Docket #0572 Date Filed: 10/24/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
PGX HOLDINGS, INC., *et al.*,[1]	)	Case No. 23-10718 (CTG)
Debtors.	)	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF AN ORDER (I) APPROVING THE DEBTORS' DISCLOSURE STATEMENT ON A FINAL BASIS AND (II) CONFIRMING THE DEBTORS' JOINT CHAPTER 11 PLAN

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: PGX Holdings, Inc. (2510); Credit Repair UK, Inc. (4798); Credit.com, Inc. (1580); Creditrepair.com Holdings, Inc. (7536); Creditrepair.com, Inc. (7680); eFolks Holdings, Inc. (5213); eFolks, LLC (5256); John C. Heath, Attorney At Law PC (8362); Progrexion ASG, Inc. (5153); Progrexion Holdings, Inc. (7123); Progrexion IP, Inc. (5179); Progrexion Marketing, Inc. (5073); and Progrexion Teleservices, Inc. (5110). The location of the Debtors' service address for purposes of these chapter 11 cases is: 257 East 200 South, Suite 1200, Salt Lake City, Utah 84111.

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RELIEF REQUESTED

The above-captioned debtors and debtors in possession (collectively, the "Debtors") submit this memorandum of law in support of (a) final approval of the *Disclosure Statement Relating to the First Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 488] (as modified, amended, or supplemented from time to time, the "Disclosure Statement"), pursuant to section 1125 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code") and (b) confirmation of the *Second Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 570] (as modified, amended, or supplemented from time to time, the "Plan"),[2] pursuant to sections 1125, 1126, and 1129, respectively, of the Bankruptcy Code.

In support of the Plan, the Debtors have filed the *Declaration of Chad Wallace in Support of Confirmation of the Second Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Wallace Declaration"), the *Declaration of Matthew Henry, Managing Director of Alvarez & Marsal North America, LLC, in Support of Confirmation of the Second Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the "Henry Declaration"), and the *Declaration of Sydney Reitzel Regarding the Solicitation and Tabulation of Votes on the First Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to*

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[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Plan, the Confirmation Order (as defined herein), or the *Order (I) Approving the Adequacy of the Disclosure Statement on an Interim Basis, (II) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (III) Shortening Certain Notice Periods and Establishing Related Procedures, (IV) Approving the Solicitation and Notice Procedures, (V) Approving the Combined Hearing Notice, and (VI) Granting Related Relief* [Docket No. 478] (the "Disclosure Statement Order"), as applicable.

Chapter 11 of the Bankruptcy Code (the "Voting Report"), each filed concurrently herewith. In further support of confirmation of the Plan and approval of the Disclosure Statement, the Debtors respectfully state as follows:

Preliminary Statement

1. The Debtors commenced these chapter 11 cases to fairly and fully resolve their liabilities and effectuate a value-maximizing set of sale transactions that would allow the business to survive as a going concern. Five months from the Petition Date, the Debtors stand poised to confirm a chapter 11 plan that achieves just that. The going-concern sales have been approved by the Court and have closed, and the Plan has been overwhelmingly accepted by creditors and has the support of the whole capital structure, including the official committee of unsecured creditors, trade creditors, and other unsecured creditors.

2. The path to plan confirmation has been arduous. In response to the partial summary judgment ruling against the Debtor Defendants in the CFPB Litigation and upon the expiration of an administrative stay following the ruling, the Debtors shut down approximately 80% of their business, re-evaluated key contracts, and engaged with their prepetition lenders to obtain an emergency bridge loan and DIP financing that would allow for a robust sale process. Having reached consensus with the prepetition lenders, the Debtors commenced these cases with a $19.925 million new-money DIP Facility, two stalking horse bids, and a restructuring support agreement with the secured lenders and equity holders where the stakeholders pledged their support for a liquidating chapter 11 plan.

3. With these initial hurdles cleared, the Debtors vigorously marketed their assets and focused their efforts on building consensus with the official committee of unsecured creditors that was appointed shortly after the filing. These efforts culminated in a global settlement with the Committee that provided plan consideration to go-forward trade creditors and other unsecured

creditors. While higher or otherwise better bids for the Debtors' assets never materialized, the Debtors redoubled their focus on obtaining court approval of their sale transactions to the stalking horse bidders—the clear value-maximizing path forward for these cases.

4. But another hurdle remained. The CFPB vehemently opposed the proposed sale transactions and sought to have these cases converted to chapter 7 instead. Following hard-fought negotiations, the Debtors resolved the CFPB's concerns regarding the sales and settled the underlying, long-standing CFPB Litigation pending in the Utah district court, achieving a favorable resolution for all parties. The Debtors then obtained approval of the two sales and closed the sale transactions in late September.

5. Following the consummation of the sale transactions, the final step to achieve a value-maximizing outcome for all parties is to confirm a liquidating chapter 11 plan and wind down the Debtor entities. The Plan is the best outcome available for the Debtors and their estates: it provides recoveries to multiple classes of unsecured creditors and provides a mechanism to wind down the Debtors in an orderly fashion. Importantly, the Plan enjoys support across the Debtors' capital structure and provides recoveries for trade creditors and other general unsecured claimants, who have also voted overwhelmingly in favor of the Plan (other than Class 6C).

6. Only one party objects to the Plan: Ms. Kristin Hansen[3] (the "WARN Plaintiff"), a single plaintiff acting on behalf of herself and a class of plaintiffs that will be subsequently certified in a WARN action.[4] The WARN Plaintiff holds no allowed claims and herself asserts

[3] *Objection of Kristen Hansen, on Behalf of Herself and Others Similarly Situated, to Confirmation of the First Amended Joint Plan of PGX Holdings, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 563] (the "WARN Objection").

[4] *See Kirsten Hansen v. PGX Holdings, Inc., et al.*, Adv. Proc. No. 23-50396 (CTG) (Bankr. D. Del. Aug. 4, 2023) (the "WARN Action"). The Court entered an opinion granting the WARN Plaintiff's class certification motion,

only $10,625 in priority claims in her Proof of Claim No. 224. Contrary to the WARN Plaintiff's assertion, the Court can and should confirm the Plan notwithstanding her objection and her pending claim.

7. Contrary to the WARN Plaintiff's assertions, the Plan provides for payment in full in cash of all allowed priority claims, including any claims arising from the WARN Action that are ultimately allowed as priority claims.[5] To the extent there was a misperception to the contrary, the modified Plan, filed substantially concurrently herewith, has been revised to clarify the point. This clarification addresses the WARN Plaintiff's assertions that the Plan recharacterizes priority claims as unsecured claims, classifies priority and non-priority claims together, fails to provide for payment of priority claims in full, or violates the priority structure of the Bankruptcy Code.

8. This leaves the WARN Plaintiff's only real objection: that the Plan is not feasible under section 1129(a)(11) of the Bankruptcy Code because she (and many others) will attempt to later prove that they have around $10.5 million in priority claims. But the Debtors need only show a reasonable assurance of success with respect to implementing the terms of the Plan in order to demonstrate that the Plan is feasible.[6] Where the amount of an alleged priority claim has not been

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subject to the entry of a subsequent order of the court that redefines such a class. *See* WARN Action Docket No. 29.

[5] *See* Plan, Art. III.B.3 (providing for the treatment on account of Allowed Other Priority Claims as "either [] satisfied in full, in Cash, or otherwise receive treatment consistent with the provisions of section 1129(a)(9) of the Bankruptcy Code").

[6] *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988); *In re Flintkote Co.*, 486 B.R. 99, 139 (Bankr. D. Del. 2012); *In re W.R. Grace & Co.*, 475 B.R. 34, 115 (D. Del. 2012); *see also Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (citations omitted) (holding that "[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation"); *accord In re Capmark Fin. Grp. Inc.*, No. 09-13684 (CSS), 2011 WL 6013718, at *61 (Bankr. D. Del. Oct. 5, 2011) (same).

determined as of confirmation, the Court can estimate the claim in the feasibility context, without additional motion practice, based on confirmation briefing and oral argument alone.[7]

9. Here, as set forth in further detail below in Section V of the Argument Portion of this Brief, the Debtors have multiple valid defenses to the WARN Action, including a "faltering business" defense and an "unforeseen business circumstances" defense. These are complete defenses to the WARN Action.[8] And the bolt of lightning that was the CFPB's partial summary judgment ruling on March 10, 2023—resulting in the sudden 80% shutdown of the business—was perhaps the clearest possible example of these defenses. Based on evidence adduced at confirmation, briefing, and oral argument, the Court can find—solely for the purposes of determining feasibility—that the Debtors are reasonably likely to be successful on at least one of these arguments.

10. For the Plan to be successful, it is critical that confirmation occur as soon as possible. The administrative run rate in these chapter 11 cases is significantly higher before confirmation than it will be after. Confirmation of the Plan will dissolve the statutory committee,

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[7] *See In re Tonopah Solar Energy, LLC*, No. 20-11844 (KBO), 2022 WL 982558, at *14 (D. Del. Mar. 31, 2022) ("Tonopah") (citing *In re Windsor Plumbing Supply Co.*, 170 B.R. 503, 520 (Bankr. E.D.N.Y. 1994)).

[8] The WARN Act requires only "as much notice as is practicable"—and in some cases, no pre-termination notice at all—if the layoffs are (A) conducted by a "faltering company," (B) caused by "unforeseen business circumstances," or (C) ordered by a "liquidating fiduciary." *See* 20 C.F.R. § 639.9; *In re United Healthcare Sys.*, 200 F.3d 170, 177 (3d Cir. 1999). A company is eligible for the faltering business exception when (1) it was actively seeking capital at the time the 60-day notice would have been required, (2) it had a realistic opportunity to obtain the financing sought, (3) the financing would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown, and (4) the employer reasonably and in good faith believed that sending the 60-day notice would have precluded it from obtaining the financing. *See AE Liquidation, Inc. v. Eclipse Aviation Corp. (In re Varela)*, 522 B.R. 62, 67 (Bankr. D. Del. 2014); *see also*, *In re APA Transp. Corp. Consol. Litig.*, 541 F.3d 233, 248 (3d Cir. 2008). Under the "unforeseen business circumstances" exception, an employer is not required to provide 60-days' advance notice of layoffs where "(1) the claimed circumstance was unforeseeable, and (2) the layoffs were caused by that circumstance." *AE Liquidation*, 522 B.R. at 68 (internal quotations omitted). Last, companies are not required to provide 60-days' notice where they are merely engaged in the liquidation of assets at the time of the mass layoff. *See In re United Healthcare Sys.*, 200 F.3d at 177 (internal quotations omitted).

terminate reporting requirements, and significantly reduce the work required by hourly professionals. Accordingly, any delay in confirming the Plan threatens the carefully negotiated balance reflected therein.

11. The Plan is consistent with the Bankruptcy Code, maximizes the value of the Debtors' estates, and provides recoveries to as many creditors as possible in these circumstances, including trade creditors and other general unsecured creditors. For the reasons stated herein and in light of the evidentiary support to be offered at the Confirmation Hearing, the Disclosure Statement and the Plan satisfy all applicable provisions of the Bankruptcy Code. Therefore, and as set forth more fully in this memorandum, the Disclosure Statement should be approved on a final basis and the Plan should be confirmed.

Background

I. Procedural History.

12. On June 4, 2023 (the "Petition Date"), each of the Debtors filed a voluntary petition with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. These Chapter 11 Cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b) [Docket No. 55]. No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases. On June 14, 2023, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "Committee") [Docket No. 90].

13. A detailed description of the Debtors and their businesses, and the facts and circumstances surrounding these Chapter 11 Cases, are set forth in greater detail in the *Declaration*

of Chad Wallace, Chief Executive Officer of PGX Holdings, Inc., in Support of Chapter 11 Petitions and First Day Motions [Docket No. 12] (the "First Day Declaration").

14. On August 24, 2023, the Debtors filed with the Bankruptcy Court the *Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 410] and the *Disclosure Statement for the Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No 412], along with the Disclosure Statement Motion,[9] pursuant to which the Debtors sought a hearing on approval of the Disclosure Statement and the related Solicitation and Voting Procedures.

15. On September 15, 2023, the Debtors filed with the Bankruptcy Court, the *First Amended Joint Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 466] and the *First Amended Disclosure Statement for the First Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 468].

16. On September 16, 2023, the Bankruptcy Court entered the *Order (I) Approving the Adequacy of the Disclosure Statement on an Interim Basis, (II) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (III) Approving the Solicitation and Notice Procedures, (IV) Approving the Combined Hearing Notice, and (V) Granting Related Relief* [Docket No. 478] (the "Disclosure Statement Order"), approving, among other things, the proposed procedures for solicitation of the Plan and related notices, forms, and ballots

[9] *Motion of Debtors for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement on an Interim and Final Basis, (II) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (III) Approving the Solicitation and Notice Procedures, (IV) Approving the Combined Hearing Notice, and (V) Granting Related Relief* [Docket No. 413] (the "Disclosure Statement Motion").

(collectively, the "Solicitation Packages"). On September 19, 2023, the Debtors filed with the Bankruptcy Court the *Notice of Hearing to Consider the (I) Adequacy of the Disclosure Statement and (II) Confirmation of the First Amended Joint Chapter 11 Plan Filed by the Debtors* [Docket No. 483].

17. On September 20, 2023, the Debtors filed solicitation versions of the *First Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Cod*e [Docket No. 486] and the *First Amended Disclosure Statement for the First Amended Joint Chapter 11 Plan of PGX Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 488].

18. On October 13, 2023, the Debtors filed with the Bankruptcy Court the *Plan Supplement* [Docket No. 546] (as amended, modified, or supplemented from time to time, the "Plan Supplement"), which included the (a) Rejected Executory Contracts and Unexpired Leases Schedule, (b) Assumed Executory Contracts and Unexpired Leases Schedule, (c) Schedule of Retained Causes of Action, (d) any necessary documentation related to the Sale Transactions, (e) (i) the identity of the Creditor Trustee and (ii) the terms of the governing agreement of the Creditor Trust, (f) the Litigation Portion of the GUC Litigation Claims Settlement Cash, and (g) the PIK Notes. On October 13, 2023, the Debtors also filed with the Bankruptcy Court the *Notice of Filing Plan Supplement* [Docket No. 547].

II. The Plan Solicitation and Notification Process.

19. On or about September 22, 2023, the Debtors caused their notice and claims agent, Kurtzman Carson Consultants LLC (the "Notice and Claims Agent"), to distribute the Solicitation Packages to Holders of Claims entitled to vote on the Plan as of September 15, 2023 (the "Voting Record Date")—*i.e.*, the Holders of Prepetition Loan Claims, Continuing Trade Claims, General Unsecured Claims, Litigation Claims, and CFPB Claim (the "Voting Classes")

— in accordance with sections 1125 and 1126 of the Bankruptcy Code.[10] On September 25, 2023, the Debtors caused the Publication Notice (as defined in the Disclosure Statement Order) to be published in *USA TODAY* as provided in the Disclosure Statement Order.

20. The Plan constitutes a separate Plan for each of the Debtors, and the classification of Claims and Interests set forth herein applies separately to each of the Debtors. For purposes of administrative convenience, the Plan consolidates the process by which distributions will be made under the Plan, but the Plan does not contemplate substantive consolidation.

21. In compliance with the Bankruptcy Code and the Disclosure Statement Order, only Holders of Claims and Interests in Impaired Classes receiving or retaining property on account of such Claims or Interests were entitled to vote on the Plan.[11] Holders of Claims and Interests were not entitled to vote if their rights are (a) Unimpaired under the Plan (in which case such Holders were conclusively presumed to accept the Plan pursuant to section 1126(f) of the Bankruptcy Code) or (b) Impaired and such Holders are not entitled to receive any distribution under the Plan (in which case such Holders were conclusively deemed to reject the Plan pursuant to section 1126(g) of the Bankruptcy Code). Accordingly, the following Classes of Claims and Interests were ***not*** entitled to vote on the Plan, and the Debtors did not solicit votes from Holders of such Claims and Interests:

Class	Claim or Interest	Status	Voting Rights
1	Secured Tax Claims	Unimpaired	Not Entitled to Vote (Presumed to Accept)
2	Other Secured Claims	Unimpaired	Not Entitled to Vote (Presumed to Accept)
3	Other Priority Claims	Unimpaired	Not Entitled to Vote (Presumed to Accept)
7	Intercompany Claims	Unimpaired/ Impaired	Not Entitled to Vote (Presumed to Accept or Deemed to Reject)
8	Intercompany Interests	Unimpaired/	Not Entitled to Vote

[10] *See Certificate of Service* [Docket No. 560] (the "Solicitation Affidavit").

