IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC. *et al.*,[1]	)	Case No. 20-11548 (CSS)
Debtors.	)	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE FOURTH AMENDED JOINT PLAN OF REORGANIZATION OF EXTRACTION OIL & GAS, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

[2] Whiteford, Taylor & Preston LLC operates as Whiteford Taylor & Preston L.L.P. in jurisdictions outside of Delaware.

TABLE OF CONTENTS

Page(s)

Page(s)

Page(s)

Page(s)

TABLE OF AUTHORITIES

Cases

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Statutes

Other Authorities

RELIEF REQUESTED

The above-captioned debtors and debtors in possession (collectively, the "Debtors") respectfully submit this memorandum of law (this "Memorandum") in support of Confirmation of the *Fourth Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code*, filed contemporaneously herewith (as modified, amended, or supplemented from time to time, the "Plan"),[3] pursuant to sections 1125, 1126, and 1129, respectively, of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"). In support of the Plan, the Debtors have filed the Owens Declaration, the Grady Declaration, the Voelte Declaration, and the Voting Declaration.[4] In further support of Confirmation of the Plan, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. The Court should confirm the Plan. The Plan marks a significant achievement for the Debtors—despite the readily apparent challenges of restructuring in the midst of the COVID-19 pandemic and severe price dislocations in the oil and gas sector, the Debtors have nearly reached consensus around a plan of reorganization that will shed over $1.4 billion of funded debt, inject new equity into the reorganized Debtors, provide meaningful recoveries to unsecured creditors, and pay essential trade claimants and vendors in full. The Plan is the result of extensive

[3] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Plan.

[4] In connection with this Memorandum, the Debtors have filed contemporaneously herewith the *Declaration of Matthew R. Owens in Support of Confirmation of the Fourth Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Owens Declaration"), the *Declaration of James M. Grady in Support of Confirmation of the Fourth Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Grady Declaration"), the *Declaration of Kevin J. Voelte in Support of Confirmation of the Fourth Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Voelte Declaration"), and the *Declaration of Jeffrey Miller Regarding the Solicitation and Tabulation of Votes on the Fourth Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Voting Declaration").

discussions with the Debtors' stakeholders regarding the Debtors' best path forward and, once confirmed and consummated, will provide the Debtors with the flexibility to navigate the "new-normal" in the oil and gas industry, implement their new business plan, and position the Debtors for long-term success.

2. On June 14, 2020, the Debtors entered into the Restructuring Support Agreement with 80% of their Senior Noteholders as of the Petition Date and executed a commitment letter for a $125 million DIP facility to fund the Debtors' operations during these chapter 11 cases. Since June 2020, the Debtors and their advisors have worked tirelessly to develop a business plan and a go-forward strategy that account for the lingering effects of the COVID-19 pandemic and other unexpected externalities exacerbated by extreme volatility in oil and gas prices. Initially, as contemplated by the Restructuring Support Agreement and the DIP Facility, the Debtors exhaustively pursued a Combination Transaction. Ultimately, in consultation with the Debtors' advisors and key stakeholders, the Debtors declined to pursue a Combination Transaction as part of these chapter 11 cases and determined that the Stand-Alone Restructuring would provide the Debtors with the best and most value-maximizing path forward.[5]

3. The Debtors shifted their focus to the Stand-Alone Restructuring and effectuating their go-forward strategy through a chapter 11 plan of reorganization. A component of the Debtors' restructuring efforts was the rejection of a number of executory contracts and leases, including certain midstream agreements that, due to the dramatic shifts in the energy industry in 2020, no longer reflected the market rates for the services they provided. After a multi-day evidentiary hearing, the Debtors successfully rejected several transportation services agreements

[5] The Combination Transaction process is described more fully in the Disclosure Statement and *Notice of Termination of Discussions with Potential Merger Counterparty Regarding Combination Transaction Restructuring* [Docket No. 813].

and other related agreements with their midstream contract counterparties.[6] The Debtors then quickly entered into negotiations with the Ad Hoc Noteholder Group, the Creditors' Committee, and several midstream parties in an effort to reach consensus on a litany of outstanding issues related to the rejected contracts and the Plan. After difficult, hard-fought, and around-the-clock negotiations up until the date hereof, the Debtors have reached settlement with the Creditors' Committee and several midstream parties (the "Settlements").[7] The Settlements provide a near global resolution of all outstanding issues—an accomplishment that cannot be overstated—and provide the Debtors with a clear path to the Confirmation of the Plan. Although the Debtors did not ultimately reach a definitive Settlement with certain of the midstream contract counterparties in advance of filing of this Memorandum, the Debtors are committed to continue their good-faith and productive discussions to reach consensus and ultimately enter into a term sheet and/or other definitive documentation to cement the significant progress made to date.

4. Despite the foregoing and their best efforts, the Debtors were not able to resolve every objection to Confirmation of the Plan. The Debtors' responses to the remaining objections to the Plan are found in Section III of this Memorandum and a chart overviewing the informal objections and their resolutions is attached hereto as **Exhibit A**. For the reasons set forth herein, the Debtors believe that the Plan comports with the requirements of the Bankruptcy Code and that

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6 *See Bench Ruling* [Docket No. 942].

7 *See Order (I) Approving the Settlement By and Among the Debtors and Elevation Midstream, LLC and GSO EM Holdings LP, (II) Authorizing Extraction Oil & Gas, Inc. to Assume Certain Executory Contracts, as Amended and Restated, with Elevation Midstream, LLC and (III) Granting Related Relief* [Docket No. 1274]; *see also Debtors' Motion for Entry of an Order (I) Approving the Settlement By and Among the Debtors and REP Processing, LLC, (II) Authorizing the Debtors to Enter into that Certain Midstream Contract, as Amended, with REP Processing, LLC, and Perform Thereunder, and (III) Granting Related Relief* [Docket No. 1335]; *Debtors' Motion for Entry of an Order (I) Approving the Settlement By and Among the Debtors and Rocky Mountain Midstream LLC, (II) Authorizing the Assumption of Certain Executory Contracts, as Amended and Restated, with Rocky Mountain Midstream LLC, and (III) Granting Related Relief* [Docket No. 1365].

the objections to the Plan should be overruled. Accordingly, the Court should confirm the Plan and send a clear message to the Debtors' employees, customers, vendors, and stakeholders that the Debtors are positioned for go-forward success upon exit from chapter 11.

I. Background.

5. On June 14, 2020 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On June 16, 2020, the Court entered an order [Docket No. 79] authorizing the joint administration and procedural consolidation of the Debtors' chapter 11 cases pursuant to Bankruptcy Rule 1015(b). No entity has requested the appointment of a trustee or examiner in these chapter 11 cases. On June 30, 2020, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "Creditors' Committee") [Docket No. 155].

6. A description of the Debtors' businesses, the reasons for commencing the chapter 11 cases, and the relief sought from the Court to allow for a smooth transition into chapter 11 are set forth in the *Declaration of Matthew R. Owens, Co-Founder, President and Chief Executive Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Motions*, filed on June 15, 2020 [Docket No. 18] and incorporated herein by reference.

A. Company Overview.

7. The Debtors operate an independent exploration and production company that is focused on the acquisition, development, and production of oil, natural gas, and natural gas liquids reserves in the Rocky Mountain region—primarily in the Wattenberg Field in the Denver-Julesburg Basin of Colorado. Headquartered in Denver, Colorado, the Debtors have 125 employees as of the date hereof. As of the Petition Date, the Debtors had approximately

$1.7 billion in total funded debt obligations. The Debtors commenced these chapter 11 cases to effectuate a comprehensive balance sheet restructuring that "right-sizes" the Debtors' capital structure and positions the Debtors for long-term success.

B. The Debtors' Restructuring Process.

8. Facing an unprecedented liquidity shortfall resulting from volatility in the oil and gas industry and the onset of the COVID-19 pandemic, the Debtors entered into negotiations with certain key stakeholders regarding the terms of a consensual restructuring transaction in early 2020. Though the Debtors initially explored an out-of-court restructuring transaction, it quickly became clear that the Debtors' strained cash flow and near-term maturities necessitated quick action, and that the only viable path forward was to continue negotiations with stakeholders on the terms of an in-court restructuring and file for chapter 11 relief. On June 14, 2020, the Debtors filed for chapter 11 in the United States Bankruptcy Court for the District of Delaware.

9. The Debtors quickly forged consensus with their Senior Noteholders around the terms of an in-court restructuring transaction. On June 14, 2020, the Debtors and approximately 80% of the Debtors' Senior Noteholders executed the Restructuring Support Agreement. The Debtors also negotiated and secured the terms of a $125 million DIP Facility with the majority of the Debtors' Revolving Credit Agreement Lenders. Both the Restructuring Support Agreement and the DIP Facility allowed for a "dual-track" restructuring process—the Debtors could simultaneously pursue the Stand-Alone Restructuring that would consummate a debt for equity swap through a chapter 11 plan of reorganization and a "Combination Transaction" that would consummate a combination or merger with a third party involving all or substantially all of the Debtors' restructured equity or assets. The dual-track structure contemplated by the Restructuring Support Agreement and the DIP Facility has provided the Debtors with the requisite flexibility and

time to conduct a comprehensive review of all available options and identify the restructuring transaction that will maximize the value of the Debtors' go-forward business.

10. Following the Petition Date, the Debtors ran a comprehensive process for a Combination Transaction. Pursuant to the Proposal Submission Guidelines, on July 29, 2020, the Debtors received five initial indications of interest and subsequently, on August 28, 2020, the Debtors received four firm proposals. Upon review of the proposals received, and in consultation with their advisors and other stakeholders, the Debtors determined that the Combination Transaction did not provide the best and most value-maximizing path forward. Though the Debtors continued to discuss potential Combination Transactions with certain potential transaction partners, the Debtors focused their efforts on building consensus around the Stand-Alone Restructuring and, ultimately, the Plan.

11. The Debtors also worked closely with their advisors to analyze and effectuate rejections of various executory contracts and unexpired leases. Given the nature of certain of the executory contracts and unexpired leases, the Debtors commenced several adversary proceedings to litigate whether certain agreements are subject to section 365 of the Bankruptcy Code.[8] Specifically, the Debtors sought to reject a number of unexpired leases of nonresidential real property and executory contracts with various midstream contract counterparties, including Elevation Midstream LLC, Rocky Mountain Midstream LLC, ARB Midstream LLC's Platte River Midstream LLC and DJ South Gathering LLC, and NGL Energy Partners LP unit Grand Mesa Pipeline LLC. The Court held a multi-day evidentiary hearing on the rejections that touched upon

[8] On August 14, 2020, the Debtors filed an adversary proceeding against REP Processing, LLC [Ad. Pr. No. 20-50813]. On August 19, 2020, the Debtors filed an adversary proceeding against Grand Mesa Pipeline, LLC [Ad. Pr. No. 20-50816]. On August 25, 2020, the Debtors filed an adversary proceeding against Platte River Midstream, LLC and DJ South Gathering, LLC [Ad. Pr. No. 20-50833]. On September 4, 2020, the Debtors filed an adversary proceeding against Elevation Midstream, LLC [Ad. Pr. No. 20-50839]. On September 8, 2020, the Debtors filed an adversary proceeding against Rocky Mountain Midstream LLC [Ad. Pr. No. 20-50840].

a number of issues, including the Debtors' business judgement, whether the transportation services agreements contained covenants that run with the law, and whether the Federal Energy Regulatory Commission ("FERC") should hold a proceeding on whether the Court should approve rejection. Ultimately, on November 2, 2020, the Court concluded that it was permissible for the Debtors to reject the transportation services agreements.[9]

12. The Debtors immediately entered into negotiations with the midstream contract counterparties in an effort to reach consensus on a number of issues related to the rejected contracts and the Debtors' go-forward business operations. Ultimately, the Debtors' efforts were successful. The Debtors entered into an agreement in principal with GSO EM Holdings LP Elevation Midstream, LLC and, on December 5, 2020, this Court approved the settlement.[10] The Debtors also reached settlements with REP Processing, LLC and Rocky Mountain Midstream LLC, and petitioned this Court for approval of each settlement.[11] Critically, the Settlements provide significant upside to the Debtors' operations by, among other thing, reducing fees, "right-sizing" drilling commitments, and eliminating minimum volume commitments. The upside achieved pursuant to the Settlements will strongly position the Debtors to successfully implement their post-emergence business plan. As a result of the Settlements, the Debtors were able to successfully resolve a plethora of issues related to confirmation of the Plan and achieve strong

9 *Bench Ruling* [Docket No. 942].

10 *Order (I) Approving the Settlement By and Among the Debtors and Elevation Midstream, LLC and GSO EM Holdings LP, (II) Authorizing Extraction Oil & Gas, Inc. to Assume Certain Executory Contracts, as Amended and Restated, with Elevation Midstream, LLC and (III) Granting Related Relief* [Docket No. 1274].

11 *Debtors' Motion for Entry of an Order (I) Approving the Settlement By and Among the Debtors and REP Processing, LLC, (II) Authorizing the Debtors to Enter into that Certain Midstream Contract, as Amended, with REP Processing, LLC, and Perform Thereunder, and (III) Granting Related Relief* [Docket No. 1335]; *Debtors' Motion for Entry of an Order (I) Approving the Settlement By and Among the Debtors and Rocky Mountain Midstream LLC, (II) Authorizing the Assumption of Certain Executory Contracts, as Amended and Restated, with Rocky Mountain Midstream LLC, and (III) Granting Related Relief* [Docket No. 1365].

support on Confirmation of the Plan across nearly all voting classes—an accomplishment that cannot be overstated. Further, the Debtors will continue to work constructively with the remaining midstream parties to reach Settlement.

13. Further, the Settlements allow the Debtors to preserve business relationships with the midstream contract counterparties and avoid protracted, expensive, and uncertain litigation concerning the size of rejection damages. Adjudicating the rejection damages claims, in particular, would be a lengthy, complicated, and contested process that would require the Debtors to present significant evidence and argument concerning the appropriate size of each midstream contract counterparty's claim. Therefore, not only do the Settlements provide the Debtors with the contracts necessary to the continued operation of their business, but the entry into the new agreements with the midstream contract counterparties avoids the significant effort and expense of protracted litigation that would harm the Debtors' estates and go-forward business.

14. The Plan is the culmination of the Stand-Alone Restructuring process. The Plan will substantially deleverage the Debtors' balance sheet, allow the Debtors to implement their go-forward business strategy, and maintain key relationships with the Debtors' trade creditors and vendors. Above all else, the Plan will provide the Debtors with a clear, viable, and expeditious path to exit chapter 11.

C. The Solicitation Process and Voting Results.

15. As more fully described in the Disclosure Statement Order,[12] on November 13, 2020, the Debtors caused their solicitation agent, Kurtzman Carson Consultants LLC ("KCC"), to

[12] *See Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures, (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. 1022] (the "Disclosure Statement Order").

distribute Solicitation Packages containing, among other items, the Disclosure Statement, the Plan, and Ballots[13] to Holders of Claims and Interests in Classes 3, 4, 6, 7, and 8, the only Classes entitled to vote to accept or reject the Plan (the "Voting Classes") as of November 4, 2020[14] (the "Voting Record Date") in accordance with sections 1125 and 1126 of the Bankruptcy Code. KCC transmitted the Solicitation Materials to Holders in the Voting Classes by overnight and electronic mail, and such Holders were directed in the Disclosure Statement and Ballots to follow the instructions contained in the Ballots (and described in the Disclosure Statement) to complete and submit their respective Ballots to cast a vote to accept or reject the Plan.

16. Each Holder was explicitly informed in the Disclosure Statement and Ballot to submit its Ballot so that it was actually received by KCC by 4:00 p.m. (prevailing Eastern Time) on December 11, 2020 (the "Voting Deadline") to be counted. Holders of Claims and Interests were not provided a Solicitation Package if such Holders were either (a) Unimpaired under and conclusively presumed to accept the Plan under section 1126(f) of the Bankruptcy Code or (b) Impaired, entitled to receive no distribution on account of such Claims or Interests under the Plan and, therefore, deemed to have rejected the Plan under section 1126(g) of the Bankruptcy Code.

17. On November 6, 2020, the Debtors filed, among other things, revised versions of the Plan and the Disclosure Statement. Pursuant to the Disclosure Statement Order, the Debtors sought approval of the Disclosure Statement and scheduling of the Confirmation Hearing.

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13 The forms of ballot used in solicitation were included as **Exhibits 3-A**, **3-B**, **3-C**, **3-D**, **3-E**, **3-F**, **3-G**, and **3-H** attached to the Disclosure Statement Order (the "Ballots").

14 As further described in the Disclosure Statement Order, the Voting Record Dates for the Elevation Parties, Grand Mesa Pipeline LLC, and DCP Operating Company, LP were extended to account for the pending contract rejection proceedings.

On November 6, 2020, the Court entered the Disclosure Statement Order that, in relevant part, (a) approved the Disclosure Statement and the Debtors' solicitation procedures, (b) established December 11, 2020, at 4:00 p.m. (prevailing Eastern Time), as the objection deadline for the Disclosure Statement and the Plan, (c) approved the solicitation procedures set forth in the Disclosure Statement (the "Solicitation Procedures"), and (d) set December 21, 2020, at 9:30 a.m (prevailing Eastern Time), as the Confirmation Hearing Date. On November 13, 2020, the Debtors caused KCC to serve the Confirmation Hearing Notice in accordance with the terms of the Disclosure Statement Order and published the Confirmation Hearing Notice in *The New York Times* and the *Denver Post* (together, the "Publication Notice"). Concurrently with the filing of this Memorandum, the Debtors submitted a proposed version of the order confirming the Plan (the "Confirmation Order").

18. The Debtors completed their final tabulation of the ballots after the Voting Deadline, following a complete review and audit of all Ballots received.[15] As set forth below and in the Voting Report, the majority of Voting Classes voted strongly in favor of the Debtors' restructuring, while Class 6 did not:[16]

TOTAL BALLOTS COUNTED				
VOTING CLASS	**ACCEPT**		**REJECT**	
	Amount	**Number**	**Amount**	**Number**
	%	**%**	**%**	**%**
Class 3 Revolving Credit Agreement Claims	$478,934,990.90	16	$0	0
	100%	100%	0%	0%
Class 4 Senior Notes Claims	$1,051,725,000	297	$1,141,000	4
	99.89%	98.67%	0.11%	1.33%

[15] For additional discussion about, and certification of, the solicitation and vote tabulation processes, *see* Voting Report.

[16] Voting Report, Ex. A.

TOTAL BALLOTS COUNTED				
VOTING CLASS	**ACCEPT**		**REJECT**	
	Amount	**Number**	**Amount**	**Number**
	%	**%**	**%**	**%**
Class 6 General Unsecured Claims	$199,112,636.31	164	$310,837,286.44	31
	39.05%	84.10%	60.95%	15.90%
Class 7 Existing Preferred Interests	$170,000	N/A	$0	N/A
	100%		0%	
Class 8 Existing Common Interests	$57,671,026	N/A	$1,388,888.	N/A
	79.37%		20.63%	

19. On December 4, 2020, the Debtors filed the Plan Supplement.[17] Also on December 4, 2020, the Debtors caused a notice of the Plan Supplement to be transmitted to all parties listed on the Debtors' master service list.[18] On December 17, 2020, the Debtors filed the First Amended Plan Supplement[19] and caused a notice of the First Amended Plan Supplement to be transmitted to all parties listed on the Debtors' master service list.

II. Argument.

20. To confirm the Plan, the Bankruptcy Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[20] As described in detail below, the Plan complies with all relevant provisions of the Bankruptcy

17 *See Notice of Filing of Plan Supplement for the Third Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1273] (the "Plan Supplement").

18 *See Certificate of Service*, Docket No. [1374].

19 *See Notice of Filing of First Amended Plan Supplement for the Fourth Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1380] (the "First Amended Plan Supplement" and, together with the Plan Supplement, the "Plan Supplements").

20 *See In re Armstrong World Indus.*, 348 B.R. 111, 120 (Bankr. D. Del. 2006); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 616 (Bankr. D. Del. 2001).

Code and all other applicable law. The Plan far exceeds the preponderance of evidence standard set forth in the Bankruptcy Code, and will be further supported by evidence that will be submitted at the Confirmation Hearing. The Debtors thus respectfully request that the Bankruptcy Court confirm the Plan.

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

21. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision also encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the content of a plan of reorganization, respectively.[21] As explained below, the Plan complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code, as well as other applicable provisions.

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

22. The classification requirement of section 1122(a) of the Bankruptcy Code provides, in pertinent part, as follows:

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.[22]

23. Consistent with the text of this provision, claims or interests in a particular class

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[21] S. Rep. No. 95-989, at 126, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008); *In re S&W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was most directly aimed at were [s]ections 1122 and 1123.").

[22] 11 U.S.C. § 1122(a).

must be "substantially similar" to the other claims or interests in such class.[23] Section 1122(a), however, does not require all "substantially similar" claims or interests to be grouped together in the same class.[24] In fact, courts have long held that plan proponents have significant discretion to place substantially similar claims in separate classes so long as the plan proponent identifies a "rational" or "reasonable" basis for such separate classification.[25] Recognizing this flexibility, "the only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan."[26] Multiple grounds can justify separate classification, including where the Debtors have valid business reasons for classification[27] and

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23 *See, e.g.*, *In re Armstrong World Indus.*, 348 B.R. 111, 159 (Bankr. D. Del. 2006).

24 *Id.*

25 *See, e.g.*, *In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at*13 (Bankr. D. Del. May 13, 2010) (holding that separate classification is proper when "reasonable and necessary for administrative convenience"); *In re Armstrong World Indus., Inc.*, 348 B.R., 111, 159 (holding that separate classification is appropriate where a reasonable basis exists for the structure and the claims or interests within each particular class are substantially similar); *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (holding that a classification scheme is proper as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed"); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (recognizing that separate classes of claims must be reasonable and allowing a plan proponent to group similar claims in different classes); *In re Idearc, Inc.*, 423 B.R. 138, 160 (Bankr. N.D. Tex. 2009) ("Decisions interpreting section 1122(a) generally uphold separate classification of different groups of unsecured claims when a reasonable basis exists for the classification."); *In re Pisces Energy, LLC*, No. 09-36591-H5-11, 2009 WL 7227880 at *8 (Bankr. S.D. Tex. Dec. 21, 2009) ("[A] plan proponent is afforded significant flexibility in classifying claims under section 1122(a) of the Bankruptcy Code provided there is a reasonable basis for the classification scheme and all claims within a particular class are substantially similar."); *In re Lightsquared Inc.*, 513 B.R. 56, 82–83 (Bankr. S.D.N.Y. 2014) ("Courts that have considered the issue [of classification], including the Court of Appeals for the Second Circuit . . . have concluded that the separate classification of otherwise substantially similar claims and interests is appropriate so long as the plan proponent can articulate a 'reasonable' (or 'rational') justification for separate classification." (collecting cases)).

26 *In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007); *see also Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir.1991) ("thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan"); *In re W.R. Grace & Co.*, 2012 WL 2130981, at *37 (D. Del. June 11, 2012) ("It is a well-recognized principle that the classification of claims or interests must be 'reasonable,' and cannot be grouped together for arbitrary or fraudulent purposes."); *In re Boston Post Rd. Ltd. P'ship*, 21 F.3d 477, 483 (2d Cir. 1994) (holding that similar claims may be separately classified unless the sole purpose of separate classification is to engineer an assenting impaired class).

27 *See supra* note 34.

where members of a class possess different legal rights from similar claimants.[28]

24. Not only is the law clear in the Third Circuit and elsewhere that separate classification of "substantially similar" claims is legally permissible under the Bankruptcy Code, courts also hold that all creditors of equal rank (*i.e.*, unsecured creditors) need not receive the same treatment.[29]

a. *The Debtors Have Rational, Reasonable, and Justifiable Bases for Separately Classifying Certain Claims and Interests under the Plan.*

25. The Plan places Claims and Interests into 12 separate Classes. Classes are separated based on relevant legal or factual criteria.[30] Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

a. Class 1: Other Secured Claims;

b. Class 2: Other Priority Claims;

c. Class 3: Revolving Credit Agreement Claims;

d. Class 4: Senior Notes Claims;

e. Class 5: Trade Claims;

f. Class 6: General Unsecured Claims;

g. Class 7: Existing Preferred Interests;

h. Class 8: Existing Common Interests;

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28 *See In re Charter Commc'ns*, 419 B.R. 221, 264 (Bankr. S.D.N.Y. 2009); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 714, 715 (Bankr. S.D.N.Y. 1992).

