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IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH, CENTRAL DIVISION

In re PolarityTE, Inc., a Delaware corporation Debtor.	Case No. 23-bk-22358-KRA Case No. 23-bk-22360-KRA Case No. 23-bk-22361-KRA Jointly administered Chapter 11 Cases Judge Kevin R. Anderson **THIS DOCUMENT RELATES TO ALL DEBTORS**
In re PolarityTE, MD Inc., a Nevada corporation Debtor	
In re PolarityTE, Inc., a Nevada corporation Debtor	

DEBTORS' MOTION UNDER SECTIONS 1122 AND 1129 OF THE BANKRUPTCY CODE TO APPROVE AND CONFIRM PLAN OF LIQUIDATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

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PolarityTE, Inc., a Delaware corporation ("**PTE**"), PolarityTE, MD Inc., a Nevada corporation ("**PTE MD**"), and PolarityTE, Inc., a Nevada corporation ("**PTE NV**" and together with PTE and PTE MD, the "**Debtors**" and each individually, a "**Debtor**"), in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), through counsel, hereby move this Court (the "**Motion**") for entry of an order (the "**Confirmation Order**") under sections 105, 1122, 1129, and 1141 of title 11 of the United States Code (the "**Bankruptcy Code**"), approving and confirming the Debtors' Plan of Liquidation under Chapter 11 of the Bankruptcy Code dated August 15, 2024 (as the same may be amended, modified or supplemented from time to time, the "**Plan**").[1] and granting related relief.

In support of this Motion, Debtors respectfully represent as follows:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O), and the Court may enter a final order consistent with Article III of the United States Constitution.

2. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

3. The bases for the relief requested herein are sections 105 and 1122-1129 of the Bankruptcy Code and Rules 3016-3021 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"). No prior motion for the relief requested in this Motion has been filed or adjudicated. No trustee or examiner has been appointed in the Chapter 11 Cases.

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

II. BACKGROUND

A. General Background

4. The Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") on June 6, 2023 (the "**Petition Date**").

5. On the Petition Date, the Debtors moved for joint administration of the Chapter 11 Cases (ECF 2), and the Court entered an Order granting joint administration of the Chapter 11 Cases on an interim basis (ECF 19) and final basis. (ECF 69.)

6. After the Petition Date, the Debtors sought and obtained approval from the Bankruptcy Court for procedures to run a bid and sale process for the sale of substantially all their assets. (ECF 8.) At the conclusion of that process, the Debtors moved for approval of the sale of substantially all the Debtors' operating assets to Grander Acquisition LLC ("**Grander**" and the "**Grander Sale**"). (ECF 55.) On July 31, 2023, the Court approved the sale of substantially all the Debtors' operating assets to Grander for the price of $6,500,000 and the assumption of certain liabilities. (ECF 107.)

7. The Debtors continue to operate and manage their property as debtors in possession under sections 1107 and 1108 of the Bankruptcy Code.

8. No examiner or trustee has been appointed in the Chapter 11 Cases.

B. The Disclosure Statement and Plan

9. On August 15, 2024, the Debtors filed the Disclosure Statement for the Plan (as the same may be amended, modified or supplemented from time to time, the "**Disclosure Statement**"). (ECF 154.) After holding the Disclosure Statement hearing, the Court entered an

Order approving the Disclosure Statement for solicitation and setting a schedule of deadlines for the Confirmation Hearing, required notices, and related events. (ECF 166.)

10. In general,[2] the Debtors' proposed Plan provides for the establishment of an efficient mechanism for promptly and efficiently (a) completing the liquidation of the remaining assets of the Debtors' estates in an orderly fashion, (b) evaluating claims against the Estate and pursuing objections to claims where appropriate, (c) distributing the net funds of the Estates to creditors holding allowed claims; and (d) only after all creditors have been paid in full, distributing all remaining funds to the Debtors' equity holders. As there are no classes of impaired creditors, the Debtors submit that their Plan is per se confirmable under section 1129(b).

11. The Plan classifies claims into four classes:

- **Class 1** Priority Claims consisting of all Allowed Priority Claims against the Debtors;
- **Class 2** Secured Claims consisting of the secured claim of Dorsey & Whitney LLP;
- **Class 3** General Unsecured Claims consisting of all Allowed General Unsecured Claims against the Debtors; and
- **Class 4** Equity Interests and Rescission Claims, consisting of all Equity Interests and Claims for Rescission against the Debtors.

(Plan Art. 3-4.)

12. The Plan proposes to substantively consolidate all assets and liabilities of the Debtors and contribute all remaining assets of the Debtors, including the proceeds of the Grander Sale, to a Liquidating Trust that will be established on the Effective Date. (*Id.* §§ 5.1-5.3.)

13. Based on the Debtors' projections in the Disclosure Statement, Classes 1, 2, and 3 are unimpaired and will be paid in full. (Plan § 4.3.) Therefore, Classes 1, 2, and 3 comprising

[2] To the extent of any inconsistencies between this summary and the terms of the Plan, the Plan controls.

all Claims against the Debtors are deemed to accept the Plan. (*Id.*) Class 4 Equity Interests will be paid only if and when all Claims have been paid in full. (*Id.* § 4.4.)

14. The Plan is to be executed and implemented through the means of a Liquidating Trust. The Liquidating Trust will receive all property of the Estate as of the Effective Date, and the Liquidating Trustee, among other things, will liquidate the remaining property, review and object to claims as appropriate, and make distributions to creditors holding claims.