[11] *See* 11 U.S.C. § 1126.

Class	Claim or Interest	Status	Voting Rights
		Impaired	(Presumed to Accept or Deemed to Reject)
9	Interests in PGX	Impaired	Not Entitled to Vote (Deemed to Reject)
10	Interests in Lexington Law Firm	Impaired	Not Entitled to Vote (Deemed to Reject)
11	510(b) Claims	Impaired	Not Entitled to Vote (Deemed to Reject)

22. The Debtors solicited votes on the Plan only from Holders of Claims in Impaired Classes receiving or retaining property on account of such Claims. The deadline for all Holders of Claims and Interests entitled to vote on the Plan to cast their Ballots[12] was October 20, 2023, at 4:00 p.m. (prevailing Eastern Time) (the "Voting Deadline"), and the deadline to object to confirmation of the Plan was October 20, 2023, at 4:00 p.m. (prevailing Eastern Time) (the "Confirmation Objection Deadline"). As reflected in the Voting Report, all Ballots for Class 4 and Class 5 were timely returned and voted in favor of confirmation of the Plan, and all Holders of Claims in Classes 6A and 6B that cast votes, voted in favor of confirmation of the Plan.[13]

23. As set forth above and in the Voting Declaration, at least one Voting Class voted in favor of accepting the Plan. Because the Plan meets the requirements of section 1129(b) as described below, the Court should confirm the Plan over the Classes that were deemed to reject the Plan. The hearing on final approval of the Disclosure Statement and confirmation of the Plan (the "Confirmation Hearing") is currently scheduled to start on October 27, 2023, at 10:00 a.m. (prevailing Eastern Time). Concurrently with the filing of this memorandum, the Debtors submitted a proposed order confirming the Plan (the "Confirmation Order").

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[12] The forms of ballots used in solicitation were included as Exhibits 3A– 3D, attached to the Disclosure Statement Order (the "Ballots").

[13] In the WARN Objection, the WARN Plaintiff notes that, to the extent her vote counts in Class 6C, she rejects the Plan. As reflected in the Voting Report, there was one 1 timely vote cast in favor of the Plan. Given that the WARN Plaintiff stated that she votes to reject the Plan, on behalf of herself and all others similarly situated, the numerosity requirement cannot be satisfied for Class 6C. Accordingly, Class 6C has voted to reject the Plan.

III. Confirmation Objections.

24. The Debtors have not received any objections to the Plan other than the WARN Objection. The Debtors have received informal comments from certain parties, including the Office of the United States Trustee and certain sureties, and have resolved such informal comments by modification to the Plan. The Plan has the overwhelming support of parties throughout the capital structure and no party objects to confirmation except the WARN Plaintiff. To the extent that the WARN Objection has not been resolved in advance of the Confirmation Hearing, the Bankruptcy Court should overrule the WARN Objection for the reasons set forth in Section V of the following Argument portion of this Brief.

Argument

25. This memorandum is divided into three parts. ***First***, the Debtors request approval of the Disclosure Statement on a final basis and a finding that all notice requirements are satisfied. ***Second***, the Debtors present their case in chief that the Plan satisfies section 1129 of the Bankruptcy Code by a preponderance of the evidence and, accordingly, request that the Bankruptcy Court confirm the Plan. ***Third***, the Debtors address the outstanding WARN Objection.

I. The Disclosure Statement Contains "Adequate Information" as Required by Section 1125 and 1126 of the Bankruptcy Code and Satisfies Notice Requirements.

A. The Disclosure Statement Contains Adequate Information.

26. Pursuant to section 1125 of the Bankruptcy Code, the proponent of a proposed chapter 11 plan must provide "adequate information" regarding that plan to holders of impaired claims and interests entitled to vote on the plan. Specifically, section 1125(a)(1) of the Bankruptcy Code provides, in relevant part, as follows:

> '[A]dequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, 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.

27. The primary purpose of a disclosure statement is to provide all material information, or "adequate information," that allows parties entitled to vote on a proposed plan to make an informed decision about whether to vote to accept or reject the plan.[14] Congress intended that such informed judgments would be needed to both negotiate the terms of, and vote on, a chapter 11 plan.[15]

28. "Adequate information" is a flexible standard, based on the facts and circumstances of each case.[16] Courts within the Third Circuit and elsewhere acknowledge that determining what constitutes "adequate information" for the purpose of satisfying section 1125 of the Bankruptcy

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[14] *See, e.g.*, *Century Glove, Inc. v. First Am. Bank of 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."); *In re Monnier Bros.*, 755 F.2d 1336, 1342 (8th Cir. 1985) ("The primary purpose of a disclosure statement is to give the creditors the information they need to decide whether to accept the plan."); *In re Phoenix Petrol., Co.*, 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001) ("[T]he general purpose of the disclosure statement is to provide 'adequate information' to enable 'impaired' classes of creditors and interest holders to make an informed judgment about the proposed plan and determine whether to vote in favor of or against that plan."); *In re Unichem Corp.*, 72 B.R. 95, 97 (Bankr. N.D. Ill. 1987) ("The primary purpose of a disclosure statement is to provide all material information which creditors and equity security holders affected by the plan need in order to make an intelligent decision whether to vote for or against the plan.").

[15] *See Century Glove, Inc.*, 860 F.2d at 100.

[16] 11 U.S.C. § 1125(a)(1) (stating that "'adequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records"); *see also 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."); *First Am. Bank of N.Y. v. Century Glove, Inc.*, 81 B.R. 274, 279 (D. Del. 1988) (noting that adequacy of disclosure for a particular debtor will be determined based on how much information is available from outside sources); S. Rep. No. 95-989, at 121 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5907 (stating that "the information required will necessarily be governed by the circumstances of the case").

Code resides within the broad discretion of the court.[17] Accordingly, the determination of whether a disclosure statement contains adequate information must be made on a case-by-case basis, focusing on the unique facts and circumstances of each case.[18]

29. In making a determination as to whether a disclosure statement contains adequate information as required by section 1125 of the Bankruptcy Code, courts typically look for disclosures related to topics such as:

a. the events that led to the filing of a bankruptcy petition;

b. the relationship of the debtor with its affiliates;

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

d. the debtor's anticipated future performance;

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

f. the debtor's condition while in chapter 11;

g. claims asserted against the debtor;

h. the estimated return to creditors under a chapter 7 liquidation of the debtor;

i. the future management of the debtor;

j. the chapter 11 plan or a summary thereof;

k. financial information, valuations, and projections relevant to a creditor's decision to accept or reject the chapter 11 plan;

l. information relevant to the risks posed to creditors under the plan;

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[17] *See, e.g.*, *In re River Village Assoc.*, 181 B.R. 795, 804 (E.D. Pa. 1995) ("[T]he Bankruptcy Court is thus given substantial discretion in considering the adequacy of a disclosure statement."); *In re Phoenix Petrol.*, 278 B.R. at 393 (same).

[18] *See In re Phoenix Petrol.*, 278 B.R. at 393; *In re PC Liquidation Corp.*, 383 B.R. 856, 865 (E.D.N.Y. 2008) ("The standard for disclosure is, thus, flexible and what constitutes 'adequate disclosure' in any particular situation is determined on a case-by-case basis, with the determination being largely within the discretion of the bankruptcy court." (internal citations omitted)); *In re Lisanti Foods, Inc.*, 329 B.R. 491, 507 (Bankr. D. N.J. 2005) (stating that "[t]he information required will necessarily be governed by the circumstances of the case").

m. the actual or projected realizable value from recovery of preferential or otherwise avoidable transfers;

n. litigation likely to arise in a nonbankruptcy context; and

o. tax attributes of the debtor.[19]

30. The Disclosure Statement contains a number of categories of information that courts consider "adequate information," including, without limitation:

- ***The Debtors' Corporate History, Structure, and Business Overview***. An overview of the Debtors' corporate history, business operations, organizational structure, and capital structure is described in Article V of the Disclosure Statement;
- ***Events Leading to the Chapter 11 Filings***. A detailed overview of the Debtors' out-of-court restructuring efforts in response to liquidity constraints is described in Article VI of the Disclosure Statement;
- ***Material Developments and Anticipated Events of the Chapter 11 Cases***. A summary of the course of events in the chapter 11 cases, including the sale process, is described in Article VII of the Disclosure Statement;
- ***Risk Factors***. Certain risks associated with the Debtors' businesses, as well as certain risks associated with forward-looking statements and an overall disclaimer as to the information provided by and set forth in the Disclosure Statement, are described in Article VIII of the Disclosure Statement;
- ***Solicitation and Voting Procedures***. A description of the procedures for soliciting votes to accept or reject the Plan and voting on the Plan is provided in Article IX of the Disclosure Statement;
- ***Confirmation of the Plan***. Confirmation procedures and statutory requirements for confirmation and consummation of the Plan are described in Article X of the Disclosure Statement;
- ***Material United States Federal Income Tax Consequences***. A description of certain U.S. federal income tax law consequences of the Plan is provided in Article XI of the Disclosure Statement; and

[19] *See In re U.S. Brass Corp.*, 194 B.R. 420, 424–25 (Bankr. E.D. Tex. 1996); *see also In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170–71 (Bankr. S.D. Ohio 1988) (listing the factors courts have considered in determining the adequacy of information provided in a disclosure statement); *In re Metrocraft Pub. Serv., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (same). Disclosure regarding all topics is not necessary in every case. *See In re U.S. Brass Corp.*, 194 B.R. at 424; *see also In re Phoenix Petroleum*, 278 B.R. at 393 ("[C]ertain categories of information which may be necessary in one case may be omitted in another; no one list of categories will apply in every case.").

- ***Recommendation***. A recommendation by the Debtors that Holders of Claims in the Voting Class should vote to accept the Plan is included in Article XII of the Disclosure Statement.

- ***Liquidation Analysis***. An analysis of the liquidation value of the Debtors is attached to the Disclosure Statement as Exhibit B;

31. In addition, prior to the solicitation, the Disclosure Statement and the Plan were subject to review and comment by various parties, including the DIP Lenders, the Committee, and the U.S. Trustee. The Bankruptcy Court approved the Disclosure Statement on an interim basis on September 16, 2023, as containing adequate information to commence solicitation. No party in interest has requested additional information nor disputed that the Disclosure Statement contained information sufficient for Impaired Classes to be able to cast an informed vote on the Plan. For the reasons set forth above, the Debtors submit that the Disclosure Statement contains adequate information within the meaning of section 1125(a) of the Bankruptcy Code in satisfaction of section 1126(b)(2) and should be approved.

B. The Debtors Complied with Applicable Notice Requirements.

32. On September 16, 2023, the Bankruptcy Court entered the Disclosure Statement Order granting the relief requested in the Disclosure Statement Motion, including, among other things, (a) approving the Solicitation and Voting Procedures, (b) approving the form and manner of the Combined Hearing Notice and the Publication Notice, and (c) approving certain dates and deadlines with respect to the Plan and Disclosure Statement. The Debtors complied with the procedures and timeline approved by the Disclosure Statement Order.

1. The Debtors Complied with the Notice Requirements Set Forth in the Disclosure Statement Order.

33. The Debtors satisfied the notice requirements set forth in the Disclosure Statement Order, Bankruptcy Rule 3017, and Local Rule 3017-1. ***First***, on or about September 22, 2023, the Debtors caused the Notice and Claims Agent to distribute the Solicitation Packages to Holders of

Claims entitled to vote on the Plan as of the Voting Record Date.[20] ***Second***, the Debtors caused the Publication Notice to be published in USA Today (National Edition) on September 22, 2023. ***Third***, the Combined Hearing Notice included instructions on how to obtain the Plan and the Disclosure Statement without a fee through the Debtors' restructuring website or for a fee at the Bankruptcy Court's PACER website.

2. The Ballots Used to Solicit Holders of Claims Entitled to Vote on the Plan Complied with the Disclosure Statement Order.

34. The forms of Ballots used comply with the Bankruptcy Rules and were conditionally approved by the Bankruptcy Court pursuant to the Disclosure Statement Order.[21] No party has objected to the sufficiency of the Ballots. Based on the foregoing, the Debtors submit that they complied with the Disclosure Statement Order and satisfied the requirements of Bankruptcy Rule 3018(c).

3. The Debtors' Solicitation Period Complied with the Disclosure Statement Order.

35. The Debtors' solicitation period complied with the Disclosure Statement Order, the Bankruptcy Code, Bankruptcy Rules, and Local Rules. ***First***, the Solicitation Packages, including instructions for accessing electronic or hard-copy versions of the Plan and Disclosure Statement, were transmitted to all Holders of Claims entitled to vote on the Plan.[22] ***Second***, the solicitation period, which lasted from September 22, 2023 through October 20, 2023, complied with the Disclosure Statement Order and was adequate under the particular facts and circumstances of these

[20] *See* Solicitation Affidavit [Docket No. 560].

[21] *See* Disclosure Statement Order ¶ 8.

[22] *See* Solicitation Affidavit.

chapter 11 cases.[23] Accordingly, the Debtors submit that the solicitation period complied with the Disclosure Statement Order.

4. The Debtors' Tabulation Procedures Complied with the Disclosure Statement Order.

36. The Debtors request that the Bankruptcy Court find that the Debtors' tabulation of votes complied with the Disclosure Statement Order. The Notice and Claims Agent reviewed all Ballots received in accordance with the Solicitation and Voting Procedures approved pursuant to the Disclosure Statement Order.[24] Accordingly, the Debtors respectfully submit that the Bankruptcy Court should approve the Debtors' tabulation of votes, confirming that the requisite Claims voted to accept the Plan pursuant to section 1126(c) of the Bankruptcy Code.

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

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

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

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[23] *See* Disclosure Statement Order ¶ 7; Solicitation Affidavit.

[24] *See* Disclosure Statement Order ¶ 13.

II. The Plan Satisfies Each Requirement for Confirmation.

39. To confirm the Plan, the Bankruptcy Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[25] As set forth herein, the Plan fully complies with all relevant sections of the Bankruptcy Code—including sections 1122, 1123, 1125, 1126, and 1129—as well as the Bankruptcy Rules and applicable non-bankruptcy law.

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

40. Section 1129(a)(1) of the Bankruptcy Code requires that a plan "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision also encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the contents of a chapter 11 plan, respectively.[26] As explained below, the Plan complies with the requirements of sections 1122, 1123, and 1129 of the Bankruptcy Code, as well as other applicable provisions.

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

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

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or

[25] *See In re Armstrong World Indus.*, *Inc.*, 348 B.R. 111, 120, n.15 (D. Del. 2006); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 616 n.23 (Bankr. D. Del. 2001).

[26] S. Rep. No. 95-989, at 126, *reprinted in* 1978 U.S.C. C.A.N. 5787, 5912 (1978); H.R. Rep. No. 95-595, at 412, *reprinted in* 1978 U.S.C. C.A.N. 5963, 6368 (1977); *In re S&W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of [section 1129(a)(1)] reveals that although its scope is certainly broad, the provisions it was most directly aimed at were [s]ections 1122 and 1123."); *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008).

> interest is substantially similar to the other claims or interests of such class.

