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COUNSEL TO DEBTORS AND DEBTORS IN POSSESSION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Chapter 11
Higher Ground Education, Inc., *et al.*,[1]	§	Case No.: 25-80121-11 (MVL)
Debtors.	§	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF (I) FINAL APPROVAL OF THE SECOND AMENDED DISCLOSURE STATEMENT FOR THE SECOND AMENDED JOINT PLAN OF REORGANIZATION OF HIGHER GROUND EDUCATION, INC., ITS AFFILIATED DEBTORS, AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS; AND (II) CONFIRMATION OF THE MODIFIED SECOND AMENDED JOINT PLAN OF REORGANIZATION OF HIGHER GROUND EDUCATION, INC., ITS AFFILIATED DEBTORS, AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal identification number, are: Higher Ground Education Inc. (7265); Guidepost A LLC (8540); Prepared Montessorian LLC (6181); Terra Firma Services LLC (6999); Guidepost Birmingham LLC (2397); Guidepost Bradley Hills LLC (2058); Guidepost Branchburg LLC (0494); Guidepost Carmel LLC (4060); Guidepost FIC B LLC (8609); Guidepost FIC C LLC (1518); Guidepost Goodyear LLC (1363); Guidepost Las Colinas LLC (9767); Guidepost Leawood LLC (3453); Guidepost Muirfield Village LLC (1889); Guidepost Richardson LLC (7111); Guidepost South Riding LLC (2403); Guidepost St Robert LLC (5136); Guidepost The Woodlands LLC (6101); Guidepost Walled Lake LLC (9118); HGE FIC D LLC (6499); HGE FIC E LLC (0056); HGE FIC F LLC (8861); HGE FIC G LLC (5500); HGE FIC H LLC (8817); HGE FIC I LLC (1138); HGE FIC K LLC (8558); HGE FIC L LLC (2052); HGE FIC M LLC (8912); HGE FIC N LLC (6774); HGE FIC O LLC (4678); HGE FIC P LLC (1477); HGE FIC Q LLC (3122); HGE FIC R LLC (9661); LePort Emeryville LLC (7324); AltSchool II LLC (0403). The Debtors' mailing address is 1321 Upland Dr. PMB 20442, Houston, Texas 77043.

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The above-captioned debtors and debtors in possession (collectively, the "**Debtors**") submit this memorandum of law (this "**Memorandum**") in support of (a) final approval of the *Second Amended Disclosure Statement for the Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 551] (as modified, amended, or supplemented from time to time, the "**Disclosure Statement**") and (b) confirmation of the *Modified Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 649] (as modified, amended, or supplemented from time to time, the "**Plan**").[2] In further support of Confirmation of the Plan, contemporaneously herewith, the Debtors have filed: (1) the *Declaration of Marc D. Kirshbaum in Support of (I) Final Approval of the Second Amended Disclosure Statement for the Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors; and (II) Confirmation of the Modified Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* (the "**Kirshbaum Declaration**"); (2) the *Declaration* of *Sean Corwen in Support of Confirmation the Modified Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* (the "**Corwen Declaration**"); and (3) the *Declaration of Adam J. Gorman with Respect to the Tabulation of Votes on the Second Amended Joint Plan of Reorganization of Higher Ground*

[2] Capitalized terms used but not defined in this Memorandum shall have the meanings ascribed to such terms in the Plan or the *Order (I) Conditionally Approving the Disclosure Statement; (II) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing; (III) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures; (IV) Approving the Solicitation and Notice Procedures; and (V) Granting Related Relief* [Docket No. 568] (the "**Solicitation Motion Order**"), as applicable.

Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors [Docket No. 652] (the "**Voting Report**").

PRELIMINARY STATEMENT

I. Overview of the Chapter 11 Cases.

1. From their inception in 2016 through the beginning of 2025, the Debtors grew to over 150 schools, becoming the largest owner and operator of Montessori schools in the world. The Debtors' mission was to modernize and mainstream the Montessori education movement. In addition to owning and operating the Schools, the Debtors provided training and consulting services to Montessori schools around the world. The Debtors sought to offer an end-to-end experience that covers the entire lifecycle of a family at school, virtually, and at home, from birth through secondary education—enabled by next-gen, accredited Montessori instruction.

2. On June 17, 2025, and June 18, 2025 (collectively, the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 (collectively, the "**Chapter 11 Cases**").[3] The Debtors remain in possession of their property and are managing their businesses as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. The Court has not appointed a trustee, and the official committee of unsecured creditors was appointed on July 8, 2025 [Docket No. 158] (the "**Committee**").

II. The Plan Settlement and Negotiations Related Thereto.

3. In the months leading up to the Petition Date, the Debtors worked with several of their key stakeholders (the "**Supporting RSA Parties**")[4] to formulate a joint pre-arranged

[3] Information on the Debtors, their businesses, and the events leading up to these Chapter 11 Cases is in the *Declaration of Jonathan McCarthy in Support of First Day Motions* [Docket No. 15] and is incorporated herewith.

[4] The "Supporting RSA Parties" included: (i) 2HR Learning, Inc., (ii) YYYYY, LLC, (iii) Guidepost Global, Education, (iv) Learn Capital Venture Partners IV, L.P. ("**Learn**"), (v) CEA, (vi) Venn Growth GP Limited LP ("**Venn**"), (vii) Venture Lending & Leasing IX, Inc. and WTI Fund X (together, "**WTI**"), (viii) Yu Capital LLC,

chapter 11 plan pursuant to a restructuring support agreement (the "**RSA**"). Shortly after the commencement of these Chapter 11 Cases, on June 26, 2025, the Debtors filed their *Joint Plan of Reorganization of Higher Ground Education, Inc. and its Affiliated Debtors* [Docket No. 94] (the "**RSA Plan**") and *Disclosure Statement for the Joint Plan of Reorganization of Higher Ground Education, Inc. and its Affiliated Debtors* [Docket No. 97] (the "**RSA Disclosure Statement**"), in accordance with the RSA.

4. After its appointment, however, the Committee raised various concerns with the RSA Plan. Thus, in an effort to avoid the costs and uncertainty of a protracted contested confirmation process, the Debtors, the Committee, the DIP Lenders, and other key stakeholders agreed to explore terms for a consensual plan through mediation and settlement negotiations. On August 8, 2025, the Debtors hosted a settlement conference with the DIP Lenders, the Committee and certain Supporting RSA Parties. Following that conference, the parties agreed to plan mediation (the "**Mediation**") with retired U.S. Bankruptcy Judge Russell Nelms as the mediator. The Debtors hosted the Mediation on August 19 and August 20, 2025. While the Mediation did not result in a settlement, the parties were able to narrow the scope of the outstanding issues. Following the Mediation, the parties continued to engage in settlement negotiations, which ultimately led to a settlement in principle that resolved the Committee's concerns (the "**Plan Settlement**").

5. To that end, on September 12, 2025, the Debtors exercised their "fiduciary out" under the RSA and notified the Supporting RSA Parties that the Debtors were terminating the RSA to pursue confirmation of a new plan, which embodies the Plan Settlement between Debtors,

YuATI LLC, YuFICB LLC, YuHGE A LLC, NTRC Equity Partners LP (collectively, "**Yu Capital**"), and (ix) Ramandeep (Ray) Girn and Rebecca Girn (the "**Girns**").

Committee, and a majority of the Supporting RSA Parties (the "**Settlement Parties**").[5] Specifically, the Plan Settlement contemplates:

- Sources of Consideration for Plan Distributions. The Debtors, DIP Lenders, and Settlement Parties are contributing the following: (a) the Plan Sponsor Consideration, (b) the Surplus DIP Cash, (c) the Settlement Payment, (d) any D&O Claim Resolution, (e) the Liquidating Trust Assets, and (f) D&O Insurance Policies.

- Creation of Liquidating Trust. The Plan will provide for the creation of a Liquidating Trust to hold and monetize certain assets for the benefit of the Liquidating Trust Beneficiaries.

- Settlement Party Payment. On the Effective Date, the Settlement Parties shall pay or cause to be paid to the Debtors or Liquidating Trustee, as applicable, aggregate Cash in the amount of $1,950,000 (the "**Settlement Party Payment**"). The amount of the Settlement Party Payment shall be reduced on a dollar-for-dollar basis by the amount of the Excess Surplus DIP Cash. For example, if the Excess Surplus DIP Cash is $100,000, then the Settlement Party Payment will be reduced by $100,000 to $1,895,000.

- Settlement Party Payment True-Up Mechanism. In the event the Debtors or the Liquidating Trustee, as applicable, receive Excess Surplus DIP Cash after the Settlement Parties contribute the Settlement Party Payment, then the Debtors or the Liquidating Trustee, as applicable, shall return such Excess Surplus DIP Cash to Reorganized HGE or otherwise true-up such Excess Surplus DIP Cash as agreed upon by the Settlement Parties.

- Plan Sponsor Consideration. On the Plan Effective Date, the Plan Sponsor shall distribute the Plan Sponsor Consideration, if any, to the Liquidating Trust.

- Junior DIP Lender Consideration. On the Effective Date, in the event the Junior DIP Lender has not fully funded the Junior DIP Loan, the Junior DIP Lender shall contribute all remaining amounts outstanding and available to the Debtors under the Junior DIP Loan to the Liquidating Trust. Notwithstanding the foregoing, the Debtors shall be permitted to setoff valid amounts owed by the Debtors to the Junior DIP Lender against the Junior DIP Lender's remaining funding obligations under the Junior DIP Loan.

[5] The Settlement Parties include the following entities: 2HR Learning, Inc.; YYYYY, LLC; Guidepost Global; Learn; CEA; Yu Capital; WTI; TNC; and each of the aforementioned parties' Related Parties; provided, however, that no Non-Released D&O shall be considered a Settlement Party. *See* Plan, Art. 1.1.139. The Girns are not considered Settlement Parties.

- D&O Claim Resolution. On the Effective Date, all of the Debtors' Retained Causes of Action against all Non-Released D&Os shall be transferred and assigned to, and shall vest in, the Liquidating Trust for the benefit of the Liquidating Trust Beneficiaries.[6]

- Settlement Party Release of Certain Claims. On the Effective Date, unless as otherwise expressly set forth in the Plan, the Settlement Parties shall release and waive all Claims and Causes of Action against the Debtors' Estates.

- Settlement Party Mutual Releases. On the Effective Date and upon payment in full of the Settlement Party Payment, the Releasing Parties and the Settlement Parties shall be mutually released as set forth in Article 10.3 of the Plan.

III. Procedural History and Solicitation of the Plan.

A. Procedural History of the Plan.

6. On June 20, 2025, the Court entered the *Order (I) Authorizing the Debtors to Serve a Consolidated List of Creditors; (II) Authorizing the Debtors to Redact Certain Personal Identification Information; (III) Approving the Form and Manner of Notifying Creditors of the Commencement of the Debtors' Chapter 11 Cases and Bar Dates; and (IV) Granting Related Relief* [Docket No. 57], which established August 7, 2025, as the General Claims Bar Date, and December 15, 2025, as the Governmental Bar Date, and provided that any Holder of a Claim that fails to timely submit a Proof of Claim by the applicable bar date shall not be treated as a creditor with respect to such claim for the purposes of either (a) voting on any plan of reorganization filed in these Chapter 11 Cases or (b) participating in any distribution in the Debtors' Chapter 11 Cases on account of such Claim.

7. On June 26, 2025, and June 27, 2025, the Debtors filed the (a) the RSA Plan, (b) RSA Disclosure Statement, and (c) *Debtors' Motion for Entry of an Order (I) Conditionally Approving the Disclosure Statement; (II) Scheduling a Combined Disclosure Statement Approval*

[6] *See* Plan, Art. 4; *see also* Kirshbaum Decl. ¶ 37.

and Plan Confirmation Hearing; (III) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures; (IV) Approving the Solicitation and Notice Procedures; and (V) Granting Related Relief [Docket No. 98] (the "**Solicitation Motion**").

8. On October 6, 2025, the Debtors and the Committee (together, the "**Proponents**") filed (a) the *First Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 528] (the "**First Amended Plan**"), (b) the *First Amended Disclosure Statement for the First Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 530] (the "**First Amended Disclosure Statement**"), and (c) the *Notice of Filing of Revised Proposed Order (I) Conditionally Approving the Disclosure Statement; (II) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing; (III) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures; (IV) Approving the Solicitation and Notice Procedures; and (V) Granting Related Relief* [Docket No. 531]. The First Amended Plan and First Amended Disclosure Statement incorporated the terms of the Plan Settlement.

9. On October 13, 2025, the Proponents filed (a) the *Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 549] (the "**Second Amended Plan**") and (b) the *Second Amended Disclosure Statement for the Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 551] (the "**Disclosure Statement**"). The Second Amended Plan was revised to reflect the Girns' unexpected objection to the Plan Settlement, despite actively participating in settlement discussions with the parties. However, as discussed below, after the

hearing on conditional approval of the Disclosure Statement, the Debtor, the Committee, and the Settlement Parties were able to reach an agreement with the Girns regarding treatment of their Claims. That agreement is embodied in the Plan (which is substantially the same as that included in the First Amended Plan).

10. On October 13, 2025, the Debtors filed the *Notice of Filing of Further Revised Proposed Order (I) Conditionally Approving the Disclosure Statement; (II) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing; (III) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures; (IV) Approving the Solicitation and Notice Procedures; and (V) Granting Related Relief* [Docket No. 552].

11. On October 15, 2025, the Court entered the *Order (I) Conditionally Approving the Disclosure Statement; (II) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing; (III) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures; (IV) Approving the Solicitation and Notice Procedures; and (V) Granting Related Relief* (the "**Solicitation Motion Order**") [Docket No. 568] approving the Disclosure Statement on a conditional basis and the proposed procedures for solicitation of the Plan and related notices, forms, and Ballots (collectively, the "**Solicitation Packages**").

12. On November 10, 2025, the Proponents filed the *Notice of Filing of Initial Plan Supplemen*t [Docket No. 631] (the "**Initial Plan Supplement**"), which included: (a) the Cancelled Equity Interests, (b) the Schedule of Designated EB-5 Entities, (c) the Schedule of Retained Causes of Action, (d) the Liquidating Trust Agreement and identify of the Liquidating Trustee, (e) the Schedule of Transferred Executory Contracts and Unexpired Leases, (f) the Schedule of Reorganized HGE Contracts and Leases, (g) the Schedule of Reorganized HGE Assets, (h) the

Reorganized HGE Subsidiaries, (i) the identity and compensation of insiders employed or retained by Reorganized HGE, and (j) the election of subscription option.

13. On November 14, 2025, the Debtors filed the *Notice of Filing of Amended Plan Supplemen*t [Docket No. 634] (the "**Amended Plan Supplement,**" together with the Initial Plan Supplement, the "**Plan Supplement**"), which included: (a) Reorganized HGE Corporate Documents and identities of the proposed directors and officers of Reorganized HGE and HGE Subsidiaries and (b) the amended Schedule of Transferred Executory Contracts and Unexpired Leases.

14. On November 20, 2025, the Proponents filed the *Modified Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 649] and *Notice of Filing of Proposed Order: (I) Approving the Debtors' Disclosure Statement and (II) Confirming the Modified Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 650] (as may be amended, modified, or supplemented, the "**Proposed Confirmation Order**").