15. Under the Plan, the Debtors' Estates and all of its remaining assets will become property of the Liquidating Trust, and John H. Curtis of Rocky Mountain Advisory, LLC, the Debtor's restructuring advisor, will be appointed as the Liquidating Trustee (subject to the appointment of any succession trustee under the terms of the Liquidating Trust Agreement attached as Exhibit A to the Plan) to conduct an orderly liquidation of the assets with the goal of maximizing returns to creditors. (*Id.* Art. V.) In particular, the Liquidating Trustee will be responsible for liquidating all remaining assets, including evaluating and prosecuting Avoidance Actions and other Debtor Causes of Action, objecting to Claims as appropriate, and making distributions to creditors, all in the Liquidating Trustee's reasonable business judgment. The Liquidating Trustee would also be responsible for holding and administering all post-confirmation cash and bank accounts of the Liquidating Trust.

C. Solicitation and Voting

16. At a hearing on October 29, 2024, the Court approved the form of the Debtor's Disclosure Statement (the "**Disclosure Statement**") (ECF 322) and on November 1, 2024, the Court entered the Order authorizing the Debtors to solicit the Plan using the Disclosure Statement. (Order, ECF 166.) The Court set the following schedule of confirmation-related deadlines:

Deadline or Event	Date
Notice Packages Mailed	November 4, 2024
Deadline to File Confirmation Motion	November 4, 2024
Notice of Confirmation Hearing Notice Served	November 4, 2024
Confirmation Objection Deadline	December 5, 2024, at 5:00 p.m. (MT)
Reply Deadline	December 12, 2024, at 5:00 p.m. (MT)
Confirmation Hearing	December 19, 2024, at 10:00 a.m. (MT)

17. On November 4, 2024, the Debtors filed and served by U.S. Mail, First-Class™, the following to all creditors, the Debtor's entire mailing matrix, the IRS, the SEC, and all other parties entitled to notice the following documents:

(a) Notice of Confirmation Hearing and Objection Deadline for Debtor's Plan of Liquidation under Chapter 11 of the Bankruptcy Code;

(b) The Disclosure Statement;

(c) The Plan; and

(*See* Certificate of Service, to be filed on docket.)

18. Because the Debtors have no impaired classes of Claims, the Debtors will not be soliciting votes, sending out ballots, notices of non-voting status, or filing a report of balloting.

19. This Debtors by this Motion seek entry of the Confirmation Order approving the Plan.

RELIEF REQUESTED

By this Motion, the Debtors seek entry of the Confirmation Order approving and confirming the Plan under section 1129 of the Bankruptcy Code.

MEMORANDUM OF POINTS AND AUTHORITIES

Confirmation of the Plan is governed by section 1129 of the Bankruptcy Code.

I. BURDEN OF PROOF UNDER BANKRUPTCY CODE SECTION 1129

The Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship.)*, 115 F.3d 650, 653 (9th Cir. 1997) ("[t]he bankruptcy court must confirm a Chapter 11 [plan proponent's] plan of reorganization if the [plan proponent] proves by a preponderance of the evidence" that the plan satisfies Bankruptcy Code section 1129"); *see also Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1164-65 (5th Cir. 1993) (concluding that preponderance of the evidence is the appropriate standard for both consensual and nonconsensual plan confirmation); 7 COLLIER ON BANKRUPTCY ¶ 1129.02, at 1129-17 (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) ("The 16 requirements of section 1129(a) are the focus of all confirmation hearings. The plan proponent (the Debtor), as indicated above, bears the burdens of proof of establishing that each of these requirements have been satisfied. When these requirements are met, the court will confirm the plan.").

Based upon the contents of the Disclosure Statement, the Debtor's Liquidation Analysis, and the Curtis Declaration, the docket and record of this case, and any evidence the Court adduces at the Confirmation Hearing, the Debtors submit that they have proven by a preponderance of the evidence that all applicable subsections of section 1129 of the Bankruptcy Code have been satisfied. Each of these requirements are discussed below.

II. CONFIRMATION REQUIREMENTS

A. Section 1129(a)(1) – The Plan Complies with the Applicable Provisions of Title 11.

Section 1129(a)(1) of the Bankruptcy Code requires that "[t]he plan compl[y] with the applicable provisions of this title." Section 1129(a)(1) incorporates by reference the other substantive provisions of Subchapter II of Chapter 11 of the Bankruptcy Code on the formulation and solicitation of the Plan and requires that a plan comply with section 1122 (governing classification of claims) and 1123 (governing the contents of a plan). *Official Comm. of Unsecured Creditors of W. Farm Credit Bank v. Michelson (In re Michelson)*, 141 B.R. 715, 721 (Bankr. E.D. Cal. 1992); *see also In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) ("**Drexel I**") (noting that "[t]he legislative history of § 1129(a)(1) explains that this provision embodies the requirements of §§ 1122 and 1123, respectively, governing classification of claims and the contents of the Plan"); S. Rep. No. 95-989, at 126 (1978), reprinted in 1978 U.S.C.C.A.N. 5787 (stating that "[p]aragraph (1) [of 1129(a)] requires that the plan comply with the applicable provisions of chapter 11, such as §§ 1122 and 1123, governing classification of [a] plan"); H.R. REP. NO. 95-595, at 412 (1977), reprinted in 1978 U.S.C.C.A.N. 5963 (same).

1. The Plan Complies with Section 1122 of the Bankruptcy Code: Classification of Claims and Interests.

Section 1122 of the Bankruptcy Code governs the classification of claims or interests under a plan and provides, in pertinent part, as follows:

> [A] plan may place a claim or interest in a particular class only if such claim or interest is *substantially similar* to the other claims or interests of such class.