42. For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be grouped in the same class.[27] Instead, claims or interests designated to a particular class must be substantially similar to each other.[28] Courts in this jurisdiction and others have recognized that plan proponents have significant flexibility in placing similar claims into different classes, provided there is a rational basis to do so.[29]

43. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places Claims and Interests into 14 separate Classes, with Claims and Interests in each Class differing from the Claims and Interests in each other Class in a legal or factual way or based on other relevant criteria.[30] Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

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[27] *Armstrong World Indus., Inc.*, 348 B.R. at 159.

[28] *Id*.

[29] Courts have identified grounds justifying separate classification, including (a) where members of a class possess different legal rights and (b) where there are good business reasons for separate classification. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158–59 (3d Cir. 1993) (holding that, as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (recognizing that separate classes of claims must be reasonable and allowing a plan proponent to group similar claims in different classes); *see also Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 956–57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis on account of the bankruptcy court-approved settlement); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 303 (Bankr. N.D. Tex. 2007) (explaining that "the only express prohibition on separate classification is that it may not be done to gerrymander an affirmative vote on a reorganization plan"); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1018 (Bankr. S.D.N.Y. 1993) (holding that, although discretion is not unlimited, "the proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case") (internal quotations omitted); *In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) ("Courts have found that the Bankruptcy Code only prohibits the identical classification of dissimilar claims. It does not require that similar classes be grouped together . . . .").

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

a. Class 1: Secured Tax Claims;

b. Class 2: Other Secured Claims;

c. Class 3: Other Priority Claims;

d. Class 4: Prepetition First Lien Claims;

e. Class 5: Prepetition Second Lien Claims;

f. Class 6A: Continuing Trade Claims;

g. Class 6B: Other General Unsecured Claims;

h. Class 6C: Litigation Claims;

i. Class 6D: CFPB Claim;

j. Class 7: Intercompany Claims;

k. Class 8: Intercompany Interests;

l. Class 9: Interests in PGX;

m. Class 10: Interests in Lexington Law Firm; and

n. Class 11: 510(b) Claims.

44. Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims and Interests in each such Class.[31] In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests into the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests.[32] Namely, the Plan separately classifies the Claims because each Holder of such Claims or Interests may hold (or may have held) rights in the Estates

[31] *See* Wallace Declaration ¶ 14.

[32] *See id.*

legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification.[33]

45. For example, the classification scheme distinguishes Holders of Prepetition First Lien Claims (Class 4) from Holders of Other General Unsecured Claims (Class 6B) because of the different circumstances of each Class, including that the Debtors' obligations with respect to the former are secured by collateral.[34] Other Priority Claims (Class 3) are classified separately due to their required treatment under the Bankruptcy Code.[35]

46. Accordingly, the Claims or Interests assigned to each particular Class described above are substantially similar to the other Claims or Interests in each such Class and the distinctions among Classes are based on valid business, factual, and legal distinctions. The Debtors submit that the Plan fully complies with and satisfies section 1122 of the Bankruptcy Code.

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

47. The seven applicable requirements of section 1123(a) of the Bankruptcy Code generally relate to the specification of claims treatment and classification, the equal treatment of claims within classes, and the mechanics of implementing a plan. The Plan satisfies each of these requirements.

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[33] *See* Wallace Declaration ¶¶ 14–17.

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

[35] *See id*.

(1) Designation of Classes of Claims and Equity Interests (§ 1123(a)(1))

48. For the reasons set forth above, Article III of the Plan properly designates classes of Claims and Interests and thus satisfies the requirement of section 1122 of the Bankruptcy Code.[36]

(2) Specification of Unimpaired Classes (§ 1123(a)(2))

49. Section 1123(a)(2) of the Bankruptcy Code requires that the Plan "specify any class of claims or interests that is not impaired under the plan." The Plan meets this requirement by identifying each Class in Article III that is Unimpaired.[37]

(3) Treatment of Impaired Classes (§ 1123(a)(3))

50. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan." The Plan meets this requirement by setting forth the treatment of each Class in Article III that is Impaired.[38]

(4) Equal Treatment within Classes (§ 1123(a)(4))

51. Section 1123(a)(4) of the Bankruptcy Code requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."[39] The Plan meets

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[36] *See* Plan, Art. III.A.

[37] *See id*.

[38] *See id*.

[39] 11 U.S.C. § 1123(a)(4).

this requirement because Holders of Allowed Claims or Interests will receive the same rights and treatment as other Holders of Allowed Claims or Interests within such Holders' respective Class.[40]

(5) Means for Implementation (§ 1123(a)(5))

52. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation.[41] The Plan, together with the documents and forms of agreement included in the Plan Supplement, provides a detailed blueprint for the transactions that underlie the Plan, which are focused on an orderly wind-down of the estate now that all operating assets have been sold.

53. Article IV of the Plan, in particular, sets forth the means for implementation of the Plan, which include, *inter alia*: (a) general settlement of Claims and Interests; (b) the Restructuring Transactions, including the execution and delivery of any appropriate agreements or documents pursuant to the Plan; (c) the sources of consideration for Plan distributions; (d) description of the Wind-Down Debtor; (e) establishment of the Liquidating Trust (if any); (f) establishment of the Plan Administrator; (g) establishment of the Creditor Trust and Creditor Trustee; and (h) implementation of the Global Settlement.[42] In addition to these core transactions, the Plan sets forth other critical mechanics of the Debtors' liquidation, such as the

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40 *See* Plan, Art. III.B.

41 11 U.S.C. § 1123(a)(5).

42 *See* Plan, Art. IV. The Global Settlement is reflected in the Global Settlement Term Sheet, which is attached as Exhibit C to the *Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [Docket No. 332] (as may be modified, amended, or supplemented pursuant to a subsequent Final Order, the "DIP Order"), entered by the Bankruptcy Court on August 4, 2023.

dissolution of the Wind-Down Debtor, cancellation of securities and agreements, and the payment of certain fees.[43]

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

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

55. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of nonvoting equity securities.[44] Because the Debtors are not issuing any new securities under the Plan, section 1123(a)(6) of the Bankruptcy Code does not apply to the Plan.

(7) Directors and Officers (§ 1123(a)(7))

56. Section 1123(a)(7) of the Bankruptcy Code requires that plan provisions with respect to the manner of selection of any director, officer, or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy." The Plan satisfies this requirement by providing for the deemed resignation of the Debtors' managers and officers from their duties and the appointment of the Plan Administrator as the sole manager and sole officer of the Debtors and successor to the powers of the Debtors' managers and officers.[45] The Plan provides that the Plan Administrator shall act for the Wind-Down Debtor in the same fiduciary capacity as applicable to a board of managers and officers, subject to terms of

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[43] *Id.*

[44] 11 U.S.C. § 1123(a)(6).

[45] *See* Plan, Art. IV.F.

the Plan (and all certificates of formation, membership agreements, and related documents are deemed amended by the Plan to permit and authorize the same).

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

57. The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires the plan proponent to comply with the applicable provisions of the Bankruptcy Code.[46] The legislative history to section 1129(a)(2) provides that section 1129(a)(2) is intended to encompass the disclosure and solicitation requirements set forth in section 1125 and the plan acceptance requirements set forth in section 1126 of the Bankruptcy Code.[47] As set forth herein, the Debtors have complied with these provisions, including sections 1125 and 1126 of the Bankruptcy Code, as well as Bankruptcy Rules 3017 and 3018, by distributing the Disclosure Statement and soliciting acceptances of the Plan through their Notice and Claims Agent in accordance with the Disclosure Statement Order.

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

58. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a chapter 11 plan "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."[48] Section 1125

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[46] *See* 11 U.S.C. § 1129(a)(2).

[47] *See In re Lapworth*, 1998 WL 767456, at *3 (DWS) (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2)."); *In re Aleris Int'l, Inc.*, 2010 WL 3492664, at *20 (Bankr. D. Del. May 13, 2010) ("[S]ection 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the solicitation and disclosure requirements under sections 1125 and 1126 of the Bankruptcy Code."); S. Rep. No. 989, 95th Cong., 2d Sess., at 126 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess., at 412 (1977).

[48] 11 U.S.C. § 1125(b).

ensures that parties in interest are fully informed regarding the debtor's condition so that they may make an informed decision whether to approve or reject the plan.[49]

59. Section 1125 is satisfied here. Before the Debtors solicited votes on the Plan, the Bankruptcy Court approved the Disclosure Statement on an interim basis in accordance with section 1125(a)(1).[50] The Bankruptcy Court also approved the contents of the Solicitation Packages provided to Holders of Claims entitled to vote on the Plan, the non-voting materials provided to parties not entitled to vote on the Plan, and the relevant deadlines for voting on and objecting to the Plan.[51] As stated above, the Debtors, through their Notice and Claims Agent, complied with the content and delivery requirements of the Disclosure Statement Order,[52] thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code. The Debtors also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. Here, the Debtors caused a Solicitation Package or a Non-Voting Status Notice Package, as applicable, each of which included instructions for accessing electronic or hard-copy versions of the Disclosure Statement, to be transmitted to each Holder of a Claim or Interest.[53]

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

[50] *See generally* Disclosure Statement Order.

[51] *Id*.

[52] *See* Solicitation Affidavit.

[53] *See* Solicitation Affidavit. The "Non-Voting Status Notice Package" as used herein shall refer to the package of documents as referenced in the Solicitation Affidavit ¶ 6, as applicable.

60. Based on the foregoing, the Debtors submit that they have complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order.

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

61. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a chapter 11 plan. Specifically, under section 1126 of the Bankruptcy Code, only holders of allowed claims and equity interests in impaired classes of claims or interests that will receive or retain property under a plan on account of such claims or interests may vote to accept or reject such plan. Section 1126 of the Bankruptcy Code provides, in pertinent part, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan . . . .
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.[54]

62. As set forth above, in accordance with section 1125 of the Bankruptcy Code, the Debtors solicited acceptances or rejections of the Plan from the Holders of Allowed Claims in Class 4 (Prepetition First Lien Claims), Class 5 (Prepetition Second Lien Claims), Class 6A (Continuing Trade Claims), Class 6B (Other General Unsecured Claims), Class 6C (Litigation Claims), and Class 6D (CFPB Claim). The Debtors did not solicit votes from Holders of Claims and Interests in Class 1 (Secured Tax Claims), Class 2 (Other Secured Claims), and Class 3 (Other Priority Claims) because Holders of Claims in these Classes are Unimpaired and, pursuant

[54] 11 U.S.C. § 1126(a), (f).

to section 1126(f) of the Bankruptcy Code, are conclusively presumed to have accepted the Plan.[55] Depending on their ultimate treatment by the Debtors, Holders of Claims and Interests in Class 7 (Intercompany Claims) and Class 8 (Intercompany Interests) will be either conclusively deemed to accept or conclusively deemed to reject the Plan, and in either scenario are not entitled to vote on the Plan.[56]

63. Finally, Holders of Claims and Interests in Class 9 (Interests in PGX), Class 10 (Interests in Lexington Law Firm), and Class 11 (510(b) Claims) will receive no distribution on account of their Claims or Interests and, pursuant to section 1126(g) of the Bankruptcy Code, are deemed to reject the Plan.[57] Thus, pursuant to section 1126(a) of the Bankruptcy Code, only Holders of Claims in Classes 4, 5, 6A, 6B, 6C, and 6D were entitled to vote to accept or reject the Plan.[58]

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

65. The Voting Report, summarized above, reflects the results of the voting process in accordance with section 1126 of the Bankruptcy Code.[59] As set forth in the Voting Declaration and summarized above, all Holders of Claims in Class 4 and Class 5 voted in favor of confirmation

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[55] *See* Plan, Art. III.B.

[56] *Id*.

[57] *Id*.

[58] *Id.*; *see also* Solicitation Affidavit.

[59] *See generally* Voting Report.

of the Plan, and Holders of Claims in Classes 6A and 6B who casted a vote, voted in favor of confirmation of the Plan. However, based on the statements made in the WARN Objection, there was at least 1 vote to reject within Class 6C and, given there was only 1 affirmative vote in Class 6C, Class 6C has voted to reject the Plan, as described in the Voting Report. Additionally, as discussed below, the Debtors have satisfied the requirements of section 1129(a)(10) of the Bankruptcy Code and will be able to "cram down" on the Holders of Claims in Classes 6C and 6D (to the extent not deemed as voting in favor of confirmation of the Plan). Based on the foregoing, the Debtors submit that they have satisfied the requirements of section 1129(a)(2).

C. The Plan Was Proposed in Good Faith (§ 1129(a)(3)).

66. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." Where a plan satisfies the purposes of the Bankruptcy Code and has a good chance of succeeding, the good faith requirement of section 1129(a)(3) of the Bankruptcy Code is satisfied.[60] To determine whether a plan seeks relief consistent with the Bankruptcy Code, courts consider the totality of the circumstances surrounding the development of the plan.[61]

67. The Debtors negotiated, developed, and proposed the Plan in good faith and the Plan satisfies section 1129(a)(3) of the Bankruptcy Code. Throughout these Chapter 11 Cases, the Debtors worked to build consensus among their various stakeholders. The Plan and the process

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[60] *E.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000) (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986)); *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997) (quoting *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406, 408 (5th Cir. 1985)); *In re Century Glove, Inc.*, Civ. A. Nos. 90-400 and 90-401, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993); *In re NII Holdings, Inc.*, 288 B.R. 356, 362 (Bankr. D. Del. 2002).

[61] *E.g.*, *T-H New Orleans*, 116 F.3d at 802 (quoting *In re Sun Country Dev., Inc.*, 764 F.2d at 408); *W.R. Grace & Co.*, 475 B.R. at 87; *Century Glove*, 1993 WL 239489, at *4.

leading up to its formulation are the result of extensive arm's-length negotiations among the Debtors, the Consenting Lenders, the Purchaser, and the Committee.[62]

68. Throughout the negotiation of the Plan and these cases, the Debtors have upheld their fiduciary duties to stakeholders and protected the interests of all constituents with an even hand.[63] Accordingly, the Plan and the Debtors' conduct satisfy section 1129(a)(3) of the Bankruptcy Code.

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

69. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be subject to approval by the Bankruptcy Court as reasonable. Courts have construed this section to require that all payments of professional fees paid out of estate assets be subject to review and approval by the Bankruptcy Court as to their reasonableness.[64]

70. The Plan satisfies section 1129(a)(4) of the Bankruptcy Code.[65] All payments made or to be made by the Debtors for services or for costs or expenses in connection with these Chapter 11 Cases prior to the Effective Date, including all Professional Fee Claims, have been approved by, or are subject to approval of, the Bankruptcy Court.[66] Article II.B of the Plan

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62 *See* Wallace Declaration ¶ 48.

63 *Id*.

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

65 *See* Plan, Art. II.B.

66 *See* Plan, Art. II.

provides that all final requests for payment of Professional Fee Claims shall be filed no later than 60 days after the Effective Date for determination by the Bankruptcy Court, after notice and a hearing, in accordance with the procedures established by the Bankruptcy Court.[67] Accordingly, the Plan fully complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. The Debtors Have Complied with the Governance Disclosure Requirement (§ 1129(a)(5)).

71. Section 1129(a)(5)(A)(ii) of the Bankruptcy Code requires the plan proponent to disclose the identity and affiliation of any individual proposed to serve as a director or officer of the debtor or a successor to the debtor under the plan and that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and public policy.[68]

72. The Plan satisfies section 1129(a)(5). Article IV.F of the Plan provides for a Plan Administrator. The Plan provides that the Plan Administrator will act for the Wind-Down Debtor in the same fiduciary capacity as applicable to a board of managers and officers and also provides that, on the Effective Date, the authority, power, and incumbency of the persons acting as directors and officers of the Wind-Down Debtor shall be deemed to have resigned, solely in their capacities as such. At that time, Alvarez & Marsal North America, LLC ("A&M") will be appointed as the sole director and sole officer of the Wind-Down Debtor.[69] Accordingly, the Plan fully complies with and satisfies all of the requirements of section 1129(a)(5) of the Bankruptcy Code.