29 *See In re LeBlanc*, 622 F.2d 872, 879 (5th Cir. 1980) ("[A] plan should not arbitrarily classify or discriminate against creditors. The fact that bankruptcy courts are courts of equity, however, allows exceptions to any strict rules of classification of claims. A bankruptcy court can permit discrimination where the facts of the case justify it." (internal citations omitted)); *see In re Sentry Operating Co. of Tex., Inc.*, 264 B.R. 850, 860 (Bankr. S.D. Tex. 2001) ("[The Bankruptcy Code] obviously permits *some* discrimination, since it only prohibits *unfair* discrimination." (emphasis in original)); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 177 (Bankr. S.D.N.Y. 1989) (stating that "a majority of both cases and commentators have rejected the concept that all creditors of equal rank must receive equal treatment").

30 Plan, Art. III.

i. Class 9: Other Equity Interests;

j. Class 10: Intercompany Claims;

k. Class 11: Intercompany Interests; and

l. Class 12: Section 510(b) Claims.

26. Claims or Interests assigned to each Class described above are substantially similar to the other Claims or Interests in such Class. In addition, as further detailed below, valid business, legal, and factual reasons justify the separate classification of Claims or Interests under the Plan, and no unfair discrimination exists between or among Holders of Claims or Interests.

27. In general, the Plan's classification scheme follows the Debtors' capital and corporate structure. For example, debt and equity are classified separately, and secured and unsecured Claims are classified separately. Class 1 Other Secured Claims and Class 2 Other Priority Claims are classified separately due to their required treatment under the Bankruptcy Code. Class 3 Revolving Credit Agreement Claims are classified in their own Class to account for certain legal rights the Revolving Credit Agreement Lenders have under the RBL Credit Agreement, including their secured status. In addition, Interests are classified separately between Class 7, Class 8, and Class 9 because Holders of Existing Common Interests and Holders of Existing Preferred Interests have different legal rights and Other Equity Interests are held by certain Debtor entities instead of third parties.

28. The Debtors are permitted under the Bankruptcy Code and applicable law to separately classify Class 4 Claims, Class 5 Claims, and Class 6 Claims. The Third Circuit requires that a classification scheme be "reasonable" and cannot be done for the purposes of gerrymandering or an otherwise fraudulent rationale.[31] Courts accept various independent reasons

[31] *See In re W.R. Grace & Co.*, 2012 WL 2130981, at *37 (D. Del. June 11, 2012) ("It is a well-recognized principle that the classification of claims or interests must be 'reasonable,' and cannot be grouped together for arbitrary or

as the basis of separate classification, including the preservation of business relationships between a debtor and a class of claimants,[32] substantially similar members of a potential class possessing different legal rights,[33] and a debtor's consideration of "non-creditor interests."[34]

29. The Debtors had several valid business justifications for separately classifying Class 5 Claims. First, the Debtors were concerned that, given the extreme volatility in the oil and gas markets and the lasting effects of the global pandemic caused by COVID-19, vendors, service providers, employees, customers, and the energy industry writ large would not clearly understand that the Debtors' proposed financial restructuring was a reorganization of the business that would leave Class 5 Claims Unimpaired. Holders of Class 5 Claims are holders of "general business" claims, predominantly vendors, service providers, and customers that were integral to the Debtors' operations prior to the Petition Date and with whom the Debtors intend to continue to do business post-emergence. All Holders of Class 5 Claims can assert and perfect liens against the Debtors pursuant to applicable state law—thus, the Debtors would be required to pay Holders of Class 5 Claims in full upon perfection of their liens.

30. Additionally, it is rational, reasonable, and justified for the Debtors to separately classify Class 5 Claims because a predominant number of Class 5 Claims are directly concerned

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fraudulent purposes."); *In re Boston Post Rd.*, 21 F.3d,481 (holding that similar claims may be separately classified unless the sole purpose of separate classification is to engineer an assenting impaired class); *In re Tribune Co.*, 476 B.R. 843, 855 (Bankr. D. Del. 2012) ("[T]hou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.") (*In the Matter of Greystone III Joint Venture*, 995 F.2d, 1279).

32 *Supra* note 34.

33 *See In re Charter Commc'n*, 419 B.R. at 264; *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 714, 715 (Bankr. S.D.N.Y. 1992).

34 *See In re Save our Springs (S.O.S.) All., Inc.*, 632 F.3d 168, 174 (5th Cir. 2011) (holding that a non-creditor interest may justify separate classification if one creditor has "a different stake in the future viability" of the debtor's business that may cause it to vote for reasons other than its economic interest in the claim (internal citation omitted)).

with the Plan's effect on their ongoing business relationship with the Debtors. Courts in this jurisdiction and others recognize that the separate classification and treatment of trade creditors or creditors that a debtors plans to continue to do business with post-emergence is permissible.[35] The Debtors' incentive to ensure that these creditors continue to do business with the Reorganized Debtors is self-evident, and honoring the remainder of the Class 5 Claims in full maintains the "business as usual" messaging the Debtors have worked to achieve since the start of these chapter 11 cases. The Debtors submit that rendering Claims in Class 5 Unimpaired has solidified the Debtors' trade and vendor relationships and the Debtors' market position upon emergence, and has preserved value at a critical inflection point in the Debtors' restructuring efforts.

31. The Debtors also had valid business reasons for the separate classification of Class 4 Senior Notes Claims. Senior Notes Claims are legally fundamentally different than Trade Claims and General Unsecured Claims. Holders of Senior Notes Claims—unlike Holders of

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35 *See, e.g., Jersey City Med. Ctr.*, 817 at 1061 (noting the reasonableness of distinguishing the claims of physicians, medical malpractice victims, employee benefit plan participants, and trade creditors); *see In re Nuverra Envtl. Sol.*, No. 17-10949, 2017 WL 3326453, at *2 (D. Del. Aug. 3, 2017) ("The Bankruptcy Court determined that separate classification of trade creditors and noteholders was reasonable on the basis that trade creditors were critical to the success of the reorganized debtors."); *In re FTS Int'l, Inc.*, No. 20-34622 (DRJ) (Bankr. S.D. Tex. Nov. 4, 2020) (approving the debtors' classification of unsecured claimants based on, among other things, whether the debtors expected that they would maintain a business relationship with the unsecured claimants post-emergence); *In re Whiting Petroleum Corp.*, No. 20-32021 (DRJ) (Bankr. S.D. Tex. Sept. 1, 2020) (same); *In re Bruin E&P Partners, LLC*, No. 20-33605 (MI) (Bankr. S.D. Tex. Aug. 28, 2020) (approving the debtors' classification scheme where general unsecured notes claims were separately classified from trade and other general unsecured claims); *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. Aug. 26, 2020) (same); *In re Jason Indus., Inc.*, No. 20-22766 (RDD) (Bankr. S.D.N.Y. Aug. 26, 2020) (confirming plan that separately classified impaired unsecured second-lien notes claims from all other unsecured claims that remained unimpaired since the debtors would not continue to do business with the second-lien notes claimants post-emergence and, thus, there was no business justification for second lien note claims to be paid in full); *In re Snyders Drug Stores, Inc.*, 307 B.R. 889, 893–94 (Bankr. N.D. Ohio 2004) ("The reorganized debtor intends to do business with some or most of these creditors, either in the near future or long term. There is no similar potential for an ongoing relationship with the class 12 landlords."); *In re Rexford Props. LLC*, 558 B.R. 352, 363–64 (Bankr. C.D. Cal. 2016) (recognizing the important role that the cooperation of trade creditors plays in the reorganization process and finding separate classification and treatment of vital creditors to be reasonable on that basis); *In re Richard Buick, Inc.*, 126 B.R. 840, 852–853 (Bankr. E.D. Pa. 1991) (allowing the separate classification of trade claims).

General Unsecured Claims—hold approximately $1.1 billion of Claims against multiple Debtor entities as opposed to a single Debtor entity as a result of guarantees under the indenture. Further, due to the differing nature of the Claims, the mechanics of the GUC Equity Rights Offering necessitate certain modifications, such as the estimation process, from those under the Backstopped Equity Rights Offering. As such, the expectations and legal rights of Holders of Senior Notes Claims differ substantially from an ordinary course vendor or the counterparty to a rejected Executory Contract, and justify separate classification and treatment as these classes are legally distinguishable. Courts in this jurisdiction and others routinely permit the separate classification of notes claims from general unsecured claims and trade claims.[36]

32. Conversely, classifying Class 5 Claims and Class 6 Claims together lacks business justification. In fact, the vast majority of General Unsecured Claims result directly from the Debtors' business judgement decision that such Claims are not only not vital, but detrimental to the continued operation of the Debtors' business post-reorganization. Indeed, Class 5 Trade Creditors are necessary to achieve the Debtors' post-emergence business plan and will be creditors the Debtors continue to reply on to support their post-emergence operations, whereas Holders of Class 6 General Unsecured Claims are largely not involved in the Debtors' day-to-day go-forward operations and therefore have different interests than Holders of Trade Claims.

33. With regards to the Debtors' Secured Claims, it is reasonable for the Debtors to classify all substantially similar Secured Debt Claims together in Class 1. DIP Claims, Revolving

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[36] *See, e.g.*, *In re Nuverra Envtl. Sol.*, No. 17-10949, 2017 WL 3326453, at *2 (D. Del. Aug. 3, 2017) (classifying unsecured notes claims and trade claims separately); *In re Anna Holdings, Inc.*, No. 19-12551 (CSS) (Bankr. D. Del. Dec. 17, 2019) (classifying senior notes, unsecured notes, and general unsecured claims separately); *In re Longview Power*, LLC, 20-10951 (BLS) (Bankr. D. Del. May 19, 2020) (classifying subordinated notes claims and general unsecured claims separately); *In re Bruin E&P Partners, LLC*, No. 20-33605 (MI) (Bankr. S.D. Tex. Aug. 28, 2020) (classifying unsecured notes claims and general unsecured claims separately); *In re Jason Indus., Inc.*, No. 20-22766 (RDD) (Bankr. S.D.N.Y. Aug. 26, 2020) (classifying second lien notes claims and general unsecured claims separately.)

Credit Agreement Claims, and Secured Tax Claims have different legal rights and/or priority under the Bankruptcy Code and thus are classified separately. Because these Class 1 Claims have identical legal rights, they are "substantially similar," and thus the Debtors' decision to classify these Claims together in Class 1 was rational, reasonable, justified, and appropriate under the circumstances.

34. Accordingly, the Debtors respectfully submit that the Plan satisfies section 1122(a) of the Bankruptcy Code.

b. *The Classification of Claims and Interests under the Plan Is Not Designed to Gerrymander Votes.*

35. Section 1129(a)(10) of the Bankruptcy Code requires that, if any class of claims is impaired under a chapter 11 plan, at least one such impaired class must vote to accept the plan for it to be confirmed.[37] The primary concern with a debtor's classification scheme is whether the debtor's classes were designed to gerrymander votes to guarantee an impaired accepting class to satisfy section 1129(a)(10) of the Bankruptcy Code.[38]

36. Here, the Debtors' classification scheme is not designed to gerrymander the votes for an Impaired accepting Class. In particular, Class 3 is Impaired under the Plan, and the Holders of Class 3 Claims overwhelmingly voted to accept the Plan. The same is true with respect to Class 7 and Class 8—both Classes are Impaired under the Plan, and Holders of Existing Preferred

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37 *See* 11 U.S.C. § 1129(a)(10).

38 *See In re Boston Post Rd.*, 21 F.3d, 481 (holding that similar claims may be separately classified unless the sole purpose of separate classification is to engineer an assenting impaired class); *In re Village at Camp Bowie I, L.P.*, 710 F.3d 239, 247–48 (5th Cir. 2013) ("[I]n [*Greystone*] we held that a plan proponent cannot gerrymander creditor classes *solely* for purposes of obtaining the impaired accepting class necessary to satisfy § 1129(a)(10). . . . *Greystone* does not stand for the proposition that a court can ride roughshod over affirmative language in the Bankruptcy Code to enforce some Platonic ideal of a fair voting process." (emphasis added)); *see also Greystone*, 995 F.2d at 1279 ("[T]he one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification [is]: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.").

Interests in Class 7 and Existing Common Interests in Class 8 overwhelmingly voted to accept the Plan. Because no party in interest challenges whether the Claims or Interests in Classes 3, 7, and 8 are appropriately classified, it is without question that the Debtors' classification scheme is not designed to gerrymander an Impaired accepting vote on the Plan.

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

37. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy. The Plan satisfies each of these requirements.

a. *Designation of Classes of Claims and Equity Interests and Specification of Unimpaired Classes (§ 1123(a)(1)–(2)).*

38. For the reasons set forth above, Article III of the Plan properly designates Classes of Claims and Interests and identifies each Class of Claims or Interests that are not Impaired under the Plan.

b. *Treatment of Impaired Classes (§ 1123(a)(3)).*

39. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan." The Plan meets this requirement by setting forth the treatment of each Class that is Impaired in Article III.

c. *Equal Treatment within Classes (§ 1123(a)(4)).*

40. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 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.

d. *Means for Implementation (§ 1123(a)(5)).*

41. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. The Plan satisfies this requirement because Article IV of the Plan, as well as other provisions thereof, provides for the means by which the Plan will be implemented, providing for, among other things:

a. the execution and delivery of appropriate agreements or other documents of merger, amalgamation, consolidation, restructuring, reorganization, conversion, disposition, transfer, arrangement, continuance, dissolution, sale, purchase, or liquidation containing terms that are consistent with the terms of the Plan;

b. the execution and delivery of appropriate instruments of transfer, assignment, assumption, or delegation of any asset, property, right, liability, debt, or obligation on terms consistent with the terms of the Plan and having other terms to which the applicable parties agree;

c. the filing of appropriate certificates or articles of incorporation, reincorporation, formation, merger, consolidation, conversion, amalgamation, arrangement, continuance, or dissolution or other certificates or documentation for other transactions as described in clause (a), pursuant to applicable state law;

d. the execution and delivery of the New Corporate Governance Documents and any certificates or articles of incorporation, bylaws, or such other applicable formation, organizational, governance, or constitutive documents (if any) of each Reorganized Debtor (including all actions to be taken, undertakings to be made, and obligations to be incurred and fees and expenses to be paid by the Debtors and/or the Reorganized Debtors, as applicable), and the issuance, distribution, reservation, or dilution, as applicable, of the New Common Shares, as set forth herein;

e. the execution and delivery of the Exit RBL Facility and Exit Term Facility Documents (including all actions to be taken, undertakings to be made, and obligations to be incurred and fees and expenses to be paid by the Debtors and/or the Reorganized Debtors, as applicable);

f. the execution and delivery of the New Warrants Agreements and the issuance and distribution of the New Warrants;

g. the adoption of the Management Incentive Plan and the issuance and reservation of equity thereunder to the participants in the Management

Incentive Plan on the terms and conditions set by the New Board after the Effective Date; and

h. all other actions that the applicable Entities determine to be necessary or appropriate, including making filings or recordings that may be required by applicable law in connection with the Restructuring Transactions.

42. The precise terms governing the execution of these transactions are set forth in the applicable definitive documents or forms of agreements included in the Plan Supplements. The Debtors submit that the Plan satisfies section 1123(a)(5) of the Bankruptcy Code.

e. *Issuance of Non-Voting Securities (§ 1123(a)(6)).*

43. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities. Article IV.E.8 of the Plan provides that the New Organizational Documents will prohibit the issuance of non-voting equity Securities. The certificate of incorporation for Reorganized XOG similarly will reflect such prohibition.[39]

f. *Directors and Officers (§ 1123(a)(7)).*

44. Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions with respect to the manner of selection of any director, officer, or trustee, or any other successor thereto be "consistent with the interests of creditors and equity security holders and with public policy." Pursuant to Article IV.E.9 of the Plan, the New Board and new officers of the Reorganized Debtors shall be appointed in accordance with the New Corporate Governance Documents and other constituent documents of each Reorganized Debtor. Pursuant to section 1129(a)(5) of the Bankruptcy Code, to the extent known and determined, on or prior to the Effective Date, the number and identity of the members of the New Board shall be determined in accordance with the

[39] *See* Plan Supplement, Ex. A (amended and restated certificate of incorporation containing such prohibition).

Plan, Restructuring Support Agreement, and/or the applicable New Corporate Governance Documents. The selection process and composition of the New Board accords with applicable state law, the Bankruptcy Code, the interests of creditors and equity security holders, and public policy. Accordingly, the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

B. The Plan Complies with the Discretionary Provisions of Section 1123(b) of the Bankruptcy Code.

1. Overview of the Plan's Compliance with Section 1123(b) of the Bankruptcy Code.

45. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) of the Bankruptcy Code provides that a plan may: (a) impair or leave unimpaired any class of claims or interests; (b) provide for the assumption or rejection of executory contracts and unexpired leases; (c) provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estates; and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11.[40]

46. The Plan is consistent with section 1123(b) of the Bankruptcy Code. Specifically, under Article III of the Plan, Classes 1, 2, 5, and, potentially, 10 and 11, are Unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of the Holders of Claims and Interests within such Classes.[41] On the other hand, Classes 3, 4, 6, 7, 8, 9, and 12, and, potentially,

[40] *See* 11 U.S.C. § 1123(b)(1)–(3), (6).

[41] *See* Plan, Art. III.

10 and 11, are Impaired since the Plan modifies the rights of the Holders of Claims and Interests within such Classes as contemplated in section 1123(b)(1) of the Bankruptcy Code.[42]

47. In addition, and under section 1123(b)(2) of the Bankruptcy Code, Article V of the Plan provides for the assumption of all Executory Contracts and Unexpired Leases under section 365 of the Bankruptcy Code, except to the extent set forth in the Plan.[43]

2. The Plan's Release, Exculpation, and Injunction Provisions Satisfy Section 1123(b) of the Bankruptcy Code.

48. The Plan also includes certain releases, an exculpation, and an injunction provision. These provisions comply with the Bankruptcy Code, are the product of extensive good-faith, arm's-length negotiations between the Debtors and the Released Parties, and were material inducements for the parties to enter into the Restructuring Support Agreement and the comprehensive settlement embodied in the Plan. Moreover, the overwhelming approval of the Plan by the Debtors' stakeholders strongly supports the conclusion that the release and exculpation provisions are appropriate. Accordingly, and as set forth more fully below, the Debtors respectfully request that the Bankruptcy Court approve the Plan's release, exculpation, and injunction provisions.

a. *The Debtor Release Is Appropriate.*

49. 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."[44] Further, a debtor may release claims under section 1123(b)(3)(A) of the

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42 *See id.*

43 *See id.* at Art. V.A.

44 *See In re Coram Healthcare Corp.*, 315 B.R. 321, 334–35 (Bankr. D. Del. 2004) (holding that standards for approval of settlement under section 1123 of the Bankruptcy Code are generally the same as those under Bankruptcy Rule 9019). Generally, courts in the Third Circuit approve a settlement by the debtors if the settlement "exceed[s] the lowest point in the range of reasonableness." *See, e.g.*, *In re Exaeris, Inc.*, 380 B.R.

Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."[45] In determining whether a debtor release is proper, courts in Delaware and elsewhere generally may consider the following five factors:

a. whether the non-debtor has made a substantial contribution to the debtor's reorganization;

b. whether the release is essential to the debtor's reorganization;

c. agreement by a substantial majority of creditors to support the release;

d. identity of interest between the debtor and the third party; and

e. whether a plan provides for payment of all or substantially all of the claims in the class or classes affected by the release.[46]

Not all of the above factors need to be satisfied for a court to approve a debtor release.[47]

50. Article VIII.E of the Plan provides for releases by the Debtors, as of the Effective Date, of, among other things, certain claims, rights, and causes of action that the Debtors and the Reorganized Debtors may have against the Released Parties (the "Debtor Release").[48]

741, 746–47 (Bankr. D. Del. 2008) (citation omitted); *see Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (examining whether settlement "fall[s] below the lowest point in the range of reasonableness") (alteration in original) (citation omitted); *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) (stating that settlement must be within reasonable range of litigation possibilities).

45 *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 327 (Bankr. D. Del. 2011) ("In making its evaluation [whether to approve a settlement], the court must determine whether the compromise is fair, reasonable, and in the best interest of the estate.") (internal citations omitted).

46 *See, e.g., In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)); *In re Spansion, Inc.*, 426 B.R. at 143 n.47 (citing the *Zenith* factors).

47 *See, e.g., In re Wash. Mut., Inc.*, 442 B.R. at 346 ("These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the [c]ourt's determination of fairness."); *In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (finding that *Zenith* factors are not exclusive or conjunctive requirements).

48 Article I.A.85 of the Amended Plan defines "Released Party" as, collectively, and in each case in its capacity as such: (a) the Debtors and the Reorganized Debtors; (b) the Secured Parties; (c) the Term Loan Agent; (d) the

The Debtors have satisfied the business judgment standard in granting the Debtor Release under the Plan. The Debtor Release meets the applicable standard because it is fair, reasonable, the product of arm's-length negotiations, was critical to obtaining support for the Plan and Restructuring Support Agreement from various constituencies, and in the best interests of the Debtors' estates. Indeed, the Debtor Release was negotiated in connection with the other terms of the Plan and Restructuring Support Agreement and is an indispensable component to achieving final resolution of potential disputes that would otherwise negatively affect these chapter 11 cases and the available recoveries under the Plan.

51. ***First***, each Released Party has made a substantial contribution to the Debtors' estates. The Released Parties played an integral role in the formulation of the Plan and contributed to the Plan not only by expending significant time and resources analyzing the issues facing the Debtors and negotiating the terms of a comprehensive restructuring, but also in giving up material economic interests to ensure the success of the Plan. For instance, in exchange for the Debtor Release, the Consenting Senior Noteholders not only agreed to support the Plan pursuant to the Restructuring Support Agreement, but also agreed to equitize all the entirety of their Senior Notes Claims. The Revolving Credit Agreement Lenders also consented to the Debtors' use of cash collateral, which was instrumental to the uninterrupted operation of the Debtors' business during the pendency of these chapter 11 cases. Finally, the Debtors' directors, officers, and other agents,

Sponsors; (e) the Consenting Stakeholders; (f) with respect to each of the foregoing Entities in clauses (a) through (e), each such Entity's current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), subsidiaries, direct and indirect equity holders, and funds; and (g) with respect to each of the foregoing Entities in clauses (a) through (f), each of their respective current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives, principals, professionals, consultants, financial advisors, attorneys, accountants, investment bankers, and other professional advisors (with respect to clause (f), each solely in their capacity as such); *provided, however*, that any Holder of a Claim or Interest in a voting Class that (a) objects to the Plan and votes to reject the Plan or (b) abstains from voting shall not be a "Released Party" for purposes of the Plan.

as well as the creditors' professionals and other agents, have been instrumental in negotiating, formulating, and implementing the restructuring transactions contemplated under the Restructuring Support Agreement and the Plan.

52. ***Second***, the Plan, including the Debtor Release, was vigorously negotiated by sophisticated entities that were represented by able counsel and financial advisors. The release provisions were a necessary element of consideration that the Releasing Parties required before entering in the Restructuring Support Agreement or supporting Confirmation of the Plan, as applicable. Notably, the Consenting Senior Noteholders have agreed to equitize all of their Claims in order to significantly deleverage the Debtors' prepetition capital structure and the Revolving Credit Agreement Lenders provided DIP Financing and supported the consensual use of cash collateral. With respect to the Exit Facility, the Exit Facility Agent and the Exit Facility Lenders have agreed to provide exit financing in the form of the Exit Facility, which will provide the Debtors with the liquidity needed to fund distributions under the Plan and their go-forward business. If certain of the Released Parties do not receive the benefit of the Plan's proposed release provisions, they and their constituencies may not support Confirmation of the Plan. Moreover, there is no question that directors, managers, officers, and employees of the Debtors provided (and continue to provide) valuable consideration to the Debtors, as they commit substantial time and effort (in addition to their daily responsibilities) to the Debtors' Estates and restructuring efforts throughout this chapter 11 process.

53. ***Third***, the vast majority of the Voting Classes (including Class 6 in terms of numerosity) have overwhelmingly voted in favor of the Plan, including the Debtor Release. Holders of General Unsecured Claims are set to receive meaningful recoveries under the Plan.

