, 913 F.2d 873, 879 (11th Cir. 1990); *In re Aspen Village at Lost Mountain Memory Care, LLC*, 609 B.R. 536, 543 (Bankr. N.D. Ga. 2019) ("The plan proponent bears the burden of evidence and persuasion of each element of section 1129."). *See also In re Maremont Corp.*, 601 B.R. 1, 13 (Bankr. D. Del. 2019).

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

20. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code. The principal aim 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.[13] Accordingly, the determination of 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.

a. The Plan Properly Classifies Claims and Interests as Required Under Section 1122 of the Bankruptcy Code

21. 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."[14] Because claims only need to be "substantially" similar to be placed in the same class, plan proponents have flexibility in determining how to classify claims together so long as there is a rational basis to do so.[15]

22. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because Claims and Interests are in seven separate Classes, with each Class differing from the Claims and Interests in each other Class in a legal or factual

[13] *See* S. Rep. No. 95-989, at 126 *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008).

[14] 11 U.S.C. § 1122(a).

[15] *Armstrong World Indus., Inc.*, 348 B.R. at 159; *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987).

nature or based on other relevant criteria.[16] Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

Class	Claims and Interests	Status	Voting Rights
1	Other Priority Claims	Unimpaired	Deemed to Accept
2	Other Secured Claims	Unimpaired	Deemed to Accept
3	Prepetition Lender Secured Claims	Impaired	Entitled to Vote
4	General Unsecured Claims	Impaired	Entitled to Vote
5	Subordinated Claims	Impaired	Deemed to Reject
6	Intercompany Claims	Impaired	Deemed to Reject
7	Interests in the Debtors	Impaired	Deemed to Reject

23. Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims and Interests in such Class. In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests into the Classes created under the Plan, and no unfair discrimination exists between or among holders of Claims and Interests. Namely, the Plan separately classifies the Claims and Interests because each Holder of such Claims or Interests may hold (or may have held) rights in the Estates legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification. For example, Claims are classified separately from Interests and Secured Claims are classified separately from Unsecured Claims.

24. The classification of Claims and Interests under the Plan facilitates ease of distributions on the Effective Date. For the foregoing reasons, the Plan satisfies section 1122 of the Bankruptcy Code, and no party has asserted otherwise.

[16] *See* Plan, Art. III.A.

b. The Plan Satisfies the Seven Applicable Mandatory Plan Requirements of Sections 1123(a) of the Bankruptcy Code

25. The seven 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 the plan. The Plan satisfies each of these requirements.

26. ***Sections 1123(a)(1)–(3) – Specification of Classes, Impairment, and Treatment.*** The first three requirements of section 1123(a) are that the plan specify (i) the classification of claims and interests, (ii) whether such claims and interests are impaired or unimpaired, and (iii) the precise nature of their treatment under the Plan.[17] Article III of the Plan sets forth these specifications in detail in satisfaction of these three requirements.[18]

27. ***Section 1123(a)(4) – Equal Treatment.*** The fourth requirement of section 1123(a) is that the 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."[19] The Plan satisfies this requirement because Holders of Allowed Claims or Interests will receive the same rights and treatment as other Holders of Allowed Claims or Interests within such Holders' respective Class.

28. ***Section 1123(a)(5) – Adequate Means for Implementation.*** The fifth requirement of section 1123(a) is that the plan must provide adequate means for its implementation.[20] The Plan

[17] 11 U.S.C. § 1123(a)(1)–(3).

[18] Plan, Art. III.A–B.

[19] 11 U.S.C. § 1123(a)(4).

[20] 11 U.S.C. § 1123(a)(5). Section 1123(a)(5) states 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;

and the documents in the Plan Supplement provide adequate means for the Plan's implementation, including, but not limited to: (a) the cancellation of certain existing agreements, obligations, instruments, and Interests; (b) the appointment of the Plan Administrator to effectuate the Wind Down of the Wind Down Debtors in accordance with the Plan Administration Agreement and the Plan; (c) the establishment and funding of the Litigation Trust pursuant to the Litigation Trust Agreement and the transfer of the Litigation Trust Assets to the Litigation Trust free and clear of all Liens, Claims, charges, or other encumbrances, subject only to the Litigation Trust Interests; (d) the execution, delivery, filing, or recording of all contracts, instruments, releases, and other agreements or documents in furtherance of the Plan; and (e) the authorization of the Plan Administrator and the Litigation Trustee, as applicable, to take all actions necessary to effectuate the Plan.

29. Additionally, Article IV.J provides for the substantive consolidation of the Debtors' Estates for voting, confirmation, and distribution purposes. Section 1123(a)(5) of the Bankruptcy Code expressly provides that a plan may provide for the consolidation of a debtor with one or more persons. The Debtors believe that such substantive consolidation is fair, appropriate, and necessary in these Chapter 11 Cases and should be approved. As an initial matter, substantive consolidation is appropriate with the consent of the parties, and here, the Plan has received overwhelming support from Class 3 and Class 4.

30. Courts in the Eleventh Circuit consider the following factors when evaluating whether substantive consolidation is appropriate: (1) the presence or absence of consolidated financial statements; (2) the unity of interests and ownership between various corporate entities;

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cancelation 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.*

(3) the existence of parent and intercorporate guarantees on loans; (4) the degree of difficulty in segregating and ascertaining individual assets and liabilities; (5) the existence of transfers of assets without formal observance of corporate formalities; (6) the commingling of assets and business functions; (7) the profitability of consolidation at a single physical location; (8) the parent owning the majority of the subsidiary's stock; (9) the entities having common officers or directors; (10) the subsidiary being grossly undercapitalized; (11) the subsidiary transacting business solely with the parent; and (12) the entities disregarding the legal requirements of the subsidiary as a separate organization.[21]

31. As set forth in Section VII.C.10 of the Disclosure Statement, the Debtors believe that substantive consolidation is necessary in these Chapter 11 Cases for the following reasons, among others:

- Consolidated Financial Statements; Intercompany Transfers. The Debtors have historically maintained consolidated financial statements and an integrated cash management system, which includes regular intercompany transfers. As described in the Debtors' motion requesting authority to, among other things, continue to use of their cash management system [Docket No. 11], the Debtors maintain a single corporate concentration account in the name of Air Pros, LLC into which funds were swept daily from certain accounts of other operating Debtors. Although the Debtors have maintained records of these intercompany transactions since the Petition Date, the Debtors did not historically reconcile these transactions in a manner that would allow them to determine the net balances owed by one Debtor to another Debtor.

- Unity of Interests; Parent Ownership of Subsidiaries; Commingling of Business Functions. The Debtors share a unity of ownership and interests. All of the Debtors (except for Holdings) are owned and controlled by Air Pros Solutions, LLC, which is wholly owned by Holdings. Many of the Debtors also historically shared certain management and services through a centralized corporate office maintained by Debtor Air Pros Solutions, LLC, which housed its accounting, billing and collections, corporate compliance, information technology, legal, and marketing functions.

- Parent and Intercorporate Guarantees on Loans. The Debtors are jointly and severally liable under the Prepetition Loan Documents and the DIP Loan Documents as either a

[21] *Reider*, 31 F.3d at 1107–08; *Eastgroup Props. v. Southern Motel Assoc., Ltd.*, 935 F.2d 245, 249250 (11th Cir. 1991).

borrower or guarantor and, accordingly, all Debtors have pledged substantially all of their assets as security for their obligations under the Prepetition Loan Documents and the DIP Loan Documents.

