IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
COBALT INTERNATIONAL ENERGY, INC., *et al.*,[1]	)	Case No. 17-36709 (MI)
Debtors.	)	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT
OF CONFIRMATION OF JOINT CHAPTER 11 PLAN

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Cobalt International Energy, Inc. (1169); Cobalt International Energy GP, LLC (7374); Cobalt International Energy, L.P. (2411); Cobalt GOM LLC (7188); Cobalt GOM # 1 LLC (7262); and Cobalt GOM # 2 LLC (7316). The Debtors' service address is: 920 Memorial City Way, Suite 100, Houston, Texas 77024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Cobalt International Energy, Inc. ("Cobalt") and its debtor affiliates as debtors and debtors in possession (collectively, the "Debtors") respectfully submit this memorandum of law in support of confirmation of the *Fourth Amended Joint Chapter 11 Plan of Cobalt International Energy, Inc. and its Debtor Affiliates* [Docket No. 561] (as modified, amended, or supplemented from time to time, the "Plan").[2] In support of confirmation of the Plan, and in response to objections thereto (collectively, the "Objections"),[3] the Debtors respectfully state as follows.

Introduction

1. The Plan is the culmination of diligent efforts by the Debtors, in consultation with their legal and professional advisors, to consummate a sale of substantially all of the Debtors' assets. On March 6, 2018, the Debtors held an auction for four main offshore discoveries located in the Gulf of Mexico and certain additional offshore exploration leases to the highest and best bidders. Together, the assets sales will generate over $577 million for the Estate. During the chapter 11 cases, the Debtors also reached a settlement to resolve a failed sale of certain Angolan assets held by a non-Debtor subsidiary to Sonangol. In accordance with the terms of the settlement, Cobalt received the first installment payment of $150 million with the balance of $350 million to be paid by July 1, 2018.

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2 Capitalized terms used but not defined in this memorandum have the meanings ascribed to them in the Plan.

3 The following parties filed Objections, including cure objections: Enbridge, Inc. [Docket No. 625]; the SEC [Docket No. 630]; the TGS Entities and WesternGeco Entities [Docket No. 631, 632]; Allied World National Assurance Company [Docket No. 635]; the Securities Plaintiffs [Docket No. 638]; Chevron U.S.A. Inc. and Union Oil Company of California [Docket No. 640] (the "Chevron Objection"); Haliburton Atlantic Limited and Halliburton Overseas Limited-Sucursal de Angola [Docket No. 641]; Anadarko Petroleum Corporation [Docket No. 642]; Nexen Petroleum Offshore U.S.A. Inc. and Nexen Petroleum U.S.A. Inc. [Docket No. 645]; ConocoPhilips Company [Docket No. 646]; Total E&P USA, Inc. [Docket No. 647]; Whitton Petroleum Services Limited ("Whitton") [Docket No. 671]; the Committee [Docket No. 676] (the "Committee Objection"); and the Unsecured Notes Ad Hoc Committee [Docket No. 679]. The Debtors have also received a number of informal objections from various parties in interest, all of which have been resolved.

2. The Plan is a waterfall plan pursuant to which the Debtors will distribute available cash, including the sale and Sonangol Settlement proceeds, to holders of Claims in accordance with the absolute priority rule. Under the Plan, holders of Allowed First Lien Notes Claims will be paid in full in Cash, and holders of Allowed Second Lien Claims will receive a significant cash distribution with additional distributions to the extent the Debtors receive the second installment payment under the Sonangol Settlement. Holders of general unsecured claims against any Debtor other than Cobalt, including the unsecured deficiency claim of the Second Lien Noteholders, will receive their *pro rata* share of the value of the unencumbered assets after satisfying priority claims, including any claims for diminution in value. Unfortunately, the value of the Debtors' assets does not warrant a distribution to the holders of Unsecured Notes, which are structurally subordinated to the Subsidiary General Unsecured Claims, including a $6.016 billion intercompany claim of Cobalt that is the collateral of the Second Lien Noteholders.[4] The Plan satisfies all applicable provisions of the Bankruptcy Code, including section 1129, and represents the best available alternative to maximize creditor recoveries.

3. As set forth in the Plan, a Plan Administrator will be appointed on the Effective Date to administer the winding down of the Debtors' business and affairs, including resolving claims and making distributions to creditors. Therefore, confirmation of the Plan and the occurrence of the Effective Date is not the end of the chapter 11 cases, but rather the next step toward effectuating an orderly liquidation of the Debtors' estate. The Debtors received 14 Objections to confirmation of the Plan. The Debtors have been actively engaging with the objection parties to consensually resolve their Objections. The Debtors believe that they have a

[4] The Committee has filed an objection to the intercompany claim of Cobalt International Energy, Inc. against Cobalt International Energy, L.P. [Docket No. 684]. Neither the Plan nor the Confirmation Order prejudices the rights of parties in interest to object to Intercompany Claims.

successfully resolved a number of these Objections, and they hope and expect to resolve additional Objections before the Confirmation Hearing. Certain unresolved Objections are addressed in the Trial Brief or this memorandum. The remaining Objections fall into three primary categories: (a) challenges to the merits of the Debtors' marketing process and the good faith of the winning bidders; (b) challenges to the releases under the Plan; and (c) technical challenges to the Plan. As discussed in detail below and in the Trial Brief, none of the Objections present a compelling reason to deny confirmation and risk destroying the value associated with the consummation of the Sale Transaction. According, the Debtors respectfully request that the Bankruptcy Court overrule the Objections and confirm the Plan.

Background

I. Procedural History.

4. On December 14, 2017 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors are operating their businesses and properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. These chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b) [Docket No. 33]. On December 21, 2017, the U.S. Trustee appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code [Docket No. 117]. A detailed description surrounding the facts and circumstances of the chapter 11 cases is set forth in the *Declaration of David D. Powell, Chief Financial Officer of Cobalt International Energy, Inc., in Support of Chapter 11 Petitions and First Day Motions* (the "First Day Declaration") [Docket No. 16].

II. The Sale Process.

5. Beginning in 2015, the Debtors commenced a strategic review of their assets. In the third quarter of 2016, Cobalt retained investment banks to assist in a marketing and sale process to identify one or more potential buyers capable of developing Cobalt's assets and interested in consummating a purchase and sale with respect those assets. During this time, the Debtors received some indications of interest, including an indication of interest from Total E&P USA, Inc. ("Total E&P") (or one of its affiliates or subsidiaries) to purchase Cobalt's assets. Total E&P's (non-binding) indication of interest allocated approximately $1.45 billion for all of Cobalt's assets (including the West Africa assets and Gulf of Mexico assets as well as cash on hand). Because the overall value of the indication of interest was insufficient to satisfy Cobalt's funded debt obligations, Cobalt decided to continue its marketing process. As circumstances changed with the passage of time, including potential purchasers performing additional due diligence, interest in Cobalt's assets declined. In May 2017, Total E&P again approached Cobalt to purchase substantially all of its assets (including the West Africa assets and Gulf of Mexico assets, but excluding cash on hand), this time for $1.0 billion,[5] a reduction from their offer less than a year earlier. Again, this amount was insufficient to cover Cobalt's funded debt obligations. Without any viable offers outside of bankruptcy, the Debtors filed these Chapter 11 Cases to build upon their prepetition marketing efforts to drive a sale of all or substantially all of their assets through an expedient chapter 11 process with the goal of maximizing ultimate realized value for stakeholders.

[5] Notably, the Sale Transaction contemplated by the Plan coupled with the Debtors' $500 million settlement with Sonangol, offers more distributable value than Total E&P's May 2017 proposal.

6. The timeline of these chapter 11 cases has been largely driven by important milestones and operational deadlines under the Debtors' oil and gas leases that, absent extension, could lead either to the Debtors' being forced to incur significant drilling expenditures to maintain the leases or losing the leases entirely. Notably, for instance, the Debtors face a June 2018 deadline under their North Platte asset by which they must either commence a unit saving drilling operation at considerable expense or obtain a suspension-of-production extension from the United States government. All parties in interest agree that the Debtors do not have the resources to drill the North Platte well themselves, and the government has indicated that it will not grant a suspension-of-production extension unless the Debtors have a plan to address the future of the North Platte assets, including the designation of an operator with the financial resources to drill the well. Recognizing that time was of the essence, the Debtors filed the *Debtors' Motion for Entry of an Order (I) Approving Bidding Procedures for the Sale of the Debtors' Assets, (II) Scheduling an Auction, (III) Approving the Form and Manner of Notice Thereof, (IV) Scheduling Hearings and Objection Deadlines with Respect to the Debtors' Disclosure Statement and Plan Confirmation, and (V) Granting Related Relief* (the "Bidding Procedures Motion") [Docket No. 15] on the Petition Date, seeking Bankruptcy Court approval of certain bidding procedures and the sale process timeline. On January 25, 2018, the Court entered an order approving the Bidding Procedures Motion [Docket No. 299] that, among other things, established dates and deadlines for the sale process, including the bid deadline, Auction date, and sale hearing date.

7. Pursuant to the order approving the Bidding Procedures Motion [Docket No. 299], the final bid deadline for the Sale Transaction was February 22, 2018, at 5:00 p.m. (prevailing Central Time). The Debtors received bids from six different parties for certain of the Debtors' Gulf of Mexico assets. On March 6, 2018, the Debtors held an Auction for all or substantially all

of their assets. Following the auction, the Debtors named four Successful Bidders for the following asset packages: (a) Navitas Petroleum US, LLC ("Navitas") was declared the Successful Bidder for the Shenandoah prospect; (b) W&T Offshore, Inc. ("W&T") was declared the Successful Bidder for the Heidelberg prospect; (c) Total E&P and Statoil Gulf of Mexico LLC ("Statoil") submitted a joint bid and were declared the Successful Bidder for the North Platte prospect; and (d) Total E&P was declared the Successful Bidder for the Anchor prospect and other exploration leases. The total aggregate purchase price for the purchased assets is approximately $577.9 million. The Debtors followed the Court-approved procedures for selling their assets and believe that the purchase price reflects the highest and best value that could be achieved for the assets.

III. The Sonangol Settlement.

8. In August 2015, the non-Debtor subsidiary that holds the Angola assets entered into an agreement to sell their Angola assets to Sonangol for $1.75 billion. Sonangol paid an initial deposit of $250 million but failed to obtain Angolan government approvals required to close the deal, and, as a result, the purchase and sale agreement automatically terminated by its terms in August 2016. The Debtors subsequently commenced arbitration regarding the transaction and Sonangol's breach of contract. In addition, the Debtors commenced a parallel arbitration against Sonangol for non-payment of past costs owed to Cobalt for operations related to the Angola assets.

9. The Debtors engaged with Sonangol regarding potential resolution of the disputes and, on December 19, 2017, the Debtors and Sonangol successfully reached an agreement on a global settlement. The key terms of the settlement include: (a) a $500 million payment by Sonangol to Cobalt, payable in two installments ($150 million paid by February 23, 2018, and the balance of $350 million paid by July 1, 2018); (b) the resolution of Cobalt's two arbitrations; (c) a full release of all disputes, debts, and obligations between the parties; and (d) the transition of

ownership of Cobalt's assets to Sonangol.[6] On January 25, 2018, the Bankruptcy Court entered an order approving the Debtors' entry into the Sonangol Settlement.[7] The Debtors have since received the February 23 payment of $150 million. The Debtors are working with Sonangol on the definitive documents related to the transfer of assets required by the settlement.

IV. The Plan and Disclosure Statement.

10. On March 8, 2018, the Court entered the *Order Approving (I) the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Proposed Joint Chapter 11 Plan, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 563] (the "Disclosure Statement Order"). The Disclosure Statement Order approved, among other things, the proposed procedures for solicitation of the Plan and related notices, forms, and ballots (collectively, the "Solicitation Packages").

11. The deadline for all holders of Claims entitled to vote on the Plan to cast their ballots was March 26, 2018, at 4:00 p.m. (prevailing Central Time) (the "Voting Deadline"). The deadline to file objections to the Plan was also March 26, 2018, at 4:00 p.m. (prevailing Central Time). The hearing on the Plan's Confirmation (the "Confirmation Hearing") is scheduled for April 3, 2018, at 8:30 a.m. (prevailing Central Time). Before the Confirmation Hearing, the Debtors will submit a proposed order confirming the Plan (the "Confirmation Order"). On April 2, 2018, the Debtors filed the Voting Report [Docket No. 721], which is summarized below in

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6 Specific details of the Sonangol Settlement are available in the Disclosure Statement, Art. VIII and the *Debtors' Motion for Entry of an Order (I) Authorizing Performance Under Settlement Agreement, (II) Approving Settlement Agreement, and (III) Granting Related Relief* [Docket No. 127] (the "Settlement Motion").

7 *Order (I) Authorizing Performance Under Settlement Agreement, (II) Approving Settlement Agreement, and (III) Granting Related Relief* [Docket No. 300] (the "Settlement Order"), at Ex. A.

detail in section I.B, and the *Debtors' Trial Brief Regarding Releases for April 3, 2018 Confirmation Hearing* [Docket No. 720] (the "Trial Brief").

V. Voting Results.

12. In accordance with the Bankruptcy Code, only holders of Claims and Interests in Impaired Classes receiving or retaining property on account of such Claims or Interests were entitled to vote on the Plan.[8] Holders of Claims and Interests were not entitled to vote if their rights are: (a) Unimpaired by the Plan; or (b) Impaired by the Plan such that they will receive no distribution of property under the Plan. As a result, the following Classes of Claims and Interests were *not* entitled to vote on the Plan, and the Debtors did not solicit votes from holders of such Claims and Interests:

Class	Claim or Interest	Status	Voting Rights
1	Other Priority Claims	Unimpaired	Presumed to Accept
2	Other Secured Claims	Unimpaired	Presumed to Accept
3	First Lien Notes Claims	Unimpaired	Presumed to Accept
7	Section 510(b) Claims	Impaired	Deemed to Reject
8	Intercompany Claims	Impaired	Shall Not Vote
9	Intercompany Interests	Unimpaired / Impaired	Not Entitled to Vote
10	Interests in Cobalt	Impaired	Deemed to Reject

13. Accordingly, the Debtors only solicited votes on the Plan from holders of Claims in Impaired Classes receiving or retaining property on account of such Claims. The voting results, as reflected in the Voting Report, are summarized as follows:[9]

[8] 11 U.S.C. § 1126.

[9] For the avoidance of doubt, any Second Lien Notes Deficiency Claims in Class 5 (Subsidiary General Unsecured Claims) and Class 6 (Cobalt General Unsecured Claims) were not counted for tabulation purposes only.

