IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
GRITSTONE BIO, INC.,[1]	Case No. 24-12305 (KBO)
Debtor.	

DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF PLAN OF REORGANIZATION OF GRITSTONE BIO, INC. UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

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[1] The Debtor's mailing address is 4698 Willow Road, Pleasanton, CA 94588, and the last four digits of the Debtor's federal tax identification number is 9534.

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Gritstone bio, Inc., the above-captioned debtor and debtor in possession (the "Debtor" or the "Company"), submits this memorandum of law (the "Memorandum") in support of confirmation of the Plan (as defined below).[2] The Debtor will file a proposed order confirming the Plan as modified (the "Proposed Confirmation Order").

This Memorandum, Confirmation of the Plan as modified, and entry of the Proposed Confirmation Order are supported by, *inter alia*:

1) *Gritstone bio, Inc.'s First Modified Chapter 11 Plan of Reorganization* [D.I. 423] (including all exhibits thereto and as amended, supplemented, or otherwise modified from time to time, the "Plan"), filed on February 11, 2025;

2) *First Amended Disclosure Statement with Respect to Gritstone bio, Inc.'s First Modified Chapter 11 Plan of Reorganization* [D.I. 424] (including all exhibits thereto, the "Disclosure Statement"), filed on February 11, 2025;

3) *Order (I) Approving the Disclosure Statement; (II) Scheduling Confirmation Hearing; (III) Approving Form and Manner of Notice of Confirmation Hearing; (IV) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan, Including (A) Approving Form and Content of Solicitation Materials; (B) Establishing Record Date and Approving Procedures for Distribution of Solicitation Materials; (C) Approving Forms of Ballots; (D) Establishing Voting Deadline for Receipt of Ballots and (E) Approving Procedures for Vote Tabulations; (V) Approving Form and Manner of Notice of Plan Releases; (VI) Establishing Deadline and Procedures for Filing Objections to Confirmation of Plan; and (VII) Granting Related Relief* [D.I. 442] (the "Solicitation Procedures Order"), entered on February 12, 2025; and

4) The following documents that have been filed or are being filed substantially contemporaneously herewith:

a. *Notice of Filing First Amended Plan Supplement for Gritstone bio, Inc.'s First Modified Chapter 11 Plan of Reorganization* [D.I. 556] (the "Plan Supplement");

b. *Declaration of Jeffrey Miller with Respect to the Tabulation of Votes on Gritstone bio, Inc.'s First Modified Chapter 11 Plan of Reorganization* [D.I. 557] (the "Voting Declaration");

[2] Capitalized terms not defined herein shall have the meanings ascribed in the Plan.

c. *Declaration of Vassiliki ("Celia") Economides in Support of Confirmation of Gritstone bio, Inc.'s First Modified Chapter 11 Plan of Reorganization* (the "Economides Declaration");

d. *Declaration of Steven J. Fleming in Support of Confirmation of Gritstone bio, Inc.'s First Modified Chapter 11 Plan of Reorganization* (the "Fleming Declaration" and together with the Economides Declaration the "Plan Declaration(s)"); and

e. The affidavits or other proofs of service of notices with respect to the Plan, Confirmation Hearing and solicitation of voting on the Plan (including, without limitation, all of the docket numbers referenced in the Voting Declaration) (the "Solicitation Service Filings").

I.

PRELIMINARY STATEMENT

The Debtor's Plan and its related Disclosure Statement[3] reflect a global resolution that was heavily negotiated among the Debtor, the Committee, the Debtor's Prepetition Lenders, and DIP Lenders. The Debtor's proposed Plan presents a viable, efficient, and advantageous way forward for the Company to emerge from bankruptcy, while ensuring that all Allowed Administrative Expense Claims and Priority Claims are paid or otherwise satisfied as required under the Bankruptcy Code and general unsecured Creditors receive recoveries beyond what would be distributed in a liquidation, notwithstanding that the Prepetition Lenders will not recover in full on their senior claims. Indeed, given the DIP Lenders' and Prepetition Lenders' senior positions and the lack of any other workable restructuring alternative, the heavily-negotiated Plan, which importantly has the support of the Debtor's key Creditor constituencies (including the Committee), is the only path for a successful reorganization. As discussed below, the Plan enjoys broad and extensive support among key constituencies based on the Plan voting results. No Creditor voted to reject the Plan. Only one limited objection to Confirmation was filed and that objection has

[3] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Motion, Plan and Disclosure Statement, as applicable.

been resolved. Most importantly, the Plan reorganizes the Debtor, thereby preserving valuable scientific advances.

1. After extensive negotiations undertaken in good faith by the parties, the Debtor, the Prepetition Lenders, the DIP Lenders and the Committee have reached a global resolution set forth in the Plan. The Debtor is pleased to present the Plan of reorganization which provides for, among other things, a cash recovery to unsecured Creditors (along with the assignment of certain estate claims to a Liquidating Trust) in exchange for their support of a release of certain estate claims and Causes of Action, as well as additional consideration in connection with third-party releases.

2. If confirmed and consummated, the Plan will implement the reorganization of the Debtor, with it emerging from bankruptcy and reorganizing its business around the Retained IP. As of the Effective Date, the Reorganized Debtor will have a restructured balance sheet through a debt-to-equity conversion, and the Plan will establish a Liquidating Trust with certain assets for the benefit of General Unsecured Creditors.

3. The Plan incorporates the terms of a global settlement among the Debtor, the Committee, the DIP Lenders and the Prepetition Lenders, achieved after extensive negotiations among the parties. The distributions described herein are a result of such settlement.

4. Distributions to Creditors will be generally in accordance with the priority scheme under the Bankruptcy Code, subject to the terms of the Plan: (a) the Holders of the DIP Financing Claims shall (i) receive Cash in an amount equal to $16,725,000 on a Pro Rata basis and (ii) convert $5,375,000 of such claims into the New Equity Interests on a Pro Rata basis; (b) the Holders of Other Administrative Expense Claims shall be paid in full on the Effective Date or such later date the claim becomes due and payable in the ordinary course of business; (c) the Holders of Priority Tax Claims shall be paid in full in quarterly payments over five years; (d) the Holders of the

Prepetition Secured Claims, through the Prepetition Agent on account of such Holders, shall receive, in full and final satisfaction of such Allowed Claims, Cash in an amount equal to $400,000, and shall have Class 5 Allowed General Unsecured Claims with respect to the deficiency of such Prepetition Secured Claims (to the extent such deficiency qualifies as a Prepetition Lenders' Deficiency Claim in accordance with Bankruptcy Code section 506(a)), *provided* that such Holders vote to accept the Plan and no Holders of Prepetition Secured Claims object to the Plan, Plan-related documents or otherwise contest Confirmation of the Plan; (e) the Holders of Other Secured Claims shall be paid in cash, receive the relevant collateral, or otherwise be unimpaired; (f) the Holders of Secured Tax Claims (held by Governmental Units) shall be paid in full in quarterly payments over five years; (g) the Holders of Priority Non-Tax Claims (to the extent they have not already been satisfied pursuant to prior Bankruptcy Court order) shall be paid in deferred cash payments of a value, as of the Effective Date, equal to the Allowed amount of such Claim (or as otherwise permitted pursuant to Bankruptcy Code section 1129(a)(9)(B)), such payments to commence on the later of fifteen days following the Effective Date or after such claim becomes an Allowed Claim; (h) the Holders of General Unsecured Claims shall receive 100% of the Liquidating Trust Interests; (i) the Holders of Convenience Claims shall receive up to 20% of the Allowed amount of their claims, capped at the Pro Rata share of the Convenience Claims Cap of $350,000; (j) the Holders of Subordinated Claims shall receive no distributions; and (k) Equity Interests shall be cancelled. The Plan also contains (in Article X) certain release, exculpation and related provisions, including a third-party release to which Holders of Claims voting in favor of the Plan consent through such affirmative vote, unless such Holder elected on its ballot to opt out of such release. However, the Debtor is unaware of specific claims of individual Creditors that would be subject to the third-party release.

5. The Plan should be confirmed for the following reasons:

6. ***First***, the Plan provides Creditors with the best return that can be achieved under the circumstances of this Chapter 11 Case. Absent the partial conversion of the DIP Financing Claims and the compromise of the Prepetition Lenders' Deficiency Claim in particular, all Creditors junior to the Prepetition Lenders would receive no value under a chapter 11 liquidating plan or a chapter 7 proceeding.

7. ***Second***, the Plan implements the heavily-negotiated global settlement by and among the Debtor, the Prepetition Lender, the Committee, and the DIP Lenders. The global settlement will resolve the myriad disputes between the parties on the terms set forth in the Plan, which will lead to the prompt successful resolution of this case for the benefit of the Estate and all stakeholders. Extensive Creditor support for this settlement Plan is evidenced by the voting results set forth in the Voting Declaration, indicating broad support for the Plan.

