IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	**Chapter 11**
	§	
SPEEDCAST INTERNATIONAL LIMITED, *et al.*,	§	**Case No. 20-32243 (MI)**
	§	
Debtors.[1]	§	**(Jointly Administered)**
	§	

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF SECOND AMENDED JOINT CHAPTER 11 PLAN OF SPEEDCAST INTERNATIONAL LIMITED AND ITS DEBTOR AFFILIATES

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Dated: December 15, 2020
Houston, Texas

[1] A complete list of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/speedcast. The Debtors' service address for the purposes of these chapter 11 cases is 4400 S. Sam Houston Parkway East, Houston, Texas 77048.

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SpeedCast International Limited ("**SIL**") and its debtor affiliates in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), as debtors and debtors in possession (collectively, the "**Debtors**," the "**Company**" or "**Speedcast**"), submit this memorandum of law and omnibus reply in support of their request for entry of an order confirming the *Second Amended Joint Chapter 11 Plan of SpeedCast International Limited and Its Debtor Affiliates* (as may be amended, modified, or supplemented in accordance with the terms thereof, the "**Plan**"), including the agreements and other documents set forth in the Plan Supplement, dated December 1, 2020 (ECF No. 1011) (as may be amended, modified, or supplemented in accordance with the Plan, the "**Plan Supplement**"), pursuant to section 1129 of title 11 of the United States Code (the "**Bankruptcy Code**").[2]

PRELIMINARY STATEMENT

1. Having successfully financed, stabilized and protected its businesses through these chapter 11 cases, Speedcast now proposes a recapitalization and reorganization plan utilizing chapter 11 tools to effect the most efficient emergence possible within the liquidity timeframe afforded to it by its bankruptcy financing. Only one objector remains: Black Diamond.

2. Key components of Speedcast's chapter 11 plan include a $150 million cash out of the secured claims of Speedcast's prepetition secured creditors, an amount more than supported by the valuation of the Company (inclusive of its non-debtor subsidiaries) performed by Speedcast's investment banker, and a market test that yielded no higher or better plan sponsor proposals – or any other binding proposals. Speedcast's chapter 11 plan also provides for appropriate treatment of trade vendors in Class 4A that are crucial to Speedcast's future prospects through a $25 million recovery pool. Speedcast's general unsecured creditors in Class 4B will

2 Capitalized terms used but not defined herein have the meanings ascribed to them in the Plan.

receive interests in a litigation trust to be formed to pursue causes of action assigned to it. Reorganized Speedcast will emerge from these chapter 11 proceedings with no funded debt, having eliminated all of its funded debt through the Plan, and financed by an equity recapitalization from Centerbridge Partners, L.P. ("**Centerbridge**"). Through the Plan, Speedcast also seeks to redomicile from Australia to the United States, so that its business is better aligned with its core markets and customers. Speedcast seeks to reorganize as an enterprise, and this Plan is the only actionable restructuring path available to it.

3. In proposing this chapter 11 plan, Speedcast honors a primary tenet of the Bankruptcy Code by affording its creditors the right to vote on the treatment of their claims. The Debtors have garnered the support of creditors throughout their capital structure for this Plan, as well as the Creditors' Committee. The evidence will show that the Debtors have met the requirements of section 1129 of the Bankruptcy Code and the Plan should be confirmed. Importantly, the Debtors' witnesses at confirmation will include its Chief Restructuring Officer, its investment banker, its President, and two of several independent directors appointed to steward the Board through the restructuring process.

4. During the course of July and August of 2020, the Company became caught in an internecine feud among its two largest lenders, Black Diamond Capital Management L.L.C. ("**Black Diamond**") and Centerbridge over the appropriate restructuring path for the Company to pursue. Following Speedcast's chapter 11 filing, both lenders sought to consolidate their positions in the Company's prepetition Syndicated Facility Agreement (as amended, restated, supplemented or otherwise modified from time to time, the "**SFA**") and today hold almost all of the Company's SFA claims.

5. This debt trading, coupled with the inability to reach agreement on Speedcast's restructuring among themselves, paralyzed the Company's restructuring process. The consent rights of the Company's initial debtor in possession ("**DIP**") lenders (the "**Initial DIP Facility**," and the lenders thereunder, the "**Initial DIP Lenders**") and SFA lenders (together with the Initial DIP Lenders, the "**Lenders**") over the terms of an "Acceptable Restructuring" in the DIP meant the Company could not progress its restructuring without their consent. Plan filing milestones were extended by the Lenders for over three months while they remain deadlocked.

6. With a looming liquidity wall and cognizant of the risk of not being able to complete a restructuring transaction within its liquidity timeframe, Speedcast refinanced its existing DIP loans and repaid them in full in cash, with a refinancing DIP loan from Centerbridge that paid off the rolled-up portion of the existing Initial DIP Facility in the process (the "**Refinanced DIP Facility**"). Importantly, the Refinanced DIP Facility allowed Speedcast to pursue any transaction that the Company's Board determined was in the best interest of all creditors. That transaction is before the Court today, and comes on the heels of a competitive process between Black Diamond and Centerbridge that has yielded ever higher values for all of Company's creditors. That competitive process was then followed by a further competitive market test in which the Company sought higher and better binding transactions to the one it had reached with Centerbridge.

7. Remarkably, for a case of this size and complexity, only two objections were filed to confirmation of the Plan, and only one objection remains outstanding.[3] One

[3] Although the Texas Taxing Authorities filed an objection to the Plan (ECF No. 1039), such objection has been resolved and withdrawn (ECF No. 1080).

significant creditor – Black Diamond – objects to the Company's chapter 11 plan.[4] Black Diamond's objection is replete with references to a proposal that is not before the Court today, the Initial ECA (as defined below), a proposal that was never ultimately pursued. At the beginning of August 2020, the Initial ECA was the only viable restructuring transaction available to the Debtors. The Debtors' negotiations over the Initial ECA stimulated competitive bidding between Black Diamond and Centerbridge over an exit transaction for the Company culminating in the Plan before the Court today for confirmation, a transaction that has also been the subject of a market test.

8. Black Diamond objects to confirmation of the Plan on the basis that the Plan:

- denies Black Diamond credit bidding rights;
- impairs Class 3 Claims by paying such Claims in the amount allowed by the Court under section 506(a) of the Bankruptcy Code;
- violates the absolute priority rule due to reinstatement of intercompany claims and subsidiary stock interests;
- improperly classifies certain trade creditors separately from other general unsecured creditors, including the deficiency claim of the prepetition secured lenders as a result of the 506 bifurcation;
- proposes substantive consolidation of certain Debtor entities; and
- contains impermissible releases in favor of non-debtors.

Each of these objections should be overruled.

[4] *Preliminary Objection of Black Diamond Capital Management, L.L.C. and Black Diamond Commercial Finance, L.L.C. to (I) Approval of Disclosure Statement for Amended Joint Chapter 11 Plan of Speedcast International Limited and Its Debtor Affiliates and (II) Confirmation of Second Amended Joint Chapter 11 Plan of Speedcast International Limited and its Debtor Affiliates* (ECF No. 1047) (the "**Black Diamond Objection**").

9. First, this confirmation dispute involves Speedcast's fundamental right to prosecute its chapter 11 reorganization. Black Diamond's contention that it has a right to credit bid its claims is not supported by the factual record or the law.

10. The Bankruptcy Code does not obligate a debtor to provide a secured creditor the opportunity to credit bid. Even so, Speedcast, through its Plan Sponsor Selection Procedures (as defined below) and direct communication with Black Diamond, in an effort to find the best chapter 11 exit, made Herculean efforts to afford Black Diamond the ability to pursue a credit bid transaction in the face of the substantial challenges posed by a sale structure. Speedcast led the horse to water and it did not drink.

11. Black Diamond believes that, by virtue of an alleged right to credit bid, which it did not attempt to exercise, it is entitled to divest Speedcast and all of its stakeholders of the freedom to consider any plan of reorganization other than one Black Diamond sponsors. This argument is beyond any credible reading of section 1129 of the Bankruptcy Code and the attendant case law and is antithetical to the principles of chapter 11.

12. Testimony will show that early on in these chapter 11 proceedings, Speedcast was required by its Lenders, including Black Diamond, to determine the value maximizing path out of chapter 11. Speedcast determined, as communicated to its Lenders, including Black Diamond, through a written report, that material benefits would be achieved by a recapitalization transaction maintaining and respecting the Company's corporate structure, as compared to conducting asset sales at every legal entity.

13. These benefits include avoiding:

- expensive insolvency/windup proceedings in approximately 11 foreign jurisdictions;

- material regulatory approval risk concerning broadband licenses in approximately 19 foreign jurisdictions;
- commercial counterparty renegotiation risk arising from at least 57 material customer contracts across the world; and
- the placement of additional significant burden on a workforce already struggling to hold a global enterprise together in the middle of a pandemic that an asset sale transaction necessarily requires.

14. Speedcast estimated that selecting the appropriate restructuring process – a plan of reorganization – would achieve the preservation of significant tax attributes for the benefit of reorganized Speedcast and significantly lower transaction costs by approximately $100 million.

15. As will be detailed through testimony at confirmation, Speedcast pursued a process to solicit higher or better proposals from potential Plan Sponsors to the ECA transaction it had from Centerbridge. To facilitate Black Diamond's participation in the process set forth in the Plan Sponsor Selection Procedures (the "**Plan Sponsor Selection Process**"), Speedcast also provided Black Diamond with bespoke treatment, allowing it to use the value of its secured claims as currency in the Plan Sponsor Selection Process, a benefit not afforded to Centerbridge. Further, Speedcast's equity commitment agreement with Centerbridge contains a customary "fiduciary out," a fact that was communicated to Black Diamond repeatedly in writing, and which Black Diamond has been aware of since the withdrawal of the Initial ECA Motion (as defined below) in August. Accordingly, Speedcast has always had the ability to accept and pursue a binding proposal from Black Diamond for a sale of the Company through a credit bid and this ability was communicated to Black Diamond. Despite this knowledge, Black Diamond only provided Non-Binding Indications of Interest (as defined below) during the Plan Sponsor Selection Process, despite repeated calls and written requests for detailed commitments and the terms of binding transaction documents.

16. Of equal importance, the transaction embodied in the Plan is a classic recapitalization, with traditional recapitalization hallmarks including that a plan sponsor makes an investment into the Debtors pursuant to which the Debtors' legal entities remain in place, the debt is compromised, the equity of the very same debtor entities is reissued to the Plan Sponsor based on values judicially determined, and the plan is determined to be fair and equitable, and not unfairly discriminatory.

17. The evidence will amply support the bifurcation of the secured claim under the Plan. Once bifurcated, the secured claim will be paid in full in cash, rendering it unimpaired with a $150 million cash recovery. If the Court finds the secured Class impaired, Speedcast will satisfy the standard for confirmation under section 1129(b) as cash payment unquestionably constitutes the indubitable equivalent of the SFA Lenders' collateral value.

18. The evidence will also demonstrate the legitimate business rationale for treatment of Class 4A creditors as distinct from class 4B. Class 4A aggregates approximately $67-93 million in claims across all of the Debtor entities. The evidence will highlight that Speedcast's criteria for classification in Class 4A was handled methodically, in good faith, and without regard to which entities they were creditors of, or their likelihood to vote in favor of a chapter 11 plan. Speedcast will also satisfy the confirmation requirements at every debtor entity (with the exception of a few holding companies where substantive consolidation is appropriate), but also believes this case presents facts that support approving the Plan based on a "per plan" versus "per debtor" impaired accepting class in accordance with evolving case law.

19. Speedcast will prove that there is no enterprise value at any legal entity following the payment of the Class 3 claim, the allocable portion of the DIP, the exit costs, and the recoveries to Classes 4A and 4B for entities unless consented to by the vote of creditors. While

the reinstatement of subsidiary equity avoids unnecessary process costs in keep the organizational structure together, there is no value conveyed on account of subsidiary stock interests. Under the Plan, Speedcast may cancel or seek to cancel intercompany and subsidiary stock interests. Speedcast can cancel them at all U.S. entities and could seek to cancel them at foreign entities. However, some foreign jurisdictions may not recognize such cancelation and, as a result, would require local restructuring proceedings to effectuate such a step, resulting in needless expense and a waste of enterprise value. Since the evidence will show that no value is being distributed on account of these interests without creditor consent, Speedcast requests, in accordance with case precedent, that for administrative convenience the subsidiary interests be deemed canceled or reinstated, whichever is simpler as a matter of local law.

20. For the reasons set forth above and herein, and the evidence to be adduced at confirmation, the Court should overrule the Black Diamond Objection and confirm Speedcast's Plan. The alternative, should the Court not confirm this plan, is a sale process that will likely yield no different outcome, other than disenfranchisement and a reduction in the recovery to creditors.

JURISDICTION

21. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

FACTUAL BACKGROUND

I. Supporting Evidentiary Materials

22. The Debtors respectfully refer the Court to:

- the Plan;
- *Disclosure Statement for Joint Chapter 11 Plan of SpeedCast International Limited and its Debtor Affiliates* (ECF No. 810) (as amended, the "**Disclosure Statement**");

- *Order (I) Scheduling Combined Hearing on (A) Adequacy of Disclosure Statement and (B) Confirmation of Plan; (II) Conditionally Approving Disclosure Statement; (III) Approving Solicitation Procedures and Form and Manner of Notice of Combined Hearing and Objection Deadline; (IV) Fixing Deadline to Object to Disclosure Statement and Plan; (V) Approving Notice and Objection Procedures for the Assumption of Executory Contracts and Unexpired Leases; (VI) Authorizing Performance Under the Plan Sponsor Selection Procedures; and (VII) Granting Related Relief* (ECF No. 896) (the "**Solicitation Order**");

- *Declaration of Michael Healy in Support of Debtors' Memorandum of Law in Support of Confirmation of Second Amended Joint Chapter 11 Plan of SpeedCast International Limited and its Debtor Affiliates* (the "**Healy Declaration**");

- *Declaration of Adam Waldman in Support of Debtors' Memorandum of Law in Support of Confirmation of Second Amended Joint Chapter 11 Plan of SpeedCast International Limited and its Debtor Affiliates* (the "**Waldman Declaration**");

- *Declaration of David Mack in Support of Debtors' Memorandum of Law in Support of Confirmation of Second Amended Joint Chapter 11 Plan of SpeedCast International Limited and its Debtor Affiliates* (the "**Mack Declaration**");

- *Declaration of Michael Healy in Support of Debtors' Chapter 11 Petitions and First Day Relief*, dated April 23, 2020 (ECF No. 16) (the "**First Day Declaration");**

- *Declaration of P. Joseph Morrow IV of Kurtzman Carson Consultants LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Second Amended Joint Chapter 11 Plan of SpeedCast International Limited and its Debtor Affiliates* (the "**Voting Certification**");

- *Certificate of Service of Solicitation Materials Served on November 9, 2020 and November 10, 2020* (ECF No. 971) (the "**Notice Affidavit**");

- *Affidavit of Publication of Notice of Conditional (I) Approval of Disclosure Statement, (II) Establishment of Voting Record Date, (III) Combined Hearing on Confirmation of the Disclosure Statement and Plan, (IV) Procedures and Deadline for Objecting to the Confirmation of the Disclosure Statement and Plan, (V) Procedures and Deadline for Voting on the Plan, and (VI) Notice and Objection Procedures for the Assumption of Executory Contracts and Unexpired Leases (VII) Authorization of Performance Under the Plan Sponsor Selection Procedures in The New York Times* (ECF No. 970) (the "**Publication Notice**"); and

- the record of these chapter 11 cases for an overview of the Debtors' business and other facts that may bear on confirmation of the Plan.

23. The Debtors intend to adduce testimony at the hearing to consider confirmation of the Plan (the "**Confirmation Hearing**") regarding the facts cited in this brief that are not specifically addressed by declaration.

II. Background of Speedcast and these Chapter 11 Cases

A. Prepetition Speedcast

24. Speedcast consists of more than 115 entities organized in multiple jurisdictions across the globe. Speedcast is an amalgamation of over 16 acquisitions – three of which were significant – since 2012. Speedcast's business is, generally, separated into four business units, known as 'verticals', including commercial maritime and cruise ("**Maritime Business**"), enterprise and emerging markets ("**EEM Business**"), energy ("**Energy Business**") and government ("**Government Business**"). The Government Business consists of seven entities, and the parent of such group of entities is Ultisat Inc. Consistent with how any global organizations of this size operate, Speedcast includes entities that are cost-centers or revenue-centers and operating companies or holding companies.

25. Thirty-one of the Speedcast entities, including five of the Government Business entities are borrowers or guarantors under the SFA, by and among Speedcast Parent and certain of its subsidiaries, as borrowers, the lenders party thereto from time to time, and Black Diamond Commercial Finance, L.L.C. (the "**SFA Agent**").

26. In September 2019, Peter Shaper and Joe Spytek were appointed to the board of SIL, the parent entity of the Speedcast group, as independent non-executive directors. Other than PJ Beylier, then Chief Executive Officer of Speedcast, SIL's Board of Directors was and is today comprised exclusively of independent directors. In February 2020, PJ Beylier

resigned from the Board of SIL. In March 2020, to fill the role left by PJ Beylier, Peter Shaper agreed to become Speedcast's Chief Executive Officer and President, and Joe Spytek agreed to become Chief Commercial Officer of Speedcast.

27. Shortly thereafter, contemporaneously with the commencement of the COVID-19 global pandemic, Speedcast began examining strategic alternatives. On March 31, 2020, the Board of Directors formed a Special Restructuring Committee, as a sub-committee of the Board of Directors, to make recommendations to the Board in connection with the Company's evaluation of strategic alternatives. The Special Restructuring Committee (the "**Special Restructuring Committee**") was established to, among other things, evaluate and negotiate strategic alternatives for the Company and to recommend to the Board of Directors the approval of such strategic alternatives.

28. The Special Restructuring Committee was delegated the authority to implement matters related to such strategic alternatives consistent with any determinations by the Board, to supervise, direct and approve the activities of the Chief Restructuring Officer, Michael Healy of FTI Consulting, and to direct all proceedings on behalf of the Company related to the strategic alternatives. Stephe Wilks and Michael Malone were initially appointed by the Board of Directors to serve on the Special Restructuring Committee. Stephe Wilks was appointed as the Chair of the Special Restructuring Committee. The remaining Special Restructuring Committee members were appointed as detailed below.

29. Speedcast's Special Restructuring Committee and the Debtors' advisors then explored strategic alternatives, including a potential restructuring, with an ad hoc group of SFA lenders led by Black Diamond (the "**Ad Hoc Group**"). These discussions initially included Speedcast receiving bridge financing from the Ad Hoc Group members to bridge to an out-of-

court recapitalization transaction. After the Ad Hoc Group declined to provide this bridge financing, Speedcast focused on available restructuring options, which included Australian restructuring proceedings, an English scheme of arrangement, or chapter 11 proceedings. The Ad Hoc Group agreed to provide Speedcast with debtor in possession financing if it commenced chapter 11 proceedings.

30. Speedcast's liquidity was extremely constrained at the time, a situation exacerbated by the start of the pandemic. The pandemic similarly impacted a number of vendors that are essential to Speedcast's business. In the Spring of 2020, these liquidity challenges placed Speedcast significantly behind on contractually scheduled payments to vendors essential to its businesses, including Intelsat US LLC and certain of its affiliated entities ("**Intelsat**"), a material provider of satellite bandwidth uplink and related services to the Debtors.

31. In the weeks leading up to the Petition Date, the Debtors and Intelsat engaged in negotiations regarding past due balances owed by the Debtors and an agreement by Intelsat to continue providing services to the Debtors given the essential nature of Intelsat's services. During those negotiations, a service outage period occurred. Shortly after this outage with Intelsat was resolved, Speedcast filed voluntary petitions in this Court with the hopes of pursuing a rapid consensual recapitalization transaction led by the Ad Hoc Group.

B. Chapter 11 Filing; Initial DIP Facility, Milestones and Initial Plan Term Sheet

32. Immediately before the petition date, the Debtors and SFA Lenders discussed whether the Government Business should file chapter 11 proceedings. No constituency thought that such a filing was advisable. Black Diamond did not object to the Government Business' exclusion from filing for chapter 11.

33. After considerable consultation, on April 23, 2020, the Debtors – thirty-three Speedcast entities – filed for protection under chapter 11 of the Bankruptcy Code. With the consent and support of the Ad Hoc Group (as well as the consent and support of the Debtors), none of the Government Business entities, though obligors under the SFA Documents, filed chapter 11 petitions. Of the thirty-three Debtors, seven[5] are not obligors under the SFA Documents and have not pledged collateral in respect of the obligations thereunder. The Initial DIP Lenders (including Black Diamond) required the Government Business to guarantee the Initial DIP Facility even though the Government Business had not filed chapter 11 proceedings.

34. On the same date, in recognition of the filing of chapter 11 proceedings in the United States, the Board of Directors of Speedcast appointed three further independent directors to the Special Restructuring Committee with experience in U.S. restructuring transactions, Carol Flaton, Hooman Yazhari, and David Mack.

35. At the outset of these Chapter 11 Cases, the Debtors entered into the Initial DIP Facility which anticipated an expeditious chapter 11 process, with a maturity date of January 22, 2021. The milestones set forth in the Initial DIP Facility contemplated that the majority of the Initial DIP Lenders would elect, on or before May 7, 2020, that the Debtors prepare and file either an "Acceptable Plan" or motion to approve a "Sale Transaction" by the end of May. As this Court recognized at the Debtors' first day hearing, Speedcast was not permitted by the Initial DIP Facility to pursue anything other than an "Acceptable Restructuring," that is, a restructuring acceptable to, among others, its Initial DIP Lenders.

[5] These entities are (i) Evolution Communications Group Limited; (ii) Globecomm Europe B.V.; (iii) NewCom International Inc.; (iv) Speedcast Canada Limited; (v) Speedcast Cyprus Ltd.; (vi) Speedcast France SAS; and (vii) Speedcast Netherlands B.V.

36. On April 30, 2020, as required under Section 5.16(c) of the Initial DIP Facility, the Debtors delivered to the Initial DIP Lenders and the Ad Hoc Group, led by Black Diamond, a preliminary analysis in respect of the tax and regulatory consequences and requirements in connection with both an Acceptable Plan and an Acceptable Sale Transaction. Healy Decl. ¶ 8. In this analysis, the Debtors assessed the benefits and considerations of a reorganization or asset sale transaction and determined that due to significant regulatory, commercial, and logistical challenges, and associated expenses, that a reorganization transaction implemented through a plan, as opposed to a 363 sale, would maximize value for the Debtors. The Debtors' continued review and analysis of these benefits and considerations throughout the Chapter 11 Cases and have confirmed their initial conclusions.

37. These benefits of a reorganization transaction compared to a sale (collectively, the "**Recapitalization Benefits**") include the preservation of worldwide tax attributes, the ability to maintain consolidated tax group status in various jurisdictions, and the preservation of important licenses to the Company's operations. This strategic path was also preferred as it minimized risk of triggering requirements for consents or waivers from customers and other third-parties under material contracts (notwithstanding the Bankruptcy Code) and regulatory licenses (*i.e.*, telecom licenses) and the time and costs associated with implementing a sale transaction in non-U.S. jurisdictions through local administration, insolvency, recognition, or similar proceedings and winding up each legal entity left behind (and not acquired by the Plan Sponsor) in such transaction.

38. In particular, the Debtors' analysis indicates that, as compared to a reorganization transaction, a sale transaction would require the Debtors to: (i) secure an extensive number of additional regulatory approvals, including more than twice as many telecom licensing

approvals; and (ii) make a substantial number of additional filings in a variety of foreign jurisdictions, including stand-alone parallel insolvency proceedings or recognition proceedings in approximately eleven foreign jurisdictions. Healy Decl. ¶ 9. These factors associated with pursuing a sale transaction would likely add considerable cost of up to $100 million, and unnecessary delay to the Debtors' restructuring efforts.[6] The Initial DIP lenders and Ad Hoc Group did not, at any point in these Chapter 11 Cases, challenge the Debtors' conclusions in this analysis, and on May 7, 2020, made a "Plan Election." Healy Decl. ¶ 10.

39. The milestones further required that the Debtors prepare and present a business plan for the go-forward Speedcast business (the "**Business Plan**") in the beginning of June 2020. The Debtors presented the Business Plan to Black Diamond, Centerbridge, other SFA Lenders and the Creditors' Committee during the first week of June 2020. The Business Plan was heavily vetted by Initial DIP Lenders, including Black Diamond, and their financial advisors, over a week of videoconference due diligence sessions with senior management, the leads from each of the Company's business verticals, and members of Speedcast's finance, treasury, and technology teams. Each Business Plan included all of the Company's business verticals, including the Government Business, and assumed a release of the SFA obligations against all Company entities

40. During this period, the Debtors also commenced a process with their advisors to identify executory vendor contracts (in addition to those material customer contracts reviewed as part of the initial sale vs. reorganization analysis described above) and leases, as part of the process whereby the Debtors might elect to assume or reject such agreements in the course

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[6] These estimated incremental costs include (a) $70 million in incremental operating cash burn, professional fees, and DIP interest & fees; (b) up to $15 million in additional wind down expenses of Debtors' estates worldwide; and (c) $15 million in potential transfer and income taxes, which would significantly reduce the cash proceeds associated with the sale. Healy Dec. ¶ 9.

of these Chapter 11 Cases. Around this same time, the Debtors' advisors were asked by the Ad Hoc Group, including Black Diamond, to limit the exit costs, including costs to assume and cure executory contracts that would be incurred on emergence from these Chapter 11 Cases. The Debtors' efforts to negotiate with their contract counterparties was accelerated at the request of the Initial DIP Lenders, given their anticipation that they would shortly reach agreement amongst themselves over the terms of an Acceptable Plan and authorize the Debtors to pursue such a transaction.

41. The Debtors' advisors and management team expressed concerns to the Initial DIP Lenders, including Black Diamond, about the impact that paying reduced cures would have on contract terms with such vendors, and on their willingness to continue to do business with the Debtors, following their emergence from chapter 11. *See* Healy Decl. ¶ 11.

42. The Debtors believed an exit from chapter 11 still was achievable in the early fall of 2020 because the Ad Hoc Group continued to indicate that the Debtors would be receiving the terms of an Acceptable Plan imminently. Accordingly, the Debtors started to memorialize the terms on which they would cure executory contracts with their contract counterparties, generally reaching agreement on the cure amount that such a counterparty was willing to accept in exchange for payment on or around the end of September 2020, when the Debtors' plan was expected at the time to go effective. *See* Healy Decl. ¶ 12.

43. Finally, on July 2, 2020, following a number of extensions of the DIP milestones related to the filing of an Acceptable Plan under the Initial DIP Facility, the Debtors received a term sheet for a proposed plan from the Ad Hoc Group. The Debtors began evaluating this plan proposal and working on transaction documents to implement it.

C. Lender Stalemate

44. Around this time, the Debtors learned that Black Diamond and Centerbridge each had acquired holdings under the SFA of over 40% – the result of which was a stalemate between Centerbridge and Black Diamond. The Debtors expressed concern to both that they would exhaust their liquidity runway to exit chapter 11 within the Initial DIP Facility, by mid- to late-September 2020. The Initial DIP Lenders continued to extend the milestone for filing an Acceptable Plan, but were unable to provide the Debtors with the terms of, or consent to file, this Acceptable Plan.