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[67] *Id*.

[68] 11 U.S.C. § 1129(a)(5)(A).

[69] *See* Plan, Art. IV.F.

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

73. Section 1129(a)(6) of the Bankruptcy Code requires that any rate change provided for in a plan be approved by or subject to the approval of all governmental regulatory commissions with jurisdiction, if any. The Plan does not provide for any rate changes, and the Debtors are not subject to any such regulation. Thus, section 1129(a)(6) of the Bankruptcy Code does not apply to the Plan.

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

74. Section 1129(a)(7) of the Bankruptcy Code, commonly known as the "best interests test," requires that, with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either accepted the plan or will receive or retain property having a value of not less than the value such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code. The best interests test applies to individual dissenting holders of impaired claims and interests rather than classes,[70] and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's chapter 11 plan.[71]

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[70] *See Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *Century Glove*, 1993 WL 239489, at *7; *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007) (stating that section 1129(a)(7) is satisfied when an impaired holder of claims would receive "no less than such holder would receive in a hypothetical chapter 7 liquidation").

[71] *See In re Stone & Webster, Inc.*, 286 B.R. 532, 544–45 (Bankr. D. Del. 2002) (citation omitted) ("The application of the best interest test involves a hypothetical application of chapter 7 to a chapter 11 plan. A liquidation and distribution analysis is performed to see whether each holder of a claim or interest in each impaired class, as such classes are defined in the subject plan, receive not less than the holders would receive in a 'hypothetical Chapter 7 distribution' to those classes."); *In re Smith*, 357 B.R. 60, 67 (Bankr. M.D.N.C. 2007) ("In order to show that a payment under a plan is equal to the value that the creditor would receive if the debtor were liquidated, there must be a liquidation analysis of some type that is based on evidence and not mere assumptions or assertions.") (citations omitted).

75. As set forth in the Disclosure Statement,[72] the Debtors, with the assistance of A&M, the Debtors' financial advisor, prepared a liquidation analysis, which is attached to the Disclosure Statement as Exhibit B (the "Liquidation Analysis").[73] As reflected in the Liquidation Analysis, liquidation of the Debtors' businesses under chapter 7 of the Bankruptcy Code would result in substantial diminution in the value to be realized by Holders of Allowed Claims or Interests as compared to distributions contemplated under the Plan. Importantly, because this is a liquidating plan, creditors are receiving all of the remaining assets in the Debtors' estates, subject to the priority under the Bankruptcy Code and the contributions from the secured lenders for the benefit of the go-forward trade creditors, other unsecured creditors, and holders of litigation claims, as reflected in the Global Settlement Term Sheet.[74] In light of the minimal remaining assets and incremental costs of a liquidation, no party would do better in an alternative structure, including a chapter 7 liquidation.[75] Accordingly, with respect to remaining assets, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code.

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

76. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired under a plan. Pursuant to section 1126(c) of the Bankruptcy Code, a class of claims accepts a plan if holders of at least two thirds in amount and more than one half in number of the allowed claims in that class vote to accept the plan.

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[72] *See* Disclosure Statement, Art. X.

[73] *See* Disclosure Statement, Art. X., Ex. B.

[74] *See* Henry Declaration ¶¶ 10–14.

[75] *Id*.

Pursuant to section 1126(d) of the Bankruptcy Code, a class of interests accepts a plan if holders of at least two thirds in amount of the allowed interests in that class vote to accept the plan. A class that is not impaired under a plan, and each holder of a claim or interest in such a class, is conclusively presumed to have accepted the plan. On the other hand, a class is deemed to have rejected a plan if the plan provides that the claims or interests of that class do not receive or retain any property under the plan on account of such claims or interests.

77. As set forth above and as reflected in the Voting Report, Classes 1, 2, and 3 are deemed to have accepted the Plan; Classes 4, 5, 6A, and 6B have voted to accept the Plan; Class 6D (CFPB Claim) did not vote on the Plan; and for Class 6C (Litigation Claims), there was 1 timely vote cast in favor of the Plan. Given that the WARN Plaintiff stated that she votes to reject the Plan, on behalf of herself and all others similarly situated, the numerosity requirement cannot be satisfied for Class 6C. Accordingly, Class 6C has voted to reject the Plan. Moreover, Holders of Claims and Interests in Classes 7, 8, 9, 10, and 11 are deemed to have rejected the Plan and, thus, were not entitled to vote.

78. The Debtors meet the requirements of section 1129(b) of the Bankruptcy Code to "cram down" these rejecting classes.

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

79. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments. In particular, pursuant to section 1129(a)(9)(A) of the Bankruptcy Code, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative claims allowed under section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims. Section 1129(a)(9)(B) of the

Bankruptcy Code requires that each holder of a claim of a kind specified in section 507(a)(1) or (4) through (7) of the Bankruptcy Code—generally wage, employee benefit, and deposit claims entitled to priority—must receive deferred cash payments of a value, as of the Effective Date of the Plan, equal to the allowed amount of such claim (if such class has accepted the plan), or cash of a value equal to the allowed amount of such claim on the effective date of the plan (if such class has not accepted the plan). Finally, section 1129(a)(9)(C) of the Bankruptcy Code provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code—*i.e.*, priority tax claims—must receive cash payments over a period not to exceed five years from the petition date, the present value of which equals the allowed amount of the claim.

80. The Plan satisfies section 1129(a)(9) of the Bankruptcy Code. ***First***, Article II.A of the Plan satisfies section 1129(a)(9)(A) of the Bankruptcy Code because it provides that each holder of an Allowed Administrative Claim will receive payment in an amount of Cash equal to the amount of the unpaid portion of such Allowed Administrative Claim in accordance with the following: (1) if such Administrative Claim is Allowed on or prior to the Effective Date, on the Effective Date (or, if not then due, when such Allowed Administrative Claim is due or as soon as reasonably practicable thereafter); (2) if such Administrative Claim is not Allowed as of the Effective Date, no later than 30 days after the date on which an order Allowing such Administrative Claim becomes a Final Order, or as soon as reasonably practicable thereafter; (3) if such Allowed Administrative Claim is based on liabilities incurred by the Debtors in the ordinary course of their business after the Petition Date, in accordance with the terms and conditions of the particular transaction or course of business giving rise to such Allowed Administrative Claim, without any further action by the Holder of such Allowed Administrative Claim; (4) at such time and upon such terms as may be agreed upon by the Holder of such Allowed Administrative Claim and the

Debtors or the Wind-Down Debtor, as applicable; or (5) at such time and upon such terms as set forth in a Final Order of the Bankruptcy Court.[76] ***Second***, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no Holders of the types of Allowed Claims specified by 1129(a)(9)(B) are Impaired under the Plan.[77] More specifically, under Article III.B of the Plan, except to the extent that a Holder of an Allowed Other Priority Claim agrees to less favorable treatment, on the Effective Date, in full and final satisfaction, compromise, settlement, and release of and in exchange for such Allowed Other Priority Claim, each Holder of an Allowed Other Priority Claim shall receive payment in full in Cash on account of such Holder's Allowed Other Priority Claim or such other treatment rendering such Holder's Allowed Other Priority Claim Unimpaired.[78] ***Third***, Article II.D of the Plan satisfies section 1129(a)(9)(C) of the Bankruptcy Code because it provides that Holders of Allowed Priority Tax Claims shall be treated in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code.[79] The Plan thus satisfies each of the requirements of section 1129(a)(9) of the Bankruptcy Code.

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

81. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider," as an alternative to the requirement under section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either accept

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[76] *See* Plan, Art. II.A.

[77] *See* Wallace Declaration ¶ 58.

[78] *See* Plan, Art. III.B.

[79] *See* Plan, Art. II.D.

the plan or be unimpaired under the plan. As detailed herein and in the Voting Report, the Debtors have obtained the requisite acceptance to confirm the Plan. Accordingly, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

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

82. Section 1129(a)(11) of the Bankruptcy Code requires that the Bankruptcy Court find that a plan is feasible as a condition precedent to confirmation. Specifically, the Bankruptcy Court must determine that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[80] To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success.[81] Rather, a debtor must provide only a reasonable assurance of success.[82] There is a relatively low threshold of proof necessary to satisfy the feasibility requirement.[83]

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80 11 U.S.C. § 1129(a)(11).

81 *See Kane*, 843 F.2d at 649 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *Flintkote Co.*, 486 B.R. 99, 139; *W.R. Grace & Co.*, 475 B.R. at 115 ("[T]he bankruptcy court need not require a guarantee of success, but rather only must find that 'the plan present[s] a workable scheme of organization and operation from which there may be [a] reasonable expectation of success.'") (citations omitted); *In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985) ("'Feasibility' does not, nor can it, require the certainty that a reorganized company will succeed."), *aff'd,* 800 F.2d 581 (6th Cir. 1986).

82 *Kane*, 843 F.2d at 649; *Flintkote Co.*, 486 B.R. at 139; *W.R. Grace & Co.*, 475 B.R. at 115; *see also Pizza of Haw.*, 761 F.2d at 1382 (holding that "[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation") (citations omitted); *accord Capmark Fin. Grp.*, 2011 WL 6013718, at *61 (same).

83 *See, e.g.*, *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005) (quoting approvingly that "[t]he Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility") (internal citations omitted); *In re Sea Garden Motel & Apartments*, 195 B.R. 294, 305 (D. N.J. 1996); *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011), *overruled in part on other grounds,* 464 B.R. 208 (Bankr. D. Del. 2011).

83. Here, the Plan is feasible as it is an orderly wind-down with sufficient funding. As set forth in the Wallace Declaration,[84] the Debtors and their advisors have thoroughly analyzed their ability to meet their obligations under the Plan. The Debtors and the Wind-Down Debtor, as applicable, shall fund the distributions and obligations under the Plan with Available Cash held by the Debtors or in reserves, and the Wind-Down Debtor account, as applicable on the Effective Date. As indicated in Article II of the Plan, pursuant to the Sale Orders, the DIP Claims have been satisfied in connection with the Sale Transactions.

84. As more fully set forth below, the Debtors have analyzed the assertions in the WARN Action and found them to be without merit. The analysis below, which will be supplemented with additional evidence at the hearing, show that the Debtors are not likely to be liable for any amounts under the WARN Action. Thus, the claims of the WARN Plaintiff, if any, will be more than satisfied by the funds set forth in the Plan for payment of Class 6C Litigation Claims.

85. As set forth in the Henry Declaration, the Debtors sized the wind-down contribution contemplated by the Sale Transactions in order to make the Plan feasible. The Debtors have sufficient funds from the Available Cash to make all distributions contemplated by the Plan and have reserved or earmarked sufficient funds to satisfy their obligations under the Plan, including cash is sufficient to pay all known administrative expense claims pursuant to section 1129(a)(9) with approximately $2.625 million available to fund wind-down costs and $3.25 million earmarked for Class 6A earmarked for trade creditors, as detailed in the Global Settlement Term

[84] *See* Wallace Declaration ¶¶ 62–64.

Sheet.[85] Because the Purchasers assumed a majority of contracts that generated administrative claims (and therefore the need to pay obligations under such contracts as a part of cure), the estimate is reasonable.

86. As set forth in the Henry Declaration, the Plan's required distributions and obligations have been fully accounted for. The Debtors have appropriately reserved, from their Available Cash from the Wind-Down Budget attached to the Henry Declaration as Exhibit A, cash to fund their obligations under the Plan.[86] The Debtors sized the Wind-Down Budget with approximately $2.625 million to fund wind-down costs including the payment of certain claims, taxes, and statutory fees.[87] The Debtors have appropriately reserved for their obligations under the Plan to the Creditor Trust in the amount of $100,000, to make available the GUC Trade Settlement Cash in the amount of $3.25 million, and to make available the GUC Litigation Claims Settlement Cash in the amount of $750,000. Further, in accordance with the Sale Orders, the Debtors established an escrow account, which will constitute the Professional Fee Escrow Account under the Plan, and that will be used to satisfy the Professional Fee Claims arising through the Confirmation Date.[88] The Professional Fee Escrow Account was funded in an amount equal to approximately $17.3 million in accordance with the Sale Orders after closing of the sales.[89]

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[85] *See* Henry Declaration ¶[¶ 15–18.

[86] *See* Henry Declaration ¶ 16, Exh. A.

[87] *See* Henry Declaration ¶ 16.

[88] *See* Henry Declaration ¶ 18.

[89] *See id.*

87. The Wind-Down Debtor will have sufficient funds to satisfy all requirements and obligations under the Plan. The Debtors have therefore established that there will be sufficient funds to satisfy all requirements and obligations under the Plan. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(11) of the Bankruptcy Code.

L. The Plan Provides for the Payment of Certain Statutory Fees (§ 1129(a)(12)).

88. Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan." Section 507(a)(2) of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses.

89. The Plan satisfies section 1129(a)(12) of the Bankruptcy Code because Article XIII.C of the Plan provides that all fees payable pursuant to section 1930(a) of the Judicial Code, as determined by the Bankruptcy Court at a hearing pursuant to section 1128 of the Bankruptcy Code, shall be paid by the Wind-Down Debtor (or the Disbursing Agent on behalf of the Wind-Down Debtor) for each quarter (including any fraction thereof) until the Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first.[90]

M. No Remaining Retiree Benefits Obligations (§ 1129(a)(13)).

90. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code. The Debtors do not have any remaining obligations to pay retiree benefits (as

[90] *See* Plan, Art. XII.C.

defined in section 1114 of the Bankruptcy Code). Therefore, section 1129(a)(13) of the Bankruptcy Code is inapplicable to these Chapter 11 Cases or the Plan.

N. Sections 1129(a)(14) through 1129(a)(16) of the Bankruptcy Code Do Not Apply to the Plan.

91. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. Since the Debtors are not subject to any domestic support obligations, the requirements of section 1129(a)(14) of the Bankruptcy Code do not apply. Likewise, section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" as defined in the Bankruptcy Code. Because none of the Debtors is an "individual," the requirements of section 1129(a)(15) of the Bankruptcy Code do not apply. Finally, each of the Debtors are a moneyed, business, or commercial corporation and, therefore, section 1129(a)(16) of the Bankruptcy Code, which provides that property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust be made in accordance with any applicable provisions of nonbankruptcy law, is not applicable to these Chapter 11 Cases.

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

92. Section 1129(b)(1) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) of the Bankruptcy Code are met other than section 1129(a)(8) of the Bankruptcy Code, a plan may be confirmed so long as the requirements set forth in section 1129(b) of the Bankruptcy Code are satisfied. To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8) of the Bankruptcy Code), the plan proponent must show that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the non-accepting impaired classes.[91]

[91] *John Hancock*, 987 F.2d at 157 n.5; *In re Ambanc La Mesa L.P.*, 115 F.3d 650, 653 (9th Cir. 1997) ("the [p]lan satisfies the 'cramdown' alternative . . . found in 11 U.S.C. § 1129(b), which requires that the [p]lan 'does not

93. The Plan satisfies section 1129(b) of the Bankruptcy Code. As noted above, Holders of Claims and Interests in Classes 9, 10, and 11 will receive no recovery and are deemed to reject the Plan. The Holders of Class 6C Claims have voted to reject the Plan, as discussed above. Classes 7 and 8 may be deemed to reject the Plan based on the Debtors' ultimate determination to maintain or cancel these intercompany claims and interests.

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

94. The Plan does not unfairly discriminate with respect to Classes 6C, 7, 8, 9, 10, and 11. Although the Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists, courts typically examine the facts and circumstances of the particular case to make the determination.[92] In general, courts have held that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if it provides materially different treatment for creditors and interest holders with similar legal rights without compelling justifications for doing so.[93] A threshold inquiry to assessing whether a proposed chapter 11 plan

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discriminate unfairly' against and 'is fair and equitable' towards each impaired class that has not accepted the [p]lan").