- Difficulty in Segregating and Ascertaining Individual Assets and Liabilities. As discussed in Article V.I of the Disclosure Statement, the Debtors have obtained approval to sell substantially all of their assets pursuant to the Stalking Horse APAs. Pursuant to the Sale Orders, as well as the Prepetition Loan Documents and the DIP Loan Documents, the proceeds of the sales have been or will be remitted to the DIP Secured Parties and the Prepetition Secured Parties, except for amounts necessary to fund the administration of these Chapter 11 Cases through the Effective Date, as well as the Wind Down Cash Amount and the Initial Litigation Trust Funding Amount. It would be administratively impossible to segregate and ascertain the individual assets and liabilities to be administered and dealt with under the Plan for several reasons:

    - *First*, other than the Litigation Trust Funding Amount, the Litigation Trust Assets are comprised entirely of the Litigation Trust Claims (i.e., certain Causes of Action of the Debtors' Estates). The Litigation Trust Claims will include (i) certain Designated Causes of Action, such as claims for breach of fiduciary duty, corporate waste, gross mismanagement, and fraud, against former officers and directors of the Debtors (excluding the Released Debtor D&Os), and (ii) Assigned Causes of Action, which will include Avoidance Actions and other commercial tort claims of the Debtors and their Estates. Because of the nature of the Litigation Trust Claims, many of which are based upon collective injury to the Debtors as an enterprise, it would be impossible to apportion the value of these Causes of Action among the Debtors. Accordingly, all Holders of General Unsecured Claims will benefit from sharing pro rata in the recoveries from these Claims without the unnecessary and prohibitively expensive exercise of attempting to apportion value among the Debtors.

    - *Second*, all Remaining Assets (i.e., those assets of the Estates that are not be transferred to the Litigation Trust) constitute DIP Collateral and/or Prepetition Collateral, and the net proceeds thereof, after satisfaction of certain administrative and priority Claims, will be used to satisfy the DIP Lender Claims and Prepetition Lender Claims. Accordingly, the expense that would be incurred to allocate the value of the Remaining Assets among the Debtors, to the extent doing so would be possible, is materially outweighed by the benefit of substantive consolidation. Moreover, the Plan is supported by the Prepetition Lenders and DIP Lenders, the primary beneficiaries of the administration of the Remaining Assets.

- Common Officers and Directors. Prior to the Petition Date, each of the Debtors historically had the same executive leadership team, including Anthony Perera (Chief Executive Officer, before transitioning to Chief Growth Officer), Robert Dipietro (Chief Executive Officer), and Richard Outram (Chief Financial Officer). As of the Petition Date, Brian Smith is the Chief Operating Officer of each of the Debtors (other than Holdings) and Andrew Hede is the Chief Restructuring Officer of all of the

Debtors. Lawrence Hirsh is the sole manager of Holdings and Air Pros Solutions, LLC, which is in turn the sole manager of each of the Debtor subsidiaries that is a limited liability company and the Administrative Partner of Air Pros Washington, LLP. Accordingly, the Debtors have substantial overlap of core management, including officers, directors, and managing members.

32. Accordingly, the Debtors substantive consolidation is appropriate in these Chapter 11 Cases, and the Plan satisfies the requirements set forth in Bankruptcy Code section 1123(a)(5).

33. ***Section 1123(a)(6) – Non-Voting Equity Securities.*** No equity securities are being issued pursuant to the Plan. Accordingly, section 1123(a)(6) of the Bankruptcy Code does not apply to the Plan.

34. ***Section 1123(a)(7) – Directors, Officers, and Trustees.*** The Plan does not provide for the reorganization of the Debtors. The Litigation Trust Assets will be vested in the Litigation Trust, which will be administered by the Litigation Trustee, and the Remaining Assets will be vested in the Wind Down Debtors, which will be administered by the Plan Administrator. The Plan, the Plan Administration Agreement, and the Litigation Trust Agreement provide for the selection of the Plan Administrator and the Litigation Trustee in a manner and on terms consistent with the interests of creditors and equity holders and public policy. Moreover, the Debtors have disclosed the identity of the Plan Administrator and the Litigation Trustee. The Plan Supplement identifies LRHIRSH, LLC as Plan Administrator and Olympus Guardians LLC as Litigation Trustee. Accordingly, the Debtors submit that the Plan satisfies the requirements of Bankruptcy Code section 1123(a)(7).

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

35. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponents comply with applicable provisions of the Bankruptcy Code. Case law and legislative history indicate that this section principally reflects the disclosure and solicitation requirements of section

1125 of the Bankruptcy Code,[22] which prohibits the solicitation of plan votes without a court-approved disclosure statement.[23]

a. The Debtors Complied with Section 1125 of the Bankruptcy Code

36. The Debtors have satisfied section 1125. Before the Debtors solicited votes on the Plan, the Court approved the adequacy of the Disclosure Statement on an interim basis pursuant to section 1125(a) of the Bankruptcy Code and the Solicitation Procedures Order.[24] As set forth in Section A above, the adequacy of the Disclosure Statement should be approved on a final basis. The Court also approved the contents of the Solicitation Packages provided to Holders of Claims entitled to vote on the Plan, the forms of notices provided to parties not entitled to vote on the Plan, and the relevant dates for voting on and objecting to the Plan.[25] Through the Claims and Noticing Agent, the Debtors complied with the content and delivery requirements of the Solicitation Procedures Order, thereby satisfying section 1125(a) and (b) of the Bankruptcy Code.[26]

37. The Debtors 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

[22] *See* H.R. Rep. No. 95–595, at 412 (1977 ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *In re Lapworth*, No. 97-34529, 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2).").

[23] 11 U.S.C. § 1125(b).

[24] *See* Solicitation Procedures Order.

[25] *Id.*

[26] *See* Solicitation Affidavit.

particular Class. Here, the Debtors caused the Disclosure Statement to be transmitted to all parties entitled to vote on the Plan.[27]

38. Finally, the Debtors and their agents have solicited and tabulated votes on the Plan and participated in the activities described in section 1125 of the Bankruptcy Code fairly, in good faith within the meaning of section 1125(e), and in a manner consistent with the applicable provisions of the Solicitation Procedures Order, the Disclosure Statement, the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the Complex Case Procedures, and all other applicable rules, laws, and regulations.[28] The Debtors therefore submit that they and their agents are entitled to the protections afforded by section 1125(e) and the exculpation provisions set forth in Article X of the Plan.

39. Based on the foregoing, the Debtors submit that they have complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Solicitation Procedures Order.

b. The Debtors Complied with Section 1126 of the Bankruptcy Code

40. Under section 1126(f) and (g) of the Bankruptcy Code, a plan proponent is not required to solicit votes from holders of claims and interests in classes deemed to have accepted or rejected a chapter 11 plan. Accordingly, the Debtors did not solicit votes on the Plan from Classes 1, 2, 5, 6 and 7. Rather, the Debtors solicited votes only from Holders of Allowed Claims in Classes 3 and 4 (i.e., the Voting Classes) because these Classes are impaired and not presumed

[27] *Id.*

[28] *See* 11 U.S.C. § 1125(e). Section 1125(e) of the Bankruptcy Code provides that "a person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title . . . is not liable" on account of such solicitation for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan. *Id.*

to reject the Plan.[29] The Voting Declaration reflects the results of the voting process in accordance with section 1126 of the Bankruptcy Code.[30] As set forth in the Voting Declaration, Class 3 and Class 4 voted to accept the Plan.[31]

41. Based on the foregoing, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(2) of the Bankruptcy Code.

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

42. 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."[32] Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied.[33]

43. Here, the Debtors have proposed the Plan in good faith and not by any means forbidden by law. The Plan itself and the process leading to its formulation provide independent evidence of the Debtors' good faith and assure the fair treatment of Holders of Claims or Interests.

