IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
HRI HOLDING CORP., *et al.*[1]	Case No. 19-12415 (MFW)
Debtors.	(Jointly Administered)
	Ref. Nos. 704 & 731

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF (A) FINAL APPROVAL OF THE DISCLOSURE STATEMENT AND (B) CONFIRMATION OF THE PLAN

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Dated: November 3, 2020

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: HRI Holding Corp. (4677), Houlihan's Restaurants, Inc. (8489), HDJG Corp. (3479), Red Steer, Inc. (2214), Sam Wilson's/Kansas, Inc. (5739), Darryl's of St. Louis County, Inc. (7177), Darryl's of Overland Park, Inc. (3015), Houlihan's of Ohio, Inc. (6410), HRI O'Fallon, Inc. (4539), Algonquin Houlihan's Restaurant, L.L.C. (0449), Geneva Houlihan's Restaurant, L.L.C. (3156), Hanley Station Houlihan's Restaurant, LLC (8058), Houlihan's Texas Holdings, Inc. (5485), Houlihan's Restaurants of Texas, Inc. (4948), JGIL Mill OP LLC (0741), JGIL Millburn, LLC (6071), JGIL Milburn Op LLC (N/A), JGIL, LLC (5485), JGIL Holding Corp. (N/A), JGIL Omaha, LLC (5485), HOP NJ NY, LLC (1106), HOP Farmingdale LLC (7273), HOP Cherry Hill LLC (5012), HOP Paramus LLC (5154), HOP Lawrenceville LLC (5239), HOP Brick LLC (4416), HOP Secaucus LLC (5946), HOP Heights LLC (6017), HOP Bayonne LLC (7185), HOP Fairfield LLC (8068), HOP Ramsey LLC (8657), HOP Bridgewater LLC (1005), HOP Parsippany LLC (1520), HOP Westbury LLC (2352), HOP Weehawken LLC (2571), HOP New Brunswick LLC (2637), HOP Holmdel LLC (2638), HOP Woodbridge LLC (8965), and Houlihan's of Chesterfield, Inc. (5073). The Debtors' corporate headquarters and the mailing address is 8700 State Line Road, Suite 100, Leawood, Kansas 66206.

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INTRODUCTION

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors") submit this memorandum of law (the "Memorandum of Law") in support of (i) final approval of the *Disclosure Statement for the Joint Chapter 11 Plan of HRI Holding Corp. and Its Debtor Affiliates* [D.I. 735] (as modified, revised, supplemented, and amended including all attachments and exhibits thereto, the "Disclosure Statement"), pursuant to section 1125 of title 11 of the United States Code (as amended or modified, the "Bankruptcy Code") and (ii) confirmation of the *Joint Chapter 11 Plan of HRI Holding Corp. and Its Debtor Affiliates* [D.I. 734] (as modified, revised, supplemented and amended including all attachments and exhibits thereto, the "Plan"),[1] pursuant to section 1129 of the Bankruptcy Code. In addition, as set forth herein, the Debtors request a waiver of the fourteen (14) day stay of the order confirming the Plan imposed by rule 3020(e) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

PRELIMINARY STATEMENT

On November 14, 2019 (the "Petition Date"), facing significant liquidity constraints, the Debtors commenced these bankruptcy cases (the "Chapter 11 Cases") by each filing a voluntary petition under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court"). After exploring out-of-court strategic alternatives, the Debtors concluded that the best way to maximize value for the benefit of all stakeholders was through filing for Chapter 11 protection, obtaining postpetition financing and pursuing an orderly sale of their assets in a controlled, court-supervised environment (the "Sale"). Following the successful Sale and Global Settlement with the Creditors' Committee and the Prepetition Secured Lenders, winddown of operations and the subsequent sale of certain miscellaneous

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Declaration of Matthew R. Manning in Support of Debtors' Chapter 11 Petitions and First Day Pleadings* [D.I. 2] (the "First Day Declaration"), the Plan or the Disclosure Statement, as applicable.

assets, and less than one (1) year after commencing these Chapter 11 Cases, the Debtors now seek confirmation of the Plan with the full support of the Creditors' Committee and the Prepetition Secured Lenders. If confirmed, the Plan will fairly and appropriately distribute the remaining assets in and value of the Debtors' estates to their creditors and provide for the orderly wind down of the Debtors' estates.

The Plan is the culmination of the Debtors' substantial efforts over the past year to bring these Chapter 11 Cases to a fully consensual, value-maximizing close following the sale of substantially all of the Debtors' assets and the winddown of the Debtors' operations. The Plan includes and effectuates the terms of the Global Settlement reached among the Debtors, the Creditors' Committee and the Prepetition Secured Lenders that compromises claims and Causes of Action asserted or that could have been asserted by the Creditors' Committee, and by and against the Debtors, and the Prepetition Secured Lenders, as well as potential disputes related to the allocation of available value as among the Debtors' stakeholders. The Global Settlement forms the framework for the Plan and provides significant value for general unsecured creditors, who, given the Debtors' capital structure, would likely receive no (or a substantially diminished) recovery absent the substantial consideration provided by the Prepetition Secured Lenders pursuant to the terms of the Global Settlement, as incorporated into the Plan.

As set forth herein, in the *Declaration of Matthew R. Manning in Support of Confirmation of the Joint Chapter 11 Plan of HRI Holding Corp. and its Debtor Affiliates* [D.I. 804] and as will be shown at the confirmation hearing, the Disclosure Statement and the Plan meet all of the requirements under the Bankruptcy Code to be approved and confirmed. Accordingly, the Debtors request that the Disclosure Statement be approved on a final basis and the Plan be confirmed.

STATEMENT OF FACTS

I. The Debtors' Businesses

1. Prior to the Petition Date, the Debtors were leaders in the "polished casual" dining space, serving top quality food and beverages with distinctive Midwestern hospitality. Headquartered in Leawood, Kansas, as of the Petition Date, the Company owned and operated forty-seven (47) restaurants in fourteen (14) states (Connecticut, Florida, Illinois, Indiana, Kansas, Michigan, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Texas, and Virginia). The Company's restaurants operated under five (5) banners: (1) Houlihan's Restaurant + Bar ("Houlihan's"), (2) J. Gilbert's Wood-Fired Steak + Seafood ("J. Gilbert's"), (3) Bristol Seafood Grill ("Bristol"), (4) Devon Seafood Grill ("Devon"), and (5) Make Room for Truman. As of the Petition Date, the Debtors employed approximately 3,450 employees.

II. Events Leading to the Bankruptcy Filing

A. Adverse Industry Trends and Operational Challenges

2. As set forth in the First Day Declaration, a confluence of factors contributed to the Debtors' need to commence the Chapter 11 Cases. In December 2015, certain affiliates of the Debtors' equity sponsor (such affiliates, collectively, the "Sponsor") and certain company employees made significant investments in the Company and its subsidiaries based upon a strategic growth vision focused on the development of the J. Gilbert's brand and the potential acquisition of the largest Houlihan's franchisee. However, various industry headwinds, senior management changes and shifts in investment philosophy eventually left the Company without the funds needed to grow their businesses and absorb the costs associated with the shifting labor market, unfavorable leases and the rapid growth in costly third-party delivery. Additionally, in May 2018, the Company acquired seventeen (17) Houlihan's restaurants from A.C.E. Restaurant Group, Inc., which at the time was the Company's single largest franchisee. The premise of the

acquisition was to bring the units in-house and refresh certain of the locations, but the Company's liquidity constraints prevented that work from being accomplished. Consequently, and although these units continued to be strong performers (particularly in guest satisfaction metrics, where they out-performed the casual dining sector's average), this "bolt-on" acquisition had not yet achieved its potential prior to the Petition Date.

B. Restructuring Efforts

3. In an attempt to remedy this situation, prior to the Petition Date, the Debtors senior management evaluated the Company's business, closed underperforming locations and streamlined their management and support center teams. Management also evaluated and elevated its marketing and promotions, reinvented the Houlihan's menu, reinvigorated happy hour, developed the Make Room for Truman prototype, and created programs and processes to attract, train and retain top management talent for its restaurants and support teams. As a result of both senior management's and the Company's field teams' efforts, the Company's owned restaurants experienced both same store sales and traffic growth above that of the industry average.

4. Notwithstanding these industry-leading results and the cost containment and reduction measures management undertook, the Debtors' capital and debt structure, combined with its limited liquidity, severely constrained growth and jeopardized the Debtors' ability to fund operations. The Company was challenged by unsustainably high occupancy costs at many of its locations, accounting for approximately $3.5 million of annual EBITDA losses. Prior to the filing of these Chapter 11 Cases, and after unsuccessful negotiations with certain landlords regarding rent and other lease concessions, the Company closed twelve (12) of its unprofitable restaurants.

5. As a result of certain alleged defaults under the Credit Agreement as asserted by the Administrative Agent in March and April of 2019, and the Company's disputes with respect thereto, the Company, the Prepetition Secured Lenders and the Sponsor entered into that certain Forbearance and Sale Support Agreement dated June 21, 2019 (as subsequently amended or modified, the "FSSA"). Pursuant to the FSSA, the Lenders agreed (among other things) to forbear from exercising remedies and the Company agreed (among other things) to engage a chief restructuring officer and hire an investment banker to commence a sale process in connection with the potential sale of all or substantially all of the Company's capital stock, assets and/or businesses during the Forbearance Period (the "Sale Process") which, absent extension, would have expired on November 15, 2019. In connection with the FSSA, the Sponsor's board members and officers resigned from all of their positions, two (2) independent directors were nominated and appointed to the board of Holdco (the Debtors' ultimate holding company), Matthew R. Manning of M-III Advisory Partners, LP was appointed Chief Restructuring Officer, and the then existing executive and management teams continued day-to-day operation of the Company's businesses.