92 *In re 203 N. LaSalle St. Ltd. P'ship.*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, *Bank of Am.*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established"); *In re Aztec Co.*, 107 B.R. 585, 589 (Bankr. M.D. Tenn. 1989) ("Courts interpreting language elsewhere in the Code, similar in words and function to § 1129(b)(1), have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination."); *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances").

93 *See 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); *Ambanc La Mesa*, 115 F.3d at 656–57 (same); *Aztec Co.*, 107 B.R. at 589–91 (stating that plan which preserved assets for insiders at the expense of other creditors unfairly discriminated); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986) (stating that interests of objecting class were not similar or comparable to those of any other class and thus there was no unfair discrimination).

unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment.[94]

95. Here, the Plan's treatment of the non-accepting Impaired Classes is proper because all similarly situated Holders of Claims and Interests at each applicable Debtor will receive substantially similar treatment, and the Plan's classification scheme rests on a legally acceptable rationale, including in relation to their priority within the Debtors' capital structure, their differing legal nature, and their respective rights against the Debtors. Claims in each of the non-accepting Impaired Classes are not similarly situated to those of any other classes, given their distinctly different legal character from all other Claims and Interests.

96. Accordingly, the Plan does not discriminate unfairly with respect Classes 6C, 7, 8, 9, 10, or 11, who either voted to reject or is deemed to reject the Plan and satisfies the requirements of section 1129(b).

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

97. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects a plan (or is deemed to reject a plan) if it follows the "absolute priority" rule.[95] This requires that an impaired rejecting class of claims or interests either be paid in full or that a class junior to the impaired accepting class not receive any distribution under a plan on account of its junior claim or interest.[96]

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[94] *See Aleris Int'l, Inc.*, 2010 WL 3492664, at *31 (citing *Armstrong World Indus.*, 348 B.R. at 121).

[95] *Bank of Am.*, 526 U.S. at 441–42 ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

[96] *Id*.

98. Here, the Plan is "fair and equitable" to Holders of Claims and Interests in those Classes that were deemed to reject the Plan because the Plan satisfies the absolute priority rule with respect to each of these non-accepting Impaired Classes. Specifically, no holder of any junior claim or interest will receive or retain any property under the Plan on account of such junior claim or interest.[97] To the extent Holders of Class 6A, 6B, and 6D Claims receive a recovery, such recovery is a result of a negotiated resolution in connection with the DIP Lenders and the Committee embodied in the Global Settlement, pursuant to which the Holders of the Prepetition First Lien Claims and Prepetition Second Lien Claims have agreed to subordinate their deficiency claims to such Class 6B Claims for purposes of distributions of up to $10 million in value. In light of the Global Settlement, the Plan structure is fair and equitable and does not violate the absolute priority rule.

99. In addition, to the extent that Intercompany Interests are Reinstated under the Plan, distributions on account of Intercompany Interests are not being received by Holders of such Intercompany Interests on account of their Intercompany Interests but for the purposes of administrative convenience, for the ultimate benefit of all parties in interest. Any reinstatement of Intercompany Interests will thus have no economic substance.[98] Accordingly, the Plan is "fair and equitable" with respect to all Impaired Classes of Claims and Interests and satisfies section 1129(b) of the Bankruptcy Code.

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[97] *See* Wallace Declaration ¶ 89; 11 U.S.C. § 1129(b)(2).

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

100. For the foregoing reasons, and further supported by the lack of objections on any grounds related to Section 1129(b)(2), the Plan can be crammed down on the non-consenting Impaired Classes.

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

101. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code. ***First***, section 1129(c) of the Bankruptcy Code, which prohibits confirmation of multiple plans, is not implicated because there is only one proposed plan. ***Second***, the purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933.[99] Moreover, no governmental unit or any other party has requested that the Bankruptcy Court decline to confirm the Plan on such grounds. As provided in the Wallace Declaration, the Plan was proposed in good faith and not by any means forbidden by law.[100] Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code. ***Lastly***, section 1129(e) of the Bankruptcy Code is inapplicable because none of the Debtors' chapter 11 cases are a "small business case."[101] Accordingly, the Plan satisfies the requirements of section 1129(c), (d), and (e) of the Bankruptcy Code.

III. The Discretionary Contents of the Plan Are Appropriate Under Section 1123(b) of the Bankruptcy Code.

102. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. Among other things, section 1123(b) of the

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[99] *See* 15 U.S.C. § 77e.

[100] *See* Wallace Declaration ¶ 85.

[101] *See* 11 U.S.C. § 1129(e). A "small business debtor" cannot be a member "of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,566,050 [] (excluding debt owed to 1 or more affiliates or insiders)." 11 U.S.C. § 101(51D)(B).

Bankruptcy Code provides that a plan may: (a) impair or leave unimpaired any class of claims or interests; (b) modify or leave unaffected the rights of holders of secured or unsecured claims; (c) provide for the settlement or adjustment of claims against or interests in a debtor or its estate or the retention and enforcement by a debtor, trustee, or other representative of claims or interests; (d) provide for the assumption or rejection of executory contracts and unexpired leases; (e) provide for the sale of all or substantially all of the property of the Debtors' estates, and the distribution of the proceeds of such sale among holders of claims or interests; or (f) "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[102]

103. As set forth below, the Plan includes certain of these discretionary provisions, such as releases and general settlement of Claims and Interests. The Debtors have determined, as fiduciaries of their Estates and in the exercise of their reasonable business judgment, that each of the discretionary provisions of the Plan is appropriate given the circumstances of these Chapter 11 Cases.

104. Here, the Plan includes various discretionary provisions that are consistent with the discretionary authority vested under section 1123(b) of the Bankruptcy Code. For example, the Plan impairs certain Classes of Claims and Interests and leaves others Unimpaired, proposes treatment for Executory Contracts and Unexpired Leases, provides a structure for Claim allowance and disallowance, and establishes a distribution process for the satisfaction of Allowed Claims entitled to distributions under the Plan. In addition, the Plan contains provisions implementing certain releases and exculpations, and permanently enjoining certain causes of action.

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

105. Each of these provisions are appropriate because, among other things, they (a) are the product of arm's-length negotiations, (b) have been critical to obtaining the support of the various constituencies for the Plan, (c) are given for valuable consideration, (d) are fair and equitable and in the best interests of the Debtors, these estates, and the Chapter 11 Cases, and (e) are consistent with the relevant provisions of the Bankruptcy Code and Third Circuit law. Such provisions are discussed in turn below but, in summary, satisfy the requirements of section 1123(b).[103]

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

106. The Plan also includes certain Debtor and third-party releases, an exculpation provision, and an injunction provision. These discretionary provisions are proper because, among other things, they are the product of extensive good-faith, arm's-length negotiations, were a material inducement for parties to enter into the Restructuring Support Agreement and the Global Settlement, are overwhelmingly supported by the Debtors and their key stakeholders (including unanimous support from the Voting Classes), and are consistent with applicable precedent. Further, these provisions were fully and conspicuously disclosed to all parties in interest through the Combined Hearing Notice, the Ballots, and the applicable Non-Voting Status Notice Package which excerpted the full text of the releases, exculpation, and injunction provision as set forth in the Plan.[104] The Debtors also received informal comments from the U.S. Trustee and resolved all further concerns with regard to the release, exculpation, and injunction provisions.

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[103] *See* Wallace Declaration ¶¶ 19–20.

[104] In resolving certain issues related to Confirmation with the U.S. Trustee, the Debtors agreed to certain technical modifications to the release, exculpation, and injunction terms of the Plan, as reflected in the redline thereof.

1. The Debtor Releases in the Plan Are Appropriate.

107. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[105] Furthermore, a debtor may release claims under section 1123(b)(3)(A) of the Bankruptcy Code "if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."[106] Article VII.B of the Plan provides for releases by the Debtors, the Wind-Down Debtor, their estates, the Plan Administrator, and certain Related Parties of any and all Claims and Causes of Action, including any derivative claims, that the Debtors, the Wind-Down Debtor, or their Estates or affiliates could assert against each of the Released Parties (the "Debtor Releases").[107]

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[105] *See Coram*, 315 B.R. at 334–35 ("The standards for approval of settlement under section 1123 [of the Bankruptcy Code] are generally the same as those under [Bankruptcy] Rule 9019."). Generally, courts in the Third Circuit approve a settlement by the debtors if the settlement "exceed[s] the lowest point in the range of reasonableness." *Id.* at 330 (internal citations omitted). *E.g.*, *In re Exaeris, Inc.*, 380 B.R. 741, 746–47 (Bankr. D. Del. 2008); *In re World Health Alts., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) (stating that settlement must be "within the reasonable range of litigation possibilities") (internal quotation marks omitted).

[106] *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 327 (Bankr. D. Del. 2011) ("In making its evaluation [whether to approve a settlement], the court must determine whether 'the compromise is fair, reasonable, and in the best interest of the estate.'") (internal quotation marks omitted). *See also In re WCI Cable, Inc.*, 282 B.R. 457, 469 (Bankr. D. Or. 2002) ("a chapter 11 plan may provide for the settlement of any claim belonging to the debtor or to the estate").

[107] The Released Parties include, among others, in each case in their capacity as such: (a) the Debtors; (b) the Wind-Down Debtor; (c) the Plan Administrator; (d) each Consenting Stakeholder; (e) the Agent; (f) all Holders of Claims; (g) All Holders of Interests; (h) the Purchasers; (i) the Committee and its members (in their capacity as Committee members); (j) the Creditor Trust (including the Creditor Trustee on behalf of the Creditor Trust); (k) each current and former Affiliate of each Entity in clause (a) through the following clause (l); and (l) each Related Party of each Entity in clause (a) through this clause (l); *provided* that any Holder of a Claim or Interest that opts out of the releases contained in the Plan shall not be a Released Party.

108. Courts in this jurisdiction generally analyze five factors when determining the propriety of a debtor release, commonly known as the *Zenith* or *Master Mortgage* factors.[108] The analysis includes an inquiry into whether there is: "(1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources; (2) a substantial contribution to the plan by the non-debtor; (3) the necessity of the release to the reorganization; (4) the overwhelming acceptance of the plan and release by creditors and interest holders; and (5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan."[109] These factors are "neither exclusive nor conjunctive requirements" but rather serve as guidance to courts in determining fairness of a debtor's releases.[110]

109. The Debtor Releases meet the applicable standard because they are fair, reasonable, and in the best interests of the Debtors' estates. As described in the Wallace Declaration,[111] and as an analysis of the *Master Mortgage* factors demonstrates, the Debtor Releases embodied in Article VIII.B of the Plan should be approved.

- ***First***, an identity of interest exists between the Debtors and the parties to be released. Each of the Released Parties, as a stakeholder and critical participant in the Plan process, shares a common goal with the Debtors in seeing the Plan succeed and would have been unlikely to participate in the negotiations and compromises that led to the ultimate formation of the Plan without the Debtor Releases. Like the Debtors, these parties seek to confirm the Plan and implement the transaction.[112] Moreover, with respect to certain of the releases—*e.g.*,

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[108] *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013) (citing *In re Zenith Elecs. Corp.*, 241 B.R. 92, 105 (Bankr. D. Del. 1999)); *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994).

[109] *See In re Washington Mut., Inc.*, 442 B.R. at 346 (citing *In re Zenith Elecs. Corp.*, 241 B.R. at 110 and *In re Master Mortg.*, 168 B.R. at 937).

[110] *Id.* (citing *In re Master Mortg.*, 168 B.R. at 935).

[111] *See* Wallace Declaration ¶¶ 22–28.

[112] *See In re Abeinsa Holding, Inc.*, 562 B.R. 265, 284 (Bankr. D. Del. 2016) (finding that "there is an identity of interest between the Debtors and the released parties arising out the shared common goal of confirming and implementing the Plan"); *see also Zenith*, 241 B.R. at 110 (concluding that certain releasees who "were

those releasing the Debtors' current and former directors, officers, affiliates, and principals—there is a clear identity of interest supporting the release because the Debtors will assume certain indemnification obligations under the Plan that will be honored by the Wind-Down Debtor.[113] Thus, a lawsuit commenced by the Debtors (or derivatively on behalf of the Debtors) against certain individuals would effectively be a lawsuit against the Wind-Down Debtor itself.

- ***Second***, the substantial contributions are clear. The Released Parties played an integral role in the formation of the Plan and the sale process and have expended significant time and resources analyzing and negotiating the issues present in these Chapter 11 Cases to reach a value-maximizing chapter 11 plan. As Delaware bankruptcy courts have recognized, a wide variety of acts may illustrate a substantial contribution to a debtor's chapter 11 case.[114] Moreover, the Released Parties have expended time and resources analyzing and negotiating the issues presented by the Debtors' capital structure and the material barriers to the resolution thereof. Here, the value contributed by the Released Parties is certainly substantial. Without the contributions of each of these parties, the Plan and the transaction contemplated therein would not be possible.

- ***Third***, the Debtor Releases are essential to the successful resolution of the Chapter 11 Cases because they constitute an integral term of the Plan. Indeed, absent the Debtor Releases, it is highly unlikely the Released Parties would have agreed to support the Plan and the Restructuring Transactions contemplated therein. As described above, each of the Released Parties contributed substantial value to these Chapter 11 Cases and did so with the understanding that they would receive releases from the Debtors. In the absence of these parties' support, the Debtors would not be in a position to confirm the Plan and emerge from chapter 11. The Debtor Releases, therefore, are essential to the successful resolution of these Chapter 11 Cases.

- ***Fourth***, no party in interest has contested the debtor release of any hypothetical claims, and as evidenced by the Voting Report and noted herein, parties voting in Classes 4, 5, 6A, and 6B have chiefly voted to approve the Plan. Given the critical nature of the Debtor Releases and the Plan's overall support, the Debtors submit that the releases are proper.

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instrumental in formulating the Plan" shared an identity of interest with the debtor "in seeing that the Plan succeed and the company reorganize").

[113] *See* Plan Art. V.B; *see also* Wallace Declaration ¶ 23; *cf. In re Indianapolis Downs, LLC*, 486 B.R. at 303 ("An identity of interest exists when, among other things, the debtor has a duty to indemnify the nondebtor receiving the release.").

[114] *See id.* at 304 (finding that the non-debtor party had substantially contributed by performing services for the debtors post-petition without receiving compensation); *In re Wash. Mut., Inc.*, 442 B.R. at 347 (finding substantial contribution required the contribution of "cash or anything else of a tangible value to the [chapter 11 plan] or to creditors"); *In re Zenith Elecs. Corp.*, 241 B.R. at 111 (finding that prepetition contribution of work in negotiating a plan constituted adequate consideration for debtor's release).

- ***Fifth***, the Plan provides for meaningful recoveries for the Classes affected by the Debtors Releases—recoveries that would be unavailable absent the Plan.[115]

110. For the reasons set forth above, and as supported by the Wallace Declaration, each of the *Master Mortgage* factors supports approval of the Debtor Releases. Moreover, the breadth of the Debtor Releases is consistent with those regularly approved in this jurisdiction. The Debtors have satisfied the business judgment standard in granting the Debtor Releases under the Plan. The Debtor Releases easily meet the applicable standard because they are fair, reasonable, and in the best interests of the Debtors' Estates. Thus, the Bankruptcy Court should approve the Debtor Releases in the Plan.