D. Breaking the Lender Stalemate

45. Failing to agree on the terms of a Plan (and post-Effective Date control of the Reorganized Debtors) that would be acceptable to Black Diamond and Centerbridge, the lenders' paths diverged. In the middle of July, Black Diamond, representing to the Debtors that it then controlled the SFA Agent and could direct a credit bid of the SFA, directed the Debtors to begin a 'box-by-box' analysis of the contracts, liabilities and regulatory licenses of Speedcast to prepare for a sale transaction under section 363 of the Bankruptcy Code. As the Debtors came to understand, Centerbridge began analyzing and working with the Creditors' Committee on a revised plan proposal.

46. The Debtors commenced the box-by-box analysis requested by Black Diamond – an analysis that required the assistance of numerous employees at Speedcast, the Debtors' financial advisors, and the Debtors' local counsel in over thirty jurisdictions around the world. As part of looking forward to executing a transaction for the business to exit chapter 11, the Debtors also began working on proposed bid procedures and an asset purchase agreement. In gathering the data for the box-by-box analysis, the Debtors also continued to analyze the complexities inherent in a potential sale process under section 363 that they had communicated to

the Initial DIP Lenders at the outset of the chapter 11 cases. The Debtors, FTI, Black Diamond, Black Diamond's counsel and restructuring and local counsel for the Debtors held multiple diligence sessions in pursuit of a potential sale transaction structure. *See* Healy Decl. ¶ 14.

47. At this point, the timeline had advanced to late July and early August and Speedcast had developed a number of additional concerns with running a 363 process for its business. Namely, the Debtors were concerned about opening the process up to potential competitors of Speedcast, allowing such competitors unfettered access to confidential business information, and having such competitors use that information to Speedcast's detriment in the market. Speedcast also was concerned that its customers and vendors would view negatively an open 363 sale process without a clear path to conclusion and would abandon Speedcast for other providers. Finally, Speedcast also remained concerned about the ability to implement a 363 sale process in light of the Recapitalization Benefits. Speedcast communicated all these concerns to Black Diamond both verbally and in writing, and at the principal and advisor level. As set forth in the deposition of Mr. Spytek, these concerns ultimately came to pass:

> [Name of Strategic Party] is a direct competitor. They're also a vendor. So my fear was if they came in and had a look and ultimately did not transact -- which, by the way, is exactly what happened -- then they would have complete access to all of our customers and everything; and, in effect, they do. So you could say that my worst fears in this text were realized.

See Spytek Dep. Tr. 60:4-11.

48. Centerbridge presented its plan proposal to the Debtors on August 6, 2020 in the form of an Equity Commitment Agreement including a term sheet for a proposed plan of reorganization (the "**Initial ECA**") that had the support of the Official Committee of Unsecured Creditors, together with a proposal to refinance the Initial DIP Facility. At the same time, the

Debtors were requesting that Black Diamond provide details of the terms of a potential stalking horse bid that it was willing to make if the Debtors elected to pursue a sale transaction.

49. Against the backdrop of a looming liquidity wall, the Debtors and their advisors analyzed the terms of the Initial ECA and concluded that it embodied the terms of a confirmable plan transaction. Notably, the Initial ECA was fully backstopped by Centerbridge, but provided that all SFA Lenders could participate in the transaction on a pro-rata basis. The Initial ECA also reflected a reality that was apparent to the Debtors: Speedcast relies on a group of key vendors that are essential to its future viability. Accordingly, the Initial ECA proposed an enhanced recovery to these key vendors relative to other general unsecured creditors.

50. Faced with the stark choice of commencing a sale process without a stalking horse, or pursuing an otherwise confirmable plan transaction that was equitable in its funding and recovery structure, and having no other viable restructuring transaction before it, the Special Restructuring Committee recommended to the Board that the Debtors pursue the Initial ECA. On August 12, 2020, the Debtors filed a motion with the Bankruptcy Court seeking relief from the Final DIP Order to pursue the Initial ECA (the "**Initial ECA Motion**").

E. Funding the Extended Chapter 11 Cases

51. Recognizing the Debtors' need for additional liquidity to fund their extended chapter 11 process, the Debtors' investment banker, Moelis & Company LLC ("**Moelis**") communicated with the Initial DIP Lenders to determine if they would be willing to provide incremental financing. As discussed in the Waldman Declaration the Debtors' received and negotiated proposals from each of Black Diamond and Centerbridge regarding incremental or replacement DIP financing. *See generally* Ex. No. 21. On September 8, 2020, Black Diamond, as agent under the Initial DIP Facility, sent the Debtors a notice of default alleging the occurrence

of certain events of default under the Initial DIP Facility due to, among other things, the Debtors' entry into the Initial ECA and failure to file an Acceptable Plan. *See* Ex. No. 83.

52. Faced with an imminent liquidity wall and a maturity date under the Initial DIP Facility that would not permit a restructuring transaction to be completed, the notice of default from the Initial DIP Lenders, and risk that the Initial DIP Lenders would exercise remedies, the Debtors determined to either upsize or refinance the Initial DIP Facility. In addition to being more expensive than the Centerbridge proposal, Black Diamond's proposal for incremental DIP financing, accompanied by a term sheet for a 363 transaction, prohibited solicitation of alternative plans, and required an extension of the maturity date under the Initial DIP Facility that necessitated either 100% of Initial DIP Lender approval or a "buy out" of non-consenting lenders' positions, to which Black Diamond had not committed. The Debtors ultimately accepted the proposal from Centerbridge for a replacement DIP facility that would repay the Initial DIP Facility, and provide the Debtors with an additional $100 million to fund the Debtors' prolonged chapter 11 process on better terms than the Initial DIP Facility.

53. The Refinanced DIP Facility provided terms that addressed the concerns raised by the Court during the first-day:

> . . . I don't believe that it's appropriate for the first day hearing to surrender – and I don't mean that in a pejorative way – to surrender what the Plan would look like to the lenders.
>
> I agree factually, just from experience, with the statement by the Debtors with the probability that there will be a disagreement between the Debtors and their lenders as to whether to follow a Plan that reorganizes for [*sic*] a 363 sale. I don't think there will be any daylight.

Apr.23, 2020 Hr'g Tr. at 55:7 – 55:15.

54. Notably, the Refinanced DIP Facility's terms did not require the filing or consummation of a specific plan of reorganization or sale process acceptable to the DIP lenders thereunder. Rather, the Refinanced DIP Facility provided the Debtors with flexibility to pursue what they determined in their business judgment to be a value maximizing transaction. The Refinanced DIP Facility fully repaid the Initial DIP Facility and the roll-up, providing Black Diamond alone with over $90 million in cash, comprised of repayment in full of the Initial DIP Facility loans and a repayment at par of debt it had likely bought in at a fraction of the face value. Perhaps unsurprisingly, the Refinanced DIP Facility was approved on a fully consensual and final basis on October 5, 2020 (ECF No. 777).

F. Execution of Final ECA and Plan

55. The Debtors' entry into the Initial ECA was the catalyst for a competitive bidding process between Black Diamond and Centerbridge. Throughout August and September 2020, the Debtors received multiple competing proposals for restructuring or sale transaction from Black Diamond and Centerbridge and engaged in extensive and good faith attempts to broker a deal between Black Diamond and Centerbridge regarding the terms of an Acceptable Plan. After receiving higher or better proposals from each of Black Diamond and Centerbridge, the Debtors withdrew the Initial ECA motion on August 31, 2020 (ECF No. 646). This in turn led to Centerbridge further enhancing its proposals, and Black Diamond in turn making counterproposals.

56. On September 11, 2020, following extensive good faith negotiations by the Debtors and their advisors regarding the terms and structure of a potential value maximizing transaction, Black Diamond filed an emergency motion requesting mediation, or, in the alternative,

appointment of an examiner.[7] As described in the Disclosure Statement, the Debtors, Black Diamond, Centerbridge, and the Creditors' Committee consented to non-binding mediation with Chief Judge David R. Jones on September 22, 2020.[8] The mediation did not result in a fully consensual resolution.

57. Following mediation, the Debtors continued to evaluate the strategic alternatives available to it to maximize value for all creditors and, to that end, continued informal negotiations with Black Diamond and Centerbridge. Faced with the reality that there would be no consensual resolution between Black Diamond and Centerbridge that would enable the Debtors to emerge within the liquidity timeframe afforded by the Refinanced DIP Facility, the Debtors determined to pursue the Centerbridge sponsored proposal—the only actionable proposal available to them—by negotiating an amended equity commitment agreement and chapter 11 plan of reorganization.

58. To ensure that the Centerbridge proposal reflected the highest and best option available to the Debtors, the Debtors also developed, with the support of their advisors, Plan Sponsor Selection Procedures with the objective of determining whether any other parties were willing to sponsor a chapter 11 plan on superior terms to those available to the Company. The Plan Sponsor Selection Procedures were designed to preserve the going concern value of the business and maximize the potential recovery for creditors by facilitating a competitive market for bidding on the equity of the Reorganized Debtors, while not putting in jeopardy the ECA transaction that the Debtors had in hand. The Plan Sponsor Selection Procedures reflect a

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7 *Black Diamond Capital Management, L.L.C.'s Emergency Motion for Mediation, and Certain Related Relief* (ECF No. 666); *Statement of the Ad Hoc Group of Secured Lenders in Support of Black Diamond Capital Management, L.L.C.'s Emergency Motion for Mediation or, in the Alternative, Appointment of an Examiner Pursuant to 11 U.S.C. § 1104(c)* (ECF No. 686).

8 The Government Business did not participate in the mediation but made itself available to participate if needed.

reasonable exercise of the Debtors' business judgement to pursue a recapitalization transaction that, among other things, captures the Recapitalization Benefits for the benefit of the Debtors' creditors.

59. On October 10, 2020, the Debtors entered into the Amended and Restated Equity Commitment Agreement (the "**Final ECA**"), pursuant to which, among other things, Centerbridge and its affiliates committed to make a new-money equity investment for 100% of the equity interests in a newly formed parent entity of the Debtors and their non-Debtor affiliates for an aggregate amount of $500 million, and filed the Plan and Disclosure Statement. In conjunction with the solicitation of votes on the Plan, the Debtors simultaneously ran the Plan Sponsor Selection Process to allow prospective plan sponsors to make a higher or better proposal ("**Alternative Plan Proposal**"). Although the Debtors received initial indications of interest for an Alternative Plan Proposal and engaged in extensive diligence with a Strategic Party (as defined below), the Debtors' did not receive an Alternative Plan Proposal in advance of the Submission Deadline from any party.

60. Throughout the Plan Sponsor Selection Process, the Debtors continued to repeatedly encourage Black Diamond to submit a committed Alternative Plan Proposal (even if non-conforming) to the Debtors.[9] However, on November 6, 2020, the Debtors received correspondence from Black Diamond stating that "Black Diamond hereby confirms that all of its prior proposals to acquire Speedcast have expired or otherwise been withdrawn. Black Diamond intends to reject the proposed Plan and to pursue all available claims and causes of action against

[9] *See* Letter from Stephe Wilks, SpeedCast International Limited Special Restructuring Committee, Chair, to Stephen H. Deckoff, Black Diamond Capital Management, L.L.C., Managing Principal (Nov. 3, 2020) (the "**November 3 SRC Letter**"); Letter from Stephe Wilks, SpeedCast International Limited Special Restructuring Committee, Chair, to Stephen H. Deckoff, Black Diamond Capital Management, L.L.C., Managing Principal (Nov. 13, 2020) (the "**November 13 SRC Letter**").

the Debtors and their directors, officers, representatives, and advisors for their multitude of value-destroying actions and blatant and ongoing breaches of their fiduciary duties."[10] Despite further efforts by the Debtors and their advisors, both verbally and in writing, to encourage Black Diamond to submit a committed, fully documented and binding proposal, Black Diamond confirmed in writing on November 13, 2020 that no such proposal would be forthcoming.[11]

61. The Debtors have determined that the Plan maximizes the value of the Debtors' Estates and represents the best available transaction for all of the Debtors' stakeholders. The Plan is the result of extensive good faith negotiations in these highly complex and multinational chapter 11 cases. The Special Restructuring Committee oversaw Plan negotiations between the Debtors and a number of their key economic stakeholders, including the Plan Sponsor. Further, the Plan provides for a settlement with and is supported by the Creditors' Committee, and holders in Class 4A Claims that voted to accept the Plan.

62. The Plan provides for:

- a complete discharge of the Debtors' obligations under the SFA in the amount of approximately $633 million;
- a $500 million equity investment provided by the Plan Sponsor;
- a $150 million recovery to holders of Allowed Syndicated Facility Secured Claims;
- a $25 million recovery to holders of Unsecured Trade Claims; and
- establishment of the Litigation Trust for the benefit of Other Unsecured Claims; and

[10] *See* Letter from Stephen H. Deckoff, Black Diamond Capital Management, L.L.C., Managing Principal, to Stephe Wilks, SpeedCast International Limited Special Restructuring Committee, Chair (Nov. 6, 2020).

[11] *See* Letter from Stephen H. Deckoff, Black Diamond Capital Management, L.L.C., Managing Principal, to Stephe Wilks, SpeedCast International Limited Special Restructuring Committee, Chair (Nov. 13, 2020).

- the emergence of reorganized Speedcast as an enterprise unleveraged by funded debt.

III. Development of the Plan Sponsor Procedures

63. The Solicitation Order authorized the Debtors to perform under the Plan Sponsor Selection Procedures set forth in Exhibit H to the Disclosure Statement (the "**Plan Sponsor Selection Procedures**") in soliciting higher or better Plan Sponsor Proposals. The Plan Sponsor Selection Procedures fixed the deadline for submitting (i) non-binding indications of interest (each, a "**Non-Binding Indication of Interest**") as October 23, 2020 at 4:00 p.m. (prevailing Central Time), and (ii) a proposal to become the plan sponsor in the form of a definitive, binding equity commitment agreement (each such proposal, a "**Plan Sponsor Proposal**") as November 16, 2020 at 4:00 p.m. (prevailing Central Time) (as extended by agreement of the Debtors, the "**Submission Deadline**"). The Debtors qualified Black Diamond and one strategic party (the "**Strategic Party**") following their respective submissions of a Non-Binding Indication of Interest. No other parties submitted Non-Binding Indications of Interest. *See* Waldman Declaration ¶ 23.

64. The Debtors (and the Government Business) continued to provide diligence under the Plan Sponsor Selection Procedures to Black Diamond and the Strategic Party. The Debtors maintained a robust and transparent information sharing process to facilitate Black Diamond's participation in the Plan Sponsor Selection Process. For example, the Debtors set up a series of diligence calls for Black Diamond, and provided Black Diamond with access to a dataroom with extensive information covering a wide range of topics. The Debtors extended the Submission Deadline at the request of the Strategic Party until November 18, 2020, an extension that was also afforded to Black Diamond. *See id.*

65. The Debtors, with the advice of their advisors, developed the procedures, timeframes, and two-stage marketing and selection process set forth in the Plan Sponsor Selection Procedures to provide adequate and appropriate notice and information to prospective Plan Sponsors to enable them to meaningfully participate in the process, while remaining within the liquidity timeframe afforded to them by their DIP financing, and to encourage plan proposals within a transaction framework that the Debtors determined would maximize the value of the enterprise and to preserve the Recapitalization Benefits. The Debtors consulted with the Creditors' Committee in the development of the Plan Sponsor Selection Procedures, and the Debtors further revised the procedures to address certain comments included in Black Diamond's objections to the Debtors' Disclosure Statement. *See* Waldman Decl. ¶ 4, and Ex. B to the *Omnibus Reply of Debtors to Objections to Disclosure Statement* (ECF No. 836). The proposed Plan Sponsor Selection Procedures were shared with various parties, including Black Diamond, prior to filing the Disclosure Statement.

66. Although the Plan Sponsor Selection Procedures solicited bids for a reorganization transaction, the Plan Sponsor Selection Procedures provided the Debtors with flexibility to (i) modify or terminate the procedures, and (ii) in the reasonable exercise of their business judgment and in a manner consistent with their fiduciary duties and applicable law, accept a subsequent Plan Sponsor Proposal that was higher or otherwise better than the proposal provided by the Initial Plan Sponsor pursuant to the ECA. *See* Plan Sponsor Selection Procedures at 15. Moreover, the Final ECA provided a 'fiduciary out' – which provides the Debtors with the ability for the Debtors to select an alternative path to exit chapter 11 even if a proposal did not meet the requirements for a Plan Sponsor Proposal under the Plan Sponsor Selection Procedures (the "**Fiduciary Out**"). *See* Final ECA § 11(c)(i).

67. The Debtors' extensive and robust market check under the Plan Sponsor Selection Process took place over more than seven weeks and allowed the Debtors, with the assistance of their investment bankers, to identify and contact potentially-interested parties, including certain financing parties, potential strategic buyers, and other parties suggested by Black Diamond and the Prepetition Lenders at the outset of these Chapter 11 Cases. *See* Waldman Decl. ¶ 22. As a result, the Debtors engaged with twenty parties, including Black Diamond, in this competitive process – including five of whom that executed non-disclosure agreements – and were granted access to the Phase I dataroom in accordance with the timeline provided under the Plan Sponsor Selection Procedures, as extended by the Debtors. *See id.*

68. No Plan Sponsor Proposals, or indeed any alternative binding proposals, were received by the Debtors prior to the extended Submission Deadline or thereafter. On November 25, 2020, the Debtors filed the *Notice of Designation of Plan Sponsor* (ECF No. 991) designating Centerbridge as the final Plan Sponsor (the "**Final Plan Sponsor**") and noting that the Final Selection Process (as defined in the Plan Sponsor Selection Procedures) had been cancelled because no other Plan Sponsor Proposals, or any other binding or actionable proposals, had been received.

69. The Plan Sponsor Selection Procedures supplemented the Debtors' informal marketing process, which began months before the Debtors filed the Plan Sponsor Selection Procedures.[12] The Plan Sponsor Selection Procedures, including the extensive marketing process, provided a fair and transparent process, while preserving – and not risking – a path to emerge from chapter 11 under the existing Plan and ECA.

[12] Various parties began to contact the Debtors and the Debtors' advisors regarding a potential transaction beginning as early as May 2020. The Debtors began to receive more credible inbounds from interested parties beginning in late June and early July 2020. *See* Waldman Decl. ¶ 18.

IV. Plan Solicitation

70. On October 10, 2020, the Debtors filed a motion seeking approval on a conditional basis of the Disclosure Statement, and approving procedures for solicitation of votes on the Plan, and related notices, forms, and ballots (collectively, the "**Solicitation Packages**").[13] Following the hearings held October 19, 2020 and October 21, 2020, on November 2, 2020, the Court entered an order approving the Scheduling Motion.

71. On November 24, 2020, the Debtors filed the *Motion of Debtors For Order Determining Value Of The Syndicated Facility Secured Claims and Related Relief* (ECF No. 981). On November 25, 2020, the Debtors filed the *Second Amended Joint Chapter 11 Plan of SpeedCast International Limited and its Debtor Affiliates* (ECF No. 992), which proposed limited substantive consolidation for certain Debtor entities.

72. Pursuant to the Solicitation Order, the Debtors and Kurtzman Carson Consultants LLC (the "**Solicitation Agent**") distributed Solicitation Packages to all holders of Claims and Interests eligible to vote on the Plan (the "**Voting Classes**"). *See* Notice Aff. ¶¶ 6-15. The deadline for the Voting Classes to cast their ballots was December 8, 2020 (the "**Voting Deadline**").

73. The voting results demonstrate that Class 4A (Unsecured Trade Claims) voted to accept the Plan at each Debtor (inclusive of the limited substantive consolidation sought for the five Proposed Sub-Con Debtors). *See* Voting Cert. Ex. A. The Debtors did not receive votes to accept at the following entities: HCT Acquisition, LLC and Cosmos Holdings Acquisition

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[13] *Emergency Motion of Debtors for Entry of Order (I) Scheduling Combined Hearing on (A) Adequacy of Disclosure Statement and (B) Confirmation of Plan; (II) Conditionally Approving Disclosure Statement; (III) Approving Solicitation Procedures and Form and Manner of Notice of Combined Hearing and Objection Deadline; (IV) Fixing Deadline to Object to Disclosure Statement and Plan; (V) Approving Notice and Objection Procedures for the Assumption of Executory Contracts and Unexpired Leases; (VI) Approving Plan Sponsor Selection Procedures; and (VII) Granting Related Relief* (ECF No. 811) (the "**Scheduling Motion**").

Corp. (which entities are dissolving under the Plan); SpaceLink Systems, LLC; SpaceLink Systems II, LLC; SpeedCast Group Holdings Pty Ltd; and SpeedCast Managed Services Pty Limited. *See infra* ¶¶ 142-150 (discussing treatment of Proposed Sub-Con Debtors). The voting results, as described in the Voting Certification, are summarized on an aggregate basis in the table below.

Class	Accept		Reject		Result
	Amount (% of Amount Voted)	**Number (% of Number Voted)**	**Amount (% of Amount Voted)**	**Number (% of Number Voted)**	
Class 3 (Syndicated Facility Secured Claims)[14]	49.63%	78.13% (25)	50.37%	21.88%	Reject
Class 4A (Unsecured Trade Claims)	100%	100% (113)	0%	0%	Accept
Class 4B (Other Unsecured Claims)	49.99%	90.91% (170)	50.01%	9.09%	Reject

PLAN IS PROPOSED IN GOOD FAITH <u>IN COMPLIANCE WITH 11 U.S.C. § 1129(A)(3)</u>

I. <u>Plan Was Proposed in Good Faith</u>

74. Under section 1129(a)(3) of the Bankruptcy Code, a plan must be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). "The requirement of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start." *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 802 (5th Cir. 1997); *In re Vill. at Camp Bowie I, L.P.*, 710 F.3d 239, 247 (5th Cir. 2013) ("Good

[14] The Debtors solicited votes from holders of Class 3 (Syndicated Facility Secured Claims) solely to the extent that such Class is determined to be Impaired under the Plan by the Bankruptcy Court. For the reasons set forth herein, Class 3 is Unimpaired and accordingly, is deemed to accept the Plan pursuant to section 1126(f) of the Bankruptcy Code.

faith should be evaluated 'in light of the totality of the circumstances' . . . mindful of the purposes underlying the Bankruptcy Code") (citing *Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.)*, 150 F.3d 503, 519 (5th Cir. 1998)).

75. The *T-H New Orleans* court succinctly stated, "where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of § 1129(a)(3) is satisfied." *T-H New Orleans*, 116 F.3d at 802; *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Star Ambulance Serv., LLC, 540 B.R. 251, 262 (Bankr. S.D. Tex. 2015)*. "[T]o be proposed in good faith, a plan must fairly achieve a result consistent with the [Bankruptcy] Code." *In re Cypresswood Land Partners, I*, 409 B.R. 396, 425 (Bankr. S.D. Tex. 2009) (Bohm, J.) (quoting *In re Block Shim Dev. Co.-Irving,* 939 F.2d 289, 292 (5th Cir. 1991)).

76. Here, the Plan has been proposed by the Debtors in good faith, using the tools available under the Bankruptcy Code and for the legitimate and honest purposes of reorganizing the Debtors' ongoing businesses and enhancing their long-term financial viability while providing the highest recoveries in a confirmable plan to the Debtors' stakeholders. The Plan is the culmination of a rigorous and arm's-length process of negotiating and developing a value-maximizing and viable path to reorganize the Debtors' businesses. Healy Decl. ¶ 16.

77. The Plan is the result of extensive good-faith negotiations authorized by the Board and led by the Debtors' independent Special Restructuring Committee, between the Debtors and a number of their key economic stakeholders, including the Plan Sponsor, and the Creditors'

Committee. The Debtors actively participated in voluntary mediation with Black Diamond to seek a consensual resolution of their concerns.[15] *See* Healy Decl. ¶ 16.

78. These facts are the hallmarks of good faith. *See In re Lincolnshire Campus, LLC*, 441 B.R. 524, 530 (Bankr. N.D. Tex. 2010) (holding that a plan was proposed in good faith where plan was developed and negotiated at arm's-length among representatives of debtors and other major parties in interest); *In re Chemtura Corp.*, 439 B.R. 561, 609 (Bankr. S.D.N.Y. 2010) (finding that a plan was proposed in good faith where, among other things, the debtor negotiated and reached agreements with several parties in interest to put forward a chapter 11 plan which "in the aggregate . . . demonstrate[d] a good faith effort on the part of the debtor to consider the needs and concerns of all major constituencies" in case).

79. Black Diamond alleges that the Special Restructuring Committee was "overawed" by members of the Debtors' management team. Black Diamond Objection ¶ 155. All decisions with respect to the Plan were made by the Board at the recommendation of the Special Restructuring Committee, over which management had no power or authority. Members of the Debtors' management team were not members of the Special Restructuring Committee. Mr. Shaper and Mr. Spytek did attend certain Special Restructuring Committee meetings, but it is normal business practice to have members of management attend Special Restructuring Committee meetings to provide committee members with important business updates as happened here. The Special Restructuring Committee excused Mr. Shaper and Mr. Spytek from these meetings when appropriate—including during the Special Restructuring Committee meeting when it chose to discuss whether or not to recommend that the Debtors pursue the Initial ECA. The Special

[15] On September 18, 2020, the Bankruptcy Court entered the *Agreed Mediation Order Appointing David R. Jones as Mediator* (ECF No. 720).

Restructuring Committee held executive sessions at each Special Restructuring Committee meeting that Mr. Sharper and Mr. Spytek were not invited to attend. The Special Restructuring Committee was composed of five independent directors, none of whom was beholden to Mr. Spytek or Mr. Shaper.

80. When faced with potential resignations from members of management, the Special Restructuring Committee continued to support the submission of competing proposals that pushed the company's value higher. In fact, under the transaction before this Court for approval, the Special Restructuring Committee chose to pursue a plan that resulted in the resignation of Mr. Shaper and does not include a co-investment by Genesis Park, Mr. Shaper, or Mr. Spytek.

81. Importantly, support for the Plan was not obtained by manufacturing an impaired accepting class, as Black Diamond contends. The evidence will show that there was no "vote buying" in this case, which is readily distinguishable from the *In re Quigley Co.*, 437 B.R. 102 (Bankr. S.D.N.Y. 2010) case involving actual vote buying cited in Black Diamond's objection. Black Diamond Objection ¶ 159.[16]

82. Further, Black Diamond's argument that Centerbridge suppressed transaction value by procuring management's support through a generous MIP and co-investment opportunity ignores the facts of these Chapter 11 Cases and rests on irrelevant or stale allegations. Black Diamond Obj. ¶ 17. Black Diamond points to a co-investment opportunity in the Initial ECA, communications from the Company's prior Chief Executive Officer ("**CEO**"), Mr. Peter Shaper, and Genesis Park's investment strategy to support its arguments. *Id.* at ¶ 18-24. As an initial matter, the Plan and Final ECA do not contemplate a co-investment opportunity. Nor

[16] *See also* Dec. 9, 2020 Hr'g Tr. 8:25-9:3 ("But my reaction is that --- well, first of all, there's no question that we're not talking about buying votes in the sense of, you know, secretly bribing somebody, that's not what was going on by Mr. Spytek.")

was Mr. Shaper on the Special Restructuring Committee making decisions on the Debtors' restructuring at any point in these Chapter 11 Cases. Further, Mr. Shaper left the Company prior to the Final ECA being executed and the Plan that is before this Court being filed. Although Mr. Spytek has been designated as an "Operational Expert" on Genesis Park's website, the evidence will show that this website reference has no bearing on his role as President and Chief Commercial Officer of Speedcast.