B. The Solicitation and Noticing Process.

15. Pursuant to the Solicitation Motion Order, the Debtors caused the Claims and Noticing Agent to distribute (a) the Solicitation Packages to all Holders of Claims entitled to vote on the Plan—*i.e.*, Holders of Bridge CN-3 Secured Claims (Class 1), WTI Secured Lender Claims (Class 2), CN-1 Note Claims (Class 3), CN-2 Note Claims (Class 4), CN-3 Note Claims (Class 5), and General Unsecured Claims (Class 8) (collectively, the "**Voting Classes**"), and (b) the Notice of Non-Voting Status, which included the Opt-Out Form and Combined Notice, to Holders of Claims and Interests not entitled to vote—*i.e.,* Class 6 (Other Secured Claims), Class 7 (Non-Priority Tax Claims), Class 9 (Intercompany Claims), Class 10 (Equity), and Class 11 (Subsidiary

Equity Interests). The solicitation materials were distributed on October 17, 2025, in accordance with the Solicitation Motion Order.[7]

16. The Debtors also caused the Publication Notice (as defined in the Solicitation Motion) to be published in *The Wall Street Journal* on October 17, 2025, in accordance with the Solicitation Motion Order.[8] The Publication Notice contained the date of the Combined Hearing, instructions on how to access copies of the Debtors' proposed Disclosure Statement and proposed Plan, information on voting on the Plan, and the Objection Deadline.

17. In compliance with the Bankruptcy Code and the Solicitation Motion Order, only Holders of Claims in Impaired Classes entitled to receive or retain property on account of such Claims were permitted to vote to accept or reject the Plan.[9] Holders of Claims and Interests were not entitled to vote if their rights are (a) Unimpaired under the Plan (in which case such Holders were conclusively presumed to accept the Plan pursuant to section 1126(f) of the Bankruptcy Code) or (b) Impaired and such Holders are not entitled to receive any distribution under the Plan (in which case such Holders were conclusively deemed to reject the Plan pursuant to section 1126(g) of the Bankruptcy Code).

Class	Claims and Interests	Status	Voting Rights
Class 1:	Bridge CN-3 Secured Lender Claim	Impaired	Entitled to Vote
Class 2:	WTI Secured Lender Claim	Impaired	Entitled to Vote
Class 3	CN-1 Note Claims	Impaired	Entitled to Vote
Class 4:	CN-2 Note Claims	Impaired	Entitled to Vote
Class 5:	CN-3 Note Claims	Impaired	Entitled to Vote
Class 6:	Other Secured Claims	Unimpaired	Deemed to Accept; Not Entitled to Vote
Class 7:	Non-Tax Priority Claims	Unimpaired	Deemed to Accept; Not Entitled to Vote

7 *See Certificate of Service of Solicitation Materials* [Docket No. 619].

8 *See Notice of Publication* [Docket No. 623].

9 *See* 11 U.S.C. § 1126.

Class	Claims and Interests	Status	Voting Rights
Class 8:	General Unsecured Claims	Impaired	Entitled to Vote
Class 9:	Intercompany Claims	Impaired	Deemed to Reject; Not Entitled to Vote
Class 10:	Equity	Impaired	Deemed to Reject; Not Entitled to Vote
Class 11:	Subsidiary Equity Interests	Impaired	Deemed to Reject; Not Entitled to Vote

18. The deadline for all holders of Claims entitled to vote on the Plan to submit their Ballots and the deadline to file objections to Confirmation to the Plan and final approval of the Disclosure Statement was November 17, 2025, at 5:00 p.m. (prevailing Central Time). Contemporaneously herewith, the Debtors filed the Voting Report, which is summarized below in detail. The Combined Hearing is scheduled for November 24, 2025, at 1:30 p.m., prevailing Central Time.

19. As set forth above and in the Voting Report, Holders of Claims in Classes 1, 2, 3, 4, 5 and 8 were entitled to vote to accept or reject the Plan. The voting results, as reflected in the Voting Report, are summarized as follows:[10]

CLASSES	TOTAL BALLOTS RECEIVED			
	Accept		Reject	
	AMOUNT (% of Amount/ Shares Voting)	NUMBER (% of Number Voting)	AMOUNT (% of Amount/ Shares Voting)	NUMBER (% of Number Voting)
Class 1 – Bridge CN-3 Secured Lender Claim	$2,075,821.92 (100%)	2 (100%)	0 (0%)	0 (0%)
Class 2 – WTI Secured Lender Claim	$4,410,970.83 (100%)	2 (100%)	0 (0%)	0 (0%)
Class 3 – CN-1 Note Claims	$9,594,054.65 (100%)	8 (100%)	0 (0%)	0 (0%)
Class 4 – CN-2 Note Claims	$34,955,324.67 (100%)	1 (100%)	0 (0%)	0 (0%)
Class 5 – CN-3 Note Claims	$29,192,959.73 (100%)	2 (100%)	0 (0%)	0 (0%)
Class 8 –General Unsecured Claims	$139,694,667.04 (59.28%)	66 (81.48%)	$95,963,757.62 (40.72%)	15 (18.52%)

[10] *See* Voting Report.

OVERVIEW OF THE OBJECTIONS AND RESPONSES

20. The Plan initially received four (4) formal objections from the Tennessee Department of Revenue,[11] U.S. Trustee,[12] certain EB5 Claimants,[13] and Hallandale.[14] The Proponents believe they have resolved the TN Department Objection through consensual language added to the Proposed Confirmation Order. The EB5 Objection was resolved through consensual language added the Plan, and that objection has since been withdrawn.[15] The Proponents further believe that they have addressed some of the concerns raised in the UST Objection. Hallandale's Objection remains outstanding.

21. A chart summarizing all such objections and comments and the Debtors' responses is attached hereto as **Exhibit A**. The Debtors will continue working to resolve outstanding objections, where possible, in advance of the Combined Hearing. To the extent not consensually resolved, the Debtors submit that these objections should be overruled and that the Plan should be confirmed.

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[11] Tennessee Department of Revenue's Objection to Confirmation of the Second Amended Joint Plan of Reorganization of Higher Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors [Docket No. 630] (the "**TN Department Objection**").

[12] United States Trustee's Objection to (I) Final Approval of Second Amended Disclosure Statement for Second Amended Joint Plan of Reorganization of Higher Ground Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors and (II) Confirmation of Second Amended Joint Plan of Reorganization of Higher Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors [Docket No. 640] (the "**UST Objection**").

[13] *Duc Viet Nguyen, Thuy Thi Nguyen, Dixit Kishorkumar Vora's Objection to Confirmation of the Second Amended Joint Plan of Reorganization and Final Approval of the Second Amended Disclosure Statement* [Docket No. 642] (the "**EB5 Objection")** filed by Duc Viet Nguyen, Thuy Thi Nguyen, Dixit Kishorkumar Vora (collectively, the "**EB5 Claimants**").

[14] *214 E. Hallandale Beach LLC's Objection to Confirmation of the Second Amended Joint Plan of Reorganization of Higher Education, Inc., Its Affiliated Debtors, and the Official Committee of Unsecured Creditors* [Docket No. 643] (the "**Hallandale Objection**") filed by 214 E. Hallandale Beach LLC ("**Hallandale**"). Hallandale is one of the Committee members. *See* Docket No. 158.

[15] *See Notice of Withdrawal of Duc Viet Nguyen, Thuy Thi Thu Nguyen, and Dixit Kishorkumar Vora's Objection to Confirmation of the Second Amended Joint Plan of Reorganization and to Final Approval of the Second Amended Disclosure Statement* [Docket No. 651].

ARGUMENT

22. The Debtors submit that the Plan and Disclosure Statement satisfy the applicable provisions of the Bankruptcy Code. And, accordingly, for the reasons set forth herein and in the Confirmation Declarations, which will be presented at the Combined Hearing, the Debtors respectfully request that the Court (a) approve the adequacy of the Disclosure Statement on a final basis, (b) confirm the Plan, and (c) overrule the Objections.

I. The Disclosure Statement Contains "Adequate Information" as Required by Section 1125 of the Bankruptcy Code, and the Debtors Complied with Applicable Notice Requirements.

A. The Disclosure Statement Contains Adequate Information.

23. The primary purpose of a disclosure statement is to provide "adequate information" that allows parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan.[16] "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[17] Courts within the Fifth Circuit and elsewhere acknowledge

[16] *See, e.g.*, *In re J.D. Mfg., Inc.*, No. 07-36751, 2008 WL 4533690, at *2 (Bankr. S.D. Tex. Oct. 2, 2008) ("'Adequacy' of information is a determination that is relative both to the entity (e.g. assets/business being reorganized or liquidated) and to the sophistication of the creditors to whom the disclosure statement is addressed."); *In re U.S. Brass Corp.*, 194 B.R. 420, 423 (Bankr. E.D. Tex. 1996) ("The purpose of the disclosure statement is . . . to provide enough information to interested persons so they may make an informed choice. . . ."); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 831 (Bankr. W.D. Tex. 1991) ("A court's legitimate concern under Section 1125 is assuring that hypothetical reasonable investors receive such information as will enable them to evaluate for *themselves* what impact the information might have on their claims and on the outcome of the case . . . ."); *see also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321–22 (3d Cir. 2003) ("Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing adequate information to enable a creditor to make an informed judgment about the Plan.") (internal quotation marks omitted); *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 100 (3d Cir. 1988) ("§ 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote.").

[17] 11 U.S.C. § 1125(a)(1) ("'[A]dequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records."); *Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 518 (5th Cir. 1998) (citations omitted) ("The legislative history of § 1125 indicates that, in determining what constitutes 'adequate information' with respect to a particular disclosure statement, both the kind and form of information are left essentially to the judicial discretion of the court and that the information required will necessarily be governed by the circumstances of the case."); *Floyd v. Hefner*, No. CIV.A. H-03-5693, 2006 WL 2844245, at *30 (S.D. Tex. Sept. 29, 2006) (noting that what constitutes "adequate information" is a flexible standard); *In re*

that determining what constitutes "adequate information" for the purpose of satisfying section 1125 of the Bankruptcy Code resides within the broad discretion of the court.[18]

24. Courts look for certain information when evaluating the adequacy of the disclosures in a proposed disclosure statement, including:

i. the events which led to the filing of a bankruptcy petition;

ii. the relationship of a debtor with the affiliates;

iii. a description of the available assets and their value;

iv. the anticipated future of the company;

v. the source of information stated in the disclosure statement;

vi. the present condition of a debtor while in chapter 11;

vii. the claims asserted against a debtor;

viii. the estimated return to creditors under a chapter 7 liquidation;

ix. the future management of a debtor;

x. the chapter 11 plan or a summary thereof;

xi. the financial information, valuations, and projections relevant to the claimants' decision to accept or reject the chapter 11 plan;

xii. the information relevant to the risks posed to claimants under the plan;

xiii. the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;

xiv. the litigation likely to arise in a nonbankruptcy context; and

Applegate Prop., Ltd., 133 B.R. at 829 ("The issue of adequate information is usually decided on a case by case basis and is left largely to the discretion of the bankruptcy court.").

[18] *See, e.g.*, *Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court."); *Kirk v. Texaco, Inc.*, 82 B.R. 678, 682 (S.D.N.Y. 1988) ("The legislative history could hardly be more clear in granting broad discretion to bankruptcy judges under § 1125(a).").

xv. the tax attributes of a debtor.[19]

25. The Disclosure Statement, which was previously approved on a conditional basis, contains adequate information.[20] The Disclosure Statement contains descriptions and summaries of, among other things: (a) both the Plan and the Debtors' related reorganization efforts;[21] (b) the relevant events and circumstances preceding and causing the commencement of these Chapter 11 Cases;[22] (c) the key terms of the Plan Settlement;[23] (d) the key terms of the Plan, including the means for implementation and funding;[24] (e) estimates of the anticipated distributions to be received by Holders of Allowed Claims in each Class;[25] (f) risk factors affecting the Plan, including risks related to the transactions contemplated therein and recoveries under the Plan;[26] (g) the liquidation analysis setting forth the estimated return that Holders of Claims and Interests would receive in a hypothetical chapter 7 case;[27] (h) information about certain security law matters;[28] and (i) federal tax law consequences of the Plan.[29]

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[19] *In re U.S. Brass Corp.*, 194 B.R. at 424–25 (listing factors courts have considered in determining the adequacy of information provided in a disclosure statement); *Westland Oil Dev. Corp. v. MCorp Mgmt. Sols., Inc.*, 157 B.R. 100, 102 (S.D. Tex. 1993) (same); *In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (same); *In re Metrocraft Publ'g Servs., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (same). Disclosure regarding all topics "is not necessary in every case." *In re U.S. Brass Corp.*, 194 B.R. at 425; *see also In re Phx. Petroleum*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) ("[C]ertain categories of information which may be necessary in one case may be omitted in another . . . .").

[20] *See* Solicitation Motion Order [Docket No. 568].

[21] *See* Disclosure Statement, Art. V.

[22] *See id.*, Art. IV.

[23] *See id.*, Art. VI.

[24] *See id.*, Art. VII.

[25] *See id.*, Art. III.E & Exhibit B.

[26] *See id.*, Art. X.

[27] *See id.*, Exhibit B.

[28] *See id.*, Art. XI.

[29] *See id.*, Art. XII.

26. As discussed above, section 1125(a) requires only "adequate information" sufficient for parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan. Accordingly, the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code and should be approved on a final basis.

B. The Debtors Complied with the Applicable Notice Requirements.

27. In addition to conditionally approving the adequacy of the Disclosure Statement, the Solicitation Motion Order granted final relief regarding solicitation and noticing procedures and materials including, among other things: (a) approving the Solicitation and Voting Procedures including the form of Ballot; (b) approving the forms of the Combined Hearing Notice, Notice of Filing of the Plan Supplement, Non-Voting Status Notice, Publication Notice, and Opt-Out Form; and (c) approving certain dates and deadlines with respect to the Plan and Disclosure Statement. The Debtors complied with the procedures and timeline approved by the Solicitation Motion Order.[30]

C. Solicitation of the Plan Complied with the Bankruptcy Code and Was in Good Faith.

28. Section 1125(e) of the Bankruptcy Code provides that "a person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title . . . is not liable" on account of such solicitation for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan.[31]

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[30] *See*, *e.g. Certificate of Service of Solicitation Materials* [Docket No. 619]; *Notice of Publication* [Docket No. 623].

[31] 11 U.S.C. § 1125(e).

29. As set forth in the Disclosure Statement and Solicitation Motion, and as demonstrated by the Debtors' compliance with the Solicitation Motion Order,[32] the Debtors at all times engaged in arm's-length, good faith negotiations and took appropriate actions in connection with the solicitation of the Plan in compliance with section 1125 of the Bankruptcy Code. Therefore, the Debtors request that the Bankruptcy Court grant the parties, including the 1125(e) Exculpation Parties,[33] the protections provided under section 1125(e) of the Bankruptcy Code.

30. For the foregoing reasons, the Court should enter an order approving the Disclosure Statement on a final basis.

D. Modifications to the Plan Do Not Require Re-Solicitation.

31. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify a plan "at any time" before confirmation.[34] When a plan is modified, all stakeholders that previously accepted a plan are deemed to have accepted such plan as modified.[35] Bankruptcy Rule 3019(a) implements section 1127(d) by providing that such modifications do not require re-solicitation if previously accepting creditors either (a) are not materially adversely affected by such modifications or (b) consent in writing to any materially adverse modifications.[36]

32. Courts consistently interpret Bankruptcy Rule 3019(a) to only require re-solicitation of "materially" adverse modifications not otherwise consented to by previously accepting creditors.[37] A plan modification is not material unless it "so affects a creditor or interest

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[32] *See* Voting Report.

[33] *See infra* Part III.D; Plan, Art. 10.4.

[34] 11 U.S.C. § 1127(a).

[35] 11 U.S.C. § 1127(d).

[36] Fed. R. Bankr. P. 3019(a).