TOTAL BALLOTS RECEIVED					
CLASSES	Accept		Reject		RESULT
	AMOUNT (% of Amount Voted)	NUMBER (% of Number voted)	AMOUNT (% of Amount Voted)	NUMBER (% of Number Voted)	
Class 4 – Second Lien Notes Secured Claims	$786,268,459.54 (93.38%)	77 (88.51%)	$55,731,203.89 (6.62%)	10 (11.49%)	Accept
Class 5 – Subsidiary General Unsecured Claims	$1.00 (0.00%)	1 (9.09%)	$315,025.95 (100.00%)	10 (90.91%)	Reject
Class 6 – Cobalt General Unsecured Claims	$146,067,698.27 (11.99%)	56 (28.14%)	$1,072,547,865.77 (88.01%)	143 (71.86%)	Reject

14. As set forth above and in the Voting Report, Class 4 voted to accept the Plan and Classes 5 and 6 voted to reject the Plan. Further, approximately 410 individuals opted out of the Third-Party Release pursuant to the opt-out procedures.

VI. Plan Modifications.

15. The Debtors will file a revised Plan with technical modifications, including to resolve objections or concerns raised by various parties and to reflect finalized documentation (including certain documents included in the Plan Supplement), all in accordance with section 1127(a) of the Bankruptcy Code. None of the Plan modifications will adversely affect the treatment of those Classes of Claims that voted to accept the Plan.[10] Therefore, such modifications will not require the Debtors to re-solicit acceptances for the Plan.[11] Modifications to the Plan include those described in the Debtors' response to objections to the Plan, in Section V herein.

[10] *See* 11 U.S.C. § 1127(a) ("The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of section 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.").

[11] *See* Fed. R. Bankr. P. 2019(a); *In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988) ("[I]f a modification does not 'materially' impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.").

Argument

16. 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 Plan complies with all relevant provisions of the Bankruptcy Code and all other applicable law. The Debtors will provide evidence to support this conclusion at the Confirmation Hearing. The Debtors thus respectfully request that the Court confirm the Plan.

I. The Plan Satisfies Each Requirement for Confirmation.

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

17. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code.[13] 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 or liquidation.[14] 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.

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

18. 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."[15] Because claims only need to be "substantially" similar to be placed

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

13 11 U.S.C. § 1129(a)(1).

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

15 11 U.S.C. § 1122(a).

in the same class, plan proponents have broad discretion in determining to classify claims together.[16] Likewise, the Fifth Circuit has recognized that plan proponents may place similar claims into *different* classes, provided there is a rational basis to do so.[17]

19. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places Claims and Interests into ten separate Classes, with each Class differing from the Claims and Interests in each other Class in a legal or factual nature or based on other relevant criteria.[18] Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

Class 1: Other Priority Claims;

Class 2: Other Secured Claims;

Class 3: First Lien Notes Claims;

Class 4: Second Lien Notes Secured Claims;

Class 5: Subsidiary General Unsecured Claims;

Class 6: Cobalt General Unsecured Claims;

Class 7: Section 510(b) Claims;

Class 8: Intercompany Claims;

Class 9: Intercompany Interests; and

Class 10: Interests in Cobalt.

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16 *See In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 860 (Bankr. S.D. Tex. 2001) (recognizing that section 1122 is broadly permissive of any classification scheme that is not specifically proscribed, and that substantially similar claims may be separately classified).

17 *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (Matter of Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991) (holding that section 1122(a) permits classification of "substantially similar" claims in different classes if undertaken for reasons other than to secure the vote of an impaired, assenting class of claims); *see also In re Couture Hotel Corp.*, 536 B.R. 712, 733 (Bankr. N.D. Tex. 2015).

18 Plan, Art. III.

20. 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 because each holder of such Claims or Interests may hold (or may have held) rights in the Estate legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification. For example, Claims (rights to payment) are classified separately from Interests (representing ownership in the business) and Secured Claims are classified separately from Unsecured Claims. These classifications facilitate the 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.

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

21. 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.

22. ***Specification of Classes, Impairment, and Treatment.*** The first three requirements of section 1123(a) are that the plan specify (a) the classification of claims and interests, (b) whether such claims and interests are impaired or unimpaired, and (c) the precise nature of their treatment under the Plan.[19] The Plan, in particular Article III, sets forth these

[19] 11 U.S.C. § 1123(a)(1)-(3).

specifications in detail in satisfaction of these three requirements, and no party has asserted otherwise.[20]

23. ***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."[21] The Plan meets 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. No party has asserted that the Plan fails to satisfy section 1123(a)(4).

24. ***Adequate Means for Implementation.*** The fifth requirement of section 1123(a) is that the plan must provide adequate means for its implementation.[22] The Plan, together with the documents and forms of agreement included in the Plan Supplement, provides a detailed blueprint for the transactions that underlie the Plan.

25. Article IV of the Plan, in particular, sets forth the means for implementation of the Plan. It also describes the means for cancelation of existing securities and implementation of the transactions underlying the Plan, including: (a) effectuate the Restructuring Transactions, including the execution and delivery of any appropriate agreements or documents pursuant to the Plan, and rejection, assumption, or assumption and assignment of Executory Contracts and Unexpired Leases; (b) consummation of the Sale Transaction; and (c) appointment of the Plan Administrator. In addition to these core transactions, the Plan sets forth the other critical

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20 Plan, Art. III.B1-B10.

21 11 U.S.C. § 1123(a)(4).

22 11 U.S.C. § 1123(a)(5). Section 1123(a)(5) specifies that adequate means for implementation of a plan may include: retention by the debtor of all or part of its property; the transfer of property of the estate to one or more entities; 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.*

mechanics of the Debtors' emergence, like the cancelation of existing securities, the establishment and termination of certain agreements, and the settlement of Claims and Interests.

26. Additional terms governing the execution of these transactions are set forth in greater detail in the Plan Supplement.[23] Whitton's arguments that the Plan does not contain sufficient means for implementation are unpersuasive. The Plan Administrator and the Wind Down Budget provide sufficient supervision and funding to implement the Plan. Thus, the Plan satisfies section 1123(a)(5).

27. ***Non-Voting Stock.*** On the Effective Date, all remaining assets and the fiduciary duties, authority, power, and incumbency of any and all persons acting as directors and officers of the Debtors and the non-Debtors subsidiaries shall be deemed to have been terminated, and vest in the Plan Administrator. The Plan Administrator shall be responsible for: (a) winding down the Debtors' businesses; (b) resolving Disputed Claims; (c) making all distributions to holders of Allowed Claims; (d) litigating any causes of action; (e) filing tax returns; and (f) administering the Plan. Accordingly, the requirements of section 1123(a)(6) of the Bankruptcy Code are inapplicable to confirmation of the Plan.

28. ***Selection of Officers and Directors.*** Finally, section 1123(a)(7) requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan."[24] The Plan provides that, on the Effective Date, the term of the current members of the board of directors and officers of the Debtors and non-Debtor subsidiaries shall

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[23] *See Notice of Filing Plan Supplement* [Docket No. 612] (as amended, the "Plan Supplement").

[24] 11 U.S.C. § 1123(a)(7).

expire and the Plan Administrator will be appointed.[25] The Plan Administrator has been selected by the Debtors, in consultation with the Committee, the Second Lien Ad Hoc Group, and the Second Lien Indenture Trustee, and other interested parties with respect thereto.[26] The identity of the Plan Administrator and its representatives will be disclosed at or prior to the Confirmation Hearing. Thus, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code, and no party has asserted otherwise.

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

29. 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,[27] which prohibits the solicitation of plan votes without a court-approved disclosure statement.[28]

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

30. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a plan of reorganization "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information."[29] Section

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25 Plan, Art. IV.J.

26 Plan Art. I.A.92.

27 *See Cypresswood Land Partners*, 409 B.R. at 424 ("Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125.").

28 11 U.S.C. § 1125(b).

29 11 U.S.C. § 1125(b).

1125 ensures that parties in interest are fully informed regarding the debtor's condition so that they may make an informed decision whether to approve or reject the plan.[30]

31. Section 1125 is satisfied here. Before the Debtors solicited votes on the Plan, the Court approved the Disclosure Statement in accordance with section 1125(a)(1).[31] The Court also approved the contents of the Solicitation Packages provided to holders of Claims entitled to vote on the Plan, the non-voting materials provided to parties not entitled to vote on the Plan, and the relevant dates for voting and objecting to the Plan.[32] The Debtors, through their Notice and Claims Agent, complied with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code.[33] 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 particular Class. Here, the Debtors caused the Disclosure Statement to be transmitted to all parties entitled to vote on the Plan.[34]

32. 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 Disclosure Statement Order, and no party has asserted otherwise.

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

33. Section 1126 of the Bankruptcy Code provides that only holders of allowed claims and equity interests in impaired classes that will receive or retain property under a plan on account

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30 *See Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) (finding that section 1125 of the Bankruptcy Code obliges a debtor to engage in full and fair disclosure that would enable a hypothetical reasonable investor to make an informed judgment about the plan).

31 *See generally* Disclosure Statement Order.

32 *See id.*

33 *See generally Certificate of Service* [Docket No. 633] (the "Solicitation Affidavit").

34 *See id.*

of such claims or equity interests may vote to accept or reject a plan.[35] As noted above, the Debtors did not solicit votes on the Plan from the following Classes:

- Classes 1 (Other Priority Claims), 2 (Other Secured Claims), and 3 (First Lien Notes Claims), which are Unimpaired under the Plan (collectively, the "Unimpaired Classes").[36] Pursuant to section 1126(f) of the Bankruptcy Code, holders of Claims in the Unimpaired Classes are conclusively presumed to have accepted the Plan and, therefore, were not entitled to vote on the Plan.

- Classes 7 (Section 510(b) Claims) and 10 (Interests in Cobalt) are Impaired under the Plan and will not receive any distributions or retain any property under the Plan (the "Deemed Rejecting Class").[37] Pursuant to section 1126(g) of the Bankruptcy Code, holders of Claims and Interests in the Deemed Rejecting Class are deemed to have rejected the Plan and, therefore, were not entitled to vote on the Plan.

- Class 8 (Intercompany Claims) is Impaired under the Plan. In lieu of Cash payment to the Debtors holding such Intercompany Claims, the distributions on account of such Intercompany Claims may be made to the creditors of the Debtor holding such Intercompany Company. Therefore, holders of Intercompany Claims did not vote on the Plan.

- Class 9 (Intercompany Interests) are either Unimpaired, and such holders of Intercompany Interests conclusively are presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code, or Impaired, and such holders of Intercompany Interests are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Therefore, each holder of an Intercompany Interest will not be entitled to vote to accept or reject the Plan.

34. Rather, the Debtors solicited votes only from holders of Allowed Claims in Classes 4 (Second Lien Notes Secured Claims), 5 (Subsidiary General Unsecured Claims), and 6 (Cobalt General Unsecured Claims) (collectively, the "Voting Classes") because each of these Classes is Impaired and entitled to receive a distribution under the Plan.[38] The Voting Report reflects the results of the voting process in accordance with section 1126 of the Bankruptcy Code.[39]

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35 *See* 11 U.S.C. § 1126.

36 *See* Plan. Art. III.A.

37 *Id.*

38 *See* Plan, Art. III.A.1; *see generally* Solicitation Affidavit.

39 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

The Voting Report, summarized above, reflects the results of the voting process in accordance with section 1126 of the Bankruptcy Code.[40]

35. As set forth in the Voting Report, Class 4 voted to accept the Plan for each Debtor and Classes 5 and 6 voted to reject the Plan. Based on the foregoing, the Debtors submit that they have satisfied the requirements of section 1129(a)(2), and no party has asserted otherwise. No Classes of Interests were entitled to vote on the Plan.[41] Therefore, the Debtors do not need to comply with section 1126(d) of the Bankruptcy Code.

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

36. 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."[42] In assessing the good faith standard, Fifth Circuit courts consider a plan "in light of the totality of circumstances surrounding the establishment of a Chapter 11 plan, mindful of the purposes underlying the Bankruptcy Code."[43] The Plan must also achieve a result consistent with the Bankruptcy Code.[44]

37. Here, the Debtors negotiated, drafted, and implemented their proposed restructuring in good faith. The Sale Transaction and related documents were negotiated, proposed, and entered into by the Debtors and the respective Purchasers in good faith and from

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plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan. *Id.* §1126(d).

40 *See generally* Voting Report.

41 *See* Plan, Art. III.A.1.

42 11 U.S.C. § 1129(a)(3).

43 *See In re Vill. at Camp Bowie I, L.P.*, 710 F.3d 239, 247 (5th Cir. 2013); *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *Pub. Fin. Corp. v. Freeman*, 712 F.2d 219 (5th Cir. 1983); *Cypresswood Land Partners, I*, 409 B.R. at 425.

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

arm's-length bargaining positions, without any collusion, fraud, or attempt to take grossly unfair advantage of any party, including any potential purchaser. Moreover, the Plan is a result of collaboration among the Debtor's major constituents, including the First Lien Ad Hoc Group, the Second Lien Ad Hoc Group, the Unsecured Notes Ad Hoc Committee, and the Committee. Consequently and discussed further below, the Debtors believe that the Plan has been proposed in good faith and satisfies all of the requirements of section 1129(a)(3) of the Bankruptcy Code.

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

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

39. 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. Article II.B of the Plan, moreover, provides that Professionals shall file all final requests for payment of Professional Claims no later than 45 days

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

46 *Id.* at 517.

after the Effective Date, thereby providing an adequate period of time for interested parties to review such Professional Claims.[47] 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.

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

40. The Bankruptcy Code requires the proponent of a plan to disclose the identity and affiliation of any individual proposed to serve as a director or officer of the debtor or a successor to the debtor under the plan.[48] 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.[49] 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.[50] Courts have held that these provisions are meant to ensure that the post-confirmation governance of a reorganized debtor is in "good hands."[51]

41. Because the Plan provides for the liquidation of the Estate's remaining assets and dissolution of the Debtors, section 1129(a)(5) of the Bankruptcy Code is inapplicable. In any event, Article IV.D of the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code, to the extent applicable, by providing for the appointment of the Plan Administrator.

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47 Plan, Art. II.B.2.

48 11 U.S.C. § 1129(a)(5)(A)(i).

49 *Id.* § 1129(a)(5)(A)(ii).

50 *Id.* § 1129(a)(5)(B).

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

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

42. 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. Because the Debtors are not subject to any such regulation and the Plan does not propose any rate changes, section 1129(a)(6) of the Bankruptcy Code is inapplicable to these chapter 11 cases.

