Docket #0859 Date Filed: 01/23/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
SOUTHCROSS ENERGY PARTNERS, L.P., *et al.*,	)	Case No. 19-10702 (MFW)
Debtors.[1]	)	Jointly Administered
	)	Hearing Date: January 27, 2020 at 10:30 a.m. (prevailing Eastern Time)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE FIRST AMENDED CHAPTER 11 PLAN FOR SOUTHCROSS ENERGY PARTNERS, L.P. AND ITS AFFILIATED DEBTORS

[1] The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective Employer Identification Numbers, are as follows: Southcross Energy Partners, L.P. (5230); Southcross Energy Partners GP, LLC (5141); Southcross Energy Finance Corp. (2225); Southcross Energy Operating, LLC (9605); Southcross Energy GP LLC (4246); Southcross Energy LP LLC (4304); Southcross Gathering Ltd. (7233); Southcross CCNG Gathering Ltd. (9553); Southcross CCNG Transmission Ltd. (4531); Southcross Marketing Company Ltd. (3313); Southcross NGL Pipeline Ltd. (3214); Southcross Midstream Services, L.P. (5932); Southcross Mississippi Industrial Gas Sales, L.P. (7519); Southcross Mississippi Pipeline, L.P. (7499); Southcross Gulf Coast Transmission Ltd. (0546); Southcross Mississippi Gathering, L.P. (2994); Southcross Delta Pipeline LLC (6804); Southcross Alabama Pipeline LLC (7180); Southcross Nueces Pipelines LLC (7034); Southcross Processing LLC (0672); FL Rich Gas Services GP, LLC (5172); FL Rich Gas Services, LP (0219); FL Rich Gas Utility GP, LLC (3280); FL Rich Gas Utility, LP (3644); Southcross Transmission, LP (6432); T2 EF Cogeneration Holdings, LLC (0613); and T2 EF Cogeneration LLC (4976). The debtors' mailing address is 1717 Main Street, Suite 5300, Dallas, TX 75201.

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TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 2
BACKGROUND 3
A. Commencement of the Chapter 11 Cases 3
B. DIP Financing 4
C. Bar Date 5
D. Holdings Litigation and Settlement 6
E. Asset Sales 10
F. Executory Contracts and Unexpired Leases 14
G. Exit Financing 15
H. Solicitation of Plan and Supplemental Solicitation 16
I. Description of Plan 18
J. Voting Results for Plan 19
I. PLAN SATISFIES APPLICABLE PROVISIONS OF BANKRUPTCY CODE 20
A. Plan Complies with Applicable Provisions of Bankruptcy Code (11 U.S.C. § 1129(a)(1)) 20
(i) Plan Satisfies Classification Requirements of Bankruptcy Code (11 U.S.C. §§ 1122 and 1123(a)(1)) 21
(ii) Specification of Unimpaired Classes (11 U.S.C. § 1123(a)(2)) 22
(iii) Treatment of Impaired Classes of Claims and Interests (11 U.S.C. § 1123(a)(3)) 22
(iv) Same Treatment Within Each Class (11 U.S.C. § 1123(a)(4)) 23
(v) Adequate Means of Implementation (11 U.S.C. § 1123(a)(5)) 23
(vi) Charter Provisions (11 U.S.C. § 1123(a)(6)) 26
(vii) Manner of Selection of Officers and Directors and Their Successors (11 U.S.C. § 1123(a)(7)) 26
B. Proponents of Plan Have Complied with Applicable Provisions of Title 11 (11 U.S.C. § 1129(a)(2)) 27
C. Plan was Proposed in Good Faith (11 U.S.C. § 1129(a)(3)) 28
D. Payments Under the Plan Are Subject to Court Approval (11 U.S.C. § 1129(a)(4)) 30

E. Plan Properly Discloses Post-Confirmation Management Services of Certain Individuals (11 U.S.C. § 1129(a)(5)) 31

F. Plan Does Not Require Regulatory Approval of Rate Changes (11 U.S.C. § 1129(a)(6)) 32

G. Plan Satisfies the Best Interests Test (11 U.S.C. § 1129(a)(7)) 32

H. Acceptance by Impaired Classes (11 U.S.C. § 1129(a)(8)) 34

I. Plan Provides for Payment of Administrative and Priority Claims (11 U.S.C. § 1129(a)(9)) 36

J. At Least One Impaired Class Voted in Favor of Plan (11 U.S.C. § 1129(a)(10)) 37

K. Plan Is Feasible and Not Likely to Be Followed by Further Reorganization or Liquidation (11 U.S.C. § 1129(a)(11)) 37

L. Plan Provides for Payment of All Fees Under 28 U.S.C. § 1930 (11 U.S.C. § 1129(a)(12)) 39

M. Continuation of Retiree Benefits (11 U.S.C. § 1129(a)(13)) 39

N. Compliance with Nonbankruptcy Transfer Laws (11 U.S.C. § 1129(a)(16)) 39

II. PLAN SATISFIES CRAMDOWN REQUIREMENTS FOR CLASSES 5, 6, 7, AND 8 (SECTION 1129(B)(2)(B) AND (C)) 40

A. Plan Does Not Unfairly Discriminate with Respect to Class 5, Class 6, Class 7, and Class 8 40

B. Plan Is Fair and Equitable with Respect to Classes 5, 6, and 7 (Section 1129(b)(2)(B)(ii)) 42

C. Plan Is Fair and Equitable with Respect to Class 8 (Section 1129(b)(2)(C)) 42

III. PLAN SATISFIES REMAINING CONFIRMATION REQUIREMENTS 43

A. One Plan (11 U.S.C. § 1129(c)) 43

B. Principal Purpose of Plan (11 U.S.C. § 1129(d)) 43

C. Not Small Businesses Cases (11 U.S.C. 1129(e)) 43

IV. RELEASES, EXCULPATIONS, AND INJUNCTIONS PROVIDED UNDER PLAN ARE APPROPRIATE AND SHOULD BE APPROVED 44

A. Debtor Releases Are Appropriate 45

B. Third Party Releases Are Consensual and Appropriate 49

C. Exculpations Should Be Approved 51

D. Injunctions Are Narrowly Tailored and Should Be Approved 51

CONCLUSION 53

TABLE OF AUTHORITIES

CASES

PAGE(S)

203 N. LaSalle St. P'ship,
190 B.R. 567 (Bankr. N.D. Ill. 1995) 40

In re Adelphia Commc'ns Corp.,
368 B.R. 140 (Bankr. S.D.N.Y. 2007) 44

In re AOV Indus.,
31 B.R. 1005 (D.D.C. 1983), *aff'd in part, rev'd in part*, 792 F.2d 1140 (D.C. Cir. 1986), *vacated in light of new evidence*, 791 F.2d 1004 (D.C. Cir. 1986)..... 32, 33

In re Apex Oil Co.,
118 B.R. 683 (Bankr. E.D. Mo. 1990) 37, 38

In re Armstrong World Indus., Inc.,
348 B.R. 111 (D. Del. 2006) 20, 32, 41

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship (In re 203 N. LaSalle St. P'ship),
526 U.S. 434 (1999) 33

Berkeley Fed. Bank & Trust v. Sea Garden Motel & Apts. (In re Sea Garden Motel & Apts.),
195 B.R. 294 (D.N.J. 1996) 38

In re Block Shim Dev. Co. Company-Irving,
939 F.2d 289 (5th Cir. 1991) 29

In re Bowles,
48 B.R. 502 (Bankr. E.D. Va. 1985) 41

In re Combustion Eng'g, Inc.,
391 F.3d 190 (3d Cir. 2004) 28, 30

Computer Task Grp. Inc. v. Brotby (In re Brotby),
303 B.R. 177 (B.A.P. 9th Cir. 2003) 38

In re Coram Healthcare Corp.,
271 B.R. 228 (Bankr. D. Del. 2001) 29

In re Coram Healthcare Corp.,
315 B.R. 327 (Bankr. D. Del. 2004) 21, 41

CoreStates Bank, N.A. v. United Chem. Techs.,
202 B.R. 33 (E.D. Pa. 1996) 29

In re Credential Corp.,
2010 Bankr. LEXIS 2838 (Bankr. D. Del. May 26, 2010) 30

In re Crowthers McCall Pattern, Inc.,
120 B.R. 279 (Bankr. S.D.N.Y. 1990) 33

In re Drexel Burnham Lambert Grp., Inc.,
138 B.R. 723 (Bankr. S.D.N.Y. 1992) 21, 38

In re Eagle-Picher Indus., Inc.,
203 B.R. 256 (S.D. Ohio 1996) 20, 33

In re Econ. Lodging Sys., Inc.,
205 B.R. 862 (Bankr. N.D. Ohio 1991) 33

In re Eddington Thread Mfg. Co.,
181 B.R. 826 (E.D. Pa. 1995) 38

In re Elm Creek Joint Venture,
93 B.R. 105 (Bankr. W.D. Tex. 1988) 38

In re Exaeris, Inc.,
380 B.R. 741 (Bankr. D. Del. 2008) 45

In re Freymiller Trucking, Inc.,
190 B.R. 913 (Bankr. W.D. Okla. 1996) 41

In re G-1 Holdings, Inc.,
420 B.R. 216 (Bankr. D.N.J. 2009) 46

Gillman v. Continental Airlines (In re Continental Airlines),
203 F.3d 203 (3d Cir. 2000) 50

Hanson v. First Bank of S.D., N.A.,
828 F.2d 1310 (8th Cir. 1981) 28

In re Indianapolis Downs, LLC,
486 B.R. 286 (Bankr. D. Del 2013) 47, 48

In re Jartran, Inc.,
44 B.R. 331 (Bankr. N.D. Ill. 1984) 33

In re Jersey City Med. Ctr.,
817 F.2d 1055 (3d Cir. 1987) 21

John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Parlc Assocs.,
987 F.2d 154 (3d Cir. 1993) 21

In re Johns-Manville Corp.,
68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. MacArthur v. Johns-Manville Corp.*, 837 F.2d. 89 (2d Cir. 1988) 30, 31

Kane v. Johns-Manville Corp., (*In re Johns-Manville Corp.*),
843 F.2d 636 (2d Cir. 1988) 20, 37

In re Lernout & Hauspie Speech Prods., N.V.,
301 B.R. 651 (Bankr. D. Del. 2003) 41

In re Long Ridge Rd. Operating Co., II, LLC,
Case No. 13-13653 (DHS), 2014 WL 886433 (Bankr. D.N.J. Mar. 5, 2014) 51

MacArthur v. Johns-Manville Corp., 837 F.2d. 89 (2d Cir. 1988) 30, 31

In re Master Mortgage Inv. Fund,
168 B.R. 930 (Bankr. W.D. Mo. 1994) 50

In re Matter of Sound Radio, Inc.,
93 B.R. 849 (Bankr. D.N.J. 1988), *aff'd in part, remanded in part on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990) 29, 30

McCormick v. Banc One Leasing Corp. (In re McCormick),
49 F.3d 1524 (11th Cir. 1995) 29

Mercury Capital Corp. v. Milford Conn. Assocs., L.P.,
354 B.R. 1 (Bankr. D. Conn. 2006) 38

In re New Century TRS Holdings, Inc.,
390 B.R. 140 (Bankr. D. Del. 2008) 45, 46

Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.),
200 F.3d 154 (3d Cir. 1999) 29

Prudential Ins. Co. of Am. v. Monnier (In re Monnier Bros.),
755 F.2d 1336 (8th Cir. 1985) 37