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[29] *See* Plan, Art. III; *see generally* Solicitation Affidavit.

[30] "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) [section 1126], 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 [section 1126], that have accepted or rejected such plan." *Id.* § 1126(d).

[31] *See* Voting Declaration.

[32] 11 U.S.C. § 1129(a)(3).

[33] *In re McCormick*, 49 F.3d 1524, 1526 (11th Cir. 1995); *see also In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000).

Consistent with the overriding purposes of chapter 11 of the Bankruptcy Code, the Plan was negotiated and proposed with the intent of accomplishing a controlled liquidation of the Debtors and their assets and maximizing stakeholder value and for no ulterior purpose. The Plan is the result of negotiations among the Debtors and their key stakeholders, including their senior secured lenders and the Creditors' Committee. Thus, the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

4. The Plan Provides that the Debtors' Payment of Professional Fees and Expenses Are Subject to Court Approval (Section 1129(a)(4))

44. 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 issuing securities or acquiring property under the plan be approved by the Court as reasonable or subject to approval by the Court as reasonable.[34]

45. In general, the Plan provides that Professional Fee Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 or 330 of the Bankruptcy Code. The Plan and Confirmation Order provide that Professionals shall file all final requests for payment of Professional Fee Claims no later than the Professional Fee Claims Bar Date, which is 45 days after the Effective Date, thereby providing adequate time for interested parties to review such Professional Fee Claims.[35] For the foregoing reasons, the Debtors submit that the Plan complies with section 1129(a)(4) of the Bankruptcy Code, and no party has asserted otherwise.

[34] 11 U.S.C. § 1129(a)(4).

[35] Plan, Art. II.B.1.

5. The Debtors Have Complied with the Bankruptcy Code's Governance Disclosure Requirement (Section 1129(a)(5))

46. 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 Debtors or a successor to the Debtors under the Plan. 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. Lastly, it requires that the plan proponent have disclosed the identity of insiders to be retained by the reorganized debtor and the nature of any compensation for such insider.

47. The Debtors have provided the information required under section 1129(a)(5) by disclosing the identity of the Plan Administrator and the identity of the Litigation Trustee. Based upon the foregoing, the Plan satisfies the requirements of Bankruptcy Code section 1129(a)(5).

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

48. 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. The Plan does not contain any rate changes subject to the jurisdiction of any governmental regulatory commission and therefore will not require governmental regulatory approval. Accordingly, Section 1129(a)(6) of the Bankruptcy Code is inapplicable to the Plan.

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

49. 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.[36] 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 the debtor's estate against the estimated recoveries under the debtor's plan.[37]

50. As demonstrated in the liquidation analysis attached to the Disclosure Statement as Exhibit D (the "Liquidation Analysis"), as well as the Hede Declaration, all Holders of Claims and Interests in all Impaired Classes will recover at least as much under the Plan as they would in a hypothetical chapter 7 liquidation. First, all Holders of Claims in Class 3 (Prepetition Secured Claims) have voted to accept the Plan. Further, with respect to Class 4 (General Unsecured Claims), the Plan establishes a Litigation Trust for the benefit of General Unsecured Creditors, and the Litigation Trust will be funded with the Litigation Trust Funding Amount of at least $1 million. However, as set forth in and illustrated by the Liquidation Analysis, under a hypothetical liquidation under chapter 7 of the Bankruptcy Code, no distributable assets would be available for General Unsecured Creditors. Therefore, each Holder of an Allowed Claim in Class 4 will receive at least as much under the Plan as they would in a hypothetical chapter 7 liquidation.

51. Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code and the best interests test, and no party has asserted otherwise.

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[36] 11 U.S.C. § 1129(a)(7).

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

8. The Plan is Confirmable Notwithstanding the Requirements of Section 1129(a)(8) of the Bankruptcy Code

52. The Bankruptcy Code generally requires that each class of claims or interests must either accept the plan or be unimpaired under the plan.[38] Classes 1 and 2 are Unimpaired under the Plan and are deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. With respect to Classes entitled to vote on the Plan, Class 3 and Class 4 are Impaired and voted to accept the Plan. With respect to the Classes that are deemed to reject the Plan, the Plan is confirmable because the Plan does not discriminate unfairly and is fair and equitable with respect to each such Class and, thus, satisfies section 1129(b) of the Bankruptcy Code.

53. While Classes 5, 6, and 7 (the "Nonaccepting Classes") are deemed to have rejected the Plan, as set forth in further detail below, the Plan satisfies the cramdown requirements of section 1129(b). The Plan is therefore confirmable notwithstanding the non-acceptance by the Nonaccepting Classes.

9. The Plan Provides for the Required Treatment of Administrative and Priority Tax Claims (Section 1129(a)(9))

54. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. The treatment of Administrative Claims, Professional Fee Claims, and Priority Tax Claims under Article II of the Plan satisfies the requirements of, and complies in all respects with, 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 Expense Claim will be paid in full in Cash the unpaid portion of its Allowed Administrative Claim on the latest of: (a) the Effective Date, if such Administrative Claim is Allowed as of the Effective Date; (b) the date such Administrative Claim is Allowed or as soon as reasonably practicable thereafter; and (c) the date

[38] 11 U.S.C. § 1129(a)(8).

such Allowed Administrative Claim becomes due and payable or as soon thereafter as is reasonably practicable. Second, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no Holders of the types of Claims specified in section 1129(a)(9)(B) are Impaired under the Plan. Finally, Article II.D of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it specifically provides that each Holder of Allowed Priority Tax Claims will receive, in full and final satisfaction of such Allowed Priority Tax Claim, Cash equal to the amount of such Allowed Priority Tax Claim or other treatment in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code. Thus, the Plan satisfies each of the requirements set forth in section 1129(a)(9) of the Bankruptcy Code, and no party has asserted otherwise.

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

55. 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 an alternative to the requirement under section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either accept the plan or be unimpaired under the plan. As set forth in the Voting Declaration, Class 3 (Prepetition Lender Secured Claim) and Class 4 (General Unsecured Claims) are impaired and have voted to accept the Plan. Accordingly, at least one Voting Class has voted to accept the Plan, determined without including any acceptance of the Plan by any insider (as defined by the Bankruptcy Code), and the requirements of section 1129(a)(10) of the Bankruptcy Code are satisfied.

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

56. Feasibility refers to the Bankruptcy Code's requirement that plan confirmation is not "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."[39] Under this standard, the debtor does not have to guarantee a plan's success.[40] Instead, a debtor must provide only a reasonable assurance of success.[41]

57. The Plan is feasible. The Plan is a liquidating plan under which the Litigation Trust Assets will be liquidated and distributed to Holders of Allowed General Unsecured Claims pursuant to the terms of the Plan and the Litigation Trust Agreement, and the Remaining Assets will be liquidated, and the net proceeds therefrom will be distributed to Holders of Allowed Class 4 Claims. Under the Plan, the Debtors will be dissolved and no longer in existence. The Plan provides for the Plan Administrator and Litigation Trustee, as applicable, to make the necessary distributions under the Plan. The Plan further provides a mechanism for the time and method of distributions. Moreover, as reflected in the Hede Declaration, the Debtors believe that the Debtors and the Plan Administrator, as applicable, will have sufficient assets to make distributions required under the Plan, including payment of Allowed Administrative Claims (including Professional Fee Claims), Priority Tax Claims, and Other Priority Claims.