6. Ultimately, following its evaluation of all available options, the Company determined that filing for Chapter 11 protection, obtaining postpetition financing and pursuing an orderly sale of its assets in a controlled, court-supervised environment was the best available option to maximize value for the Company and its stakeholders.

7. In June 2019, the Company engaged Piper Jaffray & Co. ("PJC") in connection with the Sale Process. PJC prepared extensive marketing materials and began marketing the Company in August 2019.

8. After receiving and evaluating various proposals and conducting numerous management meetings with interested parties, the Company selected Landry's, LLC ("Landry's" or the "Purchaser") as the stalking horse purchaser in connection with the Sale. On November 13, 2019, the Company and the Purchaser entered into an asset purchase agreement (the "Asset Purchase Agreement"). The Purchaser agreed to purchase substantially all of the Debtors' assets, subject to higher or otherwise better bids, for aggregate consideration of $40.0 million in cash, subject to certain adjustments, and the assumption of certain liabilities. The Purchaser offered employment to many of the Company's operational and certain other employees with employment commencing upon the closing of the Sale.

9. In order to ensure that the Company had sufficient funds to maintain the stability of its businesses and its going concern value, the Debtors obtained authority to borrow approximately $5 million from the Lenders and utilize their cash collateral during the Chapter 11 Cases (the "DIP Facility").

III. The Chapter 11 Cases

A. First Day Relief

10. On the Petition Date, along with their voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Petitions"), the Debtors filed several motions (the "First Day Motions") designed to facilitate the administration of the Chapter 11 Cases and minimize disruption to the Debtors' operations, by, among other things, permitting the Debtors to meet certain obligations to their employees, vendors, and customers following the commencement of the Chapter 11 Cases. A brief description of each of the First Day Motions, the relief requested therein and the evidence in support thereof is set forth in the First Day Declaration, filed on the Petition Date.

B. DIP Financing & Use of Cash Collateral

11. To fund the Chapter 11 Cases and allow the Debtors to continue to operate as a going concern, the Debtors obtained Court approval of the DIP Facility and authorization to use cash collateral on an interim and final basis. On December 5, 2019, the Court entered the *Final Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Liens and Superpriority Administrative Expense Claims to Post-Petition Lenders and (C) Utilize Cash Collateral, (II) Providing Adequate Protection to the Pre-Petition Secured Parties, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief, Pursuant to 11 U.S.C. Sections 105, 361, 362, 363, 364 and 507* [D.I. 163].

C. The Sale Process

12. As explained above, the Debtors filed their Chapter 11 Cases to engage in a process to sell substantially all of their assets so that they could maximize the value of their estates for the benefit of all of their constituents. To that end, On the Petition Date, the Debtors filed (1) the *Motion of the Debtors for Entry of an Order (A) Approving Bidding Procedures in Connection with a Transaction by Public Auction; (B) Scheduling a Hearing to Consider the Transaction; (C) Approving the Form and Manner of Notice Thereof; (D) Approving Contract Procedures; and (E) Granting Related Relief* [D.I. 14] (the "Bid Procedures Motion") and (2) the *Motion of the Debtors for Entry of an Order (I) Approving Asset Purchase Agreement and Authorizing the Sale of Certain Assets of the Debtors Outside the Ordinary Course of Business, (II) Authorizing the Sale of Assets Free and Clear of All Claims and Liens, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief* [D.I. 15] (the "Sale Motion"). By Order dated December 5, 2019, the Court approved the Debtors' Bid Procedures Motion [D.I. 164] (the "Bid Procedures Order").

13. The Debtors did not receive any qualified bids (other than the Asset Purchase Agreement) prior to the deadline to submit bids. As such, in accordance with the Bid Procedures Order, the Debtors' cancelled the Auction and designated the Purchaser as the Successful Bidder (as defined in the Bid Procedures Order).

14. On December 21, 2019 the Court entered the Order [D.I. 322] (the "Sale Order") approving the Sale Motion and authorizing the sale of substantially all of the Debtors' assets to the Purchaser. In addition to the purchase price of $40 million (subject to certain adjustments), Landry's assumed certain liabilities including, among others, all accounts payable related to or arising in the ordinary course of business on or after the Petition Date, all Liabilities related to or arising under the assigned contracts, any and all "Farmers' Liens" (*i.e.*, PACA/PASA Claims) that were outstanding and unpaid with respect to the purchased assets, and all Liabilities that were outstanding and unpaid as of the Closing Date in respect of allowed 503(b)(9) Claims.

15. Pursuant to the Asset Purchase Agreement, certain assets were deemed excluded (each, a "Miscellaneous Asset" and, together, the "Miscellaneous Assets") including, but not limited to, miscellaneous equipment, certain liquor licenses and various types of other personal property that the Debtors no longer required following the Closing and cessation of their operations. On February 26, 2020, the Court entered the *Order Approving Procedures Pursuant to Bankruptcy Code Sections 105(a), 363 and 554(a) and Federal Rules of Bankruptcy Procedure 6004, for the Sale of Certain Miscellaneous Assets Free and Clear of Liens, Claims and Encumbrances and to Approve the Sale or Abandonment of Certain Miscellaneous Assets and Granting Related Relief* [D.I. 499] approving procedures (the "Miscellaneous Asset Procedures") by which the Debtors are permitted to sell or abandon Miscellaneous Assets. To the extent any Miscellaneous Assets – namely liquor licenses – are not monetized or otherwise

disposed of prior to the Effective Date of the Plan, the Plan provides that the Plan Administrator will monetize or otherwise dispose of such assets and distribute the proceeds thereof in accordance with the terms of the Plan.

D. The Global Settlement

16. In connection with the approval of the Debtors' DIP Facility and Bid Procedures Order, the Debtors, Creditors' Committee and the Prepetition Secured Parties agreed to the principal terms of the Global Settlement to address potential challenges to the extent and validity of the Prepetition Secured Parties' liens and claims, which the Prepetition Secured Parties disputed. The primary terms of the Global Settlement were announced on the record at the December 5, 2019 hearing and were subsequently memorialized in the Plan Term Sheet attached to the Sale Order.

17. Specifically, pursuant to the Global Settlement and as described in the Disclosure Statement and incorporated into the Plan, the Prepetition Secured Lenders agreed to, among other things, (a) release their respective liens, claims and rights to any Retained Sale Proceeds and Identified Liquor License Proceeds with such amounts to be held and utilized for the benefit of the Debtors' estates and creditors without any distributions therefrom in favor of the Prepetition Secured Lenders and (b) release their respective liens on the Excluded Liquor License Proceeds and have such proceeds be shared on a Pro Rata basis between (i) the Prepetition Secured Lenders on account of their Allowed Prepetition Secured Obligations Deficiency Claims and (ii) the holders of Allowed General Unsecured Claims. In return, notwithstanding anything in the Final DIP Order to the contrary, upon the closing of the sale to the Purchaser, the "Challenge Period" in the Final DIP Order terminated and the Creditors' Committee was barred from seeking to challenge or otherwise object to the amount, validity, enforceability, priority, or extent of the Prepetition Secured Obligations or the liens of the

Prepetition Secured Lenders on the Pre-Petition Collateral (as defined in the Final DIP Order) securing the Prepetition Secured Obligations Claims; *provided*, *however*, the Creditors' Committee reserved the right to reconcile the final amount of the Prepetition Secured Obligations Deficiency Claims. In addition to providing a meaningful recovery to general unsecured creditors where such recovery was otherwise unlikely, the Global Settlement provided the framework for the Plan, ending the prospect of potentially expensive, extensive and time-consuming litigation over the respective parties' rights and interests in the Debtors' assets, and providing for an expedited and efficient wind down of the Debtors' Estates for the benefit of all stakeholders.

E. Schedules and Statements and the Bar Date Motion

18. On December 12, 2019, the Debtors filed their *Schedules of Assets and Liabilities and Statements of Financial Affairs* [D.I. 187-268] (as amended or modified and together as, the "Schedules and Statements") and amended Schedules on January 30, 2020 [D.I. 368-408]. On December 19, 2019, the U.S. Trustee conducted the meeting of creditors convened pursuant to section 341 of the Bankruptcy Code (the "341 Meeting"). On January 31, 2020, the U.S. Trustee closed the 341 Meeting.

19. On February 26, 2020, the Court entered the *Order Granting Motion of the Debtors for Entry of an Order (A) Establishing Bar Dates for Filing Proofs of Claim, (B) Approving the Form and Manner for Filing Proofs of Claim and (C) Approving Notice Thereof* [D.I. 498] (the "Bar Date Order"). Pursuant to the Bar Date Order, the Court established April 1, 2020 at 4:00 p.m. (prevailing Pacific Time) (the "Bar Date") as the deadline for each person or entity, other than governmental units, holding (i) a Claim against the Debtors that arose (or was deemed to have arisen) before the Petition Date and/or (ii) any right to payment constituting a cost or administrative expense of administration of the Debtors' Chapter 11 Cases

that arose, accrued, or otherwise became due and payable or may have arisen, accrued or otherwise become due and payable at any time during the period from the Petition Date through and including February 29, 2020 to file proofs of claim against the Debtors. In addition, the Bar Date Order set May 12, 2020 at 4:00 p.m. (prevailing Pacific Time) as the deadline for all governmental units holding such claims to file proofs of claim.