In re PWS Holding Corp.,
228 F.3d 224 (3d Cir. 2000) 51

In re Rivers End Apartments,
167 B.R. 470 (Bankr. S.D. Ohio 1994) 37

In re Seaside Eng'g & Surveying, Inc.,
780 F.3d 1070 (11th Cir. 2015) 49

In re Spansion, Inc.,
426 B.R. 114 (Bankr. D. Del. 2010) 46

In re TCI 2 Holdings, LLC,
428 B.R. 117 (Bankr. D.N.J. 2010) 46

In re Toy & Sports Warehouse, Inc.,
37 B.R. 141 (Bankr. S.D.N.Y. 1984) 20

In re Tranel,
940 F.2d 1168 (8th Cir. 1991) 32

In re Tribune Co.,
464 B.R. 126 (Bankr. D. Del. 2011) 47

U.S. v. Reorganized CF&I Fabricators of Utah, Inc.,
518 U.S. 213 (1996) 33

In re Victory Constr. Co.,
42 B.R. 145 (Bankr. C.D. Cal. 1984) 33

In re W.R. Grace & Co.,
446 B.R. 96 (Bankr. D. Del. 2011) 48

In re Wash. Mut., Inc.,
442 B.R. 314 (Bankr. D. Del. 2011) 46, 47, 50, 51

In re World Health Alts. Inc.,
344 B.R. 291 (Bankr. D. Del. 2006) 46

In re Zenith Elecs. Corp.,
241 B.R. 92 (Bankr. D. Del. 1999) 29, 47, 50

STATUTES & RULES

11 U.S.C. § 101(31) 32

11 U.S.C. §§ 105..... 4

11 U.S.C. § 361 4

11 U.S.C. § 362 4

11 U.S.C. § 363..... 4, 10, 11

11 U.S.C. § 364..... 4

11 U.S.C. § 503..... 4

11 U.S.C. § 506 4

11 U.S.C. § 1107(a) 3

11 U.S.C. § 1108 3

11 U.S.C. § 1114 39

11 U.S.C. § 1122 ..... 20, 21, 22
11 U.S.C. § 1122(a) 21
11 U.S.C. § 1123 ..... 20, 21
11 U.S.C. § 1123(a)(1) 21, 22
11 U.S.C. § 1123(a)(2) 22
11 U.S.C. § 1123(a)(3) 22
11 U.S.C. § 1123(a)(4) 23
11 U.S.C. § 1123(a)(5) 23, 26
11 U.S.C. § 1123(a)(6) 26
11 U.S.C. §1123(a)(7) 26, 27
11 U.S.C. § 1123(b) 44
11 U.S.C. § 1123(b)(3) 44
11 U.S.C. § 1123(b)(3)(A) 44, 46
11 U.S.C. § 1125 ..... 17, 27, 28
11 U.S.C. § 1126 ..... 27, 28
11 U.S.C. § 1126(c) 34
11 U.S.C. § 1126(d) 35
11 U.S.C. § 1126(f) 35
11 U.S.C. §1129(a) 27, 40
11 U.S.C. §1129(a)(1) 20, 21
11 U.S.C. § 1129(a)(2) 27, 28
11 U.S.C. §1129(a)(3) 28, 29, 30
11 U.S.C. § 1129(a)(4) 30, 31
11 U.S.C. § 1129(a)(5) 31, 32
11 U.S.C. § 1129(a)(5)(B) 32
11 U.S.C. § 1129(a)(6) 32
11 U.S.C. § 1129(a)(7) 32, 33, 34

11 U.S.C. § 1129(a)(7)(A)(ii) 32
11 U.S.C. § 1129(a)(8) 34, 35, 40
11 U.S.C. § 1129(a)(9) 36
11 U.S.C. § 1129(a)(9)(C) 36
11 U.S.C. § 1129(a)(10) 37
11 U.S.C. § 1129(a)(11) 37, 38, 39
11 U.S.C. § 1129(a)(12) 39
11 U.S.C. § 1129(a)(16) 39, 40
11 U.S.C. § 1129(b) 34, 35, 40, 41
11 U.S.C. § 1129(b)(1) 40, 42
11 U.S.C. § 1129(b)(2)(B)(ii) 42
11 U.S.C. § 1129(b)(2)(C) 42
11 U.S.C. § 1129(b)(2)(C)(i)-(ii) 42
11 U.S.C. § 1129(c) 43
11 U.S.C. § 1129(d) 43
11 U.S.C. § 1129(e) 43
28 U.S.C. § 1930 39
Bankr. R. 1015(b) 4
Bankr. R. 9019 10

OTHER AUTHORITIES

7 COLLIER ON BANKRUPTCY 1129.03[2] (15th rev. ed. 2008) 27
H.R. Rep. No. 95-595, at 412 (1977) 20, 27
H.R. Rep. No. 109-31, at 145 (2005) 40
S. Rep. No. 95-989, at 126 (1978) 20, 27

Southcross Energy Partners, L.P. ("**Southcross**"), Southcross Energy Partners GP, LLC (the "**Southcross GP**"), and Southcross's wholly owned direct and indirect subsidiaries, each of which is a debtor and debtor in possession (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), hereby file this memorandum of law in support of confirmation of the *First Amended Chapter 11 Plan of Southcross Energy Partners, L.P. and its Affiliated Debtors*, dated January 7, 2020 [D.I. 816] (as may be further amended, modified, or supplemented from time to time in accordance with the terms thereof, the "**Plan**"),[1] pursuant to section 1129 of title 11 of the United States Code (as amended, the "**Bankruptcy Code**"). This memorandum of law is supported by the following:

(a) *Certification of Leanne V. Rehder Scott with Respect to Tabulation of Votes on the First Amended Chapter 11 Plan for Southcross Energy Partners, L.P. and its Affiliated Debtors* [D.I. 850] (the "**Tabulation Certification**");

(b) *Declaration of Ed Mosley in Support of Confirmation of the First Amended Chapter 11 Plan of Southcross Energy Partners, L.P. and its Affiliated Debtors* [D.I. 851] (the "**Mosley Declaration**"); and

(c) *Declaration of Robert A. Pacha in Support of Confirmation of the First Amended Chapter 11 Plan of Southcross Energy Partners, L.P. and its Affiliated Debtors* [D.I. 852] (the "**Pacha Declaration**").

In further support of confirmation of the Plan, the Debtors respectfully state as follows:

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan, the *Disclosure Statement for Chapter 11 Plan for Southcross Energy Partners L.P. and its Affiliated Debtors* [D.I. 677] (the "**Original Disclosure Statement**"), or the *Disclosure Statement Supplement for First Amended Chapter 11 Plan for Southcross Energy Partners L.P. and its Affiliated Debtors* [D.I. 818] (the "**Disclosure Statement Supplement**" and, together with the Original Disclosure Statement, the "**Disclosure Statement**"), as applicable.

PRELIMINARY STATEMENT

1. Throughout the Chapter 11 Cases, the Debtors have worked tirelessly to build a consensus among their major economic stakeholders. After substantial discussions and arm's length and good-faith negotiations with the Ad Hoc Group (whose members hold approximately 74% of the Prepetition Revolving Credit Facility Claims and approximately 83% of the Prepetition Term Loan Claims) and other parties in interest, the Debtors filed the Plan, support for which was memorialized in a cooperation agreement dated December 12, 2019 (the "**Cooperation Agreement**") signed by 100% of the holders of Roll-Up DIP Claims (the "**Consenting Roll-Up DIP Lenders**"). The Cooperation Agreement provides, among other things, that each Consenting Roll-Up DIP Lender:

- consents to the treatment of Allowed Roll-Up DIP Claims set forth in the Original Plan, which may be amended in a manner that is reasonably acceptable to the Debtors and the Majority Ad Hoc Group in accordance with Section 14.3 of the Original Plan; provided that each holder of an Allowed Roll-Up DIP Claim continues to receive its Pro Rata Share of any such amended treatment;

- shall, if such Consenting Roll-Up DIP Lender holds any other Claims, including, without limitation, Prepetition Revolving Credit Facility Claims and/or Prepetition Term Loan Claims, timely vote each such claim in favor of the Original Plan and shall not withdraw, amend, or revoke such vote; and

- shall not, directly or indirectly, object to, delay, impede, or take any other action to interfere with the acceptance, implementation, confirmation, or consummation of the Original Plan, including by filing any motion or pleading with the Court that is not materially consistent with the Cooperation Agreement, whether in its capacity as a holder of Allowed Roll-Up DIP Claims or other Claims.

2. With the assistance of the legal and financial advisors to the Ad Hoc Group, the Debtors were able to obtain signatures to the Cooperation Agreement from 100% of holders of DIP Roll-Up Loans, including all members of the Ad Hoc Group,

which provides the Debtors with a clear and consensual path towards emergence from chapter 11. Moreover, the Plan is overwhelmingly supported by holders of Claims in Voting Classes, as holders of 100% of Allowed Prepetition Revolving Credit Facility Claims and 100% of Allowed Prepetition Term Loan Claims have voted to accept the Plan.

3. Finally, the Debtors received three formal objections, and certain informal comments, to the Plan. The Debtors worked constructively with such parties to develop mutually acceptable language in the Confirmation Order, as detailed in Exhibit A hereto. With the addition of such language, the Debtors believe that the Plan is fully consensual.

4. Accordingly, because the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code and is in the best interests of their estates and economic stakeholders, the Debtors respectfully request that the Court confirm the Plan and enter the Confirmation Order.

BACKGROUND

A. Commencement of the Chapter 11 Cases

5. On April 1, 2019 (the "**Petition Date**"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "**Court**"). The Debtors have continued in possession of their property and have continued to operate and manage their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. No request has been made for the appointment of a trustee or examiner, and no official committee has been appointed in the Chapter 11 Cases.

7. The Chapter 11 Cases are being jointly administered pursuant to Bankruptcy Rule 1015(b) and the *Order Directing Joint Administration of Chapter 11 Cases* [D.I. 48] entered by the Court on April 2, 2019 in each of the Chapter 11 Cases.

B. DIP Financing

8. On the Petition Date, the Debtors filed the *Motion of Debtors for Entry of Interim and Final Orders Pursuant To 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, 506, and 507, (i) Authorizing the Debtors to Obtain Senior Secured Superpriority Post-petition Financing, (ii) Granting Liens and Superpriority Administrative Expense Claims, (iii) Authorizing the Use of Cash Collateral, (iv) Granting Adequate Protection, (v) Modifying the Automatic Stay, (vi) Scheduling Final Hearing, and (vii) Granting Related Relief* [D.I. 14] (the "**DIP Financing Motion**"). Pursuant to the DIP Financing Motion, the Debtors sought authority to, among other things, obtain debtor-in-possession credit financing in an aggregate principal amount of up to $255 million to be funded by certain of the Prepetition Term Loan Lenders (the "**DIP Lenders**") under a secured term loan and letter of credit facility (the "**DIP Facility**") consisting of (a) new money term loans (the "**DIP Term Loans**") in an aggregate principal amount of up to $72.5 million, (b) letter of credit term loans (the "**DIP LC Loans**") in an aggregate principal amount of up to $55 million, the proceeds of which were proposed to cash-collateralize prepetition letters of credit issued (or deemed issued) under a letter of credit subfacility in an aggregate principal amount of up to $55 million, and (c) roll-up term loans proposed to refinance dollar-for-dollar prepetition term loans held by the DIP Lenders in the aggregate amount of $127.5 million.

9. The DIP Financing Motion also requested authority to, among other things, (a) grant the DIP Agent valid, enforceable, non-avoidable, and automatically and

fully perfected liens and security interests to secure obligations under the financing arrangements, (b) grant superpriority administrative claims to the DIP Lenders and the agent for the DIP Facility, and (c) continue to use the Cash Collateral (as defined in the DIP Financing Motion).

10. The Court granted the relief requested in the DIP Financing Motion on an interim basis on April 2, 2019 [D.I. 59] and on a final basis on May 7, 2019 [D.I. 200] (the "**Final DIP Order**"). In addition, since the entry of the Final DIP Order, the DIP Facility has been amended seven times to, among other things, extend certain milestones thereunder, extend the maturity date of the DIP Facility to April 30, 2020, and permit the acquisition of the Acquired Companies in connection with the Settlement with Holdings (each such term as defined herein).

11. On December 6, 2019, the Court entered the *Order Approving Stipulation Regarding Modification to Adequate Protection Payments* [D.I. 734] approving the stipulation attached thereto as Exhibit 1, which provides, among other things, that notwithstanding paragraph 14(c) of the Final DIP Order, the Debtors shall not be required to provide adequate protection to the Prepetition Agents for the benefit of the Prepetition Secured Parties in the form of Adequate Protection Payments (each as defined in the Final DIP Order) that have accrued as of or may accrue after November 29, 2019.

C. Bar Date

12. On May 22, 2019, the Debtors filed the *Motion of Debtors for Entry of an Order Establishing Deadlines and Procedures for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof* [D.I. 224] (the "**Bar Date Motion**"). On June 10, 2019, the Court entered an order approving the Bar Date Motion [D.I. 260] (the "**Bar Date Order**"). Pursuant to the Bar Date Order, the deadline for creditors to file a proof

of claim ("**Proof of Claim**") against any of the Debtors was July 19, 2019 at 5:00 p.m. (prevailing Eastern Time). Solely with respect to governmental units, the deadline to file a Proof of Claim against the Debtors was September 30, 2019 at 5:00 p.m. (prevailing Eastern Time).

D. Holdings Litigation and Settlement

13. The Debtors derived a material portion of their revenue through long-term, fixed-rate contracts with certain Southcross Holdings Entities.