54. ***Fourth***, an identity of interest exists between the Debtors and the parties to be released. Each Released Party, as a stakeholder and critical participant in the Plan process, shares a common goal with the Debtors in seeing the Plan succeed. Like the Debtors, these parties seek to confirm the Plan and implement the transactions contemplated thereunder. Moreover, with respect to certain of the releases—*e.g.*, those releasing the Debtors' current and former directors, officers, and principals—there is a clear identity of interest supporting the release because the Debtors will assume certain indemnification obligations under the Plan that will be honored by the Reorganized Debtors (and such claims would "ride through" these chapter 11 cases and would be paid in full similarly to all other general unsecured claims, even assuming that the indemnification obligations were not being assumed). Thus, a lawsuit commenced by the Debtors (or derivatively on behalf of the Debtors) against certain individuals would effectively be a lawsuit against the Reorganized Debtors themselves.

55. Accordingly, the Plan fairly provides the various Released Parties the global closure for which they negotiated in exchange for, among other things, the various concessions and benefits provided to the Debtors' Estates under the Plan, and the Debtors submit that the Debtor Release is consistent with applicable law, represents a valid settlement and release of claims the Debtors may have against the Released Parties pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, is a valid exercise of the Debtors' business judgment, and is in the best interests of their Estates.

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

56. Article VIII.F of the Plan contains a third-party release (the "Third-Party Release"). It provides that each Releasing Party—including all Holders of Claims and Interests that do not opt out of the Third-Party Release by checking the box labeled "opt out" on the applicable ballot

or opt out form returned before the Voting Deadline—releases 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.[49] Courts in this jurisdiction routinely approve such release provisions if, as here, they are consensual.[50] Ultimately, the value-maximizing restructuring contemplated by the Plan would not be possible absent the support of the Released Parties. Thus, the Third-Party Release operates to maximize the Debtors' fresh start by minimizing the possibility of distracting post-emergence litigation or other disputes. The Third-Party Release is consensual, consistent with established Third Circuit law, and integral to the Plan, and therefore should be approved.

57. Numerous courts have recognized that a chapter 11 plan may include a release of non-debtors by other non-debtors when such release is consensual.[51] Consensual releases are permissible on the basis of general principles of contract law.[52] The law is clear that a release is consensual where parties have received sufficient notice of a plan's release provisions and have had an opportunity to object to or opt out of the release and failed to do so (including where such holder abstains from voting altogether).[53] Here, all parties in interest had ample opportunity to

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49 *See* Plan, Art. VIII.E.

50 *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 304–05 (Bankr. D. Del. 2013) (approving third-party release that applied to unimpaired holders of claims deemed to accept the plan as consensual); *In re Spansion, Inc.*, 426 B.R. at 144 (same); *In re Wash. Mut., Inc.*, 442 B.R. at 352 (observing that consensual third-party releases are permissible); *In re Zenith Elecs. Corp.*, 241 B.R. at 111 (approving non-debtor releases for creditors that voted in favor of the plan); *see also In re PES Holdings, LLC*, No. 18-10122 (KG) (Bankr. D. Del. Apr. 2, 2018).

51 *See, e.g.*, *Indianapolis Downs*, 486 B.R. at 305 (collecting cases); *Spansion*, 426 B.R. at 144 (stating that "a Third-Party Release may be included in a plan if the release is consensual").

52 *In re Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004).

53 *See, e.g.*, *In re Indianapolis Downs, LLC*, 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third-Party Releases may be properly characterized as consensual and will be approved."); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009) ("Except for

evaluate and opt out of the Third-Party Releases or object to the Plan. All parties in interest were provided extensive notice of these chapter 11 cases, the Plan, and the deadline to object to confirmation of the Plan. With respect to the Third-Party Release, each of the Disclosure Statement (transmitted to all members of Voting Classes and otherwise publicly available), the notices of non-voting status (transmitted to all members of Classes 1, 2, 5, 10, 11, and 12 and otherwise publicly available), and the Confirmation Hearing Notice (transmitted to all parties in interest) expressly states in capitalized, bold-faced, underlined text that Holders of Claims and Interests that do not check the box labeled "opt out" on the applicable Ballot or opt out form returned before the Voting Deadline or object to the Plan will be bound by the Third-Party Release.

58. Specifically, the notices of non-voting status contained the following disclaimer along with an opt out form:

> ARTICLE VIII OF THE PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS, AND **ARTICLE VIII.F CONTAINS A THIRD-PARTY RELEASE**. PURSUANT TO THE PLAN YOU ARE DEEMED TO ACCEPT THE PLAN AND THEREFORE ARE DEEMED TO HAVE CONSENTED TO THE RELEASES SET FORTH IN ARTICLE VIII. THUS, YOU ARE ADVISED TO REVIEW AND CONSIDER THE PLAN CAREFULLY BECAUSE YOUR RIGHTS MIGHT BE AFFECTED THEREUNDER.
>
> **THIS NOTICE IS BEING SENT TO YOU FOR INFORMATIONAL PURPOSES ONLY. IF YOU HAVE QUESTIONS WITH RESPECT TO YOUR RIGHTS UNDER THE PLAN OR ABOUT ANYTHING STATED HEREIN OR IF YOU WOULD LIKE TO OBTAIN ADDITIONAL INFORMATION, CONTACT THE NOTICE AND CLAIMS AGENT.**

those who voted against the Plan, or who abstained and then opted out, I find the Third-Party Release provision consensual and within the scope of releases permitted in the Second Circuit."), *aff'd* 2010 WL 1223109 (S.D.N.Y. March 24, 2010), *modified on other grounds*, 634 F.3d 79 (2d Cir. 2011); *In re Conseco, Inc.*, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) ("The Article X release now binds only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release. Therefore, the Article X release is purely consensual and within the scope of releases that *Specialty Equipment* permits.") (citing *In re Specialty Equip. Cos. Inc.*, 3 F.3d 1043 (7th Cir. 1993)).

59. Further, the Confirmation Hearing Notice contained the following disclaimer:

> ARTICLE VIII OF THE PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS, AND **ARTICLE VIII.F CONTAINS A THIRD-PARTY RELEASE**. THUS, YOU ARE ADVISED TO REVIEW AND CONSIDER THE PLAN CAREFULLY BECAUSE YOUR RIGHTS MIGHT BE AFFECTED THEREUNDER.
>
> YOU MAY ELECT NOT TO GRANT THE RELEASES CONTAINED IN ARTICLE VIII.F OF THE PLAN ONLY IF YOU (A) DO NOT VOTE TO ACCEPT THE PLAN AND (B) RETURN A BALLOT CHECKING THE BOX TO "OPT OUT" FROM THE THIRD PARTY RELEASES. SUBJECT TO ANY FINAL ORDER OF THE BANKRUPTCY COURT TO THE CONTRARY, REGARDLESS OF WHETHER THE COURT DETERMINES THAT YOU HAVE A RIGHT TO OPT-OUT OF THE RELEASES, IF YOU (A) VOTE TO ACCEPT THE PLAN, (B) FAIL TO SUBMIT A BALLOT BY THE VOTING DEADLINE, OR (C) SUBMIT THE BALLOT BUT ABSTAIN FROM VOTING TO ACCEPT OR REJECT THE PLAN OR VOTE TO REJECT THE PLAN AND, IN EITHER CASE, FAIL TO CHECK THE BOX TO "OPT OUT" FROM THE THIRD PARTY RELEASES, IN EACH CASE YOU WILL BE DEEMED TO CONSENT TO THE RELEASES SET FORTH IN ARTICLE VIII.F OF THE PLAN.

60. Moreover, each ballot and opt out form distributed also contained the full text of Article VIII.F of the Plan—the Third-Party Release itself, along with a box by which the applicable Holder of such Claim or Interest could opt out of the Third-Party Release by checking the box.

61. As set forth in the Voting Report, in addition to serving full solicitation packages on all voting parties, KCC timely (a) served opt out forms on all members of Classes 5, 7, and 8; and (b) served the Confirmation Hearing Notice on all parties in interest. The Debtors also caused the Confirmation Hearing Notice to be published in the *New York Times* and the *Denver Post*. In addition to providing free access to all documents on their restructuring website, the Debtors posted certain key notices, including the Confirmation Hearing Notice, to their restructuring website. Each document was available free of charge. The Debtors took all steps reasonably practicable under the circumstances to ensure the broadest possible notice to parties in interest and,

as of the date hereof, are not are not aware of any issues with reaching parties providing notice of the Third-Party Release to parties in interest.[54]

62. Based on the foregoing, the Debtors have established that the Third-Party Release is consensual, and there is no need to consider the factors governing non-consensual third-party releases under *Continental*[55] and its progeny. Nonetheless, even if the Court determines that such releases are non-consensual, the Debtors submit the Third-Party Release is appropriate and should be approved.

63. Courts in the Third Circuit have held that a non-consensual release may be approved if such release is fair and necessary to the reorganization, and the court makes specific factual findings to support such conclusions.[56] In addition, the Third Circuit has found that, for such releases to be permissible, fair consideration must be given in exchange for the release.[57]

64. The Third-Party Release is warranted under the circumstances of these chapter 11 cases because it is critical to the success of the Plan and it is fair and appropriate. Without the

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54 The Debtors were made aware that Colorado Interstate Gas Company, L.L.C. ("CIG") did not receive service of the Third-Party Release opt out form. However, CIG received constructive notice of the opt out form through the Debtors' Publication Notice and filed a notice to opt out of the Third-Party Release. *See Colorado Interstate Gas Company, L.L.C.'s Notice to Opt Out of Releases and to Elect Cash Out Option for the Third Amended Joint Plan of Reorganization of Extraction Oil and Gas, Inc. and its Debtor Affiliates* [Docket No. 1308].

55 *See Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 213-14 (3d Cir. 2000).

56 *See Id* (noting that the "hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, specific factual findings to support these conclusions"); *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (evaluating certain factors to determine whether the "hallmarks" of permissible non-consensual releases are met, including "(i) the non-consensual release is necessary to the success of the reorganization; (ii) releases have provided a critical financial contribution to the Debtors' plan; (iii) the releasee's financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the release"); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 607-08 (Bankr. D. Del. 2001) (evaluating similar factors to determine whether non-consensual third-party releases were permissible); *cf. Washington Mutual*, 442 B.R. at 355 ("[T]he Court concludes that any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of third party releases.").

57 *See United Artists Theatre Co. v. Walton*, 315 F.3d 217, 227 (3d Cir. 2000) (citing *In re Continental Airlines*, 203 F.3d at 215).

efforts of the Released Parties, both in negotiating and navigating the Restructuring Support Agreement and Plan negotiations, the Debtors would not be poised to confirm a plan that provides a meaningful recovery to unsecured claimants. In addition, many of the Released Parties have been instrumental in supporting these chapter 11 cases and facilitating a smooth and expeditious administration thereof. Finally, throughout these chapter 11 cases and the related negotiations, the Debtors' directors and officers steadfastly maintained their duties to maximize value for the benefit of all stakeholders, investing countless hours both prepetition and postpetition.[58]

65. Moreover, the third parties bound by the Releases have received sufficient consideration in exchange for the release of their Claims against the Released Parties to justify the Third-Party Release, which was a critically negotiated provision of the Plan. For example, without the concession by the Senior Noteholders to equitize their Senior Notes Claims, Holders of General Unsecured Claims and equity would have received little to no recovery in these chapter 11 cases. Without the Third-Party Release, the Debtors' key stakeholders would not have been willing to fund and otherwise support the consensual restructuring transactions contemplated by the Restructuring Support Agreement, support confirmation of the Plan, and enable the Debtors to emerge from chapter 11 and paying their trade creditors in full.

66. Each of the Released Parties, as stakeholders and critical participants in the Debtors' reorganization process, share a common goal with the Debtors in seeing the Plan succeed. Further, the Debtors and the Reorganized Debtors are required to indemnify certain of the Released Parties under, among other agreements, their credit facilities and, with respect to officers and members of the boards of directors of the Debtors, certain indemnification agreements. Thus, causes of action against one of the Debtors' indemnitees could create an obligation on behalf

58 *See generally* Owens Declaration.

of the Debtors and could effectively amount to litigation against the Debtors, depleting assets of the Debtors' estates. Accordingly, there is an identity of interests between the Debtors and the entities that will benefit from the Third-Party Releases.

67. The Released Parties, including the Consenting Senior Noteholders, the Ad Hoc Noteholder Group, the DIP Lenders, the Revolving Credit Agreement Lenders, the Creditors' Committee, such parties' professionals and agents, certain of the Debtors other key stakeholders, and the Debtors' officers and members of their board of directors played an integral role in the formulation and negotiation of the Plan and the transactions contemplated thereby. As discussed above, the Released Parties have been active and important participants in the development of the Plan and have expended significant time and resources analyzing and negotiating the issues presented by the Debtors' capital structure and the material barriers to the resolution thereof. These parties have each provided material concessions or contributions to ensure that the Debtors have a consensual and expeditious reorganization. The Debtors' restructuring would not have been possible without the Released Parties' support and contributions. In addition to concessions under the Plan, the Released Parties made the contributions as discussed above, each in exchange for, among other things, the Third-Party Releases.

68. The Debtors submit that the Third-Party Releases are consensual or otherwise appropriate under *Continental* and its progeny. Accordingly, the Third-Party Releases should be approved.

(i) The Exculpation Provision Is Appropriate.

69. Article VIII.G of the Plan contains an exculpation provision (the "Exculpation Provision"). Exculpation provisions that apply only to estate fiduciaries, and are limited to claims not involving actual fraud, willful misconduct, or gross negligence, are customary and generally

approved in this district under appropriate circumstances.[59] Unlike third-party releases, exculpation provisions do not affect the liability of third parties *per se*, but rather set a standard of care of gross negligence or willful misconduct in future litigation by a non-releasing party against an "Exculpated Party" for acts arising out of the Debtors' restructuring.[60]

70. Here, the Plan's definition of exculpated parties includes the following estate fiduciaries:

> (a) the Debtors; (b) the Reorganized Debtors; (c) any statutory committee appointed in the Chapter 11 Cases and each of such committee's members; and (d) with respect to each of the foregoing Persons in clauses (a) through (c), such Person's Related Parties, in each case in their capacity as such.[61]

71. The Exculpated Parties have participated in good faith in formulating and negotiating the Plan as it relates to the Debtors, and they should be entitled to protection from exposure to any lawsuits filed by disgruntled creditors or other unsatisfied parties.

72. Moreover, the Exculpation Provision and the liability standard it sets represents a conclusion of law that flows logically from certain findings of fact that the Court must reach in confirming the Plan as it relates to the Debtors. As discussed above, this Court must find, under section 1129(a)(2), that the Debtors have complied with the applicable provisions of the Bankruptcy Code. Additionally, this Court must find, under section 1129(a)(3), that the Plan has

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59 *See Wash. Mut.*, 442 B.R. at 350–51 (holding that an exculpation clause that encompassed "the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the [c]ommittees and their members, and the [d]ebtors' directors and officers" was appropriate).

60 *See In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (finding 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"); *see also In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS), 2010 WL 2745964, at *10 (approving a similar exculpation provision as that provided for under the Plan); *Spansion*, 2010 WL 2905001, at *16 (same).

61 Plan, Art. I.A.89.

been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtors and, by extension, to the Debtors' officers, directors, employees, and professionals. Further, these findings imply that the Plan was negotiated at arm's length and in good faith. Where such findings are made, parties who have been actively involved in such negotiations should be protected from collateral attack.

73. Here, the Debtors and their officers, directors, and professionals actively negotiated with Holders of Claims and Interests across the Debtors' capital structure in connection with the Plan and these chapter 11 cases. Such negotiations were extensive and the resulting agreements were implemented in good faith with a high degree of transparency, and as a result, the Plan enjoys strong support from Holders of Claims and Interests entitled to vote.[62] The Exculpated Parties played a critical role in negotiating, formulating, and implementing the Restructuring Support Agreement, the Disclosure Statement, the Plan, and related documents in furtherance of the restructuring transactions.[63] Accordingly, the Court's findings of good faith vis-à-vis the Debtors' chapter 11 cases should also extend to the Exculpated Parties.

74. Additionally, the promise of exculpation played a significant role in facilitating Plan negotiations. All of the Exculpated Parties played a key role in developing the Plan that paved the way for a successful reorganization, and likely would not have been so inclined to participate in the plan process without the promise of exculpation. Exculpation for parties

62 *See, e.g.*, Voting Report, Ex. A.

63 *See* Hr'g Tr. 58:18–19, *In re Verso Corp.*, No. 16-10163 (KG) (Bankr. D. Del. June 23, 2016) ("[T]he debtors did not do this alone; they did it with the help of many others.").

participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability.[64]

75. Accordingly, under the circumstances, it is appropriate for the Court to approve the Exculpation Provision, and to find that the Exculpated Parties have acted in good faith and in compliance with the law.[65]

(ii) The Injunction Provision Is Appropriate.

76. The injunction provision set forth in Article VIII.G of the Plan implements the Plan's release, discharge, and exculpation provisions, in part, by permanently enjoining all entities from commencing or maintaining any action against the Debtors, the Reorganized 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, discharged, or subject to exculpation pursuant to Article VIII.F of the Plan. Thus, the injunction provision is a key provision of the Plan because it enforces the release, discharge, and exculpation provisions that are centrally important to the Plan. As such, to the extent the Court finds that the exculpation and release provisions are appropriate, the Debtors respectfully submit that the injunction provision must also be appropriate. Moreover, this injunction provision is narrowly tailored to achieve its purpose.

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

77. 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 nonbankruptcy law."

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64 *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition").

65 *See PWS Holding Corp.*, 228 F.3d at 246–47 (approving plan exculpation provision with willful misconduct and gross negligence exceptions); *In re Indianapolis Downs, LLC*, 486 B.R. at 306 (same).

78. The Plan complies with section 1123(d) of the Bankruptcy Code because it provides for the satisfaction of monetary defaults under each Executory Contract and Unexpired Lease to be assumed under the Plan by payment of the default amount, if any, on the Effective Date or in the ordinary course of business, subject to the limitations described in Article V of the Plan or the proposed Confirmation Order. In accordance with Article V of the Plan and section 365 of the Bankruptcy Code, the Debtors will satisfy any monetary defaults under each Executory Contract and Unexpired Lease to be assumed under the Plan on the Effective Date or in the ordinary course of business.

C. The Debtors Complied with the Applicable Provisions of the Bankruptcy Code (§ 1129(a)(2)).

79. The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. The legislative history to section 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code.[66] As discussed below, the Debtors have complied with sections 1125 and 1126 of the Bankruptcy Code regarding disclosure and solicitation of the Plan.

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

80. As discussed in this Section I.C. of this Memorandum, the Debtors complied with the notice and solicitation requirements of section 1125 of the Bankruptcy Code.

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66 *See, e.g.*, *In re Lapworth*, No. 97-34529 (DWS), 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2)."); *In re Worldcom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code").

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

81. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Specifically, under section 1126 of the Bankruptcy Code, only holders of allowed claims and allowed interests in impaired classes of claims or interests that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject such plan. Section 1126 of the Bankruptcy Code provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan. . . .
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.[67]

82. As set forth above, in accordance with section 1125 of the Bankruptcy Code, the Debtors solicited acceptances or rejections of the Plan from the Holders of Allowed Claims and Interests in Classes 3, 4, 6, 7, and 8. The Debtors did not solicit votes from Holders of Claims and Interests in Class 1, 2, or 5 because Holders of Claims and Interests in these classes are Unimpaired and, pursuant to section 1126(f) of the Bankruptcy Code, are conclusively presumed to have accepted the Plan. Depending on their ultimate treatment by the Debtors, Holders of Claims in Class 10 (Intercompany Claims) and Interests in Class 11 (Intercompany Interests) will either be conclusively deemed to accept or conclusively deemed to reject the Plan, and in either scenario are not entitled to vote on the Plan. Similarly, the Debtors did not solicit votes from Holders of Claims in Class 9 (Other Equity Interests) or Holders of Claims in Class 12 (Section 510(b) Claims) because such Holders are deemed to reject the Plan. Thus, pursuant to section 1126(a) of

[67] 11 U.S.C. § 1126(a), (f).

the Bankruptcy Code, only Holders of Claims and Interests in Classes 3, 4, 6, 7, and 8 were entitled to vote to accept or reject the Plan.[68]

83. With respect to the Voting Classes, (a) section 1126(c) of the Bankruptcy Code provides that a class accepts a plan where holders of claims holding at least two-thirds in amount and more than one-half in number of allowed claims in such class vote to accept such plan and (b) section 1126(d) of the Bankruptcy Code provides that a class accepts a plan where holders of at least two-thirds in amount of allowed interests vote to accept such plan.

84. As described above, Classes 3, 4, 7 and 8 voted in sufficient number and in sufficient amounts as required by the Bankruptcy Code to confirm the Plan.[69] Class 6 voted in sufficient number to accept the Plan.[70] Based upon the foregoing, the Debtors submit that they satisfy the requirements of section 1129(a)(2) of the Bankruptcy Code.

D. The Plan Is Proposed in Good Faith (§ 1129(a)(3)).

85. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied.[71] To determine whether a plan seeks

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68 *See* Plan, Art. III.

69 *See* Voting Report, Ex. A.

70 *Id*.

71 *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d at 242 (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986)); *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997) (quoting *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.*), 764 F.2d 406, 408 (5th Cir. 1985)); *In re Century Glove, Inc*., Civ. A. Nos. 90-400 and 90-401, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993); *In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002).

relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[72]

86. Here, the Plan will enable the Debtors to emerge with a substantially deleveraged capital structure and sufficient liquidity that puts the Debtors in a strong position to execute their go-forward business plan. Moreover, the Plan is the product of extensive arm's-length negotiations among the Debtors, the Ad Hoc Noteholder Group, the DIP Lenders, the Creditors' Committee, and other key stakeholders. The strong support of the Plan by the voting creditors and equityholders is strong evidence that the Plan has a proper purpose.

87. Throughout the negotiation of the Plan and these chapter 11 cases, the Debtors have upheld their fiduciary duties to stakeholders and protected the interests of all constituents with an even hand. Accordingly, the Plan and the Debtors' conduct satisfy section 1129(a)(3) of the Bankruptcy Code. No party in interest has asserted otherwise.

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

88. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent or by the debtor be subject to approval by the Court as reasonable. Courts have construed this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the court as to their reasonableness.[73]

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72 *See, e.g.*, *T-H New Orleans*, 116 F.3d at 802 (quoting *In re Sun Country Dev., Inc.*, 764 F.2d at 408); *In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012); *Century Glove*, 1993 WL 239489, at *4.

73 *See In re Lisanti Foods, Inc.*, 329 B.R. at 503 ("Pursuant to § 1129(a)(4), a [p]lan should not be confirmed unless fees and expenses related to the [p]lan have been approved, or are subject to the approval, of the Bankruptcy Court."), *aff'd*, 241 F. App'x 1 (3d Cir. 2007); *In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation").

89. The Plan satisfies section 1129(a)(4) of the Bankruptcy Code. The Debtors submit that payment of their professional claims is the only category of payments that falls within the ambit of section 1129(a)(4) of the Bankruptcy Code in these chapter 11 cases, and the Debtors may not pay their professional claims absent Court approval. Further, all such professional claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 and 330 of the Bankruptcy Code.[74] Article II.B.1 of the Plan, moreover, provides that the Debtors' professionals shall file all final requests for payment of the professional claims no later than 45 days after the Effective Date, thereby providing adequate time for interested parties to review such professional claims.

F. The Debtors Disclosed All Necessary Information Regarding Directors, Officers, and Insiders (§ 1129(a)(5)).

90. Section 1129(a)(5)(A)(i) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors. Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan proponent to disclose the identity of an "insider" (as defined by section 101(31) of the Bankruptcy Code) to be employed or retained by the reorganized debtor and the nature of any compensation for such insider. Additionally, the Bankruptcy Code provides 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.[75] Section 1129(a)(5)(A)(ii) directs the Court to ensure that the post-confirmation governance of the Reorganized Debtors is in "good hands," which courts have interpreted to mean:

[74] 11 U.S.C. §§ 328(a), 330(a)(1)(A).

[75] 11 U.S.C. § 1129(a)(5)(A)(ii).