8. ***Finally***, the Plan complies with all applicable provisions of Bankruptcy Code and the Bankruptcy Rules. As discussed below, the Plan satisfies all of the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018.

9. Only one objection to the Plan was filed which objection has been resolved.[4] As a result of this resolution, Confirmation of the Plan is uncontested. Together, this Memorandum, the Disclosure Statement and Plan, the Plan Declarations, the Voting Declaration, the Plan Supplement, and the Solicitation Service Filings, along with the files and records in this Chapter 11 Case, reflect that the Plan complies with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules, and provide the legal and evidentiary bases necessary for this Court to

[4] The Limited Objection and Reservation of Rights Regarding Debtor's First Modified Chapter 11 Plan of Reorganization filed by Oracle, Inc. [D.I. 526] has been resolved.

confirm the Plan.

II.

BACKGROUND

10. On October 10, 2024 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor is operating its business and managing its property as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in the Chapter 11 Case.

11. On October 29, 2024, the Office of the United States Trustee (the "UST") appointed the Committee consisting of: BMR-Sidney Research Campus LLC, Presidio, and Murigenics, Inc. [D.I. 77].

12. The factual background regarding the Debtor is set forth in detail in the *Declaration of Vassiliki ("Celia") Economides in Support of the Debtor's Chapter 11 Petition and First Day Relief* [D.I. 17] and is fully incorporated herein by reference.

13. On February 11, 2025, the Debtor filed the Disclosure Statement [D.I. 424]. On February 12, 2025, the Court entered the Solicitation Procedures Order [D.I. 442]. The Debtor solicited the solicitation version of the Disclosure Statement and Plan in accordance with the Solicitation Procedures Order. *See* Voting Decl.

III.

SUMMARY OF THE PLAN[5]

14. Under the Plan, certain Claims are not classified and are entitled under the Bankruptcy Code (and the Plan) to a full recovery (*i.e.*, Administrative Expense Claims and Priority Tax Claims). As discussed further below, the Plan designates seven classes of Claims and

[5] To the extent that there is any inconsistency between this Summary and the Plan itself, the Plan controls.

one class of Equity Interests:

Class	Designation	Treatment	Entitled to Vote
1	Prepetition Secured Claims	Impaired	Entitled to Vote
2	Other Secured Claims	Unimpaired	Deemed to Accept
3	Secured Tax Claims	Impaired	Entitled to Vote
4	Priority Non-Tax Claims	Impaired	Entitled to Vote
5	General Unsecured Claims	Impaired	Entitled to Vote
6	Convenience Claims	Impaired	Entitled to Vote
7	Subordinated Claims	Impaired	Deemed to Reject
8	Equity Interests	Impaired	Deemed to Reject

15. The Debtor's reorganization Plan provides for the satisfaction of Administrative Expense Claims (except as otherwise may be agreed), the treatment of Secured Claims in accordance with the Bankruptcy Code, and the continuation of the Debtor's remaining operation and business, on and after the Effective Date. The Plan restructures the Debtor's balance sheet and operations, facilitates the Debtor's exit from chapter 11, and ensures a distribution to Holders of General Unsecured Claims.

16. The Plan contemplates the reorganization of the Debtor with it emerging from bankruptcy and continuing to operate its business with respect to the Retained IP as the Reorganized Debtor with a completely restructured balance sheet. With the exception of the Liquidating Trust Assets, all of the property of the Estate and of the Debtor, including the Retained IP, shall vest automatically in the Reorganized Debtor free and clear of any and all Claims, Liens and Equity Interests, except for those Claims and Liens expressly provided for in the Plan pursuant to Bankruptcy Code sections 1141(b) and (c), without the need for any further notice or order of the Bankruptcy Court, act or action under applicable law, regulation, order or rule or the vote, consent, authorization or approval of any Person or Entity. For the avoidance of doubt, the

Reorganized Debtor shall not assume and will have no liability for any claim for indemnity, contribution, advancement or reimbursement asserted by or on behalf of any officer or director who served in such role prior to the Effective Date.

17. On the Effective Date, the Debtor and the Liquidating Trustee, on their own behalf and on behalf of Holders of Allowed Claims in Classes 5 and 6, shall execute the Liquidating Trust Agreement and shall take all other steps necessary to establish the Liquidating Trust for the benefit of the Liquidating Trust Beneficiaries in accordance with the Plan. The Liquidating Trust will issue a single class of Liquidating Trust Interests.

18. The Liquidating Trust will be irrevocably vested with the Liquidating Trust Assets: (a) Trust Funding Amount, (b) Vested Causes of Action, and proceeds thereof and (c) Trust Initial Distribution Amount. The Liquidating Trustee will make distributions in accordance with the Plan, *provided, however*, that upon request by the Liquidating Trustee and/or Committee to the Debtor and/or the Reorganized Debtor, the parties may agree that the Debtor and/or Reorganized Debtor will make distributions directly to Holders of Allowed Class 6 Claims from the amount of the Trust Initial Distribution, up to the amount of the Convenience Claim Cap, in accordance with the terms of such Holder's treatment under the Plan; *provided, for the avoidance of doubt,* that any such direct payments to Holders of Allowed Class 6 Claims shall reduce the amount of the Trust Initial Distribution that is required to be funded to the Trust under the Plan.

19. The Plan also includes certain releases: a Debtor's release provision (Article X.E), a voluntary third-party release provision (Article X.C), an exculpation provision (Article X.G), and a Plan injunction provision (Article X.D). Article X.D of the Plan provides for an injunction that bars all holders of Claims from pursuing such claims against the Released Parties of Exculpated Parties with respect to any Enjoined Matters (the "Injunction"). Following the

issuance of the Injunction in accordance with the Confirmation Order, any and all holders of Claims will be permanently enjoined from seeking satisfaction of their Claims against the Released Parties or Exculpated Party or the property of any such party.

20. Approval of the Injunction, as well as the third-party release and exculpation, is a condition to Confirmation of the Plan (Article IX), and thus, these provisions are critical and necessary for the Plan to proceed.

21. As discussed herein, all such provisions are appropriate and consistent with applicable provisions of chapter 11 and Third Circuit law and are the product of good-faith, arm's-length negotiations among the Debtor, the Prepetition Lenders, the DIP Lenders and the Creditors' Committee.

IV.
THE PLAN SATISFIES EACH OF THE REQUIREMENTS FOR CONFIRMATION UNDER THE BANKRUPTCY CODE

22. Jurisdiction over this matter is proper pursuant to 28 U.S.C. § 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b) and the Bankruptcy Court may enter a final order consistent with Article III of the United States Constitution.

23. The Plan complies with all relevant sections of the Bankruptcy Code and the Bankruptcy Rules relating to confirmation. The Debtor must show by a preponderance of the evidence that the Plan satisfies section 1129 of the Bankruptcy Code in order to confirm the Plan.[6] In particular, the Plan complies with the requirements of sections 1123 and 1129 of the Bankruptcy Code. This Memorandum addresses each requirement below.

[6] *See, e.g., Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir.1993) ("The . . . preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown.").

A. The Plan Satisfies Section 1129(a)(1) of the Bankruptcy Code

24. Section 1129(a)(1) of the Bankruptcy Code provides that a plan may be confirmed only if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) indicates that the primary focus of this requirement is to ensure that the plan complies with sections 1122 and 1123 of the Bankruptcy Code, which govern classification of claims and interests and the contents of a plan, respectively.[7] The Plan complies with these provisions in all respects.

i. The Plan Meets the Requirements of Section 1122 of the Bankruptcy Code

25. The classification requirements of section 1122(a) of the Bankruptcy Code provide, 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.[8]

26. Section 1122(a) does not require that similar claims be classified together, only that claims grouped together in a class should be similar. *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 585 (6th Cir. 1986). The Third Circuit has recognized that debtors have significant flexibility in placing similar claims into different classes under section 1122, provided there is a rational basis to do so and it is not done

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[7] *See* S. Rep. No. 989, 95th Cong. 2d Sess. 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5913 (1978) ("Senate Report"); H.R. Rep. No. 595, 95th Cong. 1st Sess. 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5962, 6368 (1977) ("House Report"); *see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 648–49 (2d Cir. 1988).