11 U.S.C. § 1122(a) (emphasis added). Under this section, the relevant inquiries are (i) whether all claims and interests in a class have substantially similar rights with respect to the debtor's assets, and (ii) whether there are sufficient business or legal justifications to justify separate classes of similar claims or interests. *See Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (In re Tucson Self-Storage, Inc.)*, 166 B.R. 892, 897 (B.A.P. 9th Cir. 1994) ("Separate classifications for unsecured creditors are only justified 'where the legal character of their claims is such as to accord them a status different from the other unsecured creditors'") (citation and internal quotation marks omitted); *Principal Mut. Life Ins. Co. v. Baldwin Park Towne Ctr., Ltd (In re Baldwin Park Towne Ctr., Ltd.)*, 171 B.R. 374, 376 (Bankr. C.D. Cal. 1994) (holding that substantially similar claims may be separately classified if there is some business or economic justification for doing so).

Article IV of the Plan specifies the Plan's classification of Claims and Equity Interests in five classes, each based upon the legal nature and/or priority of such Claims and Equity Interests. Administrative Claims and Priority Tax Claims are separately treated in Article II of the Plan. The classes of Claims and Equity Interests are as follows:

- **Class 1** Priority Claims consisting of all Allowed Priority Claims against the Debtors;
- **Class 2** Secured Claims consisting of the secured claim of Dorsey & Whitney LLP;
- **Class 3** General Unsecured Claims consisting of all Allowed General Unsecured Claims against the Debtors; and
- **Class 4** Equity Interests and Rescission Claims, consisting of all Equity Interests and Claims for Rescission against the Debtors.

(Plan Art. 3-4.)

The Claims or Equity Interests in each class are substantially similar to the other Claims or Equity Interests in such class. Accordingly, the Plan's classification of Claims and Equity Interests

does not prejudice the rights of holders of such Claims and Equity Interests. The Secured Claim, of Dorsey & Whitney, is separately classified in Class 2 because it is Secured in its retainer, and thus not substantially similar to General Unsecured Claims. The Priority Claims are classified separately in Class 1 from General Unsecured Claims in Class 3. And Equity Interests are separately classified in Class 4. Thus, there is a valid legal reason for separately classifying the various classes of Claims and Equity Interests under the Plan, and the classes do not unfairly discriminate between holders of Claims or Equity Interests. *Steelcase, Inc v. Johnston (In re Johnston)*, 21 F.3d 323, 327-28 (9th Cir. 1994) (holding that separate classification was permissible and that bankruptcy courts have broad discretion to classify claims); *Tucson Self-Storage, Inc.*, 166 B.R. at 897 (plan proponent allowed considerable discretion to classify claims and interests according to facts and circumstances of case so long as classification scheme does not violate basic priority rights or manipulate voting); *State St. Bank & Trust Co. v. Elmwood, Inc. (In re Elmwood, Inc.)*, 182 B.R. 845, 849 (D. Nev. 1995) ("A plan may place substantially similar claims in different classes when a reasonable nondiscriminatory basis exists for such treatment.").

Here, the Claims or Equity Interests that are separately classified are not substantially similar because the rights of each class differ as against the Debtor. Class 1 and Class 3 may both be unsecured, but Class 1 has the benefit of having priority and administrative claims that are given precedence over general unsecured claims under sections 503(b), 507(a)(1) and 507(a)(8), thereby making the claims substantially different as Class 1 has superior rights against the Debtors than Class 3 has. Therefore, the classification of Claims and Equity Interests in the Plan complies with section 1122(a) of the Bankruptcy Code.

B. Section 1123 of the Bankruptcy Code: Contents of the Plan.

Section 1123(a) of the Bankruptcy Code sets forth eight requirements with which every chapter 11 plan must comply. *See* 11 U.S.C § 1123(a). As demonstrated below, the Plan fully complies with those requirements.

2. The Plan Designates Classes of Claims and Interests – 11 U.S.C. § 1123(a)(1).

Section 1123(a)(1) of the Bankruptcy Code requires that a plan designate classes of claims, other than claims of a kind specified in sections 507(a)(2) (administrative expense claims), 507(a)(3) (claims arising during the "gap" period in an involuntary case), or 507(a)(8) (priority tax claims) of the Bankruptcy Code. 11 U.S.C. § 1123(a)(1). As set forth above, Article IV of the Plan designates three classes of Claims and one class of Equity Interests and therefore complies with section 1123(a)(1) of the Bankruptcy Code.

3. The Plan Specifies Unimpaired Classes –11 U.S.C. § 1123(a)(2).

Section 1123(a)(2) of the Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan." 11 U.S.C. § 1123(a)(2). Article IV of the Plan specifies that Equity Interests (Class 4) are impaired under the Plan. Article IV of the Plan also specifies that Class 1, Class 2, and Class 3 are unimpaired under the Plan. The Plan complies with section 1123(a)(2) of the Bankruptcy Code.

4. The Plan Adequately Specifies the Treatment of Impaired Classes –11 U.S.C. § 1123(a)(3).

Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that is impaired under the plan." 11 U.S.C. § 1123(a)(3). Article IV

of the Plan specifies the treatment of Class 5 Equity Interests, the only impaired class, by explaining the distribution Equity Interest will receive:

> (b) Treatment. Class 4 is impaired under the Plan. On the terms and conditions set forth in the Liquidating Trust (including the establishment of a reserve), holders of Equity Interests in the Debtors shall receive their Pro Rata share of remaining Cash after Class 3 (General Unsecured Claims) have received their distributions and all Equity Interests in the Debtors shall be cancelled. Claims arising from the purchase or rescission of Equity Interests subordinated under Bankruptcy Code Section 510(b) shall be determined by the Bankruptcy Court in shares equivalent to Equity Interests. On the terms and conditions set forth in the Liquidating Trust (including the establishment of a reserve), in full satisfaction of their Rescission Claims, holders of Equity Interests shall be entitled to their Pro Rata share of remaining Cash after Class 3 (General Unsecured Claims) have received their distributions pro rata with Equity Interests in the Debtors.