F. The Plan and the Disclosure Statement

20. The Debtors filed the Plan and Disclosure Statement on August 25, 2020 [D.I. 702 and 703, respectively]. The solicitation versions of the Plan and the Disclosure Statement were filed on September 16, 2020 [D.I. 734 & 735]. On October 19, 2020, the Debtors filed the Plan Supplement [D.I. 772] (as amended, revised, updated, or supplemented, the "Plan Supplement").

21. The Disclosure Statement is the product of the Debtors' extensive review and analysis of their businesses, assets and liabilities, and circumstances leading to the Chapter 11 Cases. The Disclosure Statement provides information regarding: (a) the terms of the Plan, including a summary of the classifications and treatment of all Classes of Claims and Interests; (b) the distributions to holders of Allowed Claims; (c) the effect of the Plan on holders of Claims and Interests and other parties in interest thereunder; (d) the estimated amount of Claims that will ultimately be Allowed; (e) certain risk factors to consider that may affect the Plan; (f) certain tax issues related to the Plan and distributions; and (g) the means for implementation of the Plan.

22. The Plan classifies holders of Claims and Interests into certain Classes for all purposes, including with respect to voting rights, if any, as follows:

Class	Claim/Interest	Status	Voting Rights
1	Secured Tax Claims	Unimpaired	Not Entitled to Vote - Deemed to Accept
2	Other Secured Claims	Unimpaired	Not Entitled to Vote - Deemed to Accept
3	Other Priority Claims	Unimpaired	Not Entitled to Vote - Deemed to Accept

Class	Claim/Interest	Status	Voting Rights
4	Prepetition Secured Obligations Claims	Impaired	Entitled to Vote
5	General Unsecured Claims	Impaired	Entitled to Vote
6	Prepetition Secured Obligations Deficiency Claims	Impaired	Entitled to Vote
7	Subordinated Claims	Impaired	Not Entitled to Vote - Deemed to Reject
8	Intercompany Interests	Impaired	Not Entitled to Vote - Deemed to Reject
9	Interests in Holdco	Impaired	Not Entitled to Vote - Deemed to Reject

23. As set forth in the chart above, Class 4 (Prepetition Secured Obligations Claims), Class 5 (General Unsecured Claims) and Class 6 (Prepetition Secured Obligations Deficiency Claims) were the only classes of Claims or Interests that were entitled to vote on the Plan (the "Voting Classes"). All other holders of Claims or Interests were not entitled to vote on the Plan because each such holder holds a Claim or Interest presumed to accept or deemed to reject under the Plan. As such, the Debtors did not solicit votes from holders of Claims or Interests in Classes 1, 2, 3, 7, 8, and 9.

24. The deadline for the Voting Classes to cast their ballots was October 26, 2020 at 11:59 p.m. (prevailing Eastern Time). As set forth in the *Declaration of Leanne V. Rehder Scott Regarding the Solicitation and Tabulation of Votes on the Joint Chapter 11 Plan of HRI Holding Corp. and Its Debtor Affiliates* [D.I. 803] (the "Voting Declaration"), the holders of Claims or Interests in the Voting Classes overwhelmingly accepted the Plan. To be sure, 230 of the 258 Ballots cast (89%) voted to accept the Plan by Holders of Claims and Interests representing $2,034,107,517.73 of the $2,034,702,077.39 voting dollars. *See* Voting Declaration at Exhibit A.

IV. Responses to Confirmation of the Plan and Final Approval of the Disclosure Statement

25. The deadline to object to confirmation of the Plan and final approval of the adequacy of the Disclosure Statement was October 26, 2020 at 4:00 p.m. (prevailing Eastern Time). In addition to certain informal comments received by the Debtors from certain parties in

interest with respect to the Plan (collectively, the "Responses"), one formal objection was filed by Denton County, Texas [D.I. 785] and it was subsequently withdrawn [D.I. 797]. The Debtors have resolved all of the Responses to confirmation of the Plan through clarifying language in the Confirmation Order. The Debtors did not receive any informal or formal responses to final approval of the Disclosure Statement.

THE DISCLOSURE STATEMENT SATISFIES THE REQUIREMENTS OF BANKRUPTCY CODE SECTION 1125

26. The Debtors request that the Court approve the Disclosure Statement as containing "adequate information" in accordance with Bankruptcy Code section 1125 on a final basis. Bankruptcy Code section 1125(b) states that "[a]n acceptance or rejection of a plan may not be solicited . . . unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). In turn, Bankruptcy Code section 1125(a) defines "adequate information" as:

> 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, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

11 U.S.C. § 1125(a).

27. The primary purpose of a disclosure statement is to provide information that is "reasonably practicable" to permit an "informed judgment" by creditors and interest holders

entitled to vote on the plan. *See Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003); *see also Century Glove, Inc. v. First Am. Bank N.Y.*, 860 F.2d 94, 100 (3d Cir. 1988) ("[Section] 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote.").

28. Bankruptcy courts have broad discretion in determining whether a disclosure statement contains adequate information based on the unique facts and circumstances of each case. *See Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) ("From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case."); *Lisanti v. Lubetkin (In re Lisanti Foods, Inc.)*, 329 B.R. 491, 507 (D.N.J. 2005), *aff'd*, 241 Fed. App'x. 1 (3d Cir. Aug. 2, 2007) ("Section 1125 affords the Bankruptcy Court substantial discretion in considering the adequacy of a disclosure statement."); *In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) ("The general language of the statute and its surrounding legislative history make clear that the determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court.") (internal quotations omitted).

29. In accordance with Bankruptcy Code section 1125, the Disclosure Statement provides "adequate information" to allow holders of Claims entitled to vote to make an informed decision on the Plan. The Disclosure Statement is the product of the Debtors' extensive review and analysis of their business, assets and liabilities, and circumstances leading to the Chapter 11 Cases. The Disclosure Statement provides information regarding: (a) the terms of the Plan, including a summary of the classifications and treatment of all Classes of Claims and Interests; (b) the distributions to holders of Allowed Claims; (c) the effect of the Plan on holders of Claims

and Interests and other parties in interest thereunder; (d) the Claims asserted against the Debtors and the estimated amount of Claims that ultimately will be Allowed; (e) certain risk factors to consider that may affect the Plan; (f) certain tax issues related to the Plan and distributions; and (g) the means for implementation of the Plan. Accordingly, the Debtors believe that the Disclosure Statement complies with all aspects of Bankruptcy Code section 1125 and contains information more than sufficient for a hypothetical reasonable investor to make an informed judgment about the Plan.

30. Accordingly, for the foregoing reasons the Debtors submit that the Disclosure Statement contains adequate information within the meaning of Bankruptcy Code section 1125(a) and should be approved on a final basis.

THE PLAN MEETS ALL APPLICABLE CONFIRMATION REQUIREMENTS

31. To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of Bankruptcy Code section 1129 by a preponderance of the evidence. *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006). As set forth below and based on the record and filings in these Chapter 11 Cases and as may be further demonstrated at the Confirmation Hearing, the Plan meets all applicable requirements of Bankruptcy Code section 1129 and should be confirmed.

I. The Plan Complies with Bankruptcy Code section 1129(a)

A. Bankruptcy Code section 1129(a)(1)

32. The Plan complies with Bankruptcy Code section 1129(a)(1), which provides that a plan may be confirmed only if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1); *see also In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 270-73 (S.D. Ohio 1996) (examining each requirement of chapter 11 to demonstrate that Bankruptcy Code section 1129(a)(1) was satisfied); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr.

S.D.N.Y. 1984) (stating that "[i]n order for a plan of reorganization to pass muster . . . it must comply with all the requirements of Chapter 11").

33. The legislative history of Bankruptcy Code section 1129(a)(1) indicates that the primary focus of this requirement is to ensure that a plan complies with Bankruptcy Code sections 1122 and 1123, which govern classification of claims and interests and the contents of a plan, respectively. *See* S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368 (1977); *see also Kane v. Johns-Manville Corp. (In re Johns Manville Corp.)*, 843 F.2d 636, 648-49 (2d Cir. 1988) (holding that legislative history indicates that Section 1129(a)(1) was intended to require compliance with Sections 1122 and 1123).

1. Bankruptcy Code section 1122 – Classification of Claims and Interests

34. Bankruptcy Code section 1122 provides that the claims or interests within a given class must be "substantially similar" to the other claims or interests in that class:

> (a) 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.

11 U.S.C. § 1122. Courts consistently have held that Bankruptcy Code section 1122(a) is satisfied so long as similar claims are classified together. *See In re Armstrong World Indus.*, 348 B.R. at 160 (holding that Bankruptcy Code section 1122(a) was satisfied where similar claims were classified together); *In re Eagle-Picher Indus.*, 203 B.R. at 270 (same).

35. Accordingly, the sole mandatory obligation of section 1122(a) is that substantially similar claims may be classified together. *In re Tribune Co.*, 476 B.R. 843, 854 (Bankr. D. Del 2012). Section 1122(a) is, in fact, permissive inasmuch as "it does *not* provide that *all* similar claims must be placed in the same class." *Id.* at 855 (emphasis in original); *see also John*

Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 158 (3d Cir. 1993); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) ("[W]e agree with the general view which permits the grouping of similar claims in different classes"); *In re Coram Healthcare Corp.*, 315 B.R. 321, 348 (Bankr. D. Del. 2004) (explaining the Bankruptcy Code "does not expressly prohibit placing 'substantially similar' claims in separate classes.").