(a) experience in the reorganized debtors' business and industry;[76] (b) experience in financial and management matters;[77] (c) that the debtors and creditors believe control of the entity by the proposed individuals will be beneficial;[78] and (d) does not "perpetuate[] incompetence, lack of discretion, inexperience, or affiliations with groups inimical to the best interests of the debtor."[79] The "public policy requirement would enable [the court] to disapprove plans in which demonstrated incompetence or malevolence is a hallmark of the proposed management."[80]

91. The Plan satisfies section 1129(a)(5) of the Bankruptcy Code. As described above, in accordance with Article IV.M of the Plan, on or prior to the Effective Date, the number and identity of the members of the New Board shall be determined by the Required Consenting Senior Noteholders in accordance with the Plan, the Restructuring Support Agreement and/or the applicable New Organizational Documents. On the Effective Date, the officers of the Reorganized Debtors shall be appointed in accordance with the New Corporate Governance Documents and other constituent documents of each Reorganized Debtor.[81] The Debtors will make all known disclosures in advance of the Effective Date regarding the identity and affiliations of any members

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76 *See In re Rusty Jones, Inc.*, 110 B.R. 362, 372, 375 (Bankr. N.D. Ill. 1990) (stating that 1129(a)(5) not satisfied where management had no experience in the debtor's line of business); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149–50 (Bankr. S.D.N.Y. 1984) (continuation of debtors' president and founder, who had many years of experience in the debtors' businesses, satisfied section 1129(a)(5)); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 760 (citing *Toy & Sports*, 37 B.R. at 149–50).

77 *In re Stratford Assocs. Ltd. P'ship*, 145 B.R. 689, 696 (Bankr. D. Kan. 1992); *In re Sherwood Square Assoc.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989).

78 *See In re Apex Oil Co.*, 118 B.R. 683, 704–05 (Bankr. E.D. Mo. 1990).

79 *In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003).

80 7 Collier on Bankruptcy ¶ 1129.02[5][b] (16th ed. 2018).

81 *See* Plan, Art. IV.E.8; Plan Supplement, Ex. A.

of the New Board in the Plan Supplements.[82] In instances where specific individuals are not yet known, the Debtors have disclosed which creditor constituency has the right to appoint the applicable director. The Debtors and their creditors believe control of the Reorganized Debtors by the proposed individuals or individuals to be appointed in accordance with the Plan and New Corporate Governance Documents will be beneficial, and no party in interest has objected to the Plan on these grounds. Therefore, the requirements under section 1129(a)(5)(A)(ii) of the Bankruptcy Code are satisfied.

92. Finally, the Plan satisfies section 1129(a)(5)(B) of the Bankruptcy Code because the Debtors have or will publicly disclose the identity of all insiders that the Reorganized Debtors will employ or retain in compliance with the Bankruptcy Code in the Plan Supplements.

G. The Plan Does Not Require Governmental Regulatory Approval (§ 1129(a)(6)).

93. 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. Section 1129(a)(6) of the Bankruptcy Code is inapplicable to these chapter 11 cases.

H. The Plan Is in the Best Interests of All the Debtors' Creditors (§ 1129(a)(7)).

94. Section 1129(a)(7) of the Bankruptcy Code, commonly known as the "best interests test," provides, in relevant part:

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

[82] *See In re Beyond.com Corp.*, 289 B.R. 138, 145 (Bankr. N.D. Cal. 2003); *see also In re Armstrong World Indus.*, 348 B.R. at 165 (finding disclosure of identities and nature of compensation of persons to serve as directors and officers on the effective date sufficient for section 1129(a)(5) of the Bankruptcy Code).

> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date . . . .[83]

95. The best interests test applies to individual dissenting holders of impaired claims and interests—rather than classes—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.[84] As section 1129(a)(7) of the Bankruptcy Code makes clear, the best interests test applies only to holders of impaired claims or interests that do not accept a chapter 11 plan. Classes 3, 4, 7, and 8 voted in favor of Confirmation of the Plan, and Holders of Claims and Interests in all Impaired Classes will recover at least as much as a result of the confirmation of the Plan as they would in a hypothetical chapter 7 liquidation.[85]

96. Additionally, the Debtors, with the assistance of their advisors, prepared a liquidation analysis that estimates recoveries for members of each Class under the Plan.[86] The projected recoveries under the Plan for each Class are equal to or in excess of the recoveries

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83 11 U.S.C. § 1129(a)(7).

84 *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 442 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *In re Century Glove*, 1993 WL 239489, at *7; *In re Adelphia Commc'n Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) (stating that section 1129(a)(7) is satisfied when an impaired holder of claims would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

85 *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)).

86 Disclosure Statement, Ex. C.

estimated in a hypothetical chapter 7 liquidation.[87] Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code

I. The Plan Is Confirmable Despite Not Meeting the Requirements of Section 1129(a)(8) of the Bankruptcy Code.

97. 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. However, the Holders of Claims and Interests in the Classes that may reject are deemed to have rejected the Plan and, thus, were not entitled to vote. While the Plan may not satisfy section 1129(a)(8) of the Bankruptcy Code with respect to the Classes 6, 10, and 11, the Plan is nonetheless confirmable because it satisfies sections 1129(a)(10) and 1129(b) of the Bankruptcy Code, as discussed below.

J. The Plan Provides for Payment in Full of All Allowed Priority Claims (§ 1129(a)(9)).

98. 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 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

[87] *Id.* at 4. Each row in the Liquidation Analysis chart included associated notes that provided further detail and information with respect to the estimated recoveries presented therein. The full text of these notes is included in Exhibit C of the Disclosure Statement.

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 5 years from the Petition Date, the present value of which equals the allowed amount of the claim.

99. 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 Claim. ***Second***, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no Holders of the types of claims specified by 1129(a)(9)(B) are Impaired under the Plan and such Claims have been paid in the ordinary course. ***Third***, Article II.D of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it provides that Holders of Allowed Priority Tax Claims shall be treated in accordance with the terms of section 1129(a)(9)(C) of the Bankruptcy Code. The Plan thus satisfies each of the requirements of section 1129(a)(9) of the Bankruptcy Code.

K. At Least One Class of Impaired, Non-Insider Claims Accepted the Plan (§ 1129(a)(10)).

100. 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.

101. Here, Classes 3, and 4, which are Impaired, voted to accept the Plan independent of any insiders' votes. Thus, the Plan has been accepted by two voting classes holding impaired,

non-insider claims with respect to each Debtor. Accordingly, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

L. The Plan Is Feasible (§ 1129(a)(11)).

102. Section 1129(a)(11) of the Bankruptcy Code requires that the Court find that a plan is feasible as a condition precedent to confirmation. Specifically, the Court must determine that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[88] To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[89] Rather, a debtor must provide only a reasonable assurance of success.[90] There is a relatively low threshold of proof necessary to satisfy the feasibility requirement.[91] As demonstrated below, the Plan is feasible within the meaning of section 1129(a)(11) of the Bankruptcy Code.

103. In determining standards of feasibility, courts have identified the following probative factors:

a. the adequacy of the capital structure;

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88 11 U.S.C. § 1129(a)(11).

89 *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012); *In re W.R. Grace & Co.*, 475 B.R. at 115; *In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd*, 800 F.2d 581 (6th Cir. 1986).

90 *Kane*, 843 F.2d at 649; *In re Flintkote Co.*, 486 B.R. at 139; *In re W.R. Grace & Co.*, 475 B.R. at 115; *see also Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (citations omitted) (holding that "[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation"); *accord In re Capmark Fin. Grp. Inc.*, No. 09-13684 (CSS), 2011 WL 6013718, at *61 (Bankr. D. Del. Oct. 5, 2011) (same).

91 *See, e.g., In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (quoting approvingly that "[t]he Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility"); *In re Sea Garden Motel &*

b. the earning power of the business;

c. the economic conditions;

d. the ability of management;

e. the probability of the continuation of the same management; and

f. any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[92]

104. ***First***, as set forth in the Grady Declaration, the Debtors thoroughly analyzed their ability post-confirmation to meet their obligations under the Plan and continue as a going concern without the need for further financial restructuring.[93] The Debtors have concluded based on their analysis that they will be able to make all payments required under the Plan while conducting ongoing business operations. This is not surprising and is indisputable given that the Debtors' Restructuring Transactions contemplated by the Plan will eliminate $1.4 billion in funded debt from the Debtors' capital structure and the Exit Facilities will provide $192 million of liquidity upon emergence from chapter 11. The Debtors also stand to emergence from chapter 11 with $10 million of cash.

105. ***Second***, the Debtors prepared Financial Projections of the Debtors' financial performance through fiscal year 2025, which Financial Projections were attached to the Disclosure Statement as Exhibit E. These Financial Projections demonstrate the Debtors' ability to meet their

Apartments, 195 B.R. 294, 305 (D. N.J. 1996); *In re Tribune Co.*, 464 B.R. at 185, *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

92 *See, e.g.*, *In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *28 (Bankr. D. Del. May 13, 2010).

93 *See* Voelte Decl., ¶¶ 11–15; Owens Decl., ¶¶ 46–47.

obligations under the Plan and to have a viable business going forward.[94] Thus, the Debtors respectfully submit that the Plan satisfies section 1129(a)(11) of the Bankruptcy Code.

M. All Statutory Fees Have Been or Will Be Paid (§ 1129(a)(12)).

106. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan." Section 507(a)(2) of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses. The Plan satisfies section 1129(a)(12) of the Bankruptcy Code because Article II.A of the Plan provides that all such fees and charges, to the extent not previously paid, will be paid (a) if such Administrative Claim is Allowed on or prior to the Effective Date, no later than thirty (30) days after the Effective Date or as soon as reasonably practicable thereafter (or, if not then due, when such Allowed Administrative Claim is due or as soon as reasonably practicable thereafter); (b) if such Administrative Claim is not Allowed as of the Effective Date, no later than thirty (30) days after the date on which an order Allowing such Administrative Claim becomes a Final Order, or as soon as reasonably practicable thereafter; (c) if such Allowed Administrative Claim is based on liabilities incurred by the Debtors in the ordinary course of their business after the Petition Date, in accordance with the terms and conditions of the particular transaction or course of business giving rise to such Allowed Administrative Claim, without any further action by the Holder of such Allowed Administrative Claim; (d) at such time and upon such terms as may be agreed upon by the Holder of such Allowed Administrative Claim and the Debtors or the Reorganized Debtors, as applicable; or (e) at such time and upon such terms as set forth in a Final Order of the Bankruptcy Court.

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94 *Id*.

N. All Retiree Benefits Will Continue Post-Confirmation (§ 1129(a)(13)).

107. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code.

108. The Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code because Article IV.E.14 of the Plan provides that, on the Effective Date, the Debtors will assume each of the written contracts, agreements, policies, programs, or plans for retirement benefits.

O. Sections 1129(a)(14) through 1129(a)(16) Do Not Apply to the Plan.

109. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. Since the Debtors are not subject to any domestic support obligations, the requirements of section 1129(a)(14) of the Bankruptcy Code do not apply. Likewise, section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" as defined in the Bankruptcy Code. Because none of the Debtors is an "individual," the requirements of section 1129(a)(15) of the Bankruptcy Code do not apply. Finally, none of the Debtors is a nonprofit corporation, and, therefore, section 1129(a)(16) of the Bankruptcy Code, which relates only to nonprofit corporations, is not applicable in these chapter 11 cases.

P. The Plan Satisfies the "Cram Down" Requirements of Section 1129(b) of the Bankruptcy Code.

110. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) of the Bankruptcy Code, a plan may be confirmed so long as the requirements set forth in section 1129(b) of the Bankruptcy Code are satisfied. To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy Code), the

plan proponent must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[95]

1. The Plan Does Not Unfairly Discriminate with Respect to the Impaired Classes that Have Not Voted to Accept the Plan (§ 1129(b)(1)).

111. Although the Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists, courts typically examine the facts and circumstances of the particular case to make the determination.[96] In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so.[97] A threshold inquiry to assessing whether a proposed plan of

95 *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d at 157 n.5; *In re Ambanc La Mesa L.P.*, 115 F.3d 650, 653 (9th Cir. 1997) ("the [p]lan satisfies the 'cramdown' alternative . . . found in 11 U.S.C. § 1129(b), which requires that the [p]lan 'does not discriminate unfairly' against and 'is fair and equitable' towards each impaired class that has not accepted the [p]lan").

96 *See In re 203 N. LaSalle St. Ltd. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, *Bank of Am. Nat. Tr. & Sav. Assoc. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"); *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"); *In re Aztec Co.*, 107 B.R. 585, 589–91 (Bankr. M.D. Tenn. 1989) ("Courts interpreting language elsewhere in the Code, similar in words and function to § 1129(b)(1), have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination.").

97 *See In re Coram Healthcare Corp.*, 315 B.R. at 349 (citing cases and noting that separate classification and treatment of claims is acceptable if the separate classification is justified because such claims are essential to a reorganized debtor's ongoing business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination); *Ambanc La Mesa*, 115 F.3d at 656–57 (same); *Aztec Co.*, 107 B.R. at 589–91 (stating that plan which preserved assets for insiders at the expense of other creditors unfairly discriminated); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986) (stating that interests of objecting class were not similar or comparable to those of any other class and thus there was no unfair discrimination).

reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment.[98]

112. Here, the Plan's treatment of Class 6 (General Unsecured Claims), Class 10 (Intercompany Claims), and Class 11 (Intercompany Interests) 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. These Intercompany Claims and Intercompany Interests, which exist to support the Debtors' corporate structure, ultimately may be reinstated because reinstatement of intercompany claims and interests advances an efficient reorganization by avoiding the need to unwind and recreate the corporate structure and relationships of the reorganized Debtors. Such Intercompany Claims shall be resolved or compromised and such Intercompany Interests shall be Reinstated or cancelled and released consistent with the Restructuring Transactions after the Effective Date by the Reorganized Debtors, and importantly, this reinstatement does not affect the economic substance of the Plan for the Debtors' stakeholders.

113. Thus, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code and the Plan may be confirmed notwithstanding the deemed rejection by the Class 10 and Class 11.

2. The Plan Is Fair and Equitable (§ 1129(b)(2)(B)(ii)).

114. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority" rule.[99] This

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98 *See In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *31 (citing *In re Armstrong World Indus.*, 348 B.R. at 121).

99 *See 203 N. LaSalle St. P'ship*, 526 U.S. at 441–42 ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest

requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired accepting class not receive any distribution under a plan on account of its junior claim or interest.[100] Under the Plan, no Holder of a Claim or Interest junior to an Impaired Class of Claims or Interests will receive any recovery under the Plan on account of such Claim or Interest.

115. Although Intercompany Claims and Intercompany Interests may be reinstated under the Plan and, therefore, would be Unimpaired, such treatment is for the purposes of preserving the Debtors' corporate structure and will have no economic substance.[101] Accordingly, the Plan is "fair and equitable" with respect to all Impaired Classes of Claims and Interests and satisfies section 1129(b) of the Bankruptcy Code.

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

116. 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.

117. Section 1129(d) of the Bankruptcy Code provides that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the

any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

100 *See id.*

101 *See In re ION Media Networks, Inc.*, No. 09-13125 (JMP) 419 B.R. 585, 601 (Bankr. S.D.N.Y. Nov. 24, 2009) ("This technical preservation of equity is a means to preserve the corporate structure that does not have any economic substance and that does not enable any junior creditor or interest holder to retain or recover any value under the Plan. The Plan's retention of intercompany equity interests for holding company purposes constitutes a device utilized to allow the Debtors to maintain their organizational structure and avoid the unnecessary cost of having to reconstitute that structure.").

application of section 5 of the Securities Act of 1933."[102] 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.

118. Lastly, section 1129(e) of the Bankruptcy Code is inapplicable because none of the Debtors' Chapter 11 Cases is a "small business case."[103] Thus, the Plan satisfies the Bankruptcy Code's mandatory confirmation requirements.

R. Modifications to the Plan.

119. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan. Bankruptcy Rule 3019 provides that modifications after a plan has been accepted will be deemed accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder. Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[104]

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102 *See* 11 U.S.C. § 1129(d).

103 *See* 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).

104 *See, e.g., In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation); *In re Burns & Roe Enters., Inc.*, No. 08-4191 (GEB), 2009 WL 438694, at *23

120. Contemporaneously with the filing of this Memorandum, the Debtors filed an amended version of the Plan, which makes technical clarifications and resolves certain formal and informal comments to the Plan by parties in interest. The modifications are immaterial and thus comply with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019. [The Creditors' Committee supports these modifications.] Accordingly, the Debtors submit that no additional solicitation or disclosure is required on account of the modifications, and that such modifications should be deemed accepted by all creditors that previously accepted the Plan.

S. Good Cause Exists to Waive the Stay of the Confirmation Order.

121. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise." Bankruptcy Rules 6004(h) and 6006(d) provide similar stays to orders authorizing the use, sale, or lease of property (other than cash collateral) and orders authorizing a debtor to assign an executory contract or unexpired lease under section 365(f) of the Bankruptcy Code. Each rule also permits modification of the imposed stay upon court order.

122. The Debtors submit that good cause exists for waiving and eliminating any stay of the proposed Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the proposed Confirmation Order will be effective immediately upon its entry.[105] As noted above, these chapter 11 cases and the related Plan transactions have been negotiated and implemented in

(D.N.J. Feb. 23, 2009) (confirming plan as modified without additional solicitation or disclosure because modifications did "not adversely affect creditors").

[105] *See, e.g.*, *In re Source Home Entm't, LLC*, No. 14-11553 (KG) (Bankr. D. Del. Feb. 20, 2015) (waiving stay of confirmation order and causing it to be effective and enforceable immediately upon its entry by the court); *In re GSE Envtl., Inc.*, No. 13-11126 (MFW) (Bankr. D. Del. July 25, 2014) (same); *In re Physiotherapy Holdings, Inc.*, No. 13-12965 (KG) (Bankr. D. Del. Dec. 23, 2013) (same); *In re Gatehouse Media, Inc.*, No. 13-12503 (MFW) (Bankr. D. Del. Nov. 6, 2013) (same); *In re Dex One Corp.*, No. 13-10533 (KG) (Bankr. D. Del. Apr. 29, 2013) (same); *In re Geokinetics Inc.*, No. 13-10472 (KJC) (Bankr. D. Del. Apr. 25, 2013) (same).

good faith and with a high degree of transparency and public dissemination of information. Additionally, each day the Debtors remain in chapter 11 they incur significant administrative and professional costs, which will be significantly reduced if the Debtors emerge expeditiously.

123. For these reasons, the Debtors, their advisors, and other key constituents are working to expedite the Debtors' entry into and consummation of the documents and transactions related to the restructuring transactions so that the Effective Date of the Plan may occur as soon as possible after the Confirmation Date. Based on the foregoing, the Debtors request a waiver of any stay imposed by the Bankruptcy Rules so that the proposed Confirmation Order may be effective immediately upon its entry.

III. Response to Outstanding Objections to Confirmation of the Plan.

124. Certain parties in interest objected to Confirmation of the Plan.[106] These Objections are without merit and should be overruled.

A. The Debtors' Third-Party Releases Are Consensual and Permissible.

125. The SEC and the U.S. Trustee objected to the permissibility of the Plan's Third-Party Releases. As discussed in Section II.B.2 of this Memorandum and below, the Third-Party Release is reasonable, appropriate, consistent with provisions regularly approved in this jurisdiction, and should be approved.

1. The Plan's Third-Party Release Is Appropriate.

126. The Third-Party Releases are consensual, narrowly tailored releases that benefit, and are in exchange for, the Released Parties' substantial contributions to the Debtors' reorganization. All parties in interest—including equity holders—had ample opportunity to evaluate and opt out of the Third-Party Release by (a) returning the opt out form to the Debtors or

[106] A chart overviewing the informal objections and their resolutions is attached hereto as **Exhibit A**.

(b) objecting (formally or informally) to the Third-Party Release. Several parties did object to the Third-Party Release. For such parties, the Debtors will include language in the proposed Confirmation Order carving out those parties as it relates to their inclusion as a releasing party. As such, the Third-Party Release is a consensual release of all creditors and interest holders who did not object to the Third-Party Release.

127. The SEC and the U.S. Trustee, however, have objected on the grounds that the Third-Party Release is not consensual. The SEC also suggests that the Court may lack the authority to approve the Third-Party Release. Notwithstanding the SEC and the U.S. Trustee's concerns, the Third-Party Release complies with Third Circuit law and is supported by the facts and circumstances of these chapter 11 cases. The Court unambiguously has the authority to approve the Third-Party Release, and courts in this district routinely exercise that authority by confirming plans containing third-party releases.[107] Accordingly, the Court should overrule the objections by the SEC and the U.S. Trustee and approve the Third-Party Release.

a. *The Third-Party Release Is Consensual.*

128. The Third-Party Release is consensual. The law is clear that a release is consensual where parties have received sufficient notice of a plan's release provisions and have had an opportunity to object to or opt out of the release and failed to do so (including where such holder abstains from voting altogether).[108] Article VIII.D of the Plan provides that each Releasing

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[107] *See, e.g.*, *In re Akorn, Inc*, No. 20-111177 (KBO) (Bankr. D. Del. Sept. 4, 2020) (confirming plan containing a third-party release); *In re Bluestem Brands, Inc.*, No. 20-10566 (MFW) (Bankr. D. Del. Aug. 21, 2020) (same); *In re APC Auto. Techs. Intermediate Holdings, Inc.*, No. 20-11466 (CSS) (Bankr. D. Del. July 10, 2020); *In re Clover Technologies Group, LLC*, No. 19-12680 (KBO) (Bankr. D. Del. Jan. 22, 2020) (same); *In re Anna Holdings, Inc.*, No. 19-12551 (CSS) (Bankr. D. Del. Dec. 17, 2019) (same).

[108] *See, e.g.*, *In re Indianapolis Downs, LLC*, 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third-Party Releases may be properly characterized as consensual and will be approved."); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009) ("Except for

Party shall release any and all claims and causes of action such parties could assert against the Released Parties arising on or before the Effective Date.

129. Here, the Third-Party Release is consensual, and no party with a financial stake or interest in the Debtors' restructuring who objected to, or opted-out of, the Third-Party Release is subject to that provision. The Debtors clearly and conspicuously included the Third-Party Release language in the Confirmation Hearing Notice, which was sent to creditors and equity holders, and explicitly alerted such parties that unless a party expressly objects or opts-out, it shall be deemed a releasing party under the Plan. Further, all parties received notice of the deadline to vote on the Plan and object to Plan Confirmation, as well as notice of the Confirmation Hearing Date.[109] Accordingly, all stakeholders had proper notice of their rights and could have chosen to object to the release, opt-out of the release, or object to Confirmation of the Plan.

130. Because the Third-Party Release applies only to Holders of Claims or Interests that do not opt out, it is consensual under the weight of authority (in this district and others) of what constitutes consent in the context of a third-party release.[110] Generally, voting in favor of a plan

those who voted against the Plan, or who abstained and then opted out, I find the Third-Party Release provision consensual and within the scope of releases permitted in the Second Circuit."); *In re Conseco, Inc.*, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) ("The Article X release now binds only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release. Therefore, the Article X release is purely consensual and within the scope of releases that *Specialty Equipment* permits.").

[109] See *Certificate of Service* [Docket No. 1351].

[110] *See, e.g.*, *In re Akorn, Inc*, No. 20-111177 (KBO) (Bankr. D. Del. Sept. 4, 2020) (approving third-party releases with objection "opt-out" mechanic); *In re APC Auto. Techs. Intermediate Holdings, Inc.*, No. 20-11466 (CSS) (Bankr. D. Del. July 10, 2020) (same); *In re Clover Technologies Group, LLC*, No. 19-12680 (KBO) (Bankr. D. Del. Jan. 22, 2020) (same); *In re Indianapolis Downs, LLC*, 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third-Party Releases may be properly characterized as consensual and will be approved.").

is sufficient to demonstrate consent to any third-party release contained therein.[111] Similarly, those Holders of Claims that have not objected to the releases in the Plan, opted out of the releases in the Plan, or are paid in full and thus deemed to have accepted the Plan, may generally, and consensually, be bound by Third-Party Release provisions.[112]

b. *The Court Has Jurisdiction and Authority to Approve the Third-Party Release.*

131. The Court has clear authority to approve the Third-Party Release. Confirmation of a plan, including one with third-party releases, requires the application of federal standards, not state, thus granting bankruptcy judges with the constitutional authority to enter final judgments on confirmation.[113] Furthermore, the Court has subject matter jurisdiction over matters that "might have any conceivable effect on the bankruptcy estate."[114] Given the importance of the Third-Party Release here and the critical role the Released Parties play in ensuring that the Plan is successfully

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111 *See, e.g.*, *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (finding that a third-party release binds those voting in favor of the plan); *In re Wash. Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) (same); *In re Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (same); *In re Chassix Holdings, Inc.*, 533 B.R. 64, 82 (Bankr. S.D.N.Y. 2015) (same).