(Plan § 4.4(b).) Thus the Plan complies with section 1123(a)(3) of the Bankruptcy Code.

5. The Plan Provides for the Same Treatment for Claims or Interests Within the Same Class –11 U.S.C. § 1123(a)(4).

Section 1123(a)(4) of the Bankruptcy Code requires that a 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." 11 U.S.C. § 1123(a)(4). This provision provides creditors of the same class with a right to equality of treatment. Article IV of the Plan provides for equality of treatment for each Claim or Equity Interest within a particular class because each member of each Class is substantially similar, and each member's claim or interest is receiving the same treatment in the Plan. Thus, the Plan complies with section 1123(a)(4) of the Bankruptcy Code.

6. The Plan Provides Adequate Means for Its Implementation –11 U.S.C. § 1123(a)(5).

Section 1123(a)(5) of the Bankruptcy Code requires a plan of liquidation to "provide adequate means for the plan's implementation" and sets forth several examples of such means, including retention by the debtor of property of the estate, sales of the debtor's property, satisfaction or modification of any lien, and issuance of securities of the debtor in exchange for claims or interests. 11 U.S.C. § 1123(a)(5). Article VI of the Plan provides for, among other things the following:

- the method of distributions to holders of Claims entitled to distributions from the Debtors under the Plan, and, specifically, the establishment of the Liquidating Trust and appointment of the Liquidating Trustee (Plan § 6.1);
- reversion of unclaimed checks and disputed claim reversion by the Estates (Plan § § 6.4-6.5);
- retention and preservation of claim objections and causes of action by the Liquidation Trustee (Plan § 6.6);
- prosecution of Debtor Causes of Action to generate additional proceeds (Plan § 6.6);

Thus, the Plan complies with section 1123(a)(5) of the Bankruptcy Code.

7. The Plan Complies with the Prohibition on the Issuance of Nonvoting Equity Securities –11 U.S.C. § 1123(a)(6).

Section 1123(a)(6) of the Bankruptcy Code does not apply because the Debtors are not issuing any new securities under the Plan.

8. Certain Provisions are Inapplicable –11 U.S.C. §§ 1123(a)(7)-(8).

The Plan is a liquidating plan so the Debtors will merge into the Liquidating Trust upon the Effective Date. The Debtors will otherwise cease to exist as a corporate entity, and so this provision is inapplicable.

9. The Plan Contains Permitted Provisions – 11 U.S.C. § 1123(b).

Section 1123(b) of the Bankruptcy Code sets forth the permissive provisions that may be incorporated into a chapter 11 plan, including any "provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). As permitted by the subparts of section 1123(b)—

- Plan, Art. IV, impairs or leaves unimpaired classes of claims –§ 1123(b)(1);
- Plan Art. VIII provides for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases under section 365 of the Bankruptcy Code – § 1123(b)(2);
- Plan § 6.6 provide for the settlement and retention of claims and Debtor Causes of Action belonging to the Debtors –§ 1123(b)(2);

C. Section 1129(a)(2) - The Debtors Have Complied with Bankruptcy Code

1. The Plan Proponent Has Complied with the Provisions of Title 11.

Section 1129(a)(2) of the Bankruptcy Code requires the proponent of a plan, in this case the Debtor, to comply "with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). Whereas section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, section 1129(a)(2) is concerned with the applicable activities of a plan proponent under the Bankruptcy Code. *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[2], at 1129-19; *see also Andrew v. Coopersmith (In re Downtown Inv. Club III)*, 89 B.R. 59, 65 (B.A.P. 9th Cir. 1988) Bankruptcy Code § 1127(b) requires that a modified plan must comply with Bankruptcy Code § 1129. Section 1129(a)(2) in turn requires that the proponent of the plan complies with the applicable provisions of Title 11.").

In determining whether a plan proponent has complied with this section, courts focus on whether the disclosure and solicitation requirements adhere to sections 1125 and 1126 of the

Bankruptcy Code. *See, e.g., Computer Task Group, Inc. v. Brotby (In re Brotby)*, 303 B.R. 177, 192-93 (B.A.P. 9th Cir. 2003) (focusing its analysis under section 1129(b) on the adequacy of the disclosure and solicitation of the plan); *Drexel I*, 138 B.R. at 759 (noting that the legislative history of section 1129(a)(2) explains that this provision embodies the disclosure and solicitation requirements under sections 1125 and 1126); *In re Johns-Manville Corp.*, 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part, on other* grounds, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, 843 F.2d 636 (2d Cir. 1988) (stating that "[o]bjections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code"); *see also* S. REP. NO. 95-989, 95th Cong., 2d Sess. 126 (1978) (stating that section 1129(a)(2) "requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure"); H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 412 (1977).

In this respect, the Debtors have provided adequate disclosures of its assets, liabilities, and operations throughout the Chapter 11 Cases as follows:

(a) The Debtors, through their representatives, timely attended the first meeting of creditors under section 341(a) of the Bankruptcy Code conducted by the U.S. Trustee and provided all information requested by the U.S. Trustee at that time.

(b) The Debtors are a proper proponent of the Plan under sections 1121(c) and 1189(a) of the Bankruptcy Code.

(c) The Debtors have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and other orders of the Court in transmitting the Plan and related documents and notices, and in soliciting the Plan.

(d) The Debtors have timely (or within a few days of being timely) filed each month's Monthly Operating Report, which have been attested to being true and accurate.

(e) The Debtors have not paid any professionals or expenses out of the ordinary course except upon order of the Court.