[37] *See In re New Power Co.*, 438 F.3d 1113, 1117–18 (11th Cir. 2006) (explaining that a party's "vote for or against a plan" may be applied "to a modified Plan unless the modification materially and adversely changes" the party's treatment); *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 857 (Bankr. S.D. Tex. 2001) (finding that nonmaterial modifications that do not adversely impact parties who have previously voted on the plan do not

holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance."[38] In short, courts allow plan proponents to make nonmaterial, non-adverse, or consensual changes to a plan without further disclosure. Plan modifications that improve, maintain, or only minimally reduce the recovery of affected creditors do not require re-solicitation. Similarly, creditors' prior acceptances may be enforced without re-solicitation if such creditors agree to their reduced distribution as part of the modification process.[39]

33. The Debtors made certain modifications reflected in the Plan (the "**Modifications**"). A majority of these Modifications reflect the agreement between the Debtors, the Committee, the Settlement Parties, and the Girns with respect to the treatment of the Girns' Claims under the Plan. Specifically, the Girns ***agreed*** to waive any rights to distributions on account of their Claims under the Plan. These Modifications do not materially diminish or alter any other creditor's substantive rights under the Plan, but instead, provide certainty as to the distributions for the Holders of Allowed General Unsecured Claims.

34. The other Modifications were intended to resolve certain formal and informal objections to the Plan, and do not materially adversely affect any parties' substantive rights. In particular, the modified Plan now contains agreed-upon language that resolves the EB5 Objection

require additional disclosure or re-solicitation); *In re Caremax, Inc.*, No. 24-80093 (MVL) (Bankr. N.D. Tex. Jan. 31, 2025) [Docket No. 587] (confirming plan with immaterial modifications and stating that such plan did not require re-solicitation); *In re Kidkraft, Inc.*, No. 24-80045 (MVL) (Bankr. N.D. Tex. June 24, 2024) [Docket No. 241] (same).

[38] *In re Am. Solar King Corp.*, 90 B.R. 808, 824 (Bankr. W.D. Tex. 1988) ("[T]he statute permits modifications that might technically have a negative impact on claimants where the modifications are not substantial."); *see also In re Sentinel Mgmt. Group, Inc.*, 398 B.R. 281, 302 (Bankr. N.D. Ill. 2008) (holding that one percent reduction of one class's distribution was not sufficiently material to require re-solicitation).

[39] *See, e.g.*, *In re Aleris Int'l, Inc.*, No. 09–10478, 2010 WL 3492664, at *31–32 (Bankr. D. Del. May 13, 2010) (holding that plan modifications that did not adversely affect any creditor other than consenting parties did not require re-solicitation); *In re Pisces Energy, LLC*, 2009 WL 7227880, at *10 (Bankr. S.D. Tex. Dec. 21, 2009) (same).

and part of the U.S. Trustee's Objection.[40] These Modifications are supported by all of the Debtors' key constituencies including the DIP Lenders, the Committee, and the Settlement Parties.[41] All Modifications were expressly contemplated in the Disclosure Statement in which the Proponents retained the right to modify the Plan without the need for re-solicitation.[42] Accordingly, no additional solicitation or disclosure is required on account of the Modifications. All creditors in the Voting Classes who accepted the Plan should be deemed to have accepted the Plan as modified.

II. The Plan Satisfies Each Requirement for Confirmation.

35. To confirm the Plan, the Court must find that the Proponents have satisfied the requirements of section 1129 of the Bankruptcy Code.[43] As described in detail below, the Plan complies with all relevant provision of the Bankruptcy Code and all other applicable law.

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

36. Under section 1129(a)(1) of the Bankruptcy Code, a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]."[44] 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

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[40] *See* Plan, Art. 1.1.123 (resolving the UST Objection as to the scope of the "Related Parties"); Art. 4.8 (including the language requested by EB5 Claimants).

[41] Kirshbaum Decl. ¶ 17.

[42] *See* Disclosure Statement, Art. VII.F.1, VII.Q, IX.H.

[43] *See Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd. II* (*In re Briscoe Enters., Ltd. II*), 994 F.2d 1160, 1165 (5th Cir. 1993) (holding "that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown"); *In re Briscoe Enters., Ltd. II*, 994 F.2d 1160, 1165 (5th Cir. 1993) ("The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof under both § 1129(a) and in a cramdown."); *In re Cypresswood Land Partners, I*, 409 B.R. 396, 422 (Bankr. S.D. Tex. 2009); *In re J T Thorpe Co.*, 308 B.R. 782, 785 (Bankr. S.D. Tex. 2003). Preponderance of the evidence has been described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("The preponderance-of-the-evidence standard results in roughly equal allocation of the risk of error between litigants.") (citations omitted).

[44] 11 U.S.C. § 1129(a)(1).

contents of a plan of reorganization, respectively.[45] As explained below, the Plan complies with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as well as other applicable provisions.

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

37. 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.[46]

38. For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be grouped in the same class.[47] Instead, claims or interests designated to a particular class must be substantially similar to each other.[48] The Fifth Circuit has recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[49]

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[45] S. Rep. No. 95-989, at 126, *reprinted in* 1978 U.S.C. C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C. C.A.N. 5963, 6368 (1977); *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 Sections 1122 and 1123."); *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008) (noting that a plan must comply with Sections 1122 and 1123).

[46] 11 U.S.C. § 1122(a).

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

[48] *In re Vitro Asset Corp.*, No. 11-32600-HDH, 2013 WL 6044453, at *5 (Bankr. N.D. Tex. Nov. 14, 2013) ("[A] plan may provide for multiple classes of claims or interests so long as each claim or interest within a class is substantially similar to other claims or interests in that class.").

[49] *Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1167 (5th Cir. 1993) (recognizing that "there may be good business reasons to support separate classification"); *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 Idearc Inc.*, 423 B.R. 138, 160 (Bankr. N.D. Tex. 2009) ("Significantly, a plan proponent is afforded significant flexibility in classifying claims under section 1122(a) of the Bankruptcy Code provided there

39. The Plan satisfies these requirements because each Class under the Plan is comprised solely of "substantially similar claims or interests." Indeed, the Plan places Claims and Interests into eleven (11) separate Classes, with each Class differing from the Claims and Interests in each other Class in a legal or factual nature or based on other relevant criteria.[50] Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

(a) Class 1: Bridge CN-3 Secured Lender Claim;

(b) Class 2: WTI Secured Lender Claim;

(c) Class 3: CN-1 Note Claims;

(d) Class 4: CN-2 Note Claims;

(e) Class 5: CN-3 Note Claims;

(f) Class 6: Other Secured Claims;

(g) Class 7: Non-Tax Priority Claims;

(h) Class 8: General Unsecured Claims;

(i) Class 9: Intercompany Claims;

(j) Class 10: Equity; and

(k) Class 11: Subsidiary Equity Interests.

40. Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims and Interests in such Class. Moreover, the Plan's classification generally tracks the Debtors' prepetition capital structure. In addition, valid business,

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is a reasonable basis for the classification scheme and all claims within a particular class are substantially similar."), *aff'd*, 662 F.3d 315 (5th Cir. 2011); *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 Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) ("[T]he only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan.").

[50] Plan, Art. 3.

legal, and factual reasons justify the separate classification of the particular Claims or Interests into the Classes created under the Plan, and no unfair discrimination exists between or among holders of Claims and Interests.[51] Namely, the Plan separately classifies the Claims because each holder of such Claims or Interests may hold (or may have held) rights in the Estates legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification.[52]

41. For example, Claims (rights to payment) are classified separately from Interests (representing ownership in the business). Secured Claims are classified separately from unsecured Claims because the Debtors' obligations with respect to the former are secured by collateral. Equity Interests are classified separately based upon their preferred status and are further separated between the Equity in HGE (Class 10) and the Equity Interests held by HGE's subsidiaries (Class 11). No objections were filed with respect to the Plan's classification of Claims and Interests.

42. Accordingly, the Plan satisfies section 1122(a) of the Bankruptcy Code. The Debtors submit that the Plan fully complies with and satisfies section 1122 of the Bankruptcy Code, and no party has asserted otherwise.

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

43. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy.[53] The Plan satisfies each of these requirements.

[51] Kirshbaum Decl. ¶¶ 22- 23.

[52] *See id.*

[53] *See* 11 U.S.C. § 1123(a).

a. *Section 1123(a)(1)—Designation of Classes of Claims and Equity Interests.*

44. Section 1123(a)(1) of the Bankruptcy Code requires that the Plan designate "classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests."[54] For the reasons set forth above, Article 3 of the Plan properly designates Classes of Claims and Interests and thus satisfies this requirement of the Bankruptcy Code.

b. *Section 1123(a)(2)—Specification of Unimpaired Classes.*

45. Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan."[55] The Plan meets this requirement by identifying each Class in Article 3 that is Unimpaired.

c. *Section 1123(a)(3)—Treatment of Impaired Classes.*

46. 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."[56] The Plan meets this requirement by setting forth the treatment of each Class in Article 3 that is Impaired.

d. *Section 1123(a)(4)—Equal Treatment within Classes.*

47. 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."[57] The Plan meets this requirement because holders of Allowed Claims or Interests will receive the same rights and

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[54] *Id.* § 1123(a)(1).

[55] *Id.* § 1123(a)(2).

[56] *Id.* § 1123(a)(3).

[57] *Id.* § 1123(a)(4).

treatment as other holders of Allowed Claims or Interests within such holders' respective Class unless otherwise agreed to by a Holder.[58]

e. *Section 1123(a)(5)—Means for Implementation.*

48. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation.[59] The Plan, together with the documents and forms of agreement included in the Plan Supplement,[60] provides a detailed blueprint for the transactions that underlie the Plan.

49. Article 4 of the Plan, in particular, sets forth the means for implementation of the Plan and the transactions underlying the Plan, including: (a) the funding and sources of consideration for Plan distributions; (b) the terms of the Plan Settlement between the Debtors, the Committee, and the Settlement Parties; (c) the establishment and creation of the Liquidating Trust, the execution of the Liquidating Trust Agreement, the appointment of the Liquidating Trustee, and the transfer of the Liquidating Trust Assets to the Liquidating Trust; (d) the preservation of the Debtors' Retained Causes of Action and respective assignment of certain causes of action to the Liquidating Trust; (e) the authorization and issuance of Reorganized HGE Common Stock; (f) the contribution of Guidepost Global Assets to Reorganized HGE for the benefit of the Plan Sponsor; (g) the transfer of the Designated EB-5 Entities (except for their assets, unless otherwise specified in the Plan Supplement) to Guidepost Global; (h) the cancellation of Equity in the Debtors identified in the Plan Supplement; (i) the release of Liens with respect to any of the Debtors' Property; (j) the vesting of assets in Reorganized HGE (with the exception of the Liquidating Trust Assets transferred or issued to the Liquidating Trust); (k) providing for the exemption of certain

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58 Plan, Art. 3.

59 *See* 11 U.S.C. § 1123(a)(5).

60 *See* Plan Supplement.

securities law matters; (l) the authorization and approval to dissolve certain Debtors; and (m) the effectuation and implementation of documents and further transactions.[61] In addition to these core transactions, the Plan provides for the settlement of Claims and Interests and establishment of certain agreements and critical documents, like the Corporate Documents.[62]

50. The precise terms governing the execution of these transactions are set forth in greater detail in the applicable definitive documents or forms of agreements included in the Plan Supplement.[63] Thus, the Plan satisfies section 1125(a)(5) of the Bankruptcy Code.

f. *Section 1123(a)(6)—Issuance of Non-voting Securities.*

51. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities.[64] Article 5.1 of the Plan provides that upon the Effective Date, Reorganized HGE's Corporate Documents shall be deemed amended (a) to the extent necessary, to incorporate the provisions of the Plan, and (b) to prohibit the issuance by Reorganized HGE of nonvoting securities to the extent required under section 1123(a)(6) of the Bankruptcy Code.[65] Accordingly, the Plan satisfies section 1123(a)(6) of the Bankruptcy Code.

g. *Section 1123(a)(7)—Directors and Officers.*

52. 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."[66]

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61 Plan, Art. 4.

62 Kirshbaum Decl. ¶¶ 29-30; *see also* Plan, Art. 4 & Art. 5.

63 *See* Plan Supplement.

64 *See* 11 U.S.C. § 1123(a)(6).

65 Plan, Art. 5.1.

66 *See* 11 U.S.C. § 1123(a)(7).

The Plan satisfies this requirement by providing for the appointment of new directors and officers of Reorganized HGE and Reorganized HGE Subsidiaries upon the Effective Date.[67] The identities of these individuals are set forth in Exhibit J of the Plan Supplement.[68] Accordingly, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

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

53. 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.[69]

54. The Plan is consistent with section 1123(b) of the Bankruptcy Code. ***First***, under Article 3 of the Plan, Classes 6 and 7 are Unimpaired because the Plan leaves unaltered the legal, equitable, and contractual rights of the Holders of Claims within such Classes.[70]

55. ***Second***, Article 9 of the Plan provides the treatment of Executory Contracts and Unexpired Leases that may be assumed, assumed and assigned, or rejected. Pursuant to sections 365 and 1123 of the Bankruptcy Code, the Plan provides that Executory Contracts and Unexpired Leases are deemed rejected as of the Effective Date if they: (a) are not listed in the Plan Supplement; (b) were not assumed or assumed and assigned prior to the Effective Date or

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67 Plan, Art. 5.2.

68 Plan Supplement, Exhibit J.

69 11 U.S.C. §§ 1123(b)(1)–(3), (6).

70 Plan, Art. 3.

otherwise the subject of a motion or notice to assume or assume and assign filed on or before the Effective Date; and/or (c) were not previously rejected.[71] It further provides that each Reorganized HGE Contract or Lease assumed or assumed and assigned pursuant to the Plan shall vest or re-vest in and be fully enforceable by Reorganized HGE in accordance with its terms, except as modified by the provisions of the Plan or the Confirmation Order.[72]

56. ***Third***, Classes 1, 2, 3, 4, 5 and 8 are Impaired because 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.[73] Classes 9 (Intercompany Claims), 10 (Equity) and 11 (Subsidiary Equity Interests) are also Impaired under the Plan.[74]

57. ***Finally***, the Plan contains certain settlements, release, exculpation, and injunction provisions, which for the reasons set forth in Part III of this Memorandum, are consistent with section 1123(b) of the Bankruptcy Code.[75]

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

58. 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 applicable nonbankruptcy law."[76]

59. The Plan complies with section 1123(d) of the Bankruptcy Code. Article 9.2 of the Plan provides for the satisfaction of Cure Claims under each assumed or assumed and assigned Executory Contract and Unexpired Lease in accordance with section 365(b) of the Bankruptcy

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71 *Id.*, Art. 9.1.

72 *Id.*

73 *Id.*, Art. 2 & Art. 3.

74 *Id.*

75 *Id.*, Art. 4 & 10.

76 11 U.S.C. § 1123(d).

Code. Specifically, payment of such Cure Claim (if any) shall be made on the Effective Date or as soon as reasonably practicable thereafter, or in the ordinary course of business or on other terms as the parties to such Executory Contract or Unexpired Lease may agree.[77]

60. Moreover, the Plan provides that the Cure Claims related to designation of an Executory Contract and Unexpired Lease by the Plan Sponsor shall be paid by the Plan Sponsor in addition to the funding of the Plan Sponsor Consideration; and any and all Cure Claims related to a Transferred Executory Contract / Unexpired Lease shall be paid by Guidepost Global, CEA, or TNC, as applicable.[78] To the extent there is a dispute related to any such Cure Claim, then payment of such Cure Claim shall be made following the entry of a Final Order or orders resolving such dispute and approving such assumption (and, if applicable, assignment). The Debtors are not aware of any objections, formal or informal, to the Cure Claims or any assumption disputes.