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

43. The best interests of creditors test requires that, "[w]ith respect to each impaired class of claims or interests," each individual holder of a Claim or Interest has either accepted the plan or will receive or retain property having a value of not less than the value such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code.[52] The best interests test applies to each non-consenting member of an impaired class, and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization.[53] "[I]f a claim is settled through a chapter 11 plan, once the court determines that

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[52] 11 U.S.C. § 1129(a)(7).

[53] *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."); *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1159 n. 23 (5th Cir. 1988) (stating that under section 1127(a)(7) of the Bankruptcy Code a bankruptcy court was required to determine whether impaired claims would receive no less under a reorganization than through a liquidation); *see In re Neff*, 60 B.R. 448, 452 (Bankr. N.D. Tex. 1985) *aff'd*, 785 F.2d 1033 (5th Cir. 1986) (stating that "best interests" of creditors means "creditors must receive distributions under the Chapter 11 plan with a present value at least equal to what they would have received in a Chapter 7 liquidation of the Debtor as of the effective date of the Plan"); *In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) ("Section 1129(a)(7)(A) requires a determination whether 'a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization.'") (internal citations omitted).

the settlement should be approved, the court will assume the same settlement would be made in chapter 7 for applying section 1129(a)(7)" of the Bankruptcy Code.[54]

44. Here, 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.[55] Substantially all of the assets of the Debtors' assets will be liquidated through the Sale Transaction and the Plan effectuates a liquidation of the Debtors' remaining assets. Although a chapter 7 liquidation would achieve the same goal, the Plan provides a greater recovery to holders of Allowed Second Lien Notes Claims and Allowed Subsidiary General Unsecured Claims than would a chapter 7 liquidation. Liquidating the Debtors' estate under the Plan likely provides holders of Second Lien Notes Claims and Allowed Subsidiary General Unsecured Claims with a larger, more timely recovery primarily due to expected materially lower realized sale proceeds in chapter 7. ***First***, a chapter 7 liquidation would trigger termination events under each of the asset purchase agreements.[56] As such, the chapter 7 trustee would have to either renegotiate the terms of the current asset purchase agreements or run another sale process. The chapter 7 trustee would likely lack the technical expertise and knowledge of the Debtors' business necessary to drive a value maximizing marketing process and sale transaction, resulting in reduced recoveries for stakeholders.

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54 *In re Capmark Fin. Grp., Inc.*, 438 B.R. 471, 513 (Bankr. D. Del. 2010); *see In re Nortel Networks, Inc.*, 522 B.R. 491, 507 (Bankr. D. Del. 2014); *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549, at *117-20 (Bankr. S.D.N.Y. July 15, 2004) (observing that section 1129(a)(7) requires an "apples to apples" comparison that contains the same settlement, and "assuming common legal issues are resolved that same way [in chapter 7 and chapter 11]").

55 *See* Disclosure Statement, Art. X.A.

56 *See, e.g.*, Asset Purchase Agreement, dated as of March 12, 2018, by and among Cobalt International Energy, L.P., as Seller, and Total E&P USA, Inc., as Buyer, Art. 11.1 ("Notwithstanding anything herein to the contrary, this Agreement may be terminated at any time prior to Closing: (a) be either Seller or Buyer: . . . (vii) if the Bankruptcy Court enters an Order dismissing, or converting into cases under chapter 7 of the Bankruptcy Code, any of the cases commenced by Seller under chapter 11 of the Bankruptcy Code and comprising part of the Bankruptcy Case.") attached to *Notice of Filing of Certain Successful Bid Documents* [Docket No. 594] as Ex. A.

45. ***Second***, any delay in closing the Sale Transaction would result in lost leases, severely diminishing creditor recoveries. As previously stated above, the Debtors must either commence a unit saving drilling operation or obtain a suspension of production by June 2018, or else lose their interest in North Platte. The time needed for a chapter 7 trustee to become familiar with the Debtors' highly technical assets would almost certainly cause the Debtors to miss their June deadline resulting in the loss of the North Platte assets. Currently, the purchase price for the North Platte assets are approximately $339 million.[57] In a chapter 7 liquidation where the lease is lost, that amount would be reduced to zero.

46. ***Third***, the amount of claims and expenses in a chapter 7 liquidation would only increase, further reducing creditor recoveries. The conversion to chapter 7 would require entry of a new bar date for filing claims that would be more than 90 days following conversation of the case to chapter 7.[58] Thus, the amount of Claims ultimately filed and Allowed against the Debtors could materially increase, thereby further reducing creditor recoveries versus those available under the Plan. These additional Allowed Claims would be in addition to all of the unpaid expenses incurred by the Debtors during the chapter 11 cases, which the Estate would continue to be obligated to pay in a chapter 7 liquidation. In addition, the chapter 7 trustee and his or her professionals would incur fees and expenses that would also diminish creditor recoveries.[59]

47. The Debtors release of certain Claims and Causes of Action does not result in a violation of section 1129(a)(7) of the Bankruptcy Code. As described more fully in the Trial Brief, after an extensive investigation, the Debtors determined that the released Claims and Causes of

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57 *See Notice of Successful Bidders and Backup Bidders* [Docket No. 542].

58 *See* Fed. R. Bankr. P. 1019(2); 3002(c).

59 *See, e.g.*, 11 U.S.C. § 326(a) (providing for compensation of a chapter 7 trustee up to three percent of the value of the assets); 11 U.S.C. § 503(b)(2) (providing administrative expense status for compensation and expenses of a chapter 7 trustee and such trustee's professionals).

Action are meritless. As such, they have no monetary value, either in chapter 11 or a chapter 7 liquidation, and the prosecution of such Claims and Causes of Action would only drain the Estate's resources reducing creditor recoveries in either scenario. Nevertheless, even if any hypothetical proceeds could be collected, they would flow to the Second Lien Noteholders on account of their Secured Claims and/or diminution in value claims. As a result, even if such proceeds were available, the unsecured creditors or shareholder would not benefit. Lastly, the resolution of the Claims and Causes of Action is an appropriate settlement reached under the Plan, which has been accepted by the Second Lien Noteholders. It is, therefore, appropriate for the Court to determine that a chapter 7 trustee would reach the same conclusion.[60]

48. In light of the foregoing, the Debtors submit that a chapter 7 liquidation would result in materially reduced sale proceeds, increased expenses, delayed distributions, and the prospect of additional claims that were not asserted in the chapter 11 cases. Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code and the best interests test.

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

49. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan.[61] Class 4 voted to accept the Plan, Classes 5 and 6 voted to reject the Plan, and the Deemed Rejecting Classes are deemed to have rejected the Plan under section 1126(g) because holders of Claims and Interests in these

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60 *See Capmark Fin. Grp.*, 438 B.R. at 513; *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549, at *117-20.

61 11 U.S.C. § 1129(a)(8). A class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than half in number of the claims in that class actually vote to accept the plan. *Id.* § 1126(c). A class that is not impaired under a plan, and the creditors in that class, are conclusively presumed to have accepted the plan. *Id.* § 1126(f). A class is deemed to have rejected a plan if the plan provides that the holders of claims or interests in that class do not receive or retain any property under the plan on account of such claims or interests. *Id.* § 1129(a)(9).

Classes are not entitled to receive or retain any property under the Plan. Nevertheless, the Debtors respectfully submit that the Plan is confirmable because it satisfies section 1129(b), as discussed below.

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

50. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments. In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative claims allowed under section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims. Section 1129(a)(9)(B) of the Bankruptcy Code requires that each holder of a claim of a kind specified in section 507(a)(1) or (4) through (7) of the Bankruptcy Code—generally domestic support obligations, wage, employee benefit, and deposit claims entitled to priority—must receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim (if such class has accepted the plan), or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). Finally, section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—i.e., priority tax claims—must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim.

51. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. First, Article II.A of the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because it provides that each holder of an Allowed Administrative Claim will receive Cash equal to the amount of such Allowed Administrative Claim on the Effective Date, or as soon as reasonably practicable thereafter, or at

such other time defined in Article II.A of the Plan. Second, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no holders of the types of Claims specified by section 1129(a)(9)(B) are Impaired under the Plan.[62] Finally, Article II.C of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it specifically provides that each holder of Allowed Priority Tax Claims shall be treated 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.

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

52. 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. Section 1129(a)(10) of the Bankruptcy Code applies on a per plan, not a per debtor basis.[63] As detailed herein, Class 4, Second Lien Notes Secured Claims, voted to accept the Plan.

53. Accordingly, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

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62 Plan, Art. III.B.

63 *JPMCC 2007-C1 Grasslawn Lodging, LLC v Transwest Resort Props. Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018) ("Section 1129(a)(10) requires that one impaired class 'under the plan' approve 'the plan' . . . [and] makes no distinction concerning or reference to creditor of different debtors under 'the plan,' nor does it distinguish between single-debtor and multi-debtor plans.").

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

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

55. The Plan is feasible. Through the Plan, the Debtors will fund the Disputed Claims Reserve, which will be used by the Plan Administrator for distribution on account of Disputed Claims that are not Assumed Liabilities and that are subsequently Allowed after the Effective Date. The Debtors established the amount of the Disputed Claims Reserve in consultation with the First Lien Ad Hoc Group, the First Lien Indenture Trustee, the Second Lien Ad Hoc Group, the Second Lien Indenture Trustee, the Unsecured Notes Ad Hoc Committee, and the Committee. Additionally, the Debtors will reserve funds in accordance with the Wind Down Budget to cover the reasonable activities and expenses to be incurred by the Plan Administrator in winding down the chapter 11 cases. The Debtors will also establish and fund the Professional Fee Escrow to pay

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64 11 U.S.C. § 1129(a)(11).

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

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

67 *T-H New Orleans*, 116 F.3d at 802.

Professional Fee Claims. Finally, certain of the Debtors' liabilities will be assumed by the Purchaser in accordance with the Sales Transaction Documentation. Thus, the Debtors submit that the Purchaser's ability to satisfy the liabilities it is assuming is clearly sufficient to enable performance of the Plan. Accordingly, the Debtors believe the Plan satisfies the feasibility requirements of section 1129(a)(11).

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

56. The Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930.[68] Article II.D of the Plan includes an express provision requiring payment of all fees under 28 U.S.C. § 1930.[69] The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code, and no party has asserted otherwise.

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

57. A number of the Bankruptcy Code's confirmation requirements are inapplicable to the Plan. Section 1129(a)(13) of the Bankruptcy Code requires chapter 11 plans to continue all retiree benefits (as defined in section 1114 of the Bankruptcy Code). The Debtors have no obligations to pay retiree benefits and, as such, section 1129(a)(13) of the Bankruptcy Code is inapplicable to the Plan. Section 1129(a)(14) of the Bankruptcy Code is inapplicable to the Plan because the Debtors are not subject to any domestic support obligations.[70] Section 1129(a)(15) is inapplicable because no Debtor is an "individual" as defined in the Bankruptcy Code.[71]

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68 11 U.S.C. § 1129(a)(12) .

69 Plan, Art. II.D.

70 *See* 11 U.S.C. § 1129(a)(14).

71 *See* 11 U.S.C. § 1129(a)(15).

Section 1129(a)(16) is inapplicable because the Plan does not provide for any property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.[72]

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

58. If an impaired class has not voted to accept the plan, the plan must be "fair and equitable" and not "unfairly discriminate" with respect to that class.[73] The Plan satisfies both of these "cramdown" requirements with respect to Classes 5, 6, 7, 8, 9, 10—i.e., the Classes that are deemed to have rejected the Plan or voted to reject the Plan.

i. The Plan Is Fair and Equitable.

59. 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."[74] This requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest.[75] The Plan satisfies section 1129(b) of the Bankruptcy Code. The objecting parties' arguments that the Plan is not "fair and equitable" ignore this standard.

60. Here, all similarly situated holders of Claims and Interests will receive substantially similar treatment and the Plan's classification scheme rests on a legally acceptable rationale. To the extent any impaired rejecting class of claims or interests is not paid in full, no class junior to the impaired rejecting class will receive any distribution under the Plan on account of its junior claim or interest. Therefore, the Plan satisfies the "fair and equitable" requirement.

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72 *See* 11 U.S.C. § 1129(a)(16).

73 *See* 11 U.S.C. § 1129(b)(1).

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

75 *Id.*

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

61. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination."[76] Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.[77] 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.[78] 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.[79] 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.[80]

62. Because the Debtors seek to confirm the Plan with respect to each Debtor, the relevant inquiry is whether the Plan unfairly discriminates against a rejecting Class at each

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76 *See In re Idearc Inc.*, 423 B.R. 138, 171 (Bankr. N.D. Tex. 2009).

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

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

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

80 *Aztec Co.*, 107 B.R. at 590.

applicable Debtor where there is a rejecting Class. Here, the Plan's classification of Claims and Interests is proper because similar situated Classes are treated comparably at each Debtor. Specifically, the rejecting Classes include:

- Class 5 – Subsidiary General Unsecured Claims
- Class 6 – Cobalt General Unsecured Claims
- Class 7 – Section 510(b) Claims
- Class 8 – Intercompany Claims
- Class 9 – Intercompany Interests
- Class 10 – Interest in Cobalt

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

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

64. 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 there is only one proposed plan of reorganization.[81]

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

[81] 11 U.S.C. § 1129(c).

66. Lastly, section 1129(e) of the Bankruptcy Code is inapplicable because none of the Debtors' chapter 11 cases is a "small business case."[82] Thus, the Plan satisfies the Bankruptcy Code's mandatory confirmation requirements.

II. The Discretionary Contents of the Plan Are Appropriate.

67. Section 1123(b) of 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."[83] Among other discretionary provisions, the Plan contains releases by the Debtors and third party holders of Claims and Interests, and exculpation and injunction provisions.[84] The Debtors have determined, as fiduciaries of their Estate and in the exercise of their reasonable business judgment, that each of the discretionary provisions of the Plan is appropriate given the circumstances of these chapter 11 cases.

A. The Plan Appropriately Incorporates a Settlement of Claims and Causes of Action.

68. The Bankruptcy Code states that a plan may "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[85] A court may only approve settlements under a plan when they are "fair and equitable."[86] In particular, the Fifth Circuit applies a five-factor test for considering motions to approve settlements under Bankruptcy Rule 9019, weighing:[87] "(1) the probability of success in litigation with due consideration for

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82 11 U.S.C. § 1129(e). A "small business debtor" cannot be a member "of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,490,925[] (excluding debt owed to 1 or more affiliates or insiders)." 11 U.S.C. § 101(51D)(B).