58. Accordingly, the Plan satisfies the requirements of feasibility under section 1129(a)(11) of the Bankruptcy Code.

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[39] 11 U.S.C. § 1129(a)(11).

[40] *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012); *In re W.R. Grace & Co.,* 475 B.R. 34, 115 (D. Del 2012).

[41] *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990); *Internal Revenue Serv. v. Kaplan* (*In re Kaplan*), 104 F.3d 589, 597 (3d Cir. 1997).

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

59. The Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930.[42] The Plan includes an express provision requiring payment of all fees under 28 U.S.C. § 1930.[43] The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code, and no party has asserted otherwise.

13. Sections 1129(a)(13) Through Sections 1129(a)(16) of the Bankruptcy Code Do Not Apply to the Plan.

60. Several of the Bankruptcy Code's confirmation requirements are inapplicable to the Plan. The Debtors have no obligations to provide retiree benefits (as such term is used in section 1114 of the Bankruptcy Code) and, accordingly, section 1129(a)(13) of the Bankruptcy Code is inapplicable. None of the Debtors owes any domestic support obligations, is an individual, or is a nonprofit corporation. Therefore, sections 1129(a)(14), 1129(a)(15), and 1129(a)(16) of the Bankruptcy Code do not apply to the Plan.

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

61. If an impaired class has not voted to accept the plan or is deemed to reject the plan, the plan must be "fair and equitable" and not "unfairly discriminate" with respect to that class.[44] Here, as described in section B.10 above, the Nonaccepting Classes are Impaired and are deemed to reject the Plan. However, the Plan satisfies the cramdown requirements because it does not discriminate unfairly and is fair and equitable with respect to those Nonaccepting Classes.

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[42] 11 U.S.C. § 1129(a)(12).

[43] *See* Plan, Art. II.E.

[44] *See* 11 U.S.C. § 1129(b)(1).

a. The Plan Is Fair and Equitable

62. 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."[45] This rule 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.[46]

63. Under the Plan, no Holder of a Claim or Interest junior to the Claims and Interests in the Nonaccepting Classes will receive any recovery under the Plan on account of such junior Claim or Interest. Indeed, the Plan is a straightforward liquidating plan that follows the priority scheme established by the Bankruptcy Code. Accordingly, the Plan is fair and equitable within the meaning of section 1129(b) of the Bankruptcy Code.

b. The Plan Does Not Unfairly Discriminate Against the Rejecting Classes

64. The unfair discrimination standard of section 1129(b) ensures that a plan does not unfairly discriminate against a dissenting class with respect to what the dissenting class will receive under a plan when compared to the value given to all other similar situated classes.[47] The Bankruptcy Code does not provide a standard for determining when "unfair discrimination"

[45] *203 N. LaSalle St. P'ship*, 526 U.S. at 441–42.

[46] *Id*.

[47] *In re Armstrong World Indus., Inc.*, 348 B.R. 111, at 120 (D. Del. 2006).

exists.[48] Rather, courts typically examine the facts and circumstances of the particular case.[49] 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.[50] 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.[51] 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.[52]

65. The Plan satisfies the "unfair discrimination" requirement of section 1129(b) of the Bankruptcy Code. All Classes under the Plan are provided treatment that is substantially equivalent to the treatment that is provided to other Classes of equal rank. Accordingly, there is no unfair discrimination with respect to these Classes, and no party has otherwise alleged that the Plan discriminates unfairly with respect to any Nonaccepting Class.

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[48] *See In re 203 N. LaSalle St. Ltd. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"), *rev'd on other grounds*, 526 U.S. 434.

[49] *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").

[50] *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003).

[51] *See Armstrong World*, 348 B.R. at 121–22 (*citing In re Dow Corning Corp.*, 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999)).

[52] *Id.*

15. The Plan Complies with the Other Provisions of Section 1129 of the Bankruptcy Code (Section 1129(c)–(e)).

66. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code. Section 1129(c), prohibiting confirmation of multiple plans, is not implicated because no other plan has been filed in these Chapter 11 Cases.[53]

67. No Governmental Unit has requested that the Court refuse to confirm the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act. As evidenced by its terms, the principal purpose of the Plan is not such avoidance. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

68. Lastly, section 1129(e) of the Bankruptcy Code is inapplicable because these Chapter 11 Cases are not small business cases. Thus, the Plan satisfies the Bankruptcy Code's mandatory confirmation requirements.

C. The Discretionary Contents of the Plan Are Appropriate.

69. The Bankruptcy Code identifies various additional provisions that may be incorporated into a chapter 11 plan, including "any appropriate provision not inconsistent with the applicable provisions of this title."[54] Pursuant to section 1123(b), a plan may (1) impair or leave unimpaired any class of claims or interests, (2) provide for the assumption, assignment, or rejection of executory contracts and unexpired leases, (3) provide for the settlement of claims and/or the retention of claims or causes of action, (4) provide for the sale of all or substantially all of the debtor's property, (5) modify or leave unaffected the rights of holders of claims, and (6) include

[53] 11 U.S.C. § 1129(c).

[54] *Id.* § 1123(b)(1)-(6).

any other appropriate provision not inconsistent with the Bankruptcy Code.[55] As provided herein, the Plan complies with section 1123(b).

1. The Plan Complies with Section 1123(b)(1): Impairment/Unimpairment of Classes of Claims and Interests

70. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests."[56] As discussed above, consistent with section 1123(b)(1) of the Bankruptcy Code, Article III of the Plan classifies and describes the treatment of each Impaired and Unimpaired Class.

2. The Plan Complies with Section 1123(b)(2): Assumption, Assignment, and Rejection of Executory Contracts and Unexpired Leases

71. Section 1123(b)(2) of the Bankruptcy Code permits a plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases, subject to section 365 of the Bankruptcy Code. Article VI of the Plan addresses the assumption and rejection of executory contracts and unexpired leases and meets the requirements of section 365(b) of the Bankruptcy Code. Consistent with section 1123(b)(2) of the Bankruptcy Code, Article VI.A of the Plan provides that on the Effective Date, except as otherwise provided in the Plan, each Debtor will be deemed to have rejected each Executory Contract or Unexpired Lease to which such Debtor is a party, unless such Executory Contract or Unexpired Lease (i) was previously assumed, assumed and assigned, or rejected; (ii) was previously expired or terminated pursuant to its own terms; or (iii) is the subject of a motion or notice to assume or reject filed on or before the Confirmation Date.

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[55] *Id.*

[56] 11 U.S.C. § 1123(b)(1).

72. In accordance with the Sale Orders and the Asset Purchase Agreements, each Stalking Horse Purchaser designated certain executory contracts and unexpired leases for assumption and assignment to the respective Stalking Horse Purchaser. The Debtors have reviewed any remaining executory contracts and unexpired leases that have not been assumed, assumed and assigned, or rejected, as of the date hereof, and, except to the extent such executory contract or lease is subject of a motion to assume as of the date hereof, the Debtors have determined in their business judgment that such agreements are not necessary to the administration of the Wind Down Debtors' Estates and, therefore, should be rejected as set forth in the Plan.