36. The Plan classifies Claims and Interests in accordance with Bankruptcy Code section 1122(a), as each of the Plan's Classes contains Claims or Interests that share the same priority status, contractual rights and enforcement rights against the Debtors' estates. In particular, Article III of the Plan segregates into separate Classes:[2] Class 1 (Secured Tax Claims), Class 2 (Other Secured Claims), Class 3 (Other Priority Claims), Class 4 (Prepetition Secured Obligations Claims), Class 5 (General Unsecured Claims), Class 6 (Prepetition Secured Obligations Claims Deficiency Claims), Class 7 (Subordinated Claims), Class 8 (Intercompany Interests), and Class 9 (Interests in Holdco). The number of Classes in the Plan reflects the diverse characteristics of the Claims and Interests classified in the various Classes, and the legal rights under the Bankruptcy Code of each of the holders of Claims or Interests within a particular Class are substantially similar to other holders of Claims or Interests within the same Class.

37. In addition, valid business, factual and legal reasons exist for the separate classification of Claims and Interests. For example, the Plan separates Claims from Interests and Priority Claims from both secured claims (including Secured Tax Claims and Other Secured Claims) and General Unsecured Claims.

38. Accordingly, the classification of Claims and Interests under the Plan is appropriate and should be approved.

[2] In accordance with Bankruptcy Code section 1123(a)(1), Administrative Claims and Priority Tax Claims have not been classified. *See* Plan, Art. II.

2. Compliance with Bankruptcy Code section 1123(a) – Mandatory Contents of the Plan

39. Bankruptcy Code section 1123(a) requires that a chapter 11 plan: (a) designate classes of claims and interests; (b) specify unimpaired classes of claims and interests; (c) specify treatment of impaired classes of claims and interests; (d) provide for equality of treatment within each class; (e) provide adequate means for the plan's implementation; (f) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and (g) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, trustee, or their respective successors under the plan. *See* 11 U.S.C. § 1123(a).

40. The Plan fully complies with each requirement of Section 1123(a). As previously noted with respect to the Plan's compliance with Bankruptcy Code section 1122, Article III of the Plan designates nine (9) separate Classes of Claims and Interests, as required by Bankruptcy Code section 1123(a)(1). Article III.B of the Plan specifies that the Claims in Classes 1-3 are unimpaired under the Plan, as required by Bankruptcy Code section 1123(a)(2) of the Bankruptcy Code. Article III.B further specifies that the Claims or Interests in Classes 4-9 are impaired and describes the treatment of each such Class in accordance with Bankruptcy Code section 1123(a)(3). Further, as required by Bankruptcy Code section 1123(a)(4), the treatment of each Claim or Interest within a Class is either (i) the same as the treatment of each other Claim or Interest in such class or (ii) otherwise consistent with the legal rights of such claimant.

41. In accordance with the requirements of Bankruptcy Code section 1123(a)(5), the Plan provides adequate means for its implementation through Article IV and various other provisions. Specifically, the Plan provides for, among other things:

(a) the cancellation of all existing securities and related documents of the Debtors;

(b) the dissolution of the existing board of directors or managers, as applicable, of the Debtors;

(c) the appointment of the Plan Administrator as the Debtors' sole officer, director, and manager, as applicable; and

(d) the exemption from certain transfer taxes.

42. Bankruptcy Code section 1123(a)(6) requires that a debtor's corporate organizational documents prohibit the issuance of nonvoting equity securities. The Plan does not contemplate reorganization or amended organizational documents. Thus, this provision is not applicable to the Plan.

43. Finally, Bankruptcy Code section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, directors, or trustee under the plan . . . ." 11 U.S.C. § 1123(a)(7). This provision is supplemented by Bankruptcy Code section 1129(a)(5), which directs the scrutiny of the court to the methods by which the management of the reorganized corporation is to be chosen to provide adequate representation of those whose investments are involved in the reorganization — *i.e.*, creditors and equity holders. *See* 7 Alan N. Resnick et al., COLLIER ON BANKRUPTCY ¶ 1123.01[7] (16th ed. rev. 2010).

44. The Plan appoints the Plan Administrator as the Debtors' sole officer, director and manager following the Effective Date. This appointment is consistent with the interests of creditors and equity security holders as the Debtors are liquidating and the remaining matters for the Post-Effective Debtors will involve monetizing any remaining Miscellaneous Assets, implementing the Plan transactions and winding down the Debtors' affairs and closing the Chapter 11 Cases.

3. Bankruptcy Code section 1123(b) – Discretionary Contents of the Plan

45. Bankruptcy Code section 1123(b) identifies various discretionary provisions that may be included in a plan but are not required. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. 11 U.S.C. §§ 1123(b)(1)-(2). A plan also may provide for (a) "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate;" (b) "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;" (c) "the sale of all or substantially all of the property of the estate;" and (d) "the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. §§ 1123(b) (1-4), (6).

46. The Plan includes various provisions that fall under the broad spectrum of Bankruptcy Code section 1123(b). For instance, the Plan impairs Classes 4 through 9, leaving Classes 1 through 3 unimpaired. *See* Plan Art. III. The Plan further provides for approval of the treatment of executory contracts and unexpired leases to which the Debtors are a party. *See* Plan Art. V.

47. In accordance with Bankruptcy Code section 1123(b)(6), the Plan includes other provisions designed to ensure its implementation that are consistent with the Bankruptcy Code, including the provisions of Article XI, regarding retention of jurisdiction by the Court over certain matters after the Effective Date. The Debtors believe each of these provisions is appropriate under applicable law, including Bankruptcy Code sections 1123(b)(1), (3) and (6). A further analysis of these provisions is set forth below.

B. Bankruptcy Code Section 1129(a)(2)

48. The Plan complies with Bankruptcy Code section 1129(a)(2), which requires that a plan proponent comply with applicable provisions of the Bankruptcy Code. The legislative history accompanying section 1129(a)(2) indicates that the principal purpose of this section is to ensure compliance with the disclosure and solicitation requirements set forth in Bankruptcy Code section 1125. *See In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000) ("[Section] 1129(a)(2) [of the Bankruptcy Code] requires that the plan proponent comply with the adequate disclosure requirements of § 1125"); *Official Comm. of Unsecured Creditors v. Michelson (In re Michelson)*, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) ("Compliance with the disclosure and solicitation requirements is the paradigmatic example of what Congress had in mind when it enacted Section 1129(a)(2)."); *In re Texaco, Inc.*, 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988) ("[The] principal purpose of Section 1129(a)(2) is to assure that the proponents have complied with the requirements of Section 1125 in the solicitation of acceptances to the plan"); *see also* S. Rep. No. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (1978) ("Paragraph (2) [of Section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as Section 1125 regarding disclosure."); H.R. Rep. No. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368 (1977).

49. The Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions of section 1125 regarding disclosure and plan solicitation. Bankruptcy Code section 1125 prohibits the solicitation of acceptances or rejections of a plan from holders of claims or interests "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or summary of the plan, and a written disclosure statement approved . . . by the court as containing adequate information." 11 U.S.C. § 1125(b). In the instant case, the Debtors solicited votes to accept the Plan from Class 4 (Prepetition Secured

Obligations Claims), Class 5 (General Unsecured Claims) and Class 6 (Prepetition Secured Obligations Deficiency Claims) as such Classes are impaired. The Debtors did not solicit votes from Classes 1, 2, 3, 7, 8, or 9 as such Classes are either presumed to accept or deemed to reject the Plan.

50. Pursuant to the Interim Approval and Procedures Order, the Court determined on an interim basis that the Disclosure Statement contained adequate information within the meaning of Bankruptcy Code section 1125. *See Interim Approval and Procedures Order* ¶ 2. The Court further approved the form of notices of (i) the hearing on final approval of the Disclosure Statement and confirmation of the Plan (the "Combined Hearing Notice") and (ii) the rights of holders of Claims and Interests not entitled to vote on the Plan (the "Non-Voting Notices"). The Court also required that the Debtors serve creditors the Combined Hearing Notice and/or the Non-Voting Notices, as applicable, pursuant to the Interim Approval and Procedures Order.

51. The Debtors have complied with the Interim Approval and Procedures Order and caused the mailing of the Combined Hearing Notice and the Non-Voting Notices to occur in accordance with the requirements of the Interim Approval and Procedures Order. *See Certificates of Service* [D.I. 753 and 794]. The Debtors further complied with all applicable provisions of the Bankruptcy Code, including Bankruptcy Code section 1125 and Bankruptcy Rules 3017 and 3018. Additionally, the Debtors caused the Plan, the Disclosure Statement, the Interim Approval and Procedures Order, the Combined Hearing Notice, the Solicitation Procedures, the Plan Supplement, and other information pertinent to voting on the Plan and responding to final approval of the Disclosure Statement and confirmation of the Plan to appear conspicuously on the main page of the website maintained by the Debtors' noticing, claims and

administrative agent, Kurtzman Carson Consultants LLC, in these Chapter 11 Cases. *See HRI Holding Corp., et al.*, KCC, http://www.kccllc.net/HRI (last visited Oct. 29, 2020). As a result, the Plan meets the requirements of Bankruptcy Code section 1129(a)(2).