83. Black Diamond also points to the "generous MIP" contemplated in the Initial ECA (Black Diamond Obj. ¶ 17), while ignoring the fact that Black Diamond previously expressed a willingness to support a similar management incentive plan. The Plan does not bind the Reorganized Debtors to the terms of a future MIP. Rather, the terms of such program will be subject to the New Board's development and approval upon emergence. Plan § 5.11. Black Diamond's allegations also ignore the well-documented process overseen by the Special Restructuring Committee, who at all times made decisions independent from (and at times at odds with) management, aimed at maximizing value of the Company for the benefit of all stakeholders.

84. Finally, the Debtors did everything in their power to ensure that all interested parties had ample opportunity to submit an actionable proposal. Even though the Debtors were not required to do so, they created the Plan Sponsor Selection Procedures to provide a market test for the Final ECA. The Plan Sponsor Selection Procedures gave Centerbridge and Black Diamond equal opportunity to put forth the highest and best actionable proposal. The Debtors' Fiduciary Out could be exercised even if the best proposal did not conform to the bid procedures under the Plan Sponsor Selection Procedures. The Special Restructuring Committee told Black Diamond about this fiduciary out several times and requested that Black Diamond submit any actionable proposal. *See* November 3 SRC Letter; November 13 SRC Letter. After

the Plan Sponsor Selection Procedures were put in place, Black Diamond never submitted an actionable bid.

85. The Debtors were not required to create the Plan Sponsor Selection Procedures, nor were they required to allow a credit bid as part of a reorganization proposal. However, in its pursuit of the highest and best proposal, the Debtors encourage Black Diamond to submit any actionable proposal. The Debtors' Special Restructuring Committee encouraged the submission of any actionable credit or cash bid, but it could not force Black Diamond to submit one. For these reasons, and as the evidence will show, the Plan was proposed in good faith, and Black Diamond's arguments to the contrary should be rejected.

II. **<u>Plan Sponsor Selection Procedures Were Constructed in Good Faith</u>**

86. Black Diamond asserts that the Plan Sponsor Selection Procedures were not designed to attract a competitive bidding process or maximize value. Black Diamond Obj. ¶ 81. This is simply not true. The factual record described below and the Waldman Declaration demonstrates that the Debtors' advisors constructed these procedures to provide the best opportunity for potential Plan Sponsors to meaningfully participate in the process and ultimately maximize value.

87. Following the filing of the Initial ECA Motion on August 12, 2020, the Debtors pursued an informal competitive process between Black Diamond and Centerbridge during which the Debtors analyzed proposals submitted by both parties. This informal process ultimately resulted in the execution of the Final ECA.

88. Following execution of the Final ECA, and though under no obligation to do so, the Debtors developed and pursued a further market test through the Plan Sponsor Selection Procedures of the informal process run between their key lenders, and to determine whether it was possible to further maximize value for creditors, either through a binding proposal from Black

Diamond, or from third-party financial or strategic parties. *See, e.g.*, *In re Emerge Energy Servs. LP*, No. 19-11563 (KBO), 2019 WL 7634308, at *5 (Bankr. D. Del. Dec. 5, 2019) (finding that marketing process is not required in the context of confirmation).

89. Black Diamond's objections to various aspects of the Plan Sponsor Selection Procedures, including the procedures' (i) bar on credit bidding; (ii) minimum bid amount; (iii) transaction structure requirements; (iv) bid qualification process and due diligence requirements; and (v) timeline, are without merit.

A. Black Diamond Did Not Submit a Binding Offer

90. As an initial matter, the Plan is not a sale, and, therefore, Black Diamond has no statutory right to credit bid its debt under it. *See infra* ¶¶ 124-136; *see also In re NNN 3500 Maple 26, LLC*, No. 13-30402-HDH-11, 2014 WL 14007320, at *8 (Bankr. N.D. Tex. Apr. 10, 2014). Nevertheless, in an effort to incentivize Black Diamond to submit a binding proposal, the Plan Sponsor Selection Procedures provided Black Diamond with the ability to submit a proposal using "Non-Cash Consideration" to submit a hybrid offer comprised of cash and a credit against the Prepetition Loans that it owned. *See* Plan Sponsor Selection Procedures § C.5.

91. Notwithstanding the Recapitalization Benefits on which the Plan Sponsor Selection Procedures were structured, throughout the Plan Sponsor Selection Process, the Debtors repeatedly informed Black Diamond that, if provided an actionable binding proposal, whether or not a Qualified Plan Proposal under the Plan Sponsor Selection Procedures, the Debtors would evaluate such proposal and consider its 'fiduciary out' under the Equity Commitment Agreement to act on any higher or better proposals, as appropriate.

92. Upon receipt of two Non-Binding Indications of Interest from Black Diamond on October 23, 2020, the Special Restructuring Committee communicated to Black Diamond that the Debtors remained willing to work with Black Diamond and encouraged

submission of a proposal that conformed to the Plan Sponsor Selection Procedures. Although the elements of Black Diamond's Non-Binding Indications of Interest did not conform to the Plan Sponsor Selection Procedures, the Debtors qualified Black Diamond to the following round (Phase 2) and granted Black Diamond access to additional diligence in the data room contemplated by the Phase 2 Diligence described in the Plan Sponsor Selection Procedures.[17]

93. In further communications from the Special Restructuring Committee to Black Diamond, the Special Restructuring Committee identified the terms of a transaction that it viewed as necessary to exercise its Fiduciary Out, including one in the form of a credit bid of all of the SFA obligations. *See* November 3 SRC Letter; November 13 SRC Letter. The Special Restructuring Committee's position was also reiterated in direct discussions between Black Diamond and Mr. Healy, Black Diamond and Ms. Flaton, as well as between the Debtors' and Black Diamond's advisors.

94. Despite the Debtors' repeated requests, Black Diamond failed to submit any binding, actionable proposal to the Debtors by (or after) the Submission Deadline. *See* Waldman Decl. ¶ 28. Black Diamond cannot have it both ways: if it wants the Debtors to pursue an alternative transaction, it must submit a binding offer. The Debtors cannot exercise their Fiduciary Out and pursue such a transaction if such a transaction does not, in fact, exist.

B. Plan Sponsor Selection Procedures Appropriately Solicited Bids for a Recapitalization Transaction

95. Black Diamond argues that the Plan Sponsor Selection Procedures are unnecessarily prescriptive concerning the structure of the transaction. *See* Black Diamond

[17] *See* Letter from Stephe Wilks, SpeedCast International Limited Special Restructuring Committee, Chair, to Stephen H. Deckoff, Black Diamond Capital Management, L.L.C., Managing Principal (Oct. 27, 2020) (the "**October 27 SRC Letter**").

Obj. ¶ 81. Subject to a Fiduciary Out, the Plan Sponsor Selection Procedures required "Qualified Plan Proposals" to be structured as a chapter 11 plan investment in exchange for 100% of the New Speedcast Equity Interests. *See* Plan Sponsor Selection Procedures § V.A.

96. Given the material timing and process risk related to an asset sale transaction, and the Debtors' conclusion that a value maximizing transaction, inclusive of the Recapitalization Benefits, was one that should be pursued under a plan of reorganization through a recapitalization, Black Diamond is misguided in its argument. Black Diamond's statement that the Debtors do not justify their refusal to consider other acquisition structures conveniently ignores Black Diamond's intimate involvement in these Chapter 11 Cases, the Plan Election that *it* made, the term sheets for a reorganization transaction submitted as part of the Ad Hoc Group that *it* led, and numerous letters from the Special Restructuring Committee to Black Diamond encouraging it to submit a committed, fully documented and binding transaction agreement for a credit bid, and Black Diamond's inability to fully develop an alternative restructuring pathway.[18]

97. The Debtors' determination in these circumstances to require investments to be made in cash—whether in full or in part—was wholly appropriate. Here, the Debtors' requirement that part of any competing proposal be in cash is necessary to enable the Debtors to pay off the Refinanced DIP Facility and pay various exit costs. In addition, even though the Debtors did not solicit credit bids, as an accommodation to Black Diamond, the Debtors have proposed that a Qualified Plan Proposal may be partially composed of Non-Cash Consideration under certain circumstances, as detailed in the Plan Sponsor Selection Procedures. The Debtors have done all this with the support of the Creditors' Committee.

[18] *See* Letter from Gary T. Holtzer, Weil, Gotshal & Manges LLP, to Stephen H. Deckoff, Black Diamond Capital Management, L.L.C., Managing Principal (Sept. 21, 2020); October 27 SRC Letter; November 3 SRC Letter; November 13 SRC Letter.

98. In addition, the Debtors' Refinanced DIP Facility matures on March 15, 2021. The Debtors will need to work expeditiously to close the recapitalization transaction embodied in the Plan within the current liquidity runway. The transaction structure embodied in the Plan and the Final ECA has been extensively researched and developed, and was made available to all prospective Plan Sponsors. The time and effort required to devise alternative plan or sale structures is not available to the Debtors within their liquidity timeframe. Indeed, despite having since March 29, 2020 to come up with such a structure, Black Diamond has yet to propose one.

C. Required Base Cash Amount is Appropriate

99. The Plan Sponsor Selection Process was implemented to solicit higher or better Plan Sponsor Proposals than the Final ECA from any and all willing investors, including Black Diamond. The Required Base Cash Amount was calculated to ensure the feasibility of the Plan at emergence, by funding, among other things: (i) the repayment in full of all obligations under the Refinanced DIP Facility; (ii) the payment of all administrative and priority claims, including fees incurred by the Debtors' professional advisors and claims arising under section 503(b)(9) of the Bankruptcy Code; (iii) the provision of collateral for letters of credit; (iv) the payment of cure amounts arising under prepetition contracts; (v) payment of certain lease and vendor exit costs; (vi) payment of certain unsecured trade claims; and (vii) funding of the Litigation Trust. *See* Healy Decl. ¶ 49.

100. To assist the Debtors with an apples-to-apples evaluation of Plan Sponsor Proposals that were submitted, the Debtors used January 31, 2021 as the date of reference for Plan Sponsor Proposals. On January 31, 2021, the Debtors project having $30 million of available liquidity remaining under the DIP. *See* Healy Decl. ¶ 50. The Debtors are targeting a closing on or around March 10 on the ECA transaction if approved by this Court, and anticipate

approximately $7 million or less of availability at that time under the Refinanced DIP Facility . *See id.* ¶ 50.

D. Length of the Selection Process is Appropriate

101. The length of the Plan Sponsor Selection Process reflected both the reality of the Debtors' liquidity runway, the informal process that the Debtors had run prior to seeking conditional approval of their Disclosure Statement, and the Debtors' and Moelis' contact with potential Plan Sponsors throughout the chapter 11 cases. Based on advice from advisors globally, any Plan Sponsor transaction pursued by the Company would require an extensive regulatory review with a review period of up to 120 days following approval of the transaction by the Bankruptcy Court. The Government Business additionally raises issues of foreign ownership, classified information, and special government contracts. A lengthy review period would be extended substantially if a strategic competitor was selected as the Final Plan Sponsor or if the Debtors determined to pursue a chapter 11 sale of all or substantially all of their assets. *See* Healy Decl. ¶ 51.

102. With no certainty that the Plan Sponsor Selection Process would yield a higher or better offer for the Company, and with no indication that additional DIP funding would be available to the Debtors, the length of the Plan Sponsor Selection Process was intended not to put the ECA in jeopardy.

103. As noted above, the Debtors are targeting a March 10, 2021 closing on the ECA transaction, with a DIP maturity of March 15, 2021, and very little availability remaining under the DIP at that time. *See supra* ¶ 100. Pursuing a longer Plan Sponsor Selection Process simply would have not been possible absent funding being available to pursue such a process. The Debtors are not aware of any such funding being available to them under such terms. *See* Healy Decl. ¶ 51.

104. Accordingly, for all of the foregoing reasons, the Plan Sponsor Selection Procedures were reasonable and should be approved because they provided for a fair, transparent, and competitive process, and demonstrated a sound exercise of the Debtors' business judgment.

105. As the evidence shows, the Plan was proposed in good faith, and the Plan Sponsor Selection Procedures were similarly proposed in good faith to maximize value for all economic stakeholders; accordingly, the Plan complies with section 1129(a)(3) of the Bankruptcy Code.

DEBTORS' CLASSIFICATION APPROPRIATELY
RECOGNIZES THE IMPORTANCE OF THE DEBTORS' TRADE PARTNERS

106. Black Diamond objects to the Plan's separate classification in Class 4A of certain key trade creditors from other unsecured claims, including Syndicated Facility Deficiency Claims, in class 4B on the basis that there is allegedly no business justification for doing so. *See* Black Diamond Obj. ¶ 90. This objection is detached from the reality of the Debtors' classification process and go-forward business needs, and for the reasons set forth herein, should be overruled.

107. Under the Bankruptcy Code and Fifth Circuit precedent, classes must contain "substantially similar" claims, but debtors may separate similar claims into different classes for good business reasons. *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1167 (5th Cir. 1993) (citing *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274 (5th Cir. 1991) (finding good business reasons supported the separate classification where unsecured creditor had a unique interest in the debtor's continued operations and maintaining an ongoing relationship with the creditor was essential to the debtor's ongoing business)); *In re Bernhard Steiner Pianos USA, Inc.*, 292 B.R. 109, 114 (Bankr. N.D. Tex. 2002) ("[I]n this Circuit, separate classification is permitted for 'good business reasons.'"); *In re Trimm, Inc.*, No. B-97-16637-C-

11D, 2000 WL 33673795, at *6 (Bankr. M.D.N.C. Feb. 17, 2000) (determining that Debtor had proven by the greater weight of evidence that it had a valid justification to separately classify creditors essential to its ongoing business and that "the proposed classification scheme was not simply for the purpose of gerrymandering the voting in th[e] plan").

108. Courts have found good business reasons to support separate classification where the debtor's business was dependent on maintaining an ongoing business relationship with separately classified creditors. *See In re Bernhard Steiner Pianos*, 292 B.R. at 114 (separate classification of consignment creditors justified where consignment business had "historically been an important part of the [d]ebtor's business" and it was "contemplated to be an integral part of the [d]ebtor's future"); *In re Trimm, Inc.*, 2000 WL 33673795, at *5 (separate classification justified where debtors' continued business operation was dependent upon maintaining a continued commercial relationship with separately classified trade creditors).[19]

109. Here, the Debtors engaged in a rigorous process to determine which of their creditors need to receive enhanced recoveries to maintain goodwill and ensure their continued provision of goods and services to protect the Debtors' post-emergence value. At trial, the Debtors will present evidence about the process showing, among other things, that:

- The proposal by Centerbridge and supported by the Creditors' Committee to create a class of claims providing enhanced recoveries to a group of key creditors reflected the Company's independent view that the Debtors' value depends on maintaining the support of certain key vendors, suppliers, and other contract counterparties on the same or better terms as currently in effect Accordingly, concluding that the separate classification of claims in Class 4A and 4B under the Plan was supported by good

[19] *See also In re Brinkley v. Chase Manhattan Mortg. and Realty Tr. (In re LeBlanc)*, 622 F.2d 872, 879 (5th Cir. 1980) (approving separate classification of trade creditors who advanced goods and services in the ordinary course of business and were essential to debtor's operation); *In re Chinos Holdings, Inc.*, Case No. 20 32181 (KLP) (Bankr. E.D. Va., Aug. 26, 2020), Conf. Hr'g Tr. at 37:16-18 (ECF No. 881) (finding reasonable basis for separate classification of certain trade claims from other unsecured claims); *In re Havre Aerie No. 166 Eagles*, No. 12-60679-11, 2013 WL 1164422, at *14 (Bankr. D. Mont. Mar. 20, 2013) (finding that debtor's testimony that "he must pay the trade creditors' claims in order to be able to remain in business and generate income" constituted a "legitimate business justification[]").

business reasons and proper under the Bankruptcy Code, the Debtors commenced the determination of the composition of Class 4A.

- The Debtors determined that the appropriate process to evaluate which creditors need enhanced recoveries to ensure their ongoing support of the Debtors was to establish specific standards for inclusion in Class 4A and make an assessment objectively, rigorously, and in good faith to the Company's list of counterparties, *without regard as to whether such counterparty would vote for or against the proposed plan, or how such selection would impact voting in other plan classes*.

- Michael Healy of FTI, the Debtors' Chief Restructuring Officer, led the Debtors' work to determine the composition of Class 4A, with input from senior management of the Debtors, extensive discussions with the Debtors' supply chain teams, and supervision by the Debtors' Special Restructuring Committee.

- The Debtors considered factors including their ability to replace the supplier, vendor, or other significant contract counterparty, and whether such supplier, vendor, or other significant contract counterparty was essential to maintaining the Debtors' go-forward business and operations. *See* Healy Decl. ¶ 24. The Debtors did not consider which Debtor a given claim is asserted against when evaluating whether a claim should be included in Class 4A. As a result, several Debtors do not have any creditors in their Class 4A.

- Out of the Debtors' approximately 1,500 trade creditors, the Debtors determined that only thirty-seven needed to be categorized in Class 4A. However, those vendors have significant relationships with the Debtors—as evidenced by the fact that estimated allowed amount of Class 4A claims represents $67 – $93 million of $91 - $126 million in total estimated allowed trade claims against the Debtors. Additionally, as discussed in more detail below, many of these creditors dominate their respective markets either as the sole provider in a specific geographic area or by offering superior products or services that others cannot readily provide or that would be time-consuming and cost-prohibitive to replace.

In summary, this evidence will show that the Debtors reasonably determined in good faith, in compliance with the principles in Fifth Circuit case law, that preservation of relationships with the creditors placed in Class 4A is essential to preservation of the Debtors' value going forward.

110. Notwithstanding the rigor and good faith of the Debtors' process to establish and populate Class 4A, Black Diamond tries to muddy the picture by alleging that: (i) professional services firms cannot be included in Class 4A; (ii) the Debtors included in Class 4A creditors with whom the Debtors have already negotiated waivers of their claims; and

(iii) Class 4A was concocted by Centerbridge and supported by the Creditors' Committee to create an impaired accepting class. None of these arguments withstands scrutiny.

111. At the Confirmation Hearing, the Debtors will offer evidence to show why, out of the Debtors' over 200 professional services vendors, only three were included in Class 4A. They were included because the Debtors' failure to do so would either jeopardize the Debtors' access to crucial business information, negatively impact their ability to timely complete necessary statutory audits, and/or significantly increase the Debtors' costs to complete required tasks to transform the business. Black Diamond disingenuously and incorrectly asserts that these vendors obligated themselves to continue providing services through their filings to work as ordinary course professionals during the chapter 11 cases. But these vendors did not obligate themselves to continue working for the Debtors *after* emergence.

112. Further, professional services vendors comprise only three of the thirty-seven vendors in Class 4A. For example, Class 4A includes:

- At least fifteen vendors that enable the Debtors to provide high-bandwidth remote connectivity through the world. Each satellite bandwidth vendor plays a critical role in the Debtors' network of vendors, which facilitates global coverage. Even if the Class 4A satellite bandwidth vendors could be replaced, the cost of doing so would likely exceed the cost of classifying such vendors in Class 4A because these satellite bandwidth vendors are either the only vendor in a specific region or the only vendor with the technology necessary to satisfy customers.

- At least four vendors that provide sophisticated equipment and services that the Debtors either cannot source from a different vendor or cannot reasonably source from a different vendor given that changing vendors would be time consuming, expensive, and necessarily involve a transition period where the Debtors would be reliant on the prior vendor for certain things like spare parts and service.

- At least six terrestrial vendors that provide data Internet connectivity on the ground and typically operate in only specific locations; therefore, multiple vendors are necessary. Confirmation evidence will show that certain terrestrial vendors in Class 4A are the only vendors in specific regions, while others cannot be replaced because any change would involve significant cost and require a lengthy transition period.

Unless there is a *per se* rule that professional services firms can never be considered key vendors that may need to be motivated to continue to work for post-emergence debtors – and Black Diamond does not cite any authority for this because none exists – there is nothing improper about the inclusion of a small number of professional services vendors among thirty-seven total vendors in Class 4A.[20]

113. Black Diamond also misrepresents the discussions and "agreements" that the Debtors had previously with some creditors in Class 4A. In its Objection, Black Diamond argues that the Debtors' efforts to convince certain creditors to partially compromise their cure claims "entirely undercut[s]," the Debtors arguments that providing an enhanced recovery to Class 4A claimants is necessary to ensure those vendor continue dealing with the Company on the same or better terms.[21] However, in so doing, Black Diamond ignores that the Company reached out to negotiate the lowest possible cure amounts based on the capital structure Black Diamond indicated it would be willing to approve through a plan at emergence.

114. As Ethan Auerbach of Black Diamond explained, "We asked Mr. Healy to do his best to – to lower cure costs as much as possible"; he further elaborated that Black Diamond

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[20] Black Diamond's complaint that Class 4A for SpeedCast UK Holdings Ltd. contains only a single claim of just over $5,000 by a professional services company ignore the total size of Class 4A across the Debtors ($67-93 million in claims) and that the Debtors operate as a single business across their entities. As stated simply by the Bankruptcy Court for the Southern District of New York after extensive analysis of the case law surrounding dismissals of chapter 11 cases of subsidiaries of parent debtors: "the interests of the group can and should be considered." *In re Gen. Growth Props., Inc.*, 409 B.R. 43, 61-65 (Bankr. S.D.N.Y. 2009). When considering the Debtors' motivations and process to create and populate Class 4A, the Court should consider the value of the vendor relationships to the Debtors as a group rather than focusing only on the amount of claims asserted against an individual Debtor.

[21] Because the Class 4A vendors are essential to the Debtors' reorganization and go-forward business, the disparity in respective recovery between Class 4A and Class 4B is permissible and consistent with case law approving plan providing for similar enhanced recoveries for certain trade creditors. *203 N. LaSalle St.*, 126 F.3d at 969 (confirming plan where trade creditors recovered 100% and bank deficiency claim recovered 16%); *Jersey City Med.*, 817 F.2d at 1057 (approving plan with 100% recovery for physicians claims and 30% for other unsecured claims).

made that request "so that the company's exit costs would be minimized." *Id.* at 56:20-57:18. Moreover, Mr. Auerbach acknowledged that he agreed with the Debtors that maintaining relationships with trade vendors is "absolutely" essential to the debtor's go-forward business, *id.* at 59:17-20, and that Mr. Healy "laid out the concerns around negotiating too hard with certain vendors," *id.* at 58:1-11, and "played out for us the pros and cons of the strength of negotiations with different vendors," *id.* at 57:12-18, when Black Diamond requested cure costs be lowered "as much as possible," *id.* at 56:17-22.

115. The Debtors' negotiations to lower cure costs at the direction of their Initial DIP Lenders is not at odds with the treatment of certain of these creditors under the proposed Plan. To the contrary, it's a direct result. The Initial DIP Lenders contemplated that the Debtors' plan of reorganization would provide for the lowest possible exit capital, notwithstanding any long-term consequences to the Debtors' businesses. However, Centerbridge, as Plan Sponsor, shares the Debtors' strategic view that enhanced treatment to the Debtors' key contract counterparties and vendors under the Plan is the most effective way to ensure their continued support post-emergence from chapter 11, and is a critical element of the $500 million recapitalization transaction.

116. The Debtors' communications with vendors about cures were never formalized in duly-executed written agreements; rather, these understandings were arrived at via phone and email communications which regularly included language indicating that the Company would be unable to pay any sums until this Court confirms a plan of reorganization, which the Company anticipated would occur by the end of September or early October. Thus, even had such understandings been binding, the Company's failure make payment on the previously discussed timeline would have rendered any agreement null and void.

117. Finally, Black Diamond's allegations about Centerbridge's motivations are irrelevant. This Court has already correctly determined that Centerbridge did not attempt an improper "vote buying" scheme. *See* Dec. 9, 2020 Hr'g Tr. 8:25-9:3 ("But my reaction is that --- well, first of all, there's no question that we're not talking about buying votes in the sense of, you know, secretly bribing somebody, that's not what was going on by Mr. Spytek."). More importantly, it is the Debtors' intent, as the Plan proponent, that is relevant to this analysis. *See, e.g.*, *In re Trimm*, 2000 WL 33673795, at *5-6 (examining Debtor's proffered justification for the separate classification scheme); *In re Bernhard Steiner Pianos*, 292 B.R. at 114 (focusing on testimony from the Debtor's principal as to the justification for the separate classification in finding no evidence of gerrymandering).

118. Centerbridge's proposal to enhance recoveries to induce certain key vendors to continue doing business with the Debtors was neither surprising nor exotic. Instead, it recognized an obvious truth about the Company: Speedcast's business relies on a core set of contract counterparties whose continued support during these extended chapter 11 cases and thereafter is critical to the go forward viability of the Debtors' enterprise.

119. Recognizing this reality, the proposed plan structure contemplated a $25 million recovery pool for these critical counterparties and required the Company to identify which vendors would fit within this criteria. Notably, the Creditors' Committee also supported the proposed plan and recognized the need to provide enhanced recoveries to certain key counterparties to maximize the Debtors' prospects and value. Indeed, Black Diamond apparently also appreciated this reality, and submitted a proposal dated October 13, 2020 that preserved the Debtors' separate classification of Unsecured Trade Claims and the Plan's proposed treatment of such claims. *See* Ex. 46.

120. Black Diamond's assertions will be squarely controverted by evidence at trial demonstrating that by the time the Plan Sponsor proposed a plan construct that included a critical trade class, it was clear that the chapter 11 process would last longer than the Debtors or their lenders had initially anticipated. As a result, the evidence will also show that the Debtors believed they would need to take further steps to maintain their crucial business relationships throughout the duration of a prolonged chapter 11 process. The importance of maintaining these relationships is not disputed. *See* Auerbach Dep. Tr. 57:02-21 ("Q: Do you agree that maintaining relationships with trade vendors is essential to the debtors' go-forward business plan? A: Absolutely.")

121. Testimony at trial also will demonstrate that Centerbridge did not ask the Debtors to ensure that Class 4A include creditors of each Debtor, and that the Debtors did not factor this into their analysis of which creditors need to receive enhanced recoveries. If Centerbridge and the Debtors were trying to pursue a gerrymandering scheme, it is only logical that they would have tried to ensure the presence of at least one Class 4A creditor for each Debtor.

122. Finally, Black Diamond incorrectly asserts that Class 4A was proposed by the Debtors to create an impaired accepting class that would vote in favor of the Plan because the Debtors knew that Black Diamond would vote against the Plan. *See* Black Diamond Obj. ¶¶ 100-02, 109. The Debtors will present evidence that they intended to use the Plan put forth by Centerbridge to create competitive tension to maximize the Debtors' value: the Debtors did not know whether they would be able ultimately to convince Black Diamond to support the Plan or even whether Black Diamond, Centerbridge, a third party or some combination would own the Debtors.

123. Because the Class 4A members are vital to the Debtors' business, the Plan's classification scheme complies with § 1122 of the Bankruptcy Code. Contrary to Black Diamond's assertion, Class 4A was not proposed by the Debtors to gerrymander a vote in favor of confirmation; rather, the Plan provides preferential treatment to the members of Class 4A because the Debtors must maintain essential business operations and goodwill with those crucial supplier, vendor, or other significant contract counterparties.