3. The Plan Complies with Section 1123(b)(3): Settlement and Retention of Claims and Causes of Actions

a. Approval of the Creditors' Committee Settlement

73. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may "provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estate. . . ."[57] As part of the restructuring process, a court "may approve a compromise or settlement" under Bankruptcy Rule 9019(a), and "the standards for approval of a settlement under section 1123 are generally the same as those under [Bankruptcy] Rule 9019 . . . ."[58] In order for a court to approve a settlement, it must be "fair and equitable."[59] In making this determination, it is not necessary for the court to conduct a "mini trial" of the facts or the merits of the underlying disputes to be settled or decide the numerous questions of law or fact raised by litigation.[60] Instead,

[57] 11 U.S.C. § 1123(b)(3)(A).

[58] *In re Coram Healthcare Corp.*, 315 B.R. 321, 334-35 (Bankr. D. Del. 2004).

[59] *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 475 (Bankr. D. Del. 2010).

[60] *Id.* at 515 ("[T]he Court is not required to conduct a full evidentiary hearing as a prerequisite to approving a compromise."); *see also In re Penn. Cent. Transp. Co.*, 596 F.2d 1127, 1146 (3d Cir. 1979) (explaining that a court

the court "should canvass the issues to determine whether the settlement falls above the lowest point in the range of reasonableness."[61]

74. In addition, courts in the Eleventh Circuit evaluate the following factors: (1) the probability of success in litigation; (2) difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors.[62] In addition, the court should defer to the debtor's business judgment "so long as there is a legitimate business justification . . . ."[63] In considering whether to approve a settlement, courts should exercise their discretion "'in light of the general public policy favoring settlements.'"[64] Finally, when evaluating the settlement, courts look to "whether the settlement as a whole is reasonable."[65]

75. The Court should approve the Creditors' Committee Settlement and the Debtors' support thereof as a valid exercise of the Debtors' reasonable business judgment. As an initial matter, the Debtors have limited obligations under the Creditors' Committee Settlement, and it does not place any significant burden on the Debtors or their Estates. Further, the Creditors'

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need only consider those facts which are necessary to enable it to evaluate the settlement and to make an informed and independent judgment about the settlement).

[61] *Capmark*, 438 B.R. at 515.

[62] *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1549 (11th Cir. 1990); *In re Marvelay, LLC*, No. 18-69019-LRC, 2019 WL 3334706, at *5 (Bankr. N.D. Ga. July 23, 2019) (*citing Chira v. Saal (In re Chira)*, 567 F.3d 1307, 1312–13 (11th Cir. 2009)).

[63] *Myers v. Martin* (*In re Martin*), 91 F.3d 389, 395 (3d Cir. 1996).

[64] *Capmark*, 438 B.R. at 515 (quoting *In re Hibbard Brown & Co.*, 217 B.R. 41, 46 (Bankr. S.D.N.Y. 1998)).

[65] *In re Wash. Mut., Inc.*, 442 B.R. 314, 329 (Bankr. D. Del. 2011) ("[E]ach part of the settlement must be evaluated to determine whether the settlement as a whole is reasonable. This is not to say, however, that this is a mere math exercise comparing the sum of the parts to the whole. Rather, the Court recognizes that there are benefits to be recognized by a global settlement of all litigation . . . that may recommend a settlement that does not quite equal what would be a reasonable settlement of each part separately.")

Committee Settlement offers (a) a global resolution to the parties' issues and (b) the potential for creditors (namely General Unsecured Creditors) to obtain a recovery in these Chapter 11 Cases. Accordingly, the Debtors submit that their entry into the Creditors' Committee Settlement is a valid exercise of the Debtors' reasonable business judgment.

76. The Creditors' Committee Settlement also satisfies the factors in the Eleventh Circuit under *Justice Oaks*.[66] As to the first and third factors, balancing the probability of the Debtors' successfully obtaining confirmation of the Plan over the objections of the Creditors' Committee, and the consequences that would result from going forward with a contested confirmation weighs in favor of approving the Creditors' Committee Settlement. By entering into the Creditors' Committee Settlement, the Debtors reached a resolution with their key constituents, which fosters a far more "consensual" path to confirmation of the Plan and ultimately creating an opportunity for the Holders of Class 4 Claims to obtain a recovery.

77. The fourth factor – the paramount interest of creditors – also favors the Creditors' Committee Settlement, which provided the framework for a global resolution among the Debtors' key creditor constituencies and, as noted above, the possibility of a recovery for General Unsecured Creditors. The record also supports that the Creditors' Committee Settlement was the product of arm's-length negotiations and not fraud or collusion, which favors the fourth factor. The Creditors' Committee Settlement was reached only after extensive negotiations between the Creditors' Committee, the Prepetition Lenders, the DIP Lenders, and the Debtors. Thus, the Debtors believe that the fourth factor has been met.

[66] With regard to the second factor – the difficulties in collection – the Debtors contend that it does not apply to the case at hand.

78. As set forth above, the Creditors' Committee Settlement is (a) the product of extensive arm's-length negotiations, (b) in the best interests of the Debtors, their Estates, and the Holders of Claims and Interests, and (c) fair, equitable, and reasonable. Accordingly, the Creditors' Committee Settlement should be approved pursuant to section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019.

b. Retention of Causes of Action and Reservation of Rights

79. Section 1123(b)(3)(B) of the Bankruptcy Code permits a chapter 11 plan to provide for the retention and enforcement of any claim or interest by the debtor, a trustee, or a representative of the estate. Article IV.E of the Plan provides that, except for any Cause of Action against a Person that is expressly waived, relinquished, exculpated, released, compromised under the Plan or Final Order, transferred to the Litigation Trust, or settled in the Plan or a Final Order, in accordance with section 1123(b) of the Bankruptcy Code, the Wind Down Debtors shall retain and may enforce all rights to commence and pursue, as appropriate, any and all Causes of Action, whether arising before or after the Petition Date and such rights to commence, prosecute, or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date. Accordingly, the Plan is consistent with section 1123(b)(3)(B) of the Bankruptcy Code.

4. The Plan Complies with Section 1123(b)(5): Modification of Rights

80. Section 1123(b)(5) of the Bankruptcy Code permits a plan to modify or leave unaffected the rights of holders of any class of claims. In accordance and in compliance with section 1123(b)(5) of the Bankruptcy Code, the Plan properly modifies or leaves unaffected the rights of Holders of Claims and Interests in each of the Classes. Thus, the Plan complies with section 1123(b)(5) of the Bankruptcy Code.

5. The Plan Complies with Section 1123(b)(6): Additional Plan Provisions

81. Section 1123(b)(6) permits a plan to include "any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[67] The permissive provisions of the Plan are appropriate and consistent with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1123(b)(6) of the Bankruptcy Code. The failure to address specifically a provision of the Bankruptcy Code in this memorandum or the Confirmation Order shall not diminish or impair the effectiveness of the Confirmation Order.