C. Bankruptcy Code section 1129(a)(3)

52. The Plan satisfies Bankruptcy Code section 1129(a)(3), which requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Courts consider a plan as proposed in good faith "if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code." *Hanson v. First Bank of S.D.*, 828 F.2d 1310, 1315 (8th Cir. 1987); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 247 (3d Cir. 2004) ("for purposes of determining good faith under Section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code") (quotations and citation omitted); *Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 165 (3d Cir. 1999) (explaining the good faith standard in Section 1129(a)(3) requires that there be "'some relation'" between the chapter 11 plan and the "reorganization-related purposes" that chapter 11 was designed to serve) (citations omitted); *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001) ("The good faith standard requires that the plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.") (quoting *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999)) (internal quotations omitted).

53. One must view the requirement of good faith in the context of the totality of the circumstances surrounding the formulation of a chapter 11 plan. *See McCormick v. Banc One Leasing Corp. (In re McCormick)*, 49 F.3d 1524, 1526 (11th Cir. 1995) ("The focus of a court's

inquiry is the plan itself, and courts must look to the totality of the circumstances surrounding the plan."); *In re Block Shim Dev. Co.*, 939 F.2d 289, 292 (5th Cir. 1991) (finding that good faith requirement "is viewed in the context of the circumstances surrounding the plan"); *CoreStates Bank, N.A. v. United Chem. Techs.*, 202 B.R. 33, 57 (E.D. Pa. 1996) (concluding that courts must view good faith by looking at the totality of circumstances).

54. In determining whether a plan will succeed and accomplish goals consistent with the Bankruptcy Code, courts look to the terms of the plan itself and not the proponent of the plan. *See In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988) (concluding that the good faith test provides the court with significant flexibility and is focused on an examination of the plan itself, rather than other, external factors), *aff'd in part, remanded in part on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990); s*ee also In re Combustion Eng'g*, 391 F.3d at 246.

55. The Debtors must show, therefore, that the Plan has not been proposed by any means forbidden by law and that the plan has a reasonable likelihood of success. *See In re Century Glove, Inc.*, 1993 LEXIS 2286, at *15 (D. Del. Feb. 10, 1993) ("A court may only confirm a plan for reorganization if . . . 'the plan has been proposed in good faith and not by any means forbidden by law.' . . . Moreover, '[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of Section 1129(a)(3) is satisfied.'") (citations omitted); *see also Fin. Sec. Assur. 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) (same); *In re Koelbl*, 751 F.2d 137, 139 (2d Cir. 1984) (noting that plan provisions may not contravene any law, including state law, and a plan must have been proposed with "a basis for expecting that a reorganization can be effected") (citations omitted).

56. The Debtors structured and proposed the Plan in a manner that effectuates the objectives and purposes of the Bankruptcy Code. The Plan is the product of consensus among the Debtors, the Creditors' Committee and the Prepetition Secured Lenders, after extensive arm's length negotiations, which in itself demonstrates that the Debtors proposed the Plan in good faith. *See In re Eagle-Picher Indus.*, 203 B.R. at 274 (finding that a plan of reorganization was proposed in good faith when, among other things, it was based on extensive arms-length negotiations among plan proponents and other parties in interest). The Plan contains no provisions that are contrary to state or other laws nor is there any indication the Debtors lack the ability to consummate the Plan. Accordingly, the Debtors submit that they have met the requirements of Bankruptcy Code section 1129(a)(3).

D. Bankruptcy Code section 1129(a)(4)

57. The Plan also complies with Bankruptcy Code section 1129(a)(4), which states the following:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). In essence, Bankruptcy Code section 1129(a)(4) requires that any and all fees promised or received in connection with or in contemplation of a chapter 11 case must be disclosed and subject to the court's review. *See In re Crdentia Corp.*, 2010 Bankr. LEXIS 2838, at *8 (Bankr. D. Del. May 26, 2010) (holding that plan complied with Section 1129(a)(4) where all final fees and expenses payable to professionals remained subject to final review by bankruptcy court); *In re Johns-Manville Corp.*, 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986) (explaining that all payments contemplated by a plan must "have been or will be" made subject

to the court's approval), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987). Pursuant to the Plan and other orders of the Court, all Professional Fee Claims are subject to Court approval. *See* Plan Art. II.B.1. Accordingly, the Plan complies with the requirements of Bankruptcy Code section 1129(a)(4).

E. Bankruptcy Code section 1129(a)(5)

58. The Debtors are not reorganizing under the Plan and accordingly, the appointment of the Plan Administrator as the Debtors' sole officer, director, and manager, as applicable, is not inconsistent with Bankruptcy Code section 1129(a)(5).

F. Bankruptcy Code section 1129(a)(6)

59. Bankruptcy Code section 1129(a)(6) is inapplicable to the Debtors, as it requires that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129 (a)(6). The Debtors' business has no involvement with the establishment of rates over which any regulatory commission has jurisdiction or will have jurisdiction after the Plan's confirmation. Accordingly, Bankruptcy Code section 1129(a)(6) is inapplicable to the Debtors.

G. Bankruptcy Code section 1129(a)(7)

60. The Plan satisfies the "best interests of creditors" test set forth in Bankruptcy Code section 1129(a)(7). This test requires that, with respect to each impaired class of claims or interests, each holder of such claims or interests (a) has accepted the plan or (b) will receive or retain property of a value not less than what such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. *See In re Armstrong World Indus.*, 348 B.R. at 165-66; *see also In re Tranel*, 940 F.2d 1168, 1172 (8th Cir. 1991) (considering evidence supporting best interests of creditors test outcome); *In re AOV Indus.*, 31 B.R. 1005,

1008-13 (D.D.C. 1983) (if no impaired creditor receives less than liquidation value, plan of reorganization is in best interests of creditors), *aff'd in part, rev'd in part*, 792 F.2d 1140, 1144 (D.C. Cir. 1986), *vacated in light of new evidence*, 797 F.2d 1004 (D.C. Cir. 1986); *In re Econ. Lodging Sys., Inc.*, 205 B.R. 862, 864-65 (Bankr. N.D. Ohio 1997) (analyzing evidence relating to best interests of creditors test); *In re Eagle-Picher Indus.*, 203 B.R. at 266 (best interest of creditors test must be met even in cramdown situation). A court, in considering whether a plan is in the "best interests" of creditors, is not required to consider any alternative to the plan other than the dividend projected in a liquidation of all the debtor's assets under chapter 7 of the Bankruptcy Code. *See, e.g.*, *In re Victory Constr. Co.*, 42 B.R. 145, 151 (Bankr. C.D. Cal. 1984); *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990); *In re Jartran, Inc.*, 44 B.R. 331, 389-93 (Bankr. N.D. Ill. 1984) (best interests test satisfied by showing that, upon liquidation, cash received would be insufficient to pay priority claims and secured creditors so that unsecured creditors and equity holders would receive no recovery).

61. The first step in meeting the best interests test is to determine the proceeds that the hypothetical liquidation of a debtor's assets and properties would generate in the context of a liquidation under chapter 7 of the Bankruptcy Code. The gross amount available would be the sum of the proceeds from liquidating the debtor's assets plus the cash held by the debtor at the time of commencement of the hypothetical case under chapter 7 of the Bankruptcy Code. The amount of any claims secured by these assets, the costs and expenses of the liquidation, and any additional administrative expenses and priority claims that may result from the termination of the debtor's business and the use of chapter 7 of the Bankruptcy Code for the purposes of a hypothetical liquidation would reduce the amount of these proceeds. Any remaining net cash would be allocated to creditors and equity interest holders in strict priority in accordance with

Bankruptcy Code section 726.

62. The Debtors submit that liquidation under chapter 7 of the Bankruptcy Code would result in significantly smaller, if any, distributions to holders of Claims and Interests than those provided for in the Plan because of (a) the likelihood that the Debtors' assets would have to be sold or otherwise disposed of in a less orderly fashion, (b) additional administrative expenses involved in the appointment of a chapter 7 trustee, and (c) the inability of a chapter 7 trustee to maximize the return to the Debtors' creditors to the same degree as provided by the Global Settlement as set forth in the Plan.

63. Specifically, as described in the hypothetical Liquidation Analysis attached to the Disclosure Statement as Exhibit B, the Debtors assumed that any liquidation of their assets would be accomplished through conversion of the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code on or about August 31, 2020. On the hypothetical conversion date, it is assumed that the Court would appoint a chapter 7 trustee to oversee the liquidation of the Debtors' estates, during which time all of the Debtors' major assets would be sold, distributed or surrendered to the respective lien holders, and the cash proceeds, net of liquidation related costs, would then be distributed to creditors in accordance with relevant law. There could be no assurance that the liquidation would be completed in a limited time frame, nor is there any assurance that the recoveries assigned to the assets would in fact be realized.

64. Additionally, the costs of liquidation under chapter 7 of the Bankruptcy Code would include the fees payable to a chapter 7 trustee, as well as those fees that might be payable to attorneys and other professionals that such trustee would engage. Moreover, the foregoing types of claims and other claims that might arise in a chapter 7 liquidation case (including claims from potentially redundant activities that could be engaged in by a chapter 7 trustee) or result

from the pending Chapter 11 Cases, including any unpaid expenses incurred by the Debtors during the Chapter 11 Cases such as compensation for attorneys and financial advisors, would be paid in full from the liquidation proceeds before the balance of those proceeds would be made available for distributions to other creditors.