DEBTORS' PLAN IS A RECAPITALIZATION THAT <u>RECOGNIZES THE COMPLEXITY OF THE DEBTORS' BUSINESS ENTERPRISES</u>

124. Black Diamond believes it is entitled to the "opportunity to credit bid the full amount of the Syndicated Facility Claims[]" – and seeks to drag minority debt holders under the SFA by virtue of its majority control position – pursuant to section 1129(b)(2)(A)(ii) of the Bankruptcy Code and *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639 (2012), which provide that a Debtor cannot cram down secured creditors in a 363 sale scenario without providing the opportunity to credit bid. *See* Black Diamond Objection ¶ 77. To be clear, Black Diamond was afforded the opportunity to credit bid the full amount of the Syndicated Facility Secured Claims or to apply its Syndicated Facility Secured Claims as a non-cash currency in a Plan Sponsor Proposal. Setting aside the matter of whether Black Diamond was afforded these opportunities, Black Diamond is not entitled to credit bid as a matter of law because the Plan is a recapitalization and not a sale.

I. <u>Plan Is a Recapitalization</u>

125. Black's Law Dictionary defines "recapitalization" as: "[a]n adjustment or recasting of a corporation's capital structure — that is, its stocks, bonds, or other securities — through amendment of the articles of incorporation or merger with a parent or subsidiary." Black's

Law Dictionary 1295 (8th ed. 2004). Black's defines "sale" as "[t]he transfer of property or title for a price." *Id*. at 1364.

126. The Plan is a straightforward recapitalization of the Debtors' businesses financed by an equity investment at the top of the corporate structure. Unlike cases cited by Black Diamond – and as discussed in greater detail below – the Plan does not involve transfers of operating assets to new entities to form new businesses or the transfer of real property that is the Debtors' sole asset. The only transfers in the Plan beyond the issuance of new equity in the new top parent to Centerbridge are the Corporate Restructuring Steps, which entail a small number of intercompany debt and equity transfers, but no transfers of operating or other assets. *See* Plan Supplement, Ex. F. The Corporate Restructuring Steps are primarily being effectuated to redomicile the business from Australia to the United States (where it is now headquartered) for a more efficient operational, tax, and organizational profile.

127. As such, these steps adjust the Debtors' capital structure through transfers of debt and stock interests, squarely within the definition of a recapitalization. As will be set forth in testimony offered by the Debtors, the Corporate Restructuring Steps simply increase the value of the Debtors for the benefit of all parties in interest while keeping the Debtors' existing operational structure and ultimate ownership structure in place. In fact, the Corporate Restructuring Steps are not necessary to effectuate the Plan's recapitalization. Centerbridge could implement the steps needed to redomicile the enterprise after consummating the Plan, but this would reduce the Debtors' value by increasing legal expenses and delaying implementation of the most efficient structure for the Debtors' operations. Consistent with the Plan entailing a recapitalization rather than an asset sale, on the Effective Date, the Reorganized Debtors will assume (rather than assign) a broad array of executory contracts, maintain (rather than assign)

ongoing vendor relationships, maintain employment of their employees, and satisfy outstanding claims against them pursuant to the Plan's terms. Additionally, the. Debtors will not have to endure winding up and dissolution expenses or the increased regulatory approvals necessitated by reorganizing through as asset sale.

A. Black Diamond Misreads the Relevant Caselaw

128. The Debtors agree with Black Diamond that *Pac. Lumber* is the leading Fifth Circuit case regarding whether a proposed chapter 11 plan transaction is a sale. *Bank of N.Y. Tr. Co., N.A. v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 245 (5th Cir. 2009). But Black Diamond ignores critical differences between the relevant facts of these cases and those in *Pac. Lumber*.

129. There were six debtors in the *Pac. Lumber* bankruptcy cases. *Id.* at 236. The two primary debtors were Pacific Lumber Company ("**Palco**") and Scotia Pacific LLC ("**Scopac**"). *Id.* Palco "operated a sawmill, a power plant, and the town of Scotia, California." *Id.* Scopac owned "200,000 acres of prime redwood timberland." *Id.* Palco owned Scopac, and the debtors operated as an integrated company with shared directors and senior officers. *Id.* at 236-237. Following the expiration of the Pacific Lumber debtors' exclusive periods to file a chapter 11 plan, Marathon, one of Palco's creditors, and MRC, one of Palco's competitors, proposed a chapter 11 plan. *Id.*

130. The plan "proposed to dissolve all six entities, cancel intercompany debts, and create two new entities, Townco and Newco." *Id.* The assets of the six debtors were to be distributed between two new entities, Townco and Newco. *Id.* Marathon was to convert its senior secured claim against Palco's assets into equity in Townco. *Id.* Marathon and MRC would also invest new money for equity in both Townco and Newco. *Id.* Rather than simply recreating Pacific Lumber's prepetition structure under two new holding companies the stock of which would be

distributed to creditors and plan investors, the Pacific Lumber plan proposed to transfer *all* of the debtors' assets to create two new businesses that would be separately owned and controlled because Townco would be majority owned by MRC and Newco would be majority owned by Marathon. *Id.*

131. In reviewing the plan, the Fifth Circuit noted that "not every transfer is a sale," but held the particular transaction in question was a sale. *Id.* The critical point in the court's analysis was that the transaction in question involved "[n]ew entities wholly owned by MRC and Marathon receiv[ing] title to the *assets* in exchange for this purchase." *Id.* (emphasis added). Black Diamond urges this court to focus only on the fact that the *Pac. Lumber* plan would transfer equity in a reorganized debtor to a plan investor. But this ignores other elements central to the court's holding: unlike the Debtors' Plan and unlike a recapitalization, the *Pac. Lumber* plan transferred all of the debtors' assets to two newly created businesses with different owners. Thus, the Fifth Circuit unremarkably found that a transaction that transferred every asset from six dissolving debtors to create two new and separate businesses with new and separate ownership was not a recapitalization of the debtors.

132. This reading is buttressed by the only case in the Fifth Circuit to subsequently examine the issue, a case with which curiously Black Diamond chose not to engage in any detail, *NNN 3500 Maple 26*. 2014 WL 1407320, at *8. In *NNN 3500 Maple*, the court considered two potential plans, each of which proposed to transfer the debtors' membership interests in a tenancy in common to Newco. *Id.* at *3. The court noted that the creation of new holding companies with new owners resembles a sale in some respects, but held that the plan was not actually a sale because it did not involve any transfer of the real property itself. The Court found that where "real property itself is not really being sold," the plan "is a transfer of equity in

the Debtors, not a sale of real property," and is "best characterized as recapitalization[]." *Id.* at 8. This holding is consistent with *Pac. Lumber*'s requirement that a plan sale entail more than a shuffling of intercompany equity followed by issuance of shares in a new holding company to a plan investor.

133. Finally, Black Diamond's reliance on *In re Olde Prairie Block Owner, LLC*, 464 B.R. 337 (Bankr. N.D. Ill. 2011), is misplaced. *Olde Prairie Block* is easily distinguishable. The court in *Olde Prairie Block* determined that the case was a single asset real estate case under section 101 (51B) of the Bankruptcy Code. *Id.* at 339. As a single asset debtor, the relationship between asset and equity is more closely intertwined than in a typical restructuring.

134. The proposed plan contemplated a transfer of the reorganized debtor's equity interests to a newly formed joint venture held by the plan investors and assumption of the debtor's liabilities by the Newco. Notably, the plan did not involve the adjustment of debts, but instead entailed the assumption of all obligations other than a lien that was being stripped. Under those facts, the court found that the transaction was not a recapitalization. The Court found the plan, in effect, provided for the "Debtor's *assets* be transferred to control of new principals in exchange for assumption of the Debtor's liabilities to all creditors[]" thereby effecting no change in the rights or obligations of parties other than the stripping of the lien on the underlying property, and accordingly found it to be a sale. *Id*. at 346-47 (emphasis added).

135. Applying the foregoing to the facts at hand, it is clear the Plan is a recapitalization not a sale. The Plan contemplates the transfer of equity and debt, assumption and rejection of contracts, retention of employees, and satisfaction of debt across a complex corporate structure at various entities. In a sale scenario, the Debtors would lose valuable Recapitalization Benefits.

B. Implications of the Court's Holding

136. Adoption of Black Diamond's expansive definition of what is a sale in a chapter 11 plan would depart from precedent, upend complex chapter 11 cases, and effectively write the "indubitable equivalent" provision of § 1129(b)(2)(A)(iii) out of the Bankruptcy Code. This Court correctly noted that Black Diamond's argument leads to "a decision that every time you buy shares you're buying the assets themselves" thereby "destroy[ing] American corporate structure." Discl. Stmt. Hr'g Tr. at 40. Every subsequent plan of reorganization funded by any external investment would be subject to a lender's credit bid rights under section 363(k) of the Bankruptcy Code. This would chill a debtor's ability to find plan investors and deprive debtors of the ability to cram down secured creditors by providing them with the indubitable equivalent of their secured claims. This Court should decline Black Diamond's invitation to do violence to other Bankruptcy Code provisions and tilt the chapter 11 playing field in secured lenders' favor far beyond what the Bankruptcy Code provides.

II. The Plan Reflects the Economic Reality of a Single Enterprise and Should be Confirmed

137. As referenced herein, the Debtors represent a single enterprise run in four verticals, or business units, including its Maritime and Energy businesses. Throughout the organization, for corporate, tax and other legitimate business reasons, the Debtors have certain entities that are holding companies and others that are operating companies. Ignoring the reality of organizations of this size and complexity, Black Diamond asserts that the Plan fails to satisfy section 1129(a)(10) of the Bankruptcy Code, on the basis that Class 4A, an impaired accepting class, does not have claims at each Debtor entity and that the proposed limited substantive consolidation is also not appropriate. Black Diamond also asserts that the Plan violates the

absolute priority rule. For the reasons set forth below, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code, and Black Diamond's objections should be overruled.

A. Plan Should be Confirmed on a "Per Plan" Basis

138. Section 1129(a)(10) of the Bankruptcy Code provides that if there are any impaired classes under a plan, "at least one class of claims that is impaired under the plan [must] accept[] the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10).

139. Stated differently, under a joint plan involving multiple debtors—as is the case here—the support of any non-insider impaired class is sufficient to satisfy § 1129(a)(10). Indeed, courts have recognized that the plain language of § 1129(a)(10) requires the support of at least one impaired class per-plan, not per-debtor. *See, e.g.*, *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018) (applying § 1129(a)(10) on a "per-plan" basis and noting that "Congress could have required plan approval from an impaired class for each debtor involved in a plan, but it did not do so"); *In re Station Casinos, Inc.*, Case No. BK-09-52477, 2010 WL 11492265, at *23 (Bankr. D. Nev. Aug. 27, 2010) (finding that "the affirmative vote of one impaired class under the joint plan of multiple debtors is sufficient to satisfy Section 1129(a)(10)"); *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) ("it is appropriate to test compliance with section 1129(a)(10) on a per-plan basis"), *appeal dismissed sub nom. R2 Invs., LDC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc.)*, 449 B.R. 14 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 476 (2d Cir. 2012); *In re SGPA, Inc.*, Case No. 1-01-02609, 2001 Bankr. LEXIS 2291, at *21–22 (Bankr. M.D. Pa. Sept. 28, 2001) (same).

140. Black Diamond argues that, despite section 1129(a)(10) referring to a singular "plan," the Bankruptcy Code's rule of construction provides that "the singular includes the plural." Black Diamond Obj. ¶ 119. This argument has been considered and rejected because it "does not change [the] analysis." *Transwest Resort Props.*, 881 F.3d at 729-30. Pluralizing "plan" to "plans" effectively alters § 1129(a)(10) to read as follows: "at least one class of claims that is impaired under the *plans* [must] accept[] the *plans*"—meaning that *any* impaired class under *any* of the plans can satisfy § 1129(a)(10).

141. Black Diamond's second argument, that other subsections of § 1129(a) apply on a per-debtor basis so § 1129(a)(10) must be evaluated on a per-debtor basis, has also been rejected. Rather, section 1129(a) has no uniform application on a per-debtor or per-plan basis, "especially when the Bankruptcy Code phrases each subsection differently." *See id.* at 730. As discussed herein, Class 4A (Unsecured Trade Claims)—an impaired and non-insider class—has voted to accept the Plan and section 1129(a)(10) has therefore been satisfied.

B. Limited Substantive Consolidation is Also Justified

142. If the Plan is not approved on a per-plan basis as requested above, the Plan provides that it will be implemented, in part, through a substantive consolidation of the assets and liabilities of the following Debtors: (i) Speedcast Group Holdings Pty Ltd. ("**SGH**") shall be substantively consolidated with Speedcast International Limited; and, (ii) Spacelink Systems, LLC and Spacelink Systems II, LLC (fka Spacelink System Inc.) (collectively, the "**Spacelink Companies**") shall be substantively consolidated with Caprock Participações do Brasil Ltda (together "**Proposed Sub-Con Debtors**"). *See* § Plan 5.15.

143. All property of the estate of each applicable Proposed Sub-Con Debtor shall be deemed to be property of the applicable consolidated estate with respect to the payment of claims against the consolidated estate.

144. The Black Diamond Objection asserts that the Debtors' proposed request for substantive consolidation came late and cannot satisfy the standard for substantive consolidation "under any of the tests" adopted by other bankruptcy courts and courts of appeal. Black Diamond Obj. ¶ 125. This is both irrelevant and incorrect. Irrespective of the timing of the Debtors' determination that they could meet the standard, the facts and circumstances present in these cases justify the limited relief sought in the Plan. Substantive consolidation provides value to the Debtors' Estates, and the Debtors should not be penalized for undertaking legitimate efforts to maximize value to the Debtors' Estates over the objections of a single creditor – especially one whose recovery will be unchanged as result of the substantive consolidation of the Proposed Sub-Con Debtors.

145. Courts have stated that "[t]here seems to be no universally accepted legal standard for when substantive consolidation is appropriate (or not)." *In re ADPT DFW Holdings, LLC*, 574 B.R. 87, 93 (Bankr. N.D. Tex. 2017). However, courts have recognized "two standards that have developed over the years in case law—(1) a more traditional, multi-factor test (which ultimately gets distilled down to two critical factors); and (2) a balancing of harm test." *Id*. at 94. Indeed, the Debtors have satisfied at least one of the "critical factors" in the multi-factor test (and the presence of either factor is sufficient to order substantive consolidation). The majority of the Debtors, including all the Proposed Sub-Con Debtors, are jointly and severally liable under the SFA Documents (note, all of the Debtors are jointly and severally liable) and Refinanced DIP Facility, and, as indicated herein, the Debtors operate largely as one single economic enterprise. *See In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515 (2d Cir. 1988).

146. In addition, several of the relevant elements of the traditional "multi-factor test" outlined in *In re ADPT DFW Holdings,* have been met by the Proposed Sub-Con Debtors as:

a. the Proposed Sub-Con Debtors have consolidated financial records;

b. the Proposed Sub-Con Debtors are interrelated in that Speedcast International Limited owns all of the capital stock of SGH, and the capital stock of Caprock Participações do Brasil Ltda. is owned by Spacelink Systems, LLC (1% ownership) and Spacelink Systems II, LLC (fka Spacelink System Inc) (99% ownership);

c. The directors and officers are the same across the Proposed Sub-Con Debtors, including: (i) The directors of SGH are the Chief Financial Officer and General Counsel of Speedcast International Limited; (ii) SGH and Speedcast International Limited share the same registered office and principal place of business; and (iii) The directors of the Spacelink Companies are the same and the Spacelink Companies maintain the same registered office;

d. The Proposed Sub-Con Debtors have little or no liquid assets, holding only equity interests in subsidiaries and intercompany receivables that are compromised and subject, potentially, to setoff and other defenses;

e. Outside the obligations under the SFA Credit Facility, which are shared with Speedcast Parent, SGH has only one small creditor; and

f. The Spacelink Companies have no liabilities other than those under the prepetition SFA Credit Facility, which are shared jointly with, among other Debtors, Caprock Participações do Brasil Ltda.

147. In addition to the traditional "multi-factor test", the Proposed Sub-Con Debtors have met the "Balance of Harm Test" under which the court "balances the harms or prejudice along with considering how many of the traditional factors exist." *In re ADPT DFW Holdings*, 574 B.R. at 100; *see In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bankr. D. Mass. 1982) (holding that the substantive consolidation analysis boils down to weighing the economic prejudice of separateness versus economic prejudice of consolidation); *Eastgroup Props. v. S. Motel Ass'n, Ltd.*, 935 F.2d 245, 250 (11th Cir. 1991) (holding that the proponent of substantive consolidation must show (i) there is substantial identity between the entities to be consolidated, and (ii) whether consolidation is necessary to avoid some harm or realize some benefit).

148. Because SGH and the Spacelink Companies are not operating companies and are, instead, holding companies for equity interests in subsidiaries, it is not surprising that the substantial identity amongst the Proposed Subcon Debtors is supported by the fact that SGH and the Spacelink Companies do not have critical trade creditors in Class 4A.

149. Absent substantive consolidation (and the recognition of the economic realities for the Proposed Sub-Con Debtors), SGH and the Spacelink Companies would not have an impaired accepting class for confirmation of the Plan. Absent confirmation of plans for those entities, the Debtors have different options, each with material administrative costs, including implementing the transaction contemplated under the ECA through a potential foreclosure under the Refinanced DIP Facility.

150. By contrast, the proposed treatment of creditors for the Proposed Sub-Con Debtors will not change if substantive consolidation is allowed, and the creditors of the Proposed Sub-Con Debtors will suffer no harm whatsoever. Further, as indicated above, the Debtors maintain consolidated financial information, have common directors and officers, operate largely as an integrated economic unit and are jointly and severally liable the SFA. The Debtors note that courts in this circuit have approved substantive consolidation involving holding companies. *See In re ADPT DFW Holdings*, 574 B.R. 87 (Bankr. N.D. Tex. 2017); *In re Mortg. Inv. Co. of El Paso, Tex.,* 111 B.R. 604 (Bankr. W.D. Tex. 1990). Given that there is no harm to creditors from substantive consolidation and given the other factors outlined above, the Debtors submit that the substantive consolidation of the Proposed Sub-Con Debtors should be approved.

C. Plan Does Not Violate the Absolute Priority Rule

151. The Plan provides that, in the Debtors' discretion, Allowed Intercompany Interests may remain unaffected, or be cancelled. *See* Plan at §4.9. No cash or consideration is being distributed on account of the Intercompany Interests and the Intercompany Interests may

remain unaffected solely as an administrative convenience to preserve the Debtors' complex corporate structure. Thus, the Plan does not violate the absolute priority rule.

152. As the evidence will show, the allocation of proceeds from the Plan Sponsor equity investment to each Debtor entity does not provide capital in excess of the administrative, secured, priority and unsecured claim payments.[22] Healy Decl., Ex. A. Any recoveries to all other creditors, including to the unsecured portion of Black Diamond's claim in Class 4B, will not be increased regardless of whether Intercompany Interests are cancelled or reinstated for the purpose of maintaining a corporate structure. *Id.* In fact, no creditor, including Black Diamond, will actually benefit if Intercompany Interests are cancelled. *Id.* Although the Court could require the cancellation of all Intercompany Interests and reconstitution of the Company's corporate structure upon emergence to satisfy the absolute priority rule, existing precedent provides relief in certain circumstances, as is the case here, from such unnecessary technical burdens and associated costs under the Bankruptcy Code.

153. Black Diamond has been—and continues to be—the only party attempting to block the Debtors' emergence from chapter 11. The court in *In re Ion Media Networks, Inc.*, confirmed an otherwise consensual chapter 11 plan where the objecting debtholder had an "undisguised economic objective" that sought to use its role to gain leverage to earn an "outsized" recovery. *See Ion Media Networks v. Cyrus Select Opportunities Master Fund, Ltd. (In re Ion Media Networks, Inc.)*, 419 B.R. 585, 602 (Bankr. S.D.N.Y. 2009). In confirming the plan, the

[22] To the extent there is residual value for equity at Globecomm Europe B.V. ("**Globecomm**"), evidence will show at the Confirmation Hearing that Globecomm may maintain residual enterprise value on a reorganized basis. Globecomm is not a party to the SFA and Class 4B creditors voted to accept the Plan at Globecomm. Voting Decl. Ex. A. Such acceptance of the Plan at Globecomm by the holders of unsecured claims within Class 4B effectively serves as their consent to the distribution of such residual value for equity. Accordingly, the absolute priority rule does not apply since the class of unsecured claims was not being crammed down at Globecomm. 11 U.S.C. § 1129(b)(2)(B).

Ion Court stated that "self-interested motivation does not detract from the strength of an otherwise good argument, but it does provide context that cannot be ignored." *Id*. Here, Black Diamond seeks to disenfranchise all other creditors of the Debtors' Estates by blocking the Plan and forcing the Debtors to pivot to a transaction under section 363 of the Bankruptcy Code, thereby circumventing the requirements of section 1129 of the Bankruptcy Code, and destroying value to earn an outsized recovery.

154. In claiming that the proposed treatment of intercompany interests under the Plan violates the absolute priority rule, Black Diamond cites to several cases that are not on point. Black Diamond Obj. ¶ 85. Specifically, the cases referenced are ones where the proposed plans attempted to reinstate or maintain equity interests at the parent level, and not (as is the case here) at the subsidiary level to maintain the corporate structure of the organization in chapter 11. As a result, in those cases existing equity holders would recover value before creditors in violation of the absolute priority rule.

155. For instance, in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988), the Supreme Court held that "a reorganization plan in which respondents retain an equity interest in the farm is contrary to the absolute priority rule." However, in *Ahlers*, the respondents were the original farm owners who had proposed a plan under which they would retain their junior equity interest in the farm, *i.e.*, the parent entity in chapter 11 proceedings, in violation of the absolute priority rule. *Id*. Similarly, in 203 *N. LaSalle St.*, the Supreme Court held that the proposed chapter 11 plan could not be confirmed because existing equity owners were given the exclusive opportunity to retain equity in the reorganized partnership, thereby extending the partnership interest on account of old equity. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 454 (1999). Once again, however, this case involved a situation where

the debtor proposed a reorganization plan under which certain pre-existing partners would contribute new capital in exchange for the debtor's entire ownership of the reorganized entity at the parent level, not at the subsidiary level to maintain corporate structure. *Id*.

156. A similar result can be found in *DISH Network Corp. v. DBSD N. Am. Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79 (2d Cir. 2011), where the court found that a proposed plan could not be confirmed since it violated the absolute priority rule. In *DISH*, the Plan provided for "the existing shareholder receiv[ing] 'property' in the form of shares and warrants in the reorganized entity." *Id*. at 95. Once again, the *DISH* case also involved a scenario where the proposed plan provided for equity interests to be reinstated or maintained at the parent level for a prior equity holder of the debtor.

157. Unlike the cases cited by Black Diamond, the Plan here does not propose that equity interests for the parent entity be reinstated or that the current holders of Class 7 (Parent Interests) receive any recovery on account of those interests. Instead, it proposes that the Intercompany Interests be reinstated at the subsidiary level to preserve the Debtors' complex corporate structure as an administrative convenience to avoid unnecessary costs. Black Diamond itself concedes that the Plan provides solely "for each Debtor (other than Speedcast Parent)" through the reinstatement of the intercompany interests, and not for the Parent. *See* Black Diamond Obj. ⁋ 85.

158. As shown in the organizational chart filed with the petitions in these Chapter 11 Cases, Speedcast has a complex, global corporate structure. *See* Ex. No. 7. While a cancellation of Intercompany Interests is achievable under a combination of the Bankruptcy Code and U.S. state law for the Debtors formed in the United States, such cancellations pose significant additional challenges in several foreign jurisdictions. In the absence of recognition of these U.S.

bankruptcy proceedings, which is, in many cases, not possible as a matter of local law, the Debtors would be required to pursue additional stand-alone proceedings in as many as seven foreign jurisdictions, adding unnecessary time and cost to effectuate the Debtors' reorganization. As such, the treatment of Intercompany Interests under the Plan allows the Debtors to minimize the potential administrative expense related to foreign implementation by simply preserving the valueless Intercompany Interests.

159. Courts have found, in this district and others, that plans are "fair and equitable" under section 1129 of the Bankruptcy Code where they provide for the reinstatement of a parent debtor's equity interests in a subsidiary debtor but do not provide for recoveries with respect to claims in higher priority classes. *See*, *e.g.*, *Ion*, 419 B.R. at 601; *In re Am. Media, Inc.*, No. 10-16140 (MG), 2010 WL 5483463, at *14–15 (Bankr. S.D.N.Y. Dec. 20, 2020).

160. Black Diamond's attempt to undermine these well-established principles by asserting that the Debtors "will find no refuge in cases permitting the technical reinstatement of intercompany equity interests for administrative convenience" is premised on a misreading of *Ion*. Black Diamond Obj. ⁋ 87. Pointing to *Ion*, Black Diamond asserts that preserving intercompany claims as a means to maintain corporate structure is only permissible in a plan that equitizes a fulcrum class of claims. *Id*. But nowhere does the *Ion* court, or any other court, require this. To be clear, *Ion* does not stand for the proposition that a plan can preserve intercompany claims only when it specifically equitizes a fulcrum class of claims.

161. Black Diamond appears to have invented its own rule in an effort to avoid the holdings in *Ion* and other cases. Instead, *Ion* stands for the proposition that a plan can maintain intercompany equity interests that have no value when necessary to maintain the debtors' existing corporate structure and preserve their value. The focus is on whether value is leaking

from the debtor in violation of the absolute priority rule, which is clearly not the case here where existing equity in the parent company is being wiped out.[23] *See generally*, *Ion*, 419 B.R. at 600-01 (holding that the proposed plan did not violate the absolute priority rule). Black Diamond's argument, therefore, misses the mark.[24]

162. Consistent with *Ion*, courts in the Fifth Circuit have previously approved plans of reorganization that provide for similar reinstatement or preservation of intercompany interests as long as no value is being distributed to existing equity. *E.g.*, *In re PHI, Inc.*, Ch. 11 Case No. 19-30923-hdh11, 2019 Bankr. LEXIS 2472, at *164 (Bankr. N.D. Tex. Aug 2, 2019) (confirming plan that reinstated intercompany interests "for the purposes of administrative convenience and due to the importance of maintaining the corporate structure"); *In re Taco Bueno Rests., Inc.*, Ch. 11 Case No. 18-33678, 2018 Bankr. LEXIS 4017, at *151 (Bankr. N.D. Tex. Dec. 19, 2018) (confirming plan that reinstated intercompany interests "solely for the purposes of administrative convenience"); *In re CHC Grp. Ltd.*, Ch. 11 Case No. 16-31854, 2017 Bankr. LEXIS 1016, at *72 (Bankr. N.D. Tex. Mar. 3, 2017) (confirming plan that reinstated

[23] Black Diamond unsuccessfully asserts an identical argument in its attempt to distinguish *Am. Media*, inaccurately representing that it also stands for the proposition that a plan can preserve intercompany claims only when it equitizes a fulcrum class of claims. Black Diamond Obj. ¶ 86, n. 117.