83 11 U.S.C. § 1123(b) (1)-(6).

84 Plan, Art. VIII.

85 11 U.S.C. § 1123(b)(3)(A).

86 *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 754 n.22 (5th Cir. 1995) (citing *In re AWECO, Inc.*, 725 F.2d. 293, 297 (5th Cir. 1984)).

87 Fed. R. Bankr. P. 9019.

uncertainty in fact and law; (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay, including the difficulties, if any to be encountered in the matter of collection; (3) the paramount interest of the creditors and a proper deference to their respective views; (4) the extent to which the settlement is truly the product of arm's-length bargaining and not fraud or collusion; and (5) all other factors bearing on the wisdom of the compromise."[88]

69. As discussed more fully in the Trial Brief, the Plan embodies a multiparty settlement that resolves disputes with various constituents. The settlement embodied in the Plan is fair and equitable and consistent with the Bankruptcy Rule 9019 factors as applied in this jurisdiction. The Plan resolves a host of alleged Claims and Causes of Action, which were thoroughly analyzed by the Debtors, the consenting stakeholders, and their advisors, all of which are highly uncertain to succeed and have an immense capacity to cause extensive delay, cost, and uncertainty in these chapter 11 cases and otherwise. As further reflected by the support of creditors for the Plan, this settlement, which was the result of arm's-length negotiations, is in the best interests of creditors and all parties in interest.

B. The Plan's Release, Exculpation, and Injunction Provisions Are Appropriate and Comply with the Bankruptcy Code.

70. The Bankruptcy Code identifies various additional provisions that may be incorporated into a chapter 11 plan, including "any other appropriate provision not inconsistent with the applicable provision of this title."[89] The Plan includes certain Debtor and third-party releases, an exculpation provision, and an injunction provision. These provisions comply with the Bankruptcy Code and prevailing law because, among other things, they are the product of

88 *See In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010).

89 11 U.S.C. § 1123(b)(1)–(6).

extensive good faith, arm's-length negotiations. Further, these provisions were necessary to generate consensus with certain of their creditors regarding the Plan. Notably, these provisions are supported by the Second Lien Noteholders who hold the primary (if not exclusive) economic interest in the claims because their interests span all Voting Classes—i.e., Class 4, Class 5, and Class 6—as a result of their secured claims and any deficiency claims.

i. The Debtor Release Is Appropriate and Complies with the Bankruptcy Code.

71. 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 to the estate." Accordingly, pursuant to section 1123(b)(3)(A), the Debtors may release estate causes of action as consideration for concessions made by their various stakeholders pursuant to the Plan.[90] In considering the appropriateness of such releases, courts in the Fifth Circuit generally consider whether the release is (a) "fair and equitable" and (b) "in the best interests of the estate."[91] The "fair and equitable" prong is generally interpreted, consistent with that term's usage in section 1129(b) of the Bankruptcy Code, to require compliance with the Bankruptcy Code's absolute priority rule.[92] Courts generally determine whether a release is "in the best interest of the estate" by reference to the following factors:

a. the probability of success of litigation;

b. the complexity and likely duration of the litigation, any attendant expense, inconvenience, or delay, and possible problems collecting a judgment;

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90 *See, e.g.*, *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (plan release provision "constitutes an acceptable settlement under § 1123(b)(3) because the debtors and the estate are releasing claims that are property of the estate in consideration for funding of the plan"); *In re Heritage Org., LLC*, 375 B.R. 230, 259 (Bankr. N.D. Tex. 2007); *In re Mirant Corp.*, 348 B.R. 725, 737–39 (Bankr. N.D. Tex. 2006); *In re General Homes Corp.*, 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991).

91 *Mirant*, 348 B.R. at 738; *see also Heritage*, 375 B.R. at 259.

92 *Mirant*, 348 B.R. at 738.

c. the interest of creditors with proper deference to their reasonable views; and

d. the extent to which the settlement is truly the product of arm's-length negotiations.[93]

Ultimately, courts afford debtors some discretion in determining for themselves the appropriateness of granting plan releases of estate causes of action.[94]

72. Article VIII.B of the Plan provides for releases by the Debtors, their Estate, and Related Parties[95] of any and all Causes of Action, including any derivative claims, the Debtors could assert against the Released Parties—e.g., the First Lien Noteholders, the First Lien Ad Hoc Group, the Second Lien Noteholders, the Second Lien Ad Hoc Group, the Unsecured Noteholders the Unsecured Notes Ad Hoc Committee, the First Lien Indenture Trustee, the Second Lien Indenture Trustee, the 2.625% Senior Notes Indenture Trustee, the 3.125% Senior Notes Indenture Trustee, each Purchaser, the Committee and its members, and the Debtors' directors, officers, and advisors—and Related Parties (the "Debtor Release").[96]

73. The Debtor Release easily meets the controlling standard. As described herein and in the Trial Brief, the Plan, including the Debtor Release, complies with the Bankruptcy Code's absolute priority rule. To the extent any Class is found to have rejected the Plan, no Class of equal priority is receiving more favorable treatment and no Class that is junior to such rejecting Classes

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93 *Id.* at 739-40 (citing *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop.* (*In re Cajun Elec. Power Coop.*), 119 F.3d 349, 355-56 (5th Cir. 1997)).

94 *See General Homes*, 134 B.R. at 861 ("[t]he court concludes that such a release is within the discretion of the Debtor").

95 As used herein, the term "Related Parties" shall refer to various individuals and entities related to the Debtors, Released Parties, Releasing Parties, and Exculpated Parties, as applicable, including affiliates, predecessors, successors, and current and former equity holders, officers, directors, employees, agents, advisors, and other professionals.

96 The foregoing description is meant as a summary of the operative plan provisions only. Certain of the Released Parties are defined as such in multiple capacities. To the extent there is any conflict between the forgoing summary and the definition of "Released Party" contained in Article I of the Plan, the Plan shall control.

will receive or retain any property on account of the Claims or Interests in such junior Class in a manner that violates the absolute priority rule.

74. In addition to being fair and equitable, the Debtor Release is in the best interest of the Debtors' Estate. ***First***, the Debtors are receiving valuable consideration in exchange for the releases. More specifically and as discussed in the Trial Brief, certain parties to the derivative lawsuits, including the Debtors' former equity sponsor and certain of the Debtors' former directors and officers, are releasing valuable indemnification claims owed to them by the non-Debtor Angolan subsidiaries in exchange for the Debtors' release of the derivative actions. As demonstrated by the provision of the Confirmation Order, many of these parties are agreeing to release the indemnification claims if, and only if, the Debtor Release is granted. Because these indemnification claims are against non-Debtor Angolan subsidiaries, they could impair the distribution of the Sonangol Settlement proceeds to the Debtors' creditors. Any depletion in the proceeds from the Sonangol Settlement may diminish recoveries, particularly for the Second Lien Noteholders. As a result, the waiver of these indemnification claims represents valuable consideration to the Estate that enhances creditor recoveries.

75. ***Second***, as described more fully in the Trial Brief, the Debtors undertook an extensive investigation into the probability of success in litigation with respect to claims, if any, the Debtors may have against the Released Parties. Ultimately, the Debtors determined that the probability of success on such claims was low to non-existent. ***Third***, as described more fully in the Trial Brief, any potential claims against the Released Parties are exceedingly complex and, even if successful, may be difficult to collect in light of the sophisticated nature of the underlying transactions and certain structural barriers. ***Fourth***, at least one of the Voting Classes have voted in favor of the Plan, including the Debtor Release. Notably, the Second Lien Noteholders voted

to accept the Plan. Although the Second Lien Noteholders voted as Class 4, their economic interests include both secured and unsecured claims and span Class 4, Class 5, and Class 6—i.e., all Voting Classes. Indeed, the Second Lien Noteholders hold interests in the unsecured classes on account of their deficiency claim and, therefore, would be the primary benefactors if any Estate claim or cause of action was successfully pursued. Accordingly, their support of the Plan and the releases contained therein demonstrates the reasonableness of the releases. And ***fifth***, the Plan, including the Debtor Release, was heavily negotiated by sophisticated entities that were represented by able counsel and financial advisors. The result is a compromise that reflects the give-and-take of a true arm's-length-negotiation process. Accordingly, the Debtor Release is fair, equitable, and in the best interest of the Debtors and of their Estate, is justified under the controlling Fifth Circuit standard, and should be approved.

ii. The Third-Party Release Is Consensual, Appropriate, and Complies with the Bankruptcy Code.

76. The Debtors acknowledge the line of decisions from the United States Court of Appeals for the Fifth Circuit that, at first blush, seem to cast some doubt as to the availability of third-party releases.[97] But the limited prohibition against third-party releases set forth in these decisions only applies to certain *non-consensual* third-party releases—i.e., when the affected party in interest specifically objects.[98] Here, the vast majority of parties in interest did not object to the Plan's release provisions. Moreover, each holder of a Claim or Interest had an opportunity to opt

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97 *See Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V.* (*In re Vitro S.A.B. de C.V.*), 701 F.3d 1031, 1059 (5th Cir. 2012); *Bank of New York Trust Co. v. Official Unsecured Creditors' Comm.* (*In re The Pacific Lumber Co.*), 584 F.3d 229, 252 (5th Cir. 2009); *Feld v. Zale Corp.* (*In re Zale Corp.*), 62 F.3d 746, 760-61 (5th Cir. 1995).

98 *See, e.g.*, *In re Pilgrim's Pride Corp.*, No. 08-45664, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010) (under *Pacific Lumber* "the court may not, *over objection*, approve through confirmation of the Plan third-party protections") (emphasis added); *see also In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701-2 (Bankr. W.D. Tex. 2011) ("the Fifth Circuit does allow permanent injunctions *so long as there is consent*") (emphasis in original).

out of the Plan's release provisions using either the ballots for Holders of Claims in Voting Classes or the opt out forms for holders of Claims and Interests in non-Voting Classes. As contemplated by and specifically stated in the Debtors' solicitation materials and notice of the confirmation hearing, the Debtors have agreed to carve out all parties who opt out of their inclusion as a Releasing Party under the Plan's third-party release provision (the "Third-Party Release"). Accordingly, the Third-Party Release is appropriate under Fifth Circuit law as a ***consensual*** third-party release.

77. "Most courts allow consensual nondebtor releases to be included in a plan."[99] This rule makes intuitive sense—"[t]he validity of a consensual release is primarily a question of contract law because such releases are no different from any other settlement or contract."[100] While the Fifth Circuit has not directly addressed the parameters of what constitutes a consensual third-party release, it has previewed the issues in a series of decisions addressing the *res judicata* effect of a confirmed chapter 11 plan that contains a third-party release provision.[101] The *Republic Supply* court found that the Bankruptcy Code does not preclude a third-party release provision where "it has been accepted and confirmed as an integral part of a plan of reorganization."[102] The *Republic Supply* court ultimately found that the third-party release provision at issue—which no party timely objected to in connection with plan confirmation—was binding and enforceable.[103] The Fifth Circuit has subsequently addressed the exact issue in *Republic Supply* on three occasions,

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99 *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007).

100 *Id.* (citations omitted).

101 *See Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. Appx. 281, 286-88 (5th Cir. 2016); *FOM Puerto Rico S.E. v. Dr. Barnes Eyecenter Inc.*, 255 Fed. Appx. 909, 911-12 (5th Cir. 2007); *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist.* (*In re Applewood Chair Co.*), 203 F.3d 914, 919 (5th Cir. 2000); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

102 *Republic Supply*, 815 F.2d at 1050.

103 *Id*. at 1053.

focusing on the specificity of the third-party release provision at issue to determine its *res judicata* effect.[104] *Republic Supply* and its progeny ultimately stand for the proposition that "[c]onsensual nondebtor releases that are specific in language, integral to the plan, a condition of the settlement, and given for consideration do not violate" the Bankruptcy Code.[105]

78. Distilling the foregoing Circuit-level guidance, lower courts in the Fifth Circuit have acknowledged that "[t]he Fifth Circuit has held that a nondebtor release violates section 524(e) when the affected creditor *timely objects* to the provision."[106] Texas bankruptcy courts have applied this standard in approving third-party releases similar to the Third-Party Release in recent oil and gas industry bankruptcies. In doing so, these courts have focused on ***process***—i.e., whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look over it, [and] the disclosure is adequate so that they can actually understand what they're being asked to do and the options that they're being given."[107] Ultimately, these courts acknowledge that parties-in-interest waive their rights with respect to a third-party release if they do not object.[108] Chapter 11 is a collective proceeding meant to maximize the prospect for a debtor's "fresh start," so long as the debtors satisfy their obligation under the Bankruptcy Code in good

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104 *See generally Hernandez*, 628 Fed. Appx. 281 (comparing the septicity of the third-party release provisions at issue in *Republic Supply*, *Applewood*, and *Dr. Barnes Eyecenter*).

105 *Wool Growers*, 371 B.R. at 776 (citing *Republic Supply*, 815 F.2d at 1050; *Dr. Barnes Eyecenter*, 255 Fed. Appx. at 911-12).

106 *Id*. at 776 (citing *Zale*, 62 F.3d at 761) (emphasis added).

107 Confirmation Hr'g Tr. at 47, *In re Energy & Exploration Partners, Inc.*, No. 15-44931 (Bankr. N.D. Tex. April 21, 2016) [Docket No. 730] (hereinafter "ENXP Tr.").