D. The Releases and Exculpation are Appropriate and Should be Approved

82. In accordance with sections 1123(b)(3)(A) and 1123(b)(6) of the Bankruptcy Code, Article X of the Plan provides for the Debtor Release, the Third-Party Release, and an exculpation. The scope of the "Released Parties" [68] and "Exculpated Parties"[69] are limited to only those Persons described in the respective definitions under the Plan. Importantly, the identity of such Released Parties and Exculpated Parties and the scope of the releases and exculpation have been the subject of negotiations with the Committee, the Prepetition Lenders, and the DIP Lenders, and are

[67] 11 U.S.C. § 1123(b)(6).

[68] Under Article I.139 of the Plan, "*Released Party*" means each of the following, solely in its capacity as such: (a) the DIP Agent; (b) the DIP Lenders; (c) the Prepetition Agent; (d) the Prepetition Lenders; (e) the CPO; (f) the Released Debtor D&Os; and (g) the Debtors' Professionals retained in these Chapter 11 Cases; (i) with respect to the Entities in the foregoing clauses (a) through (g), each such Entity's current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers, control persons, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, participants, managed accounts or funds, fund advisors, predecessors, successors, assigns, subsidiaries, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, investment managers, and other professionals, each in their capacity as such; provided that any Holder of a Claim that opts out of the Third-Party Releases contained in the Plan and any Holder of a Claim or Interest that is not a Releasing Party shall not be a "Released Party". For the avoidance of doubt, the Non-Released Debtor D&Os shall not be Released Parties.

[69] Under Article I.73 of the Plan, "*Exculpated Parties*" means, collectively, and in each case in its capacity as such: (a) the Debtors, (b) the Released Debtor D&Os, (c) the Debtors' Professionals retained in these Chapter 11 Cases, (d) the Creditors' Committee, the members of the Creditors' Committee in their capacity as such, the individuals representing such members, in their capacity as such, (e) the Creditors' Committee Professionals, and (f) the CPO.

specifically contemplated under the Creditors' Committee Settlement. Accordingly, the releases and exculpation are integral components of the Plan and the settlement and transactions embodied therein, are appropriate and necessary under the circumstances, are consistent with the Bankruptcy Code, and comply with applicable law.

1. The Debtor Release is Appropriate and Should be Approved

83. As permitted by section 1123(b)(3)(A) of the Bankruptcy Code, Article X of the Plan defines and sets forth the Debtor Release. Claims held by a debtor against third parties are property of the estate and may be released in exchange for settlement.[70] Section 1123(b)(3)(A) of the Bankruptcy Code allows a plan to provide for "the settlement or adjustment of any claim or interest belonging to the Debtors or to the estate."[71]

84. In accordance therewith, Article X.C of the Plan contains the Debtor Release – the release of certain claims or Causes of Action of the Debtors and the Estates against the Released Parties in exchange for good and valuable consideration and valuable compromises made by the Released Parties. Such consideration includes, without limitation, the service of the Released Parties before and during the Chapter 11 Cases to facilitate the implementation of the Plan. The Debtor Release does not release "any Claims related to any act or omission that is determined in a Final Order by a court of competent jurisdiction to have constituted criminal conduct, actual fraud, willful misconduct, knowing violation of law, gross negligence or bad faith."[72]

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[70] *See PWS Holding Corp.*, 228 F.3d at 242; *In re Johns-Manville* (*Manville I*), 837 F.2d 89, 91–92 (2d Cir. 1988); *see also* 11 U.S.C. § 541(a)(1).

[71] 11 U.S.C. § 1123(b)(3)(A).

[72] Plan, Art. XIII.C.

85. When considering releases by a debtor of non-debtor third parties pursuant to § 1123(b)(3)(A), the appropriate standard is whether the release is a valid exercise of the debtor's business judgment and is fair, reasonable, and in the best interests of the estate.[73] As an exercise of its business judgment, a debtor's decision to release claims against third parties under a plan is afforded deference.[74]

86. The Debtor Release is an essential component of the Plan and constitutes a sound exercise of the Debtors' business judgment given that the Plan represents a fully integrated comprehensive liquidation of the Debtors' Assets, including the Litigation Trust Assets, and provides a potential recovery to Holders of General Unsecured Claims. It is also the result of extensive negotiations with the Prepetition Lenders, the DIP Lenders, and the Creditors' Committee. Accordingly, the Debtor Release it is a sound exercise of the Debtors' business judgment and should be approved.

2. The Third-Party Release is Consensual and the UST Objection Should be Overruled

87. Article X.D contains the Third-Party Release, which provides for releases by the Releasing Parties[75] of the Released Parties for liability relating to the Debtors or these Chapter 11

[73] *U.S. Bank Nat'l Assoc. v. Wilmington Tr. Co.* (*In re Spansion, Inc.*), 426 B.R. 114, 143 (Bankr. D. Del. 2010) ("[A] debtor may release claims in a plan pursuant to Bankruptcy Code § 1123(b)(3)(A), if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."); *see also In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS), 2010 WL 3492664, at *20 (Bankr. D. Del. May 13, 2010) (stating that where a debtor release is "an active part of the plan negotiation and formulation process, it is a valid exercise of the debtor's business judgment to include a settlement of any claims a debtor might own against third parties as a discretionary provision of a plan"); *Coram Healthcare Corp.*, 315 B.R. at 334 (holding that standards for approval of a settlement under section 1123 of the Bankruptcy Code generally are the same as those under Bankruptcy Rule 9019).

[74] *See, e.g., Spansion*, 426 B.R. at 140 ("It is not appropriate to substitute the judgment of the objecting creditors over the business judgment of the [d]ebtors.").

[75] Under Article I.140, "*Releasing Party*" means each of the following, solely in its capacity as such: (a) the Debtors; (b) the Estate; (c) the DIP Agent; (d) the DIP Lenders; (e) the Prepetition Agent; (f) the Prepetition Lenders; (g) the CPO; (h) with respect to each of the foregoing entities in clauses (a) through (g), such entity's respective current and former Affiliates, and each of such entity's, and such entity's current and former Affiliates', current and former equity

Cases. The U.S. Trustee objects to the Third-Party Release and asserts that (i) the Third-Party Release is an improper, non-consensual release that cannot be included in a chapter 11 plan under the Supreme Court's decision in *Harrington v. Purdue Pharma, L.P.*,[76] (ii) the Plan includes an improper injunction to enforce the Third-Party Release, and (iii) the Plan improperly deems the Third-Party Release to be a settlement. As set forth herein, the Third-Party Release is consensual under applicable authority, including this Court's prior decisions. Additionally, the U.S. Trustee's remaining arguments are premised on the incorrect conclusion that the Third-Party Release is non-consensual. As set forth below, the injunction is appropriate, and the Third-Party Release is a proper, consensual settlement. Accordingly, the Debtors request that the Court overrule the U.S. Trustee Objection in its entirety and approve the Third-Party Release.

a. The Third-Party Release is Consensual

88. The U.S. Trustee Objection is premised, in large part, on *Purdue Pharma*, in which the Supreme Court held that the Bankruptcy Code does not allow ***non-consensual*** third-party releases in chapter 11 plans.[77] As the U.S. Trustee observes in its objection, the Supreme Court did not express a view on what qualifies as a consensual release.[78]

holders (regardless of whether such interests are held directly or indirectly), subsidiaries, officers, directors, managers, principals, members, employees, agents, advisors, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such; (i) all Holders of Claims and Interests that vote to accept the Plan; (j) all Holders of Claims and Interests that are deemed to accept the Plan and do not opt out of the Third-Party Release; (k) all Holders of Claims and Interests in voting classes that abstain from voting on the Plan and do not opt out of the Third-Party Release; (l) all Holders of Claims and Interests that vote, or are deemed, to reject the Plan and do not opt out of the Third-Party Release; (m) each Holder of an unclassified Claim who does not object to the Third-Party Release; and (n) all other Holders of Claims and Interests to the maximum extent permitted by law.