[24] Black Diamond also argues that while there is residual value at the subsidiary entities due to the preservation of the Intercompany Interests, the new value exception to the absolute priority rule does not apply. Black Diamond Obj. ¶ 85. However, Black Diamond cannot have it both ways. Either, there is no residual value, and the *Ion* court's administrative convenience argument applies, or, in the alternative, the new value exception, which is recognized in the Fifth Circuit, applies. *See Cypresswood Land Partners*, 409 B.R. at 438–40 (finding that the plan is fair and equitable because it satisfies the absolute priority rule even though a previous owner would be receiving estate property because "he is paying 'new value' for the Property"). The new value exception to the absolute priority rule in Section 1129(b)(2)(B) provides that existing equity may retain an interest in the reorganized entity by participating in a plan of reorganization through a contribution of new capital. *Case v. L. A. Lumber Prods. Co.*, 308 U.S. 106, 121 (1939). The exception applies in a situation where the new capital is contributed "in money or money's worth, [is] reasonably equivalent to the property's value, and [is] necessary for successful reorganization of the restructured enterprise." *203 N. LaSalle St.*, 526 U.S. at 442 (citing *L. A. Lumber*, 308 U.S. at 118). Here, although it is the Plan Sponsor that is providing the new value in the form of the Direct Investment (as defined in the Plan), such new value is ultimately allocable to each subsidiary entity where no value previously existed. Additionally, such a monetary investment is critical for the successful reorganization of the Debtor because it allows for the maintenance of the Debtor's complex corporate structure post-reorganization.

intercompany interests because "Impairment or cancellation of these Interests would collapse the Debtors' carefully designed organizational structure, which was specifically created based on the Debtors' specific business and operational needs, and to comply with regulatory requirements and maintain tax efficiencies"); *In re Sandridge Energy, Inc.*, Ch. 11 Case No. 16-32488 (DRJ), 2016 Bankr. LEXIS 4622 (Bankr. S.D. Tex. Sept. 20, 2016) (confirming plan that reinstated intercompany interests); *In re Bosque Power Co., LLC*, Ch. 11 Case No. 10-60348-rbk, 2010 Bankr. LEXIS 5991, at *30-31 (Bankr. W.D. Tex. Oct. 7, 2010) (confirming plan that left unaffected the rights of holders of claims in multiple classes comprised of intercompany interests).

163. Most importantly, the administrative convenience standard adopted by the Fifth Circuit courts in these cases, as well as by the *Ion* court, is consistent with the purpose behind the absolute priority rule. In applying the absolute priority rule, courts have been clear about their focus on preventing economic recovery or distribution to equity holders in violation of the basic principles of priority within bankruptcy. *See, e.g.*, *Louisville Tr. Co. v. Louisville, New Albany & Chi Ry Co.*, 174 U.S. 674, 684 (1899) (asserting that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of . . . creditors comes within judicial denunciation."); *In re Arnold*, 471 B.R. 578, 595 (Bankr. C.D. Cal. 2012) (stating that "the legal rule of absolute priority had its genesis in the long-standing common law maxim that creditors would be paid ahead of equity. This rule assured those who did business with the corporation that if the business were dissolved the creditors would be paid before the insiders would recover their investments. In case of collapse, the creditors could count on payment in full before equity collected anything from the business assets.") (citing Elizabeth Warren, *A Theory of Absolute Priority*, 1991 Ann. Surv. Am. L. 9, 37-38 (1991)).

164. The historical codification and adjudication of the absolute priority rule further indicates the rule's focus is on stopping equity, even at the subsidiary level of a corporate structure, from receiving economic distributions prior to the satisfaction of creditors' claims. *See 203 N. LaSalle*, 526 U.S. at 444 (noting that the Bankruptcy Act preceding the current Bankruptcy Code included a fair and equitable standard due to the "the danger inherent in any reorganization plan proposed by a debtor, then and now, that the plan will simply turn out to be too good a deal for the debtor's owners.") (citing H.R. Doc. No. 93-137, pt. I, p.255 (1973)); *Dish*, 634 F.3d at 94 (noting that the absolute priority rule was originally developed as a response to the common practice of existing equity holders receiving or retaining some stake in the reorganized entity while junior creditors "received little or nothing even though they technically stood above the old shareholders in priority.").

165. Here, however, the Intercompany Interests are not being reinstated to allow economic distributions to be made to existing equity holders prior to the satisfaction of creditors' claims. The equity held by the subsidiaries are simply equity interests in each other holding the corporate structure together; thus, they must be reinstated for the enterprise to reorganize. There is no true residual value to be maintained by the Intercompany Interests being reinstated, as all value in any particular Debtor is being swept up by the Refinanced DIP Facility, administrative claims, priority claims and the recovery to Class 3 secured creditors. The reinstatement of the Intercompany Interests is purely administrative and does not impact the recovery for other creditors, including the general unsecured creditors in Class 4B. It is merely a mechanism through which the overall corporate structure of the Debtor can be maintained as an administrative convenience for purposes of the reorganization. Therefore, the preservation of Intercompany Interests is permissible and Black Diamond's objection should be overruled.

DEBTORS' PREPETITION SFA LENDERS ARE TREATED APPROPRIATELY UNDER THE PLAN

I. Impairment of Syndicated Facility Secured Claims

166. Syndicated Facility Secured Claims are bifurcated into two classes: Class 3 and Class 4 pursuant to operation of section 506(a) of the Bankruptcy Code. *See infra* ¶ 171, n.27. The Debtors solicited votes from each class. Class 4 was indisputably impaired. Class 3's status as unimpaired was disputed and, accordingly, Class 3 was solicited on a conditional basis. *See* Disclosure Statement § II.

167. If the Bankruptcy Court approves the Non-Debtor SFA Loan Party Releases, Class 3 will be impaired under the Plan. If the Court does not approve the Non-Debtor SFA Loan Party Releases, Class 3 is unimpaired under the Plan and should be deemed to have voted to accept the plan pursuant to section 1126(f) of the Bankruptcy Code thereby meeting the requirements of section 1129(a)(8)(A) of the Bankruptcy Code. In either circumstance, the Debtors meet the standard under section 1129 as set forth below.

168. The Plan provides that each holder of a Class 3 Claim will receive on account of such Claim its Pro Rata share of $150 million–the SFA Secured Claim Cash Pool–in Cash. This amount is equal to or greater than the value of the collateral underlying the SFA (net of the DIP obligations).

169. Section 1124 of the Bankruptcy Code Section "defines impairment as being any treatment other than treatment as provided by section 1124(1) or (2) [of the Bankruptcy Code]." *In re Tex. Rangers Baseball Partners*, 434 B.R. 393, 406 (Bankr. N.D. Tex. 2010).[25] Section 1124(1) of the Bankruptcy Code provides in relevant part that a "class of claims or

[25] For the avoidance of doubt, the Debtors do not seek to apply section 1124(2) of the Bankruptcy Code.

interests" is not impaired under a plan unless it "leaves unaltered the [claimant's] legal, equitable, and contractual rights." *Rivers Holdings, L.L.C. v. Ad Hoc Comm. of Unsecured Creditors of Ultra Res., Inc. (In re Ultra Petroleum Corp.)*, 943 F.3d 758, 762 (5th Cir. 2019) quoting 11 U.S.C. § 1124(1).

170. Approval of the Non-Debtor SFA Loan Party Releases would impair all Syndicated Facility Secured Claims. The SFA Loan Parties have rights against the Non-Debtor SFA Loan Parties that are not subject to the terms of the Bankruptcy Code. A release of those rights would therefore be effected by the Plan rather than the Bankruptcy Code. Accordingly, if granted, provisions providing for release of the Non-Debtor SFA Loan Parties would be Plan impairment.

171. If the Non-Debtor SFA Loan Party Releases are not granted, Class 3 is impaired only pursuant to the terms of sections 502 and 506 of the Bankruptcy Code, and, as a result, would be unimpaired.[26] *See In re Ultra Petroleum*, 943 F.3d at 765 ("Where a plan refuses to pay funds disallowed by the Code, the Code—not the plan— is doing the impairing.").

[26] Black Diamond's arguments the Plan is impairing the Debtors are inapposite. The Syndicated Facility Secured Claims are bifurcated pursuant to section 506(a) of the Bankruptcy Code. 4 Collier on Bankruptcy P 506.03 (16th 2020) ("Stated differently, section 506(a) requires a bifurcation of a "partially secured" or "undersecured" claim into separate (and independent) secured and unsecured components."); *see* ¶¶ 98-114. The secured portion of the bifurcated claim is "limited to the value of the collateral." *Assocs. Com. Corp. v. Rash*, 520 U.S. 953, 961 (1997). Subsequent courts to examine the issue have determined that payment in cash in full satisfaction of the underlying claims, including the right to interest, is sufficient to result in unimpairment, "[f]or the typical unsecured creditor, those rights equate to payment of the debt owed with interest as allowed by law." *Tex. Rangers Baseball*, 434 B.R. at 407. Class 3 has no right to interest pursuant to section 502(b)(2) of the Bankruptcy Code. Accordingly payment in full equal to the amount of the underlying collateral renders class 3 unimpaired. This is consistent with section with section 1111 of the Bankruptcy Code which provides creditors with the option to compel consideration of the entirety of an undersecured claim for purposes of section 1129(a)(8) of the Bankruptcy Code if they so choose. It would be incongruent with the statutory scheme and render the decision to elect under section 1111 of the Bankruptcy Code meaningless if a court were to find that section 506(a) of the Bankruptcy Code by its operation impairs an undersecured claim under section 1129(a)(8) of the Bankruptcy Code because a creditor could enjoy both the blocking power provided by section 1111 of the Bankruptcy Code and the deficiency claim provided under section 506(a) of the Bankruptcy Code.

II. Plan Provides Prepetition SFA Lenders with the Indubitable Equivalent

172. Section 1129(b)(2) of the Bankruptcy Code provides two sets of standards the Plan must meet to be fair and equitable with respect to a class of claims: one for secured claims which is applicable to Class 3 and one for unsecured claims which is applicable to Class 4(b). Section 1129(b)(2)(A) provides that for a Plan to be fair and equitable with respect to secured claims the Plan must provide:

> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A)(i-iii).

173. The "or" in section 1129(b)(2) is disjunctive, "[t]he question here is not whether debtors must comply with more than one clause, but rather which one of the three they must satisfy." *RadLAX Gateway Hotel*, 566 U.S. at 647. Neither section 1129(b)(2)(A)(i) or 1129(b)(2)(A)(ii) are applicable. The Plan does not contemplate Class 3 retaining the liens securing the claims. In fact, if the Court declines to grant the Non-Debtor SFA Loan Party Releases, Class 3 is unimpaired and analysis under section 1129(b) of the Bankruptcy Code is unnecessary.

174. The Plan is not a sale under section 363 of the Bankruptcy Code. *See supra* ¶¶ 116-127. Section 1129(b)(2)(A)(iii) is the only applicable section; the Debtors must establish that the Plan provides Class 3 the indubitable equivalent of their claims. There are instances where, as here, a creditor may not be able to make an election under section 1111(b) of the Bankruptcy Code or credit bid. Section 1111(b) of the Bankruptcy Code requires a creditor to hold sufficient claims to make an election; it does not provide a special recourse for creditors who do not meet this threshold. Creditors may protest this robs them of their rights, however, as the Supreme Court has observed "nothing in the generalized statutory purpose of protecting secured creditors can overcome the specific manner of that protection which the text of § 1129(b)(2)(A) contains . . . . the pros and cons of credit-bidding are for the consideration of Congress, not the courts." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. at 649

175. The concept of "indubitable equivalent" is rooted in the language of *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935). The *Murel* court stated that:

> "[A] creditor who fears the safety of his principal will scarcely be content with . . . [interest payments alone]; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that . . . unless by a substitute of the most indubitable equivalence."

Id. at 942. In interpreting the term, the Fifth Circuit has noted that "[w]hat measures constitute the indubitable equivalent of the value of the Noteholders' collateral are rarely explained in caselaw, because most contested reorganization plans follow familiar paths outlined in Clauses (i) and (ii) [of section 1129(b)(2) of the Bankruptcy Code]." *Pac. Lumber*, 584 F.3d at 246. However the *Pac. Lumber* court went on to note that "[w]hatever uncertainties exist about indubitable equivalent, paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral." *Id.* at 247.

176. The only question the Court must answer is whether payment in cash equal to the value of Class 3 Claims satisfies the indubitable equivalence test and the answer to this question is clearly yes. *See In re Moritz Walk, LP*, No. 10-41069-H3-11, 2011 WL 4372405, at *8 (Bankr. S.D. Tex. Sept. 19, 2011) ("The Fifth Circuit held that the cash payment was the indubitable equivalent of their claim.") (discussing *Pac. Lumber*, 584 F.3d 229).

177. The Plan provides that "each holder of an Allowed Syndicated Facility Secured Claim … shall receive on account of such Allowed Syndicated Facility Secured Claim its Pro Rata share of the SFA Secured Claim Cash Pool in Cash." Plan § 4.3(a). Because Class 3 is created by operation of section 506(a) of the Bankruptcy Code, as a matter of law it is equal in value to the underlying collateral securing its claims.

178. Under governing Fifth Circuit law the Court must "consider the purpose of the valuation and the proposed use or disposition of the collateral at issue." *Houston SportsNet Fin., L.L.C. v. Houston Astros, L.L.C. (In re Houston Reg'l Sports Network, L.P.)*, 886 F.3d 523 (5th Cir. 2018). The Debtors will adduce evidence at the Combined Hearing that the value of the SFA Collateral, inclusive of the non-debtor subsidiaries and their respective businesses and assets, is no more than $150 million. Accordingly, the payment of Class 3 is in full in cash which by definition is the indubitable equivalent of the value of the Class 3 Claims collateral. *See Sandy Ridge Dev. Corp. v. Louisiana Nat'l Bank (In re Sandy Ridge Dev. Corp.)*, 881 F.2d 1346, 1350 (5th Cir. 1989) ("since common sense tells us that property is the indubitable equivalent of itself, this portion of the current plan satisfies the 'indubitable equivalent' requirement"); *Pac. Lumber*, 584 F.3d at 247 ("paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral."). Accordingly, the Plan is "fair and equitable" with respect to Class 3.

RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS ARE APPROPRIATE AND SHOULD BE APPROVED

I. Plan's Releases Are Appropriate

179. Section 10.6 of the Plan provides for releases of claims by the Debtors and their Estates (the "**Debtors' Releases**") in favor of the Released Parties,[27] as well as by holders of certain Claims and Interests (the "**Non-Debtor SFA Loan Party Releases**"), in favor of the Government Business. Section 10.7 of the Plan further provides for third-party releases by holders of Claims and Interests (the "**Third-Party Releases**") in favor of the Released Parties. As discussed below, the release provisions are integral components of the Plan, and the consideration and the compromises thereunder, are consistent with the Bankruptcy Code, and comply with applicable case law and, as such, should be approved.

A. Debtors' Releases Under Section 10.6(a) of the Plan Are Appropriate

180. Black Diamond's allegation that the Debtors cannot justify the Debtors' Releases under Plan is wrong. The evidence will show that the Debtors' Releases under section 10.6(a) represent valid and appropriate settlements of claims that the Debtors (or Reorganized Debtors) may have against the Released Parties. In addition to the Debtors having no basis to

[27] Under Section 1.1 of the Plan, "**Released Parties**" means, collectively, and in each case solely in their capacities as such: (i) the Debtors; (ii) the Reorganized Debtors; (iii) the Debtors' non-Debtor affiliates; (iv) the DIP Lenders; (v) the Prepetition Lenders who vote in favor of the Plan; (vi) the Creditors' Committee; (vii) each of the Creditors' Committee's current and former members (solely in their capacity as members of the Creditors' Committee); (viii) the DIP Agent; (ix) the Disbursing Agent; (x) the Initial Plan Sponsor; (xi) with respect to each of the foregoing, where any of the foregoing is an investment manager or advisor for a beneficial holder, such beneficial holder; (xii) with respect to each of the foregoing Persons in clauses (i) through (xi), each of their affiliates, predecessors, successors, assigns, direct and indirect subsidiaries, affiliated investment funds or investment vehicles, managed accounts, funds and other entities, investment advisors, sub-advisors and managers with discretionary authority; and (xiii) with respect to each of the foregoing Persons in clauses (i) through (xii), each of their respective current and former officers and directors, principals, equity holders, members, partners, managers, employees, subcontractors, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, and such Person's respective heirs, executors, estates, servants, and nominees, in each case in their capacity as such; *provided*, that notwithstanding anything to the contrary herein, "Released Parties" shall not include any Non-Released Parties listed on the Non-Released Party Exhibit.

believe that claims exist against any of the Released Parties, the Debtors' Releases constitute an integral aspect of the Debtors' arm's length negotiations with their key creditor constituencies that resulted in the Plan. The Debtors' Releases are being granted in exchange for the significant benefits provided to the Debtors leading up to and throughout these Chapter 11 Cases.

181. 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." *See, e.g.*, *In re Bigler*, 442 B.R. at 547 (plan release provision "constitutes an acceptable settlement under § 1123(b)(3) because the Debtors and the Estate are releasing claims that are property of the Estate in consideration for funding of the Plan"); *In re Heritage Org., LLC*, 375 B.R. 230, 308 (Bankr. N.D. Tex. 2007) ("[T]he plain language of § 1123(b)(3) provides for the inclusion in a plan of a settlement of claims belonging to the debtor or to the estate . . . .") (emphasis omitted); *In re Gen. Homes Corp.*, 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991) ("To the extent that . . . the plan purports to release any causes of action against the [creditor] which the Debtor could assert, such provision is authorized by § 1123(b)(3)(A) . . . .").

182. As set forth above, the Debtors' Releases are evaluated under the standard set forth in Bankruptcy Rule 9019. *In re Bigler*, 442 B.R. at 543 n.6 ("[S]ettlement provisions in a Chapter 11 plan must satisfy the standards used to evaluate compromises under Rule 9019."). In this case, such releases are "fair and equitable and in the best interest of the [Debtors' E]state[s]" and should be approved. *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995).

183. In consideration of the Releases, the Released Parties have, among other things (and as applicable): voted to accept the Plan; provided consensual postpetition cash collateral usage and debtor-in-possession financing under the Refinanced DIP Facility to refinance

and fund these Chapter 11 Cases; provided the Debtors with an equity commitment to fund the Debtors' at emergence; agreed to provide the Non-Debtor SFA Loan Party Releases; negotiated in good faith with the Debtors regarding a broad range of disputed issues; provided pre and postpetition services to the Debtors in their capacity as officers or directors; and/or guided the Debtors through this restructuring, including these chapter 11 cases. *See* Mack Decl. ¶¶ 8, 15-16.

184. The Debtors' current and former officers and directors, to the extent not identified on the Non-Released Party Exhibit, should be released. The Debtors' officers and directors and executive management team were instrumental throughout the duration of these Chapter 11 Cases and in negotiating the Plan, which provides for agreed-upon recoveries to a number of the Debtors' stakeholders, securing access to debtor-in-possession and postpetition financing, and ensuring the preservation of the Debtors' business as a going concern. The Debtors' officers and directors and executive management team were able to stabilize the Debtors' operations during the course of these Chapter 11 Cases, thereby preserving the value of the Debtors' Estates.

185. Black Diamond's objection to the releases of Mr. Shaper and Mr. Spytek should be overruled. The Debtors' Releases were negotiated as part of global negotiations regarding treatment of Claims and Interests under the Plan. Each of the Released Parties, including Mr. Shaper and Mr. Spytek, provided significant consideration for such releases. As directors and officers, Mr. Spytek and Mr. Shaper provided indispensable service to the Debtors. Appointed to the Board in September 2019 as independent non-executive directors, Mr. Spytek and Mr. Shaper agreed to act as interim co-CEOs following the resignation of the Company's former CEO in February 2020, while the Company performed a global search for a new CEO for the Company.

186. In March 2020, Mr. Spytek and Mr. Shaper agreed to move to full-time roles as President and Chief Commercial Officer, and Chief Executive Officer, respectively, and assisted with the formulation of a focused transformation plan to address the numerous business issues facing the Company. Throughout the chapter 11 process, Mr. Spytek and Mr. Shaper applied their experience and skillful relationship management to maintain stability during highly unusual and challenging circumstances, consistent with their fiduciary duties as both members of senior management and the Board. *See e.g.*, Auerbach Dep. 171:11–17 (stating that Joe Spytek is a hard worker, who had a good handle on the business and generally negotiated contracts that make good business sense.) In addition, as a current officer of the Company, Mr. Spytek has and will continue to contribute significantly in ultimately effectuating the Plan.

187. Lastly, certain of the Debtors' organizational documents provide for the indemnification of officers and directors for causes of action arising out of their service to and activities on behalf of those Debtor entities. These indemnification obligations create an identity of interest between the Debtors and their directors and officers, such that the mutual releases between Mr. Shaper, Mr. Spytek, and the Debtors can only serve to enhance the value of the Debtors' estates. The evidence will demonstrate that the Debtors' Releases were negotiated at arm's-length among sophisticated parties and were overseen by the Special Restructuring Committee following its review and approval of the Independent Investigation. *See* Healy Decl. ¶ 30.

188. Accordingly, the Debtors' Releases, including those of Mr. Shaper and Mr. Spytek, are reasonable, represent a valid exercise of the Debtors' business judgment, and should be approved.

B. Non-Debtor SFA Loan Party Releases Under Section 10.6(b) of the Plan Should be Approved

189. Section 10.6(b) of the Plan provides for the release of Claims arising under the SFA, any SFA Loan Document and any related instrument, agreement, and document (collectively, the "**SFA Documents**"), against the Non-Debtor SFA Loan Parties. Specifically, the Non-Debtor SFA Loan Party Release provides for the release of all claims, liens, and causes of action under the SFA Documents against the Government Business –the five wholly-owned subsidiaries of the Debtors including Ultisat and Globecomm – on the Effective Date of the Plan. The releases in 10.6(b) are limited and benefit only the non-Debtors comprising the Debtors' Government Business whose value is being delivered to satisfy the Claims under the SFA.

190. As discussed throughout this Memorandum, recoveries to SFA creditors under the Plan are based on the value of the Debtors' interest in the SFA Collateral as utilized on a going concern basis under the Debtors' Business Plan. This value includes the Government Business.

191. Additionally, the Non-Debtor SFA Loan Party Releases are integral components of the Plan, and are critical to the success of these chapter 11 cases. Although non-consensual, non-debtor releases have traditionally been disfavored in the Fifth Circuit, the Non-Debtor SFA Loan Party Releases here are a logical extension to the economic reality that the cumulative value of the Government Business is being distributed to the SFA creditors under the Plan. As a result, the Non-Debtor SFA Loan Party Releases should be approved.[28]

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[28] As a threshold matter, the Court has subject matter jurisdiction over the Non-Debtor SFA Loan Party Releases. Subject matter jurisdiction is conferred and delimited by 28 U.S.C. §§ 157(a)–(b), and by Fifth Circuit precedent, which has distilled the jurisdictional inquiry to a singular determination: "whether a matter is at least 'related to' the bankruptcy." *Walker v. Cade Co. (In re Walker)*, 51 F.3d 562, 569 (5th Cir. 1995) (citing *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987)) (internal quotation marks omitted). The Non-Debtor SFA Loan Party Releases directly impact the handling and administration of the Debtors' estates, as the value of the Government

192. Under section 1123(b)(6) of the Bankruptcy Code, a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). Here, the Non-Debtor SFA Loan Party Releases are fair and equitable, not inconsistent with the Bankruptcy Code and, thus, appropriate under section 1123(b)(6).

193. Although the Fifth Circuit disfavors non-consensual, non-debtor releases, neither Fifth Circuit law nor the Bankruptcy Code unequivocally prohibit them in all circumstances. *See Pac. Lumber*, 584 F.3d at 252 (noting that "cases *seem* broadly to foreclose non-consensual non-debtor releases and permanent injunctions," rather than affirmatively finding them foreclosed (emphasis added)). The Fifth Circuit has also noted a general opposition to non-debtor releases in the context of a chapter 15 proceeding in which the Debtors sought relief that had the effect of preventing creditors from recovering from a separate pool of non-debtor subsidiary assets while the top level equity remained in place. *See Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de CV (In re Vitro S.A.B. de CV)*, 701 F.3d 1031, 1063 (5th Cir. 2012) ("[U]nder the Concurso plan, they would recover only around 40% of the Old Notes' value, while Vitro's shareholders would retain equity interests worth $500 million.").

194. By contrast, the Fifth Circuit has recently, however, in *Zacarias v. Stanford Int'l Bank Ltd.*, approved third-party releases in a receivership context over the objection of third parties enjoined from suit because, in part: (i) it considered the consideration paid in exchange for the releases; and (ii) the releases were integral to settlement. 945 F.3d 883, 900–01 (5th Cir. 2019). Most importantly, the Fifth Circuit reasoned that because all the value from the third parties being

Business is part of the recovery provided to creditors under the Plan. In addition, the releases of claims against the Government Business solely related to the SFA Documents is a condition to the Effective Date of the Plan.

released was being delivered to the persons providing the non-consensual releases, the non-consensual releases were appropriate. *Id.* at 902 ("Again, the receivership solves a collective-action problem among the Stanford entities' defrauded investors, all suffering losses from the same Ponzi scheme. It maximizes assets available to them and facilitates an orderly and equitable distribution of those assets. Allowing investors to circumvent the receivership would dissolve this orderly process—circumvention that must be foreclosed for the receivership to work."). Unlike the facts in *Vitro* where there were other assets being protected by the third-party releases that were not otherwise available for distribution to the releasing creditors, the opposite is true here where all the value of the Government Business is being delivered to the SFA creditors.

195. Certainly, other courts have approved releases in the bankruptcy context based on similar factors. *See, e.g.*, *SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp.)*, 960 F.2d 285, 293 (2d Cir. 1992) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4th Cir. 1989) (declining to limit the bankruptcy court's equitable power to enjoin suits when claimants had other opportunities recover, the non-debtors provided consideration, and "where the entire reorganization hinge[d] on the debtor being free from indirect claims"); *Greenblatt v. Richard Potasky Jeweler, Inc.(In re Richard Potasky Jeweler, Inc.)*, 222 B.R. 816, 826 (S.D. Ohio 1998) (explaining that "unusual circumstances" warranting non-debtor releases include, among other things, (i) when a substantial contribution of assets has been made to the debtor's estate as part of the reorganization plan and (ii) when the injunction is "essential to reorganization" without which "the entire reorganization plan would unravel"); *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 934 (W.D. Mo. 1994) (same); *Ion*, 419 B.R. at 602 (approving third-party releases in

the "unique circumstances" that arose as a result of the authorization required to transfer the debtors' most valuable asset, their FCC licenses).

196. These factors are also present here. First, the Government Business has significantly contributed to the Debtors' reorganization efforts. Indeed, the Government Business agreed to guarantee the original and refinanced DIP Facility—a critical component for the Debtors to obtain post-petition DIP financing. Without DIP financing, the Debtors would have likely liquidated. Upon liquidation, *all creditors*—including Black Diamond—would have recovered less than anticipated under the Plan.

197. Second, the releases are integral to and, in fact, a condition to the Effective Date of, the Plan. The Plan Sponsor is making its investment in the Debtors' business enterprise based, in no small part, on the Government Business' contributions to the Debtors' go-forward Business Plan. A key feature of the Business Plan is that Speedcast upon chapter 11 emergence does not include the continued overhang of SFA Claims. As such a critical component to the Plan investment and overall Plan settlement, the Non-Debtor SFA Loan Party Releases cannot be viewed on a standalone, severable basis from the rest of the Plan.