[8] 11 U.S.C. § 1122(a).

to gerrymander a consenting impaired class.[9]

27. The classification of Claims and Equity Interests under the Plan is proper under the Bankruptcy Code. There are seven classes of Claims and one class of Equity Interests: (1) Prepetition Secured Claims; (2) Other Secured Claims; (3) Secured Tax Claims; (4) Priority Non-Tax Claims; (5) General Unsecured Claims; (6) Convenience Claims; (7) Subordinated Claims; and (8) Equity Interests. As the foregoing descriptions of the classes reflect, valid reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan and, accordingly, the classification of Claims and Equity Interests under the Plan satisfies the requirements of section 1122 of the Bankruptcy Code.

ii. The Plan Meets the Requirements of Section 1123(a) of the Bankruptcy Code

28. Section 1123(a) of the Bankruptcy Code sets forth seven requirements with which every chapter 11 plan must comply. The Plan complies fully with each requirement.

29. First, paragraph (1) of section 1123(a) requires that a plan designate classes of claims, other than claims with the priority specified in subparagraphs 1, 2, and 8 of section 507(a) of the Bankruptcy Code. Article III of the Plan designates Classes of Claims and Equity Interests and does not classify Administrative Expense Claims or Priority Tax Claims because they must receive the treatment specified in the Bankruptcy Code and cannot otherwise be Impaired. *See* 11 U.S.C. §§ 1123(a)(1) and 1129(a)(9).

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[9] *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060–61 (3d Cir. 1987) (observing that separate classes of claims must be reasonable, and allowing a debtor to group similar claims in different classes); *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 956–57 (2d Cir. 1993) (finding separate classification appropriate because a classification scheme had a rational basis where separate classification was based on a bankruptcy court-approved settlement); *Aetna Cas. & Sur. Co. v. Clerk of the U.S. Bankr. Ct. (In re Chateaugay Corp.)*, 89 F.3d 942, 950 (2d Cir. 1996) (finding that classification was proper since the plan did not classify similar claims separately to gerrymander an impaired assenting class); *In re Adelphia Commc'n Corp.*, 368 B.R. 140, 246–47 (Bankr. S.D.N.Y. 2007) ("When considering assertions of gerrymandering, courts in the Second Circuit have inquired whether a debtor has classified substantially similar claims in separate classes for the sole purpose of obtaining at least one impaired assenting class.").

30. Second, paragraph (2) of section 1123(a) of the Bankruptcy Code requires that a plan specify those classes or interests that are not Impaired. Sections III.A and III.B.2 of the Plan specify that Class 2 (Other Secured Claims), is Unimpaired.

31. Third, paragraph (3) of section 1123(a) of the Bankruptcy Code requires that a plan specify those classes of claims or interests that are impaired. Article III of the Plan specifies that Class 1 (Prepetition Secured Claims), Class 3 (Secured Tax Claims), Class 4 (Priority Non-Tax Claims), Class 5 (General Unsecured Claims), Class 6 (Convenience Claims), Class 7 (Subordinated Claims), and Class 8 (Equity Interests) are Impaired.

32. Fourth, paragraph (4) of section 1123(a) of the Bankruptcy Code requires that a plan provide the same treatment for each claim in a particular class unless the holder of a claim in that class agrees to less favorable treatment for such claim. All of the Holders of Claims or Equity Interests within each Class, as set forth in section III.B of the Plan, are treated identically under the Plan as required by section 1123(a)(4) of the Bankruptcy Code.[10]

33. Fifth, paragraph (5) of section 1123(a) of the Bankruptcy Code requires that a plan provide adequate means for its implementation. Here, Article V (Provisions for Implementation of Plan), Article V.B (Liquidating Trust), Article VI (Treatment of Executory Contracts and Unexpired Leases), and Article IX (Conditions Precedent to Confirmation and Effective Date of The Plan), among other provisions of the Plan, set forth the means for the Plan's implementation.

34. Sixth, paragraph (6) of section 1123(a) of the Bankruptcy Code requires that a plan impose certain restrictions on a corporate debtor's equity securities. Consistent with section 1123(a)(6) and as necessary to facilitate compliance with applicable non-bankruptcy federal laws

[10] Provided that each claimant within a class has the "same opportunity to receive equal treatment," there is no violation of section 1123(a)(4). *See In re W.R. Grace & Co*., 729 F.3d 311, 327 (3d Cir. 2013); *In re Washington Mutual Inc*., 442 B.R. 314, 356 (Bankr. D. Del. 2011).

governing foreign ownership of the Debtor, the Reorganized Debtor's governing documents shall include provisions prohibiting the issuance of non-voting equity interests in the Reorganized Debtor. Thus, section 1123(a)(6) is satisfied.

35. Finally, paragraph (7) of section 1123(a) of the Bankruptcy Code requires that a plan contain only provisions that are consistent with the interests of creditors, equity security holders, and public policy with respect to the manner of selection of any officer, director, or trustee under a plan and any successor thereto. The Plan satisfies this requirement. Section V.C (Appointment of Officers and Directors of the Reorganized Debtor) provides for disclosure of the members of the new board of directors of the Reorganized Debtor (the "New Board"). The Plan Supplement discloses that Michael Solomon, John Demeter, Wayne Robinson and Brian Paperny will be the initial members of the New Board as of the Effective Date. The Plan Supplement also identifies Wayne Robinson (CEO/CFO), Rachel Miller (VP Operations and Corporate Secretary) and Brian Paperny (Treasurer) as officers of the Reorganized Debtor. Section V.B.3 (Appointment of Liquidating Trustee) of the Plan describes the manner of selection of the Liquidating Trustee. The identity of the Liquidating Trustee has been disclosed in the Plan Supplement. Thomas A. Pitta will be appointed the Liquidating Trustee. The appointment of the members of the New Board and the Liquidating Trustee is consistent with the interests of Holders of Claims and Equity Interests and with public policy and so satisfy section 1123(a)(7) of the Bankruptcy Code.

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

36. 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 estate, and (d) include any other appropriate provision not inconsistent with the applicable provisions of chapter 11. 11 U.S.C. § 1123(b)(1).

37. The Plan is consistent with section 1123(b) of the Bankruptcy Code. Specifically, under Article III of the Plan, Class 2 is Unimpaired because the Plan provides the Holders of such Claims or Equity Interests with the treatment required under the Bankruptcy Code or otherwise does not alter the Holders' rights. On the other hand, Classes 1, 3, 4, 5, 6, 7, and 8 are Impaired because the Plan modifies the rights of the Holders of Claims or Equity Interests within such Classes.

38. In addition, pursuant to section 1123(b)(2) of the Bankruptcy Code, section VI.A of the Plan provides for the rejection of all executory contracts and unexpired leases under section 365 of the Bankruptcy Code other than those that (a) are identified on the Schedule of Assumed Executory Contracts and Unexpired Leases (as amended); (b) have previously expired or terminated pursuant to their own terms or agreement of the parties thereto; (c) have been previously assumed or rejected by the Debtor pursuant to a Final Order; or (d) are, as of the Effective Date, the subject of (i) a motion to assume that is pending or (ii) an order of the Bankruptcy Court that is not yet a Final Order.[11]

39. The Plan's discretionary provisions also include a Debtor's release provision, a voluntary third-party release provision, an exculpation provision, and Injunction provision. These provisions are appropriate and consistent with the applicable provisions of chapter 11 because, among other things, they are the product of good-faith, arm's-length negotiations and are necessary

[11] For the avoidance of doubt, the Debtor intends to file a final Schedule of Assumed Executory Contracts and Unexpired Leases concurrent with providing notice of the occurrence of the Effective Date, which schedule shall control.

to be able to confirm the Plan.

i. Rule 9019 Settlements

40. Article X.A. of the Plan provides:

> Pursuant to Sections 363 and 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the distributions and other benefits provided pursuant to the Plan, the provisions of the Plan shall constitute a good faith compromise of substantially all Claims, Equity Interests and controversies relating to the contractual, legal and equitable rights that a Holder of a Claim or Equity Interest may have with respect to any Claim or Equity Interest or any distribution to be made on account of such Claim or Equity Interest. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all such Claims, Equity Interests and controversies, as well as a finding by the Bankruptcy Court that such compromise or settlement is in the best interests of the Debtor, the Estate and Holders, and is fair, equitable and reasonable. In accordance with the provisions of the Plan, pursuant to Section 363 of the Bankruptcy Code and Bankruptcy Rule 9019(a), without any further notice to or action, order, or approval of the Bankruptcy Court, after the Effective Date, the Reorganized Debtor may compromise and settle claims against it.
>
> Pursuant to Sections 363 and 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the distributions and other benefits provided pursuant to the Plan, the provisions of the Plan shall constitute a good faith compromise, integral to this Plan, of substantially all Claims and controversies among the Debtor, the Committee, the DIP Lenders, the Prepetition Agent and the Prepetition Lenders, including, without limitation, any Challenges by the Committee whether or not asserted, the 3012 Motion,

claims and causes of actions against the DIP Lenders and claims and causes of actions against the Debtor and its Related Parties. Provided the aggregate Allowed Professional Fee Claims of the Committee's Professionals do not exceed the Committee Professional Budget, the DIP Lenders and the Prepetition Agent shall not object to or challenge or cause any other person or entity to object to or challenge the award, allowance and payment of the Allowed Professional Fee Claims of the Debtor and the Committee. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all such claims and controversies, as well as a finding by the Bankruptcy Court that such compromise or settlement is in the best interests of the Debtor, the Estate and Holders, and is fair, equitable and reasonable.