14. *First*, Debtor FL Rich Gas Services, LP ("**FL Services**") and non-Debtor Frio LaSalle Pipeline, LP ("**Frio LaSalle**"), a subsidiary of Holdings, were party to a Gas Gathering and Processing Agreement, dated August 1, 2014 (the "**Intercompany GPA**"), pursuant to which FL Services provided processing and transportation services for rich natural gas (*i.e.*, natural gas with high concentrations of methane and ethane) delivered from Holdings' Lancaster and Valley Wells systems. Frio LaSalle was not obligated to deliver to Southcross a minimum volume of gas from the Lancaster system for processing under the Intercompany GPA, but had historically taken advantage of the Intercompany GPA to satisfy its obligations to process and transport rich natural gas that its own counterparties delivered. In 2018, Southcross earned $10.8 million in gross margin under the Intercompany GPA in connection with the Lancaster system.

15. *Second*, FL Services and Frio LaSalle amended the Intercompany GPA on January 1, 2015 to provide for a minimum volume commitment with respect to the Valley Wells system. As amended, the Intercompany GPA required Frio LaSalle to deliver and pay FL Services to process a minimum of 35.0 million cubic feet of gas per day. In 2018, Southcross earned $11.9 million in gross margin under the Intercompany GPA in connection with the Valley Wells system. Frio LaSalle's obligations—including

its minimum volume commitments—under the Intercompany GPA ran until August 1, 2024.

16. *Third*, FL Services and Frio LaSalle were party to a Gas Gathering and Treating Agreement, dated May 1, 2015 (the "**FL Rich Gas Services GTA**"), pursuant to which FL Services provided gathering, treating, and compression services for sour natural gas (*i.e.*, natural gas with significant amounts of hydrogen sulfide) delivered from Southcross's Valley Wells system.[2] The FL Rich Gas Services GTA required Frio LaSalle to deliver and pay FL Services for (a) treatment and compression of 60.0 million cubic feet of gas per day and (b) redelivery of 26.5 million cubic feet of treated natural gas per day. In 2018, Southcross earned $13.1 million in gross margin under the FL Rich Gas Services GTA. Frio LaSalle's obligations under the FL Rich Gas Services GTA ran until April 30, 2023.

17. *Fourth*, FL Services and certain Holdings subsidiaries were parties to agreements related to gas compression equipment in the Lancaster system with a capacity of 32,757 horsepower, which Holdings sold to FL Services in May 2015. Under a Master Compression Services Agreement dated May 1, 2015 (the "**MCSA**"), FL Services charged Frio LaSalle $21.31 per horsepower-month for use of the equipment to compress gas as part of Holdings' Lancaster system. Under a separate Master Services Agreement, also dated May 1, 2015, Southcross GP charged FL Services $5.38 per horsepower-month for operating costs associated with the compression system. In 2018, Southcross earned $6.0 million in gross margin under the Lancaster compression agreements. Frio LaSalle's obligations under the MCSA ran until April 30, 2023.

[2] In 2015, the Valley Wells system was sold by the Southcross Holdings Entities to FL Services.

18. On August 12, 2019, the Debtors commenced two actions in the Court under adversary proceeding nos. 19-50283 (MFW) and 19-50286 (MFW) (the "**Adversary Proceedings**"). In the Adversary Proceedings, FL Services asserted claims against the Southcross Holdings Entities (and one of their former subsidiaries) alleging actual and constructive fraudulent transfers under the Texas Uniform Fraudulent Transfer Act, based on various transactions occurring between FL Services and the Southcross Holdings Entities since 2015, *see* Adv. No. 19-50283 (MFW) (Bankr. D. Del.), and, in a separate action, sought a declaratory judgment against Frio LaSalle for breach of contract and the implied duty of good faith and fair dealing under Texas law related to the Intercompany GPA. *See* Adv. No. 19-50286 (MFW).

19. In order to resolve the Adversary Proceedings in a consensual and efficient manner, the Debtors, in consultation with the Ad Hoc Group, engaged in constructive discussions with the Southcross Holdings Entities regarding the terms of a potential value-maximizing settlement for the benefit of the Debtors' estates and their economic stakeholders. The Debtors believed that the resolution of the Adversary Proceedings and all claims and obligations under the Intercompany Contracts would allow the Debtors to maximize value in their sale efforts (as described below) by removing concerns relating to the Intercompany Contracts without the need to continue prosecuting complex and expensive litigation when the outcome cannot be assured. Indeed, certain buyers had expressed their reluctance to ascribe full value for the Debtors' assets that were the subject of pending litigation (*i.e.*, the Intercompany Contracts). As a result, the disputes with the Southcross Holdings Entities created uncertainty in the Debtors' marketing process, particularly in light of how much revenue the Debtors

derived from the Intercompany Contracts. Accordingly, the Debtors believed that a settlement of the Adversary Proceedings would significantly benefit their estates by removing the cloud overhanging their assets and facilitating a cleaner and more predictable marketing process. On September 16, 2019, the Debtors entered into an agreement in principle with the Southcross Holdings Entities (the "**Settlement**"). The material terms of the Settlement include the following:

- FL Services granted a claim against the Acquired Companies in the amount of $60 million, which claim was secured by a lien on substantially all assets of the Acquired Companies;
- 100% of the equity interests of the following companies were transferred to the Debtors: (a) Frio LaSalle; (b) Frio LaSalle GP, LLC, which is the sole general partner of Frio LaSalle; (c) Southcross Midstream Utility, LP; and (d) Southcross Midstream T/U GP, LLC, which is the sole general partner of Southcross Midstream Utility, LP (collectively, the "**Acquired Companies**");
- The Southcross Holdings Entities transferred $22.5 million in cash to the Debtors;
- The Parties agreed to terminate all Intercompany Contracts other than (a) the Shared Services Agreement and (b) Intercompany Contracts between the Acquired Companies and the Debtors that the Debtors elected not to terminate, and all Customer Contracts were indirectly transferred to the Debtors pursuant to the contribution of the Acquired Companies;
- Each of the Debtors (together with their subsidiaries) and the Southcross Holdings Entities (together with the non-Debtor affiliates of Holdings) agreed to comprehensive, unrestricted, mutual releases of all claims against each other party to the Settlement, together with (a) such party's current and former officers, directors, shareholders, employees, and professionals (each in their capacity as such), and (b) all non-Debtor affiliates of Holdings, and their current and former officers, directors, shareholders, employees, and professionals (each in their capacity as such); and
- The Debtors sought to dismiss the Adversary Proceedings with prejudice.

20. On September 25, 2019, the Court entered an order approving the Settlement pursuant to Bankruptcy Rule 9019 [D.I. 503]. On October 1, 2019, the Settlement closed and the Court entered two orders dismissing the Adversary Proceedings. *See Order Approving Stipulation Dismissing Adversary Proceeding*, Adv. Case No. 19-50283, D.I. 18 (MFW) (Bankr. D. Del. Oct. 2, 2019); *Order Approving Stipulation Dismissing Adversary Proceeding*, Adv. Case No. 19-50286, D.I. 18 (MFW) (Bankr. D. Del. Oct. 2, 2019).

E. Asset Sales

21. The Debtors formally retained Evercore Group L.L.C. ("**Evercore**") on March 12, 2019, and commenced an extensive marketing process for the potential sale of all or substantially all of the Debtors' assets (the "**Assets**") under section 363 of the Bankruptcy Code. After being retained, Evercore reached out to potential purchasers to explore a sale of the Assets. Over the course of the months that followed, Evercore contacted over 65 potential purchasers, and the Debtors executed non-disclosure agreements with over 35 of those parties with respect to a sale of all or some of the Assets. Evercore provided additional details to these parties, including access to confidential diligence materials.

22. In May 2019, the Debtors received, in accordance with the case milestones set forth in the DIP Credit Agreement, non-binding indications of interest from 21 parties for all or some of the Assets. After evaluating the non-binding indications of interest with Evercore and their other advisors, the Debtors and the Required Lenders (as defined in the DIP Credit Agreement) determined that the continuation of the marketing and sale process would maximize the realizable value of the Assets and recoveries for the benefit of the Debtors' estates and stakeholders. In doing so, the Debtors and Evercore arranged

for such parties to meet with management and provided such parties with additional data room access and opportunities to make diligence requests.

23. The Debtors advanced 28 parties (including seven parties that did not formally submit a non-binding indication of interest in the first round, but that expressed interest in continuing in the process) to the second round of the marketing and sale process. Evercore continued to provide additional due diligence detail to these parties and hosted 19 management presentations for such potential bidders.

24. On May 22, 2019, the Debtors filed with the Court the *Motion of Debtors for Entry of Orders (i)(a) Approving Bidding Procedures for Sale of Debtors' Assets, (b) Authorizing the Selection of a Stalking Horse Bidder, (c) Approving Bid Protections, (d) Scheduling Auction for, and Hearing To Approve, Sale of Debtors' Assets, (e) Approving Form and Manner of Notices of Sale, Auction, and Sale Hearing, (f) Approving Assumption and Assignment Procedures, and (g) Granting Related Relief and (ii)(a) Approving Sale of Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances, (b) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases, and (c) Granting Related Relief* [D.I. 225] (the "**Bidding Procedures Motion**").

25. On June 13, 2019, the Court entered an order approving the Bidding Procedures Motion [D.I. 324] (the "**Bidding Procedures Order**"). Pursuant to the Bidding Procedures Order, the Debtors obtained a pathway to sell all of their right, title, and interest in and to the Assets free and clear of any pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon to the maximum extent permitted by section 363 of the Bankruptcy Code, with such pledges, liens, security

interests, encumbrances, claims, charges, options, and interests to attach to the net proceeds of the sale of the Assets with the same validity and priority as such pledges, liens, security interests, encumbrances, claims, charges, options, and interests applied against the Assets. The Bidding Procedures Order also authorized the Debtors, in the exercise of their business judgement (in consultation with the Consulting Parties (as defined in the Bidding Procedures Order)), to (a) agree with any Qualified Bidder (as defined in the Bidding Procedures Order) that such Qualified Bidder shall be the stalking horse bidder (with respect to the Assets or lot thereof) and (b) enter into a definitive agreement with such Stalking Horse Bidder (as defined in the Bidding Procedures Order) subject to the terms and conditions set forth in the Bidding Procedures Order.

26. The Debtors filed two motions to designate Qualified Bidders as Stalking Horse Bidders for specific lots of Assets. *First*, on August 23, 2019, the Debtors filed the *Motion of Debtors For Entry of an Order (I) Designating Stalking Horse Bidder in Connection with the Mississippi and Alabama Assets, (II) Approving Expense Reimbursement, and (III) Granting Related Relief* [D.I. 439] (the "**Magnolia Stalking Horse Motion**"), which requested authority to designate Magnolia Infrastructure Holdings, LLC ("**Magnolia**") as the Stalking Horse Bidder with respect to the sale of the Debtors' assets located in Mississippi and Alabama (collectively, the "**MS/AL Assets**") identified in the form of asset purchase agreement attached to the Magnolia Stalking Horse Motion as Exhibit A. *Second*, on August 24, 2019, the Debtors filed the *Motion of Debtors For Entry of an Order (I) Designating Stalking Horse Bidder in Connection with the Corpus Christi Pipeline Network Assets, (II) Approving Bid Protections, and (III) Granting Related Relief* [D.I. 440] (the "**Kinder Stalking Horse Motion**"), which

requested authority to designate Kinder Morgan Tejas Pipeline LLC ("**Kinder Morgan**") as the Stalking Horse Bidder with respect to the sale of the Debtors' Corpus Christi Pipeline Network assets (the "**CCPN Assets**") identified in the form of the asset purchase agreement attached to the Kinder Stalking Horse Motion as Exhibit A. On August 30, 2019, the Court entered orders approving the Magnolia Stalking Horse Motion [D.I. 454] and the Kinder Stalking Horse Motion [D.I. 455]. The Debtors filed revised asset purchase agreements with respect to the CCPN Assets and MS/AL Assets on September 13, 2019 [D.I. 470, 471].

27. The Debtors did not receive any Qualified Bids for the MS/AL Assets or the CCPN Assets other than the Stalking Horse Bids from Magnolia and Kinder Morgan, respectively. As a result, and in accordance with the Bidding Procedures Order, the Debtors cancelled the Auctions for the MS/AL Assets and CCPN Assets and determined that Magnolia and Kinder Morgan were the Successful Bidders (as defined in the Bidding Procedures Order) for the MS/AL Assets and CCPN Assets, respectively. On October 22, 2019, the Court approved the sales of the CCPN Assets and the MS/AL Assets, which were sold for $76 million and $31.5 million, respectively [D.I. 595–596].