112 *See, e.g.*, *Indianapolis Downs*, 486 B.R. at 306 ("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) ("I note that no creditor or interest holder whose rights are affected by the 'deemed' acceptance language has objected to the Plan. While I recognize—and fully appreciate—the importance of the UST's supervision of the administration of bankruptcy cases . . . the silence of the unimpaired classes on this issue is persuasive. This aspect of the Third-Party Release is not over-reaching. The unimpaired classes are being paid in full and have received adequate consideration for the release.").

113 *In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 271 (Bankr. D. Del. 2017) (noting the court's constitutional authority to confirm a plan, including one with releases, despite *Stern v. Marshall*). In its objection, the SEC completely ignores the holding in *In re Millennium Lab Holdings II*, despite citing to the same. *See also In re Quigley Co., Inc.*, 676 F.3d 45, 52 (2d Cir. 2012) (noting *Stern's* narrow holding in deciding that the court had constitutional authority to grant an injunction against third-party non-debtors).

114 *In re Quigley Co.*, 676 F.3d at 53; *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995) (collecting cases); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992) (noting that if the outcome of litigation "might have any 'conceivable effect' on the bankruptcy estate" then "the litigation falls within the 'related to' jurisdiction of the bankruptcy court") (internal citations omitted).

consummated, the Debtors respectfully submit that this Court has the requisite subject matter jurisdiction to consider and approve such releases. In light of the foregoing, the Debtors respectfully request that the Court overrule the SEC's objection to the Court's jurisdiction to approve the Third-Party Release.

B. The Debtors' Exculpation Provision Is Permissible.

132. The U.S. Trustee objected to the Plan's Exculpation Provision, asserting that (a) inclusion of Exculpated Party's "Related Parties" is impermissible and (b) the Exculpation Provision is impermissibly broad because includes certain prepetition activities.

133. The Plan's Exculpation Provision is the product of arm's-length negotiations, was critical to obtaining the support of various constituencies for the Plan, and, as part of the Plan, has received considerable support from the Voting Classes.[115] The Exculpation Provision was important to the development of a feasible, confirmable Plan, and the Exculpated Parties participated in these chapter 11 cases in reliance upon the protections afforded to those constituents by the exculpation.[116]

134. Courts evaluate the appropriateness of exculpation provisions based on a number of factors, including whether the plan was proposed in good faith, whether liability is limited, and whether the exculpation provision was necessary for plan negotiations.[117] Exculpation provisions that are limited to claims not involving actual fraud, willful misconduct, or gross negligence are

[115] Grady Decl. ¶ 48.

[116] *Id.*

[117] *See, e.g.*, *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005) (evaluating the exculpation clause based on the manner in which the clause was made a part of the agreement, the necessity of the limited liability to the plan negotiations, and that those who participated in proposing the plan did so in good faith).

customary and generally approved in this district under appropriate circumstances.[118] Unlike third-party releases, exculpation provisions do not affect the liability of third parties *per se*, but rather set a standard of care of gross negligence or willful misconduct in future litigation by a non-releasing party against an "Exculpated Party" for acts arising out of the Debtors' restructuring.[119]

135. The Exculpated Parties have participated in good faith in formulating and negotiating the Plan as it relates to the Debtors, and they should be entitled to protection from exposure to any lawsuits filed by disgruntled creditors or other unsatisfied parties.[120] Moreover, the Exculpation Provision and the liability standard it sets represents a conclusion of law that flows logically from certain findings of fact that the Court must reach in confirming the Plan as it relates to the Debtors. As discussed above, this Court must find, under section 1129(a)(2), that the Debtors have complied with the applicable provisions of the Bankruptcy Code. Additionally, this Court must find, under section 1129(a)(3), that the Plan has been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtors and, by extension, to the Debtors' officers, directors, employees, and professionals. Further, these findings imply that the Plan was negotiated at arm's length and in good faith.

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118 *See Wash. Mut.*, 442 B.R. at 350-51 (holding that an exculpation clause that encompassed "the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the [c]ommittees and their members, and the [d]ebtors' directors and officers" was appropriate).

119 *See In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (finding 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"); *see also In re Premier Int'l Holdings, Inc.*, 2010 WL 2745964, at *10 (CSS) (Bankr. D. Del. Apr. 29, 2010) (approving a similar exculpation provision as that provided for under the Plan); *In re Spansion*, 2010 WL 2905001, at *16 (Bankr. D. Del. Apr. 16, 2010) (same).

120 Owens Decl., ¶ 67.

136. Here, the Debtors and their officers, directors, and professionals actively negotiated with Holders of Claims and Interests across the Debtors' capital structure in connection with the Plan and these chapter 11 cases.[121] Such negotiations were extensive and the resulting agreements were implemented in good faith with a high degree of transparency, and as a result, the Plan enjoys strong support from Holders of Claims entitled to vote.[122] The Exculpated Parties played a critical role in negotiating, formulating, and implementing, among other things, the Disclosure Statement, the Plan, and the Restructuring Support Agreement.[123] Accordingly, the Court's findings of good faith vis-à-vis the Debtors' chapter 11 cases should also extend to the Exculpated Parties.

137. Additionally, the promise of exculpation played a significant role in facilitating Plan negotiations.[124] All of the Exculpated Parties played a key role in developing the Plan that paved the way for a successful reorganization, and likely would not have been so inclined to participate in the plan process without the promise of exculpation.[125] Exculpation for parties participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability.

138. Courts in this jurisdiction routinely approve exculpation provisions that include an exculpated party's "related parties."[126] Further, courts in this jurisdiction routinely approve

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121 *Id.*

122 *See* Voting Report.

123 *See* Hr'g Tr. 58:18–19, *In re Verso Corp.*, No. 16-10163 (KG) (Bankr. D. Del. June 23, 2016) ("[T]he debtors did not do this alone; they did it with the help of many others.").

124 Owens Decl., ¶ 67.

125 *Id.*

126 *See, e.g.*, *In re Akorn, Inc*, No. 20-111177 (KBO) (Bankr. D. Del. Sept. 4, 2020) (approving exculpation provision that included similar parties); *In re Bluestem Brands, Inc.*, No. 20-10566 (MFW) (Bankr. D. Del. Aug. 21, 2020)

exculpation clauses that cover prepetition activity related to similar transactions.[127] Under the circumstances, it is appropriate for the Court to approve the Exculpation Provision, and to find that the Exculpated Parties have acted in good faith and in compliance with the law.[128]

C. The Debtors' Classification Scheme Comports with the Bankruptcy Code.

a. *The U.S. Trustee's Objection to the Debtors' Classification Scheme Should Be Overruled.*

139. The U.S. Trustee objected to Confirmation of the Plan on the grounds that the Debtors' classification scheme is improper. As discussed in Section II.A, the classification of Claims and Interests under the Plan is permissible under the Bankruptcy Code and applicable Third Circuit law. The Debtors have valid business justification for classifying Class 5 and Class 6 claims separately. In light of the foregoing and the arguments contained in this Memorandum, the Debtors respectfully request that the Court overrule the U.S. Trustee's objection to the classification of the Debtors' Claims and Interests.

b. *The Royalty Owners' Objection to the Debtors' Classification Scheme and Plan Treatment Should Be Overruled.*

140. Certain Royalty Owners[129] objected to their classification under the Plan as Class 6 Holders of General Unsecured Claims on the basis that such Royalty Owners are not unsecured

(same); *In re APC Auto. Techs. Intermediate Holdings, Inc.*, No. 20-11466 (CSS) (Bankr. D. Del. July 10, 2020) (same); *In re Anna Holdings, Inc.*, No. 19-12551 (CSS) (Bankr. D. Del. Dec. 17, 2019) (same).

[127] *See e.g.*, *In re Bluestem Brands, Inc.*, No. 20-10566 (MFW) (Bankr. D. Del. Aug. 21, 2020) (same); *In re Longview Power*, LLC, 20-10951 (BLS) (Bankr. D. Del. May 19, 2020) (same); *In re Clover Technologies Group, LLC*, 19-12680 (KBO) (Bankr. D. Del. Jan. 22, 2020) (approving exculpation provision covering prepetition conduct); *In re Anna Holdings, Inc.*, No. 19-12551 (CSS) (Bankr. D. Del. Dec. 17, 2019) (same).

[128] *See PWS Holding Corp.*, 228 F.3d at 246–47 (approving plan exculpation provision with willful misconduct and gross negligence exceptions); *In re Indianapolis Downs, LLC*, 486 B.R. at 306 (same).

[129] "Royalty Owners" means claimants Annette Leazer, Gordon D. and Joy Dean Niswender, H.L. Willett Estate, Saglio Energy LLC, Overland Oil & Gas Advisory LLC, Overland Minerals and Royalties LLC, Overland Energy Partners Fund I LLC, Overland Energy Partners Fund II LLC, J A Investments, Brighton South, LLC, Atomic Capital Minerals, LLC, ACM Fund II LLC, Timnath Lands LLC, Rawah Resources LLC, Thunder Ridge

creditors but property owners of the royalties to be paid from the Debtors' production of oil and gas whose property has been held by the Debtors in a constructive or resulting trust.[130] Relatedly, Midwest Trust, as Trustee of the Meredith O. Johnson Trust, individually and on behalf of itself and the certified class of royalty owners (collectively, "Midwest"), objects to the portion of the Plan that purports to treat Midwest's breach of contract claims as General Unsecured Claims on the basis that, (a) under applicable provisions of the Colorado's Uniform Commercial Code, Midwest has security interests in the proceeds received by Extraction on the sale of oil and natural gas products produced from wells subject to Midwest's leases and (b) Midwest's share of the oil and natural gas sale proceeds, which Extraction has failed to correctly pay Midwest, is not property of the estates.[131] Finally, Regal Petroleum, LLC ("Regal," and together with the Royalty Owners and Midwest, collectively, the "Royalty Claimants") objects to the Plan to the extent it attempts to construct and treat Regal's interest in the monies being held in suspense pursuant to a purported boundary dispute as a general unsecured claim because such royalties are not property of Extraction's estates.[132]

141. In essence, through their objections, the Royalty Claimants seek a declaratory judgement that determines that the royalty payments at issue are not property of the Debtors and that, consequently, the Royalty Claimants are not General Unsecured Claimants. The Court should

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Resources LLC, TRG Oil and Gas, and Moody Group (J Moody, Val Moody, and Alaskan Oil and Resources, LLC).

130 *See Limited Objection to Classification Under Plan and to Third Party Releases* [Docket No. 1316] (the "Royalty Owners Objection").

131 *See Midwest Trust and Other Royalty Owner Claimants' Objections to Paragraph 11 of Article IV of the Debtors' Third Amended Joint Plan of Reorganization* [Docket No. 1332] (the "Midwest Objection").

132 *See Regal Petroleum, LLC's Limited Objection to Extractions' Third Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1331] (the "Regal Objection," and together with the Royalty Owners Objection and the Midwest Objection, collectively, the "Royalty Claimants Objection").

overrule the Royalty Claimants Objection. An objection to confirmation is not the appropriate means of seeking declaratory relief. Pursuant to Bankruptcy Rule 7001, an adversary proceeding includes "a proceeding to obtain a declaratory judgment . . . to determine the validity, priority, or extent of . . . [an] interest in property, other than a proceeding under . . . Rule 4003(d)."[133] Seeking a declaratory judgment "requires the filing of an adversary proceeding" and when parties seek declaratory relief outside of an adversary proceeding courts will deny relief.[134]

142. The Royalty Claimants seek a determination of their rights to receive royalty payments. Whether the Royalty Claimants are entitled to receive royalty payments is a determination as to the validity and extent of an interest in property.[135] The relief requested by the Royalty Claimants in their objection may solely be sought as part of an adversary proceeding. Such disputes are not properly lodged as an objection to confirmation of the Plan but, rather, will appropriately be resolved in the post-Confirmation claims resolution process through the relevant adversary proceeding. And as a matter of fact, the Royalty Owners filed an adversary complaint [Adv. Pro. No. 20-50963 (CSS)] to address these specific issues, alleging, among other things, that the amounts due from the non-payment and underpayment of royalties by the Debtors constitute the Royalty Owners' property which cannot be classified as property of the estate. Similarly, Midwest commenced litigation and a class arbitration in Colorado (JAG No. 2018-0919A) to recover their full royalty share of the proceeds which Extraction allegedly failed to correctly pay

133 Fed. R. Bankr. P. 7001(2) and (9).

134 *See In re DBSD, Inc.*, 432 B.R. 126, 135 (Bankr. D. Del. 2010) (denying a declaratory judgment motion where the movant failed to bring the matter as an adversary proceeding); *see also In re Oritz*, 2012 WL 1758194, at *3 (Bankr. S.D. Tex. May 15, 2012) ("[T]he seeking of a declaratory judgement requires the filing of an adversary proceeding") (citing Fed. R. Bankr. P. 7001).

135 Fed. R. Bankr. P. 7001(2) and (9).

Midwest. As such, the Royalty Claimants' respective interests in the royalty proceeds will appropriately be determined in these actions.

143. The Royalty Claimants will also not be prejudiced by a post-confirmation determination of their respective interests in the royalty payments because the Plan already provides for an appropriate mechanism to address exactly the kind of situations at hand here where a dispute exists as to the allowance of a Claim—namely, the Disputed Claims Reserve. Through the Disputed Claims Reserve, the Reorganized Debtors may hold any property to be distributed pursuant to the Plan in trust for the benefit of the Holders of a disputed Claim until a Final Order ultimately rules on the allowance of such Claim. To the extent a Final Order ultimately allows the Claims asserted by the Royalty Claimants, the Reorganized Debtors will have appropriate resources allocates to the payment of such allowed Claim.

144. Accordingly, the Debtors request that the Court overrule the Royalty Claimants Objections.

D. Payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees Is Appropriate.

145. The U.S. Trustee objects to payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees, alleging that the Debtors inappropriately contravene sections 503(b) and 1129(a)(4) of the Bankruptcy Code.[136] The U.S. Trustee argues that such fees are not reimbursable absent an application, notice and hearing pursuant to the "substantial contribution" standard under section 503(b)(3)(D) and (4) of the Bankruptcy Code. The U.S. Trustee also argues that, because section 503(b) of the Bankruptcy Code provides for the

[136] U.S. Trustee Obj. at pp. 50-59.

reimbursement of attorneys' fees and expenses of creditor professionals, the Debtors cannot agree to pay such fees and expenses pursuant to section 363(b) of the Bankruptcy Code.

146. The U.S. Trustee's objection to payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees should be overruled because the payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees is permissible under section 363(b). Courts, including this Court,[137] have recognized that section 503(b) of the Bankruptcy Code is not the exclusive avenue for payment of creditors' fees and expenses.[138] Courts also routinely approve debtors' decisions to pay creditors' fees and expenses without requiring a fee application or showing of substantial contribution.[139] Notably, in *Bethlehem Steel*,

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[137] *See In re Anna Holdings, Inc.*, Case No. 19-12551 (CSS) (Bankr. D. Del. Dec. 16, 2019) [Dkt. No. 151] (confirming a plan which included the payment of the unsecured notes indenture trustee's fees as a condition precedent to the effective date); *In re EV Energy Partners, L.P.*, Case No. 18-10814 (CSS) (Bankr. D. Del. May 17, 2018) [Dkt. No. 238] (confirming a plan and approved the payment of the indenture trustee's and noteholders' fees and expenses); *In re TerraVia Holdings, Inc.*, Case No. 17-11655 (CSS) (Bankr. D. Del. January 8, 2018) [Dkt. No. 480] (confirming a plan which provides for the payment of the indenture trustee's fees and expenses); *In re Paragon Offshore PLC*, Case No. 16-10386 (CSS) (Bankr. D. Del. June 7, 2017) [Dkt. No. 1614] (same).

[138] *See, e.g., In re Adelphia Commc'ns Corp.*, 441 B.R. 6, 12-13 (Bankr. S.D.N.Y. 2010) (approving payment of creditors' professional fees without the need for submitting substantial contribution applications because "section 503(b) does not provide, in words or substance, that it is the only way by which fees of this character may be absorbed by an estate. Thus the Court is free to look at other provisions of the Code that might also authorize payment."); Hr'g Tr. at pg. 36, 2-6, *In re Energy Future Holdings Corp.*, No. 14-10979 (Bankr. D. Del. Dec. 3, 2015) (acknowledging "There is an argument to be made that the Court could authorize these fees outside of Section 503 and without court review as to reasonableness. See, for example, In Re: *Adelphia Communications Corp* 441 B.R. 6, Bankruptcy Southern District of New York."); Hr'g Tr. at pg. 148, 10-25, *In re Paragon Offshore PLC*, No. 16-10386 (CSS) (Bankr. D. Del. June 7, 2017) (stating "…I am going to endorse, however, Judge Gerber's holding in *Adelphia*, and find that, under 1123(b)(6) and 1129(a)(4), these fees can be paid as a piece of this global settlement of this case…"); Hr'g Tr. at p. 37, 23-25, *In re Southeastern Grocers, LLC*, No. 18-10700 (Bankr. D. Del. May 14, 2018) (MFW) (determining "With respect to the payment of expenses, 503(b)(3)(D) is not the only way where such expenses can be approved and paid in a case."); See also In re Stearns Holdings, LLC, 607 B.R. 781, 793 (Bankr. S.D.N.Y. 2019) (ruling that "The Debtors have resoundingly demonstrated that the Global Settlement, a value-accretive compromise whose terms are embodied in the Amended Plan, is in the best interests of their estates and their creditors and is fair and equitable…As the Debtors correctly point out, this Court has held that, where consideration is paid pursuant to a settlement, the Court need not review such payment under section 503(b) of the Bankruptcy Code. See, e.g., In re Charter Communications, Inc., Case No. 09-11435 (JMP), 419 B.R. 221 (Bankr. S.D.N.Y. 2009) [Dkt. No. 921]").

[139] *See, e.g., In re Altegrity, Inc.*, No. 115-10226 (LSS) (Bankr. D. Del. Mar. 16, 2015) (approving payment of fees and expenses pursuant to section 363(b) of the Bankruptcy Code under assumed restructuring support agreement without requiring a showing of substantial contribution); *In re Dendreon Corp.*, No. 14-12515 (PJW) (Bankr. D. Del. Dec. 23, 2014) (overruling U.S. Trustee's objection that creditors must seek reimbursement for fees and expenses under sections 503(b)(3)(D) and (b)(4) of the Bankruptcy Code and approving payment of unsecured

the District Court for the Southern District of New York held that "subsections 503(b)(3)(D) and (b)(4) do not bar a bankruptcy court from allowing a debtor in possession to reimburse a creditor for professional fees—provided, of course, that the standard for allowing transactions under § 363(b) has been met."[140] The court rejected the U.S. Trustee's argument that the "sole statutory avenue for an individual creditor to have its professional fees reimbursed is as an administrative expense," holding that relying on the general provisions of section 363(b) of the Bankruptcy Code "threatens to create an exception that will swallow the Bankruptcy Code's detailed language limiting administrative expenses and professional fees."[141] Ultimately, the court upheld the debtors' decision to pay the creditor's fees and expenses because it was "a good business reason and would help develop a reorganization plan."[142]

147. Payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees is in the best interest of the Debtors' business and restructuring efforts. The Consenting Senior Noteholders' and the Indenture Trustee's significant participation in

noteholders' professional fees and expenses pursuant to plan support agreements under section 363(b) of the Bankruptcy Code subject to providing the creditors' committee and U.S. Trustee with copies of invoices); *In re USEC Inc.*, No. 14-10475 (CSS) (Bankr. D. Del. Apr. 21, 2014) (approving the assumption of plan support agreements and the payment of creditor fees and expenses without the need for further application or approval by the bankruptcy court); *In re Terrestar Networks Inc.*, No. 10-15446 (SHL) (Bankr. S.D.N.Y. Oct. 19, 2010) (approving stipulation pursuant to section 363(b) of the Bankruptcy Code and Bankruptcy Rule 9019 that provided for the debtors to reimburse the members of an ad hoc group of noteholders up to $2 million of professional fees by wire transfer upon entry of court orders approving various settlements); *In re Lyondell Chemical Co.*, No. 09-10023 (REG) (Bankr. S.D.N.Y. Feb. 17, 2010) (approving settlement agreement pursuant to Bankruptcy Rule 9019 that provided for the payment of up to $1 million of professional fees of certain noteholders as an administrative priority claim pursuant to a plan, without the need for further application or a showing of substantial contribution); *see also In re MPM Silicones, LLC*, No. 14-22503 (RDD) (Bankr. S.D.N.Y. June 23, 2014) (approving payment of creditors' fees and expenses in connection with assumed restructuring support agreement as an "actual and necessary cost and expense to preserve the Debtors' estates" without further application to the court).

[140] *See U.S. Trustee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, No. 02 Civ. 2854 (MBM), 2003 U.S. Dist. LEXIS 12909, at *11 (S.D.N.Y. July 28, 2003).

[141] *Id*. at *23.

[142] *Id*. at *38.

negotiations regarding, and ultimate support of, the restructuring transactions contemplated by the Plan is essential to the Debtors' reorganization efforts. The Consenting Senior Noteholders provided critical support to the Debtors' restructuring efforts, as evidenced by their entry into the Restructuring Support Agreement simultaneous with the commencement of these chapter 11 cases and subsequent substantial involvement throughout the entirety of these chapter 11 cases, including executing the heavily negotiated Backstop Commitment Agreement and Equity Rights Offering Procedures. The Indenture Trustee is the co-chair and member of the Creditors' Committee and has been critical to the both the smooth administration of these chapter 11 cases and, ultimately, the settlement with the Creditors' Committee regarding the Plan.[143]

148. The Plan represents a comprehensive settlement that is supported by the vast majority of the holders of the Debtors' capital structure, including the DIP Lenders, the Exit Facility Lenders, the Creditors' Committee, the Consenting Senior Noteholders, and the Midstream Parties. Payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees are two components of that settlement. The Consenting Senior Noteholders have been integral to the Debtors' efforts during these chapter 11 cases. They have supported to the Debtors' reorganization efforts pursuant to the terms of the Restructuring Support Agreement since the Petition Date. The Consenting Senior Noteholders supported the Debtors efforts to maximize value through the Combination Transaction process and, when those efforts failed, agreed to provide the Debtors a fully-backstopped $200 million equity investment pursuant to the terms of the Backstop Agreement. Absent that commitment, the Debtors would not have been able to secure financing from their Exit RBL Lenders under the Exit Facility—which the

[143] *See Reply of the Official Committee of Unsecured Creditors to the Objection of the United States Trustee to the Third Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1363].

Consenting Senior Noteholders helped negotiate—or emerge from chapter 11 without in a reasonable timeframe. In addition, the Consenting Senior Noteholders agreed to material concessions to resolve the Committee's objections to the Disclosure Statement and confirmation that resulted in increased recoveries for the General Unsecured Creditors under the Plan. Finally, the Consenting Senior Noteholders also played critical roles in resolving outstanding issues with the Midstream Parties to facilitate confirmation pursuant to the terms of the Midstream Settlement. In short, the Consenting Senior Noteholders have played a crucial role in the successful outcome of these chapter 11 cases. Many of these contributions, taken alone, would be sufficient to justify the payment of the Consenting Senior Noteholder Fees and Expenses under the Plan. Taken together, there is no doubt that these parties have made a substantial contribution to the Debtors' chapter 11 cases and the payment of their fees and expenses should be approved. In light of the benefits of the Plan—*i.e.*, the massive deleveraging of the Debtors' balance sheet and global resolution—payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees is well within the Debtors' sound business judgment under section 363(b)(1) of the Bankruptcy Code.[144] Importantly, the Indenture Trustee, pursuant to the Senior Notes Indentures, can exercise a charging lien to secure repayment of Indenture Trustee Fees.[145] The Indenture Trustee's ability to enforce such charging lien could adversely affect other creditors' recoveries,

[144] *See* Hr'g Tr. at 256-57, *In re Penn Virginia Corporation*, No. 16-32395 (Bankr. E.D. Va. June 13, 2016) (allowing payment of certain fees and expenses of the Consenting Noteholders pursuant to section 363(b)(1) of the Bankruptcy Code).