61. Accordingly, the Plan satisfies the requirements of section 1123(d) of the Bankruptcy Code, and no party has asserted otherwise.

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

62. 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.[79] 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.[80] As discussed below, the Debtors

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77 Plan, Art. 9.2.1.

78 *Id.*

79 *See* 11 U.S.C. § 1129(a)(2).

80 S. Rep. No. 95-989, at 126, *reprinted in* 1978 U.S.C. C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C. C.A.N. 5963, 6368 (1977); *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

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.

63. As discussed above, the Debtors complied with the notice and solicitation requirements of section 1125 of the Bankruptcy Code.[81]

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

64. 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.[82] 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.[83]

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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"); *see also Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop.),* 150 F.3d 503, 512 n.3 (5th Cir. 1998) (noting that section 1129(a)(2) includes requirement of compliance with section 1125); *In re Cypresswood Land Partners, I*, 409 B.R. 396, 424 (Bankr. S.D. Tex. 2009) ("Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125."); *In re Star Ambulance*, 540 B.R. 251, 262 (Bankr. S.D. Tex. 2015) ("Courts interpret this language to require that the plan proponent comply with the disclosure and solicitation requirements set forth in Bankruptcy Code §§ 1125 and 1126.").

81 *See supra* Parts II.B–II.C.

82 *See* 11 U.S.C. § 1126.

83 *Id.* §§ 1126(a), (f).

65. 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 Claims in Classes 1, 2, 3, 4, 5, and 8. The Debtors were not required to solicit votes from Holders of Claims and Interests in Classes 6, 7, 9, 10, or 11 because Holders of such Claims and Interests are either Unimpaired and deemed to accept the Plan under section 1126(f) or Impaired and conclusively presumed to have rejected the Plan under section 1126(g). Thus, pursuant to section 1126(a) of the Bankruptcy Code, only Holders of Claims in Classes 1, 2, 3, 4, 5, and 8 were entitled to vote to accept or reject the Plan.

66. Section 1126(c) of the Bankruptcy Code specifies that the requirements for acceptance of a plan by class of claims, and provides, in pertinent part:

> A class of claims has accepted a plan if such plan has been accepted by creditors . . . 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 . . . that have accepted or rejected such plan.[84]

Section 1126(d) provides the same requirements (i.e., two-thirds in amount and over one-half in number) with respect acceptance of a plan by a class of interests.[85]

67. As evidenced by the Voting Report, the Voting Parties in Classes 1, 2, 3, 4, and 5—all of which are Impaired Classes that are entitled to vote—voted unanimously to accept the Plan in sufficient number and amount to constitute accepting Classes under the Bankruptcy Code.[86]

68. Class 8 voted to reject the Plan.[87] The Debtors received 81 votes on the Plan, with 66 votes accepting the Plan—well satisfying the numerosity requirement. However, Class 8 did not obtain the required amount of accepting Claims due to three rejecting ballots filed by (a)

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[84] *Id.* § 1126(c).

[85] *Id.* § 1126(d).

[86] *See* Voting Report, Exhibit A.

[87] *Id.*

Hallandale; (b) Carl Barney, individually and as Trustee of the Carl Barney Living Trust; and (c) San Ramon Guidepost LLC, a landlord, accounting for approximately $90.2 million of the approximate $95.9 million rejecting Class 8 Claims.[88] These three Claims reflect either rejection damage claims that have not been reduced to the limitations of section 502(b)(6) of the Bankruptcy Code or contingent, disputed, and unliquidated litigation claims. This information is to provide that a limited number of claimants are commandeering Class 8's rejection of the Plan.

69. Notwithstanding Class 8's vote to reject the Plan, based upon the foregoing, the Proponents have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.

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

70. 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."[89] In assessing good faith, the Fifth Circuit has held that good faith should be evaluated "in light of the totality of the circumstances surrounding the development of the plan."[90] Moreover, to be proposed in good faith, a plan must fairly achieve a result consistent with the Bankruptcy Code.[91] The fundamental purpose of chapter 11 is to enable a distressed business to reorganize its affairs to prevent job losses and the adverse economic effects associated with disposing of assets at liquidation value.[92]

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88 *Id.*

89 *See* 11 U.S.C. § 1129(a)(3).

90 *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 Village at Camp Bowie I, L.P.*, 710 F.3d 239, 247 (5th Cir. 2013) ("Good faith should be evaluated 'in light of the totality of the circumstances' . . . mindful of the purposes underlying the Bankruptcy Code.") (citing *In re Cajun Elec. Power*, 150 F.3d at 519); *see also In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012); *In re Century Glove*, Nos. 90-400-SLR, 90-401-SLR, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993).

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

92 *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 528 (1984); *B.D. Int'l Disc. Corp. v. Chase Manhattan Bank (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) ("[T]he two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start.").

71. The Plan satisfies section 1129(a)(3) of the Bankruptcy Code. The Proponents propose the Plan in good faith and solely for the purpose to maximize recoveries for creditors.[93] Indeed, integral to the Plan is the Plan Settlement, under which the Settlement Parties and Debtors are providing meaningful consideration to the Liquidating Trust for the benefit of the Liquidating Trust Beneficiaries.[94] The Plan, including the Plan Settlement, is the product of months of extensive arm's-length negotiations between the Debtors, the Committee, the Plan Sponsor, the other Settlement Parties, and their respective professionals.[95] Importantly, the Plan Settlement, which is embodied in the Plan, reflects a good faith compromise among the parties that achieves the best possible result for all of the Debtors' creditors and settles litigation that likely would have included material risk and been time consuming and costly.

72. As such, the Plan and all the related documents were negotiated, proposed, and entered into by the Debtors, the Committee, the Settlement Parties, and the respective parties thereto in good faith and from arm's-length bargaining positions, without any collusion, fraud, or attempt to take unfair advantage of any party. The fact that the Committee is a Proponent of the Plan, as well as the support from the vast majority of the Voting Classes, including those Classes of Secured Claims that have waived distributions under the Plan to allow for the funding of the Liquidating Trust, is strong evidence that the Plan has a proper purpose and is likely to succeed.[96] Finally, as set forth herein, the Plan complies with bankruptcy and applicable nonbankruptcy law, and satisfies section 1129(a)(3) of the Bankruptcy Code.

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93 Kirshbaum Decl. ¶¶ 63-64.

94 *See* Plan, Art. 4.

95 Kirshbaum Decl. ¶¶ 63-64.

96 *See* Voting Report.

D. Section 1129(a)(4)—The Plan Provides for Court Approval of Certain Administrative Expense Claims.

73. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be subject to approval by the Court as reasonable.[97] 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.[98] The Fifth Circuit has held this is a "relatively open-ended standard" that involves a case-by-case inquiry and, under appropriate circumstances, does not necessarily require that a bankruptcy court review the amount charged.[99] As to routine legal fees and expenses that have been approved as reasonable in the first instance, "the court will ordinarily have little reason to inquire further with respect to the amount charged."[100]

74. The Plan satisfies section 1129(a)(4) of the Bankruptcy Code. Payment of Professional Fee Claims is the only category of payments that fall within the ambit of section 1129(a)(4) of the Bankruptcy Code in these Chapter 11 Cases; and the Debtors may not pay Professional Fee Claims absent Court approval.[101] Further, all such Professional Fee Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 and/or 330 of the Bankruptcy Code.[102] Article 3.2.5.1 of the Plan,

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97 11 U.S.C. § 1129(a)(4).

98 *See Cajun Elec.*, 150 F.3d at 518 (citations omitted) ("Section 1129(a)(4) by its terms requires court approval of any payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case."); *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").

99 *Cajun Elec.*, 150 F.3d at 517 ("What constitutes a reasonable payment will clearly vary from case to case and, among other things, will hinge to some degree upon who makes the payments at issue, who receives those payments, and whether the payments are made from assets of the estate.").

100 *Id*.

101 *See* Plan, Art. 3.2.5.1.

102 11 U.S.C. §§ 328(a), 330(a)(1)(A).

moreover, provides that Professionals shall file all final requests for payment of Professional Fee Claims no later than forty-five (45) days after the Effective Date, thereby providing an adequate period of time for interested parties to review such Professional Fee Claims.[103] Accordingly, the Plan satisfies section 1129(a)(4) of the Bankruptcy Code.

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

75. Section 1129(a)(5)(A) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors, to the extent known, of the reorganized debtors.[104] It further requires that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy.[105] Lastly, it requires that the plan proponent have disclosed the identity of insiders to be retained by the reorganized debtor and the nature of any compensation for such insider.[106] Courts have held that these provisions ensure that the postconfirmation governance of a reorganized debtor is in "good hands."[107]

76. The Plan satisfies section 1129(a)(5) of the Bankruptcy Code. Article 5 of the Plan provides that, upon the Effective Date, the current members of the Debtors' board of directors and officers will no longer serve in any such capacity with Reorganized HGE.[108] The identities of the new directors and officers of Reorganized HGE and Reorganized HGE Subsidiaries are disclosed

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[103] Plan, Art. 3.2.5.1.

[104] 11 U.S.C. § 1129(a)(5)(A)(i).

[105] *Id.* § 1129(a)(5)(A)(ii).

[106] *Id.* § 1129(a)(5)(B).

[107] *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.").

[108] Plan, Art. 5.2.

in the Plan Supplement.[109] Also upon the Effective Date, Reorganized HGE's Corporate Documents, including the certificate of incorporation, charters, bylaws, operating agreements, or other necessary organizational documents, as applicable, shall be deemed amended to be consistent with 1123(a)(6) of the Bankruptcy Code.[110] The Proponents believe control of Reorganized HGE and Reorganized HGE Subsidiaries by the individuals to be appointed in accordance with the Plan and Corporate Documents will be consistent with public policy.[111]

77. To the extent that section 1129(a)(5) applies to the Liquidating Trust and Liquidating Trustee, the Proponents believe they have satisfied the requirements of section 1129(a)(5)(A)(i) of the Bankruptcy Code. Specifically, the Plan will appoint a Liquidating Trustee whose identity has been disclosed in Exhibit E of the Plan Supplement. Moreover, the Plan and Liquidating Trust Agreement (which is also part of the Plan Supplement)[112] describes, among other things, the Liquidating Trustee's right to administer the Estates, including making distributions to Holders of Claims and Interests and pursue any Claims or Causes of Action that constituted a Liquidating Trust Asset on behalf of the Debtors and their Estates.[113]

78. Therefore, the requirements under section 1129(a)(5) of the Bankruptcy Code are satisfied.

F. Section 1129(a)(6)—The Plan Does Not Require Governmental Regulatory Approval.

79. 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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109 *Id. See also*, Plan Supplement, Exhibit J.

110 Plan, Art. 5.1.

111 Kirshbaum Decl. ¶ 66.

112 Plan Supplement, Exhibit E.

113 *See* Plan, Art. 4.3; Plan Supplement, Exhibit E.

approved any rate change provided for in the plan.[114] No such rate changes are provided for in the Plan.[115] Section 1129(a)(6) of the Bankruptcy Code is therefore inapplicable to these Chapter 11 Cases.

G. Section 1129(a)(7)—The Plan Is in the Best Interests of All the Debtors' Creditors.

80. 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
>
> (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 . . . .[116]

81. The best interests test applies individually to 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.[117] As

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[114] 11 U.S.C. § 1129(a)(6).

[115] Kirshbaum Decl. ¶ 69.

[116] 11 U.S.C. § 1129(a)(7).

[117] *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."); *In re Century Glove*, Nos. 90–400–SLR, 90–401–SLR, 1993 WL 239489, at *7 (D. Del. Feb. 10, 1993); *In re Cypresswood Land Partners, I*, 409 B.R. 369, 428 (Bankr. S.D. Tex. 2009) ("This provision is known as the 'best-interests-of-creditors-test' because it ensures that reorganization is in the best interest of individual claimholders who have not voted in favor of the plan."); *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").

section 1129(a)(7) of the Bankruptcy Code makes clear, the best interests test applies only to holders of non-accepting impaired claims or interests.

82. Although Classes 8, 9, 10, and 11 have either voted to reject the Plan or are deemed to reject the Plan, all 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.[118] Indeed, as set forth in Exhibit B of the Disclosure Statement, the Debtors, with the assistance of their advisors, prepared the Liquidation Analysis that estimates recoveries for members of each Class under the Plan. The Liquidation Analysis shows that projected recoveries under the Plan are equal to or in excess of the recoveries estimated in a hypothetical chapter 7 liquidation.[119] In particular:

- Holders of Allowed General Unsecured Claims (Class 8) would receive nothing in a hypothetical chapter 7 liquidation, whereas under the Plan, they are expected to recover up to 10% of their Allowed Claim.[120] Importantly, pursuant to the Plan Settlement, Holders of Claims in Classes 1, 2, 4, and 5 are waiving their distributions under the Plan on account of their Allowed Claims in order to maximize recoveries for general unsecured creditors.[121]

- Holders of Allowed Intercompany Claims (Class 9) would receive the same in a chapter 7 liquidation as they would under the Plan because in either scenario, they will not receive any recovery.[122]

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[118] *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) (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.'").

[119] Kirshbaum Decl. ¶¶ 70-75; Corwen Decl. ¶¶ 16, 18. SCP performed an additional liquidation analysis, attached as Exhibit A to Corwen Declaration (the "**Updated Liquidation Analysis**"), with an assumed conversion date of November 24, 2025. The Updated Liquidation Analysis fully confirms and corroborates the Liquidation Analysis attached to the Disclosure Statement. Both liquidation analysis charts included associated notes that provided further detail and information with respect to the estimated recoveries presented therein. The full text of these notes are included in Exhibit B of the Disclosure Statement and Exhibit A of the Corwen Declaration.

[120] *See* Disclosure Statement, Exhibit B; Corwen Decl., Exhibit A.

[121] *See* Kirshbaum Decl. ¶¶ 39-41.

[122] *See* Disclosure Statement, Exhibit B; Corwen Decl., Exhibit A.

- Holders of Allowed Equity (Class 10) would receive the same in a chapter 7 liquidation as they would under the Plan because in either scenario, they will not receive any recovery.[123]

- Holders of Allowed Subsidiary Equity Interests (Class 11) would receive the same in a chapter 7 liquidation as they would under the Plan because in either scenario, they will not receive any recovery.[124]

83. Despite this analysis, Hallandale contends that the Plan Settlement does not provide enough recovery in these Chapter 11 Cases and therefore does not satisfy the "best interest" test.[125] This argument overlooks the fact that Hallandale, as a general unsecured creditor in Class 8, would receive *nothing* in a hypothetical chapter 7 liquidation. The only reason that Halladale, and the other situated unsecured creditors in Class 8, are expected to receive anything under the Plan is because of the Plan Settlement. As such, Hallandale's Objection as to section 1129(a)(7) should be overruled.

84. Accordingly, because the recovery for creditors provided by the Plan is equal to or far exceeds the available creditor recovery in a chapter 7 liquidation, the Plan is in the best interests of creditors and complies with section 1129(a)(7) of the Bankruptcy Code.

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

85. 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.[126] If not, the plan must satisfy the "cram down" requirements of section 1129(b) with respect to the claims or interests in that class.[127] Of the Voting Classes, Classes 1 (Bridge CN-3 Lender Claim), 2 (WTI Secured Lender

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123 *See* Disclosure Statement, Exhibit B; Corwen Decl., Exhibit A.

124 *See* Disclosure Statement, Exhibit B; Corwen Decl., Exhibit A.

125 Hallandale Objection, ¶ 31.

126 11 U.S.C. 1129(a)(8)

127 *Id.* § 1129(b).