2. The Third-Party Releases Are Wholly Consensual and Appropriate and Should Be Approved.

111. In addition to the Debtor Releases, the Plan provides for releases by certain Holders of Claims and Interests. Specifically, Article VII.C of the Plan provides that each Releasing Party shall release any and all Claims and Causes of Action such parties could assert against the Debtors, the Wind-Down Debtor, and the Released Parties (the "Third-Party Release" and, together with the Debtor Releases, the "Releases"). The Releasing Parties include, among others: (a) the Debtors; (b) the Wind-Down Debtor; (c) the Plan Administrator; (d) each Consenting Stakeholder; (e) the Agent; (f) all Holders of Claims; (g) all Holders of Interests; (h) the Purchasers; (i) the Committee and its members (in their capacity as Committee members); (j) the Creditor Trust (including the Creditor Trustee on behalf of the Creditor Trust); (k) each current and former Affiliate of each Entity in clause (a) through the following clause (l) for which such Entity is legally entitled to bind such Affiliate to the releases contained in the Plan and under applicable non-bankruptcy law; and (l) each Related Party of each Entity in clause (a) thought this clause (l)

[115] *See* Wallace Declaration ¶ 27.

for which such Affiliate or Entity is legally entitled to bind such Related Party to the releases contained in the Plan under applicable non-bankruptcy law; *provided*, *however*, that in each case, an Entity shall not be a Releasing Party if it (x) elects to opt out of the release contained in the Plan, (y) timely objects to the Third-Party Releases and such objection is not withdrawn before Confirmation, or (z) is an Entity in a voting class whose solicitation package was returned as undeliverable. The Third-Party Releases are consensual, consistent with established Third Circuit law, and integral to the Plan, and should therefore be approved.

112. Numerous courts have recognized that a chapter 11 plan may include a release of non-debtors by other non-debtors when such release is consensual.[116] Consensual releases are permissible on the basis of general principles of contract law.[117] The law is clear that a release is consensual where parties have received sufficient notice of a plan's release provisions and have had an opportunity to object to or opt out of the release and failed to do so (including where such holder abstains from voting altogether).[118] Here, all parties in interest had ample opportunity to

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[116] *See, e.g.*, *Indianapolis Downs*, 486 B.R. at 305 (collecting cases); *Spansion*, 426 B.R. at 144 (stating that "a third party release may be included in a plan if the release is consensual").

[117] *Coram*, 315 B.R. at 336.

[118] *See, e.g.*, *In re Indianapolis Downs, LLC*, 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third-Party Releases may be properly characterized as consensual and will be approved."); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 218–19 (Bankr. S.D.N.Y. 2009) ("Except for those who voted against the Plan, or who abstained and then opted out, I find the Third Party Release provision consensual and within the scope of releases permitted in the Second Circuit."), *aff'd*, 2010 WL 1223109 (S.D.N.Y. March 24, 2010), *modified on other grounds*, 634 F.3d 79 (2d Cir. 2011); *In re Conseco, Inc.*, 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) ("The Article X release now binds only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release. Therefore, the Article X release is purely consensual and within the scope of releases that *Specialty Equipment* permits." (citing *In re Specialty Equip. Corp.*, 3 F.3d 1043 (7th Cir. 1993))).

evaluate and opt out of the Third-Party Releases by opting out of, or objecting to, the Third-Party Release.

113. Importantly, the Ballots distributed to Holders of Claims entitled to vote on the Plan quoted the entirety of the Third-Party Release, clearly informing Holders of Claims entitled to vote of the steps they should take if they disagreed with the scope of the Third-Party Release. Similarly, the applicable Non-Voting Status Notice Package distributed to Holders of Claims and Interests not entitled to vote on the Plan also included a document that quoted the entirety of the Third-Party Release, clearly informing Holders of Claims and Interests not entitled to vote of the steps they should take if they disagreed with the scope of the Third-Party Release. Thus, affected parties were on notice of Third-Party Release, including the option to opt out of the Third-Party Release. As such, the Third-Party Releases are consensual releases of all Holders of Claims or Interests who did not object.

114. The circumstances of these Chapter 11 Cases warrant the Third-Party Release because it is critical to the success of the Plan, and it is fair and appropriate. Without the efforts of the Released Parties in providing the DIP Financing and actively participating in the Sale Transaction and Plan negotiations, the Debtors would not have been able to consummate a value-maximizing Sale Transaction for the benefit of all stakeholders and an orderly post-sale wind down through the Plan. In addition, many of the Released Parties have been instrumental in supporting these Chapter 11 Cases and facilitating a smooth administration thereof. Finally, throughout the entire case and all these negotiations, the Debtors' directors and officers steadfastly

maintained their duties to maximize value for the benefit of all stakeholders, investing countless hours both pre- and post- petition.[119]

115. Moreover, the third parties bound by the Releases have received sufficient consideration in exchange for the release of their Claims against the Released Parties to justify the Third-Party Release. The Released Parties have made massive concessions and commitments that will allow the Debtors to maximize the value of their estates and maintain their business as a going concern through the Debtors' restructuring. The Released Parties have been active and important participants in the development of the Plan and have expended significant time and resources analyzing and negotiating the issues presented by the Debtors' capital structure and the material barriers to the resolution thereof. In addition to significant concessions under the Plan, the Released Parties made the contributions as discussed above, each in exchange for, among other things, the Third-Party Releases.

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

3. The Exculpation Provision Is Appropriate.

117. Exculpation provisions that apply only to estate fiduciaries and are limited to claims not involving actual fraud, willful misconduct, or gross negligence, are customary and generally approved in this district under appropriate circumstances. Unlike third-party releases, exculpation provisions do not affect the liability of third parties per se, but rather set a standard of care of gross

[119] *See* Wallace Declaration ¶ 32.

negligence or willful misconduct in future litigation by a non-releasing party against an "Exculpated Party" for acts arising out of the Debtors' restructuring.[120]

118. Article VII.D of the Plan provides for the exculpation of the Exculpated Parties. The exculpation is fair and appropriate under both applicable law[121] and the facts and circumstances of these Chapter 11 Cases. The Plan's exculpation provision is the product of arm's-length negotiations, was critical to obtaining the support of various constituencies for the Plan, and, as part of the Plan, has received support from the Debtors' major stakeholders. The exculpation provision was important to the development of a feasible, confirmable Plan, and the Exculpated Parties participated in these Chapter 11 Cases in reliance upon the protections afforded to those constituents by the exculpation.

119. The Plan provides for the exculpation of the Exculpated Parties.[122] The Exculpation is fair and appropriate under both applicable law and the facts and circumstances of these chapter 11 cases. The Exculpated Parties have participated in good faith in formulating and negotiating the Plan as it relates to the Debtors, and they should be entitled to protection from exposure to any lawsuits filed by disgruntled creditors or other unsatisfied parties.

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[120] *See In re PWS Holding Corp.*, 228 F.3d at 245 (finding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code"); *see also In re Premier Int'l Holdings, Inc.*, 2010 WL 2745964, at *10 (Bankr. D. Del. Apr. 29, 2010) (approving a similar exculpation provision as that provided for under the Plan); *In re Spansion*, No. 09-10690 (KJC), 2010 WL 2905001, at *16 (Bankr. D. Del. 2010) (same).

[121] *See In re Lab'y Partners, Inc.*, No. 13-12769 (PJW) (Bankr. D. Del. July 10, 2014) (finding that exculpation was appropriately extended to secured lender who funded the chapter 11 case); *In re FAH Liquidating Corp.*, No. 13-13087 (KG) (Bankr. D. Del. July 28, 2014) (finding that exculpation as applied to a non-debtor purchaser was appropriate under section 1123(b)).

[122] Article I.A.74 of the Plan defines "Exculpated Parties" as, collectively, and in each case in its capacity as such: (a) the Debtors; (b) the Committee and each of its respective members; (c) with respect to the Entities in clause (a) and (b), each of their respective current and former directors, managers, officers, attorneys, financial advisors, consultants, or other professionals or advisors that served in such capacity between the Petition Date and the Effective Date.

120. Moreover, the exculpation provision and the liability standard it sets represents a conclusion of law that flows logically from certain findings of fact that the Court must reach in confirming the Plan as it relates to the Debtors. As discussed above, this Court must find, under section 1129(a)(2) of the Bankruptcy Code, that the Debtors have complied with the applicable provisions of the Bankruptcy Code. Additionally, this Court must find, under section 1129(a)(3) of the Bankruptcy Code, that the Plan has been proposed in good faith and not by any means forbidden by law. These findings apply to the Debtors and, by extension, to certain of the Debtors' officers, directors, employees, and professionals. Furthermore, these findings imply that the Plan was negotiated at arm's-length and in good faith. Where such findings are made, parties who have been actively involved in such negotiations should be protected from collateral attack.

121. Here, the Debtors and their officers, directors, and professionals actively negotiated with Holders of Claims and Interests across the Debtors' capital structure as part of the Plan and these chapter 11 cases. Such negotiations were extensive, and the resulting agreements were implemented in good faith with a high degree of transparency.[123] As a result, the Plan enjoys significant support from Holders of Claims entitled to vote.[124] Accordingly, the Court's findings of good faith vis-à-vis the Debtors' Chapter 11 Cases should also extend to the Exculpated Parties.

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

[123] *See* Wallace Declaration ¶¶ 36, 37.

[124] *See, e.g.*, Voting Report Exhibit A.

plan process is appropriate where plan negotiations could not have occurred without protection from liability.[125]

123. Accordingly, under the circumstances, it is appropriate for the Court to approve the exculpation provision and to find that the Exculpated Parties have acted in good faith and in compliance with the law.[126]

124. Under the circumstances, it is appropriate for the Bankruptcy Court to approve the exculpation provision, and to find that the Exculpated Parties have acted in good faith and in compliance with the law.[127]

4. The Injunction Provision Is Appropriate.

125. The injunction provision set forth in Article VII.E of the Plan merely implements the Plan's release and exculpation provisions, in part, by permanently enjoining all entities from commencing or maintaining any action against the Debtors, the Wind-Down Date Debtor, the Exculpated Parties, or the Released Parties on account of or in connection with or with respect to any such claims or interests released or subject to exculpation. Thus, the injunction provision is a key provision of the Plan because it enforces the release and exculpation provisions that are centrally important to the Plan. As such, to the extent the Bankruptcy Court finds that the exculpation and release provisions are appropriate, the Debtors respectfully submit that the

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

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

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

injunction provision must also be appropriate. Moreover, this injunction provision is narrowly tailored to achieve its purpose.

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

126. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and nonbankruptcy law."[128]

127. Article V.D of the Plan provides for the satisfaction of all monetary defaults under each Executory Contract and Unexpired Lease assumed pursuant to the Plan in accordance with section 365 of the Bankruptcy Code by payment of the default amount in Cash on the Effective Date, or as soon as reasonably practicable thereafter, subject to certain limitations set forth in the Plan, or on such other terms as the parties to such Executory Contracts or Unexpired Leases may otherwise agree.[129] The Debtors, in accordance with the Disclosure Statement and the Plan, filed the Plan Supplement with the Assumed Executory Contracts and Unexpired Leases Schedule.[130] The Debtors will cure any monetary defaults in any of the Assumed Executory Contracts and Unexpired Leases on the Effective Date, subject to the restrictions set forth in Plan Article VII.D.

128. Under the Plan, the Debtors, the Wind-Down Debtor, the Purchasers, and the Plan Administrator, as applicable, reserve the right to alter, amend, modify, or supplement the Assumed Executory Contracts and Unexpired Leases Schedule and the Rejected Executory Contracts and Unexpired Leases Schedule identified in Article V of the Plan and in the Plan Supplement.

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[128] 11 U.S.C. § 1123(d).

[129] Plan, Art. V.D.

[130] *See* Plan Supplement at Ex. B.

129. Accordingly, the Debtors submit that the Plan fully complies with section 1123(d) of the Bankruptcy Code.

C. Modifications to the Plan.

130. Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation as long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. Further, when the proponent of a plan files the plan with modifications with the court, the plan as modified becomes the plan. Bankruptcy Rule 3019 provides that modifications after a plan has been accepted will be deemed accepted by all creditors and equity security holders who have previously accepted the plan if the court finds that the proposed modifications do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder. Interpreting Bankruptcy Rule 3019, courts consistently have held that a proposed modification to a previously accepted plan will be deemed accepted where the proposed modification is not material or does not adversely affect the way creditors and stakeholders are treated.[131]

131. On October 24, 2023, the Debtors filed a modified version of the Plan, which makes technical clarifications and resolves certain formal objections and informal comments to the Plan by parties in interest. The modifications are immaterial or do not adversely affect the way creditors and stakeholders who have previously accepted the Plan are treated and thus comply with section 1127 of the Bankruptcy Code and Bankruptcy Rule 2019. Accordingly, the Debtors submit that

[131] *See, e.g.*, *In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 WL 6825278, at *4 (Bankr. D. Del. Nov. 30, 2009) (finding that nonmaterial modifications to plan do not require additional disclosure or resolicitation); *In re Burns & Roe Enters., Inc.*, No. 08-4191 (GEB), 2009 WL 438694, at *23 (D.N.J. Feb. 23, 2009) (confirming plan as modified without additional solicitation or disclosure because modifications did "not adversely affect creditors").

no additional solicitation or disclosure is required on account of the modifications, and that such modifications should be deemed accepted by all creditors that previously accepted the Plan.

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

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

133. The Debtors submit that good cause exists for waiving and eliminating any stay of the Confirmation Order pursuant to Bankruptcy Rules 3020, 6004, and 6006 so that the Confirmation Order will be effective immediately upon its entry.[132] The Debtors have undertaken great efforts to facilitate their restructuring to exit chapter 11 as soon as practicable. Additionally, each day the Debtors remain in chapter 11 they incur significant administrative and professional costs.

134. For these reasons, the Debtors, their advisors, and other key constituents are working to expedite the Debtors' entry into and consummation of the documents and transactions related to the restructuring transactions so that the Effective Date of the Plan may occur as soon as

[132] *See, e.g.*, *In re SiO2 Med. Prods., Inc.*, No. 23-10366 (JTD) (Bankr. D. Del. July 19, 2023) (waiving stay of confirmation order and causing it to be effective and enforceable immediately upon its entry by the court); *In re Tricidia, Inc.*, No. 23-10023 (JTD) (Bankr. D. Del. May 23, 2023) (same); *In re HighPoint Res. Corp.*, No. 21-10565 (CSS) (Bankr. D. Del. Mar. 18, 2021) (same); *In re APC Auto. Techs. Intermediate Holdings, LLC*, No. 20-11466 (CSS) (Bankr. D. Del. July 10, 2020) (same); *In re Longview Power, LLC*, No. 20-10951 (BLS) (Bankr. D. Del. May 22, 2020) (same); *In re Clover Techs. Grp., LLC*, No. 19-12680 (KBO) (Bankr. D. Del. Jan. 22, 2020) (same); *In re Anna Holdings, Inc.*, No. 19-12551 (CSS) (Bankr. D. Del. Dec. 17, 2019) (same). Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request to the Debtors' counsel.

possible after the Confirmation Date. Based on the foregoing, the Debtors request a waiver of any stay imposed by the Bankruptcy Rules so that the proposed Confirmation Order may be effective immediately upon its entry.

V. The WARN Objection Should Be Overruled.[133]

135. Contrary to the WARN Plaintiff's assertion, the Plan is feasible notwithstanding her alleged claims in the WARN Action. To show that the Plan is feasible, the Debtors need only demonstrate a reasonable likelihood of success of implementing the terms of the Plan. Further, as other courts have observed, an objecting party has the burden of producing evidence to support its objection on feasibility grounds—the debtor need not introduce evidence to overcome each specific objection that is merely pleaded, as the WARN Objection appears to assume.[134] Faced with an alleged priority claim, the Court can estimate the claim, without additional motion practice, solely for the purposes of feasibility. Here, as set forth below, the Debtors have multiple defenses to the WARN Action, including a "faltering business" defense and an "unforeseen business circumstances" defense. The Court can find a reasonable likelihood of success based on the availability of these defenses, solely for the purposes of feasibility, based on confirmation briefing and argument and evidence adduced at the confirmation hearing.

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[133] Terms used in this Section V that are not otherwise defined in the Plan, Confirmation Order, or Disclosure Statement Order shall have the meaning ascribed to such term as in the First Day Declaration or Wallace MSJ Declaration.

[134] *See W.R. & Grace*, 475 B.R. 475 at 119 ("It has been recognized that while plan proponents bear the burden of showing that their proposed reorganization plan is confirmable, those objecting to the terms of the plan 'bear the burden of producing evidence to support their objection.'"); *see also*, *In re Armstrong World Indus.*, 348 B.R. 111 (Bankr. D. Del. 2006).