41. All of the settlements embodied in the Plan (collectively, the "Plan Settlements")[12] – which are supported by the Committee, DIP Lenders and Prepetition Lenders – are reasonable compromises satisfying the standards of Bankruptcy Rule 9019.

42. Section 105(a) of the Bankruptcy Code provides in relevant part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105(a) has been interpreted to expressly empower bankruptcy courts with broad equitable powers to "craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain." *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (*en banc*).

43. Settlements in bankruptcy are favored as a means of minimizing litigation,

[12] The Plan Settlements include, without limitation, the Debtor Release.

expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996). In deciding whether to approve a settlement pursuant to Bankruptcy Rule 9019, the court should determine whether the compromise is fair, reasonable, and in the interests of the estates. *In re Marvel Entertainment Group, Inc*., 222 B.R. 243, 249 (D. Del. 1998). The decision whether to accept or reject a compromise lies within the sound discretion of the court. *In re Neshaminy Office Bldg. Assocs.*, 62 B.R. 798, 803 (E.D. Pa. 1986).

44. In making this determination, the United States Court of Appeals for the Third Circuit has provided four criteria that a bankruptcy court should consider: (a) the probability of success in litigation; (b) the likely difficulties in collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors. *Martin*, 91 F.3d at 393. Courts generally defer to a trustee's business judgment when there is a legitimate business justification for the trustee's decision. *Id*. at 395.

45. When applying the *Martin* factors to a particular settlement, "the court is not supposed to have a 'mini-trial' on the merits, but should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness." *Aetna Casualty & Surety Co. v. Jasmine, Ltd (In re Jasmine, Ltd)*, 258 B.R. 119, 123 (D.N.J. 2000) (internal quotations omitted); *see also In re TSIC, Inc*., 393 B.R. 71, 79 (Bankr. D. Del. 2008); *In re World Health Alternatives, Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006). Although approval of a compromise is within the "sound discretion" of the bankruptcy court (*World Health*, 344 B.R. at 296), the court should not substitute its judgment for that of a trustee or debtor in possession. *In re Parkview Hosp.-Osteopathic Med. Ctr*., 211 B.R. 603, 610 (Bankr. N.D. Ohio 1996). The ultimate inquiry is whether the compromise is "fair, reasonable, and in the interests of the estate." *TSIC*, 393 B.R.

at 78. A court need not be convinced that a proposed settlement is the best possible settlement, but "must conclude that it is within the reasonable range of litigation possibilities." *World Health*, 344 B.R. at 296 (internal citations omitted).

46. Aside from the standards under Bankruptcy Rule 9019, a settlement of an estate's claims and causes of action against third parties constitutes a use of property of the estate. *See e.g. Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 350-51 (3d Cir. 1999). If a settlement is outside of the ordinary course of business of the debtor, it requires approval of the bankruptcy court pursuant to section 363(b) of the Bankruptcy Code. *See id.; see also Martin*, 91 F.3d at 395 n.2 ("Section 363 of the Code is the substantive provision requiring a hearing and court approval; Bankruptcy Rule 9019 sets forth the procedure for approving an agreement to settle or compromise a controversy."). Courts normally defer to the trustee's business judgment so long as there is a legitimate business justification. *See id.; see also Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (Bankr. D. Del. 1999) (trustee need only have a "sound business purpose" to justify use of estate property pursuant to section 363(b)).

47. Here, the Plan Settlements are within the range of reasonableness and are an exercise of sound business judgment. The Plan Settlements, which drive the Plan resulting in Creditors junior to the Prepetition Lenders receiving meaningful recoveries (in contrast to receiving no recoveries in a chapter 7 proceeding), have been negotiated extensively at arm's-length between counsel for each of the primary Creditor constituencies, based on their own investigations and analyses of any potential claims against Released Parties and potential challenges to the liens and claims of the Prepetition Lenders.

ii. The Exculpation, Third-Party Release, Direct Claims Injunction and Related Provisions Are Appropriate and Justified.

48. Sections X.E (a release by the Debtor and the Estate of the Released Parties (the "Debtor Release")), X.C (Third-Party Releases), X.G (Exculpation), and X.D (Injunction) of the Plan are appropriate and justified under the exceptional circumstances at hand.

49. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." A debtor may release claims under section 1123(b)(3)(A) "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co.* (*In re Spansion, Inc.*), 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Washington 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.'"). A court's evaluation of the propriety of a debtor's release "is often dictated by the specific facts of the case." *In re Washington Mut*., 442 B.R. at 345; *In re Tribune Co*., 464 B.R. 126, 186 (Bankr. D. Del. 2011), *modified*, 464 B.R. 208 (Bankr. D. Del. 2011) (same); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013) (courts evaluating a debtor's releases weigh "the equities of the particular case after a fact-specific review"). As demonstrated below, the Plan's release, exculpation, and injunction provisions are fair, reasonable, and in the best interests of the Debtor and its Estate, and appropriate under the circumstances of this Chapter 11 Case.

50. Courts in this district consider the following factors to determine whether releases in a chapter 11 plan are appropriate: (a) whether there is an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (b) whether the non-debtor has made a substantial contribution;

(c) the essential nature of the release to the extent that, without the release, there is little likelihood of success; (d) an agreement by a substantial majority of creditors to support the release, specifically if the impacted class or classes "overwhelmingly" vote to accept the plan; and (e) whether there is a provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the release. *See In re Indianapolis Downs*, 486 B.R. at 303 (*citing In re Zenith Elecs. Corp*., 241 B.R. 92, 110 (Bankr. D. Del. 1999)); *see also In re Spansion*, 426 B.R. at 143 n.47. Importantly, a court need not find that all of these factors apply to approve a debtor's release of claims against non-debtors. *See, e.g., In re Washington Mut*., 442 B.R. at 346. Rather, such factors are "helpful in weighing the equities of the particular case after a fact-specific review." *In re Indianapolis Downs*, 486 B.R. at 303.

51. Further, courts in the Third Circuit have held that, "[w]here such releases are an active part of the plan negotiation and formulation process, it is a valid exercise of the debtor's business judgment to include a settlement of any claims a debtor might own against third parties as a discretionary provision of a plan." *In re Aleris Int'l, Inc.*, 2010 WL 3492664, at *20; *see also In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000) (affirming debtor's release of claims against equity sponsor in connection with leverage privatization transaction where the claims had "negative value" to the estate because they were not likely to produce recoveries and were costly to the estate).

52. *First*, there is an identity of interests between the Debtor and the Released Parties. Each of the Released Parties, as stakeholders and key participants in the Chapter 11 Case, share a common goal with the Debtor in seeing the Plan succeed.[13] *See In re Tribune Co.*, 464 B.R. at 187

[13] The Released Parties include the Debtor, the Estate, the Committee, each of the DIP Lenders, the DIP Agent, each of the Prepetition Lenders, each of the Prepetition Agent and various parties related to each of the foregoing (other than Excluded Parties). *See* Plan § I.B.94 at 10.

(noting the existence of an identity of interest between the debtors and the settling parties where such parties "share the common goal of confirming the DCL Plan and implementing the DCL Plan Settlement).

53. *Second*, the Released Parties have made a substantial contribution to the Chapter 11 Case, which include, among other things, negotiating, formulating, and executing the Plan, as well as providing other material support to the Debtor. The DIP Lenders provided the Debtor with postpetition financing facilitating the Debtor's operations while in chapter 11 and the runway to execute an efficient wind-down of certain segments of its business. Further, the Released Parties played an active role throughout the duration of the Chapter 11 Case, including in negotiating the global settlement embodied in the Plan that has garnered support from the Debtor's key stakeholders. Additionally, as part of the Plan Settlements, the Prepetition Lenders have agreed to limit their recovery to the distribution and treatment set forth in the Plan.

54. *Third*, the Third-Party Release is essential to the disposition of the Chapter 11 Case. Without such release, and the active participation of the Released Parties in this Chapter 11 Case, none of the value-maximizing transactions that have been consummated over the course of the case would have been possible. Certain key stakeholders notably went to great lengths to negotiate settlements, participate in the formulation of a chapter 11 plan, and even forgo part of their own recoveries. These stakeholders had to make considerable contributions and concessions in taking these steps toward formulating the Plan. The consideration for this support is the Third-Party Release.