Claim), 3 (CN-1 Note Claims), 4 (CN-2 Note Claims) and 5 (CN-3 Note Claims) voted to accept the Plan. Holders of Claims in Class 8 (General Unsecured Claims) voted to reject the Plan. Holders of Claims in Classes 6 (Other Secured Claims) and Class 7 (Non-Priority Tax Claims) are presumed to accept, while Holders of Claims and Interests in Classes 9 (Intercompany Claims), 10 (Equity), and 11 (Subsidiary Equity Interests) are deemed to reject the Plan. Notwithstanding such rejections, the Plan is confirmable because it satisfies 1129(b) of the Bankruptcy Code, as discussed below.

I. Section 1129(a)(9)—The Plan Provides for Payment in Full of All Allowed Priority Claims.

86. 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.[128] Relevant here, section 1129(a)(9)(A) provides that 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 unless the holder agrees to different treatment.[129] Section 1129(a)(9)(C) also provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—*i.e.*, priority tax claims—must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim.[130]

87. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. ***First,*** Article 3.2 of the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because it provides that Holders

[128] *See* 11 U.S.C. § 1129(a)(9).

[129] *Id.* § 1129(a)(9)(A).

[130] *Id.* § 1129(a)(9)(C).

of Allowed Administrative Claims be paid in full, in Cash by the Debtors, equal to the amount of such Allowed Administrative Claim, in such amounts as (a) are incurred in the ordinary course of business by the Debtors when and as such Claim becomes due and owing, (b) are Allowed by the Bankruptcy Court upon the later of the Effective Date, the date upon which there is a Final Order allowing such Administrative Expense Claim, or any other date specified in such order, or (c) may be agreed upon between the Holder of such Administrative Expense Claim and the Debtors.[131] Holders of Administrative Expenses Claims must make a request for payment no later than the thirty (30) days following the Effective Date (the "**Administrative Bar Date**").[132]

88. ***Second,*** Article 3.3 of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it specifically provides that each holder of an Allowed Priority Tax Claim shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code.

89. ***Third,*** the Plan also provides for the payment of other priority claims, such as Other Non-Tax Priority Claims and Professional Fee Claims.[133] The Plan provides that Professional Fee Claims will be paid in Cash from the Professional Holdback Escrow Account or, to the extent the Professional Holdback Escrow Account contains insufficient funds, receive the same treatment as Administrative Expense Claims as discussed more fully above. Non-Tax Priority Claims (Class 7) are unaltered by the plan and will be paid in full in cash on or as soon as reasonably practicable after the later of the Claims Objection Deadline and the date on which a Non-Tax Priority Claim becomes Allowed, or in accordance with the terms of any agreement between the Debtors, the Committee, the Plan Sponsor, and the Holder of an Allowed Non-Tax Priority Claim.[134]

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131 *Id.*, Art. 3.2.3.

132 *Id.*, Art. 3.2.4

133 *See* Plan, Art. 3.2.5 & 3.13.

134 *Id.,* Art. 3.13.

90. ***Lastly***, Claims entitled to priority under section 507(a)(1), (4), and (6)–(7) of the Bankruptcy Code either do not exist or have already been paid pursuant to this Court's *Order (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Salaries, Other Compensation, and Reimbursable Expenses, (B) Continue Employee Benefits Programs, and (II) Granting Related Relief.*[135] Accordingly, section 1129(a)(9)(B) is not an issue in this case.

91. Thus, the Plan satisfies each of the requirements set forth in section 1129(a)(9) of the Bankruptcy Code.

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

92. 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."[136] As set forth above, Holders of Claims in Classes 1, 2, 3, 4 and 5—which are Impaired Classes under the Plan—voted to accept the Plan independent of any insiders' votes.[137] The Plan thus satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

K. Section 1129(a)(11)—The Plan Is Feasible.

93. 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:

> Confirmation 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.[138]

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[135] Docket No. 61

[136] 11 U.S.C. § 1129(a)(10).

[137] *See* Voting Report.

[138] 11 U.S.C. § 1129(a)(11).

There is a relatively low threshold of proof necessary to satisfy the feasibility requirement.[139] Indeed, to demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[140] Rather, a plan proponent must provide only a reasonable assurance of success.[141] Put differently, a plan proponent need only show that "the successful performance of [the plan's] terms is not dependent or contingent upon any future, uncertain event."[142] A plan proponent does not need to establish that the success of any future litigation is guaranteed or that a trust's funds will never run out.[143]

94. The Plan is feasible. Distributions under the Plan will come from (a) the Plan Sponsor Consideration, (b) the Surplus DIP Cash, (c) the Settlement Party Payment, (d) any D&O

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[139] *E.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (citations omitted) (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"); *Berkeley Fed. Bank & Trust v. Sea Garden Motel & Apartments (In re Sea Garden Motel & Apartments)*, 195 B.R. 294, 305 (D.N.J. 1996); *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011).

[140] *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."); *In re Save Our Springs (S.O.S.) All., Inc.*, 632 F.3d 168, 172 (5th Cir. 2011) ("To obtain confirmation of its reorganization plan, a debtor must show by a preponderance of the evidence that its plan is feasible, which means that it is 'not likely to be followed by . . . liquidation, or the need for further financial reorganization.'") (citing 11 U.S.C. § 1129(a)(11)); *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").

[141] *Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1165–66 (5th Cir. 1993) ("As numerous courts have explained 'the court need not require a guarantee of success' . . . [and] '[o]nly a reasonable assurance of commercial viability is required" to meet the feasibility test) (citing *In re Lakeside Global II*, 116 B.R. 499, 507 (Bankr. S.D. Tex. 1989)); *Kane*, 843 F.2d at 649; *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012); *In re W.R. Grace & Co.*, 475 B.R. 34, 115 (D. Del. 2012); *see also Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (citations omitted) ("The 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).

[142] *See In re Heritage Org., L.L.C.*, 375 B.R. 230, 311 (N.D. Tex. 2007) (holding that the creation of a creditor trust with res consisting of estate cash and the proceeds of any future successful litigation in addition to a fixed trust governance mechanism qualified as feasible).

[143] *See T-H New Orleans Ltd. P'ship*, 116 F.3d at 801 (stating that a court "need not require a guarantee of success").

Claim Resolution, (e) the Liquidating Trust Assets, and (f) the D&O Insurance Policies.[144] These sources of Plan funding were heavily negotiated and are integral components to the Plan Settlement. On the Effective Date, the Settlement Parties will pay the Debtors or Liquidating Trustee, as applicable, in Cash the Settlement Party Payment. Following the Petition Date, additional sources of funding are expected to come from proceeds of the Debtors' Retained Causes of Action (which are transferred to the Liquidating Trust for the benefit of Liquidating Trust Beneficiaries). Moreover, because the DIP Lenders and Settlement Parties are waiving their right to receive distributions under the Plan, the Debtors and Liquidating Trustee, as applicable, will have sufficient funds to pay Allowed Administrative Expense Claims and other priority claims in accordance with the Plan and to make the other distributions contemplated by the Plan.

95. As such, the Proponents believe the Plan is feasible and that the requirements of section 1129(a)(11) of the Bankruptcy Code have been satisfied.

L. Section 1129(a)(12)—All Statutory Fees Have Been or Will Be Paid.

96. 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."[145] 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 status.

97. Article 3.4 of the Plan provides that all Statutory Fees due and payable shall be paid by Reorganized HGE, Guidepost Global, or the Liquidating Trustee, respectively, for each quarter

[144] Plan, Art. 4.1.

[145] 11 U.S.C. § 1129(a)(12).

(including any fraction thereof) until these Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first.[146] Thus, the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

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

98. Section 1129(a)(13) of the Bankruptcy Code requires that chapter 11 plans continue all retiree benefits.[147] The Debtors do not have any obligations to pay any retiree benefits, so section 1129(a)(13) of the Bankruptcy Code is inapplicable.[148]

99. Sections 1129(a)(14) and (15) of the Bankruptcy Code apply only in cases in which the debtor is an "individual" as defined in the Bankruptcy Code.[149] Since the Debtors are not "individuals," those sections do not apply.[150]

100. Section 1129(a)(16) of the Bankruptcy Code applies only to debtors that are nonprofit entities or trusts and also does not apply here. [151]

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

101. 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.[152] To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy

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146 Plan, Art. 3.4.

147 11 U.S.C. § 1129(a)(13).

148 Kirshbaum Decl. ¶ 84.

149 11 U.S.C. §§ 1129(a)(14) (individuals who owe domestic support obligations) & 1129(a)(15).

150 Kirshbaum Decl. ¶ 84.

151 *See* 11 U.S.C. § 1129(a)(16)

152 *Id.* § 1129(b)(1).

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.[153]

102. The Plan satisfies section 1129(b) of the Bankruptcy Code. As noted above, Classes 1, 2, 3, 4, and 5 voted to accept the Plan. Class 8 (General Unsecured Claims) voted to reject the Plan, and Classes 9 (Intercompany Claims), 10 (Equity), and 11 (Subsidiary Equity Interests) are Impaired Classes deemed to reject the Plan (collectively, the "**Rejecting Classes**"). Notwithstanding, the Proponents submit that the Plan may be confirmed over the rejecting Impaired Classes because the requirements under section 1129(b) of the Bankruptcy Code are satisfied.

1. Section 1129(b)(1)—The Plan Does Not Unfairly Discriminate with Respect to the Rejecting Classes.

103. Section 1129(b)(1) does not prohibit discrimination between classes; it only prohibits discrimination that is unfair. To determine whether "unfair discrimination" exists, courts typically examine the facts and circumstances of the particular case to make the determination.[154] Generally, courts have found that a plan unfairly discriminates in violation of section 1129(b) only if it provides materially different treatment for creditors and interest holders with similar legal

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[153] *See* 11 U.S.C. § 1129(b)(1); *see also In re Sentry Operating Co. of Tex., Inc.*, 264 B.R. 850, 862 (Bankr. S.D. Tex. 2011) ("[I]f the plan meets all of the requirements for plan confirmation except § 1129(a)(8), the plan may nevertheless be confirmed if the plan is fair and equitable and does not discriminate unfairly . . . ."); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999) (explaining that "[w]here a class of creditors or shareholders has not accepted a plan of reorganization, the court shall nonetheless confirm he plan if it 'does not discriminate unfairly and is fair and equitable.'").

[154] *In re 203 N. LaSalle St. Ltd. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, *203 N. LaSalle*, 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 (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").

rights without compelling justifications for doing so.[155] 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.[156]

104. Here, the Plan's treatment of the Rejecting Classes is proper because all similarly situated holders of Claims and Interests will receive substantially similar treatment, and the Plan's classification scheme rests on a legally acceptable rationale. Specifically, Claims and Interests in (or may be in) the Rejecting Classes—*i.e.*, Classes 8, 9, 10, and 11—are not similarly situated to any other classes, given their distinctly different legal character from all other Claims and Interests in the other classes. Class 8 is comprised of Holders of General Unsecured Claims. Holders of Intercompany Claims are in Class 9, while Holders of Equity and Subsidiary Equity Interests are in Classes 10 and 11, respectively.

105. 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 rejection by certain Impaired Classes.

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

106. 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.[157] The

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[155] *See 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."); *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); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986) (finding no unfair discrimination where the interests of objecting class were not similar or comparable to those of any other class).

[156] *See In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *31 (Bankr. D. Del. May 13, 2010) (citing *In re Armstrong World Indus.*, 348 B.R. 111, 121 (D. Del. 2006)).

[157] *Bank of Am. Nat'l Trust & Sav. Ass'n 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, § 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

absolute priority rule provides that a junior stakeholder (*e.g.*, an equity holder) may not receive or retain property under a plan of reorganization "on account of" its junior interests unless all senior classes either (a) are paid in full or (b) vote in favor of the plan.[158]

107. The Plan satisfies the absolute priority rule. ***First***, no Claims or Interests that are junior to the Rejecting Classes will receive or retain any property under the Plan.[159] In fact, the junior classes (*i.e.*, Classes 9, 10, and 11) to Class 8 are deemed to reject the Plan because they will not receive distributions under the Plan. Moreover, as part of the Plan Settlement, the Holders of Claims in Classes 1, 2, 4, and 5 (*i.e.*, the Settlement Parties) agreed to waive distributions under the Plan to provide for a distribution to Holders of General Unsecured Claims in Class 8.[160] ***Second***, in accordance with the Bankruptcy Code the Claims and Interests in Classes 9 (Intercompany Claims), 10 (Equity), and 11 (Subsidiary Equity Interests) will be retired, cancelled, extinguished, or discharged, as applicable.[161]

108. Accordingly, the Plan satisfies the absolute priority rule (and is fair and equitable) as to Rejecting Classes because there is no Class of equal priority receiving more favorable

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on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

158 *See* 11 U.S.C. § 1129(b)(2)(B)(ii); *see also DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 88 (2d Cir. 2011) (citations omitted) (the absolute priority rule "provides that a reorganization plan may not give 'property' to the holders of any junior claims or interests 'on account of' those claims or interests, unless all classes of senior claims either receive the full value of their claims or give their consent"); *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512 (3d Cir. 2005) (citations omitted) ("Under the statute, a plan is fair and equitable with respect to an impaired, dissenting class of unsecured claims if (1) it pays the class's claims in full, or if (2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan 'on account of' such claims or interests.").

159 Kirshbaum Decl. ¶¶ 85-88.

160 *Id.* ¶ 39, 41.

161 *Id.* ¶ 87. For the avoidance of doubt, Subsidiary Equity Interests in the Designated EB-5 Entities will not be retired, cancelled, extinguished and discharged and will be transferred to Guidepost Global in accordance with Article 4.8 of the Plan. *See* Plan, Art. 3.17.2. This also does not violate the absolute priority rule because this is a mere technical preservation, and does not have any economic substance nor does it enable any junior creditor or interest holder to retain or recovery any value under the Plan.

treatment, and no Class that is junior to such Classes will receive or retain any property on account of the Claims or Interests in such Class.[162]

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

109. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code. ***First***, section 1129(c) of the Bankruptcy Code, which prohibits confirmation of multiple plans,[163] is not implicated because there is only one proposed Plan. ***Second***, the purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933.[164] Moreover, no governmental unit or any other party has requested that the Bankruptcy Court decline to confirm the Plan on such grounds.[165] Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code. ***Lastly***, section 1129(e) of the Bankruptcy Code is inapplicable because none of the Debtors' Chapter 11 Cases is a "small business case."[166]

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

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

111. As discussed above, the Bankruptcy Code identifies various additional provisions that may be incorporated into a chapter 11 plan, including "any other appropriate provision not inconsistent with the applicable provisions of this title."[167] Among other discretionary provisions,

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[162] Kirshbaum Decl. ¶¶ 86-87.

[163] *See* 11 U.S.C. § 1129(c).

[164] Kirshbaum Decl. ¶ 90.

[165] *Id*.

[166] *See* 11 U.S.C. § 1129(e); *see also id.* § 101(51D)(B) (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 million] (excluding debt owed to 1 or more affiliates or insiders)").

[167] *Id.* §§ 1123(b)(1)–(6).

the Plan contains a settlement of claims and causes of action, a debtor release, a consensual third-party release, an exculpation provision, and an injunction provision.[168] These provisions are proper because, among other things, they are the product of extensive good faith, arms'-length negotiations, are a material inducement for parties to enter into the Plan Settlement and support the Plan, and are compliant with the Bankruptcy Code and prevailing Fifth Circuit law.

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

112. As detailed above, the Plan provides for a general settlement of Claims and Interests and the Plan Settlement. These settlements of Claims and Interests under the Plan are critical to the resolution of these Chapter 11 Cases and are consistent with section 1123(b) of the Bankruptcy Code and Bankruptcy Rule 9019.