A. Factual Background.

1. Procedural History of the WARN Action.

136. The WARN Action is, at this time, in a preliminary, pre-discovery stage and has not even been fully briefed in connection with the Debtor-defendant's pending motion for summary judgment.[135]

137. Prior to the Petition Date, the WARN Plaintiff filed a complaint in the Utah District Court against the Debtor-defendants alleging certain layoffs violated the WARN Act (29 U.S.C. §§ 2101 et seq.). After the Petition Date, on June 5, 2023, the WARN Plaintiff filed the WARN Action as an adversary proceeding alleging certain damages arising under the WARN Act against certain of the Debtors.[136] Over the next two (2) months, while the Debtors, Committee, lenders, CFPB and all other parties in interest developed the Chapter 11 Cases, negotiated and navigated the sales processes, and conducted extensive discovery, the WARN Plaintiff sat on the sideline. On August 4, 2023, the WARN Plaintiff filed a motion and brief in support of the certification of a class of plaintiffs comprised of certain individuals alleged to be similarly situated to WARN Plaintiff, among other related relief.[137] On August 18, 2023, the Debtor-defendants in the WARN Action timely filed an objection to the class certification papers, to which the WARN Plaintiff timely filed a reply on September 13, 2023.[138] On October 24, 2023, the Court entered an opinion

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[135] *See Defendants' Motion for Summary Judgment* [WARN Action Docket No. 16] (the "MSJ Motion") and *Opening Brief in Support of Defendant's Motion for Summary Judgment* [WARN Action Docket No. 17] (the "MSJ Opening Brief" and, with the MSJ Motion, the "MSJ").

[136] *See* WARN Action Docket No. 1.

[137] *See* WARN Action Docket Nos. 5–6.

[138] *See* WARN Action Docket Nos. 8–13. For the avoidance of doubt, the WARN Plaintiff's reply deadline was consensually extended to (and including) September 13, 2023. *See* WARN Action Docket No. 12.

granting the certification of a class of such plaintiffs, however subject to a redefinition of the class and entry of a subsequent order of the Court.[139]

138. On September 22, 2023, the Debtor-defendants filed the motion for summary judgment, a brief in support thereof, and the *Supplemental Declaration of Chad Wallace in Support of Defendants' Motion for Summary Judgment* [WARN Action Docket No. 18] (the "Wallace MSJ Declaration"), which is incorporated by reference herein.[140] The WARN Plaintiff timely filed a response to the Debtors' MSJ papers on October 20, 2023.[141] The Debtor-defendants' current reply deadline in connection with the MSJ papers is Friday, October 27, 2023, and the Debtor-defendants have been working to timely file such a reply.

139. Notwithstanding the papers filed in connection with the class certification motion and the MSJ over the past nearly five months, the WARN Plaintiff's first request for production was served on October 3, 2023, and the WARN Plaintiff's first subpoena was served on the same day.[142] No Rule 26(f) conference has been held in the WARN Action.

2. Factual Background of the CFPB Litigation, Effects of the Adverse Ruling Thereon, and Efforts to Seek Financing.

140. As further described in the First Day Declaration, the CFPB Litigation initiated in May 2019 came to a head on March 10, 2023, when the Utah District Court granted the CFPB's motion for summary judgment as to Count I of the complaint, finding that the Debtor Defendants

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[139] *See* WARN Action Docket No. 29.

[140] *See* WARN Action Docket Nos. 17–18.

[141] *See* WARN Action Docket No. 28. For the avoidance of doubt, the WARN Plaintiff's objection deadline as to the MSJ papers was consensually extended to (and including) October 20, 2023. *See* WARN Action Docket No. 23.

[142] *See* WARN Action Docket Nos. 24–26

violated the advance fee provisions of the TSR. The ruling and its timing surprised all parties because the Utah District Court had denied two (2) prior dispositive motions and the U.S. Supreme Court had granted certiorari on issues related to the constitutionality of the CFPB structure in a separate case. The Debtor Defendants sought to stay the partial summary decision and filed an interlocutory appeal before the Tenth Circuit, which temporarily stayed the order. However, on April 3, 2023, the Tenth Circuit lifted the temporary stay and denied the Debtors Defendants' request for immediate review, and on April 6, 2023, the Utah District Court denied the request to stay the order pending a final judgment. In connection with the partial summary judgment ruling, the CFPB, among other things, sought over $2.7 billion in monetary relief from the Debtor Defendants.

141. Meanwhile, the Debtors continued seeking financing in the form of draws from the December 2022 Facility (as defined in the Wallace MSJ Declaration).[143] On March 17, 2023, the PGX Defendants (as defined in the Wallace MSJ Declaration) requested to draw the $30 million balance of the December 2022 Facility to supplement their revenue so they could cover operating expenses, including payroll, and make a $7.7 million interest payment that was due March 31, 2023, on the Prepetition Facilities. However, on March 24, 2023, the lenders under the December 2022 Facility did not fund the PGX Defendants' request, stating that the borrowers had not satisfied all conditions under the Prepetition Facilities, to which the PGX Defendants replied demanding that Prospect fund the $30 million draw because they had not defaulted under the Second Lien Facility and failure to receive those funds would cause the PGX Defendants to shut down

[143] For the avoidance of doubt, the December 2022 Facility refers to the advance of $40 million in new funds under the Prepetition Facilities on December 20, 2022, in exchange for a transfer of equity to Prospect from the prior majority owner of PGX Holdings, Inc. *See* MSJ Opening Brief ¶ 38; *see also* First Day Declaration ¶¶ 50, 51.

operations on March 29, 2023. Nevertheless, on March 31, 2023, the lenders under the December 2022 Facility did not fund the $30 million draw.

142. Instead, the PGX credit parties negotiated a short forbearance agreement with the prepetition lenders, allowing the Debtors to skip the $7.7 million interest payment that was due on March 31, 2023 while the Debtors began working on a structure for liquidation. The parties entered into successive forbearance agreements with respect to the Prepetition Facilities effective through June 4, 2023 (collectively, the "Forbearance Agreements"). With the Forbearance Agreements in place, the parties focused on a more comprehensive restructuring transaction to be effectuated through a chapter 11 process.

143. Throughout the CFPB Litigation, the Defendants worked on alternative business models that would address the CFPB's concerns surrounding the Defendants' business practices. Those efforts continued until April 4, 2023, when the Tenth Circuit denied the motion to for interlocutory appeal and lifted its stay of the March 10 Order. After determining they would run out of liquidity by mid-May 2023, and that a sale of substantially all of their assets, followed by a controlled liquidation through chapter 11 would yield the highest return for creditors, between April 5 and 6, 2023, some of the Defendants shut down nearly eighty percent (80%) of their operations while conducting the First Layoffs (as defined in the Wallace MSJ Declaration) that terminated nearly 900 employees. On May 11, 2023, the Second Layoffs (as defined in the Wallace MSJ Declaration) occurred, terminating the employment of approximately 150 individuals, and on June 6, 2023, the Third Layoffs (as defined in the Wallace MSJ Declaration) occurred, which terminated the employment of more than 30 employees. As further outlined in the Wallace MSJ Declaration, the Debtors provided certain notices to employees terminated in the layoffs.

Event	Date	Number of Employees Terminated (Approx.)
First Layoff	April 5–6, 2023	891
Second Layoff	May 11, 2023	151
Third Layoff	June 6, 2023	33

144. Contrary to the WARN Plaintiff's assertion, the Plan is feasible notwithstanding her alleged claims in the WARN Action. The Debtors need only demonstrate a reasonable likelihood of success to show feasibility. Further, as other courts have observed, an objecting party has the burden of producing evidence to support its objection on feasibility grounds—not that the debtor needs to introduce evidence to overcome each specific objection that is merely pleaded, as the WARN Objection appears to assume.[144] Faced with an alleged priority claim, the Court can estimate the claim, without additional motion practice, solely for the purposes of feasibility. Here, as set forth below, the Debtors have multiple defenses to the WARN Action, including a "faltering business" defense and an "unforeseen business circumstances" defense. The Court can find a reasonable likelihood of success based on the availability of these defenses, solely for the purposes of feasibility, based on confirmation briefing and argument and evidence adduced at the confirmation hearing.

[144] *See W.R. Grace & Co.*, 475 B.R. 475 at 119 ("It has been recognized that while plan proponents bear the burden of showing that their proposed reorganization plan is confirmable, those objecting to the terms of the plan 'bear the burden of producing evidence to support their objection.'"); *see also*, *In re Armstrong World Indus.*, 348 B.R. 111.

B. Notwithstanding the WARN Objection, the Plan Meets the Feasibility Standard.

145. To confirm the Plan, the Debtors need only demonstrate that the Plan is feasible, not that success is guaranteed.[145] A debtor must show only a reasonable assurance of success.[146] There is a relatively low threshold of proof necessary to satisfy the feasibility requirement, and the debtor must establish this feasibility by a preponderance of the evidence.[147]

146. This Court may assess and estimate the WARN Claim in connection with confirmation of the Plan. Where the amount and priority of a claim has not been determined, the Court may estimate the claim for determining plan feasibility.[148] The Court may estimate the claim at $0 or significantly less than the face amount.[149] Specifically, the Delaware District Court recently found:

> Indeed, the court may estimate the value through a simple review of the pleadings and oral argument. *See In re Windsor Plumbing Supply Co.*, 170 B.R. 503, 520 (Bankr. E.D.N.Y. 1994) (citations omitted). The Bankruptcy

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

[146] *Kane*, 843 F.2d at 649; *Flintkote Co.*, 486 B.R. at 139; *W.R. Grace & Co.*, 475 B.R. at 115; *see also In re Pizza of Haw.*, 761 F.2d at 1382 (holding that "[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation") (citations omitted); *accord In re Capmark Fin. Grp. Inc.*, 2011 WL 6013718, at *61 (same).

[147] *See, e.g.*, *In re Prussia Assocs.*, 322 B.R. at 584 (quoting approvingly that "[t]he Code does not require the debtor to prove that success is inevitable, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility") (internal citations omitted); *In re Sea Garden Motel*, 195 B.R. at 305; *In re Tribune Co.*, 464 B.R. at 185, *overruled in part on other grounds,* 464 B.R. 208 (Bankr. D. Del. 2011); *see also In re Armstrong World Indus.*, 348 B.R. at 120 (articulating that the debtor's standard of proof that the requirements of 1129 are satisfied is the preponderance of the evidence standard).

[148] *See Tonopah*, 2022 WL 982558, at *14.

[149] *In re Spansion*, 426 B.R. at 146 (estimating administrative claim at 4.2% of asserted value for plan confirmation purposes); *In re GBG USA Inc.*, Case No. 21-11369, Docket No. 672 (Bankr. S.D.N.Y. Aug. 2, 2022) (estimating priority amount of employee claims at $0 from alleged violation of labor law).

> Court [below] made its determination after receiving substantial motion to dismiss briefing from the parties concerning the claims alleged in the [complaint filed by the plaintiff]. The issue of the sufficiency of the [complaint] was addressed in the Claim Objection and Confirmation Brief, and was also the subject of oral argument at the Confirmation Hearing.[150]

147. In exercising this discretion regarding plan feasibility, courts have used a review of pleadings in pending litigation as an appropriate method for determining the value of a claim.[151] There is no requirement that estimation of a claim for the purposes of plan feasibility be sought by a formal motion; rather, courts can consider claim estimation as a key component of the plan confirmation process when determining whether the plan is feasible.[152] The Court is entitled to use whatever method is best suited to the contingencies of the case so long as the principles of accomplishing an efficient and expedient reorganization are respected.[153] Without the ability to estimate administrative or priority claims for the purposes of plan confirmation, "bankruptcy courts facing large asserted, but not yet allowed," priority claims would "have two basic choices at the time of plan confirmation. They can either put off plan confirmation for months or years . . . or they can set aside cash for the entire amount" of the priority claim "an amount that may or may not have any rational relationship to the amount likely to be ultimately allowed."[154] To put

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150 *Tonopah*, 2022 WL 982558, at *14 (citations omitted).

151 *See In re Adelphia Bus. Sols., Inc.*, 341 B.R. 415, 422-23 (Bankr. S.D. N.Y. 2003).

152 *In re Verity Health Sys. of California, Inc.*, No. CV 20-7632 DSF, 2021 WL 1102441, at *2 (C.D. Cal. Mar. 23, 2021). In *Verity Health*, the district court dismissed the notion that estimating a claim for the purposes of determining plan feasibility requires a section 502(c) procedure, noting that "Section 502(c) empowers a bankruptcy court to estimate claims for the purpose of allowance. The Bankruptcy Court was clear that its estimate was for the purposes of determining plan feasibility only and not for the purposes of fixing the allowed amount of [the creditor's] claim." *Id.*

153 *Id.*

154 *Id.*

off confirmation until all contingent liabilities could be reduced to allowed claims would introduce unprecedented amounts of uncertainty and risk administrative insolvency for debtors while also undercutting the standard for plan feasibility—which is one of a reasonable likelihood of success, not certainty.

148. Here, as in *Tonopah*, *Adelphia*, and *Verity Health*, the Court can rely on confirmation briefing, pleadings in the adversary proceeding, and arguments and evidence introduced at Plan confirmation to estimate the WARN Claims for the sole purpose of determining whether the Plan is feasible. As discussed in greater detail below, the Debtors have valid and complete defenses to the WARN Action, such that the WARN Action should ultimately result in no allowed claims, priority or otherwise.

C. The Debtors Are Likely to Succeed on the Merits in the WARN Action in Connection with the MSJ.

149. The Debtors will demonstrate that they are reasonably likely to succeed on the merits in the WARN Action. The WARN Act requires only "as much notice as is practicable"—and in some cases, no pre-termination notice at all—if the layoffs are (a) conducted by a "faltering company," (b) caused by "unforeseen business circumstances," or (c) ordered by a "liquidating fiduciary."[155] Here, the Debtors were excused from providing the 60-day notice due to the faltering business and unforeseen business circumstances exceptions to the WARN Act. The Debtors have filed a motion for summary judgment in the WARN Action, which will be fully briefed substantially contemporaneously with (or even prior to) the time of the hearing to consider approval of the Disclosure Statement on a final basis and Confirmation of the Plan. As more fully

[155] *See* 20 C.F.R. § 639.9; *In re United Healthcare Sys.*, 200 F.3d at 177.

set forth in the MSJ, the Debtors are not liable for any damages in the WARN Action. To support the MSJ, the Debtors also filed the Wallace MSJ Declaration.

1. The Debtors Are Likely to Succeed on the Merits in the WARN Action in Connection with the MSJ Because the "Faltering Business Exception" to the WARN Act Likely Applies to the First, Second, and Third Layoffs.

150. The Debtors qualify for the faltering business exception. A company is eligible for the faltering business exception when:

> (1) it was actively seeking capital at the time the 60-day notice would have been required, (2) it had a realistic opportunity to obtain the financing sought, (3) the financing would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown, and (4) the employer reasonably and in good faith believed that sending the 60-day notice would have precluded it from obtaining the financing.[156]

The Debtors have satisfied all of these elements as to the First, Second, and Third Layoffs.

(1) The Debtors Were Actively Seeking Capital at the Time of Layoffs.

151. An employer is "actively seeking capital" within the meaning of the WARN Act when it is "seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing" or "seeking additional money, credit, or business through any other commercially reasonable method."[157] "The employer must be able to identify specific actions taken to obtain capital or business."[158] Here, the Debtors were actively seeking capital more than 60 days before each of the three rounds of layoffs.

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[156] *AE Liquidation*, 522 B.R. at 67; *see also*, *In re APA Transp. Corp. Consol. Litig.*, 541 F.3d 233, 248 (3d Cir. 2008).

[157] 20 C.F.R. § 639.9(a)(1).

[158] *Id*.