(f) The Debtors have paid all fees of the U.S. Trustee that have come due.

(g) The Debtors have obeyed all orders of the Bankruptcy Court and otherwise applied with the Bankruptcy Code and Bankruptcy Rules.

Further, the Debtors have complied with the solicitation and notice requirements, including Bankruptcy Rule 2002, for the Disclosure Statement and Plan, and in accordance with section 1125(f)(1) of the Bankruptcy Code. (Certificate of Service to be filed.)

D. Section 1129(a)(3) - The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law.

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although the Bankruptcy Code does not define "good faith," "[a] plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code." *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1074 (9th Cir. 2002) (citing *Ryan v. Loui (In re Corey)*, 892 F.2d 829, 835 (9th Cir. 1989)). "[F]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *Id.* (quoting *Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.)*, 84 B.R. 167, 172 (B.A.P. 9th Cir. 1988).

A plan may also be found to have been proposed in good faith where there is a showing that "the plan was proposed with honesty and good intentions and with a basis for expecting that a reorganization can be effected." *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 649 (2d Cir. 1988) (citing *Koelbl v. Glessing (In re Koelbl)*, 751 F.2d 137, 139 (2d Cir. 1984) (quoting *Manati Sugar Co. v. Mock*, 75 F.2d 284, 285 (2d Cir. 1935)). Moreover,

"[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied." *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *Sylmar Plaza*, L.P., 314 F.3d at 1074.

In this case, the Plan achieves these goals by maximizing the value of the estates in liquidation while preserving the estates' most valuable assets: the cash from the Grander Sale and the Causes of Action that the Liquidating Trustee is retaining and pursuing for the benefit of the Holders of General Unsecured Claims and Equity Interests. Further, this Plan provides for the full recovery on their Claims all Classes of creditors and maximizes the value of the estate for the remaining Class of Equity Interests. Not liquidating the Debtors would only serve to deplete what money remains in the Estate, and only would decrease the assets available to distribute to each Holder and Equity Interests. Conversely, allowing the Plan to move forward maximizes the value of the Estate as it stands and allows the Liquidating Trustee to pursue the Causes of Action and distribute the proceeds of the estates efficiently and quickly. This liquidating Plan is fair and reasonable and should be approved by the Court.

E. Section 1129(a)(4) - The Plan Provides for Court Approval of Payment of Services and Expenses.

Section 1129(a)(4) of the Bankruptcy Code provides that "[a]ny payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). This subsection requires that all postpetition, pre-

confirmation fees in the bankruptcy case be disclosed and subject to the court's review. *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. 756, 774 (Bankr. D. Nev. 1998) (noting that "[a]ll payments made or to be made by [the debtor] for services or for costs and expenses in or in connection with the case, or in connection with a plan and incident to the case, have been approved by, or are subject to the approval of, the court as reasonable as required by 11 U.S.C. § 1129(a)(4)."); *In re Pomare, Ltd.*, No. 08-01448, 2009 WL 3232851, *7 (Bankr. D. Haw. Oct. 2, 2009) (confirming plan with all post-confirmation fees subject to court approval).

The Court has authorized and approved the retention and interim payment of certain professionals in the chapter 11 case, including Rocky Mountain Advisory, LLC, as restructuring advisor and Parsons Behle & Latimer as chapter 11 counsel. Except as otherwise ordered by the Court, all such fees and expenses and all other accrued fees and expenses of professionals through the Effective Date remain subject to final approval and Allowance by the Court under sections 330 and 331 of the Bankruptcy Code. (Plan §§ 2.2(c) and 5.8.)

The Plan also specifically provides for the review of fees and expenses to be paid to Professionals for pre-Confirmation Date services. Section 11.3 of the Plan provides that all claims for Administrative Expense Claims must be filed no later than 30 days after the Effective Date, and that the Allowed amounts of such fees and expenses shall be determined by the Court.

The foregoing procedures for the Court's review and ultimate determination of the fees and expenses to be paid to professionals participating in the chapter 11 case satisfy the objectives of section 1129(a)(4). *See In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. at 774; *In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (requirements of section 1129(a)(4) satisfied where plan provided for payment of only "allowed" administrative expenses); *In re Future Energy*

Corp., 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988) ("Court approval of payments for services and expenses is governed by various Code provisions – *e.g.* §§ 328, 329, 330, 331, and 503(b) – and need not be explicitly provided for in a Chapter 11 plan."). The Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

F. Section 1129(a)(5) – All Necessary Information Regarding the Directors and Officers of the Debtors Under the Plan Has Been Disclosed.

Section 1129(a)(5) of the Bankruptcy Code requires that (i) the plan disclose the identity and affiliations of the proposed officers and directors of liquidating debtor, (ii) the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy, and (iii) there be disclosure of the identity and compensation of any insiders to be retained or employed by the reorganized debtors. 11 U.S.C. § 1129(a)(5).

The Plan satisfies the foregoing requirements. Section 5.2 of the Plan provides as follows:

> 5.2 **Administration of the Estate**. Under the terms of the Liquidating Trust Agreement, the Liquidating Trustee shall administer the Estate on and after the Effective Date. As of the Effective Date, all officers of the Debtors will be deemed terminated. The Liquidating Trustee shall hold all rights, powers, and duties of a trustee of the Estate under Chapter 11 of the Bankruptcy Code and the sole officer of the Debtors vested with all corporate authority. The Liquidating Trustee shall jointly reduce all property of the Estate and Causes of Action to Cash and distribute such Cash pursuant to the provisions of this Plan. The Liquidating Trustee shall use such Cash to pay the holders of Allowed Claims until such Cash is exhausted.