113. The settlements embodied in the Plan contemplate, among other things, the materiality of the releases, exculpations, and injunction provisions with respect to the parties' support of the Plan, the value of potential litigation Claims, and the expenses of litigating such Claims.[169] Thus, as discussed further the below, the releases, exculpation, and injunction provisions, are reasonable under the circumstances, appropriate, and in the best interests of the Debtors, their Estates, and all of the Debtors' stakeholders.

114. The Bankruptcy Code states that a plan may "provide for . . . the settlement or adjustment of any claims or interest belonging to the debtor or the estate."[170] Settlements are favored in chapter 11 because they minimize litigation and expedite the administration of the

[168] Plan, Art. 10.

[169] Kirshbaum Decl. ¶¶ 36-59.

[170] 11 U.S.C. § 1123(b)(3)(A).

bankruptcy case.[171] Ultimately, approval of a compromise is within the "sound discretion" of the Bankruptcy Court.[172] In considering whether a settlement is appropriate, courts in the Fifth Circuit consider whether the settlement is (a) "fair and equitable" and (b) "in the best interests of the estate."[173]

115. The "fair and equitable" requirement generally is interpreted, consistent with that term's usage in section 1129(b) of the Bankruptcy Code, to require compliance with the Bankruptcy Code's absolute priority rule.[174] In determining whether a settlement meets the best interest requirement under Bankruptcy Rule 9019, courts within the Fifth Circuit generally consider the following factors:

(a) the probability of success of litigation;

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

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

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171 *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (stating that settlements are considered "a normal part of the process of reorganization" and a "desirable and wise method[] of bringing to a close proceeding otherwise lengthy, complicated[,] and costly.") (quotations and citations omitted).

172 *See In re AWECO, Inc.*, 725 F.2d 293, 297–98 (5th Cir. 1984) ("The decision of whether to approve a particular compromise lies within the discretion of the trial judge . . . . The term 'discretion' denotes the absence of a hard and fast rule. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.") (citations omitted); *see also In re Jackson Brewing, Co.*, 624 F.2d at 602–03 (same).

173 *See In re Foster Mortg. Corp*., 68 F.3d 914, 917 (5th Cir. 1995) ("[T]he court should approve the settlement only when the settlement is fair and equitable and in the best interest of the estate."); *see also In re Gen. Homes*, 134 B.R. at 861 ("To the extent that the language contained in the plan purports to release any causes of action against the [creditor] which the Debtor could assert, such provision is authorized by § 1123(b)(3)(A), subject to compliance with provisions of the code requiring that the plan be fair and equitable as to creditors and that the plan be proposed in good faith.").

174 *See In re Mirant Corp*., 348 B.R. 725, 738 (Bankr. N.D. Tex. 2006) ("Because 'fair and equitable' translates to the absolute priority rule, in order for a settlement to meet that test it must be consistent with the requirement that dissenting classes of creditors must be fully satisfied before any junior creditor receives anything on account of its claim.") (internal citations omitted).

(d) the extent to which the settlement is truly the product of arm's-length negotiations, and not of fraud or collusion.[175]

116. Generally, the role of the bankruptcy court is not to decide the individual issues in dispute when evaluating a settlement; instead, the court should determine whether the settlement as a whole is fair and equitable.[176] Courts also afford debtors discretion in deciding for themselves the appropriateness of granting plan releases of an estate's causes of action when doing so within their sound business judgment.[177]

117. The Proponents believe the settlement of Claims and Interests under the Plan, including the Plan Settlement, satisfies the above factors. ***First***, as set forth above, the Plan (including the Plan Settlement) is "fair and equitable" because it does not violate the absolute priority rule.[178] Accordingly, the settlement of Claims and Interests under the Plan, including the Committee Settlement, satisfies the "fair and equitable" requirement.

118. ***Second***, the Plan and Plan Settlement are in the best interest of the Debtors' Estates and a sound exercise of the Debtors' business judgement. Without the settlements contemplated in the Plan, including the Plan Settlement, significant litigation would ensue. As detailed infra, the

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[175] *See, e.g., id.* at 739–40 (citing *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 355–56 (5th Cir. 1997)); *In re Roqumore*, 393 B.R. 474, 479–80 (Bankr. S.D. Tex. 2008) (citing the factors set forth by the court in *Jackson Brewing Co*., 624 F.2d at 602); *see also In re Age Ref., Inc*., 801 F.3d 530, 540 (5th Cir. 2015) (same); *Foster Mortg.*, 68 F.3d at 918–19 (citations omitted).

[176] *See In re Victory Med. Ctr. Mid-Cities, LP*, 601 B.R. 739, 749 (Bankr. N.D. Tex. 2019) ("[W]hile a [bankruptcy] court must evaluate all factors relevant to a fair and full assessment of the wisdom of the proposed compromise, a court need not conduct a 'mini-trial' of the merits of the claims being settled.") (citation omitted); *see also Watts v. William*s, 154 B.R. 56, 59 (Bankr. S.D. Tex. 1993) ("In considering these factors, the bankruptcy court must review the facts supporting a compromise, yet not decide the merits of individual issues. Rather, the bankruptcy court determines whether the settlement is fair and equitable as a whole.") (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)).

[177] *See In re Gen. Homes*, 134 B.R. at 861 ("The court concludes that such a release is within the discretion of the Debtor."); *see also In re CiCi's Holdings, Inc.*, No. 21-30146 (SGJ), 2021 WL 819330, at *8 (Bankr. N.D. Tex. Mar. 3, 2021) ("In accordance with section 1123(b)(3)(A) of the Bankruptcy Code, the releases of claims and Causes of Action by the Debtors described in . . . the Plan represent a valid exercise of the Debtors' business judgment under Bankruptcy Rule 9019.").

[178] *See supra* Part II.N.2; *see also* Kirshbaum Decl. ¶ 39.

Independent Director evaluated that the potential Estate Claims and Causes of Actions against the Release Parties that the Debtors propose to settle or otherwise release through the Plan, and determined such claims are complex.[179] If such litigation were to be pursued, the Proponents believe that it would be costly to the Estates as the potential defendants (*i.e.*, the Released Parties) would aggressively defend and likely assert numerous counterclaims.[180] The Proponents believe the likelihood of success of litigation is uncertain.[181] The Proponents believe that the pursuit of such litigation would be time consuming, costly, and could potentially go for multiple years.[182] The funding to pursue the litigation of these Claims and Causes of Action is also not readily available to the Debtors, and they would likely need obtain financing from a third party not currently involved in these Chapter 11 Cases.[183] These unknown factors, which add costs and time to any potential recoveries, were material in the Independent Director's considerations when agreeing to the settlements and releases of potential Claims and Causes of Action, including the Plan Settlement.[184]

119. Additionally, the majority of the Debtors' creditors and the Committee voted in favor of the Plan, thereby indicating their approval of the settlements incorporated into the Plan. As explained above, Classes 1, 2, 3, 4, and 5 unanimously voted to accept the Plan; and even though Class 8 collectively voted to reject the Plan, over 81% of Holders of General Unsecured Claims in Class 8 voted to accept the Plan, including the settlements and releases therein.[185]

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179 Kirshbaum Decl. ¶ 40.

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *See generally* Voting Report at ¶ 12 & Exhibit A.

120. The Plan Settlement and development of the Plan were the product of robust, good-faith, and arm's-length negotiations among the Debtors, the Committee, the Plan Sponsor, the other Settlement Parties, and their respective professionals.[186] There is no evidence of fraud or collusion, nor has any party alleged as such. Overall, the Plan, including the Plan Settlement, ensures a larger recovery to the Holders of Allowed General Unsecured Claims. Indeed, as part of the Plan Settlement, the Holders of Claims in Classes 1, 2, 4, and 5 (*i.e.*, the Settlement Parties) agreed to waive distributions under the Plan to allow for a distribution to Holders of Allowed General Unsecured Claims in Class 8.[187]

121. Hallandale, however, objects to the Plan Settlement, arguing, among other things, that it does not comply with Bankruptcy Rule 9019 or sections 323(b) and 1123(a)(3) of the Bankruptcy Code. In particular, Hallandale contends that (a) the Plan Settlement does not provide sufficient consideration for the Debtors' Release and (b) the Plan and Disclosure Statement fail to provide sufficient analysis regarding the Plan Settlement and the releases set forth in the Plan.[188] But Hallandale's Objection fails for several reasons. ***First***, Hallandale is an unsecured creditor that is receiving a distribution under the Plan ***only*** because of the Plan Settlement. As stated in the Debtors' Liquidation Analysis, Holders of General Unsecured Claims in Class 8 would receive nothing on account of their Allowed Claim under a hypothetical chapter 7 liquidation.[189] While many parties would have preferred a settlement that provided more recoveries for the Debtors' Estates, the Plan Settlement reflects the value-maximizing resolution of the Debtors' potential Claims against the Settlement Parties. ***Second***, the Independent Director, in his business judgment,

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[186] Kirshbaum Decl. ¶¶ 41-42.

[187] *Id.*

[188] Halladale Objection, ¶¶ 30-31.

[189] Disclosure Statement, Exhibit B; Corwen Decl. ¶¶ 16, 18 & Exhibit A; Kirshbaum Decl. ¶ 74.

determined that the Plan Settlement reflects the highest and best alternative for the Debtors' Estates.[190] Without the Plan Settlement, significant litigation would ensue.[191] How that litigation would be funded and the likelihood of success of such litigation remains a significant unknown factor and risk that the Independent Director determined when agreeing to the Plan Settlement.[192] Hallandale would prefer to displace the Independent Director's business judgment for its own, without knowing or understanding all of the relevant factors. ***Third***, the Plan Settlement and the Plan is supported by the Committee (of which Hallandale is a sitting member). It is evident that the Committee's support of the Plan Settlement and the Plan was not unanimous. However, the majority of the Committee's members voted in support of the Plan Settlement and the Plan. Again, Hallandale would request that its judgment usurp the Committee's judgment. For these reasons, the Debtors assert that the Hallandale Objection be overruled.

122. Accordingly, the settlement of Claims and Interests under the Plan, including the Plan Settlement, satisfies the "best interest of the estate" requirement.

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

123. Article 10.2 of the Plan sets forth the Debtor Releases. The Debtor Release provides for a release of Claims and Causes of Action held by the Debtors against the Released Parties,[193] in connection with, among other things, the Debtors (including the management, ownership, or operation thereof), the Chapter 11 Cases, the RSA, the Disclosure Statement, the Plan, the Plan

[190] *See, e.g.,* Kirshbaum Decl. ¶¶ 8, 10, 40, 44.

[191] *See, e.g., id.* ¶ 40, 44.

[192] *See, e.g., id.* ¶¶ 40, 44.

[193] "Released Parties" are defined as means each of, and in each case in their capacity as such: (a) the Debtors; (b) the Independent Director; (c) Reorganized HGE; (d) the Committee and its members; (e) the Liquidating Trustee; (f) the Settlement Parties; (g) each current and former Affiliate of each Person in clause (a) through the following clause (f), but only in their capacity as such; and (h) each Related Party of each Entity in clause (a) through (f), but only in their capacity as such; *provided*, *however*, that for the avoidance of doubt, the Non-Released D&Os. shall not be a Released Party under this Plan except as may be provided under a D&O Claim Resolution; provided, further, that Venn shall not be a Released Party under this Plan. Plan, Art. 1.1.24.

Supplement, the DIP Loans, the DIP Financing, other than: (a) any Debtors' Retained Causes of Action or any Person or Entity that is the subject thereof; (b) any post-Effective Date obligations of any Person or Entity under this Plan, the Confirmation Order or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement this Plan or transactions thereunder; (c) the rights of any Holder of Allowed Claims to receive distributions under this Plan; or (d) the Non-Released D&Os.[194]

124. Pursuant to section 1123(b)(3)(A), the Debtors may release Causes of Action as part of a settlement in exchange for consideration or concessions made by various stakeholders pursuant to the Plan.[195] As such, the Debtor Release must satisfy the same standard under Bankruptcy Rule 9019, articulated above—it must be fair, equitable and in the best interests of the estate.[196]

125. Here, the Debtor Release is fair, equitable, and in the best interest of the Debtors' Estates. The terms of the Debtor Release comply with the Bankruptcy Code's absolute priority rule. The Debtor Release and settlements embodied therein, and in the Plan, do not result in any junior Classes receiving or retaining any property on account of junior Claims or Interests. Thus, the Debtor Release is fair and equitable in line with Fifth Circuit precedent.

126. The Debtor Release is also in the best interest of the Estates and a sound exercise of the Debtors' business judgment. ***First***, as detailed in the Kirshbaum Declaration, the

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[194] Plan, Art. 10.2. The foregoing description is meant as a summary of the operative Plan provisions only. To the extent there is any conflict between the foregoing summary and the Plan, the Plan shall control.

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

[196] *In re Cajun Elec. Power Co-op., Inc.*, 119 F.3d 349, 355 (5th Cir. 1997).

Independent Director of the Debtors conducted a thorough investigation into the viability of potential Claims or Causes of Action of held by the Debtors' Estates.[197] After extensive analysis of the potential Claims and Causes of Action, he ultimately concluded that, if litigated, the Debtors' Claims or Causes of Action against the Released Parties were not likely to provide value to the Estates beyond that provided under the Plan Settlement.[198] As such, after completing the investigation and with the assistance of the Debtors' legal and other advisors, the Independent Director determined that the releases under the Plan are fair and reasonable and in the best interests of the Debtors' Estates.[199]

127. ***Second***, as a piece of the Plan Settlement, the Debtor Release is supported by the Committee in light of the consideration that the Settlement Parties have agreed to provide and the waiver of the Senior and Junior DIP Claims under the Plan. As detailed above, a majority of the Debtors' creditors support the release through their acceptance of the Plan.[200]

128. ***Third***, the Debtor Release is integral to the Plan, including the Plan Settlement. Indeed, as detailed above, the Plan and Plan Settlement are the product of extensive negotiation between the Debtors, the Committee, the Plan Sponsor, and the other Settlement Parties, all of whom were represented by sophisticated counsel.[201] The Plan Settlement, which includes the Debtor Release, paves the path forward for a consensual exit from the Chapter 11 Cases, provides for a meaningful distribution to Holders of Allowed General Unsecured Claims, and avoids lengthy, complex, and value-destructive litigation that would potentially destroy any recoveries

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197 *See, e.g.,* Kirshbaum Decl. ¶¶ 40, 44.

198 *Id.* ¶ 44.

199 *Id*.

200 *See generally* Voting Report at ¶ 12 & Exhibit A.

201 Kirshbaum Decl. ¶ 46.

for Allowed General Unsecured Claims.[202] Moreover, these Chapter 11 Cases stand or fall on the support and contributions of the Released Parties, which would not be possible without providing the Debtor Release in exchange.[203]

129. Accordingly, the Debtor Release is fair, equitable, and in the best interest of the Debtors' Estates and should be approved.

C. The Third-Party Release Is Appropriate and Complies with the Bankruptcy Code.

130. The Third-Party Release set forth in Article 10.3 of the Plan provides that each Releasing Party—including Holders of Claims and Interests who do not specifically opt-out to their inclusion as a Releasing Party—and Related Parties, solely in their respective capacities as such and to the maximum extent permitted by the law, shall release any and all Causes of Action such parties could assert against the Released Parties.[204]

131. While the Fifth Circuit has not directly addressed what constitutes a consensual third-party release, the Court in *Republic Supply*[205] found that the Bankruptcy Code does not preclude a third-party release provision where "it has been accepted and confirmed as an integral part of a plan of reorganization."[206] Specifically, *Republic Supply* and its progeny[207] stand for the

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202 *Id.*

203 *Id.*

204 The foregoing description is meant as a summary of the operative Plan provisions only. Certain of the Releasing Parties are defined as such in multiple capacities. To the extent there is any conflict between the foregoing summary and the definition of "Releasing Party" contained in Article 1 of the Plan, the Plan shall control.