[145] The U.S. Trustee concedes that the existence of a charging lien will allow payment of the Indenture Trustee Fees. *See* U.S. Trustee Obj. n.14 ("As may be set forth and alluded to in other documents, certain of the Indenture Trust documents most likely provide for the payment of such fees and expenses as part of the Indenture Trustee's charging liens. To the extent that such fees and expenses are paid pursuant to and in accordance with the charging liens asserted upon the respective creditors distributions, the U.S. Trustee has no objection where a particular creditor's plan distribution, subject to a proper and valid charging lien, is sur-charged in accordance with such indenture as may be applicable.").

severely damaging the months of hard fought negotiations and consensus reached by all key stakeholders pursuant to the Plan. Further, the Debtors will pay the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees only upon the occurrence of the Plan's Effective Date, which will have occurred after extensive notice and solicitation and the Court's independent review and approval of the Plan.

149. Accordingly, the Debtors respectfully request that the Court overrule the U.S. Trustee's objection to payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees.

E. The Plan's Compromise Language Is Appropriate.

150. The U.S. Trustee objected to the scope of the Plan's language regarding the general settlement of claims.[146] Since the date of the U.S. Trustee's objection, the Debtors entered into the Settlements and this Court approved the Settlements.[147] Each Settlement is subject to the requirements of Bankruptcy Rule 9019. Further, the Settlements are critical to the Debtors' emergence from these chapter 11 cases, as they are prerequisites to the Debtors' settlement with the Creditors' Committee on the terms of the Plan.[148]

F. FERC's Objections to the Plan Should be Overruled.

151. 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

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146 *See* Plan Article IV.A.

147 *Order (I) Approving the Settlement By and Among the Debtors and Elevation Midstream, LLC and GSO EM Holdings LP, (II) Authorizing Extraction Oil & Gas, Inc. to Assume Certain Executory Contracts, as Amended and Restated, with Elevation Midstream, LLC and (III) Granting Related Relief* [Docket No. 1274].

148 *See Reply of the Official Committee of Unsecured Creditors to the Objection of the United States Trustee to the Third Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1363].

approved any rate change of the debtor provided for in the plan. This section applies only in instances where the plan specifically calls for a prospective change in rate,[149] *i.e.*, when there is evidence that the plan would actually provide a different rate structure going forward.[150] Here the Plan does not contemplate, let alone provide for, any "rate change" going forward, and certainly does not provide for a rate change "of the debtor."

152. FERC objects to the Plan on the grounds that, because the Court did not permit the parties to seek guidance from the Commission regarding the rejection of FERC-jurisdictional filed rate contracts prior to submission of the Plan, the Plan must provide that Confirmation is conditioned on post-confirmation approval of any rate changes provided for in the Plan.[151] On November 2, 2020, when approving the rejection of the certain transportation service agreements subject to certain conditions, the Court stated on the record that rejection does not constitute an abrogation or modification of any filed rates.

153. While the Debtors believe the Court was clear in its November 2, 2020 ruling on whether contract rejection constitutes a rate change and, accordingly, FERC's jurisdiction over the rejected contracts, for the avoidance of doubt the Debtors argue that section 1129(a)(6) is inapplicable to the facts here, established law, and the Court's own statements, for at least four reasons.

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149 7 Collier on Bankruptcy P. 1129.02[6] (16th ed. 2020).

150 *See In re Shenandoah Realty Partners, L.P.*, 248 B.R. 505, 514-15 (W.D. Va. 2000) (noting that the objecting party introduced no evidence at confirmation that the plan would provide for a different rate structure than any other similarly situated and regulated entity).

151 FERC Obj., pp. 1-2.

154. ***First***, the Plan simply does not propose (nor has the Court stated it will approve) any rate changes, making section 1129(a)(6) inapplicable.[152] ***Second***, rejection of a FERC jurisdictional contract under section 365 of the Bankruptcy Code—pursuant to a separate contested matter independent from plan confirmation—does not constitute a rate change under the plan implicating section 1129(a)(6).[153] Instead, the rejection is simply a separate court-authorized breach of the contract, giving rise to a rejection damages claim calculated based on the rate.[154] As this Court recently held, the Court and FERC have "parallel exclusive jurisdiction—a debtor seeking to reject a FERC jurisdictional contract through bankruptcy must obtain approval from the bankruptcy court to reject the contract but a debtor may go before FERC to abrogate or modify the filed rate in that contract. They are two separate matters."[155] It would make no sense for the Third Circuit to give the bankruptcy court (and not FERC) the power to authorize a motion to reject a FERC-jurisdictional contract on the basis that there is no change in the "rate," but then force that very same debtor to obtain FERC approval of its separate chapter 11 plan on the basis that section

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[152] "Here, the Debtors are seeking to reject the contracts and not to abrogate or to modify the rates therein." *In re Extraction Oil & Gas*, No. 20-11548 (CSS), 2020 WL 6389252, at *10 (Bankr. D. Del. Nov. 2, 2020).

[153] "Moreover, as the Court recently held in this case, an order authorizing rejection does not abrogate or modify a filed rate." *Id.*

[154] *See Letter to Richard W. Riley, et al. re Bench Ruling for Denial of the Motion of Grand Mesa Pipeline, LLC for Order Confirmation that the Automatic Stay Does Not Apply, or in the Alternative for relief from the Automatic Stay* [Docket No. 770] (finding that rejection of a Commission-jurisdictional contract in bankruptcy court does not alter the essential terms and conditions of the contract but instead constitutes a breach and gives the counterparty a claim for damages) (citing to *Mission Product Holdings v. Tempnology, LLC*, 139 S. Ct. 1652 (2019)).

[155] *See also In re Mirant Corp.*, 378 F.3d 511, 522 (5th Cir. 2004)("[a] motion to reject an executory power contract is not a collateral attack upon that contract's filed rate because that rate is given full effect when determining the breach of contract damages resulting from the rejection."); 11 U.S.C. §365(g). The Fifth Circuit also noted that "[i]n light of the numerous specific exceptions to the general § 365(a) authority to reject contracts that Congress chose to include in the Bankruptcy Code, including those for other contracts subject to extensive regulation, and the absence of any exception for contracts subject to FERC jurisdiction, it is clear that Congress intended § 365(a) to apply to contracts subject to FERC regulation." *Id.* at 521-22.

1129(a)(6) requires FERC approval of a change in the rate of that very same contract separately rejected in the bankruptcy case.

155. ***Third***, section 1129(a)(6) is also inapplicable because, to the extent that FERC may argue that there is a "rate change" at issue here—an argument that Debtors do not concede—it could not be a rate "of the debtor" because the Debtors in this case are not rate-regulated by FERC. Under the Interstate Commerce Act, FERC has jurisdiction over the transportation rate charged by an oil pipeline operating in interstate commerce (*i.e.*, the Platte River, Grand Mesa, and DJ South Pipelines).[156] This conclusion is confirmed by the fact that each of the FERC-jurisdictional oil pipeline contracts at issue here was entered into under the terms and conditions of service of Platte River, Grand Mesa, and DJ South's FERC-jurisdictional and FERC-approved tariffs.[157] FERC does not regulate the purchaser of oil pipeline transportation service in the price that the shipper is permitted to pay for such services; rather if a purchaser such as the Debtors wishes to take service on a pipeline, the purchaser simply pays the rate that FERC has authorized a pipeline to charge. In this case, that is the rate *of the Platte River, Grand Mesa and DJ South Pipelines*, not the rate *of the Debtors*. Thus, section 1129(a)(6) by its plain language does not apply to the present case.

156. ***Fourth***, section 1129(a)(6) of the Bankruptcy Code pertains to debtor-utility reorganizations to ensure that the regulated entity does not attempt to impose new rates on its own customers through a chapter 11 plan and, as a result, bypass the generally applicable energy

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156 *See* 49 U.S.C. app. § 1(5)(a) (1988); *See also United Airlines, Inc. v. FERC*, 827 F.3d 122, 127-28 (D.C. Cir. 2016) (explaining that Congress amended the Interstate Commerce Act in 1906 to provide the Interstate Commerce Commission with ratemaking authority over oil pipelines operating in interstate commerce. Congress transferred this authority to the FERC in 1977 by passing the Department of Energy Organization Act.)

157 *See* Platte River Midstream, LLC Oil Pipeline Tariff Filing, FERC Docket No. IS20-158-000 (Jan. 16, 2020); Grand Mesa Pipeline, LLC Oil Pipeline Tariff Filing, FERC Docket No. IS16-695-000 (Sept. 30, 2016); DJ South Gathering, LLC Oil Pipeline Tariff Filing, FERC Docket No. IS20-723-000 (July 10, 2020).

regulatory commission approval of rate changes.[158] This context confirms that section 1129(a)(6) of the Bankruptcy Code is inapplicable here, because there are no concerns in the instant proceeding of a FERC-regulated entity attempting to circumvent FERC's rate-setting jurisdiction.

157. FERC also objected to the injunction provision contained in the Plan on the grounds that the scope of the injunction must be limited to allow a party to enforce their "claim" or "interest" related to a rejected contract before FERC and through the appropriate proceeding under applicable non-bankruptcy law.[159]

158. The scope of the Debtors' injunction provision is appropriate. As the Supreme Court held in *Mission Product*, "because rejection 'constitutes a breach,' § 365(g), the same consequences follow in bankruptcy. The debtor can stop performing its remaining obligations under the agreement."[160] While "the counterparty retains the rights it has received under the agreement," the counterparty cannot re-cast obligations of the debtor as rights already received by the counterparty.[161] FERC expresses "concern" that a party "could have" a claim or interest "related to a rejected contract" that "could survive rejection, but does not articulate any such claim, interest, right or obligation."[162] This vague expression of concern about unidentifiable claims that FERC theorizes might survive rejection and not be discharged fails to provide any valid basis for

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158 *See, e.g.*, *In re Cajun Elec. Power Coop.*, 185 F.3d 446, 451-452 (5th Cir. 1999) (discussing 1129(a)(6) in the context of public utility commission approvals of debtor-utility rates) (citations omitted); *In re Public Service Co. of New Hampshire*, 88 B.R. 521, 530 (Bankr. D.N.H. 1988) ("Except in the context of an industry as heavily regulated as the utility industry, any suggestion that a state agency could nullify bankruptcy court approval of any of these transactions or interfere with the implementation of a plan would be ludicrous.") (citing *Perez v. Campbell*, 402 U.S. 637 (1971)); U.S. Const. Art. VI.

159 FERC Obj., pp. 1-2.

160 *Mission Product*, 39 S.Ct. 1652 at 1662.

161 *Id*.

162 FERC Obj., pp. 2.

limiting the scope of the injunction. Rather, it is entirely appropriate for the injunction provision to enjoin enforcement of obligations under rejected contracts.

159. Accordingly, the Debtors respectfully request that the Court overrule FERC's objection to the injunction provision.

G. Grand Mesa and Platte River's Remaining Objections to the Plan Should be Overruled.

160. Grand Mesa and Platte River filed separate objections to Confirmation of the Plan. Based on the arguments contained herein, Grand Mesa's and Platte River's objections should be overruled.

1. The Debtors' Classification Scheme is Proper and Comports with the Bankruptcy Code and Third-Circuit Law.

161. Grand Mesa and Platte River objected to Confirmation of the Plan on the grounds that the Debtors' classification scheme is improper. As Section II.A outlines, the classification of Claims and Interests under the Plan is permissible under the Bankruptcy Code and applicable Third Circuit law. The Debtors have valid business justification for classifying Class 4, Class 5, and Class 6 claims separately. Accordingly, the Debtors' classification scheme is proper.

2. The Plan Does Not Unfairly Discriminate Between Holders of Class 4 Claims, Holders of Class 5 Claims, and Holders of Class 6 Claims.

162. Grand Mesa and Platte River objected to Confirmation of the Plan on the grounds that the Plan unfairly discriminates between Holders of Class 4 Claims and Holders of Class 6 Claims. Grand Mesa and Platte River argue that the different recoveries provided to Class 4 Claims and Class 6 Claims constitutes "unfair discrimination" and contravenes the requirements of the Bankruptcy Code.

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

case to determine whether unfair discrimination exists.[163] 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.[164] A plan does not unfairly discriminate where it provides different treatment to two or more classes that are comprised of dissimilar claims or interests.[165] Likewise, there is no unfair discrimination if, taking into account the particular facts and circumstances of the case, there is a reasonable basis for disparate treatment.[166]

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163 *In re 203 N. LaSalle St. Ltd. P'ship.*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds, Bank of Am.*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established."); *In re Aztec Co.*, 107 B.R. 585, 589–91 (Bankr. M.D. Tenn. 1989) ("Courts interpreting language elsewhere in the Code, similar in words and function to § 1129(b)(1), have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination."); *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").

164 *See Coram*, 315 B.R. at 349 (citing cases and noting that separate classification and treatment of claims is acceptable if the separate classification is justified because such claims are essential to a reorganized debtor's ongoing business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination) *Idearc*, 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."); *Ambanc La Mesa*, 115 F.3d at 650, 656 ("Discrimination between classes must satisfy four criteria to be considered fair under 11 U.S.C. § 1129(b): (1) the discrimination must be supported by a reasonable basis; (2) the debtor could not confirm or consummate the Plan without the discrimination; (3) the discrimination is proposed in good faith; and (4) the degree of the discrimination is directly related to the basis or rationale for the discrimination."); *In re Aztec Co.*, 107 B.R. 585, 589–91 (Bankr. M.D. Tenn. 1989) (permitting different treatment of two classes of similarly situated creditors upon a determination that the debtors showed a legitimate basis for such discrimination); *Matter of Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd sub nom. In re Johns-Manville Corp.*, 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) (finding no unfair discrimination where the interests of objecting class were not similar or comparable to those of any other class).

165 *See Ambanc La Mesa*, 115 F.3d at 655–56 (finding differing treatment of creditors was fair where each's interests varied); *Aztec Co.*, 107 B.R. at 588–91 (listing numerous instances in which differing treatment of creditors was fair); *Johns-Manville*, 68 B.R. at 636 (finding no unfair discrimination where separate classes receiving disparate treatment do not have comparable claims).

166 *Aztec*, 107 B.R. at 590; *see also John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d. Cir. 1993) (holding that a classification scheme is proper as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed"); *In re Eddington Thread Mfg. Co., Inc.*, 181 B.R. 826 (Bankr. E.D. Pa. 1995) ("[A] plan proponent may classify unsecured creditors differently if the differences in classification are in the

164. The separate classification of Class 4 Claims and Class 6 Claims 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. Claims in Classes 4 and 6 are not similarly situated to any other classes due to their distinct legal character that is different from all other Claims and Interests. While Class 4 and Class 6 may appear similar at first glance, as both Classes are comprised of unsecured Claims, a deeper review shows that Class 4 and Class 6 Claims are dissimilar in light of the guaranties available to Class 4 Claims. Class 4 Claims arise out of the Senior Notes Indentures and are guaranteed by the Debtors who, collectively, own the bulk of the Company's assets.[167] Pursuant to the Senior Notes Indentures, each Holder of a Senior Notes Claims is entitled to recover against each of the Debtors.[168] In contrast, each Class 4 Claim exists against only a single Debtor entity. Accordingly, Holders of Class 4 Claims possess different legal rights from Holders of Class 6 Claims. Thus, the Plan appropriately recognizes the varying legal entitlements between Class 4 and Class 6.

165. Platte River and Grand Mesa do not dispute that the Holders of Class 4 Claims and Holders of Class 6 Claims possess differing legal rights, instead noting that it is "perhaps true" that the Senior Noteholders have claims against each Debtor entity or that such claims "may be against multiple debtors vs. a single debtor for the General Unsecured Claims."[169] Instead, Platte River and Grand Mesa argue that such a distinction is irrelevant. In doing so, Platte River and Grand Mesa disregard well-established case law in this jurisdiction and others that differing legal

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best interest of the creditors, foster reorganization efforts, do not violate the absolute priority rule and do not needlessly increase the number of classes.").

[167] The "Company" includes both the Debtors and their non-debtor affiliates.

[168] The guarantors to the Senior Notes Indentures are Debtors in these chapter 11 cases.

[169] Platte River Obj., pp. 3; Grand Mesa Obj., pp. 13

rights is a valid justification for the separate classification of claims.[170] Courts in this jurisdiction and others also routinely confirm plans that separately classify unsecured noteholders and general unsecured claims.[171] Ultimately, in any plan of reorganization in these chapter 11 cases, the Senior Noteholders will possess superior legal rights to Class 6 Claimants due to the guaranties afforded to them as lenders under the Senior Notes Indentures.

166. Platte River and Grand Mesa also misunderstand the distribution that Holders of General Unsecured Claims are entitled to. Each Holder of a Class 6 Claim is entitled to the protection of section 1129(a)(7), commonly known as the "best interests test." Section 1129(a)(7) provides, in relevant part:

> With respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date . . . .[172]

167. Accordingly, each Holder of a General Unsecured Claim is entitled to as much as the Holder would receive under a liquidation. Pursuant to the Liquidation Analysis, Holders of General Unsecured Claims would not receive any recovery in a hypothetical liquidation.[173]

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[170] *See supra* note 29.

[171] *See supra* note 37.

[172] 11 U.S.C. § 1129(a)(7).

[173] Disclosure Statement, Ex. C. Further, a liquidation done on an entity-by-entity basis would determine that Class 4 Claimants have a stronger opportunity for recovery than Class 6 Claimants and that Holders of Class 6 Claims would be even less likely to recover on their Claims.

Although the Debtors believe all unsecured creditors are significantly out of the money, in any hypothetical liquidation Holders of Class 4 Claims have a substantially stronger argument for a recovery due to the rights afforded to them under the Senior Notes Indentures. Accordingly, the Plan satisfies the requirements of section 1129(a)(7).

168. Platte River also objected on the grounds that the Plan unfairly discriminates between Holders of Class 5 Claims and Holders of Class 6 Claims. As Section II.A.1 of this Memorandum addresses, it is well established in courts in this jurisdiction and others that the separate classification of trade claims and general unsecured claims is permissible when, among other justifications, a Debtor plans to continue doing business with the trade claimants post-emergence.[174] Such is the case in these chapter 11 cases—all Class 5 Trade Claimants are crucial to the Debtors' go-forward operations and the value of the Debtors' business upon emergence. The fact that Holders of Class 5 Trade Claims must be able to assert a state-law lien is not the "lynchpin" of the Debtors' justification for the separate classification of Trade Claims. Instead, it merely bolsters their Unimpaired status under the Plan, as they would be required to be paid in full upon perfection of their lien regardless of their treatment under the Plan.

169. Further, the ability of Holders of General Unsecured Claims to participate in the GUC Equity Rights Offering on a substantially similar basis as the Equity Rights Offering that is available to Holders of Senior Notes Claims significantly delegitimizes and invalidates any disparate treatment or unfair discrimination argument that Grand Mesa or Platte River may think exists. Providing the GUC Rights Offering to Holders of Class 6 Claims, even to those Holders who engaged in intense litigation with the Debtors regarding the rejection of certain midstreams,

[174] *See supra* note 36.

grants a meaningful recovery to Holders of General Unsecured Claims that would otherwise receive nothing in any chapter 7 liquidation scenario.[175]

170. In light of the foregoing and the arguments contained in this Memorandum, the Debtors respectfully request that the Court overrule Grand Mesa's and Platte River's objections to the classification of the Debtors' Claims and Interests.

3. The Debtors' Plan Was Proposed in Good Faith

171. Grand Mesa objected to the Plan on the grounds that it was not filed in good faith. Grand Mesa is wrong.

172. Grand Mesa first asserts that the Enterprise Value used in the Valuation Analysis is "artificially low" and that the Debtors "skewed the recovery economics in favor of the Holders of Senior Notes Claims participating in the Equity Rights Offering and the Backstop Parties."[176] Grand Mesa does provide any evidence as to why it believes the Valuation Analysis is incorrect, nor does Grand Mesa, or any other party, provide an alternative valuation analysis. Grand Mesa does not even object to the Valuation Analysis provided by the Debtors or the methods used in the Valuation Analysis. Instead, Grand Mesa baselessly asserts that the midpoint of the Valuation Analysis was relied upon to favor Holders of the Senior Notes Claims and that the Court should use the high-end range of the Valuation Analysis instead. Grand Mesa's objection to the Enterprise Value in the Valuation Analysis is baseless and without merit, and, accordingly, should be overruled by the Court.

173. Grand Mesa also argues that the Plan does not maximize the value of the Debtors' estates because holders of Class 6 Claims receive a lower recovery than Holders of Class 4 Claims.

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[175] *See* Disclosure Statement, Ex. C.

[176] Grand Mesa Obj, pp. 17.

This objection confuses the requirements of Section 1129(a)(3) and the classification requirements of Section 1122. Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied.[177] To determine whether a plan seeks relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[178]

174. As outlined above and in this Memorandum, the Debtors' plan satisfies all requirements of the Bankruptcy Code, including the Classification requirements under Section 1122. Further, as Section II.D outlines, the Debtors' Plan will substantially deleverage the Debtors' capital structure and is the result of substantial, hard-fought negotiations between the Debtors and key stakeholders in the midst of a challenging operating environment in the energy sector. The Debtors have upheld their fiduciary duties, protected the interests of their constituents, and, ultimately, believe that the Plan maximizes the value of their go-forward business and is their best path forward to future success.

175. In light of the foregoing and the arguments contained in this Memorandum, the Debtors respectfully request that the Court overrule Grand Mesa's objection to the Plan on the basis of good faith.

4. The Plan Satisfies Section 1129(a)(6) of the Bankruptcy Code

176. Grand Mesa objects to the Plan on the grounds that the Plan does not satisfy the requirements of Section 1126(a)(6).

177. 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

[177] *See supra* note 71.

[178] *See supra* note 72.

approved any rate change provided for in the plan.[179] Contrary to Grand Mesa's assertion, Section 1129(a)(6) of the Bankruptcy Code is inapplicable to these chapter 11 cases because FERC does not have jurisdiction. As this Court held on November 2, 2020, rejection of the transportation services agreement between Grand Mesa and FERC does not constitute a rate change.[180]

178. In light of the foregoing and the arguments contained in this Memorandum, the Debtors respectfully request that the Court overrule Grand Mesa's objection to the Plan under Section 1129(a)(6).

H. The Resolution of Cure Objections after the Effective Date Is Proper.

179. The Debtors received several formal and informal objections relating to the Debtors' proposed cure amounts with respect to Executory Contracts and Unexpired Leases to be assumed as identified in the First Amended Plan Supplement.[181] Certain objecting parties believe that the proposed cure amount is incorrect and must be corrected before such contract or lease may be assumed. The Debtors intend to work with the various parties that have objected to the proposed cure amount in an effort to consensually resolve any pending disputes. To the extent that the Debtors are unable to consensually resolve the proposed cure amount, the Debtors will schedule a hearing to have the matter heard before the Court.[182]

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179 11. U.S.C. § 1129(a)(6).

180 *See Bench Ruling* [Docket No. 942]. The Debtors address a similar objection from FERC in Section III.E.

181 First Amended Plan Supplement, Ex. F.

182 Pursuant to Article V.C of the Plan, in the event of any dispute regarding "(1) the amount of any Cure Claim; (2) the ability of the Reorganized Debtors or any assignee, as applicable, to provide "adequate assurance of future performance" (with the meaning of section 365 of the Bankruptcy Code) under the Executory Contract or Unexpired Lease to be assumed or assumed and assigned; or (3) any other matter pertaining to assumption or the assumption and assignment, the Cure Claims shall be made following the entry of a Final Order resolving the dispute and approving the assumption or the assumption and assignment."

180. Courts in this district and others often resolve cure objections post-confirmation.[183] Accordingly, the Debtors submit that these objections are properly post-confirmation matters and should not delay confirmation of the Plan.

CONCLUSION

181. For all of the reasons set forth herein and in the Owens Declaration, the Grady Declaration, the Voelte Declaration, and the Voting Declaration and as will be further shown at the Confirmation Hearing, the Debtors respectfully request that the Court approve the Disclosure Statement and confirm the Plan as fully satisfying all of the applicable requirements of the Bankruptcy Code by entering the proposed Confirmation Order and granting such other and further relief as is just and proper.