108 ENXP Tr. at 47 ("[T]he [*Republic Supply*] case being that the Debtor is authorized, I think, I don't think there's anything that's necessarily bad faith about the Debtor putting release provisions like this into a plan. And if we assume that the Debtor has otherwise satisfied procedural due process . . . and then they choose not to participate one way or the other, can they be bound by it? I would say that this is one of those situations where [*Republic Supply*] says those people can waive substantive rights by not affirmatively participating in the case."); Confirmation Hr'g Tr. at 42, *In re Southcross Holdings, LP*, No. 16-20111 (Bankr. S.D. Tex. April 11, 2016) [Docket No. 191] (approving as consensual a third-party release provision in favor of the debtors' prepetition equity sponsors that bound all holders of claims and interest).

faith. Perhaps the bedrock obligation underlying chapter 11 is due process. Where, as here, a debtor satisfies its due process obligations, parties-in-interest may waive their rights by failing to participate. Thus, "[i]f a creditor wants to preserve his right to object to confirmation, on whatever ground, ***he must file an objection***. If he does not file an objection, he generally cannot complain about the results of the confirmation proceeding."[109]

79. To facilitate consensus, the Debtors went above and beyond what was required by prevailing law and provided all holders of Claims and Interest the opportunity to opt out of the Plan's release provisions. Indeed, the Third-Party Release contained in Article VIII.C of the Plan provides that each Releasing Party—i.e., all holders of Claims and Interests that do not opt out of or otherwise object to their inclusion as a Releasing Party—and Related Parties shall release any and all Causes of Action (including a list of specifically enumerated claims) such parties could assert against the Debtors, the Reorganized Debtors, and the Released Parties.[110]

80. Accordingly, the Third-Party Release easily meets the standard set forth in *Republic Supply* and its progeny. ***First***, the Third-Party Release is consensual. All Parties in interest were provided extensive notice of the chapter 11 cases, the Plan, and the deadline to object to confirmation of the Plan or otherwise opt out of the Plan's release provisions. The Disclosure Statement (transmitted to all members of Voting Classes and otherwise publicly available) states, in multiple locations, in capitalized, bold-faced, underlined text that holders of Claims and Interests that are not in the Voting Classes, that ***do not opt out or otherwise object to the release***

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109 *In re U.S. Fidelis, Inc.*, 481 B.R. 503, 517 (Bankr. E.D. Mo. 2012) (emphasis added); *see also Camp Arrowhead*, 451 B.R. at 702 ("[w]ithout an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing") (citing *Pacific Lumber*, 584 F.3d at 253; *Pilgrim's Pride*, 2010 WL 200000, at *5); *Republic Supply*, 815 F.2d at 1050; *Wool Growers*, 371 B.R. at 775-76.

110 The foregoing description is meant as a summary of the operative plan provisions only. Certain of the Releasing Parties are defined as such in multiple capacities. To the extent there is any conflict between the forgoing summary and the definition of "Releasing Party" contained in Article I of the Plan, the Plan shall control.

in the Plan will be bound by the Third-Party Release.[111] The ballots that we transmitted to all members of the Voting Classes states in capitalized text that parties would abstain from voting or vote to reject the Plan will nevertheless be bound by the releases if they do not opt out. The notice of the confirmation hearing (transmitted to ***all*** parties in interest) state in capitalized, bold-faced, underlined text that all holders of Claims and Interest that ***do not opt out or otherwise object to the releases in the Plan*** will be bound by the Third-Party Release. Moreover, the Court-approved solicitation materials sent to voting creditors and notices sent to non-voting creditors (including contract counterparties) specifically referenced the Third-Party Release provisions in conspicuous, bold-faced type and the process for exercising their right to ***not*** being a "Releasing Party" (namely, opting out or objecting), and further indicated how such party would be deemed to have consented to the Third-Party Release unless such party opts out or otherwise objects. Even though the vast majority of holders of Claims and Interest have not opted out of or objected to such Third-Party Releases, as of the date hereof, approximately 410 parties in interest spanning all Voting Classes, multiple non-Voting Classes, and contract counterparties have elected ***not*** to be a "Releasing Party" by following these procedures, demonstrating the sufficiency of the notice and the parties in interest ability to understand the procedures. The Debtors have agreed to carve out any holders of Claims or Interests that have opted out or otherwise objected to the Third-Party Releases, formally or informally.

81. Accordingly, the Committee's argument that these notices were insufficient is unpersuasive. Moreover, to the extent the Committee believed that the procedures were flawed or the release language was unclear, they were provided multiple opportunities to comment, including at the Disclosure Statement Hearing when the Court scrolled through the entire Disclosure

[111] *See* Disclosure Statement, Articles III.M, IV.H, V.E.

Statement and Solicitation Package to ensure everyone was signed off. Indeed, at the Disclosure Statement Hearing, the Court specifically asked the Committee, "[y]ou're withdrawing objections to the disclosure statement itself, right?" to which the Committee responded "[t]hey're resolved, yes."[112]

82. In addition, because the release opt-out provisions are consensual, the releases do not require carveouts for claims and causes of action related to actual fraud or gross negligence. While case law exists holding that such carveouts are required in the context of ***exculpation*** provisions, those cases do not extend either by their holding or by analogy to ***release*** provisions. Indeed, addressing this exact issue, the bankruptcy court in *Energy Future Holding* held that "[t]he UST objects that the D&O releases do not contain a carve out for actual fraud, willful misconduct, or gross negligence. While such carve outs are necessary in connection with exculpation, and are common in releases, they're not actually required for the Court to approve a release. Requiring this carve out would weaken the settlement that is at the heart of this plan."[113] Moreover, the courts that have ruled on the necessity of such carveouts in the exculpation context have used an entirely different framework in assessing Plan releases.[114] This distinction makes sense—exculpation provisions and release provisions are intended to address two very different concerns. Exculpation provisions provide limited immunity to estate fiduciaries for actions taken in their fiduciary capacities within the context of a chapter 11 case. Release provisions, on the other hand, release

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112 Disclosure Statement Hr'g Tr. at 51, *In re Cobalt Int'l Energy Inc.*, No. 17-36709 (MI) (Bankr. N.D. Tex. March 8, 2018). The Court went on to ask whether anyone had "any unresolved objections to the disclosure statement" to which the Committee did not respond. *Id.*

113 *See* Hr'g Tr. at 69, *In re Energy Future Holding Corp.*, No. 14-10979 (CSS) (Bankr. D. Del. Dec. 3, 2015).

114 *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009) (distinguishing exculpations as releasing parties from acts arising out of the chapter 11 cases); *In re Bigler*, 442 B.R. at 540; *In re Wash. Mut.*, 442 B.R. at 350 (citing *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)) ("a creditors' committee, its members, and estate professionals may be exculpated under a plan for their actions in the bankruptcy case except for willful misconduct or gross negligence").

third parties from prepetition and postpetition claims and causes of action. Fiduciaries, both in and out of chapter 11, are generally held to a higher standard. Importantly, there is ample precedent in this district where bankruptcy courts have supported the difference between release provisions and exculpation provisions and, consequently, confirmed plans of reorganization that do not contain carveouts from nearly identical releases.[115]

83. ***Second***, the Third-Party Release is sufficiently specific so as to put the Releasing Parties on notice of the released claims. In particular, the Plan lists specific transactions and potential Causes of Action to be released, including with respect to the Plan, the Disclosure Statement, the Sale Transaction, and these Chapter 11 Cases, and the Debtors have caused various related disclosures to be served in accordance with the Disclosure Statement and Order.[116] Language both far less specific and less precise has been found specific enough.[117] Moreover, all parties in interest have received extensive notice of and opportunity to opt out of the Third-Party Release. The ballots, notice of unimpaired status, and confirmation hearing notice, for instances, all specifically reference in conspicuous, bold-face type, and Third-Party Release.

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[115] *GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017); *Goodman Networks Inc.*, No. 17-31575 (MI) (Bankr. S.D. Tex. May 4, 2017); *Sherwin Alumina Co., LLC*, No. 16-20012 (DRJ) (Bankr. S.D. Tex. Feb. 17, 2017); *Linn Energy, LLC*, No. 16-60040 (Bankr. S.D. Tex. Jan. 27, 2017); *CJ Holding Co*, No. 16-33590 (DRJ) (Bankr. S.D. Tex. Dec. 16, 2016); *Midstates Petroleum Co., Inc.*, No. 16-32237 (DRJ) (Bankr. S.D. Tex. Sept. 28, 2016); *Sandridge Energy, Inc.*, No. 16-32488 (DRJ) (Bankr. S.D. Tex. Sept. 9, 2016); *Ultra Petroleum Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. March 14, 2017).

[116] *See, e.g.*, *Dr. Barnes Eyecenter*, 255 Fed. Appx. at 910, 912 (finding release language that provided for release of any and all claims "based in whole or in part on any act or omission, transaction, or occurrence from the beginning of time through the Effective Date in any way relating to [the debtor], its Bankruptcy Case, or the Plan").

[117] *See, e.g.*, *FOM P.R.S.E. v. Dr Barnes Eyecenter Inc.*, 255 Fed. Appx. at 910, 912 (finding release language that provided for release of any and all "based in whole or in part on any act or omission, transaction, or occurrence from the beginning of time through the Effective Date in any way relating to [the debtor], its Bankruptcy Case, or the Plan" was specific enough to satisfy the Standard in *Shoaf*).

84. ***Third***, the Third-Party Release is integral to the Plan and a condition of the settlement embodied therein.[118] The provisions of the Plan were heavily negotiated by sophisticated parties each represented by competent counsel.

85. ***Fourth***, to the extent necessary, the Third-Party Release was given for consideration. As discussed more fully in the Trial Brief, the Debtors and their advisors undertook an extensive investigation into Estate Claims and Causes of Action. The results of the investigation indicated that the Claims or Causes of Action being released are meritless. Because any Claims or Causes of Action being released pursuant to the Third-Party Release are meritless, no consideration is required. Nevertheless, each Released Party provided consideration in exchange for the release. Holders of Second Lien Notes have agreed to compromise their claims. There is no question that current directors and officers provided consideration, as they have continued to commit their time and efforts to the Debtors' Estate throughout this chapter 11 process. In addition, the Debtors' equity sponsors and certain former director and officers are releasing valuable indemnification claims against the non-Debtor Angolan subsidiaries in exchange for the release.

86. And ***fifth***, courts in this district and others have confirmed chapter 11 plans containing releases similar to the Third-Party Release in comparable cases.[119]

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118 *See* Plan, Art. VIII.A.

119 *See, e.g.*, *In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017) (approving third-party releases as consensual over objections from parties in interest, including U.S. Trustee); *Ameriforge Grp., Inc.*, No. 17-32660 (DRJ) (Bankr. S.D. Tex. May 19, 2017) (overruling U.S. Trustee objection and confirming chapter 11 plan where general unsecured creditors were unimpaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re Ultra Petrol. Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. Mar. 14, 2017) (same); *In re CJ Holding Co.*, No. 16-33590 (DRJ) (Bankr. S.D. Tex. Dec. 16, 2016) (confirming chapter 11 plan where general unsecured creditors were impaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re Light Tower Rentals, Inc.*, No. 16-34284 (DRJ) (Bankr. S.D. Tex. Sept. 30, 2016) (confirming chapter 11 plan where general unsecured creditors were unimpaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re Southcross Holdings LP*, No. 16-20111 (MI) (Bankr. S.D. Tex. Apr. 11, 2016) (same); *see also In re BCBG Max Azria Glob. Holdings, LLC*, No. 17-10466 (SCC) (Bankr. S.D.N.Y. July 26, 2017) (overruling

87. Accordingly, the Third-Party Release is consensual and otherwise complies with the controlling Fifth Circuit standards set forth in *Republic Supply*, *Wool Growers*, and their progeny.

iii. The Exculpation Provision Is Appropriate and Complies with the Bankruptcy Code.

88. Article VIII.D of the Plan provides that each Exculpated Party—i.e., the Debtors and any official committee appointed in these chapter 11 cases and its members (including the Committee and its members)—and Related Parties shall be released and exculpated from any Cause of Action arising out of acts or omissions in connection with these chapter 11 cases and certain related transactions, except for acts or omissions that are found to have been the product of actual fraud or gross negligence (the "Exculpation Provision").[120]

89. At the outset, it is important to underscore the difference between the Third-Party Release and the Exculpation Provision. Unlike the Third-Party Release, the Exculpation Provision does not affect the liability of third parties *per se*, but rather sets a standard of care of actual fraud or gross negligence in hypothetical future litigation against an Exculpated Party for acts arising out of the Debtors' restructuring.[121] A bankruptcy court has the power to approve an exculpation provision in a chapter 11 plan because a bankruptcy court cannot confirm a chapter 11 plan unless

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U.S. Trustee objection and confirming chapter 11 plan where general unsecured creditors were unimpaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) ("In this case, the third party releases in question bind certain unimpaired creditors who are deemed to accept the Plan: these creditors are being paid in full and have therefore received consideration for the releases."); *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (overruling U.S. Trustee objection and confirming chapter 11 plan with third-party release applicable to unimpaired parties who were "deemed" to accept the plan and did not object to such release).

120 The foregoing description is meant as a summary of the operative plan provisions only. To the extent there is any conflict between the forgoing summary and the definition of "Exculpated Party" contained in Article I of the Plan, the Plan shall control.

121 *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (holding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code.").

it finds that the plan has been proposed in good faith.[122] As such, an exculpation provision represents a legal conclusion that flows inevitably from several different findings a bankruptcy court must reach in confirming a plan,[123] as well as the statutory exculpation in section 1125(e) of the Bankruptcy Code.[124] Once the court makes its good faith finding, it is appropriate to set the standard of care of the fiduciaries involved in the formulation of that chapter 11 plan.[125] Exculpation provisions, therefore, appropriately prevent future collateral attacks against fiduciaries of the Debtors' Estate. Here, the Exculpation Provision is likewise appropriate and vital because it provides protection to those parties who served as fiduciaries during the restructuring process.

90. There can be no doubt that the Debtors themselves are entitled to the relief embodied in the Exculpation Provision. Having acted in "good faith" within the meaning of section 1125(e) of the Bankruptcy Code, the Debtors are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and the Exculpation Provision.[126] Further, granting such relief falls squarely within the "fresh start" principles underlying the Bankruptcy Code.[127] Even courts in the Fifth Circuit that have approached plan exculpation provisions with skepticism have

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122 *See* 11 U.S.C. § 1129(a)(3).

123 *See* 11 U.S.C. § 157(b)(2)(L).

124 *See* 11 U.S.C. § 1125(e) ("A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.").

125 *See PWS*, 228 F.3d at 246-47 (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties").

126 *See In re Sears Methodist Ret. Sys., Inc.*, No. 14-32821-11, 2015 WL 1066882, at *9 (Bankr. N.D. Tex. Mar. 6, 2015).

127 *See Pacific Lumber*, 584 F.3d at 252.

done so *only* where the provision at issue exculpates *non-debtor* parties.[128] The *Pacific Lumber* court also carved out an exception in favor of exculpatory relief for non-debtor parties where such parties owe duties in favor of the debtors or their estate and act within the scope of those duties—i.e., excluding acts of fraud or gross negligence.[129]

91. The Exculpation Provision is essential to ensure that capable individuals are willing to manage and assist a debtor in the chapter 11 context.[130] Here, in addition to the Debtors, each of the exculpated Related Parties—including the directors, officers, and advisors that have acted on the Debtors' behalf in these chapter 11 cases—owe duties in favor of the Estate.[131] The Exculpated Parties serving in their capacities as board members and officers of the Debtors owed fiduciary duties to the Debtors. To the extent the Debtors acted in good faith, Debtors' management and professionals should presumptively not be subject to liability.[132] To the extent any exculpated individuals do not, strictly speaking, owe fiduciary duties to the Debtors, they were integral participants to the settlement embodied by the Plan, are *de facto* proponents of the Plan, and are therefore properly included in the Exculpation Provision. This court has confirmed numerous plans with identical and similar exculpation provisions.[133]

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128 *See, e.g.*, *id.* at 251–52.