65. After considering the effects that a liquidation under chapter 7 of the Bankruptcy Code would have on the ultimate proceeds available for distribution to the holders of Claims and Interests in the Chapter 11 Cases, including (a) the decrease in value caused by a chapter 7 liquidation of the Debtors' assets, (b) the increased costs and expenses of a liquidation under chapter 7 of the Bankruptcy Code arising from fees payable to a trustee in bankruptcy and professional advisors to such trustee, and (c) the costs of a corporate wind-down of operations, the Debtors assert that confirmation of the Plan will provide each holder of a Claim with a recovery that is not less than what such holder would receive pursuant to a liquidation of the Debtors under chapter 7 of the Bankruptcy Code. Indeed, no party has objected to confirmation under the "best interests" test. Thus, the Debtors submit that they have satisfied the requirements of Bankruptcy Code section 1129(a)(7).

H. Bankruptcy Code section 1129(a)(8)

66. Bankruptcy Code Section 1129(a)(8) requires that "with respect to each class of claims or interests — (A) such class has accepted the plan or (B) such class is not impaired under the Plan." 11 U.S.C. § 1129(a)(8). Pursuant to Bankruptcy Code section 1126(c), a class of claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the allowed claims in that class vote to accept the plan. 11 U.S.C. § 1126(c). Pursuant to Bankruptcy Code section 1126(d), a class of interests accepts a plan if at least two-thirds in amount of allowed interests in that class vote to accept the plan. 11 U.S.C. § 1126(d).

67. As set forth above, the holders of Claims in Classes 1 through 3 are unimpaired under the Plan and, pursuant to Bankruptcy Code section 1126(f), are conclusively presumed to have voted to accept the Plan. Thus, the requirements of section 1129(a)(8) have been satisfied as to each of Classes 1 through 3.

68. As set forth above and in the Voting Declaration, the holders of Claims in Class 4 (Prepetition Secured Obligations Claims) and Class 6 (Prepetition Secured Obligations Deficiency Claims) voted to accept the Plan in each of the Debtors' Chapter 11 Cases and Class 5 (General Unsecured Claims) overwhelming voted to accept the Plan in twenty-seven (27) of the Debtors' thirty-nine (39) Chapter 11 Cases. Thus, as to the impaired and accepting Classes 4, 5 and 6, the requirements of section 1129(a)(8) likewise have been satisfied.

69. Holders of Claims in Class 7 (Subordinated Claims), Class 8 (Intercompany Interests) and Class 9 (Interests in Holdco) are not entitled to receive or retain any property from the Debtors' estates under the Plan on account of their Claims and Interests and, therefore, are deemed to reject the Plan pursuant to Bankruptcy Code section 1126(g). As noted above, in twelve (12) of the thirty-nine (39) Chapter 11 Cases Class 5 (General Unsecured Claims) voted to reject the Plan.[3] The Plan nonetheless may be confirmed under the "cram down" provisions of section 1129(b) of the Bankruptcy Code, as discussed below.

I. Bankruptcy Code section 1129(a)(9)

70. The Plan satisfies Bankruptcy Code section 1129(a)(9), which requires that a chapter 11 plan provide for the payment of certain priority claims in full on the effective date in the allowed amount of such claims. In particular, pursuant to Bankruptcy Code section 1129(a)(9)(A), unless otherwise agreed by the holder, holders of claims of a specific kind

[3] Notably, in each of the twelve (12) Chapter 11 Cases in which Class 5 (General Unsecured Claims) voted to reject the Plan, there was only one (1) Ballot submitted voting to reject by a single Holder of a Claim or Interest with less than $500 in voting dollars (the "Dissenting Classes").

specified in Bankruptcy Code section 507(a)(1) — administrative claims allowed under Bankruptcy Code section 503(b) — must receive cash equal to the allowed amount of such claims on the effective date of a plan. 11 U.S.C. § 1129(a)(9)(A). Bankruptcy Code section 1129(a)(9)(B) further requires that the holders of claims of a kind specified in Bankruptcy Code sections 507(a)(1) and 507(a)(4) through (7) (generally, wage and employee benefit claims and consumer deposits that are entitled to priority) must receive, if the class in which such claimants are members has accepted the plan, deferred cash payments of a value equal to the allowed amount of these claims or, if the class in which such claimants are members has not accepted the plan, cash equal to the allowed amount of these claims on the effective date of a plan. *See id.* at § 1129(a)(9)(B). Finally, Bankruptcy Code sections 1129(a)(9)(C) and (D) provide for the payment of priority tax claims, including secured claims that would otherwise meet the requirements of Bankruptcy Code section 507(a)(8) absent the secured status of such claims, in cash in regular installments. *See id.* at § 1129(a)(9)(C) and (D).

71. In accordance with Bankruptcy Code section 1129(a)(9)(A), Article II of the Plan provides that, unless otherwise agreed by the holder of an Administrative Claim or an order of the Court provides otherwise, each holder of an Allowed Administrative Claim shall be entitled to payment from the Priority Claims Reserve. Similarly, unless otherwise agreed by the holder of an Allowed Professional Fee Claim, or an order of the Court provides otherwise, each holder of an Allowed Professional Fee Claim shall be entitled to payment equal to the amount of such Allowed Claim from the Professional Fee Escrow Account in full satisfaction of its Allowed Professional Fee Claim on or as soon as reasonably practicable after the Effective Date and the approval of such underlying fee applications by the Court.

72. In accordance with Bankruptcy Code section 1129(a)(9)(B), Article II.D of the Plan provides that each holder of an Allowed Priority Tax Claim shall receive, in full and final satisfaction, compromise, settlement, and release of such Allowed Priority Tax Claim either (i) payment from the Priority Claims Reserve or (ii) such different treatment as to which such holder and the Debtors shall have agreed upon.

73. In accordance with Bankruptcy Code section 1129(a)(9)(C), Article III.B.3 of the Plan provides that the holder of any such Other Priority Claim shall receive Cash equal to the amount of such Allowed Other Priority Claim from the Priority Claims Reserve or such other treatment rendering such holder's Allowed Other Priority Claim Unimpaired on the later of the Effective Date and the date such holder's Other Priority Claim becomes and Allowed Claim or as soon as reasonably practicable thereafter.

74. Accordingly, the Plan satisfies the requirements set forth in Bankruptcy Code section 1129(a)(9).

J. Bankruptcy Code section 1129(a)(10)

75. Bankruptcy Code section 1129(a)(10) provides the following:

> If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10); *see also In re Martin*, 66 B.R. 921, 924 (Bankr. D. Mont. 1986) (holding that acceptance by three classes of impaired creditors, exclusive of insiders, satisfied requirement of Section 1129(a)(10)). As set forth in the Voting Declaration, Class 4 (Prepetition Secured Obligations Claims), Class 6 (Prepetition Secured Obligations Deficiency Claims) voted to accept the Plan as well as the overwhelming majority of Class 5 (General Unsecured Claims). Accordingly, the Debtors submit that the requirements of Bankruptcy Code section 1129(a)(10)

are satisfied because the Plan received broad support and was accepted by at least one impaired class at every Debtor for which votes were cast.

K. Bankruptcy Code section 1129(a)(11)

76. The Plan satisfies Bankruptcy Code section 1129(a)(11), which provides that a court may confirm a plan only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan." 11 U.S.C. § 1129(a)(11). One leading commentator has stated that this section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." COLLIER ON BANKRUPTCY at ¶ 1129.03[11]; *accord In re Aleris Int'l, Inc.*, 2010 Bankr. LEXIS 2997, at *27 (Bankr. D. Del. May 3, 2010) ; *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994); *In re Rivers End Apartments, Ltd.*, 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994); *In re Johns-Manville*, 68 B.R. at 635.

77. Section 1129(a)(11), however, does not require a guarantee of the plan's success; rather, the proper standard is whether the plan offers a "reasonable assurance" of success. *See, e.g.*, *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d at 649 (noting plan may be feasible although its success is not guaranteed); *Prudential Ins. Co. of Am. v. Monnier (In re Monnier Bros.)*, 755 F.2d 1336, 1341 (8th Cir. 1985) (same); *In re Rivers End Apartments*, 167 B.R. at 476 (to establish feasibility, "a [plan] proponent must demonstrate that its plan offers 'a reasonable prospect of success' and is workable"); *In re Apex Oil Co.*, 118 B.R. 683, 708 (Bankr. E.D. Mo. 1990) (guarantee of success is not required to meet feasibility standard of section 1129(a)([11])); *In re Elm Creek Joint Venture*, 93 B.R. 105, 110 (Bankr. W.D. Tex. 1988) (a guarantee of success is not required under Section 1129(a)(11), only reasonable expectation that payments will be made); *In re Texaco, Inc.*, 84 B.R. at 910 ("All that is required is that there

be reasonable assurance of commercial viability.").

78. Since the Plan expressly provides for the liquidation of the Debtors' assets, Bankruptcy Code section 1129(a)(11) is satisfied. *See In re Revco*, 131 B.R. 615, 622 (Bankr. N.D. Ohio 1990) (holding that "[s]ection 1129(a)(11) is satisfied as the plan provides that the property of [the] Debtors shall be liquidated"). As a result, confirmation of the Plan is not likely to be followed by a further financial reorganization of the Debtors. Accordingly, the Plan satisfies Bankruptcy Code section 1129(a)(11).

L. Bankruptcy Code section 1129(a)(12)

79. The Plan complies with Bankruptcy Code section 1129(a)(12), which requires that, as a condition precedent to the confirmation of a plan, "[a]ll fees payable under Section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). The Plan and the proposed Confirmation Order specifically provide that all fees payable pursuant to Section 1930 of Title 28 of the United States Code will be paid as required and all fees due and owing will be paid on or prior to the Effective Date. *See* Plan, Art. XII.C; Confirmation Order, ¶ 25. As such, the Debtors are in compliance with Bankruptcy Code section 1129(a)(12).