[183] *See, e.g.*, *In re Clover Technologies Grp., LLC*, No. 19-12680 (KBO) (Bankr. D. Del. Jan. 22, 2020) (providing for resolution of claims related to executory contracts after the effective date); *In re Bluestem Brands, Inc.*, No. 20-10566 (MFW) (Bankr. D. Del. Aug. 21, 2020) (same); *In re Longview Power, LLC*, No. 20-10951 (BLS) (Bankr. D. Del. May 22, 2020) (same); *see also In re Oasis Petroleum, Inc.*, No. 20-34771 (MI) (Bankr. S.D. Tex. Nov. 10, 2020) (same).

Dated: December 18, 2020
Wilmington, Delaware

/s/ Richard W. Riley

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[184] Whiteford, Taylor & Preston LLC operates as Whiteford Taylor & Preston L.L.P. in jurisdictions outside of Delaware.

EXHIBIT A

Exhibit A

Resolution Chart

Chart of Objections Received to the Debtors' Chapter 11 Plan[1]				
Objection	**Objection**	**Debtors' Response**	**Applicable Resolution Language**	**Status**
Confirmation Objection				
Third Party Releases.[2] The Third-Party Releases are not consensual, do not meet the requirements for non-consensual releases and holders who will not receive a ballot or only *de minimis* distribution under Plan will be bound by the releases. The Court does not otherwise have jurisdiction to approve the Third-Party Releases.	U.S. Securities and Exchange Commission ("SEC") [Docket No. 1240] / U.S. Trustee [Docket No. 1303] / Grand Mesa Pipeline, LLC ("Grand Mesa") [Docket No. 1340]	**The Third-Party Releases are consensual**. The law is clear that a release is consensual where parties have received sufficient notice of a plan's release provisions and have had an opportunity to object to or opt out of the release and failed to do so (including where such holder abstains from voting altogether). Here, all parties in interest had ample opportunity to evaluate and opt out of the Third-Party Releases or object to the Plan. All parties in interest were provided extensive notice of these chapter 11 cases, the Plan, and the deadline to object to confirmation of the Plan. With respect to the Third-Party Release, each of the Disclosure Statement (transmitted to all members of Voting Classes and otherwise publicly available), the notices of non-voting status (transmitted to all members of Classes 1, 2, 5, 10, 11, and 12 and otherwise publicly available), and the Confirmation Hearing Notice (transmitted to all parties in interest) expressly states in capitalized, bold-faced, underlined text that Holders of Claims and Interests that do not check the box labeled "opt out" on the applicable Ballot or opt out form returned before the Voting Deadline or object to the Plan will be bound by the Third-Party Release. Based on the foregoing, the Debtors have established that the Third Party Release is consensual, and there is no need to consider the factors governing non-consensual third party releases under Continental and its progeny. Nonetheless, even if the Court determines that such releases are non-consensual, the Debtors	N/A	Unresolved.

[1] Capitalized terms used but not otherwise defined herein have the meaning ascribed to such terms in the Memorandum or the relevant Objection, as applicable.

[2] Certain parties objected to the Third-Party Releases for purposes of opting-out thereof, namely CIG [Docket No. 1308], Clark Carlson [Docket No. 1314], Royalty Owners [Docket No. 1316], and GPI [Docket No. 1317] (each as defined below).

Chart of Objections Received to the Debtors' Chapter 11 Plan[1]				
Objection	**Objection**	**Debtors' Response**	**Applicable Resolution Language**	**Status**
		submit the Third Party Release is appropriate and should be approved. Courts in the Third Circuit have held that a non-consensual release may be approved if such release is fair and necessary to the reorganization, and the court makes specific factual findings to support such conclusions. In addition, the Third Circuit has found that, for such releases to be permissible, fair consideration must be given in exchange for the release. The Third-Party Release is warranted under the circumstances of these chapter 11 cases because it is critical to the success of the Plan and it is fair and appropriate. Without the efforts of the Released Parties, both in negotiating and navigating the Restructuring Support Agreement and Plan negotiations, the Debtors would not be poised to confirm a plan that provides a meaningful recovery to unsecured claimants. In addition, many of the Released Parties have been instrumental in supporting these chapter 11 cases and facilitating a smooth and expeditious administration thereof. Finally, throughout these chapter 11 cases and the related negotiations, the Debtors' directors and officers steadfastly maintained their duties to maximize value for the benefit of all stakeholders, investing countless hours both prepetition and postpetition. Moreover, the third parties bound by the Releases have received sufficient consideration in exchange for the release of their Claims against the Released Parties to justify the Third Party Release, which was a critically negotiated provision of the Plan. For example, without the concession by the Senior Noteholders to equitize their Senior Notes Claims, Holders of General Unsecured Claims and [equity] would have received little to no recovery in these chapter 11 cases. Without the Third Party Release, the Debtors' key stakeholders would not have been willing to fund and otherwise support the consensual restructuring transactions contemplated by the Restructuring Support Agreement, support confirmation of the Plan, and enable the Debtors to emerge from chapter 11 and paying their trade creditors in full. Each of the Released Parties, as stakeholders and critical participants in the Debtors' reorganization process, share a common		

Chart of Objections Received to the Debtors' Chapter 11 Plan[1]				
Objection	**Objection**	**Debtors' Response**	**Applicable Resolution Language**	**Status**
		goal with the Debtors in seeing the Plan succeed. Further, the Debtors and the Reorganized Debtors are required to indemnify certain of the Released Parties under, among other agreements, their credit facilities and, with respect to officers and members of the boards of directors of the Debtors, certain indemnification agreements. Thus, causes of action against one of the Debtors' indemnitees could create an obligation on behalf of the Debtors and could effectively amount to litigation against the Debtors, depleting assets of the Debtors' estates. Accordingly, there is an identity of interests between the Debtors and the entities that will benefit from the Third-Party Releases. The Released Parties, including the Consenting Senior Noteholders, the Ad Hoc Noteholder Group, the DIP Lenders, the Revolving Credit Agreement Lenders, the Creditors' Committee, such parties' professionals and agents, certain of the Debtors other key stakeholders, and the Debtors' officers and members of their board of directors played an integral role in the formulation and negotiation of the Plan and the transactions contemplated thereby. As discussed above, the Released Parties have been active and important participants in the development of the Plan and have expended significant time and resources analyzing and negotiating the issues presented by the Debtors' capital structure and the material barriers to the resolution thereof. These parties have each provided material concessions or contributions to ensure that the Debtors have a consensual and expeditious reorganization. The Debtors' restructuring would not have been possible without the Released Parties' support and contributions. In addition to concessions under the Plan, the Released Parties made the contributions as discussed above, each in exchange for, among other things, the Third Party Releases. **Jurisdiction**. The Court has clear authority to approve the Third-Party Release. Confirmation of a plan, including one with third-party releases, requires the application of federal standards, not state, thus granting bankruptcy judges with the constitutional authority to enter final judgments on confirmation. Furthermore, the Court has subject matter jurisdiction over matters that "might have any conceivable effect on the bankruptcy estate." Given the		

Chart of Objections Received to the Debtors' Chapter 11 Plan[1]				
Objection	**Objection**	**Debtors' Response**	**Applicable Resolution Language**	**Status**
		importance of the Third-Party Release here and the critical role the Released Parties play in ensuring that the Plan is successfully consummated, the Debtors respectfully submit that this Court has the requisite subject matter jurisdiction to consider and approve such releases. .		
Compromise. The compromise language is overbroad because the language in Article VI.A suggests that the Plan itself is a settlement agreement subject to approval under Bankruptcy Rule 9019, which it is not. Further, Article IV.A does not appear limited to the settlement of claims belonging to the Debtors or the estates and is therefore not permissible under section 1123(b)(3)(A).	U.S. Trustee [Docket No. 1303]	Since the date of the U.S. Trustee's objection, the Debtors entered into the Settlements and this Court approved the Settlements. Each Settlement is subject to the requirements of Bankruptcy Rule 9019. Further, the Settlements are critical to the Debtors' emergence from these chapter 11 cases, as they are prerequisites to the Debtors' settlement with the Creditors' Committee on the terms of the Plan. Accordingly, the U.S. Trustee's Objection regarding the scope of the Plan's language regarding the general settlement of claims should be overruled.	N/A	Unresolved.
Exculpation. The exculpation provision is overly broad because (a) the definition of "Exculpated Parties" includes estate fiduciaries' "Related Parties," which are not estate fiduciaries, and (b) the exculpation clause covers activity and contracts that occurred prepetition.	U.S. Trustee [Docket No. 1303] / DCP Operating Company, LP (f/k/a DCP Midstream, LP) ("DCP") [Docket No. 1315] / Grand Mesa [Docket No. 1340] / Platte River Midstream, LLC DJ South Gathering LLC, and Platte River Holdings, LLC ("Platter River") [Docket No. 1344]	The Plan's Exculpation Provision is the product of arm's-length negotiations, was critical to obtaining the support of various constituencies for the Plan, and, as part of the Plan, has received considerable support from the Voting Classes. The Exculpation Provision was important to the development of a feasible, confirmable Plan, and the Exculpated Parties participated in these chapter 11 cases in reliance upon the protections afforded to those constituents by the exculpation. Courts evaluate the appropriateness of exculpation provisions based on a number of factors, including whether the plan was proposed in good faith, whether liability is limited, and whether the exculpation provision was necessary for plan negotiations. Exculpation provisions that are limited to claims not involving actual fraud, willful misconduct, or gross negligence are customary and generally approved in this district under appropriate circumstances. Unlike third party releases, exculpation provisions do not affect the liability of third parties per se, but rather set a standard of care of gross negligence or willful misconduct in future litigation by a non releasing party against an "Exculpated Party" for acts arising out of the Debtors' restructuring.	N/A	Unresolved.

Chart of Objections Received to the Debtors' Chapter 11 Plan[1]				
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		The Exculpated Parties have participated in good faith in formulating and negotiating the Plan as it relates to the Debtors, and they should be entitled to protection from exposure to any lawsuits filed by disgruntled creditors or other unsatisfied parties. Moreover, the Exculpation Provision and the liability standard it sets represents a conclusion of law that flows logically from certain findings of fact that the Court must reach in confirming the Plan as it relates to the Debtors. As discussed above, this Court must find, under section 1129(a)(2), that the Debtors have complied with the applicable provisions of the Bankruptcy Code. Additionally, this Court must find, under section 1129(a)(3), that the Plan has been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtors and, by extension, to the Debtors' officers, directors, employees, and professionals. Further, these findings imply that the Plan was negotiated at arm's length and in good faith. Here, the Debtors and their officers, directors, and professionals actively negotiated with Holders of Claims and Interests across the Debtors' capital structure in connection with the Plan and these chapter 11 cases. Such negotiations were extensive and the resulting agreements were implemented in good faith with a high degree of transparency, and as a result, the Plan enjoys strong support from Holders of Claims entitled to vote. The Exculpated Parties played a critical role in negotiating, formulating, and implementing, among other things, the Disclosure Statement, the Plan, and the Restructuring Support Agreement. Accordingly, the Court's findings of good faith vis-à-vis the Debtors' chapter 11 cases should also extend to the Exculpated Parties. Additionally, the promise of exculpation played a significant role in facilitating Plan negotiations. All of the Exculpated Parties played a key role in developing the Plan that paved the way for a successful reorganization, and likely would not have been so inclined to participate in the plan process without the promise of exculpation. Exculpation for parties participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability.		

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		Courts in this jurisdiction routinely approve exculpation provisions that include an exculpated party's "related parties." Further, courts in this jurisdiction routinely approve exculpation clauses that cover prepetition activity related to similar transactions. Under the circumstances, it is appropriate for the Court to approve the Exculpation Provision, and to find that the Exculpated Parties have acted in good faith and in compliance with the law		
Classification. The Plan improperly classifies General Unsecured Claims, Trade Claims, and Senior Notes Claims separately.	U.S. Trustee [Docket No. 1303] / Grand Mesa [Docket No. 1340]	The Debtors are permitted under the Bankruptcy Code and applicable law to separately classify Class 4 Claims, Class 5 Claims, and Class 6 Claims. The Third Circuit requires that a classification scheme be "reasonable" and cannot be done for the purposes of gerrymandering or an otherwise fraudulent rationale. Courts accept various independent reasons as the basis of separate classification, including the preservation of business relationships between a debtor and a class of claimants, substantially similar members of a potential class possessing different legal rights, and a debtor's consideration of "non-creditor interests." The Debtors had several valid business justifications for separately classifying Class 5 Claims. First, the Debtors were concerned that, given the extreme volatility in the oil and gas markets and the lasting effects of the global pandemic caused by COVID-19, vendors, service providers, employees, customers, and the energy industry writ large would not clearly understand that the Debtors' proposed financial restructuring was a reorganization of the business that would leave Class 5 Claims Unimpaired. Holders of Class 5 Claims are holders of "general business" claims, predominantly vendors, service providers, and customers that were integral to the Debtors' operations prior to the Petition Date and with whom the Debtors intend to continue to do business post-emergence. All Holders of Class 5 Claims can assert and perfect liens against the Debtors pursuant to applicable state law—thus, the Debtors would be required to pay Holders of Class 5 Claims in full upon perfection of their liens. Additionally, it is rational, reasonable, and justified for the Debtors to separately classify Class 5 Claims because a predominant number of Class 5 Claims are directly concerned with the Plan's effect on	N/A	Unresolved.

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		their ongoing business relationship with the Debtors. Courts in this jurisdiction and others recognize that the separate classification and treatment of trade creditors or creditors that a debtors plans to continue to do business with post-emergence is permissible. The Debtors' incentive to ensure that these creditors continue to do business with the Reorganized Debtors is self-evident, and honoring the remainder of the Class 5 Claims in full maintains the "business as usual" messaging the Debtors have worked to achieve since the start of these chapter 11 cases. The Debtors submit that rendering Claims in Class 5 Unimpaired has solidified the Debtors' trade and vendor relationships and the Debtors' market position upon emergence, and has preserved value at a critical inflection point in the Debtors' restructuring efforts. The Debtors also had valid business reasons for the separate classification of Class 4 Senior Notes Claims. Senior Notes Claims are legally fundamentally different than Trade Claims and General Unsecured Claims. Holders of Senior Notes Claims—unlike Holders of General Unsecured Claims—hold approximately $1.1 billion of Claims against multiple Debtor entities as opposed to a single Debtor entity as a result of guarantees under the indenture. Further, due to the differing nature of the Claims, the mechanics of the GUC Equity Rights Offering necessitate certain modifications, such as the estimation process, from those under the Backstopped Equity Rights Offering. As such, the expectations and legal rights of Holders of Senior Notes Claims differ substantially from an ordinary course vendor or the counterparty to a rejected Executory Contract, and justify separate classification and treatment as these classes are legally distinguishable. Courts in this jurisdiction and others routinely permit the separate classification of notes claims from general unsecured claims and trade claims. Conversely, classifying Class 5 Claims and Class 6 Claims together lacks business justification. In fact, the vast majority of General Unsecured Claims result directly from the Debtors' business judgement decision that such Claims are not only not vital, but detrimental to the continued operation of the Debtors' business post-reorganization. Indeed, Class 5 Trade Creditors are necessary to achieve the Debtors' post-emergence business plan and will be		

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		creditors the Debtors continue to reply on to support their post-emergence operations, whereas Holders of Class 6 General Unsecured Claims are largely not involved in the Debtors' day-to-day go-forward operations and therefore have different interests than Holders of Trade Claims. With regards to the Debtors' Secured Claims, it is reasonable for the Debtors to classify all substantially similar Secured Debt Claims together in Class 1. DIP Claims, Revolving Credit Agreement Claims, and Secured Tax Claims have different legal rights and/or priority under the Bankruptcy Code and thus are classified separately. Because these Class 1 Claims have identical legal rights, they are "substantially similar," and thus the Debtors' decision to classify these Claims together in Class 1 was rational, reasonable, justified, and appropriate under the circumstances.		
Professional Fees. Payment of the Indenture Trustee Fees and the fees of the Consenting Noteholder under section 1129(a)(4) is impermissible and is instead subject to sections 503(b)(3)(D), 503(b)(4), and 503(b)(5) requiring a showing of substantial contribution.	U.S. Trustee [Docket No. 1303]	The U.S. Trustee's objection to payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees should be overruled because the payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees is permissible under section 363(b). Courts, including this Court, have recognized that section 503(b) of the Bankruptcy Code is not the exclusive avenue for payment of creditors' fees and expenses. Courts also routinely approve debtors' decisions to pay creditors' fees and expenses without requiring a fee application or showing of substantial contribution. Notably, in Bethlehem Steel, the District Court for the Southern District of New York held that "subsections 503(b)(3)(D) and (b)(4) do not bar a bankruptcy court from allowing a debtor in possession to reimburse a creditor for professional fees—provided, of course, that the standard for allowing transactions under § 363(b) has been met." The court rejected the U.S. Trustee's argument that the "sole statutory avenue for an individual creditor to have its professional fees reimbursed is as an administrative expense," holding that relying on the general provisions of section 363(b) of the Bankruptcy Code "threatens to create an exception that will swallow the Bankruptcy Code's detailed language limiting administrative expenses and professional fees." Ultimately, the court upheld the debtors' decision to pay the creditor's fees and expenses because it	N/A	Unresolved.

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		was "a good business reason and would help develop a reorganization plan." Payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees is in the best interest of the Debtors' business and restructuring efforts. The Consenting Senior Noteholders' and the Indenture Trustee's significant participation in negotiations regarding, and ultimate support of, the restructuring transactions contemplated by the Plan is essential to the Debtors' reorganization efforts. The Consenting Senior Noteholders provided critical support to the Debtors' restructuring efforts, as evidenced by their entry into the Restructuring Support Agreement simultaneous with the commencement of these chapter 11 cases and subsequent substantial involvement throughout the entirety of these chapter 11 cases, including executing the heavily negotiated Backstop Commitment Agreement and Equity Rights Offering Procedures. The Indenture Trustee is the co-chair and member of the Creditors' Committee and has been critical to the both the smooth administration of these chapter 11 cases and, ultimately, the settlement with the Creditors' Committee regarding the Plan. The Plan represents a comprehensive settlement that is supported by the vast majority of the holders of the Debtors' capital structure, including the DIP Lenders, the Exit Facility Lenders, the Creditors' Committee, the Consenting Senior Noteholders, and the Midstream Parties. Payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees are two components of that settlement. The Consenting Senior Noteholders have been integral to the Debtors' efforts during these chapter 11 cases. They have supported to the Debtors' reorganization efforts pursuant to the terms of the Restructuring Support Agreement since the Petition Date. The Consenting Senior Noteholders supported the Debtors efforts to maximize value through the Combination Transaction process and, when those efforts failed, agreed to provide the Debtors a fully-backstopped $200 million equity investment pursuant to the terms of the Backstop Agreement. Absent that commitment, the Debtors would not have been able to secure financing from their Exit RBL Lenders under the Exit Facility—which the Consenting Senior Noteholders helped negotiate—or emerge from chapter 11 without in		

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		a reasonable timeframe. In addition, the Consenting Senior Noteholders agreed to material concessions to resolve the Committee's objections to the Disclosure Statement and confirmation that resulted in increased recoveries for the General Unsecured Creditors under the Plan. Finally, the Consenting Senior Noteholders also played critical roles in resolving outstanding issues with the Midstream Parties to facilitate confirmation pursuant to the terms of the Midstream Settlement. In short, the Consenting Senior Noteholders have played a crucial role in the successful outcome of these chapter 11 cases. Many of these contributions, taken alone, would be sufficient to justify the payment of the Consenting Senior Noteholder Fees and Expenses under the Plan. Taken together, there is no doubt that these parties have made a substantial contribution to the Debtors' chapter 11 cases and the payment of their fees and expenses should be approved. In light of the benefits of the Plan—i.e., the massive deleveraging of the Debtors' balance sheet and global resolution—payment of the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees is well within the Debtors sound business judgment under section 363(b)(1) of the Bankruptcy Code. Importantly, the Indenture Trustee, pursuant to the Senior Notes Indentures, can exercise a charging lien to secure repayment of Indenture Trustee Fees. The Indenture Trustee's ability to enforce such charging lien could adversely affect other creditors' recoveries, severely damaging the months of hard fought negotiations and consensus reached by all key stakeholders pursuant to the Plan. Further, the Debtors will pay the Consenting Senior Noteholder Fees and Expenses and the Indenture Trustee Fees only upon the occurrence of the Plan's Effective Date, which will have occurred after extensive notice and solicitation and the Court's independent review and approval of the Plan		
Rate Approval. The Plan must include a representation that Confirmation is conditional on FERC's post-confirmation approval of any rate changes provided for in the Plan in accordance with section 1129(a)(6) of the Bankruptcy Code.	Federal Energy Regulatory Commission ("FERC") [Docket No. 1310] / Grand	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 of the debtor provided for in the plan. This section applies only in instances where the plan specifically calls for a prospective change in rate, *i.e.*, when there is evidence that the plan would actually provide a different rate structure going forward. Here the Plan does not contemplate, let alone	N/A	Unresolved.

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	Mesa [Docket No. 1340]	provide for, any "rate change" going forward, and certainly does not provide for a rate change "of the debtor." FERC objects to the Plan on the grounds that, because the Court did not permit the parties to seek guidance from the Commission regarding the rejection of FERC-jurisdictional filed rate contracts prior to submission of the Plan, the Plan must provide that Confirmation is conditioned on post-confirmation approval of any rate changes provided for in the Plan. On November 2, 2020, when approving the rejection of the certain transportation service agreements subject to certain conditions, the Court stated on the record that rejection does not constitute an abrogation or modification of any filed rates. While the Debtors believe the Court was clear in its November 2, 2020 ruling on whether contract rejection constitutes a rate change and, accordingly, FERC's jurisdiction over the rejected contracts, for the avoidance of doubt the Debtors argue that section 1129(a)(6) is inapplicable to the facts here, established law, and the Court's own statements, for at least four reasons. First, the Plan simply does not propose (nor has the Court stated it will approve) any rate changes, making section 1129(a)(6) inapplicable. Second, rejection of a FERC jurisdictional contract under section 365 of the Bankruptcy Code—pursuant to a separate contested matter independent from plan confirmation—does not constitute a rate change under the plan implicating section 1129(a)(6). Instead, the rejection is simply a separate court-authorized breach of the contract, giving rise to a rejection damages claim calculated based on the rate. As this Court recently held, the Court and FERC have "parallel exclusive jurisdiction—a debtor seeking to reject a FERC jurisdictional contract through bankruptcy must obtain approval from the bankruptcy court to reject the contract but a debtor may go before FERC to abrogate or modify the filed rate in that contract. They are two separate matters." It would make no sense for the Third Circuit to give the bankruptcy court (and not FERC) the power to authorize a motion to reject a FERC-jurisdictional contract on the basis that there is no change in the "rate," but then force that very same debtor to obtain FERC approval of its separate chapter 11 plan on the basis that		

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		section 1129(a)(6) requires FERC approval of a change in the rate of that very same contract separately rejected in the bankruptcy case. Third, section 1129(a)(6) is also inapplicable because, to the extent that FERC may argue that there is a "rate change" at issue here—an argument that Debtors do not concede—it could not be a rate "of the debtor" because the Debtors in this case are not rate-regulated by FERC. Under the Interstate Commerce Act, FERC has jurisdiction over the transportation rate charged by an oil pipeline operating in interstate commerce (i.e., the Platte River, Grand Mesa, and DJ South Pipelines) This conclusion is confirmed by the fact that each of the FERC-jurisdictional oil pipeline contracts at issue here was entered into under the terms and conditions of service of Platte River, Grand Mesa, and DJ South's FERC-jurisdictional and FERC-approved tariffs. FERC does not regulate the purchaser of oil pipeline transportation service in the price that the shipper is permitted to pay for such services; rather if a purchaser such as the Debtors wishes to take service on a pipeline, the purchaser simply pays the rate that FERC has authorized a pipeline to charge. In this case, that is the rate of the Platte River, Grand Mesa and DJ South Pipelines, not the rate of the Debtors. Thus, section 1129(a)(6) by its plain language does not apply to the present case. Fourth, section 1129(a)(6) of the Bankruptcy Code pertains to debtor-utility reorganizations to ensure that the regulated entity does not attempt to impose new rates on its own customers through a chapter 11 plan and, as a result, bypass the generally applicable energy regulatory commission approval of rate changes. This context confirms that section 1129(a)(6) of the Bankruptcy Code is inapplicable here, because there are no concerns in the instant proceeding of a FERC-regulated entity attempting to circumvent FERC's rate-setting jurisdiction.		
Injunction Provision. The discharge injunction provision is overly broad because it extends to any action in connection with any *released* claims or interests, which would preclude the FERC from asserting jurisdiction with respect to a	FERC [Docket No. 1310]	The scope of the Debtors' injunction provision is appropriate. As the Supreme Court held in Mission Product, "because rejection 'constitutes a breach,' § 365(g), the same consequences follow in bankruptcy. The debtor can stop performing its remaining obligations under the agreement." While "the counterparty retains the rights it has received under the agreement", the counterparty cannot re-cast	N/A	Unresolved.