152. ***First***, the Debtors were actively seeking capital at least 60 days before the First Layoffs of April 5 and 6, 2023—*i.e.*, on and after February 4, 2023. Between December 28 and through March 31, 2023, the Debtors were seeking to draw up to $30 million in additional funding that the First and Second Lien lenders committed to fund, subject to certain conditions precedent, as a delayed-draw term loan under the December 2022 Facility.[159]

153. ***Second***, the Debtors were actively seeking capital at least 60 days before the Second Layoffs of May 11, 2023—*i.e.*, on or after March 12, 2023. On March 17, 2023, the Debtors requested to draw the $30 million balance of the December 2022 Facility.[160] Even after the lenders refused to fund that request on March 31, 2023, the Debtors engaged in comprehensive restructuring discussions with the lenders and launched an aggressive search for DIP financing from alternative capital sources.[161] Those efforts continued past the Second Layoffs, and had they been completely successful, the Debtors would have been able to warn the employees at least during the 36-day gap between April 5 and May 11, 2023.[162]

154. ***Third***, the Debtors were actively seeking capital in at least 60 days before the Third Layoffs of June 6, 2023—*i.e.*, on or after April 7, 2023. Again, the Debtors sought DIP financing from April 4, 2023, through the eve of the Petition Date. In sum, the Debtors meet the first element of the "faltering company" exception as to all three rounds of layoffs because they were "actively seeking additional money [and] credit" throughout the 60 days preceding each round.

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[159] *See* First Day Declaration ¶ 51.

[160] *See* First Day Declaration ¶ 53; *see also* Wallace MSJ Declaration ¶¶ 10–17, 24.

[161] *See* Wallace MSJ Declaration ¶ 24.

[162] *See* Wallace MSJ Declaration ¶¶ 24, 29.

(2) The Debtors Had a Realistic Opportunity to Obtain the Financing They Sought.

155. The Debtors meet the second element of the "faltering company" exception because they had a realistic opportunity to obtain the financing they sought during the 60 days before each round of layoffs.[163] The Debtors successfully negotiated the December 2022 Facility, performed their obligation to transfer equity to Prospect pursuant to the terms of that deal, and obtained the first disbursement under the December 2022 Facility in the amount of $15 million. They also met the conditions to draw the balance of that facility in the amount of $30 million in the spring of 2023, even though the lenders declined to go through with that funding.[164] Notably, the stated reason for their refusal—*i.e.*, that the March 10 Order would likely prevent the borrowers from obtaining certified financials—did not arise until the Utah Court entered the order on March 10, 2023.[165] And the lenders did not notify the Debtors that the funding was in jeopardy until March 24, 2023.[166] Between then and March 31, the Debtors engaged in significant good faith negotiations to change the lenders' minds. Thus, the Debtors meet the second element of the "faltering company" exception because through March 31, 2023, they had a realistic opportunity of getting up to $30 million in additional financing under the December 2022 Facility.

156. The Debtors also had an opportunity of securing DIP financing from an alternate source through the comprehensive campaign they mounted in April and May 2023. The Debtors retained an experienced investment bank whose professionals reached out to at least 30 potential

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[163] 20 C.F.R. § 639.9(a)(2).

[164] *See* Wallace MSJ Declaration ¶ 15 Ex 2.

[165] *See id*. ¶ 13 Ex. 1.

[166] *See id*.

lenders. And while those opportunities did not materialize, ultimately, the Debtors obtained a $2.9 million bridge loan from the existing lenders that allowed them to preserve the value of their assets for the benefit of all creditors while they prepared to file chapter 11.

157. In short, the Debtors meet the second element of the "faltering company" exception because they had a realistic opportunity of obtaining additional financing during the 60 days preceding all three rounds of layoffs in the form of both further advances under the December 2022 Facility or DIP financing in anticipation of their bankruptcy filings.

(3) If Obtained, the Financing Would Have Been Sufficient to Enable the Debtors to Avoid or Postpone the Shutdown.

158. The Debtors meet the third element of the "faltering company" exception because they have "objectively demonstrate[d] that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time."[167]

159. The $30 million in additional funding available under the December 2022 Facility, combined with their operating revenue, would have allowed the Debtors to continue business operations for several months. And the Debtors were working on an alternative business model right until they were forced to conduct the First Layoffs. Borrowing from the C.F.R., "the volume of new business" that Debtors sought "would have enabled [them] to keep" operations going for a reasonable period because they were on track to generate $64 million in revenue during the first quarter of 2023.[168] Similarly, the $30 million to $50 million the Debtors sought in DIP financing in April and May of 2023 would have allowed them to continue operations to preserve the value

[167] 20 C.F.R. § 639.9(a)(3).

[168] *See* 20 C.F.R. § 639.9(a)(3); *see also*, Wallace MSJ Declaration ¶ 7.

of their businesses as going concerns.[169] While Debtors had concluded by then that an orderly liquidation was optimal, the DIP financing would have allowed the Debtors to continue supporting Lexington Law long enough for it to give sufficient notice of the Second Layoffs. In short, the Debtors meet the third element of the "faltering company" exception because the funding they sought under the December 2022 Facility and DIP proposals would have allowed them to continue operations for 60 days or more.

(4) The Debtors Reasonably and in Good Faith Believed That Sending the 60-Day Notice Would Have Precluded Them from Obtaining Financing.

160. The fourth factor of the "faltering business" exception to the WARN Act requires a showing that the Debtors "reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close."[170] The Debtors meet this element too.

161. One of the conditions of the December 2022 Facility was that the Debtors would continue operating their business, as the lenders were not then interested in financing a liquidating entity.[171] As discussed below, as of February 2023, the Debtors did not expect the Utah Court to rule in favor of the CFPB, let alone to refuse to stay such an order pending appeal. That was all unforeseeable. But even if a negative outcome in the CFPB Litigation had been foreseeable, the Debtors reasonably expected that the creditors would declare a default under the December 2022 Facility if potential layoffs had been announced at any time prior to the March 31, 2023 funding

[169] Wallace MSJ Declaration ¶ 11.

[170] 20 C.F.R. § 639.9(a)(4).

[171] *See* First Day Declaration ¶ 9.

deadline under the December 2022 Facility. Similarly, announcing the Second and Third Layoffs would have repelled potential DIP lenders who would have questioned the Debtors' ability to preserve the value of their assets without a significant staff.

162. In sum, the Debtors were not required to give 60-days' advanced notice of the layoffs because under the "faltering company" exception, they were actively seeking financing during that period, had a reasonable expectation of receiving sufficient financing in the form of both additional draws under the December 2022 Facility and the proposed DIP financing structure, and creditors would have walked away had they learned that the Debtors would need to shut down nearly 80% of their operations.

2. The Debtors Are Likely to Succeed on the Merits in the WARN Action in Connection with the MSJ Because the "Unforeseen Business Circumstances" Exception to the WARN Act Likely Applies to the First and Second Layoffs.

163. The Debtors also meet the "Unforeseen Business Circumstances" exception to WARN Act liability as to the first and second layoffs. Under the "unforeseen business circumstances" exception, an employer is not required to provide 60-days' advance notice of layoffs where "(1) the claimed circumstance was unforeseeable, and (2) the layoffs were caused by that circumstance."[172] "[T]he regulations do not suggest that this exception should be narrowly construed," and instead, the Court must simply ask whether a "similarly situated employer in the exercise of commercially reasonable business judgment would have foreseen the closing."[173]

[172] *AE Liquidation*, 522 B.R. at 68 (internal quotations omitted).

[173] *Id.* at 68 (internal citation omitted).

164. "[A]n important indication of such circumstances is a sudden, dramatic, and unexpected action or condition outside of the employer's control."[174] Moreover, courts "must bear in mind that it is the probability of occurrence that makes a business circumstance reasonably foreseeable, rather than the mere possibility of such a circumstance."[175]

165. For example, in *AE Liquidation*, the court held that the failure to close on the sale of the defendant's business was not reasonably foreseeable 60 days before corresponding layoffs because funding had already been secured for the sale and the company's majority stakeholder had already committed to finance $20 million of the purchase price. The *AE Liquidation* court found it was not probable the sale would fail, especially considering the continual assurances it would close.

166. Here, the circumstances triggering the Debtors' layoffs were not "reasonably foreseeable" 60 days ahead. On the one hand, the procedural history of the CFPB Litigation did not suggest that the Utah Court would likely rule in favor of the CFPB, let alone refuse to stay an order in the CFPB's favor. For example, although the Utah Court had denied the Debtors' motions challenging the CFPB's interpretation of the TSR, the denials were "without prejudice," suggesting that the Utah Court did not believe denial was warranted as a matter of law. And during the four years that the parties litigated over the TSR, the Fifth Circuit determined that the CFPB's structure was unconstitutional. Under such circumstances, it was not likely let alone "probable" that the Utah Court would side with the CFPB or refuse to stay the March 10 Order pending appeal,

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[174] *Id.*; 20 C.F.R. § 639.9(b)(1)

[175] *AE Liquidation*, 522 B.R. at 69 (internal quotations omitted).

or at a minimum, pending the U.S. Supreme Court's review of the Fifth Circuit's decision and the CFPB's constitutionality.

167. On the other hand, in the 60 days preceding the First Layoffs, it was not probable either that the creditors would refuse to disburse the balance of the December 2022 Facility. Again, as of February 2023, the Utah District Court had not even suggested it would rule in favor of the CFPB on Count I of the CFPB's complaint. But even after the Utah Court entered the March 10 Order, it was not probable that the creditors would pull their funding. Like the majority stakeholder in *AE Liquidation*, Prospect committed to fund the full $45 million December 2022 Facility and it honored the initial $15 million draw just three months before refusing the disburse the balance. And the lenders were intimately familiar with the Debtors operations, the status of the CFPB Litigation, and the risks of an adverse ruling on Count I of the CFPB's complaint. Given that familiarity, it was not objectively foreseeable to the Debtors that the lenders would walk away because of an adverse ruling on Count I of the complaint—or at least, not until an appeal of that ruling were exhausted. In short, the creditors' refusal to fund the balance of the December 2022 Facility was unforeseeable and thus the Debtors were not required to give 60-days' warning before the first round of layoffs in April 2023.

168. Moreover, both the substance and timing of the layoff notices complied with the WARN Act's requirements under the circumstances. Where, as here, the "unforeseen business circumstances" exception applies, the WARN Act still requires termination notices informing "employees whether the planned action will be permanent or temporary, the expected date when the layoff will begin, when the individual employees will be separated, whether bumping rights exist, and the name and telephone number of a company official who can be contacted for further

information."[176] The notices provided here include all this information.[177] The Debtors also gave those notices as soon as it was practical under the circumstances. For example, the Debtors notified nearly 90% of the employees who were laid off within three business days after the creditors refused to fund the March 31, 2023 draw and one business day after the Tenth Circuit lifted its stay of the March 10 Order.

169. In sum, the Debtors were excused from providing 60-days advanced notice under the "unforeseen business circumstances" liberal exception to the WARN Act.

3. The Debtors Were Operating as "Liquidating Fiduciaries" Rather Than "Employers" Within the Meaning of the WARN Act.

170. The Debtors were excused from the 60-days advance warning requirement as to the Second and Third Layoffs for another alternative reason: after April 5, 2023, they effectively became "liquidating fiduciaries" rather than "employers" subject to the WARN Act.[178] In a nutshell, companies are not required to provide 60-days' notice where they are merely engaged in the liquidation of assets at the time of the mass layoff.[179] "The more closely the entity's activities resemble those of a business operating as a going concern, the more likely it is that the entity is an 'employer;' the more closely the activities resemble those of a business winding up its affairs, the more likely it is the entity is not subject to the WARN Act."[180]

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[176] *AE Liquidation*, 522 B.R. at 70.

[177] *See, e.g.*, Wallace MSJ Declaration, Exs. 3–5.

[178] *See In re United Healthcare Sys.*, 200 F.3d at 177 (internal quotations omitted).

[179] *See id*.

[180] *Id.* (internal citation omitted).

171. Here, after the First Layoffs on April 5 and 6, 2023, a significant portion of the Defendants' operations more closely resembled those of a business winding down its affairs than those of the credit repair company it once was. By April 6, 2023, the Defendants had shut down nearly 80% of their collective operations, laid off 90% of their collective employees, and closed the call centers at the heart of their business model. The few employees who remained around were focused on preserving the value of the Debtors' assets in anticipation of a chapter 11 sale and liquidation. These included the 123 employees that Lexington Law ultimately laid off in May 2023. After April 6, 2023, Lexington Law lost its source of new customers and was simply focused on preparing existing customer accounts for a potential sale in bankruptcy.

172. In sum, Defendants were not required to give 60-days' advanced notice of the Second and Third Layoffs because they were liquidating fiduciaries and not "employers" under WARN Act after April 5, 2023.

D. The Other Arguments Raised in the WARN Objection Lack Merit.

173. In addition to its feasibility argument, the WARN Plaintiff asserts four other objections. Each of these is based on the misperception that the Plan seeks to classify any allowed priority claims in the WARN Action together with any allowed non-priority claims in the WARN Action. This is not true. The Plan provides Holders of Class 3 Claims payment in full in cash of such allowed priority claims, including any claims arising in the WARN Action that are ultimately allowed as priority claims.[181] Any other, non-priority claims allowed in the WARN Action would be a "Litigation Claim" as defined in the Plan. Because Class 6C (Litigation Claims) did not accept the settlement offer embodied in the Plan, such claims are treated together with Other

[181] *See* Plan, Art. III.B.3 (providing for the treatment of Other Priority Claims).

General Unsecured Claims in Class 6B. The modified Plan, filed concurrently herewith, clarifies that "Litigation Claims" only includes non-priority, unsecured claims.[182]

174. This clarification addresses each of the other objections the WARN Plaintiffs makes:

- **Recharacterization.** Contrary to the WARN Plaintiff's assertion, the Plan does not seek to recharacterize 100% of the WARN Action claims as general unsecured claims. To the extent they are allowed as priority claims, the WARN Action claims will be treated as Other Priority Claims in Class 3 of the Plan, which provides for payment in full in cash or other treatment consistent with section 1129(a)(9) of the Bankruptcy Code.

- **Improper Classification.** Contrary to the WARN Plaintiff's assertion, the Plan does not classify priority and non-priority WARN Action claims together. Allowed priority claims stemming from the WARN Action will be treated in Class 3 (Other Priority Claims) and allowed non-priority claims stemming form the WARN Action will be treated in Class 6B (Other General Unsecured Claims).

- **Payment in Cash.** Contrary to the WARN Plaintiff's assertion, the Plan does provide for payment in cash of the WARN Action claims if they are allowed as priority claims, in which case they will be treated in Class 3 with other allowed priority claims.

- **Violation of Priority Structure.** For the same reasons, the Plan does not violate the "priority structure" of the Bankruptcy Code. Priority claims, including any allowed priority claims stemming from the WARN Action, will be paid in full in cash or receive other allowed treatment pursuant to Class 3. Only unsecured claims arising from the WARN Action (if any) are impaired pursuant to the Plan.

175. This leaves only the WARN Plaintiff's feasibility objection under section 1129(a)(11) of the Bankruptcy Code. For the reasons set forth above, the Court can find that the Plan is feasible because the Debtors are reasonably likely to have valid, complete defenses to the WARN Action.

[182] *See* Plan, Art. I.105 (clarifying that "Litigation Claims," which are treated as general unsecured claims, only includes non-priority, unsecured claims).

Conclusion

176. For all of the reasons set forth herein and in the Wallace Declaration, the Henry Declaration, and the Voting Report, and as will be further shown at the Confirmation Hearing, the Debtors respectfully request that the Bankruptcy Court approve the Disclosure Statement and confirm the Plan as fully satisfying all of the applicable requirements of the Bankruptcy Code by entering the proposed Confirmation Order, overrule the WARN Objection, and grant such other and further relief as is just and proper.

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Dated: October 24, 2023
Wilmington, Delaware

/s/ Michael W. Yurkewicz

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