28. On November 19, 2019, the Debtors filed the *Notice of Closing of Sale of CCPN Assets to Kinder Morgan Tejas Pipeline LLC* [D.I. 707], which was subsequently amended on November 21, 2019, by the *Amended Notice of Closing of Sale of CCPN Assets to Kinder Morgan Tejas Pipeline LLC* [D.I. 711] (the "**CCPN Closing Notice**"). The CCPN Closing Notice provided notice that, on November 6, 2019, in accordance with the CCPN Sale Order, the CCPN Sale closed and attached thereto as Exhibit A the Amended Final Assumed Contracts Schedule (as defined therein).

29. On December 20, 2019, the Debtors filed the *Notice of Closing of Sale of MS/AL Assets to Magnolia Infrastructure Holdings, LLC* [D.I. 781] (the "**MS/AL Closing Notice**"). The MS/AL Closing Notice provided notice that, on December 16, 2019, in accordance with the MS/AL Sale Order, the MS/AL Sale closed and attached thereto as Exhibit A the Final Assumed Contracts Schedule (as defined therein).

F. Executory Contracts and Unexpired Leases

30. The Debtors filed four cure notices during the Chapter 11 Cases. On June 13, 2019, the Debtors filed and served on each applicable counterparty the *Potential Assumption and Assignment Notice* [D.I. 327]. On August 15, 2019, the Debtors filed and served on each applicable counterparty the *Supplemental Assumption and Assignment Notice* [D.I. 429]. On September 23, 2019, the Debtors filed and served on each applicable counterparty the *Second Supplemental Notic*e [D.I. 496]. On November 18, 2019, the Debtors filed and served on each applicable counterparty the *Third Supplemental Notice* [D.I. 705].

31. On December 2, 2019, in accordance with the Disclosure Statement Order, the Debtors filed and served on the applicable counterparties the *Notice of Rejected Contracts and Leases* [D.I. 725], including the Schedule of Rejected Contracts and Leases attached thereto as Exhibit A, setting forth the contracts and leases the Debtors intend to reject, subject to the Debtors' right under the Disclosure Statement Order and Section 10.1 of the Original Plan (and Section 10.1 of the Plan) to remove any contract or lease from the Schedule of Rejected Contracts and Leases up until the commencement of the Confirmation Hearing. On January 13, 2020, the Debtors filed the *Notice of Supplemental Schedule of Rejected Contracts and Leases* [D.I. 829]. To the extent that any of the executory contracts and unexpired leases of the Debtors are not listed on the

Schedule of Rejected Contracts and Leases (as supplemented) prior to the commencement of the Confirmation Hearing, those executory contracts and unexpired leases of the Debtors shall be assumed under the Plan.

G. Exit Financing

32. In October 2019, the Debtors, with the assistance of their advisors, commenced an extensive process to obtain exit financing proposals from various financial institutions in preparation for their emergence from bankruptcy. This process involved broad-based marketing procedures led by experienced investment banking professionals at Evercore. However, notwithstanding these extensive efforts, the Debtors were unable to obtain exit financing from a third party. Ultimately, the Debtors reached an agreement with the Initial Exit Lenders (as defined in the Exit Financing Term Sheet (as defined herein)) establishing the terms for obtaining commitments for approximately $65 million in Exit Financing necessary to consummate the Plan.

33. The Exit Facility contemplates the incurrence of first-lien senior secured credit facilities (together, the "**Exit Credit Facility**") in an aggregate principal amount of up to $65,000,000, consisting of (a) a revolving credit facility in an aggregate principal amount at any time outstanding up to $30,000,000 (the "**Revolving Commitments**" and, the loans extended thereunder, "**Revolving Loans**") and (b) a single-draw term loan facility in an aggregate principal amount of up to $35,000,000 (the "**Term Commitments**" and, the loans extended thereunder, "**Term Loans**"), the proceeds of which will be used to cash-collateralize a letter of credit subfacility (the "**Letter of Credit Subfacility**" and, collectively with the Exit Credit Facility, the "**Exit Financing**"). The Exit Financing will be incurred upon the Closing Date (as defined in the Exit Financing Motion) and will be used for, among other things, working capital

requirements, general corporate purposes, and the cash collateralization of letters of credit or, following the Closing Date, for use as Alternate Cash Collateral (as defined in the Exit Financing Motion[3]). The terms of the Exit Financing are described with more particularity in the Exit Financing Motion, the amended term sheet attached to the *Notice of Amended Exit Financing Term Sheet* [D.I. 793] (the "**Exit Financing Term Sheet**"), and the form of Exit Credit Facility Agreement filed as Exhibit G to the *Notice of Filing Plan Supplement to the Debtors' First Amended Chapter 11 Plan for Southcross Energy Partners L.P. and its Affiliated Debtors* [D.I. 830] (the "**Plan Supplement**").

34. As set forth in greater detail in the syndication procedures described in the Exit Financing Term Sheet, the Initial Exit Lenders, in consultation with the Debtors, broadly syndicated the Exit Credit Facility to holders of Allowed Roll-Up DIP Claims, Allowed Prepetition Revolving Credit Facility Claims, and Allowed Prepetition Term Loan Claims. The Exit Financing will be provided by the Initial Exit Lenders and each other bank, financial institution, and other institutional lender that has made a commitment to the Exit Credit Facility pursuant to those syndication procedures. On January 7, 2020, the Court approved the Exit Financing Motion and entered the *Order (I) Authorizing Entry into the Exit Financing Commitment Letter, (II) Approving Alternate Transaction Fee, and (III) Granting Related Relief* [D.I. 815].

H. Solicitation of Plan and Supplemental Solicitation

35. On November 7, 2019, the Court entered an order [D.I. 674] (the "**Disclosure Statement Order**") approving, among other things, the Original Disclosure

[3] *See Debtors' Motion For Entry of an Order (I) Authorizing Entry Into the Exit Financing Commitment Letter, (II) Approving Alternate Transaction Fee, and (III) Granting Related Relief* [D.I. 769] (the "**Exit Financing Motion**").

Statement and certain solicitation, notice, balloting, and confirmation procedures in the Chapter 11 Cases. On November 8, 2019, the Debtors filed solicitation versions of the Original Plan [D.I. 675] and Original Disclosure Statement [D.I. 677] and commenced the original solicitation process with the goal of confirming the Original Plan in the first half of December 2019.

36. Shortly thereafter, the Debtors determined that the Original Plan and Original Disclosure Statement required amendment and/or supplementation to ensure that all parties in interest, particularly the creditors in the Voting Classes, would have "adequate information" within the meaning of section 1125 of the Bankruptcy Code in advance of the Voting Deadline and the Confirmation Hearing. Based on the non-renewal of a material customer contract, among other factors, the Debtors, in consultation with their professionals, revised the Financial Projections and Valuation exhibits to the Original Disclosure Statement and made certain other changes to the Original Plan. Accordingly, on December 16, 2019, the Debtors filed the first amended Plan and the Disclosure Statement Supplement [D.I. 764, 766].

37. Simultaneously therewith, the Debtors filed the *Debtors' Motion for Entry of an Order (i) Approving the Debtors' Continued Solicitation of the Amended Chapter 11 Plan, (ii) Approving the Adequacy of the Disclosure Statement Supplement in Connection with the Amended Chapter 11 Plan, (iii) Establishing Certain Deadlines and Procedures in Connection with Confirmation of the Amended Chapter 11 Plan, and (iv) Granting Related Relief* [D.I. 768] (the "**Continued Solicitation Motion**"). Through the Continued Solicitation Motion, the Debtors sought entry of an order approving, among other things, the Disclosure Statement Supplement, a revised confirmation

timeline, and certain supplemental solicitation procedures. Specifically, in light of the amendments to the Plan, the Continued Solicitation Motion sought authority to re-solicit holders of claims in the Voting Classes (the "**Supplemental Solicitation**").

38. On January 7, 2020, the Court entered an order approving the Continued Solicitation Motion [D.I. 814] (the "**Continued Solicitation Order**"), and the Debtors filed solicitation versions of the Plan and Disclosure Statement Supplement [D.I. 816, 818] and commenced the Supplemental Solicitation. Pursuant to the terms of the Continued Solicitation Order, to the extent that a holder of a Claim in a Voting Class cast a new Ballot on the Plan in connection with the Supplemental Solicitation, such Ballot amends and supersedes any and all prior Ballots submitted by such holder. However, if any holder of a claim in a Voting Class did not submit a new Ballot, such holder's previously submitted Ballot (if any) remains binding.

39. On January 9, 2020, the Debtors filed the Plan Supplement [D.I. 826], and on January 14, 2020, the Debtors filed an amended Plan Supplement [D.I. 830].

I. Description of Plan

40. The Plan provides for a reorganization of the Debtors, the preservation of their valuable South Texas Assets, the continuation of their businesses, and the saving of jobs. Specifically, the Plan contemplates, among other things, (a) the incurrence of a new-money Exit Credit Facility in the amount of up to $65 million, as described above, (b) holders of Allowed Roll-Up DIP Claims receiving their Pro Rata Share of 84.4% of the New Series A Preferred Units, (c) holders of Allowed Prepetition Revolving Credit Facility Claims receiving their Pro Rata Share of (i) 15.6% of the New Series A Preferred Units and (ii) 15.6% of the New Common Units, and (d) holders of Allowed Prepetition Term Loan Claims receiving their Pro Rata Share of 84.4% of the New

Common Units. The New Common Units will be subject to dilution in connection with any management incentive plan that may be adopted by the New Board in accordance with Section 7.4 of the Plan.

41. Upon emergence, the Reorganized Debtors' capital structure will consist of (a) up to $65 million in aggregate principal amount of the Exit Credit Facility, (b) New Series A Preferred Units with an aggregate initial liquidation preference equal to approximately $152,658,325, (c) New Series B Preferred Units with an aggregate initial liquidation preference to be determined in accordance with the terms of the Exit Credit Facility, and (d) New Common Units. This new capital structure will, as described herein and in the Mosley Declaration and Pacha Declaration, reduce the Debtors' annual interest expense, thereby enabling them to devote more capital resources to their operations and succeed in the highly competitive midstream industry.

J. Voting Results for Plan

42. Promptly following entry of the Disclosure Statement Order, Kurtzman Carson Consultants LLC ("**KCC**"), the notice, claims, solicitation, and balloting agent retained by the Debtors in the Chapter 11 Cases, commenced distribution of the Original Disclosure Statement, the Plan, Ballots, and related solicitation materials to the holders of Claims eligible to vote on the Plan. In addition, promptly following entry of the Continued Solicitation Order, KCC commenced the Supplemental Solicitation in the manner described above. As evidenced by the Tabulation Certification, the Plan has been overwhelmingly accepted by all classes of Claims eligible to vote on the Plan.

ARGUMENT

I. PLAN SATISFIES APPLICABLE PROVISIONS OF BANKRUPTCY CODE

43. Confirmation requires that the Debtors demonstrate that the Plan satisfies the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006). As set forth below, and as will be demonstrated at the Confirmation Hearing, the Plan complies with all relevant sections of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules, as well as applicable nonbankruptcy law.

A. Plan Complies with Applicable Provisions of Bankruptcy Code (11 U.S.C. § 1129(a)(1))

44. Section 1129(a)(1) of the Bankruptcy Code requires that the Plan "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1); *see also In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 270–13 (S.D. Ohio 1996) (examining each requirement of chapter 11 to demonstrate that Bankruptcy Code section 1129(a)(1) was satisfied); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) (stating that "[i]n order for a plan of reorganization to pass muster . . . it must comply with all the requirements of Chapter 11"). The legislative history of section 1129(a)(1) of the Bankruptcy Code explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, including, principally, rules governing the classification of claims and interests and the contents of a plan. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess., at 412 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., at 126 (1978); *see also Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 648–49 (2d Cir. 1988) ("[T]he legislative history of subsection 1129(a)(1) suggests that Congress intended the phrase 'applicable

provisions' in this subsection to mean provisions of Chapter 11 that concern the form and content of reorganization plans"); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) ("The 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."). The Debtors respectfully submit that the Plan complies with sections 1122 and 1123 of the Bankruptcy Code in all respects.

(i) Plan Satisfies Classification Requirements of Bankruptcy Code (11 U.S.C. §§ 1122 and 1123(a)(1))

45. Section 1123(a)(1) of the Bankruptcy Code requires that a plan classify all claims (with the exception of certain priority claims) and all interests, and that such classification comply with section 1122 of the Bankruptcy Code. *See* 11 U.S.C. §§ 1123(a)(1) and 1122. Section 1122(a) of the Bankruptcy Code, in turn, provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to other claims or interests of such class." 11 U.S.C. § 1122(a).