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right or obligation that survives rejection of a FERC-regulated contract and that is otherwise not discharged.		obligations of the debtor as rights already received by the counterparty. FERC expresses "concern[]" that a party "could have" a claim or interest "related to a rejected contract" that "could survive rejection, but does not articulate any such claim, interest, right or obligation." This vague expression of concern about unidentifiable claims that FERC theorizes might survive rejection and not be discharged fails to provide any valid basis for limiting the scope of the injunction. Rather, it is entirely appropriate for the injunction provision to enjoin enforcement of obligations under rejected contracts.		
Classification and Treatment of Royalty Claims. The Royalty Owners object to their classification as holders of Class 6 General Unsecured Claims and, instead argue, that they are owners of the royalty payments. Regal's interests in royalty payments held in suspense due to a boundary dispute are not general unsecured claims. Midwest's interests in royalty payments are not general unsecured claims, and Midwest should be designated as a secured creditors and/or as a person who has a claim to underpaid proceeds which are not part of the Debtors' estate.	Royalty Owners[3] [Docket No. 1316] Regal Petroleum, LLC and certain other royalty owners (collectively, "Regal") [Docket No. 1331] Midwest Trust, as Trustee of the Meredith O. Johnson Trust, individually and on behalf of itself and the certified class of royalty owners (collectively, "Midwest") [Docket No. 1332]	In essence, through their objections, the Royalty Claimants seek a declaratory judgement that determines that the royalty payments at issue are not property of the Debtors and that, consequently, the Royalty Claimants are not General Unsecured Claimants. The Court should overrule the Royalty Claimants Objection. An objection to confirmation is not the appropriate means of seeking declaratory relief. Pursuant to Bankruptcy Rule 7001, an adversary proceeding includes "a proceeding to obtain a declaratory judgment . . . to determine the validity, priority, or extent of . . . [an] interest in property, other than a proceeding under . . . Rule 4003(d)." Seeking a declaratory judgment "requires the filing of an adversary proceeding" and when parties seek declaratory relief outside of an adversary proceeding courts will deny relief. The Royalty Claimants seek a determination of their rights to receive royalty payments. Whether the Royalty Claimants are entitled to receive royalty payments is a determination as to the validity and extent of an interest in property. The relief requested by the Royalty Claimants in their objection may solely be sought as part of an adversary proceeding. Such disputes are not properly lodged as an objection to confirmation of the Plan but, rather, will	N/A	Unresolved.

[3] "Royalty Owners" means claimants Annette Leazer, Gordon D. and Joy Dean Niswender, H.L. Willett Estate, Saglio Energy LLC, Overland Oil & Gas Advisory LLC, Overland Minerals and Royalties LLC, Overland Energy Partners Fund I LLC, Overland Energy Partners Fund II LLC, J A Investments, Brighton South, LLC, Atomic Capital Minerals, LLC, ACM Fund II LLC, Timnath Lands LLC, Rawah Resources LLC, Thunder Ridge Resources LLC, TRG Oil and Gas, and Moody Group (J Moody, Val Moody, and Alaskan Oil and Resources, LLC).

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		appropriately be resolved in the post-Confirmation claims resolution process through the relevant adversary proceeding. And as a matter of fact, the Royalty Owners filed an adversary complaint [Adv. Pro. No. 20-50963 (CSS)] to address these specific issues, alleging, among other things, that the amounts due from the non-payment and underpayment of royalties by the Debtors constitute the Royalty Owners' property which cannot be classified as property of the estate. Similarly, Midwest commenced litigation and a class arbitration in Colorado (JAG No. 2018-0919A) to recover their full royalty share of the proceeds which Extraction allegedly failed to correctly pay Midwest. As such, the Royalty Claimants' respective interests in the royalty proceeds will appropriately be determined in these actions. The Royalty Claimants will also not be prejudiced by a post-confirmation determination of their respective interests in the royalty payments because the Plan already provides for an appropriate mechanism to address exactly the kind of situations at hand here where a dispute exists as to the allowance of a Claim—namely, the Disputed Claims Reserve. Through the Disputed Claims Reserve, the Reorganized Debtors may hold any property to be distributed pursuant to the Plan in trust for the benefit of the Holders of a disputed Claim until a Final Order ultimately rules on the allowance of such Claim. To the extent a Final Order ultimately allows the Claims asserted by the Royalty Claimants, the Reorganized Debtors will have appropriate resources allocates to the payment of such allowed Claim.		
Good Faith. The Plan does not comply with the good faith requirement of section 1129(a)(3) because it transfer value to the holders of Senior Notes Claims at the expense of other general unsecured claimants by providing a greater recovery and depriving all other holders of general unsecured claims with disproportionally lower recoveries.	Grand Mesa [Docket No. 1340]	**Good Faith.** Grand Mesa first asserts that the Enterprise Value used in the Valuation Analysis is "artificially low" and that the Debtors "skewed the recovery economics in favor of the Holders of Senior Notes Claims participating in the Equity Rights Offering and the Backstop Parties." Grand Mesa does not provide any evidence as to why it believes the Valuation Analysis is incorrect, nor does Grand Mesa, or any other party, provide an alternative valuation analysis. Grand Mesa does not even object to the Valuation Analysis provided by the Debtors or the methods used in the Valuation Analysis. Instead, Grand Mesa baselessly asserts that the	N/A	Unresolved

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		midpoint of the Valuation Analysis was relied upon to favor Holders of the Senior Notes Claims and that the Court should use the high-end range of the Valuation Analysis instead. Grand Mesa's objection to the Enterprise Value in the Valuation Analysis is baseless and without merit, and, accordingly, should be overruled by the Court. Grand Mesa also argues that the Plan does not maximize the value of the Debtors' estate because holders of Class 6 Claims receive a lower recovery than Holders of Class 4 Claims. This objection confuses the requirements of section 1129(a)(3) and the classification requirements of section 1122. Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied. To determine whether a plan seeks relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan. As outlined above and in this Memorandum, the Debtors' plan satisfies all requirements of the Bankruptcy Code, including the Classification requirements under Section 1122. Further, as Section II.D outlines, the Debtors' Plan will substantially deleverage the Debtors' capital structure and is the result of substantial, hard-fought negotiations between the Debtors and key stakeholders in the midst of a challenging operating environment in the energy sector. The Debtors have upheld their fiduciary duties, protected the interests of their constituents, and, ultimately, believe that the Plan maximizes the value of their go-forward business and is their best path forward to future success.		
Unfair Discrimination—Classes 4 and 6. Holders of General Unsecured Claims are being unfairly discriminated because they are to receive significantly less recovery than holders of Senior Notes Claims, another class of the same priority as General Unsecured Creditors. This is, in part, due to the fact that the GUC Equity Rights	Grand Mesa [Docket No. 1340] / Platte River [Docket No. 1344]	**Unfair Discrimination—Classes 4 and 6**. The Bankruptcy Code does not provide a standard for determining "unfair discrimination." Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists. 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. A plan does not unfairly	N/A	Unresolved.

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Offering, which is illusory to the vast majority of Class 6 claimants, is materially inferior to the Backstopped Equity Rights Offering. Additionally, the presumption of disparate treatment may not be rebutted through an impermissible "deemed" substantive consolidation of the estates. **Debtor Releases**. The Debtor Releases are overly broad because they purport to release the Released Parties' "Related Parties" and the Debtors do not identify with any particularity the non-debtor Released Parties that are the proposed beneficiaries of the Plan releases. The Debtors otherwise do not make a showing that the Debtor Releases satisfy the applicable *Zenith* standard as relate to such Related Parties.		discriminate where it provides different treatment to two or more classes that are comprised of dissimilar claims or interests. Likewise, there is no unfair discrimination if, taking into account the particular facts and circumstances of the case, there is a reasonable basis for disparate treatment. The separate classification of Class 4 Claims and Class 6 Claims 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. Claims in Classes 4 and 6 are not similarly situated to any other classes due to their distinct legal character that is different from all other Claims and Interests. While Class 4 and Class 6 may appear similar at first glance, as both Classes are comprised of unsecured Claims, a deeper review shows that Class 4 and Class 6 Claims are dissimilar in light of the guaranties available to Class 4 Claims. Class 4 Claims arise out of the Senior Notes Indentures and are guaranteed by the Debtors who, collectively, own the bulk of the Company's assets. Pursuant to the Senior Notes Indentures, each Holder of a Senior Notes Claims is entitled to recover against each of the Debtors. In contrast, each Class 4 Claim exists against only a single Debtor entity. Accordingly, Holders of Class 4 Claims possess different legal rights from Holders of Class 6 Claims. Thus, the Plan appropriately recognizes the varying legal entitlements between Class 4 and Class 6. Platte River and Grand Mesa do not dispute that the Holders of Class 4 Claims and Holders of Class 6 Claims possess differing legal rights, instead noting that it is "perhaps true" that the Senior Noteholders have claims against each Debtor entity or that such claims "may be against multiple debtors vs. a single debtor for the General Unsecured Claims." Instead, Platte River and Grand Mesa argue that such a distinction is irrelevant. In doing so, Platte River and Grand Mesa disregard well-established case law in this jurisdiction and others that differing legal rights is a valid justification for the separate classification of claims. Courts in this jurisdiction and others also routinely confirm plans that separately classify unsecured noteholders and general unsecured claims. Ultimately, in any plan of reorganization in these chapter 11 cases,		

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		the Senior Noteholders will possess superior legal rights to Class 6 Claimants due to the guaranties afforded to them as lenders under the Senior Notes Indentures. Platte River and Grand Mesa also misunderstands the distribution that Holders of General Unsecured Claims are entitled to. Each Holder of a Class 6 Claim is entitled to the protection of section 1129(a)(7), commonly known as the "best interests test." Section 1129(a)(7) provides, in relevant part: With respect to each impaired class of claims or interests— (A) each holder of a claim or interest of such class— (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of [the Bankruptcy Code] on such date . . . . Accordingly, each Holder of a General Unsecured Claim is entitled to as much as the Holder would receive under a liquidation. Pursuant to the Liquidation Analysis, Holders of General Unsecured Claims would not receive any recovery in a hypothetical liquidation. Although the Debtors believe all unsecured creditors are significantly out of the money, in any hypothetical liquidation Holders of Class 4 Claims have a substantially stronger argument for a recovery due to the rights afforded to them under the Senior Notes Indentures. Accordingly, the Plan satisfies the requirements of section 1129(a)(7). **Debtor Releases**. The Debtors have satisfied the business judgment standard in granting the Debtor Release under the Plan. The Debtor Release meets the applicable standard because it is fair, reasonable, the product of arm's-length negotiations, was critical to obtaining support for the Plan and Restructuring Support Agreement from various constituencies, and in the best interests of the Debtors' estates. Indeed, the Debtor Release was negotiated in connection with the other terms of the Plan and Restructuring Support		

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		Agreement and is an indispensable component to achieving final resolution of potential disputes that would otherwise negatively affect these chapter 11 cases and the available recoveries under the Plan. First, each Released Party has made a substantial contribution to the Debtors' estates. The Released Parties played an integral role in the formulation of the Plan and contributed to the Plan not only by expending significant time and resources analyzing the issues facing the Debtors and negotiating the terms of a comprehensive restructuring, but also in giving up material economic interests to ensure the success of the Plan. For instance, in exchange for the Debtor Release, the Consenting Senior Noteholders not only agreed to support the Plan pursuant to the Restructuring Support Agreement, but also agreed to equitize all the entirety of their Senior Notes Claims. The Revolving Credit Agreement Lenders also consented to the Debtors' use of cash collateral, which was instrumental to the uninterrupted operation of the Debtors' business during the pendency of these chapter 11 cases. Finally, the Debtors' directors, officers, and other agents, as well as the creditors' professionals and other agents, have been instrumental in negotiating, formulating, and implementing the restructuring transactions contemplated under the Restructuring Support Agreement and the Plan. Second, the Plan, including the Debtor Release, was vigorously negotiated by sophisticated entities that were represented by able counsel and financial advisors. The release provisions were a necessary element of consideration that the Releasing Parties required before entering in the Restructuring Support Agreement or supporting Confirmation of the Plan, as applicable. Notably, the Consenting Senior Noteholders have agreed to equitize all of their Claims in order to significantly deleverage the Debtors' prepetition capital structure and the Revolving Credit Agreement Lenders provided DIP Financing and supported the consensual use of cash collateral. With respect to the Exit Facility, the Exit Facility Agent and the Exit Facility Lenders have agreed to provide exit financing in the form of the Exit Facility, which will provide the Debtors with the liquidity needed to fund distributions under the Plan and their		

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		go-forward business. If certain of the Released Parties do not receive the benefit of the Plan's proposed release provisions, they and their constituencies may not support Confirmation of the Plan. Moreover, there is no question that directors, managers, officers, and employees of the Debtors provided (and continue to provide) valuable consideration to the Debtors, as they commit substantial time and effort (in addition to their daily responsibilities) to the Debtors' Estates and restructuring efforts throughout this chapter 11 process. Third, the vast majority of the Voting Classes (including Class 6 in terms of numerosity) have overwhelmingly voted in favor of the Plan, including the Debtor Release. Holders of General Unsecured Claims are set to receive meaningful recoveries under the Plan. Fourth, an identity of interest exists between the Debtors and the parties to be released. Each Released Party, as a stakeholder and critical participant in the Plan process, shares a common goal with the Debtors in seeing the Plan succeed. Like the Debtors, these parties seek to confirm the Plan and implement the transactions contemplated thereunder. Moreover, with respect to certain of the releases—e.g., those releasing the Debtors' current and former directors, officers, and principals—there is a clear identity of interest supporting the release because the Debtors will assume certain indemnification obligations under the Plan that will be honored by the Reorganized Debtors (and such claims would "ride through" these chapter 11 cases and would be paid in full similarly to all other general unsecured claims, even assuming that the indemnification obligations were not being assumed). Thus, a lawsuit commenced by the Debtors (or derivatively on behalf of the Debtors) against certain individuals would effectively be a lawsuit against the Reorganized Debtors themselves. Accordingly, the Plan fairly provides the various Released Parties the global closure for which they negotiated in exchange for, among other things, the various concessions and benefits provided to the Debtors' Estates under the Plan, and the Debtors submit that the Debtor Release is consistent with applicable law, represents a valid settlement and release of claims the Debtors may have against the		

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		Released Parties pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, is a valid exercise of the Debtors' business judgment, and is in the best interests of their Estates.		
Unfair Discrimination—Classes 5 and 6. Holders of General Unsecured Claims are being unfairly discriminated because they are to receive significantly less recovery than holders of Trade Claims, another class of the same priority as General Unsecured Creditors. Additionally, the extent the Debtors are trying to use the fact that a trade creditor has the right to assert a lien to justify disparate treatment between Class 5 Trade Claims and Class 6 General Unsecured Claims, that rationale fails. If a trade creditor has a secured claim, it would not be an unsecured trade claim in Class 5 but an "Other Secured Claim" in Class 1 that is entitled to 100% payment. If a trade claim does not have valid lien rights, then they should not receive a recovery that is 5.124 times that of Class 6 creditors.	Platte River [Docket No. 1344]	As Section II.A.1 of the Memorandum addresses, it is well established in courts in this jurisdiction and others that the separate classification of trade claims and general unsecured claims is permissible when, among other justifications, a Debtor plans to continue doing business with the trade claimants post-emergence. Such is the case in these chapter 11 cases—all Class 5 Trade Claimants are crucial to the Debtors' go-forward operations and the value of the Debtors' business upon emergence. The fact that Holders of Class 5 Trade Claims must be able to assert a state-law lien is not the "lynchpin" of the Debtors' justification for the separate classification of Trade Claims. Instead, it merely bolsters their Unimpaired status under the Plan, as they would be required to be paid in full upon perfection of their lien regardless of their treatment under the Plan. Further, the ability of Holders of General Unsecured Claims to participate in the GUC Equity Rights Offering on a substantially similar basis as the Equity Rights Offering that is available to Holders of Senior Notes Claims significantly delegitimizes and invalidates any disparate treatment or unfair discrimination argument that Grand Mesa or Platte River may think exists. Providing the GUC Rights Offering to Holders of Class 6 Claims, even to those Holders who engaged in intense litigation with the Debtors regarding the rejection of certain midstreams, grants a meaningful recovery to Holders of General Unsecured Claims that would otherwise receive nothing in any chapter 7 liquidation scenario.	N/A	Unresolved
Reservation of Rights. Elevation filed a reservation of rights with respect to certain confirmation issues.	Elevation Midstream, LLC and GSO EM Holdings LP ("Elevation") [Docket No. 1343]	The Debtors and Elevation entered into a settlement agreement in resolution of Elevation's objection.	N/A	Resolved.

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United States' Rights. The Confirmation Order should be amended to preserve the United States' rights.	The United States, on behalf of its Department of Interior ("DOI") [Docket No. [1342]	The Debtors and the DOI have agreed to include language in the Confirmation Order in resolution of the DOI's objection.	Confirmation Order, ¶¶ 129-132.	Resolved.
United States' Rights. The Confirmation Order should be amended to preserve the United States' rights.	Department of Justice ("DOJ") (informal objection)	The Debtors and the DOJ, have agreed to include language in the Confirmation Order in resolution of the DOJ's objection.	Confirmation Order, ¶ 128.	Resolved.
Chubb's Rights. The Confirmation Order should be amended to preserve Chubb's rights.	Westchester Fire Insurance Company and its affiliated sureties ("Chubb") (informal objection)	The Debtors and Chubb have agreed to include language in the Confirmation Order in resolution of Chubb's objection.	Confirmation Order, ¶ 133.	Resolved.
Zurich' Rights. The Confirmation Order should be amended to preserve Zurich's rights.	Fidelity & Deposit Company of Maryland ("Zurich") (informal objection)	The Debtors and Zurich have agreed to include language in the Confirmation Order in resolution of Zurich's objection.	Confirmation Order, ¶¶ 124-127.	Resolved.
Assumption, Cure Objections				
Cure Reservation of Rights. CIG reserves its right to claim damages in accordance with the terms of the Service Agreements that are being rejected by the Debtors and the governing tariff for the remainder of the term of the Services Agreements.	Colorado Interstate Gas Company, L.L.C. ("CIG") [Docket No. 1286]	N/A	N/A	N/A.
Cure. The $0 listed cure amount must be modified to $225,836.29 plus any amount that becomes due and payable on and after December 1, 2020 to the Effective Date.	Cigna Health and Life Insurance Company ("Cigna") [Docket No. 1299]	The Debtors and Cigna have agreed to include language in the Confirmation Order in resolution of Cigna's objection.	Confirmation Order, ¶ 137.	Resolved.

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Cure. The $199,894.50 listed cure amount must be modified to $223,258.86.	All American Services, LLC ("All American") [Docket No. 1306]	The Debtors are no longer assuming All American's agreement but have listed such agreement on the Schedule of Rejected Executory Contracts and Unexpired Leases.	First Amended Plan Supplement [Docket No. 1380]	Resolved.
Cure. The Debtors may not assume and assign the 34 Contracts with Richmark listed in the Plan Supplement absent cure of defaults, specifically, compliance with all obligations under the Contracts pending assumption and payment of all charges incurred or accrued under the Contracts through the effective date of such assumption. Additionally, any cure of the Contracts must include (i) amounts received by the Debtors' customers but not reported to Richmark; (ii) the Overriding Royalty Interests in the amount of $7,566,000 and (iii) any amounts currently held in suspense.	Richmark Energy Partners, LLC, Kit Energy, LLC, and Mineral Resources (collectively, "Richmark") [Docket Nos. 1307 & 1347]	The Debtors and Richmark have agreed to include language in the Confirmation Order in resolution of Richmark's objection.	Confirmation Order, ¶ 27.	Resolved.
Cure. The $0 listed cure amount must be modified to $5,550 and language should be added to the Confirmation Order preserving Pinnacol's rights.	Pinnacol Assurance ("Pinnacol") [Docket No. 1309]	The Debtors and Pinnacol have agreed to include language in the Confirmation Order in resolution of Pinnacol's objection.	Confirmation Order, ¶ 137.	Resolved.
Assumption. Broomfield objects to assumption of the Operator Agreement because the Debtors have not proposed to cure the defaults existing thereunder and have failed to offer Broomfield adequate assurances that they will perform thereunder in the future.	City and County of Broomfield, Colorado ("Broomfield") [Docket No. 1311]	The Debtors and Broomfield have agreed to adjourn the hearing on assumption of Broomfield's agreement to a later date.	N/A	Adjourned.

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Cure. The assumption of Bison's executory contracts must be conditioned upon payment of a $2,140,793 cure amount, plus the unliquidated, contingent option claims under section 7.02(a) of the Purchase and Sale Agreement.	Bison Oil and Gas ("Bison") [Docket No. 1313]	The Debtors are no longer assuming Bison's agreements but have listed such agreements on the Schedule of Rejected Executory Contracts and Unexpired Leases.	First Amended Plan Supplement [Docket No. 1380]	Resolved.
Assumption / Cure. DCP does not object to the assumption of the Gas Purchase Agreement as long as the Plant 10 Agreement and Plan 11 Agreement, listed on the assumption list separately, are also assumed. DCP objects to the proposed cure amount of $0. DCP proposes to resolve its objection through the inclusion of language preserving DPC's rights in the Confirmation Order.	DCP [Docket No. 1315]	The hearing on the assumption of DCP's agreement will be held at a later date.	N/A	Adjourned.
Assumption / Cure. GPI's Agreements, which are or pertain to licenses of IP, may not be assigned without GPI's consent. GPI objects to the proposed cure amount of $0. The Plan does not provide GPI with adequate assurance regarding the post-confirmation ability of the Debtors to perform under the terms of GPI's Agreements. **Disallowance of Claims**. GPI objects to the provision of the Plan stating that any Proofs of Claims Filed with respect to an Executory Contract or Unexpired Lease that	Geophysical Pursuit, Inc. ("GPI") [Docket No. 1315]	The Debtors and GPI have agreed to adjourn the hearing on assumption of GPI's agreement to a later date.	N/A	Adjourned.

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has been assumed or assumed and assigned shall be deemed disallowed and expunged, without further notice to, or action, order, or approval of, the Bankruptcy Court, as such the Plan seeks to disallow such claims without the due process required for claim objections.				
Cure. The $170,400.20 cure amount should be modified to $283,261.70	Kinetic Energy Services LLC ("Kinetic") [Docket No. 1321]	The Debtors are no longer assuming Kinetic's agreement but have listed such agreements on the Schedule of Rejected Executory Contracts and Unexpired Leases.	First Amended Plan Supplement [Docket No. 1380]	Resolved.
Assumption. The Debtors may not assume the LACT agreement because (a) the agreement is integrated with the PRM TSA which has been rejected; (b) it is not an executory contract capable of assumption; and (c) the Debtors have not established that assumption of the LACT Agreement is a sound exercise of business judgement.	Platte River [Docket No. 1333]	The Debtors and Platte River have agreed to adjourn the hearing on assumption of Platte River's agreement to a later date.	N/A	Adjourned.
Assumption. The assumption of the *2D & 3d Onshore/Offshore master Seismic Data Participation and Licensing Agreement* through the Plan constitutes a change-in-control transfer that is prohibited under the MLA unless certain requirements provided for in the MLA are met. Until those requirements are met, the MLA is not assumable without Seitel's consent and Seitel does not consent unless the Debtors cure applicable re-licensing fees for $22,000 and meet other requirements.	Seitel Data, Ltd ("Seitel") (informal objection)	The Debtors and Seitel have agreed to include language in the Confirmation Order in resolution of Seitel's objection.	Confirmation Order, ¶ 123.	Resolved.