129 *Id.* at 253.

130 *See In re Chemtura Corp.*, 439 B.R. 561, 610 (Bankr. S.D.N.Y. 2010) (recognizing that "exculpation provisions are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decision makers in the chapter 11 case").

131 *See, e.g.*, *Pilgrim's Pride*, 2010 WL 200000, at *5 ("Debtors, serving through their management and professionals as debtors in possession, acted in the capacity of trustees for the benefit of their creditors . . . [t]o the extent Debtors acted in the chapter 11 cases, other than in bad faith, pursuant to the authority granted by the Code or as directed by court order, Debtors' management and professionals presumptively should not be subject to liability").

132 *Id.*; *see also PWS*, 228 F.3d at 246–247 (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties . . . .").

133 *See, e.g.*, *In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017); *In re Ultra Petroleum Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. March 14, 2017); *In re Goodrich Petroleum Corp.*, No. 16-31975

92. Further, the *Pacific Lumber* court specifically recognized that official committees and their members are entitled to exculpatory relief—thus, exculpation in favor of the Committee and its members is appropriate.[134] Accordingly, the Exculpation Provision complies with the Bankruptcy Code and is consistent with *Pacific Lumber* and its progeny.

93. The Exculpation Provision represents an integral piece of the settlement embodied by the Plan and is the product of good faith, arm's-length negotiations. The Exculpation Provision is narrowly tailored to exclude actual fraud or gross negligence, relates only to acts or omissions in connection with, or arising out of the administration of the Debtors' chapter 11 cases and their restructuring, and ultimately inures to the benefit of only those parties that may owe fiduciary duties to the Debtors and their Estate. Accordingly, the Exculpation Provision should be approved.[135]

iv. The Injunction Provision Is Appropriate and Complies with the Bankruptcy Code.

94. The injunction provision set forth in Article VIII.E of the Plan (the "Injunction Provision") merely implements the Plan's settlement, release, and exculpation provisions, in part, by permanently enjoining all Entities from commencing or maintaining any action against the Debtors, the Released Parties, or the Exculpated Parties on account of or in connection with or with respect to any such Claims or Interests released, exculpated, or settled under the Plan. The Injunction Provision is thus a key provision of the Plan because it enforces the release and exculpation provisions that are centrally important to the Plan. Further, as described above, the

(MI) (Bankr. S.D. Tex. Sept. 28, 2016); *In re Midstates Petroleum Co., Inc.*, No. 16-32237 (DRJ) (Bankr. S.D. Tex. Sept. 28, 2016); *In re Sandridge Energy, Inc.*, No. 16-32488 (DRJ) (Bankr. S.D. Tex. Sept. 20, 2016).

134 *Pacific Lumber*, 584 F.3d at 253.

135 *Cf. Wool Growers*, 371 B.R. at 775 ("[t]he validity of a consensual release is primarily a question of contract law because such releases are no different from any other settlement or contract."); *Pilgrim's Pride*, 2010 WL 200000, at *5.

injunction provided for in the Plan is consensual as to any party that did not specifically object thereto. As such, to the extent the Court finds that the Plan's exculpation and release provisions are appropriate, the Court should approve the Injunction Provision.[136]

v. Parties May Only Opt Out of the Third-Party Release.

95. Unlike the Third-Party Release, the exculpation and injunction provided for under Article IX.G of the Plan will be effective as of the Effective Date against all parties in interest, not just against the Releasing Parties. The Exculpation Provision, for example, does not affect the liability of third parties *per se*, but rather sets a standard of care of actual fraud or gross negligence in hypothetical future litigation against an exculpated party for acts arising out of the Debtors' restructuring. Further, the injunction provision is a protection provided under the Bankruptcy Code to Debtors that enforce and confirm their ability to emerge as a reorganized entity free with a "fresh start."[137] Therefore, to the fullest extent permissible under applicable law, and without limiting any provision of the Plan, the Plan and its terms shall be enforceable against all Holders of Claims or Interests subject to certain parties opting out of the Third-Party Release.[138]

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

96. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and non-bankruptcy law."[139]

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[136] *See, e.g.*, *Camp Arrowhead*, 451 B.R. at 701–02 ("the Fifth Circuit does allow permanent injunctions *so long as there is consent* . . . [w]ithout an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing") (citing *Pacific Lumber*, 584 F.3d at 253; *Pilgrim's Pride*, 2010 WL 200000, at *5).

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

[138] *See* Plan, Art. IX.F.

[139] *See* 11 U.S.C. 1123(d).

97. Article V of the Plan provides for the satisfaction of all monetary defaults under each Executory Contract and Unexpired Lease assumed pursuant to the Plan in accordance with section 365 of the Bankruptcy Code by payment of the default amount on the Effective Date, subject to the limitations described in Article V of the Plan, or on such other terms as the parties to such Executory Contracts or Unexpired Leases may otherwise agree.[140] The Debtors, in accordance with the Disclosure Statement and the Plan, distributed notices of proposed assumption to the applicable third parties. These notices included procedures for objecting to the proposed assumptions of Executory Contracts and Unexpired Leases and any Claim for cure costs, as well as a process for resolving any disputes concerning the foregoing with the Bankruptcy Court. Accordingly, the Debtors submit that the Plan complies with section 1123(d) of the Bankruptcy Code.

D. The Sale Transaction Should Be Approved Under 11 U.S.C. §§ 363 and 1123(b)(4) of the Bankruptcy Code.

i. The Sale Transaction Is a Sound Exercise of the Debtors' Business Judgment and Should be Approved.

98. The Court may authorize the Debtors to sell the assets under the Sale Transaction pursuant to sections 363(b) and 1123(b)(4) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that "[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."[141] Similarly, section 1123(b)(4) provides that a "plan may provide for the sale of all or substantially all of the property of the estate."[142] To approve a sale under section 363(b)(1) of the Bankruptcy Code, courts require a debtor to show that the decisions to sell the property outside of the ordinary

[140] *See* Plan, Article V.C.

[141] 11 U.S.C. § 363(b)(1).

[142] 11 U.S.C. § 1123(b)(4).

course of business was based on a sound exercise of the debtor's business judgment.[143] Accordingly, for the purpose of selling the assets, the Debtors need only show a legitimate business justification for the proposed action.[144]

99. The business judgment rule shields a debtor's management decisions from judicial second-guessing.[145] Once a debtor articulates a valid business justification, the law vests the debtor's decision to use property outside of the ordinary course of business with a strong presumption that "in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company."[146] Parties challenging a Debtor's decision must "overcome the powerful presumptions of the business judgment rule" to show the business decision cannot be attributed to any rational purpose.[147] Generally, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

100. The Sale Transaction represents a sound exercise of the Debtors' business judgment, is essential to the Plan, and is justified under section 363(b) of the Bankruptcy Code. The Debtors believe that the Sale Transaction represents the most efficient and appropriate means of maximizing the value of the Debtors' Estate. No other person or entity or group of entities has

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143 *See In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (holding that a debtor-in-possession may sell substantially all of its assets under 11 U.S.C. § 363(b)(1) so long as there is "some articulated business justification for using, selling, or leasing the property outside the ordinary course of business") (citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)); *In re Quality Beverage Co., Inc.*, 181 B.R. 887 (Bankr. S.D. Tex. 1995); *In re Gulf Coast Oil Corp.*, 404 B.R. 407 (Bankr. S.D. Tex. 2009); *In re Asarco, L.L.C.*, 650 F.3d 593 (5th Cir. 2011).

144 *Lionel Corp.*, 722 F.2d at 1071.

145 *Id.*; *see also In re Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) (a "presumption of reasonableness attaches to a debtor's management decisions" and courts will generally not entertain objections to the debtor's conduct after a reasonable basis is set forth).

146 *Freuler v. Parker*, 803 F. Supp. 2d 630, 638 n.6 (S.D. Tex. 2011), *aff'd*, 517 F. App'x 227 (5th Cir. 2013) (citing *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006)).

147 *Id.*; *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984); *In re Walt Disney*, 906 A.2d at 74.

offered to purchase the assets for greater overall value to the Debtors' Estate than the Successful Bidders. Moreover, the Sale Transaction is appropriate under 1123(b)(4) as it is provided for by the Plan, which, for the reasons set forth herein, satisfies all of the requirements to be confirmed. Accordingly, the Sale Transaction should be approved.

ii. The Sale Should Be Approved "Free and Clear" Under Sections 363(f) and 1123 of the Bankruptcy Code.

101. The Debtors request approval to sell the assets subject to the Sale Transaction free and clear of any and all liens, claims, and encumbrances in accordance with sections 363(f) and 1129(b)(2)(A)(ii) of the Bankruptcy Code. Section 1129(b)(2)(A)(ii) allows a debtor to sell property pursuant to a Plan free and clear of liens.[148] Further, section 363(f) of the Bankruptcy Code permits a debtor to sell property free and clear of another party's interest in the property if: (a) applicable nonbankruptcy law permits such a free and clear sale; (b) the holder of the interest consents; (c) the interest is a lien and the sale price of the property exceeds the value of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest.[149]

102. Section 363(f) of the Bankruptcy Code is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to warrant the Debtors' sale of the Transferred Assets free and clear of all interests (i.e. all liens, claims, rights, interests, charges, or encumbrances).[150]

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148 *See* 11 U.S.C. § 1129(b)(2)(A)(ii).

149 *See* 11 U.S.C. § 363(f).

150 *Id.*; *In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) ("[I]f any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.").

103. The Debtors have satisfied the requirements under the Bankruptcy Code to transfer their assets free and clear of any other purported liens, claims, or encumbrances on the assets. The Debtors further submit that any Interest that will not be an Assumed Liability satisfies or will satisfy at least one of the five conditions of section 363(f) of the Bankruptcy Code, and that any such interest will be adequately protected by either being paid in full at the time of closing, or by having it attach to the net proceeds of the Sale, subject to any claims and defenses the Debtors may possess with respect thereto. For example, the First Lien Ad Hoc Group and the Second Lien Ad Hoc Group are consenting to the sale of their collateral free and clear of their liens pursuant to the terms of the Plan. Accordingly, the Debtors submit that the Sale Transaction satisfies the statutory requirements of section 363(f) of the Bankruptcy Code and respectfully request that the Sale Transaction be free and clear of any liens, claims, encumbrances, and other interests.

iii. The Sale Transaction Has Been Proposed in Good Faith and Without Collusion, and the Successful Bidders Are a "Good-Faith Purchaser."

104. The Debtors request that the Court find that the Successful Bidders are entitled to the benefits and protections provided by section 363(m) of the Bankruptcy Code in connection with the Sale Transaction.

105. Section 363(m) of the Bankruptcy Code provides in pertinent part:

> [t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease or property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.[151]

[151] 11 U.S.C. § 363(m).

106. Section 363(m) of the Bankruptcy Code thus protects the purchaser of assets sold pursuant to section 363 of the Bankruptcy Code from the risk that it will lose its interest in the purchased assets if the order allowing the sale is reversed on appeal, as long as such purchaser leased or purchased the assets in "good faith." While the Bankruptcy Code does not define "good faith," courts have held that a purchaser shows its good faith through the integrity of its conduct during the course of the sale proceedings, finding that where there is a lack of such integrity, a good-faith finding may not be made.[152]

107. The Debtors submit that the Successful Bidders are "good faith purchasers" within the meaning of section 363(m) of the Bankruptcy Code, and the Sale Transaction is a good-faith agreements on arm's-length terms entitled to the protections of section 363(m) of the Bankruptcy Code. ***First***, as set forth in more detail above, the consideration to be received by the Debtors pursuant to the Sale Transaction is substantial, fair, and reasonable. ***Second***, the parties entered into the Sale Transaction in good faith and after extensive, arm's-length negotiations, during which all parties were represented by competent counsel, and the Sale Transaction is a culmination of a extensive marketing process in which all parties were represented by counsel and all negotiations were conducted on an arm's-length, good-faith basis. ***Third***, there is no indication of any "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders" or similar conduct that would cause or permit the Sale Transaction to be avoided under section 363(n) of the Bankruptcy Code. ***Fourth***, the Successful Bidders' offers were selected by the Debtors and approved by the Bankruptcy Court as the highest

[152] *See Hytken v. Williams*, No. 06-2169 (LHR), 2007 WL 1003421 (Bankr. S.D. Tex. 2007) (citing *In re Rock Indus. Machinery Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)) ("The requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchasers' good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."); *see also In re Hereford Biofuels, L.P.*, 466 B.R. 841, 860 (Bankr. N.D. Tex. 2012).

and otherwise best bids pursuant to the Court-approved Bidding Procedures. Accordingly, the Debtors believe that the Sale Transaction should be entitled to the full protections of section 363(m) and (n) of the Bankruptcy Code.

III. The Modifications to the Plan Do Not Require Resolicitation and Should Be Approved.

108. The Bankruptcy Code provides that a plan proponent may modify a plan "at any time" before confirmation.[153] It further provides that all stakeholders that previously have accepted a plan should also be deemed to have accepted such plan as modified.[154] The Bankruptcy Rules provide that such modifications do not require resolicitation where the court determines, after notice and a hearing, "that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification."[155]

109. Rather, only those modifications that are "material" require resolicitation.[156] A plan modification is not material unless it "so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance."[157] Thus, an improvement to the position of the creditors affected by the modification will not require

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153 11 U.S.C. § 1127(a).

154 *Id.* § 1127(d).

155 Fed. R. Bankr. P. 3019.

156 *See In re Am. Solar King Corp.*, 90 B.R. 808, 824 (Bankr. W.D. Tex. 1988) (approving plan modification with *de minimis* effect on creditor recoveries pursuant to Bankruptcy Rule 3019); *In re R.E. Loans, LLC*, No. 11-35865 (BJH), 2012 WL 2411877 at *10 (Bankr. N.D. Tex. June 26, 2012) (finding that none of the modifications adversely changed the treatment of the claim of any creditor or the interest of any equity security holder so as to require resolicitation pursuant to Bankruptcy Rule 3019).