46. The Third Circuit and this Court have recognized that, under section 1122 of the Bankruptcy Code, plan proponents have significant flexibility to place similar claims into different classes, provided there is a valid business, factual, or legal justification for doing so. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993); *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) ("[W]e agree with the general view which permits the grouping of similar claims in different classes"); *In re Coram Healthcare Corp.*, 315 B.R. 327, 348 (Bankr. D. Del. 2004) (explaining the Bankruptcy Code "does not expressly prohibit placing 'substantially similar' claims in separate classes").

47. Article IV of the Plan provides for the classification of Claims and Interests in eight individual Classes[4]:

Class 1:	Priority Non-Tax Claims
Class 2:	Other Secured Claims
Class 3:	Prepetition Revolving Credit Facility Claims
Class 4:	Prepetition Term Loan Claims
Class 5:	General Unsecured Claims
Class 6:	Sponsor Note Claims
Class 7:	Subordinated Claims
Class 8:	Existing Interests

48. This classification scheme is premised on, among other things, (a) the secured or unsecured status of the underlying obligation and (b) the differences in the legal nature and/or priority of the underlying obligation. The Debtors respectfully submit that the Plan's classification scheme fully satisfies the requirements of section 1122 of the Bankruptcy Code.

(ii) Specification of Unimpaired Classes (11 U.S.C. § 1123(a)(2))

49. 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). The Plan meets this requirement by stating that Claims in Classes 1 and 2 are Unimpaired. (*See* Plan § 4.2.)

(iii) Treatment of Impaired Classes of Claims and Interests (11 U.S.C. § 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." 11 U.S.C. § 1123(a)(3). The Plan satisfies this requirement by identifying Claims and

[4] In accordance with section 1123(a)(1) of the Bankruptcy Code, DIP Claims, Administrative Expense Claims, and Priority Tax Claims are not classified in the Plan.

Interests in Classes 3, 4, 5, 6, 7, and 8 as being Impaired and specifying the treatment accorded to the Claims and Interests in each such Class. (*See* Plan § 4.3.)

(iv) Same Treatment Within Each Class (11 U.S.C. § 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." 11 U.S.C. § 1123(a)(4). The Plan meets this standard because it provides for identical treatment and recoveries for all Claims or Interests in any given Class and does not provide for any kind of disparate treatment (unless lesser treatment was specifically negotiated with, and accepted by, a stakeholder).

(v) Adequate Means of Implementation (11 U.S.C. § 1123(a)(5))

52. The Plan and the Plan Documents provide adequate means for the Plan's implementation as required by section 1123(a)(5) of the Bankruptcy Code.[5] Specifically, the Plan provides for the following, among other things[6]:

Continued Existence and Vesting of Assets in the Reorganized Debtors

- Vesting of Assets. In the event the Credit Bid Transaction is not implemented and except as otherwise provided in the Plan, on or after the Effective Date, all property of the Estates, wherever located, including all claims, rights and Causes of Action, and any property, wherever located, acquired by the Debtors under or in connection with the Plan, shall vest in each respective Reorganized Debtor free and clear of all Claims, Liens, charges, other encumbrances and Interests. (*See* Plan § 7.1(b).)

[5] *See* 11 U.S.C. § 1123(a)(5) (specifying that adequate means for implementation of plan may include: (a) retention by the debtor of all or part of its property; (b) the transfer of property of the estate to one or more entities; (c) cancellation or modification of any indenture; (d) curing or waiving of any default; (e) amendment of the debtor's charter; or (f) issuance of securities for cash, property, or existing securities in exchange for claims or interests or for any other appropriate purpose).

[6] This summary is qualified in its entirety by reference to the provisions of the Plan. To the extent that there is any conflict between the summary contained in this filing and the Plan, the Plan shall control.

Issuance of New Units

- New Common Units. New Common Units shall be issued on the Effective Date and distributed as soon as practicable thereafter in accordance with the Plan. (*See* Plan § 7.4.)
- New Preferred Units. New Preferred Units shall be issued on the Effective Date and shall be distributed on the Effective Date or as soon as practicable thereafter in accordance with the Plan. (*See* Plan § 7.4.)
- Intercompany Interests. Notwithstanding anything to the contrary in the Plan, except as provided in Section 12.2 of the Plan and subject to the Implementation Memorandum, on or after the Effective Date, any and all Intercompany Interests shall survive the Debtors' restructuring by virtue of such Intercompany Interests being left Unimpaired to maintain the existing organizational structure of the Debtors. (*See* Plan § 2.3(b).)

Amended Constituent Documents

- On the Effective Date, the Amended Constituent Documents and any other applicable amended and restated corporate or other organizational documents of each of the Debtors shall be deemed authorized in all respects. (*See* Plan § 7.10(b).)

Corporate Action

- Any action under the Plan to be taken by or required of the Debtors as applicable, including the adoption or amendment of certificates of incorporation and by-laws, the issuance of securities and instruments, or the selection of officers or directors, shall be authorized and approved in all respects, without any requirement of further action by any of the Debtors' equity holders, holders of partnership interests, sole members, boards of directors or boards of managers, or similar body, as applicable. (*See* Plan § 7.10(c).)

Exit Credit Facility

- Exit Credit Facility. On the Effective Date, the Reorganized Debtors shall be authorized to enter into the Exit Credit Facility without the need for any further corporate, limited liability company, or other similar action. The entry of the Confirmation Order shall be deemed approval of the Exit Credit Facility (including the transactions contemplated thereby, and all actions to be taken, undertakings to be made, and obligations to be incurred by the Reorganized Debtors in connection therewith, including the payment of all fees, indemnities, and expenses provided for or otherwise contemplated therein) and authorization for the Reorganized Debtors to enter into and execute the Exit Credit Facility Agreement and such other documents and agreements (including supplemental bi-lateral letter of credit agreements with any letter of credit issuer and all documentation related thereto) as the lenders under the Exit Credit Facility Agreement may reasonably require, subject to such modifications as the Reorganized Debtors may deem to be reasonably

necessary to consummate transactions contemplated by the Exit Credit Facility. The Reorganized Debtors may use the Exit Credit Facility for any purpose permitted thereunder, including the funding of obligations under the Plan. (*See* Plan § 7.7.)

Cancellation of Existing Securities and Agreements

- Except for the purpose of evidencing a right to distribution under the Plan and except as otherwise set forth in the Plan on the Effective Date, all agreements, instruments, and other documents evidencing, related to or connected with any Claim or Interest, other than Intercompany Claims and Intercompany Interests, and any rights of any holder in respect thereof, shall be deemed cancelled, discharged and of no force or effect. (*See* Plan § 7.8.)

Effective Date Transactions

- Employee Protection Plan and STIP. As of the Effective Date, the Reorganized Debtors (or if the Credit Bid Transaction is implemented, NewCo) shall be deemed to have adopted the Employee Protection Plan for all of the Debtors' full-time employees, and the Reorganized Debtors' or NewCo's obligations thereunder shall be deemed incurred as of the Effective Date. For the STIP, the discretionary awards shall be paid on the Effective Date on the terms included in Exhibit E of the Plan Supplement. (*See* Plan § 7.2.)

53. In addition, as discussed above, the holders of 100% of DIP Roll-Up Loans have entered into the Cooperation Agreement, which provides, among other things, that each Consenting Roll-Up DIP Lender (a) consents to the treatment of Allowed Roll-Up DIP Claims set forth in the Plan, which may be amended in a manner that is reasonably acceptable to the Debtors and the Majority Ad Hoc Group in accordance with Section 14.3 of the Plan; provided that each holder of an Allowed Roll-Up DIP Claim continues to receive its Pro Rata Share of any such amended treatment, (b) shall, if such Consenting Roll-Up DIP Lender holds any other Claims, including, without limitation, Prepetition Revolving Credit Facility Claims and/or Prepetition Term Loan Claims, timely vote each such claim in favor of the Plan and shall not withdraw, amend, or revoke such vote, and (c) shall not, directly or indirectly, object to, delay,

impede, or take any other action to interfere with the acceptance, implementation, confirmation, or consummation of the Original Plan.

54. In light of the foregoing implementation process, the Debtors respectfully submit that the Plan satisfies the requirements of section 1123(a)(5) of the Bankruptcy Code.

(vi) Charter Provisions (11 U.S.C. § 1123(a)(6))

55. Section 1123(a)(6) of the Bankruptcy Code requires that a plan provide for the inclusion in a corporate debtor's charter of provisions (a) prohibiting the issuance of nonvoting equity securities and (b) providing for an "appropriate distribution" of voting power among those securities possessing voting power. *See* 11 U.S.C. § 1123(a)(6). The New LLC Agreement and other applicable organizational documents contain provisions necessary to prohibit the issuance of nonvoting equity securities as required by section 1123(a)(6) of the Bankruptcy Code. Accordingly, the Debtors respectfully submit that the Plan satisfies the requirements of section 1123(a)(6) of the Bankruptcy Code.

(vii) Manner of Selection of Officers and Directors and Their Successors (11 U.S.C. § 1123(a)(7))

56. Section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7).

57. Section 7.9 of the Plan provides that the board of directors of each of the Debtors shall consist of individuals (a) selected by the Debtors and reasonably acceptable to the Debtors and Majority Ad Hoc Group and (b) identified in the Plan Supplement.

The members of the board of directors of each Debtor prior to the Effective Date shall have no continuing obligations to the Debtors in their capacities as such on and after the Effective Date, and each such member shall be deemed to have resigned or otherwise cease to be a director of the applicable Debtor on the Effective Date. Commencing on the Effective Date, each of the directors of each of the Debtors shall serve pursuant to the terms of the applicable organizational documents of such Debtor and may be replaced or removed in accordance therewith. No party in interest has objected to the manner of selection of the boards of directors or the officers of the Debtors. Accordingly, the Debtors respectfully submit that the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

B. Proponents of Plan Have Complied with Applicable Provisions of Title 11 (11 U.S.C. § 1129(a)(2))

58. Section 1129(a)(2) of the Bankruptcy Code requires that a plan proponent "comply with the applicable provisions of [title 11]." 11 U.S.C. § 1129(a)(2). The legislative history of section 1129(a)(2) of the Bankruptcy Code reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of section 1129(a) of the Bankruptcy Code] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also* 7 *Collier on Bankruptcy* 1129.03[2] (15th rev. ed. 2008) (collecting cases) (stating that, with respect to compliance with section 1129(a)(2) of Bankruptcy Code, courts "have focused on compliance by the plan proponent with the disclosure and solicitation requirements of sections 1125 and 1126").

59. It is undisputed that the Debtors have complied with section 1125 of the Bankruptcy Code in light of the Court's entry of the Disclosure Statement Order and the Continued Solicitation Order.

60. Further, as evidenced by the Tabulation Certification, KCC properly solicited and tabulated votes with respect to the Plan.

61. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a chapter 11 plan. Under section 1126, only holders of allowed claims and allowed equity interests in Impaired classes of claims or equity interests that will retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan. As evidenced by the Tabulation Certification, the Plan has been accepted by substantially more than the requisite number of holders of Claims and amount in each Class of Claims entitled to vote on the Plan. Based on the foregoing, the Debtors respectfully submit that the Plan meets the requirements of sections 1125 and 1126 of the Bankruptcy Code. Accordingly, the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

C. Plan was Proposed in Good Faith (11 U.S.C. § 1129(a)(3))

62. Section 1129(a)(3) provides that a court shall confirm a plan only if the "plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Courts consider a plan as proposed in good faith "if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Bankruptcy Code." *Hanson v. First Bank of S.D., N.A.*, 828 F.2d 1310, 1315 (8th Cir. 1981); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 247 (3d Cir. 2004) ("[F]or purposes of determining good faith under Section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a

result consistent with the objectives and purposes of the Bankruptcy Code") (quotations and citation omitted); *Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 165 (3d Cir. 1999) (explaining the good-faith standard in Section 1129(a)(3) requires that there be "some relation" between the chapter 11 plan and the "reorganization-related purposes" that chapter 11 was designed to serve) (citations omitted); *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del 2001) ("The good faith standard requires that the plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.") (quoting *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999)) (internal quotations omitted).