M. Bankruptcy Code section 1129(a)(13)

80. Bankruptcy Code section 1129(a)(13) is inapplicable to the Plan, as it requires that a plan of reorganization provide for the continuation of all retiree benefits at the level established by agreement or by court order pursuant to Bankruptcy Code section 1114 at any time prior to confirmation of the plan, for the duration of the period that the debtor has obligated itself to provide such benefits. The Debtors have no retiree benefits plans. Accordingly, Bankruptcy Code section 1129(b)(13) is inapplicable to the Plan.

II. Bankruptcy Code Section 1129(b)

81. Bankruptcy Code section 1129(b)(1) allows for confirmation of a plan in cases where all requirements of Bankruptcy Code section 1129(a) are met other than section 1129(a)(8) (*i.e.*, the plan has not been accepted by all impaired classes of claims or interests), by allowing a court to "cram down" the plan notwithstanding objections or deemed rejections as long as the court determines that the plan is "fair and equitable" and does not "discriminate unfairly" with respect to the rejecting classes. 11 U.S.C. § 1129(b)(1).

82. The Debtors meet the "cram down" requirements of Bankruptcy Code section 1129(b) to confirm the Plan over the deemed rejection by Classes 7 through 9 and rejection by the Dissenting Classes in twelve (12) of the Chapter 11 Cases[4] because the Plan is fair and equitable and does not discriminate unfairly with respect to holders of Claims or Interests in those rejecting Classes, including those in the Dissenting Classes.

A. The Plan Is Fair and Equitable with Respect to the Impaired Rejecting Classes

83. Bankruptcy Code section 1129(b)(2) provides that a plan is fair and equitable with respect to a class of unsecured claims or interests if the plan provides that the holder of any claim or interest that is junior to the claims of such class will not receive or retain any property under the plan on account of such junior claim or interest. 11 U.S.C. § 1129(b)(2).

84. The Plan does not provide any recovery from the Debtors' estates for any claims or interests junior to Class 6 (Prepetition Secured Obligations Deficiency Claims). Accordingly,

[4] A single vote to reject the Plan on account of a claim valued at less than $500 was cast in Class 5 (General Unsecured Claims) in each of the following Chapter 11 Cases: HOP Bridgewater LLC, HOP Cherry Hill LLC, HOP Fairfield LLC, HOP Farmingdale LLC, HOP Heights LLC, HOP Holmdel LLC, HOP New Brunswick LLC, HOP Paramus LLC, HOP Ramsey LLC, HOP Secaucus LLC, HOP Westbury LLC, and HOP Woodbridge LLC. With the exception of two of these Chapter 11 Cases (HOP Fairfield LLC and HOP Heights LLC), no other ballots were submitted on account of a claim in Class 5 for such Debtors. With respect to Debtor, HOP Fairfield LLC, one additional ballot was received in the amount of $85.00 resulting in 50% in number and 26.81% in amount in Class 5 voting to accept the Plan. With regard to Debtor, HOP Heights LLC, one additional ballot was received in the amount of $440,267.47 resulting in 50% in number and 99.95% in amount in Class 5 voting to accept the Plan.

the Plan is fair and equitable with respect to holders of Claims or Interests in Class 7 (Subordinated Claims), Class 8 (Intercompany Interests) and Class 9 (Interests in Holdco).

B. The Plan Does Not Discriminate Unfairly with Respect to the Impaired Rejecting Classes

85. Although the Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists, courts typically examine the facts and circumstances of the particular case to determine whether unfair discrimination exists. *See In re 203 N. LaSalle*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a chapter 11 plan" and that "the limits of fairness in this context have not been established"); *In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does so [unfairly] discriminate is to be determined on a case-by-case basis."); *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"). *See also In re Armstrong World Indus.*, 348 B.R. at 121-22 (relying heavily on the facts of the case to determine whether the plan unfairly discriminated against certain classes).

86. In general, courts have held that a plan unfairly discriminates in violation of Bankruptcy Code section 1129(b) only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so. *See*, *e.g.*, *In re Coram Healthcare Corp.*, 315 B.R. 321, 349 (Bankr. D. Del. 2004) (citing cases and noting that separate classification and treatment of claims is acceptable if the separate classification is justified because such claims are essential to a reorganized debtor's ongoing business); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 661 (Bankr. D. Del. 2003) (permitting different treatment of two classes of similarly situated creditors upon a determination

that the debtors showed a legitimate basis for such discrimination); *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 655-56 (9th Cir. 1997) (same); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989) (stating that plan which preserved assets for insiders at the expense of other creditors unfairly discriminated); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986) (stating that interests of objecting class were not similar or comparable to those of any other class and thus there was no unfair discrimination). A threshold inquiry in assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to the class allegedly receiving more favorable treatment. *See In re Armstrong World Indus.*, 348 B.R. at 121.

87. No Holder of a Claim or Interest in a dissenting or rejecting Class has raised a concern that the Plan fails to satisfy the absolute priority rule. The Claims and Interests in Classes 7 through 9 are all subordinate to the priority of the Claims in Classes 1 through 6. The Plan provides for the same treatment by the Debtors of all holders of Claims and Interests within each of these three rejecting Classes. Thus, the Plan does not discriminate unfairly with respect to holders of Claims or Interests in Class 7 (Subordinated Claims), Class 8 (Intercompany Interests) and Class 9 (Interests in Holdco) and is fair, equitable and reasonable with respect to the rejecting Classes, including, without limitation, the Dissenting Classes. Accordingly, the Plan should be confirmed even if these Classes are deemed to reject the Plan.

III. Section 1129(c) – No Other Plan Has Been Proposed or Confirmed

88. The Plan satisfies Bankruptcy Code section 1129(c), which provides that, with a limited exception, a bankruptcy court may only confirm one plan. The Plan is the only plan that has been filed in these Chapter 11 Cases and is the only plan that satisfies the requirements of subsections (a) and (b) of Bankruptcy Code section 1129. Accordingly, the requirements of

Bankruptcy Code section 1129(c) are satisfied.

IV. Section 1129(d) – The Plan's Purpose Is Consistent with the Bankruptcy Code

89. The Plan satisfies Bankruptcy Code section 1129(d), which provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of Section 5 of the Securities Act of 1933. In the instant case, the Plan's principal purpose is not the avoidance of taxes or the avoidance of the requirements of Section 5 of the Securities Act of 1933, and there has been no filing by any governmental agency asserting the contrary. Accordingly, the Plan complies with Bankruptcy Code section 1129(d).

OTHER PLAN PROVISIONS ARE NECESSARY AND APPROPRIATE

I. The Plan's Releases and Exculpation Provisions Are Appropriate and Should Be Approved

90. Article VIII.D of the Plan provides for the releases by the Debtors of the Released Parties (the "Debtor Releases") and Article VIII.E of the Plan provides for consensual releases by each holder of a Claim or Interest that votes on the Plan and does not opt out of such release and each holder of a Claim or Interest that submits an opt-in form indicating that such holder opts-in to such release in accordance with the terms of the Plan (the "Consensual Third-Party Releases," together with the Debtor Release, the "Releases"). The Plan also includes in Article VIII.F a customary exculpation and limitation of liability provision (the "Exculpation Provision").

A. The Debtor Releases

91. The Debtor Releases appropriately are tailored under the facts and circumstances of these Chapter 11 Cases and are supported by ample consideration. The Debtor Releases are an integral part of the Plan and provide appropriate levels of protection to the Released Parties. Accordingly, the Debtor Releases represent the sound and valid exercise of the Debtors' business

judgment and are permissible under Bankruptcy Code section 1123(b)(6).

92. In evaluating releases, courts distinguish between a debtor's release of non-debtors and third parties' release of non-debtors. *See In re Wash. Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011) (citing *In re Exide Techs.*, 303 B.R. 48, 71-74 (Bankr. D. Del. 2003)). With respect to a debtor's release of non-debtors, courts in the Third Circuit consider the following five *Zenith* factors:

> (a) An identity of interest between the debtor and third-party, such that a suit against the third-party is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> (b) Substantial contribution by the third-party to the plan;
>
> (c) The essential nature of the release to the debtor's plan;
>
> (d) An agreement by a substantial majority of creditors to support the plan and the release; and
>
> (e) Provision in the plan for payment of all or substantially all of the claims of the creditors and interest holders under the plan.

In re Zenith, 241 B.R. at 110; *see also In re Wash. Mut., Inc.*, 442 B.R. at 314. No factor is dispositive, nor is a proponent required to establish each factor required for the release to be approved; rather the factors are intended to provide guidance to the Court in determining the fairness of the releases. *In re Wash. Mut., Inc.*, 442 B.R. at 346; *see also In re Exide Techs.*, 303 B.R. at 72 (finding that the factors are not exclusive or conjunctive requirements); *In re Indianapolis Downs, LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013) (approving debtors' releases despite not meeting the third and fifth *Zenith* factors).