55. *Fourth,* the holders of Claims in the Voting Classes have overwhelmingly voted in favor of the Plan. *See* Voting Declaration.

56. *Finally*, the Third-Party Release, like all elements of the Plan, was negotiated by

sophisticated parties represented by able counsel and are the result of arm's-length negotiations. The Third-Party Release provides the Released Parties with a level of finality that is key to an orderly and value-maximizing disposition of the Estate, a result which would be impossible without the contributions and significant concessions of the Released Parties. Accordingly, the Third-Party Release is fair and equitable, in the best interest of the Estate, and should be approved.

57. Moreover, notwithstanding the Supreme Court's recent decision in *Purdue*,[14] nothing has changed the longstanding precedent permitting consensual third-party releases. Courts in the Third Circuit have long recognized that a chapter 11 plan may include a release of non-debtors by other non-debtors when such release is consensual. *See In re Emerge Energy Servs. LP*, 2019 WL 7634308, * 17-18 (Bankr. D. Del. Dec. 5, 2019); *Indianapolis Downs*, 486 B.R. at 305; *In re Spansion*, 426 B.R. at144 (stating that "a third party release may be included in a plan if the release is consensual"); *In re Washington Mut.*, 442 B.R. at 351–52 (noting that consensual third-party releases are permissible); *In re Zenith Elecs. Corp*., 241 B.R. at 111 (approving releases by creditors that voted in favor of the plan). The determination as to whether a third-party release is consensual depends on the particular circumstances of a particular case. *See Indianapolis Downs*, 486 B.R. at 306; *see also* 99 Cents Disclosure Statement Hr'g. Tr. 31:14–15 (Judge Stickles noting "[w]hether an opt-out is appropriate is analyzed on a case-by-case basis").

58. In the Third Circuit, a third-party release is consensual where the releasing parties have received sufficient notice (including an explanation of the consequences of granting the release), had the opportunity to opt out of the release, and failed to do so. *See Indianapolis Downs*, 486 B.R. at 306 (approving consensual third party releases by "impaired creditors who abstained

[14] The Supreme Court expressly stated: "Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a [chapter 11] plan . . . [n]or do we have occasion today to express a view on what qualifies as a consensual release. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 144 S. Ct. 2071, 2087–88 (2024) (emphasis in original).

from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases" and who were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots); *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233, 271 (Bankr. S.D.N.Y. 2014) (finding third party release consensual with respect to parties that had the "ability to 'check the box' on the Plan ballots" which includes "those parties who voted in favor of the Plan and those who voted to reject the Plan but failed to opt out from granting the release provisions"). This is consistent with the majority view that an opt-out mechanism—which requires an affirmative act, and where a failure to has clearly defined consequences—is sufficient for garnering consent to third-party releases.[15] This mechanism is consistent with other examples in American jurisprudence where a failure to act constitutes consent. For example, the Supreme Court has found that opt out mechanism, when accompanied by sufficient notice, procures the consent of parties to be joined to a class settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813–14 (1985) (rejecting contention that plaintiffs could only give consent by affirmatively opting into the class). There is no reason such a principle should not also apply in bankruptcy.

59. Here, Creditors who submit a Ballot are required to check the opt-out box thereon to indicate that they opt not to grant the Third-Party Release. The Ballots were distributed to the holders of Claims entitled to vote with timely, sufficient, appropriate, and adequate notice, including the explanation that such Creditors would grant the Third-Party Release if they did not opt out by checking the opt-out box on the Ballots they submitted. The text describing the Third-

[15] *See, e.g., In re LaVie Care Centers, LLC,* No. 24-55507 (PMB), 2024 WL 4988600, at *15 (Bankr. N.D. Ga. Dec. 5, 2024) ("[I]f a creditor gets materials in a bankruptcy case, and the materials say if you do not take an action, you will be bound by the consensual release, you must do something. You cannot simply ignore it. If you do, you may be 'deemed' to consent to the release. Or you may have waived those rights. Or you may be estopped from enforcing them"); *In re Conseco, Inc.*, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) (finding consensual third-party release included in plan of reorganization that bound "only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release").

Party Release was printed in bold type in the Ballots, Plan, and Disclosure Statement. Creditors had the opportunity to opt-out of the Third-Party Release. Further, no members of the Non-Voting Classes or members of the Voting Classes who do not vote are giving a release. Thus, the Third-Party Release is fully consensual and consistent with the law in this Circuit.

60. As described above, the Released Parties have provided significant contribution and support to the Chapter 11 Case and the Plan. In addition, the Third-Party Release is narrowly tailored as they do not provide a blanket immunity and provide a carve-out for acts or omissions that constitute gross negligence, fraud, or willful misconduct, as determined by a Final Order. Accordingly, the Third-Party Release is consensual, appropriate, and narrowly tailored to the circumstances of this Chapter 11 Case and should therefore be approved.[16]

61. With respect to the Exculpation provision in the Plan, the Third Circuit assesses the appropriateness of exculpation provisions in light of the particular circumstances of each case. *See In re PWS Holding Corp*., 228 F.3d at 247 (rejecting any "*per se* rule barring any provision in a [chapter 11] plan limiting the liability of third parties[,]" including exculpation, by virtue of section 524(e) of the Bankruptcy Code); *see also In re Indianapolis Downs*, 486 B.R. at 306 (concluding that exculpation provisions are appropriate for estate fiduciaries, committees and their members and a debtor's directors and officers).

62. Unlike the Third-Party Release, the Exculpation provision does not affect the liability of the Exculpated Parties *per se*, but rather establishes a standard of care in any

[16] Courts have continued to approve third-party releases in chapter 11 plans where consent was obtained through an opt-out mechanism in cases decided post-*Purdue*. *See, e.g., In re Fisker, Inc.*, No. 24-11390 (TMH) (Bankr. D. Del. Oct. 16, 2024); *In re Wheel Pros, LLC*, No. 24-11939 (JTD) (Bankr. D. Del. Oct. 15, 2024); *In re FTX Trading Ltd.*, No. 22-11068 (JTD) (Bankr. D. Del. Oct. 8, 2024); *In re Sam Ash Music Corp.*, No. 24-14727 (SLM) (Bankr D.N.J. Aug. 15, 2024); *In re Robertshaw US Holding Corp.*, Case No. 24-90052 (CML) (Bankr. S.D. Tex. Aug. 16, 2024); *In re Invitae Corp.*, No. 24-11362 (MBK) (Bankr. D.N.J. Aug. 2, 2024); *In re Bowflex Inc.*, No. 24-12364 (ABA) (Bankr. D. N.J. Aug. 18, 2024).

hypothetical future litigation against the Exculpated Parties for acts arising out of the Debtor's Chapter 11 Case. *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d at 245–46 (holding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code.").

63. *First*, the Exculpation provision is appropriate because the Exculpated Parties have participated in the Chapter 11 Case in good faith, made substantial contributions to the Debtor's efforts to maximize value of its Estate, and will participate in the successful implementation of the Plan. *Second*, the Exculpation provision is narrowly tailored to protect the Exculpated Parties only from inappropriate litigation related to acts or omissions in connection with the administration of this Chapter 11 Case. For these reasons, the Exculpation Provision is appropriate and should be approved.

64. The Injunction Provision is a key provision of the Plan because it enforces the Debtor release, Third-Party Release, and Exculpation provision by enjoining entities from taking any actions against the Exculpated Parties or Released Parties. Therefore, to the extent the Court finds the releases and Exculpation provision are appropriate, the Injunction is also appropriate and should be approved.

C. The Debtor Has Satisfied Section 1129(a)(2) of the Bankruptcy Code

65. Section 1129(a)(2) of the Bankruptcy Code requires the proponent of a plan to comply with "applicable provisions of the Bankruptcy Code." 11 U.S.C. § 1129(a)(2). The principal purpose of section 1129(a)(2) of Bankruptcy Code is to ensure that a debtor has complied with the disclosure and solicitation requirements of sections 1125 and 1126 of the Bankruptcy

Code.[17]

i. The Debtor Has Complied With the Requirements of Section 1125 of the Bankruptcy Code

66. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a chapter 11 plan from holders of claims or interests "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved . . . by the court as containing adequate information." 11 U.S.C. § 1125(b). In this case, the Court entered the Solicitation Procedures Order, approving the Disclosure Statement as containing adequate information within the meaning of section 1125 of the Bankruptcy Code.