198. Further, as in *Zacarias* and specifically counter to the Fifth Circuit's concerns in *Vitro*, the Non-Debtor SFA Loan Party Releases do not deprive SFA creditors of a recovery because the entire economic value of the Government Business is included in the distributions. The SFA creditors will receive a recovery in respect of the SFA Claims via a cash payment through Class 3 and potential recoveries in Class 4B similar to *Zacarias*. *See Zacarias*, 945 F.3d at 903 (explaining the objectors "were not deprived of any entitlement to recovery" because "the bar orders channel investors' recovery associated with [the defendants] though the receivership's distribution process"); *compare Vitro*, 701 F.3d at 1051-52 (noting that relief sought

was inappropriate because the foreign court's order did not protect the interests of creditors). Indeed, the SFA Creditors' recovery under the Plan takes into account the value of the Government Business as a going concern unburdened by the SFA Documents.

199. Lastly, the Non-Debtor SFA Loan Party Releases are reasonable under the circumstances, and the Debtors' Plan remains feasible if such releases are not approved, because the same result could be achieved by other, potentially value-destructive means. These releases are limited to the SFA, and are not a release of all claims from all persons. In other contexts, courts have confirmed plans over technical objections that are not rooted in "economic substance." Although there are alternative options available to achieve the desired result, all are likely value destructive to the go-forward enterprise and provide no greater protection or recovery to creditors.

200. By way of example, the Government Business could commence chapter 11 cases to discharge the guarantees that the Non-Debtor SFA Loan Party Releases seek to remove. Doing so, however, would be both expensive and potentially time consuming, diminishing the value available all creditors. Such an exercise could also have a widespread negative effect on the value of the company as a go-forward enterprise. Alternatively, Centerbridge, as DIP lender, if the DIP Facility were to mature (March 15) before the Plan goes effective, could foreclose on assets of the Government Business to realize the value of those assets. This, too, would be time consuming and pose a risk to the overall business. Because the Non-Debtor SFA Loan Party Releases represent the least costly and value-preserving alternative to achieve an end that could be reached by other means, they should be approved.

201. Based on the foregoing, the facts of this case present precisely the type of unique circumstance in which non-consensual non-debtor subsidiary releases are appropriate and justified. Accordingly, these releases should be approved. *See MacArthur Co v. Johns-Manville*

Corp., 837 F.2d 89, 94 (2d Cir. 1988) (admonishing that under the bankruptcy court's powers in equity "substance will not give way to form, that technical considerations will not prevent substantial justice from being done") (quoting *In re UNR Indus. Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984) (internal quotation marks omitted)).

C. Third-Party Releases Under Section 10.7 of the Plan Are Appropriate

202. The Third-Party Releases are proper under sections 1123(b)(6), 1123(a)(5), and 1123(b)(3)(A) of the Bankruptcy Code as a *consensual* settlement of claims and Causes of Action by the Releasing Parties[29] in exchange for consideration provided by the Released Parties. *See, e.g.*, *In re Warren Res., Inc.*, No. 16-32760 (MI) (Bankr. S.D. Tex. Sept. 14, 2016), Conf. Hr'g Tr. at 14 (ECF No. 352) ("If there are third-party releases that are negotiated between the Debtor and third parties as part of their deal, that doesn't seem to me to really run afoul of anything.").

203. A plan may include a nondebtor release if "it releases claims only of parties who have consented and to whom consideration has been provided." *In re Bigler*, 442 B.R. at 549; *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007) ("Most courts allow consensual nondebtor releases to be included in a plan."). A nondebtor release may constitute consideration for a settlement of claims under section 1123(b)(3) of the Bankruptcy Code. *See In re Bigler*, 442 B.R. at 549 (approving nondebtor release under section 1123(b)(3)). It may also be "an essential means of implementing [a p]lan pursuant to Section 1123(a)(5) of the

[29] Under Section 1.1 of the Plan, "**Releasing Parties**" means, collectively, and in each case solely in their capacities as such: (i) the holders of all Claims or Interests that vote to accept the Plan, (ii) the holders of all Claims whose vote to accept or reject the Plan is solicited but that do not vote either to accept or to reject the Plan, (iii) the holders of all Claims that vote on, or are deemed to reject, the Plan, but do not opt out (in writing) of granting the releases set forth herein, (iv) the holders of all Claims and Interests, including any Claims or Interests that are Unimpaired, that were given notice of the opportunity to opt out of granting the releases set forth herein but did not opt out, and (v) the Released Parties.

Bankruptcy Code." *In re Moody Nat'l SHS Houston H, LLC*, Ch. 11 Case No. 10-30172 (MI), 2010 WL 5116872, at *5 (Bankr. S.D. Tex. June 30, 2010) (approving consensual nondebtor release).

204. Under Fifth Circuit law, third-party releases that are, as here, (i) consensual, (ii) specific in language, (iii) integral to the Plan, (iv) a condition of the settlement, and (v) given for consideration, do not violate the Bankruptcy Code and should be allowed and included in the Plan. *See In re Wool Growers*, 371 B.R. at 776 ("Consensual nondebtor releases that are specific in language, integral to the plan, a condition of the settlement, and given for consideration do not violate section 524(e)."); *see also Hernandez v. Larry Miller Roofing, Inc.*, 628 F. App'x 281, 286–88 (5th Cir. 2016) (discussing the specificity requirement for third-party releases in Fifth Circuit); *FOM P.R. S.E. v. Dr. Barnes Eyecenter Inc.*, 255 F. App'x 909, 912 (5th Cir. 2007) (enforcing a nondebtor release where "the release of claims was an integral part of the bankruptcy order [and] was not simply boilerplate language that was inserted into the [reorganization plan], but rather a necessary part of the [reorganization plan] itself").

205. The critical factor in determining whether a release is consensual is whether—after the Debtors' due process obligations of providing appropriate notice—"the affected creditor *timely objects* to the provision." *See In re Wool Growers*, 371 B.R. at 776 (citing *In re Zale Corp.*, 62 F.3d 746, 760–61 (5th Cir. 1995)) (emphasis added); *see also In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017) (ECF No. 1250) (approving third-party releases as consensual over objections from parties in interest, including U.S. Trustee); *In re Ameriforge Grp., Inc.*, No. 17-32660 (DRJ) (Bankr. S.D. Tex. May 22, 2017) (ECF No. 142) (overruling U.S. Trustee objection and confirming chapter 11 plan where general unsecured creditors were unimpaired and deemed to have consented to third-party release provisions unless

they opted out of the same); *In re Southcross Holdings, LP*, No. 16-20111 (MI) (Bankr. S.D. Tex. Apr. 11, 2016), Conf. Hr'g Tr. at 42 (ECF No. 191) (debtors correctly characterized that release was consensual as debtors provided extensive notice of plan and confirmation hearing and no party specifically objected to plan's release provisions); *see also In re RAAM Glob. Energy Co.*, No. 15-35615 (MI) (Bankr. S.D. Tex. Jan. 19, 2016), Conf. Hr'g Tr. at 61 (ECF No. 399) ("[A]s to the holders of claims, it's limited to parties that have accepted and not opted out, and having reviewed it and in the absence of objections I think it is within the range of authority I have under existing Fifth Circuit law.").

206. Further, the *Procedures for Complex Chapter 11 Cases in the Southern District of Texas* (the "**Complex Rules**") provide:

> If a proposed plan seeks consensual releases with respect to claims that creditors may hold against non-debtor parties, then a ballot must be sent to creditors entitled to vote on the proposed plan and notices must be sent to non-voting creditors and parties in interest. The ballot and the notice must inform the creditors of such releases and provide a box to check to indicate assent or opposition to such consensual releases together with a method for returning the ballot or notice.

Complex Rules ¶ 36.

207. Here, the Third-Party Releases satisfy the Fifth Circuit's standard and the Complex Rules. First, the Third-Party Releases are fully consensual. Parties in interest were provided extensive notice of these cases, the Plan, and the deadline to object to confirmation of the Plan. Each of the Notice of Non-Voting Status (the "**Notice of Non-Voting Status**"), which was sent to holders of Claims and Interests in Non-Voting Classes, and the Ballots, which were sent to holders of Claims in Voting Classes, expressly included, in bold font, the terms of the Third-Party Releases, as set forth in section 10.7 in the Plan. Approximately 309 holders of Claims and Interests (including holders in Non-Voting Classes) completed and returned forms opting out

of the Third-Party Releases. *See* Voting Decl. Ex. A. The Notice of Non-Voting Status and the Ballots advised careful review and consideration of the terms of the Third-Party Releases, along with the Exculpation and Injunction provisions. The language of the Third-Party Releases was also emphasized using bold font in the Plan and the Disclosure Statement.

208. Second, the Third-Party Releases are sufficiently specific to put the Releasing Parties on notice of the claims being released. The Third-Party Releases describe the nature and type of claims being released, including claims with respect to:

> [T]he Debtors, the Reorganized Debtors, or their Estates, the Chapter 11 Cases, the Restructuring, the DIP Documents, the Syndicated Facility Agreement, any SFA Loan Document, ad any related instrument, agreement, or document, the Equity Commitment Agreement, the Direct Investment, the Forbearance Agreement, the Amended Organizational Documents, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements or interactions between any Debtor and any Released Party, the restructuring, the restructuring of any Claims or Interests before or during the Chapter 11 Cases, the Plan, the Disclosure Statement, the Plan Sponsor Agreement, the Plan Documents and the documents in the Plan Supplement or related agreements, instruments, or other documents relating thereto, and the negotiation, formulation, preparation or consummation of any documents or transactions in connection with any of the foregoing, or the solicitation of votes with respect to the Plan, in all cases based upon any act or omission, transaction, agreement, event, or other occurrences taking place on or before the Effective Date.

Plan § 10.7.

209. Third, the Third-Party Releases are an integral part of the Plan and a condition of the settlements set forth therein. The Third-Party Releases facilitated participation in both the Plan by the Released Parties and the chapter 11 process and were critical in gaining support for the Plan. Healy Decl. ¶ 32. As such, the Third-Party Releases were a core negotiation

point and appropriately offer certain protections to parties that constructively participated in the Restructuring.

210. Fourth, the Third-Party Releases are given for consideration. The Released Parties have played an extensive and integral role in the Debtors' Restructuring. All parties in interest benefit from the Restructuring Transactions contemplated by the Plan and the significant contributions of the Released Parties in furtherance thereof. These contributions allow for a holistic restructuring that will enable the Debtors to discharge all of their funded debt obligations. Healy Decl. ¶ 33.

211. Furthermore, the Third-Party Releases comply with the Complex Rules regarding consensual releases. As evidenced by the Notice Affidavit, the Ballots were sent to all creditors entitled to vote on the Plan. *See* Notice Aff. The Notice of Non-Voting Status was sent to all non-voting creditors and parties in interest. *Id.* The Ballots and the Notice of Non-Voting Status informed creditors of the Third-Party Releases by providing the exact language of the Release, Exculpation, and Injunction Provisions in bold, conspicuous font and providing the identities of the parties subject to those provisions. *See* Solicitation Order Exs. 2-4. The Ballots provided a checkbox to opt-out of the consensual Third-Party Releases, and the Notice of Non-Voting Status included a release opt-out form that also provided a checkbox to opt-out of the consensual Third-Party Releases. *See id.* In accordance with the Solicitation Order, the Solicitation Packages and the Notices of Non-Voting Status included a pre-addressed, pre-paid envelope for returning the Ballots or the Release Opt-Out Form. *See id.*

212. Based on the foregoing, the Third-Party Releases comply with the controlling Fifth Circuit standards, are appropriate and justified under the circumstances, and should therefore be approved.

II. Exculpation Is Appropriate and Should be Approved

213. Black Diamond's objection that the Exculpations under Section 10.8 are overbroad should be overruled. Under Section 10.8 of the Plan (the "**Exculpation Provision**"), the Exculpated Parties[30] are exculpated from claims arising out of or relating to the Debtors' restructuring, these chapter 11 cases, and the negotiations and agreements made in connection therewith. The Exculpation Provision carves out acts or omissions that are determined by Final Order to constitute fraud, gross negligence, or willful misconduct. Although the Fifth Circuit has limited parties' use of exculpatory provisions in certain circumstances, *see, e.g.*, *Pac. Lumber*, 584 F.3d at 251–52 (contested plan confirmation in "freefall" bankruptcy cases with five competing plans); provisions substantially similar to the Exculpation Provision have been approved in similarly complex chapter 11 cases in the Southern District of Texas.[31]

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[30] Section 1.1 of the Plan defines "**Exculpated Parties**" as, collectively, each in their capacities as such: (i) the Debtors; (ii) the Reorganized Debtors; (iii) the Disbursing Agent; (iv) the DIP Agent; (v) the DIP Lenders; (vi) the Creditors' Committee; (vii) each of the Creditors' Committee's current and former members (solely in their capacity as members of the Creditors' Committee); (viii) with respect to each of the foregoing Persons in clauses (i) through (vii), such Persons' respective predecessors, successors, assigns, direct and indirect subsidiaries, and affiliates; and (ix) with respect to each of the foregoing Persons in clauses (i) through (viii), such Person's officers, directors, principals, shareholders, members, partners, managers, employees, agents, financial advisors, attorneys, accountants, investment bankers, investment managers, investment advisors, consultants, representatives, and other professionals, and such Person's respective heirs, executors, estates, and nominees, in each case in their capacity as such and whether currently serving or having previously served postpetition; and (xi) any other Person entitled to the protections of section 1125(e) of the Bankruptcy Code; *provided*, that no Person listed on the Non-Released Party Exhibit shall be an Exculpated Party.

[31] *See, e.g.*, *In re EP Energy Corp.*, Case No. 19-35654 (MI) (Bankr. S.D. Tex. Aug. 27, 2019) (ECF No. 1411); *In re Exco Res. Inc., et al.*, Case No. 18-30155 (MI) (Bankr. S.D. Tex. June 18, 2019) (ECF No. 2128) (order confirming chapter 11 plan and approving similar exculpation provision); *In re Parker Drilling Co., et al.*, Case No. 18-36958 (MI) (Bankr. S.D. Tex. Mar. 7, 2019) (ECF No. 459) (same); *In re Expro Holdings US Inc.*, Case No. 17-60179 (DRJ) (Bankr. S.D. Tex. Jan. 25, 2018) (ECF No. 212) (same); *In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017) (ECF No. 1250) (same); *In re Ameriforge Grp., Inc.*, Case No. 17-32660 (DRJ) (Bankr. S.D. Tex. May 22, 2017) (ECF No. 142) (same); *In re Ultra Petroleum Corp.*, Case No. 16-32202 (MI) (Bankr. S.D. Tex. Mar. 14, 2017) (ECF No. 1324) (same); *In re Stone Energy Corp.*, Case No. 16-36390 (MI) (Bankr. S.D. Tex. Feb. 14, 2017) (ECF No. 528) (same); *In re Linn Energy, LLC*, Case No. 16-60040 (DRJ) (Bankr. S.D. Tex. Jan. 27, 2017) (ECF No. 1629) (same); *In re RAAM Global Energy Co.*, Case No. 15-35615 (MI) (Bankr. S.D. Tex. Jan. 19, 2016) (ECF No. 376) (same); *In re Energy XXI, Ltd*, Case No. 16-31928 (DRJ) (Bankr. S.D. Tex. Dec. 13, 2016) (ECF No. 1809) (same).

214. Unlike the Non-Debtor SFA Loan Party Releases, the Exculpation Provision does not affect the liability of third parties *per se*, but rather sets a standard of care of gross negligence, fraud, or willful misconduct in hypothetical future litigation against an exculpated party for acts arising out of the Restructuring. *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (holding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code.").

215. An exculpation provision represents a legal determination that flows from several findings a court must reach in confirming a plan, as well as the exculpation in section 1125(e) of the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(L); 11 U.S.C. § 1125(e). Once the court makes a good-faith finding, it is appropriate to set the standard of care of the parties involved in the formulation of that plan. *See PWS Holding*, 228 F.3d at 246, 246–47 (observing that creditors providing services to debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties . . . ."). As such, exculpation provisions prevent future collateral attacks against estate fiduciaries and others that participate actively in the Debtors' restructuring. Here, the Exculpation Provision is appropriate as it provides protection to those parties, and each of the Exculpated Parties has participated in the Debtors' restructuring in good faith.

216. Further, granting such relief falls within the "fresh start" principles underlying the Bankruptcy Code. *See Pac. Lumber*, 584 F.3d at 252-53. Indeed, courts in this circuit that have cast doubt on plan exculpation provisions have done so only where the provision at issue exculpates non-debtor-affiliated parties. *See, e.g.*, *id.* at 251, 252. Nevertheless, such courts have still permitted exculpatory relief for non-debtor parties where such parties owe duties in favor of the debtors or their estates and act within the scope of those duties (excluding acts of

fraud or gross negligence). *See In re Parker Drilling Co.*, Case No. 18-36958 (MI) (Bankr. S.D. Tex. Jan. 23, 2019) (ECF No. 309) (confirmed plan defining "exculpated parties" to include the indenture trustee); *In re Vanguard Nat. Res., LLC*, Case No. 17-30560 (MI) (Bankr. S.D. Tex. July 18, 2017) (same); *In re SandRidge Energy, Inc.*, Case No. 16-32488 (DRJ) (Bankr. S.D. Tex. Sept. 20, 2016) (ECF No. 901) (same).

217. Here, the Exculpated Parties include fiduciaries of the Debtors' estates. The directors, officers, and advisors that have acted on the Debtors' behalf in these cases owe duties to the Debtors, and, therefore, exculpation for them, and for similar fiduciaries acting on behalf of the Creditors' Committee, is appropriate. *See In re Pilgrim's Pride Corp.*, Case No. 08–45664–DML–11, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010) ("Debtors, serving through their management and professionals as debtors in possession, acted in the capacity of trustees for the benefit of their creditors . . . . [t]o the extent Debtors acted in the Chapter 11 Cases, other than in bad faith, pursuant to the authority granted by the Code or as directed by court order, Debtors' management and professionals presumptively should not be subject to liability.").

218. The Exculpation Provision is narrowly tailored to protect the Exculpated Parties from inappropriate litigation based on the Restructuring and the Plan Documents and does not release any claim based on any act or omission that is a criminal act or constitutes intentional fraud, willful misconduct, or gross negligence as determined by a Final Order. Moreover, the Exculpated Parties participated in these chapter 11 cases in reliance upon the protections afforded to them by the Exculpation Provision. Failure to approve the Exculpation Provision would undermine the purpose of the Plan and the settlements embodied in the Plan and Disclosure Statement by allowing parties to pursue claims post-bankruptcy that are otherwise fully and finally resolved by the Plan. Healy Decl. ¶ 36.

219. Black Diamond objects to the exculpation of Mr. Shaper and Mr. Spytek as impermissible under *Pac. Lumber* and its progeny. That objection is incorrect for several reasons. The *Pac. Lumber* court carved out an exception in favor of exculpatory relief for non-debtor parties where such parties owe duties to the debtors or their estates, and act within the scope of those duties, *i.e.*, excluding acts of actual fraud, willful misconduct, or gross negligence. *See Pac. Lumber,* 584 F.3d at 253. As officers and directors of the Company, Mr. Shaper and Mr. Spytek both served in fiduciary capacities and Black Diamond can point to no compelling evidence to suggest that Mr. Shaper or Mr. Spytek acted outside of the scope of their fiduciary duties.

220. Second, exculpations, like those included in the Plan, are essential to ensure that capable individuals – like Mr. Spytek and Mr. Shaper – are willing to manage and assist a debtor in chapter 11. *See Chemtura*, 439 B.R. at 610 (recognizing that "exculpation provisions are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decision-makers in the chapter 11 case"). Mr. Spytek and Mr. Shaper have contributed significantly to the Debtors' restructuring. When the Debtors' CEO resigned in February 2020, Mr. Shaper and Mr. Spytek assumed interim co-CEO roles, while maintaining their seats on the Board. In March, at the onset of the COVID-19 pandemic and following a precipitous drop in oil and gas prices, Mr. Spytek and Mr. Shaper agreed to assume such roles full time just weeks prior to filing of these Chapter 11 Cases.

221. In addition to their efforts managing the Debtors during extraordinary times, Mr. Shaper and Mr. Spytek's contributions included negotiations that predated these chapter 11 cases and negotiations that have occurred during the Chapter 11 Cases. Each was integral to ensure that the Debtors' business continued to operate during the Chapter 11 Cases, thereby preserving

value for the benefit of all parties in interest. To the extent that the Debtors acted in good faith, their management and professionals should presumptively not be subject to liability, and Mr. Shaper and Mr. Spytek should not be the exception. *See also PWS*, 228 F.3d at 246-47 (observing that creditors providing services to the debtors are entitled to a limited grant of immunity for actions within the scope of their duties).

222. Last, extending exculpatory relief to Mr. Shaper and Mr. Spytek, as with the other Exculpated Parties, is essential for the Debtors' "fresh start." *See Pac. Lumber,* 584 F.3d at 252. Without this relief, the Reorganized Debtors would emerge from these Chapter 11 Cases with the potential overhang of restructuring related litigation consuming valuable time and resources.

223. Similarly, Black Diamond's objection to Centerbridge's exculpation as DIP Lender and DIP Agent (as defined in the Plan) should be overruled. Although as DIP Lender and DIP Agent, Centerbridge does not necessarily owe fiduciary duties to the Debtors, Centerbridge has been integral for the success of the Debtors in those capacities. The incremental financing provided by Centerbridge was made on better terms than the Initial DIP Facility and provided the Debtors the liquidity required to eventually emerge from these Chapter 11 Cases and the flexibility to pursue a value-maximizing plan of reorganization.

224. Accordingly, the Exculpation Provision is appropriate, conforms to existing case precedent, and should be approved.

III. <u>Plan Injunctions Are Appropriate and Should be Approved</u>

225. The injunctions set forth in Section 10.4, 10.5, and 10.9 of the Plan (the "**Plan Injunctions**") are appropriate because they comply with the Bankruptcy Code and are necessary to implement and enforce the Plan. Section 10.4 enjoins parties from interfering with the implementation of the Plan and provides:

> Unless otherwise provided in this Plan, all injunctions and stays arising under or entered during the Chapter 11 Cases, whether under sections 105 or 362 of the Bankruptcy Code or otherwise, and in existence on the date of entry of the Confirmation Order, shall remain in full force and effect until the later of the Effective Date and the date indicated in the order providing for such injunction or stay.

Plan § 10.4. Section 10.5 extends the Plan Injunctions to the Debtors' successors, including the Reorganized Debtors and their property. The Plan Injunctions thus provide a means to enforce the Debtors' discharge pursuant to sections 524 and 1141 of the Bankruptcy Code, the Debtors' Releases, the Non-Debtor SFA Loan Party Releases, the Exculpation, and the other provisions of the Plan against parties in interest in these chapter 11 cases.

226. The Plan Injunctions are integral to the Plan because they provide certainty to the Debtors and Reorganized Debtors that the Plan will be enforceable in accordance with its terms. Moreover, injunctive provisions similar to the Plan Injunctions have been approved in other, similarly complex chapter 11 cases in the Southern District of Texas. *See, e.g.*, *In re Weatherford Int'l PLC*, Case No. 19-33694, ¶ 28 (DRJ) (Bankr. S.D. Tex. Sept. 10, 2019) (ECF No. 343) (approving similar injunctions and finding that they are "an integral part of th[e] Plan and essential to its implementation."); *In re Halcón Res. Corp.*, Case No. 19-34446 (DRJ) (Bankr. S.D. Tex. Sept. 24, 2019) (ECF No. 321); *In re Gastar Expl. Inc.*, Case No. 18-36057, ¶ 34 (MI) (Bankr. S.D. Tex. Dec. 21, 2018) (ECF No. 282); *In re Goodrich Petrol. Corp.*, Case No. 16-31975, ¶¶ 29, 108 (MI) (Bankr. S.D. Tex. Sept. 28, 2016) (ECF No. 531) (approving substantially similar injunction as being "necessary to implement, preserve, and enforce the Debtors' discharge, the Debtor Releases, the Third Party Release, and the Exculpation, and . . . narrowly tailored to achieve this purpose"); *In re SandRidge Energy, Inc.*, Case No. 16-32488, at ¶¶ 43, 88 (DRJ) (Bankr. S.D. Tex. Sept. 20, 2016) (ECF No. 901) (approving substantially similar

"injunction provisions [as being] essential to the Plan and are necessary to implement the Plan and to preserve and enforce the discharge, Debtor Release, the Third Party Release, and the exculpation provisions . . . ."); *In re RAAM Glob. Energy Co.*, Case No. 15-35615 (MI) (Bankr. S.D. Tex. Jan. 19, 2016) (ECF No. 376) (approving substantially similar injunction provision). For the same reasons, the Plan Injunctions are necessary to implement the discharges, releases, and other provisions of the Plan and should be approved.

SETTLEMENTS AND COMPROMISES EMBODIED IN PLAN ARE INTEGRAL COMPONENT OF PLAN AND SHOULD BE APPROVED

227. The settlements and compromises embodied in the Plan are the result of extensive arms'-length negotiations by the Debtors with its relevant constituencies and are in the best interest of the Debtors' Estates. Black Diamond's assertions that the settlements under the Plan are *illusory* and represent an *ultra vires* act by the Plan Sponsor should be overruled. Black Diamond Obj. ¶ 110.

228. Black Diamond's objection relies on the mistaken premise that Centerbridge is settling claims on behalf of all Lenders under the SFA. To the contrary, the Creditors' Committee – who has requested standing to bring certain Challenges (as defined in the Refinanced DIP Facility) on behalf of the Debtors[32] – has determined not to pursue the Lien Challenge as a result of the agreements embodied in the Plan, including the recoveries provided to the holders of Class 4A Claims and Class 4B Claims.

[32] On December 4, 2020, the Creditors' Committee filed the *Motion of the Official Committee of Unsecured Creditors for Entry of an Order Authorizing the Committee to Prosecute Avoidance Actions and Challenges Relating to the Prepetition Secured Parties* (ECF No. 1028) (the "**Lien Challenge**") seeking standing to file a complaint challenging the perfection or enforceability of the Lenders' security interests in approximately $9 million of the Debtors' assets, and to bring certain other fraudulent transfer claims relating to obligations incurred and security interests granted by certain of the Debtors under the SFA prior to the Petition Date.

229. The standard for evaluating the validity of a settlement contained in a chapter 11 plan is the same as the standard for evaluating a settlement between a debtor and another party outside the context of a plan as long as the plan settlement does not violate statutory priority. Stated differently, settlement provisions in a chapter 11 plan must satisfy the standards used to evaluate compromises under Bankruptcy Rule 9019. *In re Bigler LP*, 442 B.R. 537, 543 n.6 (Bankr. S.D. Tex. 2010) (citing, *inter alia*, *In re MCorp Fin., Inc.*, 160 B.R. 941, 951 (S.D. Tex. 1993)). Approval should only be given if the settlement is "fair and equitable and in the best interest of the estate." *Off. Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 355 (5th Cir. 1997) (quoting *Foster Mortg.*, 68 F.3d 914, 917 (5th Cir. 1995)).