[76] 603 U.S. 204 (2024).

[77] *Id.*

[78] UST Objection ¶ 14 (*citing Purdue Pharma*, 603 U.S. at 226).

89. The U.S. Trustee asks this Court to apply state contract law in evaluating whether the Third-Party Release is consensual.[79] However, as this Court has recognized, federal bankruptcy law, rather than state contract law, controls whether Releasing Parties have consented to the Third-Party Release.[80] "[A] ruling approving third party releases is a determination that the plan at issue meets the ***federally created requisites for confirmation and third party releases***."[81]

90. Consensual releases are permitted in chapter 11 plans under sections 105(a) and 1123(b)(6) of the Bankruptcy Code. Courts may look at various factors to determine whether the opt-out process in a particular case is acceptable, and whether opt-outs are sufficient to manifest consent must be determined on a case-by-case basis.[82] Courts will consider whether affected parties receive clear and prominent notice and explanation of the releases, including whether such recipient of an opt form would understand the opt-out mechanism, the scope of the released claims, and the identity of the released parties.[83] "[E]vidence of consent, rather than whether the

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[79] *Id.* at ¶¶ 18–26.

[80] *See In re Lavie Care Ctrs.*, No. 24-55507-PMB, 2024 Bankr. LEXIS 2900, at *33 (Bankr. N.D. Ga. Dec. 5, 2024) ("[T]he basis for the enforcement of consensual releases has not as far as this Court has been able to determine been described anywhere as a 'contract' for them, or an 'agreement' to them.").

[81] *In re Millenium Lab Holdings II, LLC*, 575 B.R. 252, 272–73 (Bankr. D. Del. 2017) (emphasis added). The bankruptcy court in *Millenium Lab Holdings* further recognized that, "in confirming a plan, even one with releases, courts apply a federal standard" and often look to sections 1129(a)(1), 1123(b)(6), and 105 of the Bankruptcy Code to permit releases). *Id*.

[82] *See In re GOL Linhas Aereas Inteligentes S.A.*, No. 24-10118 (MG), 2025 WL 1466055, at *24 (Bankr. S.D.N.Y. May 22, 2025) (holding that "consent must be knowing and voluntary and can be inferred from inaction if there has been constitutionally adequate service of process"); *see also In re Spirit Airlines, Inc.*, No. 24-11988, 2025 WL 737068, at *714 (Bankr. S.D.N.Y. Mar. 7, 2025) (describing the "need to evaluate third-party releases based on the unique facts and circumstances of the case at issue including the clarity of the language used, the history of the case, and the incentive for the affected creditors to engage in the bankruptcy case").

[83] *See In re Spirit Airlines, Inc.*, No. 24-11988, 2025 WL 737068, at *703 (Bankr. S.D.N.Y. Mar. 7, 2025); *In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 (Bankr. S.D. Tex. 2024) (confirming plan that included third-party release and finding that "the consensual third-party releases in the Plan are appropriate, afforded affected parties constitutional due process, and a meaningful opportunity to opt out.").

release is a 'necessary or appropriate' plan provisions or constitutes a 'contract', appears to be the touchstone for determining whether a creditor can be bound to a release."[84]

91. Under this standard, which this Court has previously applied in approving consensual third-party releases, the Releasing Parties in these Chapter 11 Cases have consented to the Third-Party Release. Importantly, the Plan and the solicitation procedures approved by the Solicitation Procedures Order provide creditors an opportunity to opt out of granting the Third-Party Release by checking the opt-out box on the applicable ballot or opt-out form and timely returning the Ballot or opt-out form to the Debtors' Claims and Noticing Agent. The Releasing Parties have therefore consented because each Releasing Party (a) voted to accept the Plan; (b) is left unimpaired and deemed to accept the Plan and did not opt out of granting the Third-Party Release; (c) rejected, was deemed to reject, or abstained from voting on the Plan, and did not opt out of granting the Third-Party Release; or (d) did not otherwise object to the Third-Party Release.

92. The Third-Party Release, with the opportunity to opt out, is consensual and satisfies the standard for approval of third-party releases in this district and should be approved:

- First, Holders of Claims that voted to accept the Plan have indicated their express consent to the Third-Party Release by voting to accept the Plan.[85]
- Second, parties that voted to reject the Plan but did not opt out have likewise consented to the Third-Party Release. The Ballots approved by the Court provided clear and conspicuous notice of the Third-Party Release and indicated that such

[84] *In re Lavie Care Ctrs.*, No. 24-55507- PMB, 2024 Bankr. LEXIS 2900, at *35 (Bankr. N.D. Ga. Dec. 5, 2024).

[85] *Lavie*, No. 24-55507- PMB, 2024 Bankr. LEXIS 2900, at * 29 (recognizing that "an overwhelming majority of cases find that a creditor's vote to accept a plan containing a third-party release (like the Plan) makes the release consensual[.]"). *See, e.g., Coram Healthcare Corp.*, 315 B.R. at 336 (finding that voting in favor of a plan of reorganization that provides for a third-party release indicates consent to the release, even without an explicit election opting to accept the third-party release provision); *In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (same).

parties would be deemed to have consented to the Third-Party Release if they vote to reject the Plan and do not opt-out of granting the Third-Party Release. By voting to reject the Plan but not checking the conspicuous opt-out box, such parties have communicated consent to grant the Third-Party Release.[86]

- Third, parties that either (a) received a Ballot and abstained from voting or (b) received a notice of non-voting status and opt-out form, and in each case did not opt out of granting the Third-Party Release are presumed to have consented to granting the Third-Party Release. The Ballots and the notices of non-voting status each provided clear and conspicuous notice of the Third-Party Release and that such parties would be deemed to consent to the Third-Party Release unless they timely completed and submitted the opt-out form or otherwise objected to the Third-Party Release. However, consistent with this Court's holding in *Lavie*, the Plan includes a rebuttable presumption that failure to timely opt out of the Third-Party Release constitutes consent to the Third-Party Release. Specifically, Article X.D of the Plan provides in relevant part:

> any Holder of a Claim or Interest who did not (i) return a Ballot or opt-out election form or (ii) file an objection to the Third-Party Release, that believes that its individual circumstances related to its ability to return a Ballot or opt-out election form opting out of the Third-Party Release or to object to the Third-Party Release are such that it should not be deemed to have consented to such Third-Party Release as a result of such failure, may seek relief from the Bankruptcy Court to exercise its rights and claims free of the Third-Party Release by rebutting the presumption that its failure to return a Ballot or opt-out election form opting out of the Third-

[86] *Lavie*, No. 24-55507- PMB, 2024 Bankr. LEXIS 2900, at *36 (Bankr. N.D. Ga. Dec. 5, 2024) ("[I]f you send in the ballot, having filled out your name and the amount of your claim, having signed it, and indicating you reject the Plan, but you do not check the conspicuous opt out box on the ballot, you have communicated consent to give the Release if the Plan is confirmed.").

> Party Release or to object to the Third-Party Release should be deemed to represent its consent to the Third-Party Release.