67. Pursuant to the Solicitation Procedures Order, the Debtor—through its Voting Agent, Verita—transmitted the approved Solicitation Package notices in accordance with the instructions of the Court in the Solicitation Procedures Order. *See* Voting Decl. In addition, in compliance with the Solicitation Procedures Order, copies of the Solicitation Procedures Order, the Plan, and the Disclosure Statement have been available upon request from the Debtor's counsel and free of charge at https://www.veritaglobal.net/gritstone.

68. The Solicitation Package was served in accordance with the requirements of Bankruptcy Rules 2002(b) and 3017(d)–(f) and the Solicitation Procedures Order, as set forth in

[17] *See In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000) (stating that section 1129(a)(2) requires debtors to comply with the adequate disclosure requirements of section 1125); *see also In re Lapworth*, No. 97-34529, 1998 Bankr. LEXIS 1383, at *10 (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)."); *Official Comm. v. Michelson (In re Michelson)*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) ("Compliance with the disclosure and solicitation requirements is the paradigmatic example of what the Congress had in mind when it enacted section 1129(a)(2)."); *In re Texaco Inc.*, 84 B.R. 893, 906–07 (Bankr. S.D.N.Y. 1988) (stating that the "principal purpose of Section 1129(a)(2) is to assure that the proponents have complied with the requirements of section 1125 in the solicitation of acceptances to the plan"); Senate Report at 126 ("Paragraph (2) of [section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.").

the Voting Declaration.

ii. The Debtor Has Complied With the Requirements of Bankruptcy Rules 3017(d) and 3018(c)

69. Bankruptcy Rules 3017 and 3018 require, in relevant part, that a debtor transmit its plan and disclosure statement to all affected creditors and equity security holders, that it adopt effective procedures for the transmission of its plan and disclosure statement to beneficial owners of securities, and that it afford creditors and equity security holders a reasonable period of time in which to accept or reject the proposed plan. Fed. R. Bankr. P. 3017, 3018. The Debtor respectfully submits that it has met all such requirements.

70. Bankruptcy Rule 3017(d) requires that, unless a court orders otherwise, a debtor must transmit to all creditors, equity security holders, and the United States Trustee: the plan (or a court-approved summary of the plan), the disclosure statement approved by the court, notice of the time within which acceptances and rejections of such plan may be filed, and such other information as the court may direct, including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. *See* Fed. R. Bankr. P. 3017(d).

71. Bankruptcy Rule 3017 also requires that the debtor give notice of the time fixed for filing objections to the proposed disclosure statement and for the hearing on Confirmation to all creditors and equity security holders, and that a debtor mail a ballot to each creditor and equity security holder entitled to vote on the plan. *See* Fed. R. Bankr. P. 3017.

72. Bankruptcy Rule 3018(c) governs the form of ballot for accepting or rejecting a plan, providing in relevant part that an "acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent and conform to the appropriate Official Form." Fed. R. Bankr. P. 3018(c).

73. Verita completed solicitation of the Plan by February 15, 2025, by causing the

Solicitation Package (as defined and described in the Solicitation Procedures Order) to be transmitted to all known Holders of Claims in the applicable Voting Classes as of the Voting Record Date. The nonvoting parties were served with the Confirmation Hearing Notice and the applicable Notice of Non-Voting Status.

74. As required by Bankruptcy Rule 3017(d), the Solicitation Package included, *inter alia*, the Disclosure Statement and Plan. In addition, each Solicitation Package included the appropriate Ballot with voting instructions, the Confirmation Hearing Notice, and a pre-addressed return envelope each in the form approved by the Court in the Solicitation Procedures Order. The Disclosure Statement, Ballots, and Confirmation Hearing Notice provided clear notice of the voting deadline to submit the Ballots, which the Court established as March 17, 2025, at 5:00 p.m. (Eastern Time).

75. The Debtor and its professionals and agents followed the procedures set forth in the Solicitation Procedures Order for soliciting acceptances of the Plan as evidenced by the Voting Declaration and the certificates of service for the Solicitation Packages filed of record with the Court. In addition, the Debtor served the Confirmation Hearing Notice on the U.S. Trustee, counsel for the Committee, all Creditors on the list of Creditors maintained by the Debtor's Voting Agent, and those parties that requested notice pursuant to Bankruptcy Rule 2002. The Debtor did not solicit acceptances or rejection of the Plan from any Creditor or Equity Interest holder before the approval of the Disclosure Statement by this Court.

iii. The Vote Tabulation Satisfied Section 1126(c) and Bankruptcy Rule 3018(a)

76. The Debtor submits that the voting and tabulation procedures followed by Verita are in accordance with the Solicitation Procedures Order, Bankruptcy Code section 1126(c), and Bankruptcy Rule 3018(a). Bankruptcy Code section 1126(c) provides:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. § 1126(c). Section 1126 of the Bankruptcy Code provides in part that only holders of allowed claims and interests in impaired classes that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject a plan. 11 U.S.C. §§ 1126(f)–(g). Class 2 is unimpaired under the Plan. Accordingly, Classes 2 is deemed to have accepted the Plan and is not entitled to vote on the Plan. Classes 1, 3, 4, 5, and 6 are impaired and entitled to vote on the Plan (the "Voting Classes"). Classes 7 and 8 are deemed to have rejected the Plan and not entitled to vote on the Plan.

77. As set forth in the Voting Summary, in accordance with section 1126 of the Bankruptcy Code and the Solicitation Procedures Order, the Debtor solicited acceptances and rejections of the Plan from the holders of Claims in the Voting Classes. Every validly cast Ballot was counted and considered when tabulating votes for the acceptance or rejection of the Plan.[18] The voting results are set forth in Exhibit "A" to the Voting Declaration and are as follows:

Class 1
Accepting: 1 ballot (100% in number) representing $43,838,427.50 (100% in amount)
Rejecting: 0 ballots (0% in number) representing $0.00 (0% in amount)

Class 3
Accepting: 1 ballot (100% in number) representing $3,202.15 (100% in amount)
Rejecting: 0 ballots (0% in number) representing $0.00 (0% in amount)

Class 4
Accepting: 0 ballot (100% in number) representing $0.00 (0% in amount)
Rejecting: 0 ballots (0% in number) representing $0.00 (0% in amount)

Class 5
Accepting: 24 ballot (100% in number) representing $26,369,899.35(100% in amount)

[18] *See* Voting Declaration and exhibits thereto.

Rejecting: 0 ballots (0% in number) representing $0.00 (0% in amount)

Class 6
Accepting: 24 ballot (100% in number) representing $333,325.73 (100% in amount)
Rejecting: 0 ballots (0% in number) representing $0.00 (0% in amount)[19]

78. Based on the facts and arguments set forth above, the Debtor submits that the Plan-related solicitation efforts satisfied the requirements of Bankruptcy Code sections 1125 and 1126 and Bankruptcy Rules 3017(d), 3018(a), 3018(c), and 3018(e).

79. Additionally, given the clear evidence of good faith on the part of the parties involved in the solicitation and the Debtor's compliance with Bankruptcy Code section 1125, the Debtor requests that the Court grant the parties the protections provided under Bankruptcy Code section 1125(e).

D. The Plan Has Been Proposed in Good Faith (Section 1129(a)(3))

80. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). Although the term "good faith" is not defined in the Bankruptcy Code, courts have determined that "'[f]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives of the Bankruptcy Code." *In re PWS Holding Corp.*, 228 F.3d at 242 (quoting *In re Abbotts Dairies*, 788 F.2d 143, 150 n.5 (3d Cir. 1986)). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the proposal of a chapter 11 plan. *In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012). In determining whether the plan will succeed and accomplish goals

[19] One Creditor in this Class abstained.

consistent with the Bankruptcy Code, courts look to the terms of the plan itself.[20]

81. The Plan has been proposed in good faith, achieves a restructuring of the Debtor, and provides for meaningful distributions to Creditors. The Plan contains only provisions that are consistent with the Bankruptcy Code. In light of the foregoing, the Plan complies with section 1129(a)(3) of the Bankruptcy Code.

E. Payments for Services and Expenses (Section 1129(a)(4))

82. Section 1129(a)(4) of the Bankruptcy Code requires that the Debtor not make any payment for services, costs, or expenses in connection with this case unless such payments are disclosed and subject to bankruptcy court approval as reasonable. Courts have construed this section as requiring the bankruptcy court's review and approval of the reasonableness of all professional fee payments made from estate assets. Courts have construed this section as requiring the bankruptcy court's review and approval of the reasonableness of all professional fee payments made from estate assets. *See In re NH Holdings, Inc.*, 288 B.R. 356, 362–63 (Bankr. D. Del. 2002) (finding in a confirmation order that the plan complied with section 1129(a)(4) of the Bankruptcy Code where all final fees and expenses payable to professionals remained subject to final review by the court); *In re Resorts Int'l*, 145 B.R. 412, 475 (Bankr. D.N.J. 1990).