157 *Am. Solar King*, 90 B.R. at 824.

resolicitation of a modified plan.[158] Nor will a modification that is determined to be immaterial require resolicitation.[159]

110. The Debtors filed an amended version of the Plan concurrently herewith that contained certain modification to address and settle various formal and informal objections. None of the Plan modifications will adversely affect the treatment of those Classes and Claims that voted to accept the Plan.[160] Therefore, such modifications will not require the Debtors to re-solicit acceptances for the Plan.[161] Modifications to the Plan include those described in the Debtors' response to the Objections to the Plan, described in Section V herein. Accordingly, the Debtors submit that no additional solicitation or disclosure is required and the modifications should be deemed accepted by all stakeholders that previously accepted the Plan.

IV. Committee Standing Motion.

111. The Committee's standing motion does not prevent the Court from confirming the Plan. Indeed, the Committee's motion is not even up for consideration at the Confirmation Hearing. In its motion, the Committee requests standing to pursue certain fiduciary claims and to avoid numerous transactions outlined in its proposed complaint.[162] As a matter of law, only the

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158 *See In re Mangia Pizza Invs., LP*, 480 B.R. 669, 689 (Bankr. W.D. Tex. 2012) ("[A]nyone who voted to accept the previous plan will be deemed to have accepted the modified plan if the modified plan 'does not adversely change the treatment of [that creditor's] claim.'") (citing *In re Dow Corning Corp.*, 237 B.R. 374, 378 (E.D. Mich. 1999)).

159 *See Am. Solar King*, 90 B.R. at 826 ("if a modification does not 'materially' impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.").

160 *See* 11 U.S.C. § 1127(a) ("The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of section 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.").

161 *See* Fed. R. Bankr. P. 3019(a). *In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988) ("[I]f a modification does not 'materially' impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.").

162 *See Motion for Entry of an Order Granting Standing to the Official Committee of Unsecured Creditors of Cobalt International Energy Inc., et al. to Prosecute Estate Causes of Action to Avoid and Recover Fraudulent Transfers and Disallow Claims of Holders of First Lien Notes and Second Lien Notes* [Docket No. 651].

debtor in possession in chapter 11 cases has standing to pursue such actions.[163] Courts are nevertheless authorized in narrow circumstances to grant derivative standing to parties in interest like the Committee to pursue estate claims when (a) the claim to be pursued in the action is colorable, (b) the debtor in possession refuses a demand to pursue the action and the refusal is unjustified, and (c) the third party seeks and obtains permission from the court to pursue the claim.[164] In determining whether a debtor's failure to bring a colorable claim is unjustified, courts often conduct a cost-benefit analysis from the estate's perspective.[165] The party seeking derivative standing carries the burden of proof.[166]

112. As discussed herein and for reasons stated in the Trial Brief, the Bankruptcy Court should deny the Committee's motion. ***First***, these claims are being released pursuant to the Plan as part of a multiparty settlement. To the extent the Court confirms the Plan, the Committee's motion is moot. ***Second***, the Second Lien Noteholders, the constituency with the primary (and likely exclusive) economic interest in the claims being released has considered the claims and supports releasing the claims. ***Third***, the claims in the Committee's standing motion are not colorable and the Debtors are justified in their decision not to pursue such claims. The Debtors' independent and disinterested directors investigated the claims and determined that they were meritless. Moreover, the Committee's motion adds no additional facts to the record beyond those

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163 *See In re Cooper*, 405 B.R. 801, 807 (Bankr. N.D. Tex. 2009) (citing *Torth Liquidating Trust v. Stockstill*, 561 F.3d 377, 386 (5th Cir. 2009)).

164 *In re SI Restructuring Inc.*, 714 F.3d 860, 864 (5th Cir. 2013) (citing *La. World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 247 (5th Cir. 1988)); *Cooper*, 405 B.R. at 810.

165 *See, e.g.*, *Cooper*, 405 B.R. at 815-16.

166 *See La. World Exposition v. Fed. Ins. Co.*, 858 F.2d at 249–253; *In re Racing Servs., Inc.*, 540 F.3d 892, 900 (8th Cir. 2008) ("To satisfy its burden, the creditor, at a minimum, must provide the bankruptcy court with specific reasons why it believes the trustee' s refusal is unjustified. A creditor thus does not meet its burden with a naked assertion that 'the trustee's refusal is unjustified.' If presented with nothing more than this, the bankruptcy court may properly deny a creditor's motion without explanation.").

already investigated by the independent and disinterested directors. Accordingly, the Committee is unable to carry its burden and should not be granted standing to pursue the meritless claims. Based on the foregoing and the Trial Brief, the Bankruptcy Court should confirm the Debtors' Plan and find that the Committee's standing motion is moot. Nevertheless, in the event Confirmation is denied, the Debtors reserve all rights to respond to the Committee's motion.

V. Confirmation Objections.

113. The Debtors received 14 formal Objections and various informal responses to confirmation of the Plan. Many have been resolved consensually, and the Debtors continue to work to resolve the remaining unresolved issues. As of the date hereof, there are a number of outstanding Objections, none of which assert arguments or allege facts that are fatal to Confirmation. Accordingly, for the reasons set forth in this Confirmation Brief and the record the Debtors will establish at the Confirmation Hearing, the Court should overrule the Objections and confirm the Plan.

A. The Plan Meets the Section 1129(a)(3) Good Faith Requirements.

114. The Committee and the Unsecured Notes Ad Hoc Committee's Objection that the Plan was not filed in good faith should be overruled. Section 1129(a)(3) requires that a plan be "proposed in good faith and not by any means forbidden by law."[167] The plan must also achieve a result consistent with the Bankruptcy Code.[168] Whether a plan is proposed in good faith must be determined in light of the totality of the circumstances of the case.[169] In the context of an asset

[167] 11 U.S.C. § 1129(a)(3).

[168] *See In re Block Shim Dev. Company-Irving*, 939 F.2d 289, 292 (5th Cir. 1991).

[169] *Id.*; *Pub. Fin. Corp. v. Freeman*, 712 F.2d 219 (5th Cir. 1983); *Cypresswood Land Partners, I*, 409 B.R. at 425.

sale, debtors typically engage in a marketing process and conduct auctions to ensure that a proposed sale maximizes value.[170]

115. As the Court is well aware, the Debtors conducted a multi-year marketing process beginning in 2015 that culminated in the Auction. Prior to the petition date, the Debtors received some indications of interest, but none of the indications of interest were sufficient to pay all of the Debtors' funded debt in full. Accordingly, the Debtors filed these chapter 11 cases to complete their marketing and sale process. The Debtors filed their Bidding Procedures Motion on the Petition Date to build upon their out-of-court marketing efforts. The Debtors' marketing efforts ultimately yielded qualified bids from six parties for various assets on or before the Bid Deadline. The Debtors then conducted the Auction at which the various qualified bidders participated in a competitive bidding process. Following the Auction, the Debtors named four Successful Bidders for the different asset packages.[171] For the foregoing reasons, the Debtors have satisfied the good faith requirement of section 1129(a)(3).

116. The Unsecured Notes Ad Hoc Committee attempts to broaden the scope of the good faith requirements of section 1129(a)(3), arguing that the Debtors must demonstrate that the plan maximizes the value of the Estate for creditors. Section 1129(a)(3) simply does not contain such a requirement.[172] Regardless, the Debtors believe that even if section 1129(a)(3) of the Bankruptcy

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170 Rachael M. Jackson, *Survey: Responding to Threats of Bankruptcy Abuse in a Post-Enron World: Trusting the Bankruptcy Judge as the Guardian of Debtor Estates*, 2005 Colum. Bus. L. Rev. 451, 469–70 (2005) ("The process of conducting an auction generally establishes that a successful bidder has paid the fair market value for the asset.").

171 *Cf. In re Unbreakable Nation Co.*, 437 B.R. 189 (Bankr. E.D. Pa. 2010) (confirming a plan auction with only one bidder but where, "ultimately the auction process produced interested potential bidders and significant benefit to creditors, namely the full payment of administrative and priority claims and a payment of $100,000 to unsecured claims").

172 *See Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 330 (7th Cir. 1986) ("Only fraud, collusion, or knowledge of the illegality of the sale defeat 'good faith.'"); 7-1129 COLLIER ON BANKRUPTCY P. 1129.02[3][B] (generally, denial of confirmation for failure to satisfy section 1129(a)(3) "should be reserved for only the most extreme of cases").

contained such a requirement, it would be satisfied because the Auction maximized value for the Estate.[173]

117. Further, the Unsecured Notes Ad Hoc Committee's argument that the Auction was not conducted in good faith is unpersuasive and ignore the realities of an Auction. ***First***, the Unsecured Notes Ad Hoc Committee does not, nor can it, point to any facts demonstrating an effort by any bidders, either individually or collectively, to drive down the purchase price. ***Second***, a mere "asymmetry of information" is insufficient to find that the Auction was conducted in bad faith. Indeed, courts addressing similar issues have uniformly found that strategic advantages legally obtained outside the chapter 11 process are irrelevant for determining the plan proponents' good faith.[174] All bidders were provided equal access to the data room and a fair opportunity to conduct their own due diligence, and the Unsecured Notes Ad Hoc Committee cites no precedent that the bidders' varying levels of knowledge cast doubt on a plan proponents' good faith. Moreover, the Court-approved Bidding Procedures encouraged bidding and provided another opportunity for any interested party with the financial wherewithal and interest to come forward and participate in the Auction to ensure the highest and best offer was attained. Therefore, the Court should approve the Auction results and authorize the Debtors to consummate the Sale Transaction.[175]

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[173] *In re Chrysler LLC*, 405 B.R. 84, 98 (Bankr. S.D.N.Y. 2009) ("[T]he true test of value is the sale process itself"); *In re Waterford Wedgwood USA, Inc.*, 500 B.R. 371, 381–82 (Bankr. S.D.N.Y. 2013) ("Courts give significant deference to marketplace values" and to values reached in the context of "an arm's length transaction between a willing buyer and a willing seller . . . . The fair market value is equivalent to the winning bid accepted at an auction.") (internal citations and quotations omitted); *see also VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 633 (3rd. Cir. 2007) ("Absent some reason to distrust it, the market price is a more reliable measure of the [asset's] value than the subjective estimates of one or two expert witnesses.").

[174] *See, e.g.*, *Unbreakable Nation Co.*, 437 B.R. 189 (finding that the section 1129 "good faith" requirements were met where the founder/CEO formed an acquisition vehicle to purchase the debtor's assets in a chapter 11 auction); *In re Consul Restaurant Corp.*, 146 B.R. 979 (Bankr. D. Minn. 1992) (overruling "bad faith" objections where a the debtor's franchisor sought to acquire the debtor franchisee through a plan sale).

[175] *See, e.g.*, *First Nat'l Bank v. M/V Lightning Power*, 776 F.2d 1258, 1259 (5th Cir. 1985) ("Absent fraud or collusion, a bid at a judicial sale should not ordinarily be rejected."); *In re Bigler, LP*, 443 B.R. 101, 110 (Bankr.

B. The Plan Supplement's Descriptions of Retained Causes of Action Is Not a Confirmation Issue and Are Sufficiently Specific to Put Creditors on Notice of the Nature and Basis of Such Protective Causes of Action.

118. Certain of the objecting parties[176] argue that Exhibit C the Plan Supplement [Docket Nos. 612 and 686] sets forth retained Causes of Action that are vague or overbroad and may not be asserted, post-Effective Date. These objections are misplaced. The form of retained causes of action is not an issue for confirmation. Indeed, each of the cases the objecting parties cite as authority on this issue take place after a plan has been confirmed. Nevertheless, the Plan Supplement's descriptions of retained Causes of Action are sufficiently specific and do provide requisite notice to creditors pursuant to law in the Fifth Circuit.[177] The objections should be overruled.

119. "[A]fter confirmation of a plan, the ability of the debtor to enforce a claim once held by the estate is limited to that which has been retained in the [bankruptcy] plan."[178] A blanket reservation of "any and all claims" set forth in a debtor's chapter 11 plan is insufficient to constitute proper notice of retained causes of action.[179] Instead, claims must be specifically identified for a

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S.D. Tex. 2010) ("[W]hen an auction is conducted in a manner that is beyond reproach and the bidding procedures are both simple and clear, the integrity of the judicial system should take precedence over ensuring more dollars to the estate by allowing a late bid that is a higher offer."); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564 (8th Cir. 1997) ("Finality and regularity of proceedings are significant factors whenever the courts are involved in a sale of property, for devotion to those principles encourages fervent bidding and ensures that interested parties will sincerely extend their best and higher offers at the auction itself."); *In re Webcor, Inc.*, 392 F.2d 893, 899 (7th Cir. 1968) (If parties are to be encouraged to bid at a bankruptcy sale, "there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended.").

176 *See* Committee Objection at ¶¶ 51–58; Total Objection at ¶ 8; Anadarko Objection at ¶¶ 22–25; ConocoPhillips Objection at ¶ 4(d);

177 *See*, e.g., *In re Tex. Wy. Drilling, Inc.*, 647 F.3d 547 (5th Cir. 2011); *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating Company)*, 540 F.3d 351, 355-56 (5th Cir. 2008).

178 *United Operating*, 540 F.3d at 356.

179 *Id.* (holding that a blanket reservation was insufficient to retain a claim for maladministration of the estate).

debtor or plan administrator to pursue such causes of action, post-Effective Date.[180] A categorical reservation is sufficiently specific and unequivocal—i.e., "preference claims."[181] In any case, debtors need not individually name defendants to retain causes of action against such defendants.[182]

120. ***First***, here, Article IV.H of Plan limits the scope of retained Causes of Action that can be prosecuted against each of the objecting parties as holders of Claims asserted by those parties. That language permits the Debtors or Plan Administrator to defensively assert counterclaims, defenses, and other Causes of Action against the objecting parties as part of Claims administration and resolution process. Regarding Causes of Action arising or accruing post-Effective Date, the Debtors or Plan Administrator retain the right to prosecute Causes of Action so long as they are not released under the Plan.

> Unless any Cause of Action against an Entity is expressly waived, relinquished, exculpated, released, compromised, or settled in the Plan or a Final Order, in accordance with section 1123(b) of the Bankruptcy Code, the Debtors shall convey to the Plan Administrator all rights to commence, prosecute or settle, as appropriate, any and all Causes of Action, whether arising before or after the Petition Date, which shall vest in the Plan Administrator pursuant to the terms of the Plan.
>
> . . .
>
> The Debtors and the Plan Administrator expressly reserve all rights to prosecute any and all Causes of Action against any Entity, except as otherwise expressly provided in the Plan; *provided* that the Debtors before the Effective Date or the Plan Administrator after the Effective Date may prosecute any such Cause of Action against any

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[180] *Tex. Wy. Drilling, Inc.*, 647 F.3d at 551–52; *In re United Operating*, 540 F.3d at 355 (noting that a plan's categorical reservation of 'preference claims' was sufficiently specific).