93. In approving a similar third-party release in *Lavie*, this Court found, among other things, that (1) the opt out mechanism was clear and conspicuous in the Plan and the associated notices and ballots, (2) the opt out mechanism was relatively simple and easy to understand, (3) creditors and interest-holders not entitled to vote were required to object or submit an opt-out form, which the Court determined was not problematic under the circumstances where several classes were either active participants in the case or consisted of claims and interests held by the Debtors or affiliates of the Debtors, (4) the released partes were limited to either estate fiduciaries, parties providing substantial consideration under and in support of the Plan, or affiliates of such parties, (5) the plan and settlement embodied in it were the product of significant negotiations, (6) the third-party release was an integral part of the plan, and (7) the plan and opt-out releases were supported by the major constituents in the case, and the plan was accepted by a majority of voting creditors by number and dollar amount.[87]

94. Each of these facts is also present here and further support approval of the Third-Party Release under the Plan:

- The opt-out mechanism used here is clear and conspicuous in the Plan, the Ballots, and the notices. The form of Ballot was revised prior to solicitation to include comments recommended by the U.S. Trustee and the Court, including comments on the record at the hearing to consider approval of the Solicitation Procedures.

- The opt-out mechanism is relatively simple and easy to understand, requiring creditors and interested parties only to check a box on the ballot or opt-out form and timely return it to the Claims and Noticing Agent or otherwise object to the Plan.

[87] *Id.* at *42–43.

- Creditors not entitled to vote on the Plan were provided a notice of non-voting status that included an opt-out form with clear instructions for opting out of granting the Third-Party Release.

- The Released Parties are limited to estate fiduciaries, parties providing substantial consideration under and in support of the Plan, or affiliates of such parties. First, the Released Debtor D&Os are limited to certain current directors and officers that have contributed to the Debtors' restructuring and marketing and sale efforts prior to and during these Chapter 11 Cases. Additionally, the Prepetition Agent, Prepetition Lenders, DIP Agent, and DIP Lenders have provided consideration, including by providing the DIP Facility to support the Debtors during these Chapter 11 Cases and by agreeing to fund the Litigation Trust, which provides the potential for recovery to General Unsecured Creditors.

- The Plan and the Creditors' Committee Settlement were the product of significant negotiations among the Debtors and their primary stakeholders, including the Debtors' secured lenders and the Creditors' Committee, which supports the Plan and the Third-Party Releases.

- The Third-Party Release is an integral part of the Plan and is specifically contemplated by and provided for in the Creditors' Committee Settlement. The creditors affected by the Third-Party Release are receiving consideration in exchange for granting the Third-Party Release, including the funding of the Litigation Trust and the funding of the Wind Down Cash Amount.

- The Plan and the Creditors' Committee Settlement, including the Third-Party Release, are supported by the major constituents in these Chapter 11 Cases. Additionally, as evidenced by the Voting Declaration, the Plan was accepted by the vast majority of voting creditors by number and amount.

95. Accordingly, the Third-Party Release is clear and conspicuous, properly noticed, justified under the facts, and is consensual under applicable law, and the Debtors respectfully submit that the Third-Party Release under the Plan should be approved.

b. The Injunction is Appropriate

96. The U.S. Trustee further objects to the injunction under the Plan as it relates to the Third-Party Release and requests that the injunction be narrowed to exclude any reference to the Third-Party Release. The UST Objection to the injunction should be overruled.

97. First, the injunction provision under Article X.F of the Plan does not include any reference to the "Third-Party Release". As such, the U.S. Trustee's demand that the injunction provision exclude any reference to the Third-Party Release is already satisfied.

98. Second, the U.S. Trustee's opposition to the injunction is premised on the Supreme Court's observation in *Purdue Pharma* that the Bankruptcy Code permits injunctions in support of nonconsensual third-party releases only in asbestos-related cases.[88] However, as discussed above, the Third-Party Release under the Plan is consensual. The plan injunction is the primary mechanism for enforcement of the Plan, including the Third-Party Release, and is used to prevent creditors from taking actions in violation of the plan. Because the Third-Party Release is consensual, the Court can approve the injunction as a means to effectuate the Plan and the Third-Party Release.[89]

c. The Third-Party Release is an Appropriate Settlement Under Bankruptcy Rule 9019

99. The U.S. Trustee further objects to the Third-Party Release and asserts that the Plan improperly deems the Third-Party Release to be a settlement, and "[n]othing in Bankruptcy Rule 9019 permits bankruptcy courts to force non-debtors who have not consented to release their rights to sue other non-debtors under applicable state law."[90] This argument is also premised on the incorrect presumption that the Releasing Parties have not consented. However, as further discussed above, the Third-Party Release is consensual under applicable federal bankruptcy law. Accordingly, the Plan appropriately deems the Third-Party Release to be a settlement between the

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[88] UST Objection ¶ 53; Purdue Pharma, 603 U.S. at 222.

[89] *See, e.g., In re GOL Linhas Aereas Inteligentes S.A.*, No. 24-10118 (MG), 2025 WL 1466055, at *90 (Bankr. S.D.N.Y. May 22, 2025) (finding that the bankruptcy court had jurisdiction to issue an injunction where the court had jurisdiction over the third-party release that the injunction effectuates).

[90] UST Objection ¶¶ 57–65.

Releasing Parties and the Released Parties consented to by the affected parties. The UST Objection should therefore be overruled.

3. The Plan Exculpation Provision Should be Approved

100. Article X.E of the Plan provides that no Exculpated Party shall have or incur liability for, and each Exculpated Party is released and exculpated from, any Cause of Action or any claim related to any act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, or filing of the Disclosure Statement, the Plan, the Plan Supplement, solicitation of votes on the Plan, the pursuit of confirmation, the pursuit of consummation or the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place from the Petition Date through the Effective Date, except for Claims related to any act or omission that is determined by a final order by a court of competent jurisdiction to have constituted criminal conduct, actual fraud, willful misconduct, knowing violation of law, or gross negligence.

101. Exculpation does not affect the liability of third parties, but rather, sets a standard of care of gross negligence or willful misconduct in any future litigation by a non-releasing party against an Exculpated Party for certain acts arising out of the Debtors' Chapter 11 Cases.[91]

102. Ultimately, each of the Exculpated Parties has participated in the Debtors' Chapter 11 Cases in good faith. Without the support of the Exculpated Parties, the Debtors would not have been able to execute their chapter 11 strategy, commence these Chapter 11 Cases, and propose a

[91] *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 230 (3d Cir. 2000) (approving plan provision that released claims except as to willful misconduct or gross negligence, and characterizing such a provision as "commonplace . . . in Chapter 11 plans").

Plan that provides a prospect of recovery to unsecured creditors and is backed and accepted by each of the Voting Classes.

103. Exculpation is necessary to protect parties that have made substantial contributions to the Debtors' Chapter 11 Cases from collateral attacks related to good faith acts or omissions. Further, the scope of the exculpation is appropriately tailored to cover only actions taken in connection with the negotiation of the Plan and will not affect any liability that arises from criminal conduct, actual fraud, willful misconduct, knowing violation of law or gross negligence, as determined by final order. Accordingly, the exculpation provided to the Exculpated Parties is appropriate and should be approved.

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WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court enter the Order, substantially in the form to be filed with the Court prior to the Combined Hearing, approving the Disclosure Statement on a final basis, confirming the Plan, and granting such other relief as the Court deems just and equitable.

Dated: August 4, 2025

Respectfully submitted,

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