Section 5.8 further provides as follows:

> 5.8 **Employment of Professionals**. The Liquidating Trustee will be John H. Curtis of Rocky Mountain Advisory, LLC who will be compensated for his post-confirmation services at his customary hourly rate, which is currently $365 per hour, subject to yearly

> increase, for and in the range of $110 to $365 per hour for other employees and staff of Rocky Mountain Advisory, LLC. The Liquidating Trustee may employ attorneys, accountants, or other professionals as he may deem appropriate and pay such professionals reasonable fees and expenses as Liquidating Trust Expenses. Professionals employed by the Liquidating Trustee shall not be subject to Bankruptcy Court approval, and their compensation shall not be subject to Bankruptcy Court approval. The Debtors anticipates that the Liquidating Trustee will engage other professionals at Rocky Mountain Advisory, LLC and Parsons Behle & Latimer as professionals to assist him based on their expertise and familiarity with and prior experience in the Bankruptcy Case.

The Debtors' corporate forms will thus be terminated, and none of the historical officers, directors, or employees will be employed by the Liquidating Trust in capacity as officers or directors (although the Liquidating Trust would be free to employ any person necessary for the prosecution of claim objections, Debtor Causes of Action, or other necessary purpose).

Thus, the Plan properly discloses the identity of John H. Curtis of Rocky Mountain Advisory, LLC, its compensation, and its position to the Court and all parties in interest. Thus, the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

G. Section 1129(a)(6) – The Plan Does Not Contain Rate Changes Subject to the Jurisdiction of any Governmental Regulatory Commission.

Section 1129(a)(6) does not apply because the Debtors were not a rate-regulated service providers.

H. Section 1129(a)(7) – The Plan is in the Best Interests of Creditors and Interest Holders.

Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and stockholders. The best interests test focuses on individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526

U.S. 434 (1999). Under the best interests test, the court must find that each non-accepting creditor will receive or retain value that is not less than the amount such creditor would receive if the debtor were liquidated. *See generally 203 N. LaSalle*, 526 U.S. at 441-42; *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 228 (1996). As section 1129(a)(7) of the Bankruptcy Code makes clear, this liquidation analysis applies only to non-accepting impaired claims or equity interests. If a class of claims or equity interests unanimously accepts the plan, the best interests test is automatically deemed satisfied for all members of that class. Thus, the best interests test is also deemed satisfied for all holders of Claims that voted to accept the Plan.

As set forth in the Liquidation Analysis attached to the Plan, a chapter 11 liquidation of the Debtors' remaining assets results in a distribution that is the same as or, in most cases, higher than the distributions each holder of a Claim will receive in a chapter 7 liquidation using a trustee.

Additionally, there was unanimous acceptance of the Plan with every Class of Claims being deemed to accept because they are unimpaired.

Under the Plan, the Debtors' Estates and all remaining assets will become property of the Liquidating Trust administered by the Liquidating Trustee (subject to the appointment of any succession trustee under the terms of the Liquidating Trust Agreement attached as Exhibit A to the Plan) to conduct an orderly liquidation of the assets with the goal of maximizing returns to creditors. In particular, the Liquidating Trustee will be responsible for liquidating all remaining assets, including evaluating and prosecuting Avoidance Actions and other Debtor Causes of Action, objecting to Claims as appropriate, and making distributions to creditors, all in the Liquidating Trustee's business judgment. (Liquidating Trust Agreement, Ex. A to the Plan.) The

Liquidating Trustee would also be responsible for holding and administering all post-confirmation cash and bank accounts of the Liquidating Trust. (*Id.*)

A summary of the Debtors' remaining assets is set forth in Section 3.2 of the Disclosure Statement. The Debtors' remaining assets are cash derived from (a) cash on hand as of the Petition Date (b) the sale of the Debtor's assets in the Grander Sale; (c) the proceeds of the Debtor's Avoidance Actions. (Disclosure Statement § 3.3.) Some of the Debtor's Avoidance Actions and other Causes of Action are not yet resolved, and so the ultimate recovery net of costs remains subject to some uncertainty. The total cash likely to be available for distribution is estimated in Exhibit B to the Disclosure Statement (the "**Liquidation Analysis**"), which was prepared by the Debtors' financial advisors, Rocky Mountain Advisory, LLC.

As set forth in the Liquidation Analysis, each holder of a Claim will receive the same or more under the Plan than if the case were converted to a case under chapter 7 of the Bankruptcy Code. Under the Liquidation Analysis, holders of Allowed Administrative Expense Claims, Priority Tax Claims, Priority Unsecured Claims, and the Class 2 Secured Claim (Dorsey & Whitney), and General Unsecured Claims will be paid in full with interest. (Plan, §§ 4.1-4.3.) Holders of Equity Interests will receive the remaining cash after the costs of administration. (*Id.* § 4.4, Ex. C.)

In contrast, in a chapter 7 scenario, the recovery of General Unsecured Creditors would likely be lower. (Liquidation Analysis, Disclosure Statement, Ex. A.) If the Case was converted to a case under chapter 7 of the Bankruptcy Code, a chapter 7 trustee would be elected or appointed to liquidate the assets of the Debtor. (*Id.*) The net proceeds of the liquidation, after payment of all administrative expenses and further delay, would be distributed to the respective holders of

Claims against the Debtors according to the priorities established by the Bankruptcy Code, just as in the Plan. (*Id.*; *see also* Disclosure Statement, §§ 4.2-4.4 (discussing alternatives to the Plan and liquidating under chapter 7.)