[181] *United Operating* at 355 citing *In re Ice Cream Liquidation, Inc.*, 319 B.R. 324, 333 (Bankr. D. Conn. 2005); Plan Art. I.A. defines Causes of Action as including all "Avoidance Actions" and any claim on contracts or for breaches of duties arising in contract or in tort.

[182] *Tex. Wy. Drilling, Inc.*, 647 F.3d at 551–52.

> party only in connection with their objection to and resolution of any Claim asserted by such party.[183]

121. Comporting with the language set forth in Article IV.B of the Plan and applicable Fifth Circuit law, paragraphs 1–8 of Exhibit C to the Plan Supplement specifically describe retained Causes of Action that are preserved for the benefit of the Debtors or the Plan Administrator. For example, regarding contract counterparties, Exhibit C specifically describes the following retained Causes of Action:

> The claims and Causes of Actions reserved include, without limitation, Causes of Action against vendors, suppliers of goods or services, or any other parties: (a) for overpayments, back charges, duplicate payments, improper holdbacks, deposits, warranties, guarantees, indemnities, recoupment, or setoff; (b) for wrongful or improper termination, suspension of services or supply of goods, or failure to meet other contractual or regulatory obligations; (c) for failure to fully perform or to condition performance on additional requirements under contracts with any one or more of the Debtors; (d) for payments, deposits, holdbacks, reserves, or other amounts owed by any creditor, supplier, vendor, insurer, surety, factor, lessor, or other party; (e) for any liens, including mechanic's, artisan's, materialmen's, possessory, or statutory liens held by any one or more of the Debtors; (f) arising out of environmental or contaminant exposure matters against landlords, lessors, environmental consultants, environmental agencies, or suppliers of environmental services or goods; (g) counter-claims and defenses related to any contractual obligations; and (h) for unfair competition, interference with contract or potential business advantage, breach of contract, infringement of intellectual property, or any business tort claims.[184]

122. The schedules accompanying Exhibit C of the Plan Supplement identify interested parties by name—for example, parties to Executory Contracts and Unexpired Leases with the Debtors—in an effort to provide notice beyond that required by applicable law. The objecting parties argue that these schedules contain vague descriptions of retained Causes of Action (e.g.,

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[183] Plan Art. IV.H.

[184] Plan Supplement Ex. C at ¶ 2.

"Claims, Defenses, Cross-Claims, and Counter-Claims Related to Litigation or Possible Litigation").[185] To the contrary, specific claim descriptions for each of the scheduled parties are provided in paragraph 2 of Exhibit C.

123. ***Second***, because the Debtors broadly served[186] the notice of Plan Supplement and notice of the Confirmation Hearing to the creditor body in advance of the Voting Deadline, those parties were properly noticed of their status. Both notices further informed interested parties of the Notice and Claims Agent's website, telephone number, and mailing address, providing further access to the Plan and Disclosure Statement.

124. ***Third***, holders of a Claim or Interest and parties to Executory Contracts and Unexpired Leases with the Debtors had an opportunity to opt out of the Plan's Third-Party Release by electing to submit the applicable opt out form. Because holders of Claims and Interests and parties to Executory Contracts and Unexpired Leases with the Debtors were provided the applicable opt out form, each preserved the ability to opt out of the Third-Party Release.

125. With respect to Released Parties, including the Purchasers under the Sale Transaction Documentation, Exhibit C of the Plan Supplement expressly states that the list of retained Causes of Action are subject to the Plan's Releases and does not prejudice their rights.

> Except as otherwise provided in the Plan including the release provisions set forth in Article VIII of the Plan, the Debtors and Plan Administrator reserve the right to commence and pursue any and all Causes of Action against any Entity, including Causes of Action that are not expressly identified in this Schedule of Retained Causes of Action. Confirmation of the Plan shall not in any way affect such right

[185] Committee Objection at ¶ 55; Anadarko Objection at ¶ 24; ConocoPhillips Objection at ¶ 4(d).

[186] The Debtors serviced the *Notice of Plan Supplement* on March 22, 2018 as set forth pursuant to the *Certificate of Service*, filed April 1, 2018.

As a Purchaser under the Sale Transaction Documentation, the objections of Total and other Purchasers in this respect should be overruled.

126. Finally, the Committee argues that that retained Causes of Action are overbroad regarding the creditor matrix parties set forth in paragraph 8 of Exhibit C to the Plan Supplement.[187] Again, to the extent these parties are holders of Claims or parties to Executory Contracts or Unexpired Leases, the Plan only permits the Debtors or Plan Administrator to defensively assert Causes of Action against such parties regarding their Claims. The same is true regarding holders of Claims or parties to Executory Contracts or Unexpired Leases set forth in the Debtors' schedules and statements. For the foregoing reasons, the Committee objection should be overruled.

C. The Issues Raised in Chevron's Objection Have Been Resolved, and Any Remaining Arguments Have No Merit.

127. The issues raised in Chevron's Objection have largely been resolved, and any outstanding arguments fail and should be overruled. In particular, the Debtors have resolved Chevron's Cure Claim and have amended the Plan Supplement to assume certain agreements pertaining to the Anchor Prospect. The balance of Chevron's arguments, namely the assertion that the Purchaser must assume all liabilities and obligations relating to the Anchor Prospect and that certain executory contracts cannot be assumed or assigned without Chevron's consent, are unsupported by the relevant agreements and applicable law.

128. ***First***, any claims Chevron may have arising from the operating agreements governing the Anchor Prospect prior to the effective date of assignment must be asserted as a Cure Claim in accordance with the provisions of the Plan and the Disclosure Statement Order, rather

[187] Committee Objection at ¶ 54.

than against the Purchaser (with the exception of certain environmental and plugging and abandonment obligations which are expressly assumed by the Purchaser, as described below).

129. To escape this conclusion, Chevron's Objection mischaracterizes the assignment provisions of the operating agreement governing the Anchor Prospect. Chevron maintains that under the operating agreement, the Purchaser must assume all obligations regardless of when such obligations arise.[188] According to Chevron, the Purchaser cannot limit its liability by assuming only those obligations that arise after the closing date. Chevron's reading, however, is inconsistent with section 24.1 of the operating agreement:

> No Transfer of Interest shall release a Party from its obligations and liabilities under this Agreement that are incurred prior to the effective date of that Transfer of Interest, or from debts or obligations incurred prior to the effective date of that Transfer of Interest, ***except to the extent expressly assumed by the transferee***, and the security rights under Article 6.3 *(Security Rights)* shall continue to burden the Working Interest transferred and to secure the payment of any retained obligations and liabilities. Once a Transfer of Interest becomes effective under Article 24.1.2 *(Effective Date of Transfer of Interest)*, the transferor shall not be responsible for any obligations, debts, or liabilities under this Agreement, which are incurred by the Parties on or after the effective date of that Transfer of Interest.[189]

130. The foregoing provision clearly allows, and in fact ***requires***, the apportionment of liability as of the effective date of the transfer (or by express agreement). Here, the Debtors and the Purchaser expressly agreed to apportion liability as set forth in the purchase agreement in compliance with the underlying operating agreement. While Chevron correctly observes that the operating agreement requires an assignee assume "the performance of all of the assigning Party's obligations under th[e] Agreement," the scope of the assignee's obligations are temporally limited

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[188] *See* Chevron Objection at ¶ 17.

[189] Anchor North Prospect, Unit Operating Agreement § 24.1 (emphasis added).

to the effective date of the assignment, in accordance with section 24.1 cited above. As a corollary, the stipulation entered into between Cobalt and Chevron, which requires a purchaser of the Anchor Prospect to assume "all terms and conditions of the Operating Agreements" is also subject to the limitations of section 24.1.[190]

131. In the end, the purchase agreement for the Anchor Prospect is consistent with the terms of the underlying operating agreement and stipulation, and therefore any liabilities that accrued prior to the effective date of assignment must be asserted as a Cure Claim in accordance with the Plan and Disclosure Statement Order (with the exception of certain environmental and plugging and abandonment obligations expressly assumed by the Purchaser, as described below). Chevron's Objection should therefore be overruled.

132. ***Second***, Chevron incorrectly asserts that the Purchaser is jointly and severally liable under federal law and United States Bureau of Safety and Environmental Enforcement regulations for decommissioning costs incurred before the effective date of the asset purchase agreement. Under the relevant federal regulation, decommissioning obligations only accrue when a party "become[s] a lessee or the owner of operating rights of a lease on which there is a well that has not been permanently plugged."[191] Lessees only become jointly and severally responsible for meeting these obligations "as the obligations accrue."[192] Nevertheless, section 2.3 of the purchase agreement for the Anchor Prospect specifically states that "Buyer shall assume and agree to discharge . . . [a]ll of Seller's plugging and abandonment obligations under any Legal Requirements or Lease with respect to the Assets, whether such Liabilities arise prior to, at or after

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190 *See Stipulation Resolving Debtors' Motion for Entry of an Order Deeming Unenforceable Certain Preferential Rights with Respect to Chevron U.S.A. Inc.* [Docket No. 380].

191 30 C.F.R. § 250.1702.

192 30 C.F.R. § 250.1701.

the Closing Date." Accordingly, there is no basis to sustain Chevron's Objection with respect to the assumption of plugging and abandonment obligations by the Purchaser.

133. ***Third***, Chevron's claim that certain of their executory contracts cannot be assumed or assigned by the Debtors is premised upon a flawed understanding of section 365(c) of the Bankruptcy Code and applicable nonbankruptcy law governing trade secrets. In particular, the three contracts asserted by Chevron to be unassignable "proprietary intellectual property" are, by their own terms, merely licenses for trade secrets. As such, their assumption or assignment is not prohibited by any United States intellectual property law, including copyright or trademark law, and Chevron has not (and cannot) point to any other "applicable law" that would prohibit assumption or assignment pursuant to section 365(c) of the Bankruptcy Code.

134. The conclusion that Chevron's executory contracts are freely assumable and assignable in bankruptcy follows from the plain language of section 365(c) of the Bankruptcy Code, which provides in pertinent part as follows:

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor, ***whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if . . . applicable law excuses*** a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, ***whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties***; and . . . such party does not consent to such assumption or assignment.[193]

135. As the statute makes abundantly clear, the presence of an anti-assignment provision in the executory contract is irrelevant under an section 365(c) analysis—all that matters is whether "applicable law" excuses the counterparty to the executory contract from accepting performance from an entity other than the debtor. While there are certain federal intellectual property laws that

[193] 11 U.S.C. § 365(c) (emphasis added).

operate to prevent assignment of copyrightable and trademarked materials, there is no similar anti-assignment protection for trade secrets.[194] This is a critical distinction in light of section 2.3 of the Velocity Model License Agreement, which expressly states that "the Licensor considers the Velocity Model to be . . . a trade secret."[195] Revealingly, the terms "copyright" and "trademark" are absent from the underlying executory contracts and Chevron's Objection.

136. Chevron cites no law in support of its Objection. One court, however, has addressed this exact issue. In *Virgin Offshore*, the court held that ***seismic data is not copyrightable*** and affirmed the bankruptcy court order assuming the seismic data license in bankruptcy.[196] A number of other decisions in the Fifth Circuit have surmised that seismic data is not copyrightable as a matter of law.[197]

137. The Court should adopt the reasoning of the *Virgin Offshore* court and overrule Chevron's Objection.

Waiver of Bankruptcy Rule 3020(e)

138. To implement the Plan, the Debtors seek a waiver of the 14-day stay of an order confirming a chapter 11 plan under Bankruptcy Rule 3020(e). As noted above, these chapter 11

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194 "A trade secret is assignable. A trade secret can form the *res* of a trust, and it passes to a trustee in bankruptcy." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (citations omitted).

195 *See* Chevron Objection at ¶ 19.

196 *See In re Virgin Offshore USA, Inc.*, No. 13-79 (CJB), 2013 WL 4854312, at *6 (E.D. La. Sept. 10, 2013) ("[T]he Court finds that the bankruptcy judge properly determined that the Trustee may assume the License.").

197 *See, e.g.*, *id.* at *3, n.5 ("To the Court's knowledge, no court has ever found that seismic data is copyrightable."); *Mayne & Mertz, Inc. v. Quest Exp. LLC*, No. 06-800 (MEM), 2006 WL 3797194 (W.D. La. Dec. 5, 2006) ("[Seismic] data appears to meet the statutory definition of trade secret information."); *Anadarko Petrol. Corp. v. Davis*, No. 06-2849 (LHR), 2006 WL 3837518, *15 (S.D. Tex. Dec. 28, 2006) (plaintiff showed probability of success in proving that geological data was entitled to trade secret protection); *In re Bass*, 113 S.W.3d 735, 740 (Tex. 2003) (compiling cases from other jurisdictions finding that seismic data is a trade secret); *Sprint Corp. v. C.I.R.*, 108 T.C. 384, 406, 1997 WL 211306 (1997) (dissent) (In dicta, a dissenting judge stated that seismic data is a recording of "a natural phenomenon [that] is the result of human exertion, it is neither the expression of an idea nor an un-obvious improvement of prior technology or art. Accordingly, copyright or patent protection is not available for it.").

cases and the related transactions have been negotiated and implemented in good faith and with a high degree of transparency and public dissemination of information. A swift exit from chapter 11 is a crucial component of these Chapter 11 Cases, and requiring the Debtors to pause before Confirmation would be prejudicial to all parties in interest. Significantly, the Debtors must close certain components of the Sale Transaction sooner than 14 days after the Confirmation Hearing or risk violating the asset purchase agreements. More specifically, the outside closing date for the sale of the Debtors' Heidelberg and Shenandoah prospects is April 6, 2018. The outside closing date for the North Platte prospect, the Anchor prospect, and the Exploration Leases is April 18, 2018. Accordingly, at least with regard to the Heidelberg and Shenandoah prospects, the Rule 3020(e) stay could jeopardize the Plan to the detriment of all parties in interest. Additionally, each day the Debtors remain in chapter 11 they incur significant administrative and professional costs. For these reasons, the Debtors request a waiver of stay imposed by the Bankruptcy Rules so that the proposed Confirmation Order may be effective immediately upon its entry.

Conclusion

139. For the reasons set forth herein, the Debtors respectfully request that the Bankruptcy Court confirm the Plan and enter the Confirmation Order.

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Houston, Texas
Dated: April 2, 2018

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Certificate of Service

I certify that on April 2, 2018, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Zack A. Clement
Zack A. Clement