205 *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

206 *Id*.

207 *See, e.g.*, *Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. App'x 281, 286–88 (5th Cir. 2016); *FOM Puerto Rico, S.E. v. Dr. Barnes Eyecenter, Inc.*, 255 Fed. App'x 909, 911–12 (5th Cir. 2007); *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914, 919 (5th Cir. 2000).

proposition that "[c]onsensual nondebtor releases that are specific in language, integral to the plan, a condition of settlement, and given for consideration do not violate" the Bankruptcy Code.[208]

132. In determining whether a third-party release is consensual, bankruptcy courts in Texas focus on process—*i.e.*, whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look it over, [and] the disclosure is adequate so that they can actually understand what they're being asked to do and the options that they're being given."[209] These courts acknowledge that parties in interest waive their rights with respect to a third-party release if they do not opt-out or object.[210] The Third-Party Release satisfies the Fifth Circuit standard for consensual third-party releases. The recent decision in *Purdue* does not change this analysis.[211]

133. In *Purdue*, the United States Supreme Court held "only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."[212] The Supreme Court's holding only applies to nonconsensual releases and does not

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208 *In re Wool Growers*, 371 B.R. 768, 776 (N.D. Tex. 2007) (citing *Republic Supply*, 815 F.2d at 1050); *see also Dr. Barnes Eyecenter*, 255 Fed. App'x at 911–12.

209 Confirmation Hr'g Tr. at 47, *In re Energy & Exploration Partners, Inc.*, No. 15 44931 (Bankr. N.D. Tex. April 21, 2016) [Docket No. 730] (hereinafter "ENXP Tr."); *see also* Confirmation Hr'g Tr. at 32, *In re Ameriforge Group, Inc.*, No. 17-32660 (Bankr. S.D. Tex. May 24, 2017) [Docket No. 144]; Confirmation Hr'g Tr. at 7–8, *In re Hornbeck Offshore Servs., Inc.*, No. 20-32679 (Bankr. S.D. Tex. June 19, 2020) [Docket No. 227].

210 *See Wool Growers*, 371 B.R. at 775 (citing *In re Zale Corp.*, 62 F.3d 746, 761 (5th Cir. 1995)) ("The Fifth Circuit has held that a nondebtor release violates section 524(e) when the affected creditor *timely objects* to the provision.") (emphasis added); *see also* ENXP Tr. at 47:2–15 ("[T]he [*Republic Supply*] case being that the Debtor is authorized, I think, I don't think there's anything that's necessarily bad faith about the Debtor putting release provisions like this into a plan. And if we assume that the Debtor has otherwise satisfied procedural due process . . . and then they choose not to participate one way or the other, can they be bound by it? I would say that this is one of those situations where [*Republic Supply*] says those people can waive substantive rights by not affirmatively participating in the case."); Confirmation Hr'g Tr. at 29:7–19, *In re CJ Holding Co.*, No. 16-33590 (Bankr. S.D. Tex. Dec. 16, 2017) [Docket No. 1076] (approving as consensual a third-party release provision that bound all holders of claims and interest that did not object); Confirmation Hr'g Tr. at 42:2–14, *In re Southcross Holdings, LP*, No. 16-20111 (Bankr. S.D. Tex. April 11, 2016) [Docket No. 191] (approving as consensual a third-party release provision in favor of the debtors' prepetition equity sponsors that bound all holders of claims and interest that did not object).

211 *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204 (2024).

212 *Id.* at 227.

address consensual releases.[213] The Fifth Circuit already limited the availability of non-consensual third-party releases prior to *Purdue*.[214] Unsurprisingly then, bankruptcy courts in this district and others have continued to approve opt-out third-party releases post-*Purdue*, explicitly articulating that "*Purdue* did not change the law in [the Fifth] Circuit" and that "[h]undreds of chapter 11 cases have been confirmed in [the Southern] District with consensual third-party releases with an opt-out."[215]

i. *The Debtors Provided Sufficient Notice to Parties Bound by the Third-Party Release.*

134. The consensual Third-Party Release in the Plan is "appropriate, afforded affected parties constitutional due process, and a meaningful opportunity to opt out."[216] Parties in interest were provided detailed notice about the Plan, the Objection Deadline, the Voting Deadline, and the opportunity to opt-out of the Third-Party Release through the information in the Solicitation Package, specifically the Ballots and Opt-Out Forms.[217] The Disclosure Statement also included a detailed description of the Third-Party Release and the opt-out mechanism.[218] The certificate of

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213 *Id.* at 226.

214 *See, e.g., In re Pilgrim's Pride Corp.*, No. 08-45664-DML-11, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010) (finding that under *Pacific Lumber* "the court may not, *over objection*, approve through confirmation of the Plan third-party protections") (emphasis added).

215 *See In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323 (Bankr. S.D. Tex. 2024) ("There is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan . . . . Hundreds of chapter 11 cases have been confirmed in this District with consensual third-party releases with an opt-out . . . . *Purdue* did not change the law in this Circuit."); *see also In re Zips Car Wash, LLC,* No. 25-80069 (MVL) (Bankr. N.D. Tex. Apr. 15, 2025) [Docket No. 366] (confirming chapter 11 plan's opt-out third-party releases as consensual); *In re CareMax, Inc.*, No. 24-80093 (MVL) (Bankr. N.D. Tex. Jan. 31, 2025) [Docket No. 587] (same); *In re KidKraft, Inc.*, No. 24-80045 (MVL) (Bankr. N.D. Tex. June 24, 2024) [Docket No. 231] (same); *In re Diamond Sports Grp.*, No. 23-90116 (CML) (Bankr. S.D. Tex. Nov. 14, 2024) [Docket No. 2671] (same).

216 *Robertshaw*, 662 B.R. at 323.

217 *See* Solicitation Motion Order, including the exhibits thereto.

218 *See* Disclosure Statement, Art. III.N.

service show that the Ballots and Opt-Out Forms were served on the Voting Classes and Non-Voting Classes, such that all parties in interest had the opportunity to opt-out.[219]

135. The Ballots each quoted the entirety of the Third-Party Release in bold, conspicuous font and clearly informed Holders in the Voting Classes that a vote to accept the Plan is deemed consent to the Third-Party Release.[220] Further, prior to the hearing conditionally approving the Disclosure Statement, the Debtors revised the proposed form of Ballot to include the Third-Party Release language from Article 10.3 of the Plan and moved the Third-Party Release disclaimer to the top of the proposed form of the Notice of Non-Voting Status. This revision was done at the request of the U.S. Trustee and to ensure that Third-Party Release language was even more conspicuous in an effort to minimize the chance that Holders of Claims would miss the opt-out information when voting on the Plan. The Ballots clearly instructed Holders that if they do not consent to the Third-Party Release, they should opt-out of the releases and either reject the Plan or abstain from voting on the Plan.[221] Similarly, the Opt-Out Form quoted the Third-Party Release and included an option to check a box to opt-out of the Third-Party Release, meaning that every known stakeholder, including Unimpaired creditors and Holders of Equity Interests, was actually served with the means by which such stakeholder could opt-out of the Third-Party Release.[222]

136. The Debtors also caused the Third-Party Release language to be published in *The Wall Street Journal*.[223] The Voting Report shows that forty-two (42) Holders of Voting Claims with voting amounts totaling over $310 million, and twenty-two (22) non-Voting Parties elected

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219 *See Certificate of Service*, Docket No. 619

220 *See* Solicitation Motion Order, Exhibit 4.

221 *See id*.

222 *Id*. at Exhibit 5.

223 *See Notice of Publication*, Docket No. 623.

to opt out of the Third-Party Releases.[224] Accordingly, the notice provided by the Debtors, specifically in the Ballots and Notice of Non-Voting Status, was unambiguous that Holders of Claims and Interests—regardless of whether they were entitled to vote, or not entitled to vote—could either consent to or opt-out of the Third-Party Release.

ii. *The Third-Party Release Is Given for Consideration*

137. The Third-Party Release is given for consideration. Many of the Released Parties, including the Settlement Parties and the DIP Lenders, have made significant concessions and commitments that will allow the Holders of Allowed General Unsecured Claims to receive a distribution under the Plan and to facilitate the transactions therein. Specifically, the DIP Lenders and Settlement Parties are: (a) providing up to $1,950,000 in Cash as the Settlement Party Payment, which is a primary source of consideration for the Plan; (b) consented to the creation of the Liquidating Trust for the benefit of Holders of Allowed General Unsecured Claims as a part of the Plan Settlement; and (c) waived the right to receive distributions under the Plan on account of the Allowed Claims, thereby providing significant value to unsecured creditor recoveries.[225] In addition, the Debtors agreed to stipulate and confer derivative standing to the Committee for the purposes of sending one or more demands to the "Non-Released D&Os," which includes the Girns, and/or the applicable D&O Insurance Carriers.[226] From there, on the Effective Date, the Debtors' Retained Causes of Action against all Non-Released D&Os shall be transferred and assigned to, and shall vest in, the Liquidating Trust for the benefit of the Liquidating Trust Beneficiaries.[227]

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[224] *See* Voting Report for a further explanation.

[225] Plan, Art. 3 & Art. 4.

[226] *Id.*, Art. 4.

[227] *Id.*, Art. 4.

138. The Debtors, the Committee, the DIP Lenders, and the Settlement Parties spent months negotiating these concessions, which lead to the Plan Settlement embodied in the Plan. Even pre-petition, the Debtors, DIP Lenders, and the Settlement Parties (which were formally the Supporting RSA Parties) worked together for months prior to the commencement of these Chapter 11 Cases in an effort to reach a value-maximizing deal for the Debtors' stakeholders.[228] And, the Debtors' directors and officers steadfastly maintained their duties to maximize value for the benefit of all stakeholders, investing countless hours both prior to and after filing these Chapter 11 Cases in addition to performing their ordinary course responsibilities.[229]

139. The Plan embodies a global compromise and the release of claims and Causes of Action among various parties including, among others, the Debtors, the DIP Lenders, the Committee, the Settlement Parties and the Debtors' directors, officers, managers, and employees (in their capacities as such). Specifically, the Plan resolves a series of issues that could have cast uncertainty over the Debtors' restructuring and avoids further protracted and expensive litigation related to confirmation of the Plan.

140. Finally, the mutuality of such releases—a "proverbial peppercorn-for-peppercorn"—provides adequate consideration to support the Third-Party Release with respect to all Releasing Parties, including those that are not otherwise receiving any recovery under the Plan.[230]

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[228] Kirshbaum Decl. ¶ 50.

[229] *Id*.

[230] Hr'g Tr. at 244:16–18, *In re Cobalt Int'l Energy, Inc.*, No. 17-36709 (MI) (Bankr. S.D. Tex. Apr. 4, 2018) [Docket No. 790] ("I simply find that this is, in effect, the proverbial peppercorn-for-peppercorn and that that is adequate consideration for the release, given its mutuality.").

iii. *The Third-Party Release Is Specific.*

141. The Third-Party Release is sufficiently specific—listing the potential Causes of Action to be released—so as to put the Releasing Parties on notice of the released Claims.[231] The Third-Party Release explicitly lists out the Causes of Action released, including, among others, those related to the Debtors, these Chapter 11 Cases, the Plan, the RSA, Reorganized HGE, the Disclosure Statement, the Plan Supplement, the DIP Loans, and DIP Financing Documents.[232] Notably, the Third-Party Release also explicitly excludes, among other things, (a) any post-Effective Date obligations of any party or Entity under the Plan, (b) the rights of any Holder of Allowed Claims or Interests to receive a distribution under the Plan, and (c) any willful misconduct, actual or criminal fraud, or gross negligence applicable with the Released Party.[233]

iv. *The Third-Party Release Is Critical to the Success of the Plan and Was Heavily Negotiated.*

142. The circumstances of these Chapter 11 Cases warrant the Third-Party Release. The Third-Party Release is an integral aspect of the Plan Settlement, without which, there would be no value available to Holders of General Unsecured Claims under the Plan.[234] Moreover, the availability of the Third-Party Release was key in securing the support of the Released Parties to, among other things, negotiate and agree to the Plan Settlement, which inured to the benefit of all stakeholders.[235] Put simply, the Debtors' key stakeholders are unwilling to support the Plan without the assurance that they and their collateral would not be subject to post-emergence

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231 Plan Art. 10.3 (describing specifically the nature and type of claims released); Plan Art. 1.1.39 (defining "Consenting Creditors"), Art. 1.1.125 (defining the "Releasing Parties").

232 *See* Plan, Art. 10.3.

233 Plan, Art. 10.3.

234 Kirshbaum Decl. ¶¶ 51-52.

235 *Id*.

litigation or other disputes related to these cases.[236] The Third-Party Release therefore not only benefits the non-Debtor Released Parties, but the Estates as a whole.

v. *The Third-Party Release Is Consistent with Supreme Court and Fifth Circuit Precedent.*

143. The U.S. Trustee objection to the Third-Party Release should be overruled. Despite the Third-Party Release's compliance with *Republic Supply* and its progeny, the U.S. Trustee nevertheless objects to the Third-Party Release, arguing that a party cannot be deemed to consent for its failure to opt-out of the release even after receiving a fair opportunity to do so. In other words, the U.S. Trustee argues that opt-out mechanism makes the Third-Party Releases nonconsensual and therefore, violates the Supreme Court's holding in *Purdue.*[237] This argument fails for several reasons.

144. ***First***, the U.S. Trustee's position is inconsistent with the holding in *Purdue*. As noted above, *Purdue* prohibits a chapter 11 plan from imposing <u>*nonconsensual*</u> third-party releases, it does not prohibit <u>*consensual*</u> third-party releases, which are the Third-Party Releases here.[238] And despite the U.S. Trustee's persistence to the contrary, *Purdue* does not address what constitutes consent.[239] Indeed, this Court has recognized that whether opt-out procedures constitute consent is an issue that has been left to the lower courts:

> So harkening back again to opt-outs, there was no occasion for the Supreme Court in Purdue, in this Court's estimation, to take a view on what constitutes a consensual release. The Supreme Court confined its decision to the question presented, which was about non-consensual releases. When I have approved opt-outs here in my court, it's always been based upon the evidence that the affected

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236 *Id*.

237 603 U.S. 204 (2024).

238 *Purdue,* 603 U.S. at 226.

239 *Purdue,* 603 U.S. at 226 ("Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan[.]")

> parties were afforded constitutional due process and a meaningful opportunity to opt-out.[240]

In addition the cases cited above, following *Purdue*, this Court has consistently approved opt-out procedures—for both voting and non-voting classes—where parties are given due process and a meaningful opportunity to opt-out.[241] Moreover, because even pre-*Purdue*, the Fifth Circuit did not allow non-consensual third-party releases, this Court's approval of opt-out procedures pre-*Purdue* remain good law today.[242]

145. As such, consistent with this Court's precedent, the Third-Party Release here only releases the claims of those third parties who have ***consented***—*i.e.,* those who were given the opportunity to opt-out of the releases and did not do so.[243] Moreover, the Proponents have been provided conspicuous and robust notice that the Plan contains Third-Party Releases. Every Ballot and Notice of Non-Voting Status (which included the Opt-Out Form) contained the full text of Article 10.3 of the Plan—the Third-Party Release—along with relevant definitions therein.