Creditors who desired to receive a distribution of proceeds from the chapter 7 trustee would be required to file a proof of claim in the chapter 7 case. Secured and Priority Claims would, just as under the Plan, likely be paid in cash, but they would have to wait for the chapter 7 Trustee to make distributions, which if undertaken at this time would cause significant delay. Thus, the Secured Claim and Priority Claims are better off under the Plan. (*Id.*)

In a chapter 7 liquidation, the Secured Claim, Priority Claims, and General Unsecured Claims would be paid in full before any distribution to general unsecured creditors. Funds, if any, remaining after payment of Claims would be distributed pro rata to Holders of Equity Interests. The chapter 7 trustee and his or her new professionals would require significant start-up time and incur significant expenses to become as familiar with the Claims asserted against the Debtors and the Debtors Causes of Action, which the Debtors' professionals are already familiar with and pursuing. This additional burden of professionals' fees, continuing accrual and payment of fees to the U.S. Trustee, and the fees of the chapter 7 trustee would certainly erode the remaining assets of the Estates. Further, the Debtors' current attorneys and restructuring advisor (who will become the Liquidating Trustee) are more likely to persistently pursue recovery in the Causes of Action, thus resulting in a larger recovery for Holders of Equity Interests. Finally, the net available for distribution will also be reduced by the fees of the chapter 7 Trustee, which are calculated as a percentage of distributions. *See* 11 U.S.C. § 326(a).

Accordingly, each holder of an impaired Claim will receive or retain under the Plan, on account of such Claim, property of a value, as of the Effective Date, that is not less than the amount that such Holder would receive or retain if the Debtors were liquidated under chapter 7. Thus, the Plan satisfies the requirements of section 1129(a)(7) of the Bankruptcy Code.

I. Section 1129(a)(8) – The Plan Has Been Accepted by All Impaired Classes, if Any.

Section 1129(a)(8) of the Bankruptcy Code requires that each class of impaired claims or interests accept the plan: "With respect to each class of claims or interests - (A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8).

Section 1126 Bankruptcy Code specifies the requirements for acceptance of the Plan. Under section 1126 of the Bankruptcy Code, only holders of allowed claims in impaired classes of claims that will receive or retain property under a plan of reorganization on account of such claims may vote to accept or reject such plan. Further, "[a] class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan." Finally, a class that does not vote in response to a ballot is deemed to accept. *See In re Ruti-Sweetwater, Inc.*, 836 F. 2d 1263, 1267-68 (10th Cir. 1988) (finding that a secured judgment lien holder who "failed to object to the Plan [thereby] waived their right to challenge the Plan or to assert, after the fact, that the Plan discriminated unfairly and was not fair and equitable").

Here, the Debtors have no impaired Classes of Claims, and thus each Class of Claims is deemed to accept. Class 4 Equity Interests, however, did not accept the Plan and, indeed their vote

was not solicited as it is unnecessary for confirmation pursuant to section 1129(b)(2)(C), which will be discussed further below.

J. Section 1129(a)(9) – The Plan Provides for Payment in Full of Administrative Expense Claims and Priority Tax Claims.

Section 1129(a)(9) of the Bankruptcy Code requires that persons holding certain allowed claims entitled to priority under section 507(a) receive specified treatment under the plan. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) requires a plan to provide as follows:

> (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
>
> (B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—
>
> > (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
> >
> > (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;
>
> (C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—
>
> > (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;
> >
> > (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and
> >
> > (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other

> than cash payments made to a class of creditors under section 1122(b)); and
>
> (D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

11 U.S.C. § 1129(a)(9).

In accordance with sections 1129(a)(9)(A) and (B), Article II of the Plan provides that all Allowed Administrative Claims shall be paid in full in cash on the later of (a) the Effective Date or (b) the date such Administrative Claim becomes due in accordance with its terms. (Plan, §2.2.)

Section 2.3 of the Plan provides with respect to Priority Tax Claims that—

> each holder of an Allowed Priority Tax Claim shall be paid either (i) upon such terms as may be agreed to between the Debtors (prior to the Effective Date) or the Liquidating Trust (on or after the Effective Date) and such holder of an Allowed Priority Tax Claim, (ii) in full in Cash on the later of the Effective Date or the date that such Allowed Priority Tax Claim would have been due if the Bankruptcy Case had not been commenced, or (iii) in regular annual installment payments over a period ending no later than five (5) years after the Petition Date, in accordance with Bankruptcy Code Section 1129(a)(9)(C).

Because the Effective Date will occur less than three years after the Petition Date, Priority Tax Claims will be paid in full in accordance with section 1129(a)(9)(C) of the Bankruptcy Code within 5 years after the Petition Date and on terms no less favorable than General Unsecured Claims.

K. Section 1129(a)(10) – The Plan Has Been Accepted by at Least One Impaired Class Entitled to Vote.

Section 1129(a)(10) of the Bankruptcy Code requires that, if a class of claims is impaired under a plan, at least one class of impaired claims must have voted to accept the plan. 11 U.S.C. § 1129(a)(10). The accepting-impaired class requirement does not apply to classes of equity. The Debtors Plan has no impaired Classes of Claims, and so this requirement is met or inapplicable. Therefore, the Plan meets the requirements of section 1129(a)(10) of the Bankruptcy Code.

L. Section 1129(a)(11) – The Plan is Not Likely to be Followed by Liquidation or the Need for Further Financial Reorganization.

Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition precedent to confirmation, the court determine that the plan is feasible. Specifically, the court must determine that—

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11). The Plan satisfies this requirement in two ways. First, the Debtors' Plan will result without the need for further financial reorganization because it is a plan of liquidation, and once the Liquidating Trust liquidates in accordance with the Plan, then the Plan finishes. Second, the Debtors' plan provides for the controlled liquidation in satisfaction of the Debtors' obligations under the Plan. Thus, the Plan is *per se* feasible because the liquidation is the means for implementation of the Plan.