63. A court must also view the requirement of good faith in the context of the totality of the circumstances surrounding the formulation of a chapter 11 plan. *See McCormick v. Banc One Leasing Corp. (In re McCormick)*, 49 F.3d 1524, 1526 (11th Cir. 1995) ("The focus of a court's inquiry is the plan itself, and courts must look to the totality of the circumstances surrounding the plan."); *In re Block Shim Dev. Co. Company-Irving*, 939 F.2d 289, 292 (5th Cir. 1991) (finding that good-faith requirement "is viewed in the context of the circumstances surrounding the plan"); *CoreStates Bank, N.A. v. United Chem. Techs.*, 202 B.R. 33, 51 (E.D. Pa. 1996) (concluding that courts must view good faith by looking at totality of circumstances).

64. In determining whether a plan will succeed and accomplish goals consistent with the Bankruptcy Code, courts look to the terms of the plan itself and not the proponent of the plan. *See In re Matter of Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988) (concluding that the good-faith test provides the court with

significant flexibility and is focused on an examination of the plan itself, rather than other, external factors), *aff'd in part, remanded in part on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990); *see also Combustion Eng'g., Inc.*, 391 F.3d at 246.

65. Here, as the record shows and as will be affirmatively demonstrated at the Confirmation Hearing, the purpose of the Plan is to effectuate a reorganization that maximizes recoveries to all of the Debtors' economic stakeholders. Throughout the Chapter 11 Cases, the Debtors have sought to maximize value for their stakeholders, including through the sale of all or substantially of their assets during the Chapter 11 Cases and, ultimately, through the proposed transaction set forth in the Plan. Accordingly, the Debtors respectfully submit that the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

D. Payments Under the Plan Are Subject to Court Approval (11 U.S.C. § 1129(a)(4))

66. As required by section 1129(a)(4) of the Bankruptcy Code, all payments promised, received, made, or to be made by the Debtors in connection with services provided or for costs or expenses incurred in connection with the Chapter 11 Cases, including for the Debtors' professionals, are subject to the review by, and approval of, the Court. *See* 11 U.S.C. § 1129(a)(4); *see also In re Credential Corp.*, 2010 Bankr. LEXIS 2838, at *8 (Bankr. D. Del. May 26, 2010) (holding that plan complied with section 1129(a)(4) where all final fees and expenses payable to professionals remained subject to final review by bankruptcy court); *In re Johns-Manville Corp.*, 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. MacArthur v. Johns-*

Manville Corp., 837 F.2d. 89 (2d Cir. 1988) (concluding that court must be permitted to review and approve reasonableness of professional fees made from estate assets).

67. Section 3.3(a) of the Plan provides that all requests for payment of Professional Fee Claims incurred prior to the Confirmation Date must be filed with the Court by the date that is 60 calendar days after the Confirmation Date; provided that if any Professional Person is unable to file its own request with the Court, such Professional Person may deliver an original, executed copy and an electronic copy to the Debtors' attorneys and the Debtors at least three Business Days before the deadline, and the Debtors' attorneys shall file such request with the Court. Distributions on account of Allowed Professional Fee Claims shall be made as soon as reasonably practicable after such Claims become Allowed. Accordingly, the Debtors submit that the Plan satisfies section 1129(a)(4) of the Bankruptcy Code.

E. Plan Properly Discloses Post-Confirmation Management Services of Certain Individuals (11 U.S.C. § 1129(a)(5))

68. Section 1129(a)(5) of the Bankruptcy Code requires that (a) a plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors, (b) 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 (c) there be disclosure of the identity and compensation of any insiders to be retained or employed by the reorganized debtors.

69. Exhibit C of the Plan Supplement discloses the members of the board of directors and the officers of each of the Reorganized Debtors. The appointment of the proposed directors and officers will allow the Reorganized Debtors to operate smoothly and in accordance with applicable law, and is thus consistent with the interests of the

Debtors' creditors and equity security holders and with public policy. Moreover, the employment agreements included in Exhibit D of the Plan Supplement disclose the nature of compensation for the officers to be employed or retained by the Reorganized Debtors who are "insiders" under section 101(31) of the Bankruptcy Code, thereby satisfying the requirements of section 1129(a)(5)(B) of the Bankruptcy Code. Accordingly, the Debtors respectfully submit that the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

F. Plan Does Not Require Regulatory Approval of Rate Changes (11 U.S.C. § 1129(a)(6))

70. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation has approved any rate change provided for in the plan. The Plan does not provide for any rate changes over which a governmental regulatory commission has jurisdiction. Accordingly, the Debtors respectfully submit that section 1129(a)(6) of the Bankruptcy Code is not applicable.

G. Plan Satisfies the Best Interests Test (11 U.S.C. § 1129(a)(7))

71. Section 1129(a)(7) of the Bankruptcy Code requires that holders of impaired claims or interests must either (a) vote to accept a plan or (b) "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 [of the Bankruptcy Code] on such date." 11 U.S.C. § 1129(a)(7)(A)(ii); *see also Armstrong World Indus., Inc.*, 348 B.R. at 165–66; *In re Tranel*, 940 F.2d 1168, 1173 (8th Cir. 1991) (considering evidence supporting best interests of creditors test outcome); *In re AOV Indus.*, 31 B.R. 1005, 1008–13 (D.D.C. 1983) (if no impaired creditor receives less than liquidation value, plan

of reorganization is in best interests of creditors), *aff'd in part, rev'd in part*, 792 F.2d 1140, 1144 (D.C. Cir. 1986), *vacated in light of new evidence*, 791 F.2d 1004 (D.C. Cir. 1986); *In re Econ. Lodging Sys., Inc.*, 205 B.R. 862, 864–65 (Bankr. N.D. Ohio 1991) (analyzing evidence relating to best interests of creditors test); *Eagle-Picher Indus.*, 203 B.R. at 266 (best interest of creditors test must be met even in cramdown situation).

72. The best interests of creditors test focuses on individual dissenting creditors, rather than classes of claims. *See, e.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship (In re 203 N. LaSalle St. P'ship*), 526 U.S. 434, 441–42 (1999); *see also U.S. v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 228 (1996). A court, in considering whether a plan is in the "best interests" of creditors, is not required to consider any alternative to the plan other than the dividend projected in a liquidation of all the debtor's assets under chapter 7 of the Bankruptcy Code. *See, e.g.*, *In re Victory Constr. Co.*, 42 B.R. 145, 151 (Bankr. C.D. Cal. 1984); *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990); *In re Jartran, Inc.*, 44 B.R. 331, 389–93 (Bankr. N.D. Ill. 1984) (best interests test satisfied by showing that, upon liquidation, cash received would be insufficient to pay priority claims and secured creditors so that unsecured creditors and equity holders would receive no recovery). Accordingly, if the Court finds that each non-consenting member of an Impaired Class will receive at least as much under the Plan as it would receive in a chapter 7 liquidation, the Plan satisfies the best interests of creditors test.

73. The "best interests" test is generally satisfied by utilizing a liquidation analysis to demonstrate that an impaired class will receive no less under the plan than under a chapter 7 liquidation. To demonstrate compliance with section 1129(a)(7) of the

Bankruptcy Code, the Debtors prepared a liquidation analysis estimating and comparing the range of proceeds generated under the Plan and a hypothetical chapter 7 liquidation (the "**Liquidation Analysis**"). *See* Disclosure Statement Supplement, Exhibit B. As reflected in the Liquidation Analysis, the Debtors submit that the value of any distributions in a chapter 7 case would be the same or less than the value of distributions under the Plan.

74. As demonstrated in the Liquidation Analysis, holders of Impaired Claims or Interests will receive at least as much or more of a recovery under the Plan because, among other things, the continued operation of the Debtors as a going concern, rather than a chapter 7 liquidation, will allow the realization of more value on account of the assets of the Debtors.

75. Accordingly, the Debtors submit that, since the members of each Impaired Class have accepted the Plan or received at least as much as they would if the Debtors were liquidated under chapter 7 of the Bankruptcy Code, the Plan meets the "best interests of creditors" test set forth in section 1129(a)(7) of the Bankruptcy Code.

H. Acceptance by Impaired Classes (11 U.S.C. § 1129(a)(8))

76. Subject to the exceptions contained in section 1129(b) of the Bankruptcy Code, including the "cramdown" provisions discussed below, section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or equity interests must either have accepted the plan or not be Impaired under the plan. A class of claims accepts a plan if the holders of at least two-thirds (2/3) in dollar amount and more than one-half (1/2) in the number of claims that actually vote on the plan vote to accept the plan. *See* 11 U.S.C. § 1126(c). A class of equity interests accepts a plan if holders of at least two-thirds (2/3)

of the amount of interests that actually vote on the plan vote to accept the plan. *See* 11 U.S.C. § 1126(d).

77. Under the Plan, holders of Claims in Classes 1 (Priority Non-Tax Claims) and 2 (Other Secured Claims) are Unimpaired and, pursuant to section 1126(f) of the Bankruptcy Code, are conclusively presumed to have voted to accept the Plan.

78. More than the requisite number of holders and Claim amounts in the following Impaired Classes of Claims that are entitled to vote to accept or reject the Plan, and that voted, have affirmatively voted to accept the Plan, as reflected in the Tabulation Certification:

- Class 3 (Prepetition Revolving Credit Facility Claims) voted 100% in number and 100% in amount to accept the Plan; and
- Class 4 (Prepetition Term Loan Claims) voted 100% in number and 100% in amount to accept the Plan.

79. Although Classes 5 (General Unsecured Claims), 6 (Sponsor Note Claims), 7 (Subordinated Claims), and 8 (Existing Interests) are deemed to reject the Plan, the Plan may nonetheless be confirmed over such rejections because, as set forth below, the Plan satisfies the requirements for cramdown under section 1129(b) of the Bankruptcy Code.

80. Accordingly, because every Impaired Class either (a) voted to accept or will be deemed to accept the Plan or (b) can be crammed down pursuant to the requirements of section 1129(b) of the Bankruptcy Code, satisfaction of section 1129(a)(8) of the Bankruptcy Code is not required in order for the Court to confirm the Plan.

I. Plan Provides for Payment of Administrative and Priority Claims (11 U.S.C. § 1129(a)(9))

81. The Plan complies with section 1129(a)(9) of the Bankruptcy Code because, except to the extent that the holder of a particular Claim has agreed to a different treatment of such Claim, the Plan provides for full payment of Allowed Administrative Expense Claims on the applicable Distribution Date or in the ordinary course of business. The Plan also provides for the payment of Allowed Priority Non-Tax Claims on the applicable Distribution Date or as soon as reasonably practicable thereafter. Further, each holder of an Allowed Priority Tax Claim shall receive, on account of such Allowed Priority Tax Claim (a) payment in full in Cash made on or as soon as reasonably practicable after the later of the Effective Date and the first Distribution Date occurring at least 20 calendar days after the date such Claim is Allowed, (b) regular installment payments in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, or (c) such other amounts and in such other manner as may be determined by the Court to provide the holder of such Allowed Priority Tax Claim deferred Cash payments having a value, as of the Effective Date, equal to such Allowed Priority Tax Claim.

82. The Plan provides for payment of Allowed Roll-Up DIP Claims in accordance with Section 3.1 thereof, which provides that each holder of an Allowed Roll-Up DIP Claim shall receive its Pro Rata Share of the Roll-Up DIP New Preferred Units Distribution. Holders of 100% of Allowed Roll-Up DIP Claims have consented to this treatment pursuant to the terms of the Cooperation Agreement.

83. Accordingly, the Debtors respectfully submit that the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

J. At Least One Impaired Class Voted in Favor of Plan (11 U.S.C. § 1129(a)(10))

84. Section 1129(a)(10) requires that if a class of claims is impaired under the plan, at least one impaired class of claims must accept the plan, excluding acceptance by any insider. *See* 11 U.S.C. § 1129(a)(10). As discussed above, Class 3 (Prepetition Revolving Credit Facility Claims) and Class 4 (Prepetition Term Loan Claims), each of which is an Impaired Class, have voted to accept the Plan without counting the acceptance of insiders. The Debtors submit that the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code, as the Plan has been accepted by an impaired class as to each Debtor. (*See* Tabulation Certification, Exhibit A).

K. Plan Is Feasible and Not Likely to Be Followed by Further Reorganization or Liquidation (11 U.S.C. § 1129(a)(11))

85. Section 1129(a)(11) of the Bankruptcy Code requires that a court find that a plan is feasible as a condition precedent to confirmation. Specifically, the bankruptcy 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). To demonstrate that a plan is feasible, it is not necessary that success be guaranteed; the plan need only offer a ***reasonable assurance of success***. *See Johns-Manville Corp.*, 843 F.2d at 649 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *Prudential Ins. Co. of Am. v. Monnier (In re Monnier Bros.)*, 755 F.2d 1336, 1341 (8th Cir. 1985) (same); *In re Rivers End Apartments*, 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994) (to establish feasibility, "a [plan] proponent must demonstrate that its plan offers 'a reasonable prospect of success' and is workable"); *In re Apex Oil Co.*, 118 B.R. 683, 708

(Bankr. E.D. Mo. 1990) (guarantee of success is not required to meet feasibility standard of section 1129(a)([11]); *In re Elm Creek Joint Venture*, 93 B.R. 105, 110 (Bankr. W.D. Tex. 1988) (a guarantee of success is not required under section 1129(a)(11) of the Bankruptcy Code, only reasonable expectation that payments will be made).