83. No payment for services or costs and expenses in connection with the Debtor's Chapter 11 Case, or in connection with the Plan and incident to the Chapter 11 Case, has been or will be made, other than payments that have been authorized by an order of the Court. The Court has previously authorized the interim payment of the fees and expenses incurred by estate professionals. Pursuant to section II.A.4 of the Plan, professionals shall file and serve applications

[20] *See In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988) (concluding that the good-faith test provides courts with significant flexibility and is focused on examination of the plan itself, rather than external factors), *aff'd in part and remanded in part on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990).

for allowance of final compensation and reimbursement of expenses no later than 30 days after the Effective Date. Such applications will be subject to review and approval by the Court. Accordingly, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

F. Directors and Officers (Section 1129(a)(5))

84. Section 1129(a)(5) of the Bankruptcy Code requires that the identity and affiliations of the individuals proposed to serve after confirmation as a director or officer, and the identity and nature of any insider compensation, be disclosed.[21] The Debtor has complied with section 1129(a)(5) by providing in the Plan Supplement the respective identity of the Liquidating Trustee who is not an insider of the Debtor and the initial members of the New Board. The Debtor believes that the appointment of these representatives is "consistent with the interests of creditors and equity security holders and with public policy," and no party in interest has objected to the Plan on these grounds. Therefore, the requirements of section 1129(a)(5) are satisfied.

G. Rate Changes (Section 1129(a)(6))

85. 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 in this case.

H. The Plan Satisfies the "Best Interests" Test (Section 1129(a)(7))

86. The "best interests of creditors" test of section 1129(a)(7) of the Bankruptcy Code requires that, with respect to each impaired class of claims or interests, each individual holder of

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

a claim or interest has either accepted the plan or will receive or retain under the plan property having a present value, as of the effective date of the plan, of not less than what such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code at that time. The best-interests-of-creditors test 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.[22]

87. Under section 1129(a)(7), the best-interests-of-creditors test applies only to non-accepting holders of impaired claims or interests.[23] For the reasons discussed in Exhibit "D" to the Disclosure Statement [and the Fleming Declaration], the best-interests-of-creditors test is satisfied in this case. The Debtor prepared a liquidation analysis attached as Exhibit B to the Disclosure Statement and estimates of the potential recoveries of the Classes under the Plan in Section I.F of the Disclosure Statement (the "Plan Recovery/Liquidation Analysis"). As discussed in the Disclosure Statement, the Plan is expected to provide a substantially greater recovery than would a chapter 7 liquidation for unsecured Creditors.

88. Based on the Plan Recovery/Liquidation Analysis, the Debtor believes that the value of its assets are insufficient to satisfy the DIP Financing Claims, the Prepetition Secured Claims and Administrative Expense Claims. Accordingly, Holders of General Unsecured Claims would not receive any distributions or recovery, absent the transactions and settlements contemplated in the Plan. As set forth in the Liquidation Analysis (after deducting the costs of

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[22] *See In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) (citations omitted) ("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.'"); *In re Adelphia Commc'ns 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").

[23] *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan.").

liquidation), the estate would hold only between $18.4 million and $22.9 million, amounts insufficient to satisfy the more than $25.7 million DIP Financing Claims.

89. Lastly, in chapter 7 proceedings, the value available for satisfaction of Claims and Equity Interests in the Debtor would be reduced by the costs, fees, and expenses of the liquidation under chapter 7, which would include disposition expenses, the sliding scale fees and compensation of a chapter 7 trustee, the fees of the trustee's counsel and other professionals, and certain other costs arising from conversion of the chapter 11 case to a case under chapter 7. The monetization of the Debtor's assets and distributions to Creditors likely would suffer additional delays while the chapter 7 trustee and the trustee's professionals take time to get up to speed on the myriad relevant, many complex, matters to complete the administration of the Estates. Furthermore, a chapter 7 liquidation could further delay payments being made to Creditors because, in addition to the reasons described above, Bankruptcy Rule 3002(c) provides that conversion of a chapter 11 case to chapter 7 will trigger a new bar date for filing claims against the Estates. Not only could a chapter 7 liquidation delay distribution to Creditors, but it is possible that additional claims that were not asserted in the Chapter 11 Case or that were filed late could be filed against the Estate.

90. Accordingly, the Plan provides an equal or better potential recovery for Creditors and Equity Interest Holders as compared to a liquidation under chapter 7 of the Bankruptcy Code. Therefore, the Plan satisfies the "best interests" of creditors test under section 1129(a)(7) of the Bankruptcy Code.

I. Acceptance by Impaired Classes (Section 1129(a)(8))

91. A plan is accepted by the holders of the allowed claims of each class that voted if (i) at least two-thirds in dollar amount (the "Amount Requirement") and (ii) more than one-half in

number (the "Creditor-Numerosity Requirement") have voted to accept the plan. *See* 11 U.S.C. § 1126(c). A class of interests accepts the plan if the plan is accepted by holders of interests that hold at least two-thirds in amount of the allowed interests in the class that actually vote on a plan (together with the Creditor-Numerosity Requirement, the "Numerosity Requirement"). *See* 11 U.S.C. § 1126(d).

92. As discussed above, whether a class has accepted the plan is determined by reference to section 1126 of the Bankruptcy Code. Under section 1126(f), any unimpaired class is conclusively presumed to have accepted the plan.

93. Class 2 is Unimpaired under the Plan and is deemed to have accepted the Plan. Classes 1, 3, 4, 5, and 6 are Impaired and entitled to vote on the Plan. Classes 1, 3, 5 and 6 have accepted the Plan. No votes were received in Class 4 (empty class). Classes 7 and 8 are deemed to have rejected the Plan and not entitled to vote on the Plan. As discussed herein, the Debtor seeks Confirmation of the Plan under the cramdown provisions of section 1129(b).

J. Treatment of Priority Claims (Section 1129(a)(9))

94. Section 1129(a)(9) of the Bankruptcy Code contains a number of requirements concerning the payment of priority claims. 11 U.S.C. § 1129(a)(9). First, section 1129(a)(9)(A) requires that claims of a kind specified in section 507(a)(1), which gives first priority to certain administrative expenses, be paid in full in cash on the effective date of a plan. Second, section 1129(a)(9)(B) requires that claims of a kind specified in subsections 507(a)(3) through 507(a)(7) receive deferred cash payments equal to the allowed amount of such claims on the effective date. Finally, section 1129(a)(9)(C) requires that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—priority tax claims—must receive regular installment payments in cash of the total value equal to the allowed amount of such claim over a

period ending not later than five years after the petition date.

95. The Plan satisfies these requirements. Under section II.A.3 of the Plan, Holders of Allowed Administrative Expense Claims will receive payment in full. Under section II.A.5 of the Plan, each Holder of an Allowed Priority Tax Claim will, as elected by the Debtor or Reorganized Debtor, receive payment in full or receive such other treatment consistent with section 1129(a)(9).

96. Thus, the treatment of priority claims under the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

K. Acceptance by at Least One Impaired Class (Section 1129(a)(10))

97. Section 1129(a)(10) of the Bankruptcy Code requires as a condition of confirmation that if a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider. *See* 11 U.S.C. § 1129(a)(10). The voting members of Classes 1, 3, 5 and 6 are Impaired and have accepted the Plan. Therefore, the requirement of section 1129(a)(10) is satisfied.

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

98. Section 1129(a)(11) of the Bankruptcy Code provides that a plan may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtors or any successor to the debtors under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11).

99. Courts generally have held that the determination of the feasibility requirement

contemplates "'the probability of actual performance of the provisions of the plan.'"[24] Only a reasonable assurance of success is required.[25] Further, "a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility."[26]

100. Courts have identified the following nonexclusive factors as probative with respect to the feasibility of a plan:

(a) the adequacy of the capital structure;

(b) the earning power of the business;

(c) economic conditions;

(d) the ability of management;

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

(f) the provisions for adequate working capital; and

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

101. For purposes of determining whether the Plan satisfies the above-described feasibility standards, the Debtor has analyzed its ability to fulfill its obligations under the Plan and

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[24] *Clarkson v. Cooke Sale & Serv. Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985) (quoting *Chase Manhattan Mortg. & Realty Tr. v. Bergman (In re Bergman)*, 585 F.2d 1171, 1179 (2d Cir. 1978)). "The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." *Id.*; *see also In re Orlando Investors, L.P.*, 103 B.R. 593, 600 (Bankr. E.D. Pa. 1989) ("Feasibility does not require that substantial consummation of the plan be guaranteed; rather the plan proponent must demonstrate that there be a reasonable assurance of compliance with plan terms.").