230. "In determining whether a settlement is fair and equitable, [courts] apply [a] three-part test . . . with a focus on comparing 'the terms of the compromise with the likely rewards of litigation.'" *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015) (quoting *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980)). Specifically,

> [a] bankruptcy court must evaluate: (1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise. These "other" factors—the so-called *Foster Mortgage* factors—include: (i) "the best interests of the creditors, 'with proper deference to their reasonable views'"; and (ii) "'the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.'"

Id. (citing *Jackson Brewing*, 624 F.2d at 602 and quoting *Cajun Elec. Power Coop.*, 119 F.3d at 356; *Foster Mortg.*, 68 F.3d at 917–18). "[I]t is unnecessary to conduct a mini-trial to determine the probable outcome of any claims waived in the settlement." *Cajun Elec. Power Coop.*, 119 F.3d at 356.

231. Here, the settlements and compromises incorporated in the Plan should be approved because they are "fair and equitable and in the best interest of the [Debtors' E]state[s]." *Foster Mortg.*, 68 F.3d at 917. These settlements and compromises are the result of good-faith, arm's-length negotiations, which resulted in, among other things, the establishment and funding of the Litigation Trust in connection with treatment of the Class 4B (Other Unsecured Claims), and the compromise and settlement of the Causes of Action set forth in the Lien Challenge. *See* Healy Decl. ¶ 30.

232. These settlements and compromises not only avoid costly litigation and delay, but have resulted in the Creditors' Committee's support of the Plan, who determined that the agreements embodied in and transactions contemplated by the Plan represent a fair and reasonable resolution of the rights and interests of their constituent creditors based on the facts and circumstances of these Chapter 11 Cases. Given the complex and litigious history of these Chapter 11 Cases, this settlement with and support from the Creditors' Committee was critical to the Debtors' ability to pursue the Plan.

BLACK DIAMOND'S REMAINING OBJECTIONS SHOULD BE OVERRULED

I. Speedcast Parent is Entitled to a Discharge Under Section 1141 of the Bankruptcy Code

233. Black Diamond's assertion that section 1141(d)(3) of the Bankruptcy Code precludes Speedcast Parent from receiving a discharge because the Plan is a liquidating plan is incorrect. *See* Black Diamond Obj. ¶¶ 146-148. Under Section 1141(d) of the Bankruptcy Code, confirmation of a plan discharges a debtor from any debt that arose before the date of confirmation, except where "(A) the plan provides for the liquidation of all or substantially all of the property of

the estate; (B) the debtor does not engage in business after consummation of the plan; *and* (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title." 11 U.S.C. § 1141(d)(3) (emphasis added).

234. Section 5.13(b) of the Plan provides that Speedcast Parent "*may* continue operations, be wound down, liquidated, dissolved, and/or deregistered in accordance with the Corporate Restructuring." In other words, the Plan only grants the Debtors, Reorganized Debtors, or Australian Administrator(s), as applicable, the discretion to wind down or liquidate Speedcast Parent in accordance with their fiduciary duties. The Plan does not mandate the liquidation of Speedcast Parent, as required by Section 1141(d)(3)(A). Many other courts have granted discharge in such circumstances *See, e.g.*, *In re First Am. Health Care of Ga., Inc.*, 220 B.R. 720, 726 (Bankr. S.D. Ga. 1998) ("where a plan of reorganization provides viable options other than to liquidate and distribute property of the estate, it is not a 'liquidating plan'") *In re Paragon Offshore Plc*, Ch. 11 Case No. 16-10386 (Bankr. D. Del. Jun. 7, 2017) (ECF No. 1614) (granting debtors a discharge where plan of reorganization merely authorized foreign administrators to liquidate debtor entities in their discretion); *Spokane Rock I, LLC v. Um (In re Um)*, No. 10-46731, 2015 WL 6684504, at *4 (Bankr. W.D. Wash. Sept. 30, 2015) (distinguishing plans that mandate liquidation of the estate property from plans that provide options other than liquidation), *aff'd*, Case No. C15-5787-BHS, 2016 WL 7714141 (W.D. Wash. Aug. 18, 2016), *aff'd*, 904 F.3d 815 (9th Cir. 2018).

235. Indeed, granting Speedcast Parent a "fresh start" under section 1143(d)(3)(A) is consistent with Congressional intent. Section 1141(d)(3) is intended to prevent a discharge where a corporate debtor is attempting to obtain confirmation of a liquidating plan. H.R. Rep. No. 95-595, at 418-19 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6374-75. In the

instant case, however, the potential winding up of Speedcast Parent is wholly in the discretion of Speedcast Parent's post-Effective Date management and the "fresh-start" is required to facilitate Reorganized Speedcast Parent's next steps under applicable Australian law. Accordingly, Black Diamond's objection should be overruled and Speedcast Parent should be granted a discharge under the Plan and Confirmation Order.

II. <u>Plan's Retention-of-Jurisdiction Provision is Not Overbroad</u>

236. Black Diamond objects to the Plan's retention of exclusive jurisdiction provision as overly broad.[33] *See* Black Diamond Obj. ¶ 152. Section 11.1 of the Plan is drafted in a manner that is appropriate and consistent with the statutory framework of 28 U.S.C. § 1334 and 28 U.S.C. § 157 and does not purport to alter or expand the Court's jurisdiction beyond what is permitted by law. However, to avoid any doubt, the Debtors have modified the Plan to clarify that such provision does not seek to exceed the scope of 28 U.S.C. § 1334(b). To the extent Black Diamond has availed itself of the Court's exclusive jurisdiction in connection with the adversary proceeding styled *Black Diamond Commercial Finance L.L.C. v. Centerbridge Partners, L.P.* (*In re Speedcast Int'l Ltd.*) Ch. 11 Case No. 20-32243 (MI), Adv. No. 20-03496 (Bankr. S.D. Tex. Dec. 9, 2020), Black Diamond's objection should be overruled insofar as it seeks to reserve Black Diamond's rights to object to such jurisdiction at a later date.

PLAN SATISFIES REMAINING PROVISIONS OF <u>BANKRUPTCY CODE SECTION 1129 AND SHOULD BE CONFIRMED</u>

237. To obtain confirmation of the Plan, the Debtors must demonstrate by a preponderance of the evidence that the Plan satisfies section 1129 of the Bankruptcy Code with respect to each Debtor entity. *See Briscoe Enters.*, 994 F.2d at 1165 (holding "that preponderance

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[33] Section 11.1 of the Plan provides, in relevant part, that the "Bankruptcy Court shall retain exclusive jurisdiction, pursuant to 28 U.S.C. §§ 1334 and 157, over all matters arising in or related to the Chapter 11 Cases."

of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown"). The Debtors have addressed several of the requirements of section 1129 above.[34] For the reasons set forth below, the Plan satisfies the remaining requirements of section 1129 and should be confirmed.

I. <u>11 U.S.C. § 1129(a)(1): Plan's Compliance With Bankruptcy Code</u>

238. Under section 1129(a)(1) of the Bankruptcy Code, a plan must comply with the applicable provisions of the Bankruptcy Code. This provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing the classification of claims and the contents of the plan, respectively. *See, e.g.*, *Star Ambulance*, 540 B.R. at 260 ("Courts interpret [section 1129(a)(1)] to mean that a plan must meet the requirements of Bankruptcy Code Sections 1122 and 1123.") (citing, *inter alia*, *Alliance, Inc. v. WSI (II)-COS, L.L.C.* (*In re Save Our Springs (S.O.S.) Alliance, Inc.)*, 632 F.3d 168, 174 (5th Cir. 2011)); *In re J T Thorpe Co.*, 308 B.R. 782, 785 (Bankr. S.D. Tex. 2003) ("The Plan complies with the applicable provisions of the Bankruptcy Code, including the requirements of Sections 1122 and 1123(a) and (b) of the Bankruptcy Code, thereby satisfying Section 1129(a)(1) of the Bankruptcy Code."); H.R. Rep. No. 95–595, at 412 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; S. Rep. No. 95–989, at 126 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5912. As discussed below, the Plan complies with both section 1122 and section 1123.

A. 11 U.S.C. § 1122 (Classification)

239. Under section 1122(a) of the Bankruptcy Code:

[34] *See supra* ¶¶ 64 (discussing section 1129(a)(3)), 114 (discussing compliance with section 1122 and 1129(a)(1)), 128 (discussing section 1129(a)(10)), 165 (discussing section 1129(a)(8)(A)), 170 (discussing section 1129(b)(2)).

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C. § 1122(a). "Significantly, a plan proponent is afforded significant flexibility in classifying claims under section 1122(a) of the Bankruptcy Code provided there is a reasonable basis for the classification scheme and all claims within a particular class are substantially similar." *In re Idearc Inc.*, 423 B.R. 138, 160 (Bankr. N.D. Tex. 2009), *aff'd*, 662 F.3d 315 (5th Cir. 2011).

240. Here, the Plan provides for 9 Classes of Claims and Interests: (i) Class 1 (Other Priority Claims), (ii) Class 2 (Other Secured Claims), (iii) Class 3 (Syndicated Facility Secured Claims), (iv) Class 4A (Unsecured Trade Claims), (v) Class 4B (Other Unsecured Claims), (vi) Class 5 (Intercompany Claims), (vii) Class 6 (Subordinated Claims), (viii) Class 7 (Parent Interests), and (ix) Class 8 (Intercompany Interests).[35]

241. Each Class consists solely of "substantially similar" Claims or Interests that share common priority or rights against the Estates. *See In re Greystone III Joint Venture*, 995 F.2d at 1278 ("'[S]ubstantially similar claims,' those which share common priority and rights against the debtor's estate, should be placed in the same class."). All Claims and Interests within a Class have the same or similar rights against the Debtors. Moreover, the Plan's classification scheme generally tracks the Debtors' prepetition capital structure and divides the applicable Claims and Interests into Classes based on the underlying instruments giving rise to such Claims and Interests and/or the entity against which Claims or Interests are asserted. *See* Healy Decl. ¶ 23.[36]

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[35] Administrative Expense Claims, Fee Claims, Priority Tax Claims, and DIP Claims are not classified and are separately treated under the Plan.

[36] *See also supra* ¶¶ 106-123.

242. Accordingly, the Plan complies with section 1122 of the Bankruptcy Code.

B. 11 U.S.C. § 1123(a) (Required Plan Provisions)

243. Section 1123(a) of the Bankruptcy Code sets forth seven requirements that a corporate proponent of a chapter 11 plan must satisfy.[37] The Plan satisfies each such requirement.

- Pursuant to 11 U.S.C. § 1123(a)(1): Section 3 of the Plan designates Classes of Claims and Interests.

- Pursuant to 11 U.S.C. § 1123(a)(2): Section 3 of the Plan specifies whether each Class is Impaired under the Plan.

- Pursuant to 11 U.S.C. § 1123(a)(3): Section 4 of the Plan specifies the treatment of each Impaired Class.

- Pursuant to 11 U.S.C. § 1123(a)(4): Section 4 of the Plan provides that, except as a holder of a particular Claim or Interest may agree to less favorable treatment, the treatment of each Claim or Interest in a particular Class is the same as the treatment of each other Claim or Interest in such Class.

- Pursuant to 11 U.S.C. § 1123(a)(5): The Plan provides adequate means for implementation, including by way of, among other things, the compromise and settlement of Claims, Interests, and controversies (Plan § 5.1); the Debtors' continued corporate existence (unless otherwise specified in the Plan) and dissolution of Dissolving Debtors (as defined in the Plan) (*id.* § 5.2); Plan funding (*id.* § 5.6); the cancellation of existing securities and agreements of the Debtors (*id.* § 5.4); the cancellation of certain existing security interests in the Debtors (*id.* § 5.5); the composition of the board of directors and list of officers of each Reorganized Debtor (*id.* § 5.10); the Management Incentive Plan (*id.* § 5.11); the authorization, issuance, and delivery of New Equity Interests (*id.* § 5.5); the Restructuring Transactions (*id.* § 5.13); the limited Substantive Consolidation of certain Debtors (*id.* § 5.15); provisions governing distributions under the Plan (*id.* § 6); resolution of Disputed Claims (*id.* § 7.2); and the Debtors' Releases and Non-Debtor SFA Loan Party Releases, (each as defined below) (*id.* §§ 10.6, 10.7).

- Pursuant to 11 U.S.C. § 1123(a)(6): The certificate of incorporation, articles of incorporation, limited liability company agreement or similar governing document, as applicable, of each Debtor has been or will be amended on or before the Effective Date to prohibit the issuance of non-voting equity securities. Further, the only securities being issued pursuant to the Plan are the New Equity Interests, which are not non-voting equity securities. Thus, the issuance of the New Equity Interests complies with section 1123(a)(6) of the Bankruptcy Code.

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[37] An eighth requirement, set forth in section 1123(a)(8), applies only in cases in which the debtor is an individual.

- Pursuant to 11 U.S.C. § 1123(a)(7): Section 1129(a)(5) of the Bankruptcy Code requires that Debtors provide certain information regarding the appointment of directors and officers upon reorganization. The Plan's provisions governing the manner of selection of any officer, director, or manager are consistent with the interests of creditors and equity security holders and with public policy. Upon the Effective Date, the New Board shall be comprised as determined by the Plan Sponsor. If known, the officers and the composition of each board of directors of the Reorganized Debtors shall be disclosed prior to the Effective Date to the extent required by section 1129(a)(5) of the Bankruptcy Code.

244. Accordingly, the Plan contains all of the provisions required by section 1123(a) of the Bankruptcy Code.

C. 11 U.S.C. § 1123(b) (Permissible Plan Provisions)

245. Section 1123(b) of the Bankruptcy Code sets forth permissive provisions that may be included in a chapter 11 plan. Each provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code:

- Pursuant to 11 U.S.C. § 1123(b)(1): Section 4 of the Plan treats Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 5 (Intercompany Claims), and Class 8 (Intercompany Interests) as unimpaired.

- Pursuant to 11 U.S.C. § 1123(b)(2): Section 8 of the Plan provides for the rejection of all executory contracts and unexpired leases, except for those contracts or leases that are assumed and assigned in accordance with the Plan. Exhibit E to the Plan Supplement identifies those executory contracts that are being assumed pursuant to the Plan.

- Pursuant to 11 U.S.C. § 1123(b)(3)(A): The settlements and compromises contemplated by Section 5.1 of the Plan represent a good faith compromise of Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that a creditor or an Interest holder may have with respect to any Allowed Claim or Interest or any distribution to be made on account of such Allowed Claim or Interest. In addition, Section 10.6(a) of the Plan provides for the Debtors' release of the Released Claims.

- Pursuant to 11 U.S.C. § 1123(b)(3)(B): Section 10.11 of the Plan preserves for the Reorganized Debtors all of the rights, claims, Causes of Action, rights of setoff or recoupment, and other legal or equitable defenses that the Debtors had immediately before the Effective Date, except as otherwise expressly set forth in the Plan.

- Pursuant to 11 U.S.C. § 1123(b)(5): Section 4 of the Plan modifies the rights of holders of Claims or Interests in the Impaired Classes, and leaves unaffected the rights of holders of Claims or Interests in the Unimpaired Classes.

- Pursuant to 11 U.S.C. § 1123(b)(6): Sections 10.6, 10.7, 10.8, and 10.9 of the Plan include release, exculpation, and injunction provisions, respectively, that are integral to the Debtors' reorganization and are consistent with the provisions of the Bankruptcy Code and Fifth Circuit precedent. The releases and exculpation in the Plan are discussed more fully below. Further, Section 6.13 of the Plan provides that the offer, issuance, and distribution of New Equity Interests under the Plan will be exempt from registration pursuant to section 4(a)(2) of the Securities Act and/or Regulation D thereunder.

As discussed herein, these provisions of the Plan are appropriate and comply with applicable law.

246. For the foregoing reasons, the Plan complies with sections 1122 and 1123 of the Bankruptcy Code and therefore satisfies the requirements of section 1129(a)(1) of the Bankruptcy Code.

II. 11 U.S.C. § 1129(a)(2): Plan Proponents' Compliance With Bankruptcy Code

247. Under section 1129(a)(2) of the Bankruptcy Code, "[t]he proponent of the plan [must] compl[y] with the applicable provisions of th[e Bankruptcy Code]." The "applicable provisions" of the Bankruptcy Code have been interpreted to include, principally, sections 1125 and 1126. *See, e.g.*, *Cajun Elec. Power*, 150 F.3d at 512 n.3 (noting that section 1129(a)(2) includes requirement of compliance with section 1125); *Cypresswood Land Partners*, 409 B.R. at 424 ("Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125."); *Star Ambulance*, 540 B.R. at 262 ("Courts interpret this language to require that the plan proponent comply with the disclosure and solicitation requirements set forth in Bankruptcy Code §§ 1125 and 1126.").

A. Debtors Have Complied with 11 U.S.C. § 1125

248. Under section 1125(b) of the Bankruptcy Code:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.

11 U.S.C. § 1125(b).

Further, under section 1125(e) of the Bankruptcy Code:

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

11 U.S.C. § 1125(e).

249. On November 2, 2020, the Court entered the Solicitation Order, which approved the Disclosure Statement on a conditional basis and approved the Debtors' proposed solicitation procedures. As detailed in the Notice Affidavit and Voting Certification, the Debtors have solicited votes on the Plan and provided notices to Non-Voting Classes in compliance with the Solicitation Order. *See* Notice Aff. ¶¶ 6-15; Voting Cert. ¶ 6. Accordingly, the Debtors have complied with section 1125 of the Bankruptcy Code.

B. Debtors Have Complied with 11 U.S.C. § 1126

250. Under section 1126 of the Bankruptcy Code:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan.
>
> . . .
>
> (c) A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . that have accepted or rejected such plan.
>
> (d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests . . . that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests . . . that have accepted or rejected such plan.

> . . .
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interests of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

251. The Debtors solicited votes on the Plan in compliance with the Solicitation Order. The Debtors solicited the votes of all Impaired Classes of Claims.

252. The Debtors determined that Class 4A accepted the Plan and Classes 3 and 4B rejected the Plan based on the voting results described above. Voting Cert. Ex. A. Classes 1, 2, and 5 were conclusively presumed to accept the Plan because those Classes were Unimpaired under the Plan, and Classes 6, 7, and 8 were deemed to reject the Plan because those Classes will not receive any distribution on account of their claims. Votes were not solicited from these Classes.

253. Based on the foregoing, the Debtors have satisfied the requirements of section 1129(a)(2) of the Bankruptcy Code.

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

254. Addressed above. *See supra* ¶¶ 74-105.

IV. 11 U.S.C. § 1129(a)(4): Professional Fees Subject to Court Approval

255. Under section 1129(a)(4) of the Bankruptcy Code, "[a]ny payment made or to be made by the proponent . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4); *see Cajun Elec. Power*, 150

F.3d at 514–15 (explaining that section 1129(a)(4) ensures that payments for professional services connected with a chapter 11 case will be subject to court's approval as being reasonable). "What constitutes a reasonable payment will clearly vary from case to case and, among other things, will hinge to some degree upon who makes the payments at issue, who receives those payments, and whether the payments are made from assets of the estate." *Id.* at 517.

256. Here, Section 2.2 of the Plan provides that Professionals seeking approval by the Court of compensation for services rendered or reimbursement of expenses incurred after the Petition Date through the Effective Date under sections 327, 328, 330, 331, 503(b)(2), 503(b)(3), 503(b)(4), 503(b)(5), 503(b)(6), or 1103 of the Bankruptcy Code ("**Fee Claims**") must file final applications no later than 45 days after the Effective Date, thereby giving interested parties adequate time to review the Fee Claims. *Id.* Further, Section 11.1(i) of the Plan provides that the Court will retain jurisdiction to "hear and determine all Fee Claims." Accordingly, the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

V. <u>11 U.S.C. § 1129(a)(5): Information Regarding Proposed Officers and Directors</u>

257. Under section 1129(a)(5) of the Bankruptcy Code, a plan proponent must disclose:

> (A) (i) . . . the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
>
> (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and
>
> (B) . . . the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

11 U.S.C. § 1129(a)(5). "Bankruptcy courts have recognized that keeping a competent officer in charge of the reorganized debtor is consistent with public policy under § 1129(a)(5)(A)(ii)."

Cypresswood Land Partners, 409 B.R. at 427. "In order to lodge a valid objection under section 1129(a)(5), a creditor must show that a debtor's management is unfit or that the continuance of this management post-confirmation will prejudice the creditors." *In re Landing Assocs., Ltd.*, 157 B.R. 791, 817 (Bankr. W.D. Tex. 1993).

258. The Debtors will identify the directors of the Reorganized Debtors as soon as possible. The Debtors will also provide information about each of those individuals, their affiliations, and, with respect to insiders, their compensation. Upon the Effective Date, the New Board shall be comprised as determined by the Plan Sponsor. *See* Plan § 5.10. All of the proposed directors and officers of the Reorganized Debtors will be competent, have relevant and valuable business and industry experience, and will provide continuity and fresh perspectives on running the Reorganized Debtors' businesses.

VI. <u>11 U.S.C. § 1129(a)(6): No Rate Changes</u>

259. Under section 1129(a)(6) of the Bankruptcy Code, "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor [must have] approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). The Plan does not provide for rate changes by the Debtors. Accordingly, section 1129(a)(6) does not apply to the Plan.

VII. <u>11 U.S.C. § 1129(a)(7): Best Interests Test</u>

260. Under section 1129(a)(7) of the Bankruptcy Code, a plan must provide "that each holder of an impaired class of claims or interests receives at least what it would have received if the debtor were liquidated under Chapter 7." *CHS, Inc. v. Plaquemines Holdings, L.L.C.*, 735 F.3d 231, 239 (5th Cir. 2013). "The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan." *203 N. LaSalle St.*, 526 U.S. at 441 n.13. Moreover, "the inquiry is what would the creditor receive from the debtor's

estate if the debtor were to liquidate under chapter 7 of the Bankruptcy Code, not what the creditor would have received from a third party." *Lovett v. Homrich Inc. (In re Philip Servs. Corp.)*, 359 B.R. 616, 630 (Bankr. S.D. Tex. 2006). The value of plan distributions is measured "in present value terms." *Briscoe Enters.*, 994 F.2d at 1167; *In re Pisces Energy, LLC*, Case No. 09-36591-H5-11, 2009 WL 7227880, at *12 (Bankr. S.D. Tex. Dec. 21, 2009). "Although creditors being 'at least as well off' is the statutory requirement for plan confirmation, ordinarily creditors are better off when the debtor is reorganized into a going concern than when a liquidation occurs." *Cantu v. Schmidt (In re Cantu)*, 784 F.3d 253, 262 (5th Cir. 2015). A party's speculation that it would fare better in a hypothetical chapter 7 liquidation is insufficient to challenge a plan proponent's liquidation analysis. *Block Shim*, 939 F.2d at 292.

261. Here, the relative recoveries of holders of Claims or Interests under the Plan and in a hypothetical chapter 7 liquidation are set forth in Exhibit D to the Disclosure Statement (the "**Liquidation Analysis**") and supported by the Healy Declaration. They demonstrate that the holders in each Class of Claims and Interests will receive at least as much value under the Plan as they would in a hypothetical liquidation of the Debtors on the Effective Date. *See* Healy Decl. ¶ 59. Specifically, the Debtors determined that the gross proceeds available for distribution in a hypothetical chapter 7 liquidation would be between $169 to $216 million (*id.*), resulting in the following projected recoveries to each Class:

Class	Class	Liquidation Recovery[38]	Plan Recovery
Class 1	Other Priority Claims	N/A	N/A
Class 2	Other Secured Claims	N/A	N/A
Class 3	Syndicated Facility Secured Claims	0%	100%
Class 4A	Unsecured Trade Claims	0%	27% -37%
Class 4B	Other Unsecured Claims	0%	≥0%
Class 5	Intercompany Claims	0%	100%/0%
Class 6	Subordinated Claims	0%	0%
Class 7	Parent Interests	N/A	0%
Class 8	Intercompany Interests	N/A	100%/0%

262. These projections are based on reasonable, justified, and widely accepted assumptions regarding a chapter 7 trustee's ability to liquidate the Debtors' assets and the values that such sales would be likely to produce. As Judge Hughes has reasoned:

> The additional costs of three chapter 7 trustees, the short time allowed a plain liquidation, the potential for more claims to be filed against the estates, and the loss of knowledge and momentum . . . about the management of these assets would combine to reduce significantly the cash to be realized by the estates from these assets. The lower prices from the liquidation are reasonable.

MCorp Fin, 160 B.R. at 961 (confirming chapter 11 plans). And as Judge Brown has explained:

> [A] chapter 7 liquidation would increase the administrative costs of the Bankruptcy Cases and adversely affect the ultimate proceeds available for distribution to all holders of Allowed Claims in the Bankruptcy Cases and the Debtors' [post-effective] date operations. Moreover, the increased costs associated with a liquidation under chapter 7 would further reduce the proceeds available for distribution. These costs would include, among other things, administrative fees and costs payable to a trustee in bankruptcy and professional advisors to such trustee. . . .
>
> The Bankruptcy Court here considers, *inter alia:* (1) the problems associated with the quick sale of assets as contemplated in chapter 7; (2) the limitations of section 721 of the Bankruptcy Code; and (3) loss of value through passage of time.

[38] The Debtors' Liquidation Analysis further shows that in the cases of seven (7) Debtors, each of which are not subject to the SFA, on a debtor-by-debtor basis, no value will be distributed in the waterfall beyond the Secured Claims of the DIP Lenders.

Pisces Energy, 2009 WL 7227880, at *12 & n.7 (holding that plan satisfied best interests test); *accord In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 252–58 (Bankr. S.D.N.Y. 2007) (considering, among other things, costs of regulatory compliance, administrative costs of one or more chapter 7 trustees and their professionals; a trustee's lack of familiarity with debtors' business; potential for delays in claim and interest holders' receipt of distributions; and likelihood that chapter 7 trustees would adopt settlements embodied in plan).

263. Here, the Debtors have assumed, among other things, that (i) the business would cease operations on December 31, 2020 and begin a wind down process; (ii) the wind down is assumed to occur over a 6-month period; (iii) the Company would file a Chapter 7 proceeding and a Trustee would be appointed to the case (and all currently filed entities are included in the Chapter 7); (iv) the existing counsel, advisors, and consultants would be replaced by the trustee with new professionals; (v) a chapter 7 trustee's fees and retention of new professionals would result in additional costs and expenses to the Estates; (vi) the wind down has been projected utilizing the Company's August financials as well as the DIP budget; (vii) the Government Business is projected to be sold with sale proceeds flowing to the immediate Debtor parent entity; (viii) the remaining non-debtor entities are projected to be liquidated with all creditors at each entity to be satisfied before remaining proceeds flow up to their parent company; and (ix) the chapter 7 trustee would require fees necessary to facilitate the sale of the Debtors' business and would likely be approximately three percent (3%) of the available liquidation proceeds. Additionally, the liquidation analysis was prepared on a Debtor entity by Debtor entity basis and follows a priority waterfall where assets are liquidated at each Debtor entity. Under the liquidation analysis, liquidation expenses are paid first before remaining cash proceeds are distributed to creditors at each entity in accordance with creditor priorities. *See* Healy Decl. ¶ 61.

264. As the confirmation evidence will show, these assumptions are consistent with Mr. Healy's extensive experience as a financial advisor to distressed companies and are appropriate for and tailored to the Debtors' specific business and assets. Accordingly, the Debtors' assumptions and estimates used in the Liquidation Analysis are appropriate. Because each holder of a Claim or Interest in an impaired Class will receive a distribution under the Plan in excess of what such holder would receive in a hypothetical chapter 7 liquidation, the Plan complies with section 1129(a)(7) of the Bankruptcy Code.