The Plan therefore satisfies the feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

M. Section 1129(a)(12) – The Plan Provides for Full Payment of all Statutory Fees.

Section 1129(a)(12) of the Bankruptcy Code requires that "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan" 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930,] chapter 123 of title 28" are afforded priority as administrative expenses. *Id.* § 507(a)(2). In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, the Debtors or the Liquidating Trust, as applicable, will pay all fees under 28 U.S.C. § 1930 as they come due as provided in Section 11.12(a) of the Plan.

Thus, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

N. Section 1129(a)(13)–(16) – Certain Subsections Section 1129(a) Are Inapplicable.

The Debtors have no obligation to provide retiree benefits. Section 1129(a)(13) of the Bankruptcy Code does not apply.

The Debtors are not individuals and have no domestic support obligations. Section 1129(a)(14) of the Bankruptcy Code does not apply.

Section 1129(a)(15) of the Bankruptcy Code does not apply because the Debtors were business entities, and not individuals.

Section 1129(a)(16) of the Bankruptcy Code does not apply because the Debtors are not not-for-profit entities.

O. Section 1129(b) – The Plan Meets the "Cram Down" Requirements.

Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where the plan is not accepted by all impaired classes of claims and/or equity

interests. This mechanism is commonly referred to as "cram down." Section 1129(b) provides in pertinent part:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph *if the plan does not discriminate unfairly*, and *is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan*.

11 U.S.C. § 1129(b)(1) (emphasis added). Thus, under section 1129(b), the court may "cram down" a plan over the rejection by impaired classes of claims or equity interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes.

1. The Plan Does Not Discriminate Unfairly with Respect to any Class.

Section 1129(b)(1) of the Bankruptcy Code does not prohibit discrimination between classes; it prohibits only discrimination that is unfair. *See In re 11,111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn. 1990). The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar classes are treated differently without a reasonable basis for the disparate treatment. *See In re Johnston*, 21 F.3d at 328 (holding that a plan's different treatment and classification did not discriminate unfairly because "there were reasonable, nondiscriminatory reasons" for the treatment); *see also In re Buttonwood Partners, Ltd.*, 111 B.R. 57 (Bankr. S.D.N.Y. 1990); *Johns-Manville*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986).

> Discrimination between classes must satisfy four criteria to be considered fair under 11 U.S.C. § 1129(b): (1) the discrimination must be supported by a reasonable basis; (2) the [plan proponent] could not confirm or consummate the Plan without the discrimination; (3) the discrimination is proposed in good faith; and

> (4) the degree of the discrimination is directly related to the basis or rationale for the discrimination.

Liberty Nat'l Enters. V. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship), 115 F.3d 650, 656 (9th Cir. 1997) (citing *Amfac Distrib. Corp. v. Wolff (In re Wolff)*, 22 B.R. 510, 511-12 (B.A.P. 9th Cir. 1982)).

The Plan not "discriminate unfairly" with respect to any impaired Class of Claims. The treatment of the Classes of Claims differ (only slightly), but such differentiation is based upon the different rights of each Class of Claims against or Equity Interests in the Debtors.

These different classes of Claims are dissimilar in their legal nature and priority under applicable law and the Bankruptcy Code. The two classes of unsecured claims are treated differently because Class 1 is afforded priority under the Bankruptcy Code while Class 3 is not, thereby mandating different treatment. Similarly, Class 2 has different claims based on different agreements made with the Debtors and their rights vis-à-vis the Debtor's property, *i.e.*, Dorsey & Whitney LLC's retainer. Therefore, the legal nature of their rights differs justifying treating them differently. Thus, the mild differences in treatment are precisely proportional to the reasonable basis for differentiating among such claims and, in fact, mandatory in the Bankruptcy Code. Accordingly, the treatment of the Claims is reasonable, appropriate, and necessary, and not unfair. The Plan does not "discriminate unfairly."

2. The Plan Is Fair and Equitable

In this case, "cramming down" is only applicable to Class 4 (Equity Interests) because they are the only impaired Class and only Class whose vote was not solicited. Nevertheless, the Plan is fair and equitable under section 1129(b)(2)(C) with respect to Class 3 Equity Interests.

The Plan is fair and equitable with respect to all classes of Claims. Section 1129(b)(2) of the Bankruptcy Code defines the phrase "fair and equitable" as follows:

> (C) With respect to a class of interests—
>
> > (i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or
> >
> > (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

11 U.S.C. § 1129(b)(2)(C) (emphasis added). Here, the Equity Interests will receive cash and then be cancelled, thus they will be impaired. But no class of any junior interests will receive or retain anything on account of their claims or interests (because there is no class junior to common equity). Thus, notwithstanding the Class of Equity Interests not having voted to accept the Plan, the Plan may nevertheless be confirmed under section 1129(b)(2)(C) of the Bankruptcy Code.

III. RESPONSES TO OBJECTIONS

As of the date hereof, the Debtors have not received any objection to the Disclosure Statement or the Plan. The Debtors reserve their right to address any objection to the Plan in a Reply in support of this Motion and at the Confirmation Hearing. The Debtors intend to adduce evidence at the Confirmation Hearing in support of all of the points listed above from their directors, officers, and professionals, as needed, including and without limitation, its CEO, Richard Hague, and John Curtis of Rocky Mountain Advisory, LLC.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Debtors respectfully request that the Court enter the Confirmation Order, confirm the Plan, and grant such other relief as is just and proper.

Dated this 4th day of November, 2024.

PARSONS BEHLE & LATIMER

/s/ Brian M. Rothschild
Brian M. Rothschild
Darren Neilson

Attorneys for Debtors