86. There is a relatively low threshold of proof necessary to satisfy the feasibility requirement. *See Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 9 (Bankr. D. Conn. 2006), *remanded*, Case No. 04-30511, 2008 WL 687266 (Bankr. D. Conn. Mar. 10, 2008), *stay denied*, Case No. 04-330511, 2008 WL 2003118 (Bankr. D. Conn. May 7, 2008), *appeal denied*, Case No. 08-107, 2008 WL 2079126 (D. Conn. May 16, 2008) ("[A] 'relatively low threshold of proof will satisfy the feasibility requirement.") (quoting *Computer Task Grp. Inc. v. Brotby (In re Brotby)*, 303 B.R. 177, 191-92 (B.A.P. 9th Cir. 2003)); *Berkeley Fed. Bank & Trust v. Sea Garden Motel & Apts. (In re Sea Garden Motel & Apts.)*, 195 B.R. 294, 304–05 (D.N.J. 1996); *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (E.D. Pa. 1995) ("[T]he feasibility inquiry is peculiarly fact intensive and requires a case by case analysis, using as a backdrop the relatively low parameters articulated in the statute."). Indeed, "[t]he mere prospect of [] uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required." *Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 762.

87. Upon emergence from chapter 11, the Reorganized Debtors will be undertaking approximately $65 million in debt obligations. As set forth in the Pacha Declaration, the Valuation, and the Mosley Declaration, as applicable, and as will be further attested to at the Confirmation Hearing, the Debtors have a total enterprise valuation of at least $180 million and estimate that they will have sufficient available

cash and assets to ensure that they can service their obligations under the Exit Credit Facility. The Financial Projections further support the Debtors' expectation to service their post-emergence debt obligations and pay all of their operating expenses in the ordinary course of business. For the reasons set forth above, the Debtors respectfully submit that the Plan clearly and unequivocally satisfies section 1129(a)(11) of the Bankruptcy Code.

L. Plan Provides for Payment of All Fees Under 28 U.S.C. § 1930 (11 U.S.C. § 1129(a)(12))

88. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all U.S. Trustee Fees payable under 28 U.S.C. § 1930. The Plan provides that the Debtors shall each pay their respective outstanding U.S. Trustee Fees on an ongoing basis on the date such U.S. Trustee Fees become due, until such time as a final decree is entered closing the applicable Chapter 11 Case, the applicable Chapter 11 Case is converted or dismissed, or the Court orders otherwise. (*See* Plan § 3.4). Accordingly, the Debtors respectfully submit that the Plan satisfies section 1129(a)(12) of the Bankruptcy Code.

M. Continuation of Retiree Benefits (11 U.S.C. § 1129(a)(13))

89. The Debtors are not obligated to pay any retiree benefits, as such term is defined in section 1114 of the Bankruptcy Code, and, therefore, this section of the Bankruptcy Code is inapplicable to the Plan.

N. Compliance with Nonbankruptcy Transfer Laws (11 U.S.C. § 1129(a)(16))

90. Section 1129(a)(16) of the Bankruptcy Code requires that all transfers of property under the Plan are to be made in accordance with any applicable provisions of nonbankruptcy laws that govern transfers of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. *See* 11 U.S.C. § 1129(a)(16).

The legislative history of section 1129(a)(16) of the Bankruptcy Code demonstrates that this section was intended to "restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust." *See* H.R. Rep. No. 109-31, 109th Cong. 1st Sess., at 145 (2005). None of the Debtors is a nonprofit entity and, therefore, the Debtors respectfully submit that this section of the Bankruptcy Code is inapplicable to the Plan.

II. PLAN SATISFIES CRAMDOWN REQUIREMENTS FOR CLASSES 5, 6, 7, AND 8 (SECTION 1129(B)(2)(B) AND (C))

91. Section 1129(b) of the Bankruptcy Code provides that, if all applicable requirements of section 1129(a) are met other than section 1129(a)(8), a plan may be confirmed so long as the requirements set forth in section 1129(b) are satisfied. *See* 11 U.S.C. § 1129(b)(1). To confirm a plan that has not been accepted by all impaired classes (thereby failing to satisfy section 1129(a)(8)), 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. *Id.* Here, Class 5 (General Unsecured Claims), Class 6 (Sponsor Note Claims), Class 7 (Subordinated Claims), and Class 8 (Existing Interests) are deemed to reject the Plan. For the reasons detailed below, the Debtors respectfully submit that the Plan satisfies section 1129(b) of the Bankruptcy Code's cramdown requirements with respect to such Classes.

A. Plan Does Not Unfairly Discriminate with Respect to Class 5, Class 6, Class 7, and Class 8

92. 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 when making such a determination. *See 203 N. LaSalle St. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes

under a chapter 11 plan" and that "the limits of fairness in this context have not been established"); *In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does so unfairly discriminate is to be determined on a case-by-case basis."); *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances"). *See also Armstrong World Indus., Inc.*, 348 B.R. at 121–22 (relying heavily on the facts of the case to determine whether the plan unfairly discriminated against certain classes).

93. 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. *See, e.g., Coram Healthcare Corp.*, 315 B.R. at 349 (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). A threshold inquiry in assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to the class allegedly receiving more favorable treatment. *See Armstrong World Indus., Inc.*, 348 B.R. at 121.

94. Here, the Plan does not discriminate unfairly with respect to any rejecting Class. As described above, Claims in the Impaired rejecting Classes—Class 5 (General

Unsecured Claims), Class 6 (Subordinated Note Claims), Class 7 (Subordinated Claims), and Class 8 (Existing Interests)—are specifically classified in such manner because of, among other things, (a) the secured or unsecured status of the underlying obligation and (b) the differences in the legal nature and/or priority of the underlying obligation. None of the holders of Claims and Interests in such classes are receiving dissimilar treatment from any other similarly situated Claims in other Classses. Accordingly, the Debtors respectfully submit that the Plan satisfies section 1129(b)(1) of the Bankruptcy Code.

B. Plan Is Fair and Equitable with Respect to Classes 5, 6, and 7 (Section 1129(b)(2)(B)(ii))

95. Section 1129(b)(2)(B)(ii) of the Bankruptcy Code provides, among other things, that a plan is fair and equitable with respect to a class of impaired unsecured claims if, under the plan, no holder of any junior claim or interest will receive or retain property under the plan on account of such junior claim or interest. *See* 11 U.S.C. § 1129(b)(2)(B)(ii). This standard is clearly satisfied as no holder of a Claim or interest junior to Claims in Class 5 (General Unsecured Claims), Class 6 (Subordinated Note Claims), or Class 7 (Subordinated Claims) will receive or retain any property or distribution under the Plan. Accordingly, the Plan is "fair and equitable" with respect to such Classes.

C. Plan Is Fair and Equitable with Respect to Class 8 (Section 1129(b)(2)(C))

96. Section 1129(b)(2)(C) of the Bankruptcy Code provides, among other things, that a plan is fair and equitable with respect to a class of interests if 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)(i)-(ii). Under the Plan, no holder of an interest junior to Interests in Class 8 (Existing Interests)

will receive or retain any property or distribution under the Plan. Accordingly, the Plan is "fair and equitable" with respect to Class 8.

III. PLAN SATISFIES REMAINING CONFIRMATION REQUIREMENTS

A. One Plan (11 U.S.C. § 1129(c))

97. Section 1129(c) of the Bankruptcy Code states, among other things, that the Court may only confirm one plan. 11 U.S.C. § 1129(c). As set forth in the Mosley Declaration, no plan of reorganization other than the Plan has been filed in the Chapter 11 Cases, and the Plan is the only chapter 11 plan being considered for confirmation at this time. Accordingly, the Debtors respectfully submit that the requirements of section 1129(c) of the Bankruptcy Code are satisfied.

B. Principal Purpose of Plan (11 U.S.C. § 1129(d))

98. Section 1129(d) of the Bankruptcy Code states, among other things, that "on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933." 11 U.S.C. § 1129(d). As set forth in the Mosley Declaration, the principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act, thereby satisfying the requirements of section 1129(d) of the Bankruptcy Code.

C. Not Small Businesses Cases (11 U.S.C. 1129(e))

99. The Chapter 11 Cases are not small business cases and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases. *See* 11 U.S.C. § 1129(e).

IV. RELEASES, EXCULPATIONS, AND INJUNCTIONS PROVIDED UNDER PLAN ARE APPROPRIATE AND SHOULD BE APPROVED

100. Article XII of the Plan provides the following: (a) a release by the Debtors, the Reorganized Debtors, and the Estates (the "**Debtors Releases**") (*see* Plan § 12.6(a)); (b) a release by the Releasing Parties of the Released Parties (the "**Third Party Releases**") (*see* Plan § 12.6(b)); (c) an exculpation provision for the Exculpated Parties (the "**Exculpations**") (*see* Plan § 12.7); and (d) a customary injunction provision intended to implement the Debtors Releases, Third Party Releases, Exculpations, and discharge provided by the Plan (the "**Injunctions**") (*see* Plan § 12.8). As set forth below, these provisions are consistent with the Bankruptcy Code, and thus, the requirements of section 1123(b) of the Bankruptcy Code are satisfied.

101. Under section 1123(b)(3)(A) of the Bankruptcy Code, a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3); *see also In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 263 n.289 (Bankr. S.D.N.Y. 2007) ("The Debtors have considerable leeway in issuing releases of any claims the Debtors themselves own. . ."). Section 7.1(b) of the Plan provides that, on and after the Effective Date, the Reorganized Debtors may prosecute, compromise, or settle any Claims (including any Administrative Expense Claims) and Causes of Action.

102. The Plan also provides for certain settlements of Claims against, and equity Interests in, the Debtors, including through the discharge, release, exculpation, and injunction provisions contained in Article XII of the Plan, as well as in Section 7.11 of the Plan, which provides that the provisions of the Plan constitute a good-faith compromise and settlement of all Claims and controversies relating to the rights that a

holder of a Claim or Interest may have with respect to any Allowed Claim or Allowed Interest or any Plan Distribution on account thereof.

103. In the Chapter 11 Cases, potential estate claims against third parties were evaluated by the Debtors, through their disinterested directors, who considered, among other things, (a) the significant amount of the Debtors' secured debt that may not be subject to challenge on any grounds, (b) the liens on proceeds of avoidance actions granted under the DIP Orders, (c) the delay, expense, and risk associated with any challenge litigation, and (d) the limited upside for unsecured creditors even in the event that such challenge litigation were successful. Both the Debtors and Ad Hoc Group were advised by experienced and competent professionals in weighing those considerations. The Debtors and the Ad Hoc Group ultimately concluded that the settlement of claims and controversies set forth in the Plan would be in the best interests of the Debtors and their estates.

A. Debtor Releases Are Appropriate

104. Section 12.6(a) of the Plan provides for Debtor Releases of certain claims, rights, and causes of action that the Debtors may have against the Released Parties specified in the Plan. *See* Plan, §§ 1.130, 12.6(a). The Debtor Releases do not release (a) acts of actual fraud, gross negligence, or willful misconduct or (b) any document, instrument, or agreement executed to implement the Plan.

105. The Debtors proposed the Debtor Releases based on their business judgment and believe that such releases satisfy the standard—to the extent applicable—for court-approved settlements, which requires that a settlement exceed the lowest point in the range of reasonableness and be fair, equitable, and in the best interests of the estate. *See In re Exaeris, Inc.*, 380 B.R. 741, 746–47 (Bankr. D. Del. 2008); *In re New Century*

TRS Holdings, Inc., 390 B.R. 140, 168 (Bankr. D. Del. 2008); *In re World Health Alts. Inc.*, 344 B.R. 291 (Bankr. D. Del. 2006); *In re TCI 2 Holdings, LLC,* 428 B.R. 117, 135 (Bankr. D.N.J. 2010); *In re G-1 Holdings, Inc.*, 420 B.R. 216, 257 (Bankr. D.N.J. 2009). Under the Debtor Releases, the Debtors release those parties that have participated in good-faith negotiations to accomplish the Debtors' restructuring and helped facilitate the comprehensive reorganization contemplated by the Plan. There is no doubt that without the support of the Released Parties, the Debtors would not have been able to achieve this restructuring, which preserves the Debtors' going-concern value, and enables the Debtors to emerge from chapter 11 in a stronger position for future competitive and strategic growth.