[25] *In re T-H New Orleans Ltd P'ship,* 116 F.3d 790, 801 (5th Cir. 1997) (citations omitted) ("[T]he [bankruptcy] court need not require a guarantee of success . . . , [o]nly a reasonable assurance of commercial viability is required."); *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 Lakeside Glob. II, Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989) (noting that the feasibility standard "has been slightly broadened and contemplates whether the debtor can realistically carry out its plan").

[26] *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005); *Tribune*, 464 B.R. at 185.

have taken into consideration their estimated costs of administration. As part of this analysis, the DIP Agent, on behalf of the Reorganized Debtor and in in consultation with the Debtor, with the assistance of their respective financial and other advisors, has prepared financial projections for the Debtor for fiscal years 2025 - 2027 (the "Financial Projections"). These projections, and the assumptions on which they are based, are included in the Financial Projections annexed as **Exhibit E** to the Disclosure Statement. The Financial Projections are further discussed in the Fleming Declaration and the Economides Declaration.

102. The Plan effectuates a re-start of the Debtor's business operations focused on the Retained IP. The Debtor has adequate funding for its Plan obligations and for future operations in light of the type of business they operate. The Reorganized Debtor expects to operate its business and service its ordinary course operational obligations with operating cash flow and funds from the Capital Contributions (as modified, to provide up to $3.75 million principal amount), subject to the assumptions and limitations set forth in the Financial Projections.

103. As set out in the Fleming Declaration, at emergence, the total estimated Administrative Expense Claims are approximately $100,000.00.[27] Other payments due on the Effective Date total approximately $19.8 million].[28]

104. Based on all of the circumstances, the Financial Projections provide reasonable assurances that all distributions and payments required pursuant to the Plan to be made by the Reorganized Debtor will be made. For the reasons discussed herein and in Exhibit D to the Disclosure Statement, this deleveraging and the additional liquidity from the Capital Contributions equip the Reorganized Debtor for its post-emergence operations.

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[27] Fleming Declaration at ¶ 12.

[28] *Id.*

105. Accordingly, the Plan is feasible and has more than a reasonable likelihood of success, and so satisfies the feasibility requirements of section 1129(a)(11) of the Bankruptcy Code.

M. Payment of Certain Fees (Section 1129(a)(12))

106. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930, determined by the Court at the hearing on confirmation of a plan, be paid or that provision be made for their payment. *See* 11 U.S.C. § 1129(a)(12). All fees payable pursuant to Section 1930(a) of Title 28 of the United States Code, as determined by the Bankruptcy Court at the hearing pursuant to Section 1128 of the Bankruptcy Code, shall be paid for each quarter (including any fraction thereof) until the Chapter 11 Case is converted, dismissed or closed, whichever occurs first, responsibility for which shall belong to the Liquidating Trustee and Debtor, as applicable.(or when otherwise due in the ordinary course). *See* Plan § II.C. Consequently, section 1129(a)(12) of the Bankruptcy Code is satisfied.

N. Continuation of the Debtor's Obligations to Pay Retiree Benefits (Section 1129 (a)(13))[29]

107. Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continuation of retiree benefits at levels established by agreement or by court order pursuant to section 1114 of the Bankruptcy Code, for the duration of the period that the debtor has obligated itself to provide such benefits. *See* 11 U.S.C. § 1129(a)(13). The Debtor has no retiree benefit plans within the meaning of section 1129(a)(13) of the Bankruptcy Code.

O. The Plan Satisfies the "Cramdown" Requirements of Section 1129(b)(1)

108. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable

[29] The remaining elements of section 1129(a)—namely, subsections (a)(14) (domestic obligations), (15) (individual debtors), and (16) (nonprofit entities)—are inapplicable to the Debtor and will not be discussed. *See* 11 U.S.C. § 1129(a)(14), (a)(15), and (a)(16).

requirements of section 1129(a) are met other than section 1129(a)(8), a plan may be confirmed so long as the requirements set forth in section 1129(b) 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 debtor must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the nonaccepting impaired classes (the "Rejecting Classes").[30]

109. As discussed herein, Class 7 (Subordinated Claims) and Class 8 (Equity Interests) are not entitled to any recovery and thus are deemed to have rejected the Plan. To confirm the Plan, the Debtor must satisfy the Bankruptcy Code's "cramdown" requirements as to Classes 7 and 8 (the "Deemed Rejecting Classes").

i. The Plan Does Not Unfairly Discriminate Against the Deemed Rejecting Classes

110. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists.[31] Rather, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists.[32] In general, courts have held that a plan unfairly discriminates in violation of section 1129(b)(1) of the Bankruptcy Code only

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[30] 11 U.S.C. § 1129(b); *see also John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 157 n.5 (3d Cir. 1993); *Zenith*, 241 B.R. at 105 (explaining that "[w]here a class of creditors or shareholders has not accepted a plan of reorganization, the court shall nonetheless confirm the plan if it 'does not discriminate unfairly and is fair and equitable.'").

[31] *See In re 203 N. LaSalle St. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"), *rev'd on other grounds*, 526 U.S. 434 (1999).

[32] *See Genesis Health Ventures,.*266 B.R. at 611 ("The hallmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination."); *see also In re 222 Liberty Assoc.*, 108 B.R. 971, 990-991 (Bankr. E.D. Pa. 1990); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986) ("The language and legislative history of the statute provides little guidance in applying the 'unfair discrimination' standard . . . ."), *aff'd*, 843 F.2d 636 (2d Cir. 1988); *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 (Bankr. M.D. Tenn. 1989) (noting that courts "have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination").

if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so.[33] A threshold inquiry to assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment.[34]

111. The Court should find that the Plan does not unfairly discriminate against the Rejecting Classes. There are no equally situated classes that are receiving more favorable treatment under the Plan, and consequently there is no discrimination against the Deemed Rejecting Classes.

ii. The Plan Is Fair and Equitable as to the Deemed Rejecting Classes

112. 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.[35] This requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired rejecting class not receive any distribution under a plan on account of its junior claim or interest.[36]

113. Further, as noted above, there is no other class equally situated to the Deemed Rejecting Classes that will receive more favorable treatment under the Plan and no class junior to

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[33] *See In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661–62 (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), *aff'd*, 308 B.R. 672 (D. Del. 2004); *In re Idearc Inc.*, 423 B.R. 138, 171 (Bankr. N.D. Tex. 2009) ("[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.").

[34] *See In re Aleris Int'l*, No. 09-10478 (BLS), 2010 Bankr. LEXIS 2997, at *94–96 (Bankr. D. Del. May 13, 2010) (citing *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006)).

[35] *Bank of Am. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441–42 (1999) ("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, or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property.' That latter condition is the core of what is known as the 'absolute priority rule.'" (quoting 11 U.S.C. § 1129(b)(1), (b)(2)(B)).

[36] *Id.*

the Deemed Rejecting Classes will receive any distribution under the Plan. The foregoing treatment conforms to the absolute priority rule and is therefore fair and equitable within the meaning of section 1129(b).

114. Accordingly, the Plan satisfies the cramdown requirements of section 1129(b) of the Bankruptcy Code and may be confirmed notwithstanding the rejection of the Plan by the Deemed Rejecting Classes.

P. The Plan's Purpose is Consistent with the Bankruptcy Code (Section 1129(d))

115. Section 1129(d) of the Bankruptcy Code provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of section 5 of the Securities Act of 1933. 11 U.S.C. § 1129(d). The Plan is a plan of reorganization and its purpose is not avoidance of taxes or avoidance of the requirements of section 5 of the Securities Act of 1933, and there has been no filing by any governmental agency asserting such avoidance.

V.

WAIVER OF THE STAY OF THE CONFIRMATION ORDER

116. 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." Fed. R. Bankr. P. 3020(e). 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.

117. The Debtor submits that good cause exists for waiving and eliminating any stay of the Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the Confirmation Order will be effective immediately upon its entry. The Debtor submits that, based

on the circumstances of this case discussed above (including the global settlement among the key constituencies reflected therein), it is reasonable and amply justified for the Debtor and interested parties to proceed with implementing the Plan, to minimize the significant ongoing chapter 11 administrative costs, and to provide, as promptly as possible, distributions to the Debtor's Creditors.

VI.

CONCLUSION

WHEREFORE, for the reasons set forth in this Memorandum, the Debtor respectfully submit that the Plan fully satisfies all applicable requirements of the Bankruptcy Code and requests that the Court enter an order confirming the Plan substantially in the form attached hereto.

Dated: March 21, 2025

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