VIII. 11 U.S.C. § 1129(a)(8): Acceptance of Impaired Classes

265. Under section 1129(a)(8) of the Bankruptcy Code, each class of claims and interests must either accept a plan or be unimpaired under the plan. 11 U.S.C. § 1129(a)(8). Classes 1 and 2 were deemed to consent. Plan § 3.8(b).

266. As described above, if the Bankruptcy Court approves the Non-Debtor SFA Loan Party Releases, Class 3 is impaired under the Plan and entitled to vote. If the Court does not approve the Non-Debtor SFA Loan Party Releases, Class 3 is unimpaired under the Plan and should be deemed to have voted to accept the plan pursuant to section 1126(f) of the Bankruptcy Code, thereby meeting the requirements of section 1129(a)(8)(A) of the Bankruptcy Code.

267. Class 4A voted to accept the Plan. *See* Voting Cert. Ex. A. Classes 3 and 4B voted to reject the Plan (*id.*), and Classes 5, 6, 7, and 8 were deemed to reject the Plan and not entitled to vote. *See* Plan § 4. As a result, solely with respect to Classes 3 (to the extent the Non-Debtor SFA Loan Party Releases are approved), 4B, 5, 6, 7, and 8 the Plan does not satisfy the requirements of section 1129(a)(8) of the Bankruptcy Code and must be confirmed pursuant to section 1129(b) of the Bankruptcy Code.

IX. 11 U.S.C. § 1129(a)(9): Payment in Full of Priority Claims

268. Under section 1129(a)(9) of the Bankruptcy Code, a plan must provide certain treatment for specified priority claims. As to administrative expense claims:

> Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that . . . with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim[.]

11 U.S.C. § 1129(a)(9)(A). As to priority non-tax claims:

> (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim[.]

11 U.S.C. § 1129(a)(9)(B). As to unsecured priority tax claims:

> the holder of such claim will receive . . . regular installment payments in cash—(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief . . . and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan[.]

11 U.S.C. § 1129(a)(9)(C). As to secured priority tax claims: "the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C)." 11 U.S.C. § 1129(a)(9)(D).

269. Here, the Plan satisfies each of these requirements. Section 2.1 of the Plan provides that Administrative Expense Claims will be paid on the later of the Effective Date and the date on which such Administrative Expense Claim becomes an Allowed Claim, or, in each case, as soon thereafter as is reasonably practicable. Section 2.3 provides that Priority Tax Claims will be paid on the later of the Effective Date and the date on which such Priority Tax Claim becomes an Allowed Claim, or, in each case, as soon thereafter as is reasonably practicable. Section 4.1 of the Plan provides that Other Priority Claims are Unimpaired and will (i) be paid in

full in Cash or (ii) otherwise receive treatment consistent with the provisions of section 1129(a)(9) of the Bankruptcy Code, payable on the later of the Effective Date or the date that is ten (10) Business Days after the date on which such Claims becomes Allowed, in each case, or as soon as reasonably practicable thereafter. Finally, Section 4.2 of the Plan provides that holders of Other Secured Claims will (i) be paid in full in Cash on the Effective Date or the date that is ten (10) Business Days after the date on which such Claim becomes Allowed or (ii) receive such other treatment so as to render such holder's Allowed Other Secured Claim Unimpaired. Accordingly, the Plan complies with section 1129 of the Bankruptcy Code.

X. <u>11 U.S.C. § 1129(a)(10): Impaired Accepting Class</u>

270. Addressed above. *See supra* ¶¶ 166-171.

XI. <u>11 U.S.C. § 1129(a)(11): Feasibility</u>

271. Section 1129(a)(11) of the Bankruptcy Code requires the court to determine that a plan is feasible. "[T]he [bankruptcy] court need not require a guarantee of success . . . [o]nly a reasonable assurance of commercial viability is required." *Briscoe Enters.*, 994 F.2d at 1165–66; *In re Landing Assocs.*, 157 B.R. at 820 (stating that section 1129(a)(11) only requires a finding that a plan offers "a reasonable probability of success"); *In re Lakeside Glob. II, Ltd.*, 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989) (finding that feasibility "contemplates whether the debtor can realistically carry out its plan and whether the plan offers a reasonable prospect of success and is workable") (citations omitted). As a matter of law, "the mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required." *Whitney Bank v. SCC Kyle Partners, Ltd. (In re SCC Kyle Partners, Ltd.)*, 518 B.R. 393, 406 (W.D. Tex. 2014) (internal quotation marks omitted).

272. As such, courts will find that a plan is feasible if a debtor offers a reasonable assurance that consummation of the plan is not likely to be followed by a further need for financial

reorganization. *See Save Our Springs*, 632 F.3d at 172 ("To obtain confirmation of its reorganization plan, a debtor must show by a preponderance of the evidence that its plan is feasible, which means that it is 'not likely to be followed by . . . liquidation, or the need for further financial reorganization.'") (quoting 11 U.S.C. § 1129(a)(11)); *T-H New Orleans*, 116 F.3d at 801 ("Section 1129(a)(11) codifies the feasibility requirement and requires that confirmation of the plan is not likely to be followed by liquidation"); *Lakeside Glob*, 116 B.R. at 507 ("The purpose of the feasibility requirement is 'to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.'") (citations omitted). Specifically, "[w]here the projections are credible, based upon the balancing of all testimony, evidence, and documentation, even if the projections are aggressive, the court may find the plan feasible." *T-H New Orleans*, 116 F.3d at 802 (alteration in original).

273. In assessing feasibility, courts consider, among others, the following factors: (i) the adequacy of the capital structure; (ii) the earning power of the business; (iii) the economic conditions; (iv) the ability of management; (v) the probability of the continuation of the same management; and (vi) any other matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. *Save Our Springs*, 632 F.3d at 173 n.6. "There is no requirement, however, that [a] court consider all six factors." *Id*. at 173.

274. The Plan is feasible and is not likely to be followed by the liquidation or the need for further financial reorganization of the Debtors. The Debtors have prepared consolidated financial projections for the Reorganized Debtors (collectively with the reserve information, development of schedules, and financial information, the "**Financial Projections**") for the fiscal

years 2020 through 2023 attached to the Disclosure Statement as Exhibit E to the Disclosure Statement. *See* Discl. Stmt., Ex. E. Based upon such Financial Projections, the Debtors believe they will have sufficient resources to make all payments required pursuant to the Plan and that confirmation of the Plan is not likely to be followed by liquidation or the need for further reorganization.

275. On the Effective Date, the Debtors' balance sheet debt will be reduced by approximately $633 million. *See* Discl. Stmt. at 2.

276. Further, the Plan is underpinned by a new-money equity investment for 100% of the equity interests in a newly formed parent entity of the Debtors and their non-Debtor affiliates for an aggregate amount of $500 million. This capital investment provides the Debtors with access to significant levels of liquidity at emergence that will enable them to withstand short-term fluctuations in the commodities market. Such a commitment by sophisticated financial institutions is further evidence of the feasibility of the Plan, as such parties could not be expected to make such an investment in these amounts and on these terms were the Plan likely to be followed by liquidation or further financial reorganization of the Debtors. Healy Decl. ¶ 73.

277. Accordingly, the Plan complies with section 1129(a)(11) of the Bankruptcy Code and is feasible.

XII. 11 U.S.C. § 1129(a)(12): Payment of U.S. Trustee Fees

278. Under section 1129(a)(12) of the Bankruptcy Code, a plan must provide for the payment of "[a]ll fees payable under section 1930 of title 28 [of the United States Code], as determined by the court at the hearing on confirmation of the plan . . . on the effective date of the plan." 11 U.S.C. § 1129(a)(12). In accordance with these sections, Section 2.2 of the Plan provides that, on the Effective Date or as soon as practicable thereafter, such fees shall be paid by the Debtors or the Reorganized Debtors, as applicable. *See* Plan § 2.2. The proposed Confirmation

Order will also provide for the payment of all such statutory fees. *See*; Healy Decl. ¶ 75. Accordingly, the Plan complies with section 1129(a)(12) of the Bankruptcy Code. *See, e.g.*, *Star Ambulance*, 540 B.R. at 267 (holding that plan provision requiring payment of fees under 28 U.S.C. § 1930 satisfies requirements of section 1129(a)(12)); *Cypresswood Land Partners*, 409 B.R. at 433 (holding that testimony that Debtors would pay fees under 28 U.S.C. § 1930 satisfies requirements of section 1129(a)(12)).

XIII. 11 U.S.C. §§ 1129(a)(13): Retiree Benefits

279. Under section 1129(a)(13) of the Bankruptcy Code, "the plan [must] provide[] for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of th[e Bankruptcy Code] . . . ." 11 U.S.C. § 1129(a)(13). Section 8.4 of the Plan provides that "all employment policies, and all compensation and benefits plans, policies, and programs of the Debtors . . . including all savings plans, retirement plans, healthcare plans, disability plans, severance benefit plans, incentive plans, and life and accidental death and dismemberment insurance plans" and "shall be treated as executory contracts under the Plan and, on the Effective Date, shall be assumed pursuant to sections 365 and 1123 of the Bankruptcy Code." Plan § 8.4. Accordingly, the Plan complies with section 1129(a)(13).

XIV. 11 U.S.C. §§ 1129(a)(14)–(16): Inapplicable Provisions

280. Certain provisions of section 1129(a) of the Bankruptcy Code do not apply to the Debtors. Section 1129(a)(14) is inapplicable because the Debtors do not have domestic support obligations. Section 1129(a)(15) is inapplicable because no Debtor is an "individual" as that term is used in the Bankruptcy Code. Section 1129(a)(16) is inapplicable because the Plan does not provide for transfers of property by a nonprofit entity.

XV. 11 U.S.C. § 1129(b): Cramdown of Non-Accepting Classes

281. Section 1129(b) of the Bankruptcy Code provides a mechanism (known colloquially as "cram down") for confirmation of a chapter 11 plan in circumstances where the plan is not accepted by all impaired classes of claims or interests.

282. Section 1129(b) of the Bankruptcy Code provides, in pertinent part:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 112(a)(8)] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1). Under section 1129(b), the court may "cram down" a plan over the dissenting vote of an impaired class of claims or interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such dissenting class or classes. *See In re Sentry Operating Co. of Tex., Inc.*, 264 B.R. 850, 862 (Bankr. S.D. Tex. 2001) ("[I]f the plan meets all of the requirements for plan confirmation except § 1129(a)(8), the plan may nevertheless be confirmed if the plan is fair and equitable and does not discriminate unfairly . . . ."); *In re MCorp Fin., Inc.*, 137 B.R. 219, 231 (Bankr. S.D. Tex. 1992).

283. As noted above, Class 4A accepted the Plan and Classes 3[39] and 4B rejected the Plan based on the voting results. *See* Voting Cert. Ex. A. Classes 1 and 2 were deemed to accept the Plan because those Classes were Unimpaired under the Plan, and Classes 5, 6, 7, and 8 were deemed to reject the Plan because those Classes will not receive any distribution on account of their claims. As discussed below, the Plan satisfies the cram down requirements with respect to these Classes.

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39 If the Court does not approve the Non-Debtor SFA Loan Party Releases, Class 3 will be unimpaired and should be deemed to accept under the Plan.

A. Plan Does Not Discriminate Unfairly

284. Section 1129(b)(1) of the Bankruptcy Code does not prohibit discrimination between classes; rather, it prohibits unfair discrimination. Under section 1129(b) of the Bankruptcy Code, a plan unfairly discriminates where similarly situated classes are treated differently without a reasonable basis for the disparate treatment. *Cypresswood Land Partners*, 409 B.R. at 434; *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (noting that "hallmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination.") (citing *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 660 (Bankr. D. Del. 2003), *aff'd*, 308 B.R. 672 (D. Del. 2004)). As between two classes of claims or classes of interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims, *see, e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.,* 843 F.2d 636 (2d Cir. 1988), or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment. *See, e.g.*, *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992).

285. The Plan does not unfairly discriminate against Class 3 because there is no similar class of secured claims under the Plan. The Plan does not unfairly discriminate between Class 4A and 4B because there is a reasonable justification for the difference in recovery between those classes.

286. Although the Fifth Circuit has not provided guidance on when discrimination is "unfair," courts have generally found that a plan discriminates unfairly when similarly situated classes are treated differently without a reasonable basis for the disparate treatment. *Idearc*, 423 B.R. at 171 ("The Bankruptcy Code does not provide a standard for

determining when 'unfair discrimination' exists… Rather, courts may examine the facts and circumstances of the particular case to determine whether unfair discrimination exists."). In other words, "for payment to be preferred to one creditor or class over others, the [c]ourt must find an articulable basis for the preference." *In re Mortg. Inv. Co. of El Paso, Tex.*, 111 B.R. 604, 614–15 (Bankr. W.D. Tex. 1990).

287. To determine whether a reasonable basis for discrimination exists in the trade vendor context, courts focus on how important the trade vendor is to the debtor's business operations and whether discrimination protects a relationship with specific creditors that the debtor needs to successfully reorganize. *See Mortg. Inv.*, 111 B.R. at 614–15 (focusing generally on whether there was an "articulable basis" for the preference); *In re Graphic Commc'ns, Inc.*, 200 B.R. 143, 148 (Bankr. E.D. Mich. 1996); *Creekstone Apartments Assocs., L.P. v. Resol. Tr. Corp. (In re Creekstone Apartments Assocs., L.P.)*, 168 B.R. 639, 645 (Bankr. M.D. Tenn. 1994) (rejecting objection where evidence showed that preferential payment to essential trade creditors was necessary to successful reorganization).

288. As discussed at length herein, the Debtors' evidence will establish valid business justifications for the classification scheme. *See supra* ¶¶ 106-123. The Debtors used stringent criteria in determining which vendors belonged in Class 4A—including a rigorous evaluation of which vendors are essential and actually or effectively irreplaceable. Because the Debtors have legitimate justifications for the Plan's discrepancy in treatment, the Plan does not unfairly discriminate between Class 4A and Class 4B, and the Court should overrule Black Diamond's objection.

B. Plan is Fair and Equitable

289. 1129(b)(2)(B)(ii) and 1129(b)(2)(C)(ii) of the Bankruptcy Code provide that a plan is fair and equitable with respect to a class of impaired unsecured claims or interests 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.

290. The "fair and equitable" rule is satisfied as to the holders of Claims and Interests in Class 4A (Unsecured Trade Claims), Class 4B (Other Unsecured Claims), Class 7 (Subordinated Claims), and Class 8 (Parent Interests), as no Claims or Interests junior to each such class, as applicable, will receive or retain property under the Plan on account of such Junior Claims or Interests because there are no such Claims or Interests.

291. In addition, no holder of a Claim or Interest in a Class senior to the rejecting Classes 4B, 6, 7, and 8 is receiving more than 100% recovery on account of its Claim or Interest. *See* Healy Decl. ¶ 84. As set forth above, Class 3 is receiving the indubitable equivalent of its value which by definition is equal to no more than or less than 100%.

292. Accordingly, the Plan is "fair and equitable" and, therefore, consistent with the requirements of section 1129(b) of the Bankruptcy Code.

XVI. <u>Section 1129(c): Plan Is Only Plan Currently on File</u>

293. Section 1129(c) provides that "the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144." 11 U.S.C. § 1129(c). The Plan is the only plan currently on file in these cases and, accordingly, section 1129(c) of the Bankruptcy Code does not apply.

XVII. <u>Section 1129(d): Principal Purpose of Plan Is Not Avoidance of Taxes</u>

294. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of section 5 of the Securities Act, and no party has objected on any such grounds. The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

XVIII. Section 1129(e): Inapplicable Provisions

295. The provisions of section 1129(e) of the Bankruptcy Code apply only to "small business cases" as defined therein. These chapter 11 cases are not "small business cases." Accordingly, section 1129(e) of the Bankruptcy Code is inapplicable in these cases.

DISCLOSURE STATEMENT SHOULD BE APPROVED ON FINAL BASIS

I. Parties in Interest Received Sufficient Notice of Combined Hearing and Objection Deadline

296. Bankruptcy Rule 3017(a) authorizes the Court to fix a time for filing objections to the adequacy of a disclosure statement, and Bankruptcy Rule 3020(b)(1) authorizes the Court to fix a time for filing objections to confirmation of a plan. Bankruptcy Rules 2002(b), 2002(d), and 3017(a) generally provide that parties in interest should receive not less than 28 days' notice by mail of the time fixed for filing objections to approval of a disclosure statement and confirmation of a plan. However, Bankruptcy Rule 9006(c)(1) provides that the Court for cause shown may in its discretion order the time periods reduced, unless Bankruptcy Rule 9006(c)(2) (which is not applicable here) prohibits such reduction.

297. Further, the U.S. Court of Appeals for the Fifth Circuit has adopted the general rule that "[d]ue process requires that notice be 'reasonably calculated, under all the circumstances, to inform interested parties of the pendency' of a proceeding." *Williams v. Placid Oil Co. (In re Placid Oil Co.)*, 753 F.3d 151, 154 (5th Cir. 2014) (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). When evaluating the sufficiency of notice, courts in this Circuit consider whether "(1) the notice apprised the claimant of the pendency of the action, and (2) [whether] it was sufficiently timely to permit the claimant to present his objections." *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 518 (5th Cir. 1994); *Otto v. Tex. Tamale Co. (In re Tex. Tamale Co.)*, 219 B.R. 732, 739–40 (Bankr. S.D. Tex. 1998). Indeed, "[w]hether

a particular method of notice is reasonably calculated to reach interested parties depends upon the particular circumstances of each case." *Walters v. Hunt (In re Hunt)*, 146 B.R. 178, 182 (Bankr. N.D. Tex. 1992).

298. On October 10, 2020, the Debtors filed the Scheduling Motion requesting that the Court enter an order (i) scheduling the Combined Hearing to approve the Disclosure Statement on a final basis and confirm the Plan, (ii) conditionally approving the Disclosure Statement, (iii) approving the Solicitation Procedures on a final basis, and (iv) establishing dates for the various dates and deadlines related thereto, including establishing the deadline to file objections to the adequacy of the Disclosure Statement or confirmation of the Plan (the "**Objection Deadline**"). The Debtors submitted to the Court that the Combined Hearing was appropriate and would promote judicial economy and save administrative expenses by allowing the Debtors to confirm the Plan quickly and expeditiously transition to restructuring the Company, thereby preserving value. *See* Scheduling Mot. ¶ 87.

299. In support of the appropriateness of the Combined Hearing, the Debtors noted that, among other things, the Debtors had already completed the most difficult tasks required to effectuate the restructuring. Namely, the Debtors have (i) developed a new long-term business plan, (ii) explored strategic alternatives with their advisors, and (iii) engaged in extensive negotiations and mediation with several of their major stakeholders, including the Prepetition Lenders (as defined in the Plan) and the Debtors' postpetition financing facility lenders regarding potential paths forward, and that the only remaining task was to implement the procedures to pursue and consummate the Plan and the transactions contemplated thereby. *Id.* ¶ 86.

300. On November 2, 2020, the Court entered the Solicitation Order, among other things, approving the solicitation procedures, setting the Combined Hearing on December

17, 2020, approving the Objection Deadline of December 8, 2020, and approving the form and process of notice thereof.

301. In accordance with the Solicitation Order, the Debtors commenced service of the Solicitation Packages on November 9, 2020. *See* Notice Aff. ¶¶ 6-15.

302. Accordingly, the Debtors submit that all parties in interest had sufficient notice of the Objection Deadline and the Combined Hearing, and no party has been prejudiced by this schedule.

II. Disclosure Statement Contains Adequate Information and Should Be Approved

303. As set forth in the Notice Affidavit and in accordance with section 1126 of the Bankruptcy Code, the Debtors solicited acceptances of the Plan from holders of Claims in the Voting Classes, *i.e.*, Class 3 (Syndicated Facility Secured Claims), Class 4A (Unsecured Trade Claims), and Class 4B (Other Unsecured Claims). To approve a solicitation of votes to accept or reject a plan, the Court must determine that such solicitation complied with sections 1125 and 1126 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018.

304. On November 2, 2020, the Court entered the Solicitation Order, conditionally approving the Disclosure Statement as containing "adequate information" in accordance with section 1125(b) of the Bankruptcy Code. In compliance with section 1125(b), the Debtors did not solicit acceptance of the Plan from any holder of a Claim or Interest prior to entry of the Solicitation Order.

305. Under section 1125 of the Bankruptcy Code, a plan proponent must provide holders of impaired claims and interests with "adequate information" regarding a debtor's proposed plan.[40] A debtor's disclosure statement must provide sufficient information to permit an

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[40] "Adequate information" is defined in section 1125(a)(1) of the Bankruptcy Code as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition

informed judgment by impaired creditors entitled to vote on the plan. *See, e.g.*, *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, 783 F.3d 266, 271 (5th Cir. 2015) ("The proponent of a reorganization plan . . . must provide a court-approved disclosure statement that contains 'adequate information' about the assets, liabilities, and financial affairs of the debtor sufficient to enable creditors to make an 'informed judgment' about the plan."); *Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners)*, 521 B.R. 134, 176 (Bankr. N.D. Tex. 2014) ("Section 1125 of the Bankruptcy Code entitles creditors to 'adequate information' so they can make an informed decision on whether to accept or reject a chapter 11 plan."). The essential requirement of a disclosure statement is that it "must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Keisler*, No. 08-34321, 2009 WL 1851413, at *4 (Bankr. E.D. Tenn. June 29, 2009) (quoting *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991)).

306. Whether a disclosure statement contains adequate information "is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation." 11 U.S.C. § 1125(d). Instead, bankruptcy courts have broad discretion to determine the adequacy of the information contained in a disclosure statement. *See, e.g.*, *Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) (noting that the determination of what is adequate information is "largely within the discretion of the bankruptcy court").

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of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1).

307. Congress granted bankruptcy courts wide discretion in determining the adequacy of a disclosure statement to facilitate effective reorganizations of debtors in a broad range of businesses, taking into account the various facts and circumstances that accompany chapter 11 cases. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 408–09 (1977); *see also Cajun Elec. Power*, 150 F.3d at 518 ("[W]ith respect to a particular disclosure statement, 'both the kind and form of information are left essentially to the judicial discretion of the court.'" (quoting S. Rep. No. 95-989, at 121 (1978))). Accordingly, the determination of whether a disclosure statement contains adequate information is made on a case-by-case basis, focusing on the unique facts and circumstances of each case. *See Tex. Extrusion*, 844 F.2d at 1157 ("The determination of what is adequate information is subjective and made on a case by case basis.").

308. Whether a disclosure statement contains adequate information is intended by Congress to be a flexible, fact-specific inquiry left within the discretion of the Court:

> Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case, such as the cost of preparation of the statements, the need for relative speed in solicitation and confirmation, and, of course, the need for investor protection. There will be a balancing of interests in each case.

H.R. Rep. 95-595, at 409 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6365. *See also Tex. Extrusion*, 844 F.2d at 1157.

309. The Disclosure Statement is extensive and comprehensive. It includes descriptions of (i) the Plan, (ii) the Debtors' business operations, (iii) key events leading to the commencement of these chapter 11 cases, (iv) key events during these chapter 11 cases, (v) the Debtors' significant prepetition indebtedness, (vi) the proposed distributions pursuant to the Plan, (vii) a liquidation analysis setting forth the estimated return that holders of Claims and Interests

would receive in a hypothetical chapter 7 liquidation, (viii) risk factors associated with the Plan, (ix) a valuation; and (x) federal tax law consequences of the Plan.

310. For the reasons set forth above, the Disclosure Statement, which was conditionally approved pursuant to the Solicitation Order, satisfies the requirements of section 1125(a) of the Bankruptcy Code and should be approved on a final basis.

III. Solicitation of Votes Complied with Bankruptcy Code, Bankruptcy Rules, and Solicitation and Solicitation Order

311. As approved in the Solicitation Order, the Solicitation Packages and Solicitation Procedures comply with the Bankruptcy Code and Bankruptcy Rules. *See* Solicitation Order ¶ 11.

312. Bankruptcy Rule 3017(d) sets forth the materials that must be provided to holders of claims and equity interests for the purpose of soliciting their votes and providing adequate notice of the hearing on confirmation of a plan. Bankruptcy Rule 3018(c) provides for the necessary form of acceptances and rejections of a plan.

313. In accordance with these rules and the Solicitation Order, only holders of Claims in the Voting Classes were sent Ballots. Such holders also received a copy of the Disclosure Statement, the Solicitation Order, and the Combined Hearing Notice. The Ballot conformed to Official Form No. 314, as modified to address the facts of these cases and to be appropriate for the Voting Class. These modifications included bold and capitalized language disclosing the third-party releases and the procedures for opting out of such releases. The Ballots were approved by the Court in the Solicitation Order, and no party has objected to the sufficiency of the Ballots. Accordingly, the Debtors have satisfied Bankruptcy Rules 3017(d) and 3018(c).

314. Pursuant to section 1125(e) of the Bankruptcy Code, "[a] person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions

of this title . . . is not liable" on account of such solicitation for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan. 11 U.S.C. § 1125(e).

315. As set forth in the Healy Declaration and as further described below, the Debtors engaged in arm's-length, good-faith negotiations with their key stakeholders and other parties in interest, and all parties, including the Solicitation Agent and the Exculpated Parties, took appropriate actions in connection with the solicitation of the Plan. *See* Healy Decl. ¶ 19. Therefore, the Debtors submit that the Court should grant these parties the protections provided under section 1125(e) of the Bankruptcy Code.

REQUEST FOR WAIVER OF BANKRUPTCY RULE 3020(E)

316. The Debtors respectfully request that the Court direct that the proposed Confirmation Order be effective immediately upon its entry notwithstanding the 14-day stay imposed by operation of Bankruptcy Rule 3020(e). Under Bankruptcy Rule 3020(e), "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." As the Advisory Committee notes to Bankruptcy Rule 3020(e) state, "the court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately." Fed. R. Bankr. P. 3020(e). Bankruptcy Rule 3020(e) advisory committee's note to 1999 amendment; *see Idearc*, 423 B.R. at 158 ("Good cause exists for waiving and eliminating the stay of the Confirmation Order set forth in Bankruptcy Rule 3020(e). In particular, the Plan represents a fair and equitable compromise by and among the major parties-in-interest in the Chapter 11 Cases and should be consummated as expeditiously as possible.") Here, it is appropriate for the Court to exercise its discretion with respect to the stay imposed by Bankruptcy Rule 3020(e) and permit the Debtors to consummate the Plan and commence its implementation without delay. The Debtors' prompt emergence from chapter 11 is required by the Consenting Creditors under the Plan Support Agreements and will

assuage the concerns of the Debtors' customers, vendors, and employees regarding the sustainability and viability of the Debtors. A waiver of the 14-day stay is in the best interests of the Estates and will not prejudice any party in interest. Accordingly, the Court should waive the 14-day stay under Bankruptcy Rule 3020(e).

CONCLUSION

317. The Plan satisfies all of the applicable requirements of section 1129 of the Bankruptcy Code and should be confirmed. The Debtors respectfully request that the Court confirm the Plan and grant such other and further relief as is just and appropriate.

Dated: December 15, 2020
Houston, Texas

/s/ Alfredo R. Pérez

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