106. 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, [and] is fair, reasonable, and in the best interests of the estate." *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 and citations omitted)). In determining the propriety of a debtor release, courts in this jurisdiction consider the following factors (collectively, the "***Zenith* Factors**"):

- there is identity of interest between the debtor and the third party;
- the third party has made a substantial contribution to the debtor's reorganization;
- the release is essential to the debtor's reorganization;
- a substantial majority of creditors support the release; and

- the plan provides for the payment of all or substantially all of the claims in the class or classes affected by the release.

See In re Indianapolis Downs, LLC, 486 B.R. 286, 303 (Bankr. D. Del 2013) (citing *Zenith Elecs. Corp.*, 241 B.R. at 110). No one factor is determinative, and a plan proponent is not required to establish each factor for a release to be approved. *See In re Wash. Mut., Inc.*, 442 B.R. at 346 ("These factors . . . simply provide guidance in the [c]ourt's determination of fairness"). The *Zenith* Factors are also considered by bankruptcy courts assessing the propriety of nonconsensual third-party releases, as discussed below.

107. These factors support the proposed Debtor Releases. *First*, there is an identity of interest among the Debtors and all of the Released Parties in that they all "share the common goal" of confirming the Plan and implementing the restructuring that it contemplates. *See In re Tribune Co.*, 464 B.R. 126, 187 (Bankr. D. Del. 2011) (noting an identity of interest between the debtors and the settling parties where such parties "share[d] the common goal of confirming the DCL Plan and implementing the DCL Plan Settlement"); *Zenith Elecs. Corp.*, 241 B.R. at 110 (concluding that the first factor—an identity of interest with the debtor—was satisfied where certain released parties who "were instrumental in formulating the Plan" shared an identity of interest with the debtor "in seeing that the Plan succeed and the company reorganize"). Specifically, each Released Party either participated in (or represented, or was represented by, parties participating in) the negotiation of the Plan or accepted the Plan by affirmative vote (and did not opt out of the Third Party Releases). In addition, the Debtors' directors and officers share an "identity of interest" with the Debtors by virtue of the rights to

indemnification from the Debtors, such that pursuing litigation against certain of the Released Parties would be tantamount to litigation against the Debtors. *See 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."). Certain of these indemnification provisions are unaffected by the Plan and will continue post-Effective Date, as set forth in Section 10.7 of the Plan.

108. *Second*, each Released Party made significant contributions to the Debtors' reorganization. The members of the Ad Hoc Group participated in the $127.5 million of new money post-petition financing, without which the Debtors could not have operated in chapter 11. The various prepetition secured parties included among the Released Parties (*e.g.*, the Prepetition Agents) consented to the incurrence of such financing, which was secured by priming liens on substantially all of the Debtors' assets. Moreover, the Exit Credit Facility set forth in the Plan will be fully funded by lenders holding Prepetition Revolving Credit Facility Claims and Prepetition Term Loan Claims. The Debtors' directors, officers, and employees expended substantial time and effort specifically in connection with restructuring matters, in addition to their normal day-to-day duties. Without each and every one of these contributions, the restructuring contemplated by the Plan would not be possible, and without the Debtor Releases and Third Party Releases, some or all of these contributions may not have been made. These are precisely the sorts of contributions contemplated by the second Zenith Factor. *See In re W.R. Grace & Co.*, 446 B.R. 96, 138 (Bankr. D. Del. 2011) (finding that parties involved in settlement with the debtor made substantial contribution where, absent the release, settling parties would not have contributed a significant sum necessary to the

reorganization); *see also In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1079–80 (11th Cir. 2015) (debtors' professionals provided substantial contribution in the form of labor and services).

109. *Third*, the Debtor Releases are essential to the Plan. The Debtor Releases and Third Party Releases were extensively negotiated by the Debtors and their key stakeholders, including the Ad Hoc Group, the Prepetition Agents, and the DIP Agent, and are critical components of the Plan.

110. *Fourth*, the Debtor Releases and Third Party Releases enjoy broad support from creditors entitled to vote on the Plan, as demonstrated by the Voting Classes' overwhelming acceptance of the Plan.

B. Third Party Releases Are Consensual and Appropriate

111. Section 12.6(b) of the Plan sets forth Third Party Releases of certain claims, rights, and causes of action that the Releasing Parties may have against the Released Parties. The Releasing Parties consist of the following: (a) each Released Party described in clauses (a), (d), (e), and (f) of the definition thereof, (b) each holder of a Claim that votes to accept the Plan but does not check the appropriate box on such holder's timely submitted Ballot to indicate that such holder elects to opt out of the release contained in the Plan, and (c) as to each of the foregoing Entities in clauses (a) and (b) each such Entity's predecessors, successors and assigns, subsidiaries, affiliates, managed accounts or funds and their current and former officers, directors, managers, partners, principals, shareholders, members, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors and other professionals (in each case as to the foregoing Entities in clauses (a) and (b) solely in

their capacity as such); provided that no equity holder of the Debtors, in such capacity, shall be a Releasing Party (regardless of whether such interests are held directly or indirectly). *See* Plan, § 1.130.

112. Importantly, the Third Party Releases are fully consensual and should be approved on that basis alone. Here, the only stakeholders who may be bound by the Third Party Releases are holders of Claims who affirmatively voted in favor of the Plan and did not check the appropriate box on such holder's Ballot to opt out of the Third Party Releases. Such a structure is entirely consistent with the Court's prior rulings on consent. *See In re Washington Mutual, Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) ("the Court concludes that any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases"); *see also Zenith Elecs. Corp.*, 241 B.R. at 111. Accordingly, the Debtors respectfully represent that the Third Party Releases are consensual and therefore should be approved.

113. Even if the Third Party Releases were not fully consensual (which they are), the Third Party Releases should still be approved because they satisfy the standards governing nonconsensual third party releases in this Circuit, articulated in *Gillman v. Continental Airlines (In re Continental Airlines)*: fairness; necessity to the reorganization; and specific factual findings supporting those conclusions. 203 F.3d 203, 214 (3d Cir. 2000). Courts have looked to the *Zenith* Factors (which are derived from the factors originally articulated in *In re Master Mortgage Inv. Fund*, 168 B.R. 930 (Bankr. W.D. Mo. 1994)) as guideposts in applying the *Continental* standards. *See Continental*, 203 F.3d at 217, n.17 ("Although some courts may consider identity of interest when deciding

whether to grant a permanent injunction, that factor is not considered in a vacuum; rather, it must be supported by actual record facts in evidence, and accompanied by other key considerations, e.g., [the other four Master Mortgage factors]."); *In re Long Ridge Rd. Operating Co., II, LLC*, Case No. 13-13653 (DHS), 2014 WL 886433, at **14–15 (Bankr. D.N.J. Mar. 5, 2014) (applying *Zenith* Factors to determine permissibility of third party release). Consideration of those factors confirms that the Third Party Releases are appropriate as to "non-consenting creditors", for all of the reasons that the Debtor Releases are appropriate, as discussed above.

C. Exculpations Should Be Approved

114. Section 12.7 of the Plan provides for the Exculpation of the Debtors, and their respective subsidiaries, affiliates, current and former officers and directors, principals, members, partners, managers, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and all other retained Professional Persons (the "**Exculpated Parties**").

115. Here, as noted above, the Exculpated Parties played a critical role in the formulation of the Plan, and clearly satisfy the standard for exculpation under the Third Circuit, which permits exculpations of estate fiduciaries who made a substantial contribution to a chapter 11 case. *See In re Washington Mutual, Inc.*, 442 B.R. 314, 351 (Bankr. D. Del. 2011) (citing *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000)) ("The standard for exculpations has been extant in this district since the Third Circuit's PWS decision in 2000.").

D. Injunctions Are Narrowly Tailored and Should Be Approved

116. The Injunctions contained in Section 12.8 of the Plan are necessary to effectuate and implement the release provisions in the Plan, particularly the Debtors

Releases, Third Party Releases, and Exculpations. Moreover, the Injunctions are essential to protect the Debtors, the Reorganized Debtors, and the assets of the Estates from any potential litigation from prepetition creditors after the Effective Date. Any such litigation would hinder the efforts of the Debtors and the Reorganized Debtors to effectively fulfill their responsibilities as contemplated in the Plan and thereby undermine the Debtors' efforts to maximize value for all of its stakeholders. Additionally, the Injunctions are narrowly tailored to achieve their purpose, and similar injunctions have been approved by courts in other chapter 11 cases. *See, e.g.*, *In re Sorenson Commc'ns, Inc.*, No. 14-10454 (BLS) (Bankr. D. Del. Apr. 10, 2014) (holding that injunctions in the plan were necessary to preserve and effectuate the releases and exculpations under the plan and were narrowly tailored to achieve that purpose); *In re Physiotherapy Holdings, Inc.*, No. 13-12965 (KG) (Bankr. Dec. 23, 2013) (same). Accordingly, to enable the Debtors and the Reorganized Debtors to comply with their obligations under the Plan and applicable related documents, the Debtors respectfully request that the Court approve the Injunctions contained in Section 12.8 of the Plan.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Debtors respectfully submit that the Plan complies with, and satisfies all of, the requirements of section 1129 of the Bankruptcy Code and requests that the Court (a) enter the order, substantially in form of the proposed Confirmation Order, confirming the Plan and (b) grant such other and further relief as the Court may deem just and proper.

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Dated: January 23, 2020
Wilmington, Delaware

Respectfully submitted,

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Exhibit A

Summary of Objections

Objection	Confirmation Order Language Resolving Objection
The Texas Taxing Authorities' Objection to the Debtors' Chapter 11 Plan for Southcross Energy Partners, L.P. and its Affiliated Debtors [D.I. 655]	Local Texas Tax Authorities. Notwithstanding anything to the contrary in the Plan or this Order, the Debtors or Reorganized Debtors, as applicable, shall pay the Allowed Secured Claims of the Local Texas Tax Authorities[1] in the ordinary course of business. The tax liens, including statutory liens and privileges, if any, of the Local Texas Tax Authorities, to the extent that the Local Texas Tax Authorities are entitled to such liens, shall be expressly retained, in accordance with applicable state law with respect to taxes payable under applicable state law to the Local Texas Tax Authorities in the ordinary course of business, until such time as such Allowed Secured Claims are paid in full. To the extent the Local Texas Tax Authorities' Allowed Secured Claims are not paid on or prior to January 31, 2020, interest shall begin to accrue on the subject Allowed Secured Claims at the applicable non-bankruptcy interest rate provided under state law. In any event, the Allowed Secured Claims of the Local Texas Tax Authorities shall be paid within 30 days of the Effective Date unless an objection thereto has been filed. ¶60.
Objection by Lisa Bueno Martinez to Chapter 11 Plan [D.I. 843]	Order Approving Stipulation. For the avoidance of doubt, notwithstanding anything to the contrary in the Plan or this Order, the *Order Approving Stipulation Between Debtors and Lisa Bueno Martinez for Relief From the Automatic Stay* [D.I. 257] shall remain in full force and effect, to the same extent as prior to the entry of this Order.
Objection to (I) Notice of Rejected Contracts and Leases and (II) Chapter 11 Plan for Southcross Energy Partners L.P. and its Affiliated Debtors [D.I. 842] (filed under seal)	Estrella Resources. As a result of the objection filed by Estrella Resources, L.L.C. d/b/a Star Natural Gas, L.L.C. ("**Star**") [D.I. 842] in connection with the Debtors' proposed rejection of that certain Amended and Restated Throughput Fee Agreement, dated April 21, 2011 (the "**Star Agreement**"), the Star Agreement shall not be assumed, assumed and assigned, or rejected (as applicable) pursuant to the entry of this Order; rather, the assumption, assumption and assignment, or rejection of the Star Agreement (as applicable) shall be deemed effective as of the Effective Date, subject

[1] For purposes of the Confirmation Order, the term "**Local Texas Tax Authorities**" shall refer to local governmental entities that are (a) authorized by the State of Texas to assess and collect taxes and (b) represented by either the law firms of Linebarger Goggan Blair & Sampson, LLP, McCreary, Veselka, Bragg & Allen, P.C., or Perdue Brandon Fielder Collins and Mott, LLP.

Objection	Confirmation Order Language Resolving Objection
	to either (i) the entry of an additional Final Order, so determining or (ii) the agreement of Star and the Debtors or Reorganized Debtors (as applicable). ¶ 64.