93. The Debtor Releases pursuant to section 1123(b)(3)(A) of the Bankruptcy Code represent a valid exercise of the Debtors' business judgment, and the Debtors have satisfied the business judgment standard in granting such releases under the Plan. The Committee, the Administrative Agent, the Prepetition Secured Lenders and the Debtors' directors and officers

have each substantially contributed to the Chapter 11 Cases. In particular, among other things, the Prepetition Secured Lenders consented to the use of their cash collateral. The Debtors' directors, officers and employees also substantially contributed to these cases by assisting with the Sale and Plan processes to maximize value for the estates. Moreover, the Debtors' directors and officers are entitled to indemnification from the Debtors in the event that any such directors and officers are required to defend against or is found liable for a released claim. Further, the non-Debtor Released Parties have similarly each substantially contributed to these Chapter 11 Cases in connection with the Global Settlement, wherein each creditor provided significant consideration including with regard to their claims and the release of liens on assets that will enable the Debtors' estates to provide a meaningful recovery to creditors who would otherwise receive little if any distribution on account of their claims.

94. The releases easily meet the applicable standard because they are fair, reasonable and in the best interests of the Debtors' estates. First, the Debtor Releases constitute an integral part of the Plan that was negotiated between the Debtors and their primary creditor constituencies in the context of the overall Plan. The Debtor Releases are important to the Plan as a whole as well as to the numerous compromises negotiated in these Chapter 11 Cases, including the Global Settlement, and implemented in the Plan, which will ultimately result in the Debtors making meaningful distributions to certain of their creditors that would otherwise not be possible.

95. Second, and perhaps more importantly, the Debtors do not believe they are releasing any material claims. As such, pursuing non-material claims against the Released Parties is not in the best interests of the Debtors' various constituencies as the costs involved likely would outweigh any potential benefits from pursuing such claims. The Debtors' directors

and management reviewed, considered and approved such releases. Thus, reviewing the *Zenith* factors in their totality, the Debtor Releases are fair and reasonable and should be approved as a valid exercise of the Debtors' business judgment. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Wilmington Tr. Co. (In re Spansion, Inc.)*, 426 B.R. 114, 142 (Bankr. D. Del. 2010) (approving as a valid exercise of business judgment the debtors' releases of, among others, the debtors' current directors, officers and employees, the debtors' current and former professionals, secured creditors and their advisors, the debtors and their affiliates, and their officers, directors, employees, and advisors and senior noteholders and their advisors) (citing *In re DBSD North America, Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) (approving a debtor's release of third parties when the debtor testified that it was unaware of any significant potential claims that were being released).

B. The Consensual Third-Party Releases Are Fair and Reasonable

96. The Consensual Third-Party Releases are fair and reasonable and should be approved. As a threshold matter, the Consensual Third-Party Releases are consensual in nature and may be approved on the basis that they are premised upon the releasing creditor's consent. *See In re Indianapolis Downs*, 486 B.R. at 306; *In re Spansion, Inc.*, 426 B.R. 144 (Bankr. D. Del. 2010). The only creditors that are granting the Consensual Third-Party Releases are (a) those creditors that vote to accept the Plan and do not opt out of the releases; and (b) those creditors who elect to opt-in to the releases. Here, the holders of Claims or Interests have been provided sufficient information to determine whether to grant the Consensual Third-Party Releases and those holders entitled to vote on the Plan have been provided the option to opt out of the releases in Article VIII.E. Accordingly, the Consensual Third-Party Releases are entirely optional and should be approved.

C. The Exculpation Provision

97. The proposed Exculpation Provision is appropriate based on the limitation of liability provided in Bankruptcy Code section 1125(e). That section provides:

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

11 U.S.C. § 1125(e). This statutory limitation of liability encompasses the matters listed in the proposed Exculpation Provision in Article VIII.F of the Plan. *See In re HSH Del. GP LLC*, Case No. 10-10187 (MFW) (Bankr. D. Del. Jan. 18, 2011) (confirming plan that provided exculpation to, among others, debtors' lenders and stating that provision was "appropriate under [Bankruptcy Code Section] 1125(e)" because it was "limited to the activities so far in the Chapter 11" and only related to prospective acts in connection with execution and implementation of plan). Accordingly, the Court has authority and should approve the Exculpation Provision as appropriate under Bankruptcy Code section 1125(e).

98. The Plan's Exculpation Provision complies with the Bankruptcy Code and is of the type typically afforded to debtors, estate fiduciaries and third parties that participated in the plan process. Article VIII.F of the Plan is narrowly tailored to limit the liability of the Debtors, the members of the Creditors' Committee and their Related Parties in connection with, relating to, or arising out of these Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, or implementation of the Plan and its related documents, the solicitation of acceptances of the Plan, the filing of these Chapter 11 Cases; any postpetition act taken or

omitted to be taken in connection with these Chapter 11 Cases; the pursuit of Confirmation and Consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan. *See Plan*, Art. VIII.F. The proposed Exculpation Provision does not, consistent with Third Circuit precedent, affect any liability that is determined to have constituted gross negligence, fraud or willful misconduct. *Id.*; *In re PWS Holding.,* 228 F.3d at 245-46 (holding that exculpation provision must not eliminate liability arising from willful misconduct or gross negligence). The Court should approve the Exculpation Provision in Article VIII.F of the Plan because it is consistent with: (i) the limitation of liability contained in Bankruptcy Code section 1125(e) and (ii) similar provisions approved by this Court.

II. Substantive Consolidation of the Debtors' Estates

99. The Plan serves as a motion by the Debtors to partially substantively consolidate all of the estates of the Debtors into a single consolidated estate for distribution purposes only. *See Plan*, Art. IV.A. Sections 105(a) and 1123(a)(5) of the Bankruptcy Code empower a bankruptcy court to authorize substantive consolidation pursuant to a chapter 11 plan over the objections of creditors. *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005). The Third Circuit in *Owens Corning* discussed at length substantive consolidation in bankruptcy proceedings, as well as its genesis and the impact it has on debtors' creditors and their rights and recoveries. The court provided the following baseline standards for approval of non-consensual substantive consolidation, while leaving the trial court with discretion to assess what facts are necessary to meet these standards:

> (i) prepetition [the debtors] disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

Id. at 211. Courts in this District have clarified that substantive consolidation is also appropriate

where the parties consent to it. *See Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 591 (D. Del. 2009).

100. Here, the Plan contemplates only a partial substantive consolidation—for distribution purposes only. This consolidation shall not affect any Debtor's status as a separate legal entity, change the organizational structure of the Debtors' business enterprise, constitute a change of control of any Debtor for any purpose, cause a merger or consolidation of any legal entities, nor cause the transfer of any assets or the assumption of any liabilities; and, except as otherwise provided by or permitted in the Plan, all of the Debtor Entities shall continue to exist as separate legal entities. Nor will the Plan's proposed substantive consolidation adversely impact the treatment of the Debtors' creditors. Instead, substantive consolidation for distribution purposes only will allow for greater efficiencies and simplification in administration, and thus, will reduce expenses by decreasing the administrative difficulties and costs related to the administration of and distributions from the Debtors' estates

101. In addition, the Debtors' creditors, stakeholders and other parties in interest will benefit from the partial substantive consolidation. Given the potential expense of making distributions on an unconsolidated basis for each of the Debtors, the Debtors believe that the overall effect of the partial substantive consolidation will be more beneficial than harmful to creditors and will allow for greater efficiencies and simplification in administering distributions under the Plan. Accordingly, the Debtors believe that substantive consolidation, for distribution purposes only, of the Debtors' estates under the terms of the Plan will not adversely impact the treatment of the Debtors' creditors, but rather will reduce expenses by decreasing the administrative difficulties and costs related to the distribution of the Debtors' estates separately.

102. As set forth above, substantive consolidation for distribution purposes only in these Chapter 11 Cases is appropriate and consistent with Third Circuit precedent. First and foremost, substantive consolidation of the Debtors' estates as requested is consensual as not a single creditor has objected, which alone is a sufficient basis for such relief. Therefore, partial substantive consolidation of the estates of the Debtors for distribution purposes only and the Plan provisions with respect thereto should be approved.

WAIVER OF STAY

103. The Debtors respectfully request that the Court cause the Confirmation Order to become effective immediately upon its entry notwithstanding the 14-day stay imposed by operation of Bankruptcy Rule 3020(e), which states that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P 3020(e); *see also* Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend. (stating that a "court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately") (emphasis added). According to the Advisory Committee notes to the 1999 amendments to the Bankruptcy Rules, the purpose of Bankruptcy Rule 3020(e) is to permit a party in interest to request a stay of the confirmation order pending appeal before the plan is implemented and an appeal becomes moot. Fed. R. Bankr. P. 3020(e), Adv. Comm. Notes, 1999 Amend. To the extent a party wishes to seek an appeal, it may seek to stay the effectiveness of the Confirmation Order in connection with the appeal.[5] As a result, the Debtors respectfully request that the Court cause the

[5] If for some reason a party in interest appeals the Confirmation Order, such party is on notice that the Debtors are asking the Court for a waiver of the stay imposed by Bankruptcy Rule 3020(e). Therefore, such party is on notice that it must request a stay pending appeal immediately after the entry of the Confirmation Order. *See, e.g.*, *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 187 (3d Cir. 2001) (noting that all parties were on notice that plan called for "Immediate Effectiveness," allowing appellants the opportunity to seek stay immediately upon confirmation of plan).

Confirmation Order to become effective immediately upon its entry.

CONCLUSION

104. For the reasons set forth in this Memorandum of Law, the Debtors respectfully submit that: (a) the Disclosure Statement and the Plan fully satisfy all applicable requirements of the Bankruptcy Code; (b) the Disclosure Statement should be approved on a final basis and the Plan should be confirmed by the Court; and (c) the 14-day stay of the Confirmation Order should be waived.

Dated: November 3, 2020
Wilmington, Delaware

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