146. This language was bolded and conspicuous. The Ballots and Notices of Non-Voting Status also contained detailed instructions on how to timely opt-out of the Third-Party Releases and stated that those who fail to opt out of the release will nonetheless be bound by the Third-Party Release (*i.e.,* consent to providing a Third-Party Release). As such, all Holders of Claims and Interests who received either a Ballot or Notice of Non-Voting Status were aware (or

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240 *In re Zips Car Wash*, No. 25-80069 (MVL) (Bankr. N.D. Tex. Apr. 18, 2025), Hr'g Tr. at 65:14-22; *see also In re CareMax, Inc.*, No. 24-80093 (MVL) (Bankr. N.D. Tex. Dec. 17, 2024), Hr'g Tr. at 92:8–10 ("There was no occasion for the Supreme Court to express a view on what constitutes a consensual release in its decision in Purdue Pharma.").

241 *In re Zips Car Wash*, No. 25-80069 (MVL) (Bankr. N.D. Tex. Apr. 18, 2025) [Docket No. 366] (approving Debtors' Chapter 11 Plan that contained third-party release opt-outs for voting and non-voting parties); *In re CareMax, Inc.*, No. 24-80093 (MVL) (Bankr. N.D. Tex. Dec. 17, 2024) [Docket No. 587] (same).

242 *See In re Sunland Med. Found.*, No. 23-80000 (MVL) (Bankr. N.D. Tex. Apr. 25, 2024) [Docket No. 528] (approving Debtors' Chapter 11 Plan that contained third-party release opt-outs for voting and non-voting parties).

243 See Plan, Art. 1.138.

should have been aware) that their Claims against the Released Parties would be released if they did opt-out of the Third-Party Releases. In other words, all Holders of Claims or Interests were provided with clear notice that those who do not opt-out of the release contained in the Plan will nonetheless be bound by the Third-Party Release, and instructions on how to find additional information with respect to the Plan and the releases provided therein.

147. ***Second***, the Fifth Circuit has consistently held that the Bankruptcy Code does not preclude a third-party release provision where "it has been accepted and confirmed as an integral part of a plan of reorganization."[244] As detailed above, the core of this analysis is whether the third-party release is consensual. To that end, courts in the Fifth Circuit have specifically applied the *Republic Supply* standard to find that an opt-out mechanism meets the requisite level of consent to impose third-party releases.[245]

148. Even so, the Third-Party Release meets the *Republic Supply* standard because, among other reasons: (a) the Debtors have clearly described the Third-Party Release in clear, plain language in the Disclosure Statement, the Ballot, Notice of Non-Voting Status, Opt-Out Form, and the Plan; (b) the Third-Party Release is a necessary component of the Plan and the Debtors' underlying reorganization; (c) the Debtors, the Committee, and the Settlement Parties have agreed to the Third-Party Release after weeks of arm's-length negotiations; (d) the Third-Party Release is

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244 *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987) (holding third-party release was binding and enforceable where no party timely objected).

245 *See, e.g.*, *In re Cypress Environmental Partners, LP*, No. 22-90039 (MI) (Bankr. S.D. Tex. June 21, 2022) [Docket No. 260] (approving a chapter 11 plan with a consensual third-party release in the style of an opt-out provision); *In re CiCi's Holdings, Inc.*, No. 21-30146 (SGJ), 2021 WL 819330, at *9-10 (Bankr. N.D. Tex. Mar. 3, 2021) (construing silence or a lack of a timely objection as consent in light of the party receiving appropriate notice of the proceeding, plan, and objection deadline, having an opportunity to be heard, and the emphasis of the release language with conspicuous typeface); *In re Sandridge Energy, Inc.*, No. 16-32488 (DRJ), 2016 Bankr. LEXIS 4622, at *47 (Bankr. S.D. Tex. Sep. 20, 2016) (finding an adequately noticed, conspicuous opportunity for opt-out is consent for a third-party release); *In re Vista Proppants & Logistics, LLC*, No. 20-42002 (ELM), 2020 WL 6325526, at *7 (Bankr. N.D. Tex. Oct. 28, 2020).

given in consideration of the classification, distributions, releases, and other benefits provided under the Plan; and (e) the Proponents have adhered to the solicitation and noticing scheme approved by this Court.

149. Accordingly, the Debtors submit that the Court should overrule the U.S. Trustee Objection.

D. The Exculpation Provision Is Appropriate.

150. Article 10.4 of the Plan provides that each Exculpated Party—*i.e.*, (a) each of the Debtors; (b) the Independent Director; and (c) the Committee and each of its members—shall be released and exculpated from any Cause of Action arising out of acts or omissions in connection with these Chapter 11 Cases and certain related transactions, except for acts or omissions that are found to have been the product of actual fraud, willful misconduct, or gross negligence (the "**Exculpation Provision**").[246] The Exculpation Provision is narrowly tailored and consistent with Fifth Circuit precedent articulated in *NextPoint Advisors, L.P. v. Highland Capital Management, L.P., (In re Highland Capital Mgmt., LP)*, 48 F.4th 419 (5th Cir. 2022).[247] Moreover, this Court has approved exculpation provisions similar to the definitions proposed here.[248]

151. Part of the Exculpation Provision also provides that each of the 1125(e) Exculpation Parties[249]—*i.e.*, (a) each of the Exculpated Parties; (b) Reorganized HGE, (c) the Professional

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246 *See* Plan, Art. 1.1.67 (defining "Exculpated Parties"). The foregoing description is meant as a summary of the operative Plan provisions only. To the extent there is any conflict between the forgoing summary and the definition of "Exculpated Party" contained in Article 1 of the Plan, the Plan shall control.

247 *See Highland Capital*, 48 F.4th at 437-38 (finding that exculpation provisions were only lawful with respect to the debtor, creditor's committee, its members, and the debtor's independent director).

248 *See, e.g., In re Zips Car Wash*, No. 25-80069 (MVL) (Bankr. Apr. 18, 2025) [Docket No. 366] (confirming a plan that defines "Exculpated Parties" to include "(a) the Debtors; (b) each independent director of the Debtors; (c) the Creditors' Committee and each of its members, solely in their respective capacities as such; . . . ."); *In re KidKraft, Inc.*, No. 23-80045, (MVL) (Bankr. N.D. Tex. June 24, 2024) [Docket No. 241] (same).

249 Plan, Art. 1.1.1 (defining "1125(e) Exculpation Parties"). The foregoing description is meant as a summary of the operative Plan provisions only. To the extent there is any conflict between the forgoing summary and the definition of "1125(e) Exculpation Party" contained in Article 1 of the Plan, the Plan shall control.

Persons retained in the Chapter 11 Cases, and (d) the Related Parties of each to the extent permitted under section 1125(e) of the Bankruptcy Code—shall not incur liability for any Cause of Action or Claim related to any act or omission in connection with the (y) the solicitation of acceptance or rejection of the Plan in good faith and in compliance with the applicable provisions of the Bankruptcy Code or (z) the participation, in good faith and in compliance with the applicable provisions of the Bankruptcy Code, in the offer, issuance, sale, or purchase of a security, offered or sold under the Plan (the "**1125(e) Exculpation Provision**").[250] The Debtors submit that the 1125(e) Exculpation Provision is appropriate and consistent with the applicable law.

152. ***First***, the 1125(e) Exculpation Provision is limited in scope, only exculpating to the extent so provided under section 1125 of the Bankruptcy Code. Indeed, the 1125(e) Exculpation Provision mirrors the language of section 1125(e) of the Bankruptcy Code, and thus, ensures that the 1125(e) Exculpation Parties are receiving the benefits they are entitled under the Bankruptcy Code. ***Second***, the definitions of the "1125(e) Exculpated Parties" and the "Related Parties" thereof are narrowly tailored include only those who have been instrumental in the formulation, solicitation, and issuance of securities under the Plan—including, the directors and officers of the Debtors, Reorganized HGE, and the professionals to the Debtors and the Committee. Moreover, the 1125(e) Exculpated Parties would not have been willing to participate in the Debtors' restructuring efforts absent assurances that they would be exculpated for their conduct during these Chapter 11 Cases to the extent they acted in good faith.[251] Courts in this district routinely approve

[250] Plan, Art. 10.4.

[251] *See* Kirshbaum Decl. ¶¶ 54-55.

chapter 11 plans that include similar Exculpation Provisions, including with respect to good faith findings.[252]

153. Overall, the Exculpation Provision in the Plan is an integral piece of the overall settlements embodied by the Plan.[253] It is limited to parties who have performed valuable services in connection with the Debtors' restructuring, and is the product of good faith, arm's-length negotiations.[254] The Exculpation Provision is narrowly tailored to exclude acts of actual fraud, willful misconduct, or gross negligence, and relates only to acts or omissions in connection with, or arising out, of the Debtors' restructuring.[255] Additionally, no party has specifically objected to the Exculpation Provision. As such, the Exculpation Provision is a critical component of the Plan, and along with the Debtor Release, forms an integral piece of the overall settlement embodied in the Plan.[256]

E. The Injunction Provision Is Appropriate.

154. Article 10.5 of Plan is the injunction provision (the "**Injunction Provision**"). The Injunction Provision is a necessary part of the Plan because it enforces the Debtors' discharge,

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[252] *See, e.g.*, *In re Zips Car Wash, LLC,* No. 25-80069 (MVL) (Bankr. N.D. Tex. Apr. 15, 2025) [Docket No. 366] (confirming plan's exculpation provision for each "Exculpated Parties" and "1125(e) Exculpation Parties" with respect to acts or omissions regarding (a) the solicitation of the plan in good faith compliance of the Bankruptcy Code and (b) participation in good faith compliance with applicable Bankruptcy Code provisions); *see also In re Caremax, Inc.*, No. 24-80093 (MVL) (N.D. Tex. Jan. 31, 2025) [Docket No. 587] (including a finding that (a) the exculpation parties "will be deemed to have, participated in good faith" and (b) qualified that Exculpated Parties "shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities"); *In re Kidkraft, Inc.., Inc.*, No. 23-80045 (MVL) (Bankr. N.D. Tex. June 24, 2024) [Docket No. 241] (including a finding that the exculpation provision was "proposed in good faith" and approving a plan containing a provision allowing exculpated parties to reasonably rely on the advice of counsel with respect to their duties and responsibilities); *In re Venator Materials PLC*, No. 23-90301 (DRJ) (Bankr. S.D. Tex. July 25, 2023) [Docket No. 344] (approving an exculpation provision and including a finding that the exculpated parties will be deemed to have participated in good faith).

[253] Kirshbaum Decl. ¶ 55.

[254] *Id*.

[255] *Id*.

[256] *Id*.

Debtor Release, Third-Party Release, the Exculpation, and by extension the Plan Settlement on which the Plan is founded.[257] The U.S. Trustee argues that the Injunction Provision is inappropriate because the Court lacks the authority to impose an injunction, particularly with respect to the Third-Party Releases.[258]

155. While the Bankruptcy Code may not specifically provide a provision authorizing injunctions to enforce releases or exculpations, such an injunction is permissible under prevailing Fifth Circuit law so long as such injunction is consensual.[259] Because, as described above, the Debtor Release and Third-Party Release are consensual, a Holder that consents to those releases are also consenting to the corresponding injunction enforcing such release. As such, the U.S. Trustee's objection should be overruled.

156. The Injunction Provision is similarly permissible to as to the Exculpation provision. The Fifth Circuit has concluded that injunctions are permissible only as to the "legally exculpated parties."[260] As discussed above, both the definitions of "Exculpated Party" and "1125 Exculpation Parties" are narrowly tailored and comply with the prevailing Fifth Circuit precedent.

157. As such, to the extent the Court finds that the Plan's Exculpation and Release Provisions are appropriate, the Court should approve the Injunction Provision.

IV. The Remaining Objections Should Be Overruled.

158. The Debtors received four (4) formal objections set forth in **Exhibit A** attached hereto, and certain informal objections to Confirmation of the Plan. As of the filing of this

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257 *Id*. ¶ 57.

258 UST Objection, ¶ 21.

259 *See, e.g.*, *In re Camp Arrowhead*, 451 B.R. 678, 701–02 (Bankr. W.D. Tex. 2011) ("[T]he Fifth Circuit does allow permanent injunctions *so long as there is consent* . . . [w]ithout an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing") (citations omitted).

260 *Highland Cap.*, 132 F.4th at 360-61.

Memorandum, the Debtors believe that they have resolved all formal and informal objections except the Hallandale Objection and parts of the U.S. Trustee Objection, discussed *infra*. To the extent these objections are not resolved, they should be overruled.

WAIVER OF BANKRUPTCY RULE 3020(E)

159. To implement the Plan, the Proponents seek a waiver of the 14-day stay of an order confirming a chapter 11 plan under Bankruptcy Rule 3020(e). These Chapter 11 Cases and transactions contemplated therein have been negotiated in good faith and implemented with a high degree of transparency. The Debtors' swift emergence from chapter 11 is an important component of their restructuring, and requiring the Debtors to pause before emergence would be prejudicial to all parties in interest that continue to incur the cost and expense of the Debtors' Chapter 11 Cases. Given the complexity of the Plan and the various transactions implicated by the Plan, and that each day the Debtors remain in chapter 11 they incur significant administrative and professional costs, the Debtors seek to waive the stay so that the Effective Date can occur as soon as needed.[261] For these reasons, the Proponents request a waiver of stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

CONCLUSION

160. For all of the reasons set forth herein, and as will be further shown at the Combined 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 an order confirming the Plan and granting such other and further relief as is just and proper.

[261] *See* Kirshbaum Decl. ¶¶ 92-93.

DATED: November 21, 2025

Respectfully submitted by:

/s/ Holland N. O'Neil

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2025, a true and correct copy of the foregoing document was served electronically by the Court's PACER system.

/s/ Nora J. McGuffey
Nora J. McGuffey

Exhibit A

Confirmation Objections

***In re Higher Ground Education, Inc.*, Case No. 25-80121 (MVL)**

Summary of Confirmation Objections

Party	**Summary of Objection**	**Response / Status**
Tennessee Department of Revenue [Docket No. 630]	The Party objects because the Plan "is inconsistent with 11 U.S.C. § 503(b)(1)(D)."	This Objection has been **resolved**. The Debtors added agreed language to the Confirmation Order at ¶ 52.
United States Trustee [Docket No. 640]	The Party objects because: • The Plan uses opt-out procedures to establish third party consent for the Third-Party Release. • The definition of "Related Party" renders the Third-Party Release too broad. • The Court lacks jurisdiction and authority to issue the Injunction.	This Objection is **partially resolved**. The Proponents narrowed the definition of "Related Party" and the U.S. Trustee agreed to the added language. *See* Plan, Art. 1.1.123. The U.S. Trustee's remaining objections are unresolved, and addressed in the Memorandum, *see* Part III.B.
214 E. Hallandale Beach, LLC [Docket No. 643]	The Party objects because: • The Plan will result in a lower recovery for Class 8 than what it would receive in a Chapter 7. • The Plan and the Plan Settlement do not comply with Rule 9019, Section 363(b), Section 1123(a)(3), and Sections 1129(a)(1), (2), (7). • The Plan and the Plan Settlement may not comply with Section 1129(a)(8) and (10) and 1129(B).	This Objection is **unresolved**. The Liquidation Analysis confirms that the Plan results in a higher recovery for unsecured creditors than a Chapter 7 liquidation would. The Plan has the support of the Committee. The Objection is further addressed in the Memorandum, *see* Parts II.G, II.N, and III.A.
Duc Viet Nguyen, Thuy Thi Thu Nguyen, and Dixit Kishorkumar Vora [Docket No. 642]	The Parties objected primarily because the Plan and Disclosure Statement allegedly failed to adequately explain how the Parties' interests are being treated under the Plan in violation of Sections 1129(a)(1)(2) and (3), and 1123(a)(1)-(3).	This Objection has been **resolved.** The Proponents added language to the Plan clarifying the treatment of EB-5 Investors. *See* Plan, Art. 4.8. Accordingly, the Parties have **withdrawn** their Objection. *See* Docket No. 651.